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Testimonial Statements, Reliability, and the Sole or Decisive Evidence Rule: A Comparative Look at the Right of Confrontation in the United States, Canada, and Europe

Deborah Paruch

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Testimonial Statements, Reliability, and the Sole or Decisive Evidence Rule: A Comparative Look at the Right of Confrontation in the United States, Canada, and Europe

Cover Page Footnote

Deborah Paruch, Assoc. Professor of Law, University of Detroit Mercy School of Law.

TESTIMONIAL STATEMENTS, RELIABILITY, AND
THE SOLE OR DECISIVE EVIDENCE RULE: A
COMPARATIVE LOOK AT THE RIGHT OF
CONFRONTATION IN THE UNITED STATES,
CANADA, AND EUROPE

Deborah Paruch⁺

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“The right to a fair trial is also an inconvenient right.”¹ It has long been recognized that the right to confront, impeach, and cross-examine adverse witnesses in a criminal trial is the cornerstone of the defendant’s right to a fair trial. Dean J.H. Wigmore explained that the right to confrontation serves a principal purpose:

The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by direct and personal putting of questions and obtaining of immediate answers.²

He described cross-examination as “the greatest legal engine ever invented for the discovery of truth.”³ More recently, Justice Hugo Black described the importance of cross-examination: “It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of ‘even handed justice.’”⁴

The right to confrontation has never been viewed as an absolute right. Although the primary goal of the adversarial trial process is to ascertain the truth, other important societal values, such as fairness to the parties and public

1. Laura Hoyano, *What Is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial*, 1 CRIM. L. REV. 4, 28 (2014) (Eng.).

2. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1395 (2d ed. 1923). Much of this discussion that follows is from the Author’s previous article, Deborah Paruch, *Silencing the Victims in Sexual Abuse Prosecutions: The Confrontation Clause and Children’s Hearsay Statements Before and After Michigan v. Bryant*, 28 TOURO L. REV. 85 (2012).

3. 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (Chadbourne rev. ed. 1972), *quoted in* RONALD JOSEPH DELISLE ET AL., EVIDENCE PRINCIPLES AND PROBLEMS 533 (11th ed. 2015) (Can.).

4. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 176 (1970) (Black, J., concurring) (quoting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)); *see also* Mark S. Brodin, *The British Experience with Hearsay Reform: A Cautionary Tale*, 84 FORDHAM L. REV. 1417, 1426–27 (2016) (cautioning about the detrimental consequences that emerged when the United Kingdom loosened its requirements of cross-examination); Bruce P. Archibald, *The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?*, 25 QUEEN’S L.J. 1, 6–9 (1999) (Can.) (noting the importance of cross-examination in the Canadian legal system).

confidence in the integrity of the process, are at stake.⁵ As a result of these competing values, there is significant controversy surrounding the admission of hearsay in criminal trials.⁶ The controversy centers on when hearsay aids the truth-seeking process, when it impedes the process, and how it affects other values at stake.⁷

The operation of the hearsay rule, specifically as it relates to the right of accused persons to confront a witness against them, has undergone substantial development and change, received significant academic attention, and generated significant debate in the past few decades in the United States, Canada, and Europe.⁸ The result has been three markedly diverse legal doctrines. The U.S. confrontation clause jurisprudence focuses its attention on the nature of the hearsay statement and whether the statement is a “testimonial statement.”⁹ Under this doctrine, the key inquiry is whether the declarant or the interrogator intended the statements to be the equivalent of testimony at time they were made.¹⁰ If so, the statements are not admissible at trial unless it is shown that the declarant is unavailable and there has been a prior opportunity for cross-examination.¹¹ Canadian courts, on the other hand, crafted what is known as the principled approach.¹² Under this doctrine, hearsay is admitted in criminal trials provided it is shown to be both necessary and reliable.¹³ Finally, the European Court of Human Rights (ECtHR) has held that untested hearsay statements found to be the sole or decisive evidence against a defendant in a criminal trial should not be admitted unless sufficient counterbalancing factors are present to compensate for the prejudice to the defendant resulting from the admission of this untested evidence.¹⁴

Part I of this Article sets out a short discussion of the history of the right to confrontation. Part II contains a detailed discussion of the treatment of hearsay in criminal trials in the United States, Canada, and the ECtHR. It shows the

5. See Archibald, *supra* note 4, at 7–9.

6. *Id.* at 7–8 (“Much controversy over the hearsay rules, of course, is centered on questions of when they help and when they hinder truth-finding.”).

7. *Id.* at 7–10.

8. The Author has not examined the individual countries in Europe, rather focuses on the European Court of Human Rights decisions.

9. See, e.g., *Davis v. Washington*, 547 U.S. 813, 821–22 (2006).

10. See, e.g., *id.* at 822 (“[Statements] are testimonial when . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”).

11. See *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

12. See, e.g., Nicholas Bala, *Canada’s Empirically-Based Child Competency Test and Its Principled Approach to Hearsay*, 19 *ROGER WILLIAMS U. L. REV.* 513, 533–39 (2014) (Can.) (“Under this ‘principled’ approach, hearsay evidence is presumptively inadmissible, and the onus is on the Crown to establish the statement’s admissibility as reliable and necessary.”).

13. See, e.g., *R. v. Khan*, [1990] 2 S.C.R. 531, 546 (Can.) (“[T]he reception of hearsay evidence in this case is justified on grounds of necessity and reliability.”).

14. *Al-Khawaja v. United Kingdom*, 2011-VI Eur. Ct. H.R. 191, 253 (“The question . . . is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place.”).

evolution of the doctrine within each jurisdiction and includes commentary from scholars and courts identifying the strengths and weaknesses of each approach. Part III begins with a comparative analysis of the doctrines from these jurisdictions. The Author moves on to analyze and predict how the key cases from each jurisdiction would likely be decided by each of the other two jurisdictions, illustrating the markedly different outcomes that would likely occur. Finally, the Author identifies lessons that the U.S. Supreme Court could learn from Canada and the ECtHR, and argues that the Supreme Court should adopt a modified version of the doctrine established by the ECtHR to best protect a defendant's right to a fair trial while also serving the other competing values at play in criminal trials.

I. A BRIEF HISTORY OF THE RIGHT TO CONFRONTATION

An accused's right to confrontation has its origins in Roman law¹⁵ and the common law of England.¹⁶ In the common law of England, the development of "the hearsay rule, as a distinct and living idea," did not begin until the sixteenth century and did not reach full development until the early eighteenth century.¹⁷ The process of obtaining information from persons who were not called as witnesses was common practice in trials in England during the fifteenth century.¹⁸ In fact, it was standard practice for jurors to confer privately with witnesses outside of court, where the witnesses would "inform" the juror.¹⁹ This practice was described by Chief Justice Fortescue in 1450, "[i]f the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable."²⁰ Jurors may have been provided with a "counsel's report" that documented what a witness might have said or predicted what the witness would likely say about the matter before the court.²¹ During this time, there was little to no objection to the use of these types of out-of-court statements at trial.²²

15. Similar to the United States, Roman criminal procedure was accusatorial in nature. The accusing individual, the "accusator," was responsible for prosecuting the defendant and had the burden of proving the charge. Witness testimony was the principal evidence. The accusator was required to be present in court to state the charge. Defendants were also entitled to be present. There was a preference for testimony of witnesses in court where they were subject to cross examination. Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 484-89 (1994).

16. *Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("The [English] common-law tradition is one of live testimony in court subject to adversarial testing . . .").

17. John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 437 (1904).

18. *Id.* at 438-39.

19. *Id.* at 440.

20. *Id.* (quoting YB 28 Hen. 6, fol. 6, Pasch, pl. 1 (1450) (Eng.), as translated in JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 129 (1898)).

21. *Id.* at 441.

22. *Id.* at 440-41. Actually, the process of producing fact witnesses at trial was discouraged. Compulsory process for witnesses was not provided until 1562-1563. *Id.*

During the seventeenth century, juries came to depend, with increased frequency, on in-court testimony as their chief source of information.²³ At this time, a sense of impropriety developed around the use of out-of-court statements based principally on the notion that these statements should be admitted only if the person affected by them had an opportunity to test their trustworthiness by means of cross-examination.²⁴ During this time, considerable thought was being given to the quantity and reliability of the evidence that would allow jurors to reach a correct decision. Statutes and other rules were passed that addressed topics such as “good and sufficient” or “good and lawful” proofs.²⁵ As a result of these transformations, courts began to question “whether a hearsay thus laid before [a jury] would suffice.”²⁶ They began to challenge the validity of verdicts where the evidence presented at trial consisted solely of hearsay.²⁷

Many accounts of the history of the right to confrontation cite the infamous prosecution of Sir Walter Raleigh for treason in 1603.²⁸ The most damaging evidence presented by the prosecution was a statement Lord Cobham gave during an interrogation conducted in the Tower of London in which he alleged that Raleigh was the instigator of the plan to overthrow the King.²⁹ During the trial, records of this interrogation were read to the jury.³⁰ Raleigh denied the charges and demanded that the court call Cobham to appear at trial.³¹ The court denied his request, convicted him, and sentenced him to death.³²

23. *Id.* at 441.

24. *See id.* at 448.

25. *Id.* at 441–42.

26. *Id.* at 442.

27. *Id.* at 442–43. For example, a discussion was raised whether the requirement for a conviction for treason, which required evidence from two accusers, could be satisfied if one was by hearsay. *Id.*; *see also* R. v. Thomas (1553) 73 Eng. Rep. 218, 218–19 (K.B.) (“[I]t was there holden for law, that of two accusors, if one be an accuser of his own knowledge, or of his own hearing, and he relate it to another, the other may well be an accuser . . .”).

28. *See, e.g.,* Crawford v. Washington, 541 U.S. 36, 44 (2004). Raleigh was charged with conspiring against King James by raising money abroad to distribute to rebels with the objective of having Arabella Stuart placed on the throne. *See* Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388 (1959).

29. Jacqueline Forsgren Cronkhite, Comment, *Signed, Sealed, Delivered . . . Unconstitutional: The Effect of Melendez-Diaz on the Use of Notarized Crime Laboratory Reports in Arkansas*, 63 ARK. L. REV. 757, 761 (2010).

30. Crawford, 541 U.S. at 44.

31. *Id.* For a transcript of Sir Raleigh’s trial, see 1 DAVID JARDINE, CRIMINAL TRIALS 400 (1832).

32. Crawford, 541 U.S. at 44. It is reported that one of the judges responding to Raleigh’s request stated: “[M]any horse-stealers may escape, if they may not be condemned without witnesses.” Miller v. Indiana, 517 N.E.2d 64, 67 (Ind. 1987) (quoting Kenneth W. Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 (1972)).

During the sixteenth and early seventeenth centuries, courts began to question the practice of freely admitting hearsay.³³ At this time however, the law distinguished hearsay statements made under oath from those that were not.³⁴ As such, it was common practice to have a sworn statement read aloud to the jury and for the deponent to confirm it by indicating that it was freely and voluntarily made.³⁵ By the end of the seventeenth century, this practice of admitting sworn extrajudicial statements was abandoned in favor of one that required the testimony of the witness in court.³⁶ Two trials decided in 1696, *R. v. Paine*³⁷ and *Fenwick's Trial*,³⁸ appear to have solidified the rule that hearsay statements, including those given under oath, should not be admitted if there was no prior opportunity for cross-examination. In *Paine*, the declarant gave a deposition under oath in front of the Mayor of Bristol but died before the trial.³⁹ The King's Bench remarked, "these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination."⁴⁰

II. THE DEVELOPMENT OF THE RIGHT TO CONFRONTATION IN THE UNITED STATES, CANADA, AND THE EUROPEAN COURT OF HUMAN RIGHTS

A. *The United States' Jurisprudence*

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."⁴¹

In criminal trials, the question of whether hearsay is admissible involves two distinct legal issues: first, whether the out-of-court statements are admissible under the established evidentiary rules; and second, whether the admission of hearsay statements violates the Confrontation Clause of the Sixth Amendment. In *California v. Green*,⁴² the U.S. Supreme Court noted:

33. See Wigmore, *supra* note 17, at 441–42.

34. See *id.* at 447–48, 450–51.

35. *Id.* at 451.

36. *Id.* at 451–52, 454–56.

37. *R. v. Paine* (1696) 87 Eng. Rep. 584, 585 (K.B.).

38. *Fenwick's Trial* (1696) 13 How. St. Tr. 537, 596 (Eng.) (proceedings in the House of Commons).

39. *Paine*, 87 Eng. Rep. at 584.

40. *Id.* at 585.

41. U.S. CONST. amend. VI. The Amendment was proposed to Congress in 1789 and adopted in 1791. See H. JOURNAL, 1st Cong., 1st Sess. 85–88 (1789); see also Steve Mount, *Ratification of Constitutional Amendments*, USCONSTITUTION.NET, <http://www.usconstitution.net/constamrat.html> (last modified Nov. 11, 2010) (stating the dates that states ratified the Bill of Rights; Virginia was the eleventh state to ratify on December 15, 1791, providing the required majority of eleven out of fourteen states).

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

[W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.⁴³

I. *Ohio v. Roberts*

The discussion of the U.S. Supreme Court's modern Confrontation Clause jurisprudence begins with its 1980 opinion in *Ohio v. Roberts*.⁴⁴ The issue before the Court was whether an unavailable declarant's preliminary hearing testimony, obtained without cross-examination, could be admitted in a subsequent criminal trial on the same matter.⁴⁵ In this case, the defendant was arrested and charged with forging checks and possession of stolen credit cards belonging to the parents of the declarant, Anita Isaacs. At the preliminary hearing, defendant's attorney called Isaacs to the stand.⁴⁶ Although he tried to get her to admit that she had given defendant the checks and credit cards, she denied doing so. He did not request to treat her as a hostile witness and the prosecutor did not question her.⁴⁷

Isaacs was unavailable to testify at the trial.⁴⁸ The defendant took the stand and testified that she had given him the credit cards and checks.⁴⁹ The trial court admitted the transcript of Isaac's testimony at the preliminary hearing over defendant's objections.⁵⁰ The jury convicted the defendant on all counts.⁵¹

The Supreme Court began its discussion by noting that although the Confrontation Clause prefers "face-to-face confrontation at trial," this right is

43. *Id.* at 155–56 (first citing *Barber v. Page*, 390 U.S. 719 (1968); and then citing *Pointer v. Texas*, 380 U.S. 400 (1965)).

44. 448 U.S. 56 (1980). For a discussion of the Supreme Court's early decisions addressing the right to confrontation, see Brief for Petitioner at 18–21, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21939940. See also Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 *BROOK. L. REV.* 35, 49–50 (2005).

45. *Roberts*, 448 U.S. at 58.

46. *Id.*

47. *Id.*

48. *Id.* at 59 ("Between November 1975 and March 1976, five subpoenas . . . were issued to Anita at her parents' Ohio residence. The last three carried a written instruction that Anita should 'call before appearing.' . . . She did not telephone and she did not appear at trial.").

49. *Id.*

50. *Id.* at 59–60. The prosecution relied on an Ohio statute that permitted "the use of preliminary examination testimony of a witness who 'cannot for any reason be produced at the trial.'" *Id.* at 59 (quoting OHIO REV. CODE ANN. § 2945.49 (West 1975)). The trial court conducted a *voir dire* hearing in response to the defendant's objections. Amy Isaacs, Anita's mother, was the only witness at *voir dire*. Upon her testimony in which she stated that she had no way to reach her daughter, the court admitted the transcript into evidence. *Id.* at 59–60.

51. *Id.* at 60.

not absolute.⁵² It stated that “general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.”⁵³

The Court explained that the Confrontation Clause operates in two distinct ways to restrict the scope of admissible hearsay. First, a rule of necessity is implicit in the Sixth Amendment, which requires that the hearsay declarant be unavailable at trial.⁵⁴ Second, the Confrontation Clause only allows the admission of hearsay evidence that is found to be trustworthy—statements must bear adequate “indicia of reliability.”⁵⁵ The Court concluded that Anita Isaacs’ preliminary examination testimony bore sufficient “indicia of reliability” because defendant’s attorney was able to challenge her testimony at the preliminary hearing with the “equivalent of significant cross-examination.”⁵⁶

The approach set forth in *Roberts* was strongly criticized, and it was not long before scholars and several justices of the Supreme Court began to advocate for its replacement.⁵⁷ Criticism of the *Roberts* test centered on several grounds: the test was criticized for being at odds with the history, purpose, text, and structure of the Confrontation Clause;⁵⁸ for “robbing the confrontation right of any

52. *Id.* at 63.

53. *Id.* at 64 (quoting *Mattox v. United States*, 156 U.S. 237, 259–60 (1895) (Shiras, J., dissenting)).

54. *Id.* at 65.

55. *Id.* at 65–66 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)). The Court also stated that reliability could be inferred where the statement falls within a firmly rooted hearsay exception. If not, then it may still be admitted upon “a showing of particularized guarantees of trustworthiness.” *Id.*

56. *Id.* at 70–73.

57. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 125–31, 126 nn.168–70 (Yale U. Press ed. 1997); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 594 (1992); Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 780–82 (2000); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1015–18 (1998).

58. See AMAR, *supra* note 57, at 125–31, 126 nn.168–70 (citing *Roberts*, 448 U.S. 56) (“Though the text and purposes of the confrontation clause seem clear enough, modern Supreme Court case law on the clause is surprisingly muddled in logic and exposition.”).

independent substance”;⁵⁹ and for introducing unnecessary inconsistency and confusion into this area of the law.⁶⁰

2. Crawford v. Washington

The Court overruled *Ohio v. Roberts* some twenty years later in *Crawford v. Washington*.⁶¹ Justice Scalia, writing for the majority, held that the State of Washington’s use of a tape-recorded statement obtained by police during an interrogation of the defendant’s wife in the defendant’s trial for assault and attempted murder violated the Confrontation Clause.⁶² The facts of the case are as follows.

Michael Crawford and his wife Sylvia were involved in an altercation with Kenneth Lee “in which Lee was stabbed in the torso and [Michael’s] hand was cut.”⁶³ Michael and Sylvia were arrested and separately interrogated by the police. Their accounts of the events leading up to the assault differed as to whether Lee had actually drawn a weapon before Michael assaulted him.⁶⁴ Michael was subsequently charged with stabbing Lee and claimed self-defense. No charges were filed against Sylvia.⁶⁵

Sylvia was unavailable to testify on the grounds of a state marital privilege. In her absence, the prosecution sought to introduce her statements to the police in order to challenge Michael’s claims of self-defense.⁶⁶ The trial court, following *Roberts*, admitted the statements into evidence on the grounds that the statements bore “particularized guarantees of trustworthiness.”⁶⁷ The jury convicted Michael of assault and the Washington Supreme Court affirmed.⁶⁸

Justice Scalia began his opinion with a lengthy discussion of the history of the Sixth Amendment’s Confrontation Clause and suggested that history permits two inferences about its meaning.⁶⁹ First, the Confrontation Clause was

59. Thomas Y. Davies, *Not “The Framers’ Design”*: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause, 15 J.L. & POL’Y 349, 359 n.26 (2007) (first citing Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 574–75 (1988); and then citing David E. Seidelson, *The Confrontation Clause, the Right Against Self-Incrimination and the Supreme Court: A Critique and Some Modest Proposals*, 20 DUQ. L. REV. 429, 433 (1982)).

60. See Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1208 (2002); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 167–68 (1995).

61. 541 U.S. 36, 67–69 (2004).

62. *Id.* at 40, 68–69.

63. *Id.* at 38.

64. *Id.* at 39, 41–42.

65. *Id.* at 40.

66. *Id.*

67. *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

68. *Id.* at 41–42.

69. *Id.* at 50.

specifically directed at the use of *ex parte* examinations as evidence in criminal proceedings against the accused, and second, the Framers would not have allowed the admission of testimonial statements of an unavailable witness unless the defendant was previously afforded an opportunity for cross-examination.⁷⁰

He criticized *Roberts* on the grounds that conditioning the admissibility of hearsay evidence on “whether it falls under a ‘firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness’” is in conflict with the original meaning of the Confrontation Clause, principally because it allows a jury to hear evidence that can include statements, which are in fact *ex parte* testimony, upon a simple judicial determination of reliability.⁷¹ He noted, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”⁷²

Based on this, Justice Scalia opined that the confrontation right applies to witnesses, which he defined as “those who ‘bear testimony.’”⁷³ He defined testimony as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁷⁴ Although he refused to comprehensively define which statements would trigger constitutional protections, he acknowledged that “[v]arious formulations of this core class of ‘testimonial’ statements exist,” including out-of-court statements “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”⁷⁵ He further added, “[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”⁷⁶ In closing, he stated that “[w]here testimonial evidence is at issue . . . the Sixth

70. *Id.* at 53–54.

71. *Id.* at 60 (quoting *Roberts*, 448 U.S. at 66).

72. *Id.* at 62. He also stated:

Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Id. at 56 n.7.

73. *Id.* at 51 (quoting 2 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

74. *Id.* at 68 (alteration in original).

75. *Id.* at 51–52 (quoting Brief for Nat’l Ass’n of Criminal Def. Lawyers et al. as Amici Curiae Supporting Petitioner at 3, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).

76. *Id.* at 68. There is much disagreement with Justice Scalia’s interpretation. See, e.g., David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L. REV. 1899, 1905–06 (2015) (referring to the *Crawford* Court’s approach to the Confrontation Clause as “missteps [that] led to the doctrinal breakdown that continues to this day”); Friedman, *supra* note 57, at 1025–26; Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, *supra* note 44, at 86–87.

Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”⁷⁷

3. *Davis v. Washington*

One year after its decision in *Crawford v. Washington*, the Court granted certiorari in *Davis v. Washington*.⁷⁸ In this case, the Court further expanded the definition of testimonial statements and introduced what is now known as the primary purpose test. This case involved two consolidated domestic violence cases: *Davis v. Washington*⁷⁹ and *Hammon v. Indiana*.⁸⁰ In *Davis*, Michelle McCottry made a 911 emergency call during a domestic dispute with her boyfriend, Adrian Davis.⁸¹ During the call she identified Davis as the perpetrator.⁸² While she was speaking to the operator, Davis left the house and drove away in his car. The police arrived approximately four minutes later, finding McCottry in a “shaken state” with injuries on her forearm and face.⁸³ Davis was charged with a felony violation of a no-contact order. McCottry did not appear at trial and the trial court, over Davis’ objections, admitted the recording of McCottry’s 911 call.⁸⁴

In *Hammon v. Indiana*, police officers responded to a domestic disturbance report at the home of Hershel and Amy Hammon.⁸⁵ When they arrived, they found Amy on the front porch alone. Although she appeared frightened, she told them that nothing was wrong.⁸⁶ When they entered the house, they found Hershel in the kitchen. He told the officers that he and his wife had been fighting but that “everything was fine now.”⁸⁷ The officers separated Amy and Hershel and after Amy presented her side of the story, officers had her handwrite her statement in a “battery affidavit.”⁸⁸ Herschel was charged with domestic battery. Amy was subpoenaed but did not appear at trial. In her absence, the trial court allowed the officers to testify as to the statements she made and granted the prosecution’s motion to admit her affidavit into evidence.⁸⁹

Justice Scalia, writing for the majority and citing *Crawford*, noted that testimonial statements include “[s]tatements taken by police officers in the

77. *Crawford*, 541 U.S. at 68.

78. *Davis v. Washington*, 547 U.S. 813 (2006), *cert. granted*, 546 U.S. 975 (2005).

79. 111 P.3d 844 (Wash. 2005).

80. 829 N.E.2d 444 (Ind. 2005).

81. *Davis*, 547 U.S. at 817.

82. *Id.* at 818.

83. *Id.*

84. *Id.* at 818–19.

85. *Id.* at 819.

86. *Id.*

87. *Id.*

88. *Id.* at 820.

89. *Id.*

course of interrogations.”⁹⁰ However, he excepted police interrogations that occur in emergency situations, stating:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁹¹

He emphasized that the focus of the inquiry is on the declarant, stating, “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”⁹²

In applying these rules to the cases before it, the Court found that the statements made during the 911 call in *Davis* were not testimonial because the statements described events as they were occurring and the information elicited in response to the questions asked by the interrogator was necessary for the police to be able to respond to the present emergency.⁹³ By contrast, the Court found that Amy Hammon’s statements to the police were testimonial because her statements were made some time after the emergency had ended and recounted only past events.⁹⁴

4. Michigan v. Bryant

The Court altered the parameters of the primary purpose test it established in *Davis* five years later in *Michigan v. Bryant*.⁹⁵ The facts are as follows. In the early morning hours of April 29, 2001, Detroit police officers responded to a radio dispatch indicating a man had been shot.⁹⁶ They found the decedent, Anthony Covington, lying on the ground next to his car in the parking lot of a gas station. The officers noticed he had a gunshot wound to his abdomen, appeared to be in great pain, and was having difficulty speaking.⁹⁷ He told the police that a man named Rick had shot him about a half hour earlier as he was

90. *Id.* at 822 (alteration in original) (quoting Crawford v. Washington, 541 U.S. 36, 53 (2004)).

91. *Id.*

92. *Id.* at 822 n.1.

93. *Id.* at 827–28.

94. *Id.* at 831–32. Respondents for both cases argued the need for greater flexibility in the use of hearsay testimony in cases of domestic abuse because these crimes are “notoriously susceptible” to intimidation of the victims by their assailants to assure that they do not testify. Although the Court expressed its sympathy to the plight of these victims, it rejected the argument, noting: “We may not . . . vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.” *Id.* at 832–33.

95. 562 U.S. 344 (2011).

96. *Id.* at 349.

97. *Id.*

leaving Rick's house. After being shot, he fled Rick's house in his car, driving to the gas station where the police found him.⁹⁸ The police interrogation lasted approximately five to ten minutes and ended when emergency medical personnel arrived at the scene. Covington was taken to a local hospital where he died a few hours later.⁹⁹ Bryant was arrested in California approximately one year later and returned to Michigan where he was tried for murder.¹⁰⁰

The trial court admitted the statements that Covington made to the police at the gas station.¹⁰¹ Bryant was convicted of second-degree murder; however, the Supreme Court of Michigan reversed his conviction.¹⁰² Citing *Davis*, the Court found that Covington's statements to the police were inadmissible on the grounds that they were testimonial hearsay.¹⁰³

The U.S. Supreme Court granted certiorari, vacated the judgment of the Michigan Supreme Court and remanded the case, this time with Justice Sotomayor authoring the majority opinion.¹⁰⁴ Returning to the primary purpose test it set out in *Davis*, the Court noted that the existence of an ongoing emergency is one of the most important indicators in determining the primary purpose of an interrogation. This is because an ongoing emergency focuses the individuals involved on resolving an active threat rather than "proving past events potentially relevant to later criminal prosecution."¹⁰⁵ The Court explained that determining the primary purpose of an interrogation and whether an emergency exists is a fact-dependent inquiry that depends on a variety of factors including: the type and scope of danger to the police, victim, and public at large; the type of weapon involved; the victim's medical condition; and the statements and actions of all of the individuals involved.¹⁰⁶

98. *Id.*

99. *Id.* There is a significant discrepancy as to the actions of the police at this point in time. The majority opinion suggests that the police immediately called for backup and traveled to Bryant's house. *Id.* However, the dissent claims that it took the police approximately two and a half hours before they had "secured the scene of the shooting." *Id.* at 388. Nonetheless, when the police went to the defendant's house, they found a bullet hole in the back door along with Covington's wallet and identification. *Id.* at 350.

100. *Id.* at 374.

101. *Id.* at 350.

102. *Id.* Although the Michigan Supreme Court ultimately reversed his conviction, the case was previously remanded to the Michigan Court of Appeals to be reconsidered in light of the *Davis* decision, which was decided after the court affirmed the conviction. Once again, the Court of Appeals affirmed the conviction, holding that Covington's statements to police were not testimonial. *Id.*

103. *Id.* at 351.

104. *Id.* at 378.

105. *Id.* at 361 (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

106. *Id.* at 363–65. The Court compared the facts in *Davis* to the instant case and commented that in domestic violence cases such as *Davis* and *Hammon*, the emergency will have a shorter duration than the one in the present case because domestic violence cases have a "narrower zone of potential victims than cases involving threats to public safety." *Id.* at 363. A victim's medical condition will be relevant because it "sheds light on the ability of the victim to have any purpose at

Applying these rules to the case before it, the Court concluded that there was an ongoing emergency at the time the police officers interrogated Covington, noting that crimes involving guns result in a heightened state of emergency.¹⁰⁷ In examining the statements and actions of the police officers, the Court found that they responded to a call that a man had been shot and that their questions to Covington focused on obtaining information about the shooting which was necessary to allow them to “meet an ongoing emergency.”¹⁰⁸ The Court also noted that, in light of these facts, it could not reasonably say that “a person in Covington’s situation would have had a ‘primary purpose’ ‘to establish or prove past events potentially relevant to later criminal prosecution.’”¹⁰⁹ It concluded that the circumstances of the encounter, coupled with the statements and actions of Covington and the police officers, demonstrated that Covington’s statements were not testimonial because the primary purpose of the interrogation was to enable the police to respond to an ongoing emergency.¹¹⁰

5. *Ohio v. Clark*

The Supreme Court’s most recent decision in this area of the law is *Ohio v. Clark*, a 2015 decision that involved the physical abuse of a young boy and the statements he made to a teacher in which he identified his mother’s live-in boyfriend as his abuser.¹¹¹ At the time of the incident, the defendant, Darius Clark lived with his girlfriend, Tahiem T., her eighteen-month-old daughter, A.T., and her three-and-a-half-year-old son, L.P.¹¹² Tahiem had a long history with the Cuyahoga County Department of Child and Family Services. Her

all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one.” *Id.* at 364–65.

107. *Id.* at 373–74.

108. *Id.* at 376 (quoting *Davis*, 547 U.S. at 822).

109. *Id.* at 375 (quoting *Davis*, 547 U.S. at 822).

110. *Id.* at 377–78. The Court, without explanation, and in dicta, reintroduced the concept of reliability, which has been absent from its Confrontation Clause jurisprudence since its decision in *Ohio v. Roberts*, 448 U.S. 56 (1980). *Id.* at 353. It noted that in determining the primary purpose of an interrogation, “standard rules of hearsay, designed to identify some statements as reliable, will be relevant.” *Id.* at 358–59. Justice Scalia delivered a scathing dissent, accusing the majority of “distor[ting] our Confrontation Clause jurisprudence and leav[ing] it in a shambles.” *Id.* at 380. He disagreed with the majority’s interpretation of facts, stating:

Today’s tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution.

Id. at 379.

111. *Ohio v. Clark*, 135 S. Ct. 2173 (2015).

112. *Id.* at 2177.

parental rights to three older children had been terminated due to abuse and neglect and her drug abuse.¹¹³

Tahiem picked her son up from preschool on the afternoon of March 16, 2010. At that time, he had no observable injuries. She was with L.P. until approximately midnight when she left Cleveland to engage in prostitution in Washington, D.C., leaving L.P. and A.T. in Clark's care.¹¹⁴ The next day, L.P.'s preschool teachers noticed he had certain injuries, principally that one of his one eyes appeared bloodshot. They also observed red marks on his face. When he was asked what happened to him, he initially said nothing; later, he said he fell.¹¹⁵ He finally named Clark but only after prolonged questioning.¹¹⁶

The school contacted the Department of Child and Family Services, which then sent a social worker to the school to question L.P. At first, L.P. told the worker that he had fallen. However, after further questioning, L.P. indicated that "the bruises came from [Clark]."¹¹⁷ Clark arrived at the school while the social worker was questioning L.P.¹¹⁸ He denied responsibility for L.P.'s injuries and abruptly left with L.P.¹¹⁹ The next day a social worker found A.T. and L.P. at Clark's mother's house, under the care of teenagers.¹²⁰ After observing injuries to both young children, she took them to the hospital where the doctors found multiple injuries to both children.¹²¹

Clark was arrested and charged with numerous counts of felonious assault and child endangerment.¹²² The central issue at trial was whether Clark or Tahiem

113. Brief for Respondent at 8–9, *Ohio v. Clark*, 135 S. Ct. 2173 (2015) (No. 13-1352) [hereinafter Brief for Respondent] (noting there was also evidence that she continued to physically abuse her two younger children).

114. *Id.* at 9.

115. *Id.* at 9–10. Another teacher pulled him aside asking: "Who did this? What happened to you? [D]id [you] get a spanking?" *Id.* at 11 (alteration in original).

116. In describing his response to the questioning, the teacher commented that she thought he appeared "bewildered." When asked what she meant by "bewildered," she elaborated: "Out. Staring out. And I was asking him—he almost looked uncertain, but he said, 'Dee.'" Joint Appendix at 61, *Ohio v. Clark*, 135 S. Ct. 2173 (2015) (No. 13-1352), 2014 WL 6468981 [hereinafter Joint Appendix]. On cross-examination, the teacher acknowledged that she was not sure whether L.P. understood what was being asked of him. *Id.* at 82.

117. Brief for Respondent, *supra* note 113, at 12.

118. Joint Appendix, *supra* note 116, at 147.

119. The social worker testified that Clark left abruptly, before the worker could finish his questioning. Although he attempted to stop Clark from leaving, the confrontation ended at a "stare-down" between Clark and himself because he "didn't want to get into a physical altercation." *Id.* at 150–51.

120. *Id.* at 99–100.

121. Brief for Respondent, *supra* note 113, at 12–13. When a social worker contacted Tahiem by phone to relay her concerns about the children, Tahiem accused the teachers of lying. She also told the worker that she was with the children and "was about to take L.P. for treatment for pink eye"—even though she was in Washington at the time. *Id.* at 12. After being told about the physician's findings and L.P.'s allegations, Tahiem decided to remain in Washington. In fact, not until her extradition five months later did she return to Ohio. *Id.* at 14.

122. *Ohio v. Clark*, 135 S. Ct. 2173, 2178 (2015).

caused the children's injuries.¹²³ Over defense counsel's objections, the court allowed the teachers to testify to the statements L.P. made to them as evidence of Clark's guilt.¹²⁴ In closing arguments, the prosecutor repeatedly told the jury to focus on L.P.'s hearsay statements in determining Clark's guilt.¹²⁵ Clark was convicted and sentenced to twenty-eight years in prison. The Ohio Supreme Court affirmed the reversal of the court of appeals, finding that L.P.'s statements were testimonial in nature.¹²⁶

The U.S. Supreme Court granted certiorari and reversed the decision of the Ohio Supreme Court. Justice Alito, writing for the Court, found that L.P.'s statements were not testimonial because they were made during an ongoing emergency—one in which a young child was found to be a victim of physical abuse.¹²⁷ He noted that the teachers needed to determine how L.P. incurred his injuries and the identity of the abuser. He compared the situation to the 911 call in *Davis* and the situation in *Bryant*, commenting that “the emergency in this case was ongoing, and the circumstances were not entirely clear.”¹²⁸ He also distinguished the present circumstances from those in *Hammon*, because in that case “the police knew the identity of the assailant and questioned the victim after shielding her from potential harm.”¹²⁹

The majority adopted the rationale of many of the lower courts that found a young child's statements could not be testimonial in nature because a young child would be incapable of understanding that his or her statements could be used as a substitute for live testimony at trial.¹³⁰ The Court rejected defendant's

123. Brief for Respondent, *supra* note 113, at 15.

124. *Clark*, 135 S. Ct. at 2178. The court found L.P. was not competent to testify. At a competency hearing, which was held before Clark's trial, L.P., four years old by that time, was unresponsive to questioning. He was unable to state his age, where he went to school, his birthday, his sister's age, or who he lived with. As a result, the court found him incompetent to testify. For a transcript of L.P.'s competency hearing, see Joint Appendix, *supra* note 116, at 4–12.

125. Brief for Respondent, *supra* note 113, at 15.

126. *Clark*, 135 S. Ct. at 2178. Applying the primary purpose test, the court found L.P.'s statements to the teachers to be testimonial because the teachers were acting pursuant to their duty to investigate and report suspected child abuse. *State v. Clark*, 999 N.E.2d 592, 600 (Ohio 2013). The court found no ongoing emergency at the time L.P. was questioned because he did not complain of his injuries and did not need emergency medical care. It noted:

Thus, the primary purpose of that inquiry was not to extricate the child from an emergency situation or to obtain urgently needed medical attention, but rather was an information-seeking process to determine what had occurred in the past and who had perpetrated the abuse, establishing past events potentially relevant to later criminal prosecution.

Id.

127. *Clark*, 135 S. Ct. at 2181–83.

128. *Id.* at 2181.

129. *Id.*

130. *Id.* at 2182 (“On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernable purpose at all.”); *see also* Paruch, *supra* note 2, at 121 (identifying cases in which courts have adopted this approach).

argument that L.P.’s statements were testimonial because the teachers, who were obligated to investigate and report suspected cases of abuse under Ohio’s mandatory reporting laws, were functioning as an arm of the police.¹³¹ Rather, it stated, “mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission”¹³²

6. *Commentary on U.S. Jurisprudence*

The Supreme Court’s *Crawford* jurisprudence has come under significant criticism in recent years. Scholars are critical of Justice Scalia’s interpretation of the history of the Confrontation Clause and the theoretical underpinning for the testimonial approach he set out in *Crawford*.¹³³ Professor Thomas Davies

131. *Clark*, 135 S. Ct. at 2182–83.

132. *Id.* at 2183. Justice Scalia, joined by Justice Ginsburg, criticized Alito for his reintroduction of the *Ohio v. Roberts*’ “indicia of reliability” test overruled by *Crawford*, referring to it as “that flabby test” loved by prosecutors, past and present. *Id.* at 2184 (Scalia, J., concurring in the judgment). There is another line of Confrontation Clause cases dealing with laboratory reports that have been omitted from this discussion. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308–10 (2009) (holding that laboratory analysts’ certificates indicating a substance seized from the defendant was cocaine were testimonial); *Bullcoming v. New Mexico*, 564 U.S. 647, 664–65 (2011) (holding that an analysts’ report containing defendant’s blood alcohol level was testimonial); *Williams v. Illinois*, 567 U.S. 50, 56 (2012) (plurality opinion) (dealing with reports containing DNA analyses). At the time it was issued, *Williams* appeared to end any doctrinal stability among the members of the Court. The concurring justices disagreed over whether a particular laboratory report was hearsay since it had not been admitted into evidence. They also disagreed as to whether the report itself was a testimonial statement since the analysts that prepared the report were not aware of how it would be used. See *Williams*, 567 U.S. at 87–93 (Breyer, J., concurring); *id.* at 103–18 (Thomas, J., concurring in judgment). Four justices dissented, finding that the Court’s prior holdings in *Melendez-Diaz* and *Bullcoming* controlled. *Id.* at 134–40 (Kagan, J., dissenting). As a result of these divergent opinions, there was no rule of law from *Williams*.

133. See, e.g., Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5, 13 (2011) (“Justice Scalia—who allows for departures from the original understanding on the basis of precedent, justiciability, and settled historical practice—is not really an originalist at all.” (citing Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13 (2006))); see also Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 200–04 (2005) (“What is most impressive about *Crawford* is how its skillful blend of originalism and formalism persuaded seven members of the Court to throw out decades of precedent.”). Many discussions of the history of the Confrontation Clause begin by noting that history provides scant guidance in interpreting it. Justice Harlan concurring in *California v. Green* noted:

As the Court’s opinion suggests, the Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause.

.....

From the scant information available[,] it may tentatively b[e] concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses.

argues that *Crawford's* claim that the right of confrontation at the time of the framing was limited to testimonial hearsay is wrong.¹³⁴ He contends that neither the text of the Sixth Amendment nor its historical meaning compel *Crawford's* testimonial rule.¹³⁵ He rests his opinion on the fact that during the framing era, out-of-court statements, including the type contained in 911 calls, criminal investigation reports, and forensic tests, were not admitted as evidence in criminal trials.¹³⁶

Professor Mike Madden disagrees with *Crawford's* interpretation of the historical facts and text of the Confrontation Clause.¹³⁷ He argues that the majority could have reasonably concluded that no right to cross-examine witnesses is protected by the Sixth Amendment. Pointing to the ambiguity surrounding the term “witnesses” within the Confrontation Clause as an example, he highlights Justice Scalia’s acknowledgment that the phrase “witnesses against” could be read to apply to “those who actually testify at trial, those whose statements are offered at trial, or something in-between.”¹³⁸

Scholars have also criticized the Court’s primary purpose test and its focus on the “ongoing emergency” situation. They argue that it is unrealistic to require that a court determine a singular reason for the statements or the interrogation because the same statements that are used to help resolve an ongoing emergency can later be used to convict a defendant at trial.¹³⁹ Professor Jeffrey Fisher has

California v. Green, 399 U.S. 149, 173–74, 179 (1970) (Harlan, J., concurring); see also Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1881 (2012) (disagreeing with the Court’s approach as a matter of textual and historical analysis).

134. Davies, *supra* note 59, at 351–52; see also David Alan Sklansky, *Hearsay’s Last Hurrah*, 2009 SUP. CT. REV. 1, 53–54 (“What matters fundamentally is what the Confrontation Clause meant to the people who framed and adopted it.”).

135. Davies, *supra* note 59, at 369–71.

136. *Id.* at 366–67. Professor Davies demonstrates through a review of the legal sources at the time of the framing that only sworn or functionally sworn statements made by unavailable witnesses could be admitted in a criminal trial as evidence of defendant’s guilt. *Id.* at 383. He notes that the only exceptions to this rule were the use of prior out-of-court statements that could be used to corroborate or impeach a witness’s trial testimony, and the use of hearsay to establish background facts that did not establish defendant’s guilt, such as proving the existence of a conspiracy. *Id.* at 462. The author also reviewed pre-framing treatises and manuals and found that they identified two kinds of out-of-court statements that were admitted in criminal trials as evidence of defendant’s guilt—a sworn Marian examination of an unavailable witness and a dying declaration of a murder victim. *Id.* at 387, 391. These conclusions are supported by Chief Justice Marshall’s 1807 ruling on the inadmissibility of informal, out-of-court statements in *United States v. Burr*, in which he remarked, “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.” *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694).

137. Mike Madden, *Anchoring the Law in a Bed of Principle: A Critique of, and Proposal to Improve, Canadian and American Hearsay and Confrontation Law*, 35 B.C. INT’L & COMP. L. REV. 395, 411–12 (2012).

138. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004)).

139. See, e.g., Joëlle Anne Moreno, *Finding Nino: Justice Scalia’s Confrontation Clause Legacy from its (Glorious) Beginning to (Bitter) End*, 44 AKRON L. REV. 1211, 1215–17 (2011)

questioned how a state of emergency, standing alone, can make a person's statements to law enforcement nontestimonial.¹⁴⁰ He stated:

The lesson of the failed *Roberts* framework is that the confrontation right needs to be protected with doctrine that reflects confrontation values. Courts should heed that lesson when interpreting and applying the *Davis* decision. Assessing simply whether an "emergency" existed while a person described potentially criminal events does not meaningfully help determine whether introducing the person's statement in a criminal trial would make the person a "witness" against the defendant. Nor does examining any questioner's primary purpose in eliciting such an out-of-court statement materially assist in that inquiry.¹⁴¹

The Court has also been criticized for its expansive reading of the criterion of emergency statements, under which any conceivable purpose for an interview can be construed as non-interrogation, resulting in statements that fall outside of the Confrontation Clause.¹⁴² One commentator has criticized the *Bryant* Court for following such an approach, noting that the Court "manipulate[d] the facts and law arbitrarily so as to achieve [these] results."¹⁴³

(referring to Justice Sotomayor's application of *Davis* and *Crawford* in *Michigan v. Bryant*, 562 U.S. 344 (2011), as a "scattershot approach"). The Court's focus on the declarant's intentions alongside those of the interrogator in determining if statements are testimonial has been recently criticized by Professor David Noll. Professor Noll commented that "a test that turns on *awareness*" that one's statements could be used in a subsequent criminal trial, particularly given the liberal definition of relevant evidence contained in the federal rules, "does not meaningfully constrain the universe of statements subject to the Confrontation clause." Noll, *supra* note 76, at 1958. He argues that the focus should be on constitutional harm. *Id.* at 1966.

140. Jeffrey L. Fisher, *What Happened—and What Is Happening—to the Confrontation Clause*, 15 J. L. & POL'Y 587, 613 (2007).

141. *Id.* at 626–27.

142. *Id.* at 609–14.

143. Madden, *supra* note 137, at 415–16 (analogizing Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk"*, 14 WIDENER L. REV. 427, 441–42 (2009)). Criticizing the majority's decision in *Bryant*, Justice Scalia excoriated the majority's impact on confrontation clause jurisprudence as "leav[ing] it in a shambles." *Michigan v. Bryant*, 562 U.S. 344, 380 (2011) (Scalia, J., dissenting).

In short, the Court's post-*Crawford* jurisprudence has been described as a "train wreck,"¹⁴⁴ a "debacle,"¹⁴⁵ a "mess,"¹⁴⁶ and as "highly subjective, fact-intensive, [and] malleable."¹⁴⁷ Professor David Noll commented, "[o]ne of the most notable developments in contemporary constitutional law is the breakdown of jurisprudence interpreting the Sixth Amendment's Confrontation Clause following the U.S. Supreme Court's 2004 decision in *Crawford v. Washington*."¹⁴⁸

These weaknesses and flaws are readily apparent in the *Clark* opinion.¹⁴⁹ The Court's fact-intensive primary purpose test and the corresponding ongoing-emergency concept provide an avenue for courts to manipulate the facts to achieve their desired result. In *Clark*, the Court ignored relevant facts and contorted precedent in concluding that an ongoing emergency existed at the time the teachers questioned L.P. at school.¹⁵⁰ The fact that L.P. was at school and separated from his alleged abuser at the time of the questioning is significant,¹⁵¹

144. Daniel D. Blinka, *More "Bullcoming"? The Court Courts Confusion in Confrontation*, MARQ. U. L. SCH. FAC. BLOG (Mar. 3, 2011), <https://law.marquette.edu/facultyblog/author/daniel-blinka/page/2/>, quoted in Kevin C. McMunigal, *Crawford, Confrontation, and Mental States*, 64 SYRACUSE L. REV. 219, 220 (2014) ("Commentators describe the *Crawford* line of cases as 'incoherent,' 'uncertain,' 'unpredictable,' 'a train wreck,' 'suffering from "vagueness" and "double-speak,"' and, simply put, a 'mess.'" (footnotes omitted)).

145. George Fisher, *The Crawford Debacle*, 113 MICH. L. REV. FIRST IMPRESSIONS 17, 17 n.1 (2014) (attributing the term to Eileen A. Scallen, *Coping with Crawford: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558 (2009)).

146. Deborah Ahrens & John Mitchell, *Don't Blame Crawford or Bryant: The Confrontation Clause Mess Is All Davis's Fault*, 39 RUTGERS L. REC. 104, 105 (2012).

147. Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301, 1302 (2011).

148. Noll, *supra* note 76, at 1899.

149. See *Ohio v. Clark*, 135 S. Ct. 2173 (2015). As previously discussed, a foundational error in the Court's doctrine is its focus on assessing whether the statements were testimonial in nature at the time they were made. People do not become witnesses within the context of the Confrontation Clause at the time they make an out-of-court statement. Instead, they become witnesses under the Sixth Amendment when they testify at a trial, hearing, or deposition, or when their statements are introduced into evidence at a trial. See *supra* notes 139–43 and accompanying text. Professor Jeffrey Fisher recognized this distinction and said of the "ongoing emergency" inquiry: "[T]he presence of an ongoing emergency is important only insofar as it indicates that a declarant's statement describing criminal activity can fairly be described as part of the event itself, rather than a report or a narrative of it." Fisher, *supra* note 140, at 614.

150. Justice Alito failed to define the suspected child abuse against L.P. as falling within the context of domestic violence, and in doing so, he ignored the distinctions Justice Sotomayor set out for domestic violence cases in *Bryant*. In *Bryant*, the Court indicated that the duration of emergencies rested on when the threat was neutralized, adding that emergencies within the domestic violence context "often have a narrower zone of potential victims than cases involving threats to public safety" and exist only while there is "a continuing threat to them." Compare *Clark*, 135 S. Ct. at 2181, with *Michigan v. Bryant*, 562 U.S. 344, 363–64 (2011).

151. The Court supports its finding that an ongoing emergency existed by distinguishing these facts from *Hammon*, stating that in that case "the police knew the identity of the assailant and questioned the victim after shielding her from potential harm." *Clark*, 135 S. Ct. at 2181. However, in *Clark*, the teachers learned the identity of the assailant during the course of their questioning. *Id.*

as are the facts that L.P.'s injuries did not compel the teachers to seek immediate medical care, and that Clark did not pose a threat to the public at large.¹⁵² Most importantly, the fact that L.P. left school that day in Clark's custody refutes the notion that an ongoing emergency existed.¹⁵³

Furthermore, the primary purpose test, which requires a court to find only one purpose for the interrogation when other equally important purposes are present, provides a court the opportunity to choose the purpose it prefers, and thus the outcome it desires.¹⁵⁴ In finding that the teacher's primary purpose was to care for L.P.,¹⁵⁵ the Court dismissed the fact that the teachers were mandated reporters and, as such, knew or should have known that any statements they elicited from L.P. could ultimately be used in a criminal prosecution.¹⁵⁶

B. *The Law in Canada*

Section 7 of the Canadian Charter of Rights and Freedoms (Charter), enacted as part of the Constitution Act of 1982, guarantees everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."¹⁵⁷ Additionally, section 11(d) provides: "Any person charged with an offence has the right to be

at 2178. Once again deviating from precedent, the *Clark* Court failed to consider that a conversation can "evolve into testimonial statements." See *Davis v. Washington*, 547 U.S. 813, 828 (2006). Thus, under these facts, the argument could be made that even if the questioning began as a non-testimonial statement, once L.P. identified Clark as the assailant—who was not present at that time—the conversation evolved into a testimonial statement. Compare *Clark*, 135 S. Ct. at 2181, with *Bryant*, 562 U.S. at 365, and *Davis*, 547 U.S. at 830.

152. See *Bryant*, 562 U.S. at 364–65 ("The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.").

153. Although the Court acknowledged that the teachers and the social worker "were reluctant to release L.P. into Clark's care," the fact that neither the teachers nor the social worker ever felt the need to call the police after Clark's alleged "stare-down" with the social worker and aggressive taking of L.P. contradicts the finding that this was an ongoing emergency. See *Clark*, 135 S. Ct. at 2181 n.2.

154. See *supra* note 139 and accompanying text.

155. *Clark*, 135 S. Ct. at 2181 ("There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect L.P.").

156. Although the Court mentioned the concept of reliability, it failed to adequately assess whether the L.P.'s statements were reliable, even though there were serious questions regarding the reliability of his statements for a variety of reasons. L.P.'s statements were ambiguous and he gave several different reasons for his injuries during the course of the repeated questioning. *Id.* at 2178. At the trial, one of the teachers acknowledged that she was not sure he understood what he was being asked. See *supra* note 116 and accompanying text. At the competency hearing held before the trial, he was unable to answer simple questions such as who his sister was, when his birthday was, where he went to school, or even whom he lived with. It was these responses that caused the judge to remark only a few minutes into the questioning, "I've heard enough," and declare him incompetent to testify. Joint Appendix, *supra* note 116, at 4–12.

157. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.) [hereinafter Canadian Charter].

presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal[.]”¹⁵⁸

The Supreme Court of Canada (SCC) has stated that the right to a fair trial is the proper end to be achieved under section 7 and is one of the foundational principles of fundamental justice.¹⁵⁹ However, unlike the Sixth Amendment to the U.S. Constitution, the Charter does not enumerate the right of confrontation. In fact, the SCC has recognized that the rights provided under section 7 do not include the right to confront or cross-examine witnesses.¹⁶⁰ However, it has found that the right of an accused to make a full answer and defense to the charges against him is implied under section 7.¹⁶¹ It explained:

The right to make full answer and defen[s]e manifests itself in several more specific rights and principles, such as the right to full and timely disclosure, . . . as well as various rights of cross-examination, among others. The right is integrally linked to other principles of fundamental justice, such as the presumption of innocence, the right to a fair trial, and the principle against self-incrimination.¹⁶²

The SCC has also found that the principle of fundamental justice contained in section 7 encompasses not only individual rights but societal interests as well.¹⁶³ In *R. v. Jarvis*,¹⁶⁴ for example, the SCC recognized the societal interest in the truth-seeking process.¹⁶⁵ It elevated this societal interest to constitutional status by stating that the “principle of fundamental justice suggest[s] that relevant evidence should be available to the trier of fact in a search for truth.”¹⁶⁶

The SCC revolutionized the common law of evidence during the period of time that coincided with enactment of the Charter.¹⁶⁷ This revolution has

158. *Id.* § 11(d).

159. *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, para. 47 (Can.). The SCC has also noted that the rights set forth in sections 8 through 14 of the Charter are “examples of the principles of fundamental justice” that are referenced in section 7. *Madden, supra* note 137, at 418–19 (citing *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 603).

160. *Khelawon*, [2006] 2 S.C.R. 787, para. 48.

161. *R. v. Rose*, [1998] 3 S.C.R. 262, para. 98 (Can.).

162. *Id.*

163. *See, e.g.*, DAVID M. PACIOCCO & LEE STUESSER, *THE LAW OF EVIDENCE* 4 (5th ed. 2008) (Can.).

164. *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 (Can.).

165. *See* PACIOCCO & STUESSER, *supra* note 163, at 4 (citing *Jarvis*, [2002] 3 S.C.R. 757, para. 68).

166. *Jarvis*, [2002] 3 S.C.R. 757, para. 68.

167. *See* Hamish Stewart, *Section 7 of the Charter and the Common Law Rules of Evidence*, in 40 SUPREME COURT LAW REVIEW 415 (2d series, 2008) (Can.) (noting that the Charter became effective in April 1982, whereas the SCC’s evidence revolution began the next month with its decision in *R. v. Vetrovec*, [1982] 1 S.C.R. 811 (Can.) (eliminating the corroboration requirement for accomplice testimony)). It has been argued that this flexible approach is actually more in line with the Charter because it affords increased protections to defendants. Some scholars maintain that a strict interpretation of the rules of evidence would lead, in some circumstances, to the

brought significant changes to the Canadian law of evidence, the result of which has been a trend toward a more flexible approach to the admission of evidence at trial, replacing the traditional rigid approach under which the rules were strictly interpreted.¹⁶⁸ The adoption of the flexible approach, which has come to be known as the “principled approach,” was motivated in part by the perceived need to improve the law as it related to the prosecution of sexual crimes.¹⁶⁹ It was widely believed that a rigid interpretation of the rules resulted in the exclusion of valuable evidence and the acquittal of “clearly guilty” persons.¹⁷⁰ Significant changes in the law of evidence and criminal procedure were enacted in response to this perceived need, including the removal of corroboration requirements in most instances, the modification of standards for the competence of witnesses, and the relaxation of the hearsay rule.¹⁷¹ Professors Paciocco and Stuesser suggest that the trend toward more liberal admissibility rules and the adoption of the principled approach can also be attributed, in part, to the decreasing use of juries; juries hear only a small percentage of criminal cases in Canada and are rarely used in civil cases.¹⁷²

In addition to the rationale discussed above, there was growing dissatisfaction with the traditional rules related to the admissibility of hearsay in Canadian legal circles, which included the courts, legal scholars, law reform commissions, and the Federal/Provincial Task Force on the Law of Evidence.¹⁷³ Despite this, proposed parliamentary reform in the 1980s failed.¹⁷⁴ However, the SCC did not sit idly by, and in the early 1990s issued two decisions, *R. v. Khan*¹⁷⁵ and *R. v. Smith*,¹⁷⁶ which radically changed the approach that Canadian courts would take to determining the admissibility of hearsay evidence.¹⁷⁷

exclusion of exculpatory evidence and to the admission of evidence that operates unfairly against defendants. PACIOCCO & STUESSER, *supra* note 163, at 5.

168. PACIOCCO & STUESSER, *supra* note 163, at 5; *see also* Peter Sankoff, *Rewriting the Canadian Charter of Rights and Freedoms: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process*, in 40 SUPREME COURT LAW REVIEW 369 (2d series, 2008) (Can.) (commenting that “none of the Charter rights specifically target evidentiary concerns, and the absence of such a provision has prevented the Charter from having a major effect in this area”).

169. *See* PACIOCCO & STUESSER, *supra* note 163, at 5; *see also* Archibald, *supra* note 4, at 5.

170. Archibald, *supra* note 4, at 10.

171. PACIOCCO & STUESSER, *supra* note 163, at 5.

172. *Id.* at 5–7.

173. Archibald, *supra* note 4, at 2–4.

174. *Id.* at 4. The attempt to reform the law of evidence came in the form of Bill S-33, entitled *An Act to give effect, for Canada, to the Uniform Evidence Act adopted by the Uniform Law Conference of Canada*. *Id.* at 4 n.8.

175. *R. v. Khan*, [1990] 2 S.C.R. 531 (Can.).

176. *R. v. Smith*, [1992] 2 S.C.R. 915 (Can.).

177. *See* Archibald, *supra* note 4, at 4, n.9.

1. *R. v. Khan and R. v. Smith*

In *R. v. Khan*, a physician was on trial for sexually assaulting a three-year-old girl during a routine office visit.¹⁷⁸ Shortly after leaving his office (approximately thirty minutes after the alleged assault), the child described the events to her mother. The mother reported the assault to the police and the defendant was arrested and charged with sexual assault.¹⁷⁹ The trial judge found that the child was not competent to testify and denied the prosecutor's request to admit the child's statements.¹⁸⁰ Applying the common law rules of evidence, the court found the girl's statements to her mother were inadmissible because they were not contemporaneous with the event. The defendant was found not guilty.¹⁸¹

The SCC agreed with the trial court's ruling regarding the contemporaneous nature of the girl's statements.¹⁸² However, Madam Justice McLachlin, writing for the court, stressed the need for increased flexibility in interpreting hearsay rules in cases involving sexual abuse of young children.¹⁸³ She identified the two foundational principles of the law of evidence: necessity and reliability.¹⁸⁴ Incorporating these two principles, the SCC held that hearsay statements would be admissible provided the evidence is "reasonably necessary" and reliable.¹⁸⁵ The SCC set forth its new rule regarding children's statements:

[H]earsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.¹⁸⁶

The SCC refused to provide a list of factors for courts to consider in determining if the evidence was reliable, explaining that the determination of reliability varies and should be left to the discretion of the trial judge.¹⁸⁷ However, the SCC noted that "considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement" may be important in determining reliability.¹⁸⁸

178. *Khan*, [1990] 2 S.C.R. at 533–34.

179. *Id.* at 534.

180. *Id.* at 535.

181. *Id.*

182. *Id.* at 540.

183. *Id.* at 542–44.

184. *Id.* at 542.

185. *Id.* at 546–47.

186. *Id.* at 548.

187. *Id.* at 547.

188. *Id.*

The SCC held that the mother's statements should have been admitted because both the necessity and reliability requirements were met. It found the statements were necessary because the child was found not competent to testify; they were reliable because the child had no reason to fabricate her story and because she made the statement "naturally and without prompting."¹⁸⁹ Furthermore, the SCC found the statements were reliable because a child of her age would ordinarily not possess knowledge of these types of sexual acts, and her statements were corroborated by physical evidence.¹⁹⁰

Two years later, the SCC decided *R. v. Smith*, a case involving statements made by a murder victim to her mother shortly before her murder.¹⁹¹ The SCC ruled that the principles that it previously set out in *Khan* were to be applied in all cases and not limited to cases of child abuse.¹⁹² It stated, "Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity."¹⁹³

2. *R. v. Starr*

The SCC continued to develop the principled approach it established in *Khan* and *Smith* nearly a decade later in *R. v. Starr*.¹⁹⁴ In *Starr*, the defendant was charged with two counts of first-degree murder following the shooting deaths of two victims.¹⁹⁵ A key piece of evidence against the defendant was one of the victim's statements to his girlfriend in which he stated that he was going to "go and do an Autopac scam with [the defendant]."¹⁹⁶ The trial judge admitted the statement under the "present intentions" exception to the hearsay rule as proof that the victim and the defendant were together at the time of the killing.¹⁹⁷

The SCC vacated the defendant's conviction and ordered a new trial.¹⁹⁸ Noting the relationship between the principled approach and traditional hearsay exceptions, it held that in cases where the traditional exceptions are at odds with the principled approach, the traditional exceptions must be revised in light of the

189. *Id.* at 548.

190. *Id.*

191. *R. v. Smith*, [1992] 2 S.C.R. 915 (Can.).

192. *Id.* at 932 ("*Khan* should not be understood as turning on its particular facts, but, instead, must be seen as a particular expression of the fundamental principles that underlie the hearsay rule and the exceptions to it.>").

193. *Id.* at 933. It provided guidance for courts in determining these required criteria. Reliability or "the circumstantial guarantee of trustworthiness [] is a function of the circumstances under which the statement in question was made." Necessity, on the other hand, "refers to the necessity of the hearsay evidence to prove a fact in issue." The SCC also noted that necessity should be given a flexible definition "capable of encompassing diverse situations." *Id.* at 933-34.

194. *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144 (Can.).

195. *Id.* at 205, para. 103.

196. *Id.* at 208, para. 111.

197. *Id.* at 215, para. 132.

198. *Id.* at 269, para. 245.

principled approach.¹⁹⁹ In other words, the principled approach governs the admission of hearsay evidence; thus, a hearsay statement that satisfies a traditional hearsay exception is no longer automatically admissible.²⁰⁰ It stated:

In *Khan, Smith*, and subsequent cases, this Court allowed the admission of hearsay not fitting within an established exception where it was sufficiently reliable and necessary to address the traditional hearsay dangers. However, this concern for reliability and necessity should be no less present when the hearsay is sought to be introduced under an established exception. This is particularly true in the criminal context given the “fundamental principle of justice, protected by the Charter, that the innocent must not be convicted.” It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception.²⁰¹

After determining that the challenged statement was in fact hearsay,²⁰² the SCC found that the victim had a reason to lie to his girlfriend about his intentions at the time he made the statement.²⁰³ In finding that the statement was made under “circumstances of suspicion,” the SCC held that the statement did “not fall within the present intentions exception.”²⁰⁴ Therefore, in analyzing the statement under the principled approach, the “circumstances of suspicion” that surrounded the making of the statement rendered it unreliable. The SCC added, “Having found that the statement is unreliable, it is unnecessary to go on to ask whether it was necessary or not.”²⁰⁵ Accordingly, the SCC concluded that the

199. *Id.* at 250, para. 207 (“The more appropriate approach is to seek to derive the benefits of certainty, efficiency, and guidance that the [traditional hearsay] exceptions offer, while adding the benefits of fairness and logic that the principled approach provides.”).

200. *Id.* at 243, para. 192 (“[T]o the extent that the various exceptions may conflict with the requirements of a principled analysis, it is the principled analysis that should prevail.”).

Hearsay evidence may only be admitted if it is necessary and reliable, and the traditional exceptions should be interpreted in a manner consistent with this requirement.

In some rare cases, it may also be possible under the particular circumstances of a case for evidence clearly falling within an otherwise valid exception nonetheless not to meet the principled approach’s requirements of necessity and reliability. In such a case, the evidence would be excluded.

Id. at 253, paras. 213–14.

201. *Id.* at 247, para. 200 (quoting *R. v. Mills*, [1999] 3 S.C.R. 668, para. 71 (Can.)).

202. *Id.* at 231, para. 167 (“It was an out-of-court statement, and it was offered by the Crown to prove the truth of the matter asserted; namely, that [the victim] intended to do an Autopac scam with [the defendant].”).

203. *Id.* at 237, para. 179 (“[The victim] may have had a motive to lie in order to make it seem that he was not romantically involved with [another woman], and . . . could point to the [defendant], who was sitting nearby in a car but out of earshot, as being the person with whom he was going to do a scam.”).

204. *Id.*

205. *Id.* at 251, para. 209.

statement should not have been admitted because it was “inadmissible under the principled approach” and “[did] not fall under an existing exception either.”²⁰⁶

3. *R. v. Khelawon*

The SCC set out the procedure that courts should follow under the principled approach in its 2006 decision in *R. v. Khelawon*.²⁰⁷ This case involved statements made by Skupien, an elderly resident of a nursing home, to a caregiver,²⁰⁸ his physician,²⁰⁹ and ultimately in a videotaped interview with the police in which he reported that the defendant, the manager of a nursing home, had physically assaulted him.²¹⁰ In the course of their investigation, the police interviewed several other residents of the home who also reported that the defendant had assaulted them.²¹¹ The defendant was convicted of assault following a trial in which Skupien’s hearsay statements, along with those of the other residents of the home, were admitted.²¹² The trial judge found the hearsay statements were reliable because of the “striking similarity” between Skupien’s statements and those of the other residents.²¹³

The SCC noted that the rationale for the use of the principled approach in criminal cases arises from section 7 of the Charter.²¹⁴ It commented that although the adversary system is based on the assumption that the untrustworthiness of a witness’s statements is best brought to light through cross-examination, alongside the defendant’s right to make a full answer and defense is society’s interest in having a trial process that is designed to discover the truth.²¹⁵ It engaged in a lengthy discussion of the hearsay rule and the challenges presented when attempting to determine the reliability of these types of statements in the absence of cross-examination.²¹⁶ It preceded this discussion by setting out the then-current, governing framework:

206. *Id.*

207. *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 (Can.).

208. *Id.* at 797–98, paras. 11–13.

209. *Id.* at 799, para. 15.

210. *Id.* at 799, para. 16.

211. *Id.* at 800, para. 18.

212. *Id.* at 804, para. 28 (“At the conclusion of the trial, [the judge] ultimately found only two of the videotaped statements sufficiently credible to found a conviction . . .”).

213. *Id.* at 804, para. 26.

214. *Id.* at 814, para. 47. The Court stated:

The concern over trial fairness is one of the paramount reasons for rationalizing the traditional hearsay exceptions in accordance with the principled approach. As stated [in *Starr*] in respect of Crown evidence: “It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception.”

Id. at 814, para. 47 (quoting *R. v. Starr*, [2000] 2 S.C.R. 144, para. 200).

215. *Id.* at 814–15, para. 48.

216. *Id.* at 816–18, paras. 50–55.

(a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

(b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

(c) In “rare cases,” evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.²¹⁷

The SCC next set out the procedures that courts should follow. The trial judge, acting as the gatekeeper, must determine whether the principles of necessity and reliability have been established based on a balance of probabilities.²¹⁸ It emphasized that it refused to create new categorical rules with regard to reliability, preferring that the principled approach be applied on a case-by-case basis.²¹⁹ Finally, it opined that the dangers raised by hearsay evidence can be overcome if one of two broad conditions are met: (1) the circumstances surrounding the making of the statement provide evidence of the reliability of the statement or tend to show that the statement is true; or (2) “adequate substitutes for testing the evidence” exist.²²⁰

Applying this reasoning to the case before it, the SCC found little evidence to demonstrate that the statements were reliable.²²¹ It noted that an appropriate exclusionary test asks whether “the evidence was unlikely to change under cross-examination,” and found that the test was not met because the

217. *Id.* at 811–12, para. 42 (quoting *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, para. 15).

218. *Id.* at 814, para. 47. The SCC noted the distinction between “threshold reliability” and “ultimate reliability.” *Id.* at 816, para. 50. Threshold reliability is concerned with whether the statement provides “circumstantial guarantees of trustworthiness” and is determined by the court, whereas ultimate reliability involves the question of whether or not the statement will be relied upon in deciding the issues involved in the case and is a matter for the fact finder to determine. *Id.* at 816–17, paras. 51–52 (quoting *Starr*, [2000] 2 S.C.R. at paras. 215, 217).

219. *Id.* 813, para. 45.

220. *Id.* at 823, para. 66. This factor has been found to be present in cases involving prior statements that witnesses made to police officers or at preliminary hearings when the declarants testified and were subject to cross examination at the trial. *See, e.g.*, *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (Can.) (involving prior inconsistent statements); *R. v. Hawkins*, [1996] 3 S.C.R. 1043, para. 76 (Can.) (finding that testimony given at a preliminary hearing, under oath, and subject to cross-examination satisfied the test for threshold reliability).

221. *Khelawon*, [2006] 2 S.C.R. at 842, para. 105–07 (“In order to meet the reliability requirement in this case, the Crown could only rely on the inherent trustworthiness of the statement. In my respectful view, there was no case to be made on that basis either.”).

circumstances surrounding Skupien's statements raised serious concerns. The declarant was old and frail, his medical records were replete with diagnoses of paranoia and dementia, and there was evidence in the medical records that his injuries could have been caused by a fall.²²² Finally, the SCC indicated that although the existence of "striking similarities" between the statements of the witnesses could support a finding of reliability, the facts did not support this finding in the present case.²²³

Moreover, the SCC did not find there was a sufficient substitute basis for testing Skupien's statements because he died before the trial and was never cross-examined at any other hearing.²²⁴ It noted that there was nothing more than a police video of his interview stating, "[t]he principled exception to the hearsay rule does not provide a vehicle for founding a conviction on the basis of a police statement, videotaped or otherwise, without more."²²⁵

4. *Commentary on Canadian Jurisprudence*

Many view the principled approach as a major advancement in the Canadian law of evidence.²²⁶ Those who approve of this approach believe that the changes better serve the public interest because the approach results in "a greater reliance on the application of discretion at the expense of fixed rules, and more evidence being provided to the jury for consideration."²²⁷ Supporters of the principled approach also cite its preference for flexible principles that require that evidence doctrines be framed and applied in a manner focused on the interests and values at stake in the specific evidence question.²²⁸ Professor Lisa Dufraimont has opined that the approach's "consistent focus on the rationales behind the rules" has worked to assure that admissibility decisions are "more likely to further the law's underlying policies."²²⁹

Although the principled approach has its supporters, it has also been criticized on a number of fronts. First, although it was the "twin defects in the common law of evidence," complexity and rigidity, that drove the revolution in Canadian

222. *Id.* at 842–43, para. 107.

223. *Id.* at 844, para. 108.

224. *Id.* at 842, para. 106.

225. *Id.* at 842, para. 106.

226. *See, e.g.,* Lisa Dufraimont, *Realizing the Potential of the Principled Approach to Evidence*, 39 *QUEEN'S L.J.* 11, 38 (2013) (Can.).

227. Sankoff, *supra* note 168, at 370 ("The move to a principled approach swept away outmoded concepts of proof that had become 'preposterously rigid' and simultaneously forced a reconsideration of the governing tenets of admissibility." (footnotes omitted)).

228. *Id.* at 369–70. The author commented that flexibility and judicial discretion are the norm—describing the principled approach as "the triumph of a principled analysis over a set of ossified judicially created categories." *Id.* at 369 n.96 (quoting *R. v. Smith*, [1992] 2 S.C.R. 915, 930 (Can.)).

229. Dufraimont, *supra* note 226, at 38.

law,²³⁰ only rigidity has been reduced entirely under the principled approach.²³¹ Initial expectations that the principled approach would address the complexity issue have not been fulfilled. In fact, some evidence doctrines, particularly the hearsay rules, have grown in complexity. Under the principled approach, hearsay may be admitted under an existing exception to the rule or on a case-by-case basis upon a finding of necessity and reliability.²³²

Since the adoption of the principled approach, the SCC has focused most of its attention on the reliability factor.²³³ The main emphasis in its reliability discourse has been on the circumstances surrounding the making of the out-of-court statement.²³⁴ Although there are some prevailing factors,²³⁵ overall reliability remains a vague principle. The factors that courts consider are numerous and undefined, causing one scholar to comment: “[T]he legal mechanisms for admitting *hearsay* are sometimes clumsy, sometimes too restrictive, and at other times not restrictive enough. Consequently, we have a mess.”²³⁶ Likewise, Professor Bruce Archibald noted, “[t]he most significant controversy . . . over the reliability issue concerns corroboration of hearsay by

230. *Id.* at 14. The author suggests that Canadian common law hearsay rules developed ad hoc in response to “perceived problems in the process of proof.” *Id.* at 18. As a result, over time, these “rules and exceptions multiplied and their technical requirements proliferated.” *Id.*; see also MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 11 (Yale U. Press ed. 1997) (“[The disheveled state of evidence law] is primarily attributable to the fact that common law evidentiary doctrine evolved ad hoc, cobbled up over time from judicial rulings in individual cases.”).

231. Dufraimont, *supra* note 226, at 38.

232. *Id.* at 23, 38 (“In other areas, most importantly the traditional exceptions to the hearsay rule, the courts have used the additive method of piling principles atop a complex set of rules.”).

233. See, e.g., *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, paras. 61–63 (Can.). Judge Charron, writing in *Khelawon*, explained that “[s]ince the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule.” *Id.* at 820, para. 61.

234. Archibald, *supra* note 4, at 33–34.

235. Among the circumstances cited by Canadian courts as an indication of reliability, the absence of a motive on the part of the declarant to lie is prominent. *Id.* at 34. The factors that have come to be identified as those relevant to the determination of reliability as set out by the *Khelawon* Court are:

- i. the timing of the statement in relation to the event reported;
- ii. the absence of a motive to lie on the part of the declarant;
- iii. the presence or absence of leading questions or other forms of prompting;
- iv. the nature of the event reported;
- v. the likelihood of the declarant’s knowledge of the event, apart from its occurrence; and
- vi. confirmation of the event reported by physical evidence.

R. v. J.M., 2010 CanLII 117 (Can. Ont. C.A.) 117, para. 54 (citing *Khelawon*, [2006] 2 S.C.R. at para. 67).

236. Timothy E. Moore, *Distinguishing Reliability from Credibility: Children’s Hearsay Evidence in Canada*, Address at the Society for Research in Child Development Biennial Meeting (Apr. 20, 2001), in *Alan D. Gold Collection of Criminal Law Articles*, ADGN/RP-113 (QL), para. 3 (Can.).

evidence other than that found in the circumstances surrounding the making of the statement.”²³⁷ He criticizes the use of corroborating evidence to determine the reliability of the hearsay statements on grounds that, when the admission of hearsay evidence is sought, “each statement [should be] assessed for reliability in relation to hearsay dangers.”²³⁸ He argues that using corroborating evidence to determine the reliability of a hearsay statement is misplaced because “the further afield one goes in seeking reliability in corroborative evidence, the greater the dangers of a kind of ‘bootstrap’ approach, turning the principled exception into an inclusionary rule.”²³⁹ The principled approach has also been criticized because of its clear potential to increase indeterminacy.²⁴⁰ Professors David Paciocco and Lee Stuesser have noted:

The movement to make the rules responsive to the needs of the particular case has not come without a cost. Flexibility is being achieved at the expense of certainty. The rules of evidence have never been easy to apply. Yet many of those rules of evidence now require more detailed evaluation and produce less predictable results than ever before.

. . . . [A]ppellate courts sometimes try to elaborate on the vague formulae that have been adopted. In the process, they provide more particularized criteria. The precedential value in these decisions is slowly giving structure to the broad standards of admissibility that have been developed. Some of the open-textured rules are beginning to operate much like the more rigid rules that they were designed to replace.²⁴¹

Ironically, the principled approach has been criticized as being unprincipled, due to what Professor Mike Madden sees as flawed reasoning supporting the required threshold reliability assessment.²⁴² He criticizes the principled approach because it allows the admission of hearsay based solely on a trial judge’s determination of reliability without the benefit of testing the reliability of the evidence by cross-examination.²⁴³ Madden equates this approach with the

237. Archibald, *supra* note 4, at 36.

238. *Id.* at 38.

239. *Id.*

240. Professor Dufraimont notes, “[s]ince the principled approach to evidence moves the law away from rigid rules that command specific outcomes toward broad principles that allow flexible, contextual application, it clearly carries the potential to increase indeterminacy.” Dufraimont, *supra* note 226, at 17.

241. PACIOCCO & STUESSER, *supra* note 163, at 6.

242. Madden, *supra* note 137, at 429–30.

243. Professor Madden also notes that although the SCC stresses the importance of cross-examination as the best means of assessing the truth, it also suggests that there are other equally effective means to test the reliability of the evidence. He argues that this reasoning is disjointed since “cross-examination cannot logically and simultaneously be both ‘the best’ and ‘not the best’ means for testing evidence.” *Id.* at 433. He criticizes the SCC’s reasoning in *Khan*, in which it

flawed reasoning in the U.S. Supreme Court's decision in *Ohio v. Roberts*, which was acknowledged by Justice Scalia in *Crawford*: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."²⁴⁴

The principled approach has also been criticized because of what many view as its effect on the Charter's guarantees of the right to a fair trial. Professor Timothy Moore, noting the considerable uncertainty regarding the criteria under which reliability is to be determined, remarked:

Predictability and uniformity are valuable and important elements of the justice system. Without them, judicial discretion is given broad latitude, and individual cases end up being dependent on the idiosyncrasies of specific judicial decisions. Uncertainty is not what we want if [victim's] needs and defendant's rights are to be properly protected.²⁴⁵

Professor Kenneth Ehrenberg argues that the principled approach, with its movement toward judicial discretion and liberal admissibility of evidence, has costs that reformers never recognized.²⁴⁶ He further argues that it "sacrifices the promise that legal conclusions will be reached on a uniform standard of knowledge reproducible across cases."²⁴⁷ He claims that particularly in criminal trials, this subsequently "jeopardizes the promise of justice," because such trials lack "uniform justificatory standards."²⁴⁸

Others argue that the principled approach affects a defendant's right to a fair trial because a rigorous application of the hearsay rule, alongside the right to cross examination, promotes equality among the parties in the trial process and ensures that "prosecutorial power is kept in check by inhibiting the capacity of the state to use its superior resources to gather remote statements for use against a weaker accused."²⁴⁹ Professor Peter Sankoff, referencing the growing body of scholarship surrounding the causes of wrongful convictions, suggests that the principled approach, along with what he perceives as the corresponding trend

"assumed a statement to be reliable so that it could dispense with the need to actually establish the reliability of a statement through cross-examination." *Id.* at 432.

244. *Id.*

245. Moore, *supra* note 236, para 29.

246. Kenneth M. Ehrenberg, *Less Evidence, Better Knowledge*, 60 MCGILL L.J. 173, 176 (2015) (Can.).

247. *Id.*

248. *Id.*

249. Archibald, *supra* note 4, at 24–25. Other critics argue that the public credibility of verdicts in criminal cases is diminished under the principled approach because it "rests in considerable measure on the presentation of the incriminating evidence in open court," where the opposing party is given a full opportunity to test the evidence through cross-examination. *Id.* at 24.

toward “granting juries access to potentially prejudicial evidence[,] have been unwilling partners in heightening the risk of wrongful convictions.”²⁵⁰

C. *The European Court of Human Rights*

The Convention for the Protection of Human Rights and Fundamental Freedoms, later known as the European Convention on Human Rights (the Convention), became effective in 1953 after being signed and ratified by eight Western European countries.²⁵¹ The Convention identifies numerous human rights, including life, liberty, freedom of expression, and the right to marry.²⁵² Article 6 of the Convention, entitled “[r]ight to a fair trial,” sets out the rights of defendants in criminal trials, which include the right to be informed of the “nature and cause of the accusations” against them and the right to free legal assistance “when the interests of justice so require.”²⁵³ Most importantly, Article 6(3)(d), patterned after the Sixth Amendment to the U.S. Constitution, specifically sets forth a right of confrontation. It provides that a criminal defendant has the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”²⁵⁴

The Convention also established the European Court of Human Rights (ECtHR) with jurisdiction over “all matters concerning the interpretation and

250. Sankoff, *supra* note 168, at 372. He notes that studies have demonstrated that jailhouse informants, certain kinds of expert opinion evidence, and identification evidence, among others, have been identified as causes of wrongful convictions. *Id.*

251. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953), last amended by Protocol No. 14, June 1, 2010, C.E.T.S. No. 194, http://www.echr.coe.int/Documents/Convention_ENG.pdf [hereinafter European Convention on Human Rights]. Originally ratified by Denmark, Germany, Iceland, Ireland, Luxembourg, Norway, Sweden, and the United Kingdom, the Convention was established by the Council of Europe; for a brief discussion on the history and organization of the Convention, see Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 QUINNIPIAC L. REV. 777, 779–82 (2003). The forty-seven-member Council of Europe, which was established in 1949, is headquartered in Strasbourg, France, and “was set up to promote democracy and protect human rights and the rule of law in Europe.” *Do Not Get Confused*, COUNCIL OF EUR., <https://www.coe.int/en/web/about-us/do-not-get-confused> (last visited Feb. 4, 2018). For a discussion on the history and organization of the Council of Europe, see Matthew J. Gabel, *Council of Europe*, ENCYC. BRITANNICA (Feb. 17, 2017), <https://www.britannica.com/topic/Council-of-Europe>.

252. Section I of the Convention sets forth the “Rights and Freedoms” in articles two through twelve and include: the “Right to life”; the “Prohibition of torture”; the “Prohibition of slavery and forced labour”; the “Right to liberty and security”; the “Right to a fair trial”; “No punishment without law”; the “Right to respect for private and family life”; “Freedom of thought, conscience and religion”; “Freedom of expression”; “Freedom of assembly and association”; and the “Right to marry.” European Convention on Human Rights, *supra* note 251.

253. *Id.* art. 6(3)(a), (c).

254. *Id.* art. 6(3)(d).

application of the Convention.”²⁵⁵ Member countries agree to accept and implement the decisions of the ECtHR.²⁵⁶

1. *The Early Decisions*

Although the Convention became effective in 1953, it was not until some thirty years later, in 1986, that the ECtHR found that a criminal conviction based on hearsay violated Article 6(3) of the Convention.²⁵⁷ In *Unterpertinger v. Austria*, the defendant was convicted of assaulting his step-daughter and wife.²⁵⁸ The police interviewed the victims and set out their statements in police reports.²⁵⁹ They did not testify at the trial, and in their absence, the trial court admitted the report into evidence.²⁶⁰ The ECtHR found that the admission of these reports at the defendant’s trial violated the Convention because the hearsay statements were the main bases for his conviction, and he was not provided with an opportunity to cross-examine the declarants.²⁶¹

The ECtHR reached similar conclusions in subsequent cases.²⁶² An important factor it considered in determining whether the admission of hearsay rendered a trial unfair was the probative value of the hearsay evidence weighed against

255. *Id.* § II.

256. *Id.* art. 46(1). The Court is organized into five sections, or administrative entities, and each section has a president, a vice president, and a judicial chamber. *Composition of the Court*, EUR. CT. HUM. RTS., <http://www.echr.coe.int/Pages/home.aspx?p=court/judges> (last visited Feb. 5, 2018). The Grand Chamber of the Court is composed of seventeen judges, including the president and vice president of the court and the section presidents of each of the five sections, and hears only a small, select number of cases each year. *European Court of Human Rights*, INT’L JUST. RES. CTR., <http://www.ijrcenter.org/european-court-of-human-rights/#Structure> (last visited Feb. 5, 2018). Cases can be referred to the Grand Chamber in one of two ways: (1) on appeal from a Chamber decision; or (2) relinquished by a Chamber. *Id.*; see also Kirst, *Hearsay and the Right of Confrontation*, *supra* note 251, at 777 (citing FRANCIS G. JACOBS & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 3–14 (2d ed. 1996)).

257. See Kirst, *Hearsay and the Right of Confrontation*, *supra* note 251, at 782–83.

258. *Unterpertinger v. Austria*, 110 Eur. Ct. H.R. (ser. A), at 3 (1986).

259. *Id.* at 3–4.

260. *Id.* at 6.

261. *Id.* at 11–12.

262. See, e.g., *Barberà v. Spain*, 146 Eur. Ct. H.R. (ser. A), at 31–32 (1989) (finding that the admission at trial of written statements made by a person in police custody accusing the defendant of murder violated the Convention where the witness was unavailable at trial). Other cases were similarly decided. See *Bricmont v. Belgium*, 158 Eur. Ct. H.R. (ser. A), at 24–26 (1989) (finding that victims’ unsworn statements made to the court, outside of defendant’s presence, violated the Convention). The same reasoning was applied in a line of cases involving anonymous witnesses. In *Kostovski v. Netherlands*, and one year later in *Windisch v. Austria*, the ECtHR found that the use of anonymous witnesses foreclosed any opportunity for the defendants to ever confront those witnesses, either during the investigation or at any subsequent hearings, and therefore deprived the defendants of their right to a fair trial. *Kostovski v. Netherlands*, 166 Eur. Ct. H.R. (ser. A), at 16–17 (1989); *Windisch v. Austria*, 186 Eur. Ct. H.R. (ser. A), at 8–9 (1990).

other evidence produced at trial.²⁶³ Therefore, a defendant's right to a fair trial was not necessarily violated in cases where the conviction was based, in part, on hearsay statements, but not "to a decisive extent."²⁶⁴

In *Kok v. Netherlands*,²⁶⁵ a case involving an anonymous witness, the ECtHR found that the admission of the declarant's unchallenged hearsay statements did not violate the Convention because there was "considerable alternative evidence" of defendant's guilt.²⁶⁶ Likewise, in *Verdam v. Netherlands*,²⁶⁷ the ECtHR found that the admission of the hearsay statements of sexual assault victims did not violate the defendant's right to a fair trial because the details in the hearsay statements were corroborated by other evidence.²⁶⁸

Following the ECtHR's 2001 decision in *Luca v. Italy*,²⁶⁹ the sole or decisive rule was treated as an absolute rule.²⁷⁰ In this case, the ECtHR found that the defendant's conviction for distributing cocaine violated the Convention where it was based solely on hearsay statements of an individual who named the defendant as his source of the drugs.²⁷¹ It stated:

[W]here a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has

263. See, e.g., *Bricmont*, 158 Eur. Ct. H.R. at 25 ("It must nonetheless be determined to what extent the Brussels Court of Appeal relied on the Prince's [hearsay statement] in order to convict the applicants.").

264. See *Kostovski*, 166 Eur. Ct. H.R. at 17 ("The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction . . . is a different matter.").

265. 2000-VI Eur. Ct. H.R. 597.

266. *Id.* at 623–24.

267. *Verdam v. Netherlands*, No. 35253/97 (Eur. Ct. H.R. Aug., 31, 1999), <http://hudoc.echr.coe.int/eng?i=001-4748>. Additionally, in *Ferranteli v. Italy*, a case that involved confessions made by several of the defendant's accomplices, the ECtHR found that the Convention was not violated despite "the impossibility of examining or having examined before his death . . . the prosecution's witness," because the appellate court "carried out a detailed analysis of the prosecution witness's statements and found them to be corroborated by a series of other items of evidence." *Ferranteli v. Italy*, 1996-III Eur. Ct. H.R. 937, §§ 44–52.

268. *Verdam*, No. 35253/97 at 7; see also *Isgrò v. Italy*, 194-A Eur. Ct. H.R. (ser. A) at 9–10 (1989) (finding the defendant's rights were not violated, even though the witness did not appear to testify at trial, because the defendant confronted the witness at a hearing before the investigating judge).

269. *Luca v. Italy*, 2001-II Eur. Ct. H.R. 167.

270. See Bas de Wilde, *A Fundamental Review of the ECHR Right to Examine Witnesses in Criminal Cases*, 17 INT'L J. EVID. & PROOF 157, 158 (2013) (U.K.) ("[I]f the defen[s]e could not examine a witness whose statement was the sole or decisive evidence of the charges, the ECtHR consistently found there to have been a breach of the right to examine witnesses."). These rules were also applied in child sexual abuse cases. See *P.S. v. Germany*, No. 33900/96 (Eur. Ct. H.R. Dec. 20, 2001), <http://hudoc.echr.coe.int/eng?i=001-59996> (finding the Convention was violated by the admission of statements an eight-year-old student made to her mother and to police officers where the conviction was based to a decisive extent on the victim's statements).

271. *Luca*, 2001-II Eur. Ct. H.R. at 179.

had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defen[s]e are restricted to an extent that is incompatible with the guarantees provided by Article 6.²⁷²

2. *The Fourth Chamber's Decision in Al-Khawaja & Tahery v. United Kingdom*

The Fourth Chamber's opinion in *Al-Khawaja & Tahery v. United Kingdom*²⁷³ was one of the ECtHR's first opportunities to review the United Kingdom's (U.K.) recently enacted hearsay rules as they applied in criminal cases.²⁷⁴ The opinion addressed two separately filed cases that dealt with the same legal question. In *Al-Khawaja*, the defendant complained that his trial for indecent assault was unfair because the English trial court admitted the statements made by the subsequently deceased victim to the police following the alleged assault.²⁷⁵ In *Tahery*, the defendant claimed that his trial for "wounding with intent to do grievous bodily harm" was tainted when the sole witness's out-of-court statements were admitted at trial.²⁷⁶

Defendant Al-Khawaja was a rehabilitative medicine physician charged with two counts of indecent assault on two female patients who were under hypnosis at the time.²⁷⁷ One of the complainants, S.T., described the assault to the police a few months after the incident. She died of unrelated causes before the trial, and even though there was no other direct evidence of the assault, the trial court allowed her statements to be admitted into evidence.²⁷⁸ Also admitted into evidence were the testimonies from other witnesses to whom S.T. had reported the assault and the testimony of the second complainant whose description of her assault was similar to S.T.'s.²⁷⁹ At the close of the trial, the judge cautioned the jury about S.T.'s statements, noting: "[Y]ou have not seen her give evidence; you have not heard her give evidence; and you have not heard her evidence cross-examined [by applicant's counsel], who would undoubtedly have had a number of questions to put to her."²⁸⁰ Al-Khawaja was convicted by a unanimous jury.²⁸¹

272. *Id.* at 178.

273. *Al-Khawaja & Tahery v. United Kingdom*, Nos. 26766/05 & 22228/06 (Eur. Ct. H.R. Jan. 20, 2009), <http://hudoc.echr.coe.int/eng?i=001-90781>.

274. *See id.* at 7–8 (citing Criminal Justice Act 2003, c. 44, § 116 (Eng.)) ("The following legislative provisions of the Criminal Justice Act 2003 were drafted as a means to tackle crime by providing special measures to protect witnesses The Act entered into force in April 2005.").

275. *Id.* at 1, § 3.

276. *Id.* ("[Tahery] alleged that his trial . . . had been unfair because the statement of one witness who feared attending trial was read to the jury.").

277. *Id.* at 2, § 8.

278. *Id.* at 2–3, §§ 8–9.

279. *Id.* at 3, § 10.

280. *Id.*

281. *Id.* at 3, § 12.

Defendant Tahery was engaged in a fight in which he allegedly stabbed his opponent three times in the back.²⁸² The victim told police that he did not see the person who stabbed him. Other witnesses present at the scene also denied seeing who stabbed the victim. However, two days after the incident, one of the witnesses came forward and told police that he saw the defendant stab the victim.²⁸³ The witness did not appear at trial. Nonetheless, the court allowed his statements to the police to be introduced into evidence.²⁸⁴

The Fourth Chamber found that the U.K. violated the Convention because the hearsay statements in both *Al-Khawaja* and *Tahery* were the sole or decisive basis for each conviction.²⁸⁵ It rejected the government's argument that the sole or decisive rule was not an absolute rule.²⁸⁶ It also rejected the government's argument that there were sufficient counterbalancing factors in both cases to overcome the prejudice to the defendants resulting from the admission of the untested hearsay.²⁸⁷ The Chamber acknowledged its history of considering whether the trial court's use of hearsay included procedures to counterbalance the resulting difficulties on the defense, it "doubt[ed] whether any counterbalancing factors would be sufficient to justify the introduction in

282. *Id.* at 4, § 18.

283. *Id.*

284. *Id.* at 5, §§ 19–20 ("The prosecution argued that under the [Criminal Justice Act] 2003 that [the witness] was too fearful to attend trial before the jury and should qualify for special measures [exempting him from testifying at trial].").

285. *See id.* at 16–17, §§ 43, 48.

286. *Id.* at 13, § 37.

287. Regarding defendant *Al-Khawaja*, the ECtHR rejected the government's proffered counterbalancing factors as insufficient, which included: the fact that the trial judge gave a cautionary warning to the jury; the fact that inconsistencies between the victim's hearsay statement and the testimony of corroborating witnesses could be explored on cross-examination; and the fact that the declarant's credibility could be challenged by the defense were sufficient to overcome the prejudice to the defendant from admission of the statements. *Id.* at 15, § 41. It held: "Having considered these factors, the Court does not find any of them, taken alone or together, could counterbalance the prejudice to [Al-Khawaja] by admitting [the hearsay] statement." *Id.* at 15–16, § 42. Noting that the U.K.'s appellate court had found the "judge's warning to the jury" as insufficient, the Chamber added, "[e]ven if it were not so, the Court is not persuaded that any more appropriate direction could effectively counterbalance the effect of an untested statement which was the only evidence against the applicant." *Id.* In the case of defendant *Tahery*, the government's proffered counterbalancing factors included: the fact that the trial judge considered alternative measures before admitting the hearsay; the fact that *Tahery* was free to challenge or rebut the statement by testifying himself or by calling other witnesses; and that the judge told the jury that the witness was absent from trial due to a fear of testifying not caused by *Tahery*. *Id.* at 16, § 45. Nonetheless, the Chamber remained unpersuaded that those factors, "whether considered individually or cumulatively, would have ensured the fairness of the proceedings or counterbalanced the grave handicap to [Tahery] that arose from the admission of [the hearsay] statement." *Id.* at 16–17, § 46. It added that *Tahery's* right to testify in his own defense "[could not] be said to counterbalance the loss of opportunity to see and have examined and cross-examined the only prosecution eye-witness against him." *Id.*

evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant.”²⁸⁸

The newly established Supreme Court of the United Kingdom (UKSC)²⁸⁹ declined to follow *Al-Khawaja & Tahery* in *R. v. Horncastle*,²⁹⁰ which was seen by many as a clear violation of the Convention. In declining to follow *Al-Khawaja & Tahery*, Lord Phillips, writing for the UKSC, noted that this presented a rare departure from the general rule that domestic courts should “take into account” the Strasbourg jurisprudence.²⁹¹ However, he stated that in cases where a domestic court “has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision”²⁹²

288. *Id.* at 13, § 37.

289. Constitutional Reform Act 2005, c. 4, § 23 (U.K.). The Supreme Court of the United Kingdom commenced work in October 2009. *The Supreme Court*, CTS. & TRIBUNALS JUDICIARY, <https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/the-supreme-court> (last visited Feb. 15, 2018).

290. *R. v. Horncastle* [2009] UKSC 14 [108] (appeal taken from Eng.) (“In so concluding I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take account of the reasons that have led me not to apply the sole or decisive test in this case.”).

291. *Id.* [11]. The Strasbourg jurisprudence, culminating in *Al-Khawaja & Tahery*, holds that Article 6 of the Convention is violated whenever a conviction is solely or decisively based on hearsay statements admitted into evidence. *Id.* [7].

292. *Id.* [11]. This case was decided eleven months after the Fourth Chamber’s *Al-Khawaja & Tahery* decision. *Horncastle* involved two consolidated appeals. In the first case, Horncastle and an accomplice “were convicted of causing grievous bodily harm, with intent,” to a man named Peter Rice. *Id.* [2]. Rice’s statements to the police, in which he described his attackers, were admitted into evidence despite the fact that Rice was a registered alcoholic who admitted to drinking a substantial quantity of alcohol on the day of the attack. *R. v. Horncastle* [2009] EWCA (Crim) 964 [97]. In the second case, defendants Marquis and Graham were convicted of kidnapping a young woman named Hannah Miles. The trial court admitted Miles’ statements regarding the alleged kidnapping—rather than compelling her to testify at trial—because the judge determined that “she was a witness in fear.” *Id.* [125]–[133]. Lord Phillips, referencing the Criminal Justice Act of 2003, explained that English law contained numerous provisions designed to ensure that only reliable evidence would be admitted. *Horncastle* [2009] UKSC [36] (citing Criminal Justice Act 2003, c. 44, §§ 124–126 (Eng.)). He argued that although pretrial confrontations between witnesses and defendants can provide opportunities for confrontation in civil law countries, they are not practical in common law countries where police officers, not judicial officers, conduct the investigations. *Id.* [61]–[62]. He also criticized the ECtHR’s sole or decisive rule for “produc[ing] a paradox,” in that it allows the introduction of evidence if it is peripheral, but not decisive. *Id.* [91]. He further posited that courts will experience great difficulty applying the sole or decisive rule and, as such, the only proper way to deal with this rule is to exclude all hearsay evidence. *Id.* [87], [90]. This case was ultimately appealed to the Fourth Chamber of the ECtHR. *Horncastle v. United Kingdom*, No. 4184/10 (Eur. Ct. H.R. Dec. 16, 2014), <http://hudoc.echr.coe.int/eng?i=001-148673>.

3. *The Grand Chamber's Decisions*

a. *Al-Khawaja & Tahery v. United Kingdom*

The appeal from the Fourth Chamber's decision in *Al-Khawaja & Tahery v. United Kingdom* to the ECtHR's Grand Chamber was decided in December 2011.²⁹³ The Grand Chamber began by explaining that the guarantees set forth in Article 6(3)(d) are "specific aspects of the right to a fair hearing" guaranteed under Article 6(1), and that the ECtHR's primary concern under Article 6(1) is to assess the overall fairness of the proceedings.²⁹⁴ Furthermore, it set out a general principle for courts to follow:

[B]efore an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. . . . [T]he accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.²⁹⁵

Noting that "inculpatory evidence against an accused may well be 'designedly untruthful or simply erroneous,'" it stated:

[U]nsworn statements by witnesses who cannot be examined often appear on their face to be cogent and compelling Experience shows that the reliability of evidence, including evidence which appears cogent and convincing, may look very different when subjected to a searching examination. . . . The Court's assessment of whether a criminal trial has been fair cannot depend solely on whether the evidence against the accused appears *prima facie* to be reliable, if there are no means of challenging that evidence once it is admitted.²⁹⁶

Despite this strong defense of the right of cross-examination, the Grand Chamber departed from its previous bright-line rule that the admission of sole or decisive, untested hearsay evidence violates Article 6.²⁹⁷ Instead, it held that the admission of sole or decisive hearsay evidence of absent witnesses "will not automatically result in a breach of Article 6(1)."²⁹⁸ In place of the bright-line rule, the ECtHR set out three factors for courts to consider: (1) "whether it was necessary to admit the witness statements" of an absent witness at trial; (2) whether the "untested [hearsay] evidence was the sole or decisive basis" for the conviction; and (3) whether "sufficient counterbalancing factors [existed] . . . to

293. *Al-Khawaja & Tahery v. United Kingdom*, 2011-VI Eur. Ct. H.R. 191.

294. *Id.* at 243-44, § 118.

295. *Id.*

296. *Id.* at 251, § 142 (quoting *Kostovski v. Netherlands*, 166 Eur. Ct. H.R. (ser. A), § 42 (1989)).

297. *Id.* at 252-53, § 146.

298. *Id.* at 253, § 147.

ensure that each trial, judged as a whole, was fair within the meaning of [the Convention].”²⁹⁹

Applying this reasoning to the cases before it, the Grand Chamber found, like the Fourth Chamber before it, that the hearsay statements in both cases were the sole or decisive evidence against the defendants.³⁰⁰ However, in reversing the Fourth Chamber’s decision in *Al-Khawaja*, it found that there were sufficient counterbalancing factors.³⁰¹ The counterbalancing factors included: the fact that the victim’s complaints to her friends were shortly after the alleged incident; the fact that her recorded statements to police and her statements to her friends contained only minor inconsistencies; the fact that her friend’s testimony at trial was subject to cross examination; the strong similarities between her description of the alleged events and the testimony of the other complainant; and the fact that the jury was given the instruction to proceed with caution when considering the hearsay evidence.³⁰²

Conversely, the Grand Chamber upheld the Fourth Chamber’s decision in *Tahery* because it did not find sufficient counterbalancing factors.³⁰³ The government argued that the defendant was able to challenge the hearsay by “giving evidence himself or calling other witnesses who were present.”³⁰⁴ The court rejected this argument, noting:

Even if he gave evidence denying the charge, [Tahery] was, of course, unable to test the truthfulness and reliability of [the witness’s statement] by means of cross-examination. The fact is that [the witness] was the sole witness who was apparently willing or able to say what he had seen. [Tahery] was not able to call any other witness to contradict the testimony provided in the hearsay statement.³⁰⁵

299. *Id.* at 254, § 152.

300. *Id.* at 255–56, §§ 154, 160.

301. *Id.* at 256, § 158 (“[N]otwithstanding the difficulties caused to the defen[s]e by admitting the statement and the dangers in doing so, there were sufficient counterbalancing factors to conclude that the admission in evidence of S.T.’s statement did not result in a breach of [Article 6 of the Convention].”).

302. *Id.* at 255, §§ 156–57.

303. *Id.* at 257, § 165.

304. *Id.* at 256, § 161.

305. *Id.* at 257, § 162. The English courts continue to disagree with the ECtHR on this matter. A year after the Full Chamber’s decision in *Al-Khawaja & Tahery*, the English Court of Appeals (EWCA) decided *R. v. Riat*, an appeal that involved five consolidated cases. *R. v. Riat*, [2012] EWCA (Crim) 1509 [1] (Eng.). The EWCA addressed the relationship between the English rule as set forth in *R. v. Horncastle* and the ECtHR decision in *Al Khawaja & Tahery*. It noted the following key principles: (1) English domestic law is—and must be accepted as is—set out in the Criminal Justice Act 2003 (CJA 2003); (2) to the extent that the rulings in *Horncastle* and *Al-Khawaja & Tahery* differ, English courts are to follow the *Horncastle* holding; and (3) English courts should ordinarily only be concerned with the CJA 2003 and the *Horncastle* decision. *Id.* [2].

b. Schatschaschwili v. Germany

The Grand Chamber handed down its most recent decision addressing the right of confrontation under Article 6 in December 2015. In *Schatschaschwili v. Germany*,³⁰⁶ the ECtHR set out to clarify the position it announced in *Al-Khawaja & Tahery*. The facts of this case are as follows.

On October 14, 2006, the defendant and an unidentified accomplice robbed two Lithuanian national women, L. and I., who were in Germany working as prostitutes. The robbery occurred late in the evening at their apartment in Kassel, Germany.³⁰⁷ Four months later, in February 2007, the defendant and several other accomplices robbed O. and P., two Latvian nationals at their apartment in Göttingen, Germany. These women were also working as prostitutes in Germany.³⁰⁸

O. and P. reported the details of these events to their neighbor the following morning, then immediately left their apartment in Göttingen to stay for a few days with their friend L., one of the two women robbed approximately four months earlier.³⁰⁹ Upon arriving to L.'s home, just one day after the robbery occurred, O. and P. shared the details of their robbery with L., who subsequently reported it to the police.³¹⁰ The police interviewed O. and P. about the robbery, during which time they told the police that they planned to return to Latvia. Anticipating their unavailability to testify at a subsequent trial, the prosecution asked the investigating judge to obtain statements from the victims that could later be used at trial.³¹¹

The investigating judge questioned O. and P. at a hearing held on February 19, 2007. However, the defendant was not informed of this hearing because the judge feared the women would be afraid to tell the truth in the defendant's presence. The defendant was arrested in March 2007.³¹² Neither O. nor P. attended the trial; in their absence, the judge admitted their police interviews and the statements they made before the investigating judge.³¹³ There was also other

306. *Schatschaschwili v. Germany*, No. 9154/10 (Eur. Ct. H.R. Dec. 15, 2015), <http://hudoc.ec hr.coe.int/eng?i=001-159566>.

307. *Id.* at 3, §§ 12–13 (“The perpetrators were aware that the apartment was used for prostitution and expected its two female occupants to keep valuables and cash there.”).

308. *Id.* at 4, § 14.

309. *Id.* at 4, § 18.

310. *Id.* at 4–5, §§ 18–19.

311. *Id.* at 5, § 20.

312. *Id.* at 5, §§ 21–22 (“Witnesses O. and P. returned to Latvia shortly after that hearing.”).

313. *Id.* at 6–7, § 28.

evidence that corroborated their statements.³¹⁴ The defendant was convicted of two counts of aggravated robbery and extortion.³¹⁵

The Grand Chamber began its assessment by setting out the three-step analysis it fashioned in *Al-Khawaja & Tahery*.³¹⁶ Regarding the first factor—whether there existed a good reason for the witness’s absence from trial—the Chamber held that the absence of a good reason is not in and of itself a violation of Article 6.³¹⁷ Nonetheless, it noted that the lack of a good reason for the witness’s non-attendance at trial “is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favo[r] of finding a breach of Article 6 [of the Convention].”³¹⁸

The Grand Chamber next turned to the second step in the analysis—whether the conviction was based solely or decisively on the evidence of the absent witness.³¹⁹ It noted that the determination of whether the evidence is decisive turns on the relative strength of the other evidence, particularly the presence of corroborative evidence.³²⁰

With respect to the third step in the analysis—whether there were sufficient counterbalancing factors—the Chamber identified several factors for courts to consider in making this determination.³²¹ These included: the presence of corroborative evidence supporting the declarant’s statements;³²² whether the

314. The other evidence presented at trial included: the testimony of the neighbor to whom O. and P. had reported the robbery shortly after it occurred; the testimony of their friend L. to whom they also told about the robbery; information obtained from the defendant’s mobile phone; the GPS receiver from a co-accused’s car; the defendant’s admission that he had been in O. and P.’s apartment at the time of the robbery; and evidence showing similarities between the Kassel and Gottingen robberies. *Id.* at 8–9, § 36.

315. *Id.* at 7, § 30.

316. *Id.* at 23–24, §§ 102–07. The three steps in the analysis are: (1) whether a good reason existed for the absence of the witness at trial; (2) whether the conviction was solely or decisively based on the statement of the absent witness; and (3) whether sufficient counterbalancing factors existed “to compensate for the handicaps caused to the defen[s]e as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair.” *Id.* at 24, § 107 (citing *Al-Khawaja & Tahery v. United Kingdom*, 2011-VI Eur. Ct. H.R. 191).

317. *Id.* at 26–27, § 113.

318. *Id.*

319. It commented that the term decisive “should be narrowly interpreted as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case.” *Id.* at 26–27, § 113.

320. *Id.*

321. *Id.* at 30–32, §§ 125–31. The Grand Chamber stated that because a court must evaluate the overall fairness of the proceedings, it should assess the existence of sufficient counterbalancing factors in cases not only where the evidence is sole or decisive, but also where the evidence is found to “car[r]y significant weight and that its admission may have handicapped the defen[s]e.” *Id.* at 27–28, § 116.

322. This can include testimony at trial by persons to whom the declarant had reported the incident shortly after its occurrence, forensic evidence, expert opinions, and similar offenses committed by the defendant against others provided the witness testifies at trial and is subject to cross-examination. *Id.* at 31–32, § 128.

defendant was provided the opportunity to question the witness during the investigation stage of the proceeding;³²³ and whether the trial court “approached the untested evidence of an absent witness with caution,” specifically, whether instructions given to the jury as to the weight it should give this evidence.³²⁴ Under this analysis, corroborating evidence has a dual rule: assessing the probative value of the untested hearsay and determining the presence of sufficient counterbalancing factors.

In applying the facts of the case before it, the ECtHR found the hearsay statements were decisive evidence in the conviction because O. and P. were the only eyewitnesses to the crime.³²⁵ Although corroborating evidence was presented at trial, including the testimony of O. and P.’s friend, L., and their neighbor, defendant’s admission that he had been at the scene of the crime at the relevant time and data recordings from cell phones and GPS systems, the Grand Chamber found that this evidence was “either just hearsay evidence or merely circumstantial technical and other evidence which was not conclusive as to the robbery and extortion.”³²⁶

In determining whether there were sufficient counterbalancing factors to compensate for the admission of the hearsay evidence, the Grand Chamber found that the trial court’s failure to provide an opportunity for the defendant to question O. and P. during the pretrial proceedings was a serious error.³²⁷ It held that the counterbalancing measures taken by the lower court were insufficient to provide a “fair and proper assessment of the reliability of the untested evidence” because of the significant impact O. and P.’s statements had as the only eyewitnesses to the crime.³²⁸

Although the *Schatschaschwili* Court followed the *Al-Khawaja & Tahery* rules, it reached a markedly different result when applying the rules to these facts. The factors the *Al-Khawaja & Tahery* Court relied on to conclude there were sufficient counterbalancing factors were also present in *Schatschaschwili*—specifically, the similarity of the victim’s statements to

323. *Id.* at 32, § 130.

324. It added that another important consideration was whether the court provided detailed reasons for finding the evidence to be reliable. *Id.* at 31, § 126.

325. *Id.* at 35, § 144.

326. *Id.* The Chamber had already determined that there were good reasons for the witnesses’ absence at trial and that the trial court had made reasonable efforts to procure their attendance. *Id.* at 34, §§ 139–40.

327. *See id.* at 38–39, 156–60. It stated:

[W]hile Article 6 § 3 (d) of the Convention concerns the cross-examination of prosecution witnesses at the trial itself, the way in which the prosecution witnesses’ questioning at the investigation stage was conducted attains considerable importance for, and is likely to prejudice, the fairness of the trial itself where key witnesses cannot be heard by the trial court and the evidence as obtained at the investigation stage is therefore introduced directly into the trial.

Id. at 38, § 156 (citation omitted).

328. *Id.* at 39, § 163.

friends and her recorded statements to police; the opportunity to cross-examine the friends at trial; and the similarity between this crime and another one the defendant was accused of committing were also present in *Schatschaschwili*. In this case, however, the court appeared to focus solely on the inability of the defendant to question O. and P. prior to trial in finding that the defendant was denied the right to a fair trial.³²⁹ This appears to signal a swing back from the Grand Chamber's previous position and a renewed focus on the prior right to confrontation.

4. Commentary on the ECtHR's Jurisprudence

Under the Grand Chamber's decision in *Al-Khawaja & Tahery*, to determine whether the admission of hearsay statements of a non-attending witnesses violates Article 6 of the Convention, three key questions must be addressed: (1) was there a good reason for the non-attendance of the witness; (2) was the evidence the sole or decisive evidence against the accused; and (3) if the evidence was the sole or decisive evidence against the defendant, were there sufficient counterbalancing factors to compensate for the prejudice to the defendant resulting from the admission of the untested hearsay?³³⁰ Those who favor this approach have argued for a narrowing of the sole or decisive rule, suggesting that the word "decisive" should be interpreted so that it would include only evidence so significant that it was likely to be outcome determinative.³³¹

Many are critical of the Grand Chamber's opinion in *Al-Khawaja & Tahery* and the fact that it drastically changed its prior position by abandoning the sole or decisive evidence rule that had been consistently applied since the 2001 *Luca v. Italy* decision.³³² In their joint opinion, partly dissenting and partly concurring in the *Al-Khawaja & Tahery* decision, Judges Sajó and Karakaş argued that the Convention does not provide grounds for restricting defense rights.³³³ They strongly disagreed with the majority's position that the common law system can

329. The Grand Chamber particularly took issue with the fact that the absence of the witnesses was foreseeable to the prosecution, such that it formed the basis for obtaining the statement. The Chamber held: "Where the investigating authorities took the reasonable view that the witness concerned would not be examined at the hearing of the trial court, it is essential for the defen[s]e to have been given the opportunity to put questions to the witness at the investigation stage." *Id.* at 38, § 153 (citation omitted).

330. See *Al-Khawaja & Tahery v. United Kingdom*, 2011-VI Eur. Ct. H.R. 191.

331. See, e.g., de Wilde, *supra* note 270, at 163; see also *Al-Khawaja & Tahery*, 2011-VI Eur. Ct. H.R. at 263 n.1 (Sajó & Karakaş, JJ., dissenting in part and concurring in part) ("In our view, 'decisive' evidence is reasonably taken to mean evidence without which the prosecuting authorities could not bring a case.").

332. Hoyano, *supra* note 1, at 6.

333. *Al-Khawaja & Tahery*, 2011-VI Eur. Ct. H.R. at 263-73 (Sajó & Karakaş, JJ., dissenting in part and concurring in part).

be trusted to assess the reliability of evidence absent confrontation.³³⁴ They criticized the majority for replacing the previous bright-line rule that was “intended to protect human rights against the ‘fruit of the poisonous tree’” with the “uncertainties of counterbalancing.”³³⁵

Professor Liz Heffernan commented that the sole or decisive evidence rule and the sufficient counterbalancing factors test “lead us into the complex and potentially fraught terrain of the significance of the contested evidence: its relationship with the other items of evidence and its strategic importance in the prosecutorial arsenal.”³³⁶ She notes that the ECtHR’s resurgence of rules allowing corroborating evidence to determine the admissibility of hearsay “bucks a general trend away from identifying and evaluating the strength of independent supportive evidence.”³³⁷

She finds a “befuddling interplay” between evaluating the strength of the evidence for purposes of the sole or decisive rule and evaluating corroborative evidence as a potential counterbalancing factor. Although the ECtHR sets these out as distinct lines of inquiry, Professor Heffernan explains that in practice they will operate as “flip-sides of the same coin.”³³⁸ The greater degree of decisiveness of the evidence, the less likely that corroborating evidence will be present; on the other hand, the stronger the corroboration, the less likely it will be that the initial evidence is decisive.³³⁹ Professor Heffernan concludes that the ECtHR’s confrontation right remains in a state of considerable uncertainty and predicts “continued critical reflection on the disputed wisdom of the ECtHR’s doctrinal compromise embodied in its recent jurisprudence It invites renewed focus on our contemporary understanding of fairness in systems of criminal justice and the role of the ECtHR in ensuring its protection.”³⁴⁰

Professor Laura Hoyano is one of the harshest critics of the Grand Chamber’s *Al-Khawaja & Tahery* decision and its directional shift. She criticizes the ECtHR for abandoning the sole or decisive rule and finds its balancing approach as “fundamentally misconceived, reflecting a profound misunderstanding of the right to a fair trial.”³⁴¹ Pointing to the plain language of Article 6, she emphasizes that nothing in the language indicates that the right to a fair trial is

334. *Id.* at 267 (Sajó and Karakas, JJ., dissenting in part and concurring in part) (“Even experienced trial judges may erroneously give undue weight to evidence by witnesses whom the defen[s]e has not cross-examined.”).

335. *Id.* at 264–65, 273 (Sajó and Karakas, JJ., dissenting in part and concurring in part) (“[T]he [ECtHR] has systematically and consistently drawn a bright line, which it has never abandoned, in the form of the sole or decisive rule. Today this last line of protection of the right to defen[s]e is being abandoned in the name of an overall examination of fairness.”).

336. Liz Heffernan, *Calibrating the Right to Confrontation*, 20 INT’L J. EVID. & PROOF 103, 108 (2016) (U.K.).

337. *Id.* at 109.

338. *Id.*

339. *Id.* at 110.

340. *Id.*

341. Hoyano, *supra* note 1, at 6.

subject to balancing or qualification.³⁴² She adds that *Al-Khawaja & Tahery* severs the nexus between the sole or decisive rule and the Article 6(3)(d) right to challenge prosecutorial evidence, “by suggesting that the rule has no application where the evidence can be demonstrated *by the prosecution* to be reliable.”³⁴³

She further criticizes the ECtHR’s shift from considering counterbalancing factors that were procedural in nature, which were designed to assist defendants in “overcoming the disadvantage caused by the incursion into the minimum right” contained in Article 6(3)(d), to an approach that includes the use of corroborating substantive evidence as a counterbalancing factor to the use of hearsay. She questions the new approach, which allows additional inculpatory evidence to be used as a counterbalancing factor that establishes the reliability of the hearsay statements, asking, “[h]ow can other evidence further loading the prosecution’s pan on the scales of justice counterbalance the disadvantage *to the defen[s]e* of being deprived of the right to challenge the decisive evidence?”³⁴⁴

Finally, she argues that the use of untested hearsay shifts the “equality of arms institutionaliz[ed] in common law and civil law systems” and which serves to prevent a party from operating at a “substantial disadvantage” against their opponent.³⁴⁵ She comments that allowing the prosecution to proffer hearsay as a cornerstone of its case when the defense is not allowed the opportunity to directly challenge the source of the evidence inevitably results in an unfair trial. She concludes: “When this process of testing is wholly absent and pertains to the decisive evidence upon which the conviction rests, then the essence of the defe[s]e right to contest the prosecution case has evaporated, and so too has the right to a fair trial.”³⁴⁶

III. COMPARATIVE ANALYSIS OF THE THREE JURISDICTIONS

A. Foundational Principles

The following section identifies and compares the foundational principles and significant factors in the United States, Canada, and ECtHR’s confrontation jurisprudence. It includes an analysis of how the key cases in each jurisdiction would likely be decided if they were brought in each of the other two jurisdictions.

1. Constitutional Protections and Other Enumerated Rights

The Sixth Amendment to the U.S. Constitution and Article 6(3)(d) of the Convention both contain an enumerated right of confrontation. Canadian

342. *Id.* at 10.

343. *Id.* at 20.

344. *Id.* at 22.

345. *Id.* at 23.

346. *Id.* at 24.

citizens, however, are not afforded this protection as the Canadian Charter does not contain this explicit right.³⁴⁷ Although the Supreme Court of Canada recognizes that an accused has an implied right to make a full defense under section 7 of the Charter, it has noted that this does not specifically include the right to confrontation.³⁴⁸

The right to a fair trial is the overriding foundational principle repeatedly recognized in the opinions of the Canadian courts and the ECtHR. In determining the admissibility of hearsay evidence, Canadian courts evaluate the concepts of necessity and reliability within the context of the entire trial, seeking to assure the overall fairness of the trial.³⁴⁹ Similar considerations are present in the ECtHR's opinions, which repeatedly state that the right to confrontation is not an independent right, but rather one that is encompassed in the right to a fair trial contained in Article 6.³⁵⁰ Conversely, the right to a fair trial is not addressed in the U.S. Supreme Court's Confrontation Clause decisions, where there is little discussion of how the admissibility of hearsay impacts the overall fairness of the trial. The Court's approach since *Crawford* is a narrow one in which it limits its analysis to determining whether the hearsay statements are testimonial in nature.³⁵¹

2. Reliability

In *Crawford*, the U.S. Supreme Court abandoned the concept of reliability as the basis for assessing whether a defendant's constitutional rights had been violated by the admission of untested hearsay statements.³⁵² Further, although reliability has been mentioned in both *Bryant* and *Clark*, it was obiter dictum in both cases.³⁵³ On the contrary, reliability—alongside necessity—is the cornerstone of the Canadian principled approach and the primary focus of the

347. Compare U.S. CONST. amend. VI, and European Convention on Human Rights, *supra* note 251, art. 6, with Canadian Charter, *supra* note 157.

348. See Archibald, *supra* note 4, at 39–40.

349. See *id.* at 8–9 (explaining that Canadian hearsay jurisprudence, though facially concerned with necessity and reliability, is primarily aimed at ensuring fairness in criminal trials).

350. See Heffernan, *supra* note 336, at 104 (stating that confrontation is “a core value in the fair trial rights tradition of the EC[t]HR inasmuch as Article 6(3)(d) lists among the ‘minimum rights’ to which a criminal accused is entitled the right ‘to examine or have examined witnesses against him’”).

351. See discussion *supra* Sections II.A.2–6.

352. *Crawford v. Washington*, 541 U.S. 36, 60 (2004). Writing for the majority in *Crawford*, Justice Scalia noted:

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts.

Id. at 63.

353. See *Ohio v. Clark*, 135 S. Ct. 2173, 2179–80 (2015); *Michigan v. Bryant*, 562 U.S. 344, 352–54 (2011).

Canadian Supreme Court's opinions.³⁵⁴ The ECtHR's approach lies somewhere between those of the United States and Canada. The Grand Chamber's opinion in *Al-Khawaja & Tahery*, with its emphasis on the presence of corroborating evidence as an essential element in determining counterbalancing factors, makes it clear that assessing the reliability of the statements, although not central in its analysis, will be an important consideration in determining whether untested hearsay should be admissible.³⁵⁵

3. Necessity

The first prong of the Canadian principled approach is necessity, where an important consideration is the "unavailability of a witness's courtroom testimony."³⁵⁶ However, necessity is not limited to witness unavailability. The Canadian concept of necessity is founded on "the need to get at the truth," and therefore, it is given a flexible meaning consistent with the philosophy underlying the principled approach.³⁵⁷ Together these considerations have contributed to judicial findings of necessity in cases where hearsay evidence was the sole evidence introduced against the defendant.³⁵⁸

On the other hand, in the United States and in the ECtHR, necessity is only relevant to the concept of witness unavailability. In the United States, unavailability is a foundational requirement for the admission of testimonial statements under *Crawford* and its progeny.³⁵⁹ Similarly, in the ECtHR, the proponent of the hearsay evidence is required to demonstrate that there was a good reason for the absence of the witness from the trial.³⁶⁰

354. See Archibald, *supra* note 4, at 5.

355. See discussion *supra* Section II.C.3.a.

356. PACIOCCO & STUESSER, *supra* note 163, at 120.

357. *Id.*; accord Archibald, *supra* note 4, at 26–27.

358. Professor Archibald has observed an expansive approach to reasonable necessity following the adoption of the principled approach. He argues that this is due to three factors:

(1) a victim-oriented, crime-fighting set of assumptions linked to judicial assessments of the legitimacy of claims by classes of vulnerable declarants; (2) a new societal sense of where truth and justice lie in relation to the systemic treatment of such victims as opposed to accused persons; and (3) a judicial willingness to adjust hearsay doctrine in the context of post-*Charter* judicial activism.

Archibald, *supra* note 4, at 31–32. This expansive approach to necessity has resulted in an increase in the amount of hearsay proffered by the prosecution and admitted in criminal trials. To that, Professor Archibald notes: "The unspoken judicial position seems to be that the credibility of the justice system lies with crime control rather than a rigorous application of the hearsay exclusion rooted in adversarial due process concerns." *Id.* at 32–33.

359. See McMunigal, *supra* note 144, at 220–21 (discussing how testimonial statements are only admissible in a criminal trial if the witness is unavailable to testify at trial and the defense had a prior opportunity to cross-examine the witness).

360. See *Al-Khawaja & Tahery v. United Kingdom*, 2011-VI Eur. Ct. H.R. 191, at 244, § 120 ("The requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive.").

4. *The Probative Value of the Evidence*

Under Canada's principled approach, significant evidence only available through untested hearsay statements will be admitted upon a judicial finding that it is reasonably necessary to do so.³⁶¹ Therefore, the greater the need for the evidence at trial, the more likely the scales will tip in favor of admission. There is a marked difference on this issue between the Canadian approach and the ECtHR approach, where the strength of the evidence is a major consideration in applying the ECtHR's sole or decisive evidence rule. Under this doctrine, and in contrast to the principled approach, the stronger the evidence is, the more likely it will be found to be the sole or decisive basis for the conviction, and therefore, will not be admitted in the absence of significant counterbalancing factors.³⁶² On the other hand, the strength of the untested evidence is of no significance in a trial court's decision to admit evidence in the United States.³⁶³

5. *The Facts and Circumstances Surrounding the Statement*

The facts and circumstances surrounding the making of the statement are a highly significant factor in the United States and Canada for very different reasons, and are of no relevance to the ECtHR. Canadian courts must make a threshold determination of reliability based on the facts and circumstances at play at the time the statement was made.³⁶⁴ Likewise, the facts and circumstances existing when statement was made are relevant in the United States.³⁶⁵ However, they are not relevant in determining whether the statements are reliable; they are only relevant in determining whether the hearsay statement is testimonial in nature. Under *Crawford* and its progeny, courts determine the primary purpose of the statement based on an objective assessment of the declarant's and the interrogator's intentions at the time the statement was made and whether there was an ongoing emergency at that time.³⁶⁶

6. *Alternative Means of Testing the Hearsay Evidence*

A central inquiry in the ECtHR's right to confrontation doctrine is whether there are alternative means of testing the hearsay, other than cross-examination at trial. Of particular importance in cases involving absent witnesses, is whether

361. See Archibald, *supra* note 4, at 27.

362. See discussion *supra* Section II.C.3.a.

363. See discussion *supra* Section II.A; accord Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, *supra* note 44, at 64–69 (explaining that there is no consideration of the statement's evidentiary strength under modern Confrontation Clause analysis, as set forth in *Crawford*). Professor Heffernan notes that evidentiary significance plays an inferior role in common law systems, which explains why “the sole or decisive rule was the very flashpoint of disagreement between the ECtHR and the English courts.” Heffernan, *supra* note 336, at 108.

364. See Archibald, *supra* note 4, at 33–34.

365. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 52 (2004); *California v. Green*, 399 U.S. 149, 168–70 (1970).

366. See *Crawford*, 541 U.S. at 51–52; see also *Michigan v. Bryant*, 562 U.S. 344, 360 (2011).

there was an opportunity for cross-examination during the pre-trial stage of proceedings. However, with the Grand Chamber's decision in *Al-Khawaja & Tahery*, the ECtHR effectively shifted from a focus purely procedural in nature to one that also considered substantive evidence.³⁶⁷ Yet, in *Schatschaschwili*, the ECtHR appeared to move back to its previous focus on procedural factors.³⁶⁸ It based this decision solely on the fact that the defendant had not been afforded a prior opportunity to cross examine the witnesses' statements during the investigative hearing, even though there was corroborating evidence supporting their statements.³⁶⁹

Another critical factor in U.S. jurisprudence is whether there are other means of testing the evidence beyond the trial itself. Testimonial statements are only admissible at trial if the defendant was afforded a prior opportunity for cross-examination.³⁷⁰ In contrast, early Canadian cases had a singular focus on assessing the reliability of the statements through an examination of the facts and circumstances existing at the time the statements were made. However, in more recent cases, Canadian courts have noted the importance of procedural safeguards and the opportunities afforded defendants for cross-examination.³⁷¹

7. Uniformity

The Canadian principled approach was designed to be applied on a case-by-case basis; thus, by definition, it produces inconsistent decisions. On the contrary, courts in the United States and the ECtHR, both of which adhere to the long-established doctrine of stare decisis, have attempted to establish rules designed to be applied uniformly. Even so, decisions within each of these jurisdictions cannot be easily reconciled because the determination in the United States of whether statements are testimonial, and findings by the ECtHR that

367. See de Wilde, *supra* note 270, at 158.

368. See discussion *supra* Section II.C.3.b.

369. It is difficult to reconcile the Grand Chamber's finding that there were sufficient corroborating factors in *Al-Khawaja & Tahery* but not in *Schatschaschwili*. In *Al-Khawaja & Tahery*, the Chamber appeared to base its decision regarding defendant Al-Khawaja on the following corroborating evidence: testimony by another victim of the defendant; testimony by witnesses to whom the victim had relayed the details of the assault; and the statements of the victim to the police. *Al-Khawaja & Tahery v. United Kingdom*, 2011-VI Eur. Ct. H.R. 191. Similar facts were presented in *Schatschaschwili*. The corroborating evidence in that case included: the statements the victims gave to police and the investigating judge; the testimony of their friend and their neighbor regarding the statements the victims made to them following the robbery; and even the defendant's admission to being at the scene of the crime. Yet, in this case, the ECtHR dismissed this evidence as "merely circumstantial . . . which was not conclusive as to the robbery." *Schatschaschwili v. Germany*, No. 9154/10, at 35, §§ 143–44 (Eur. Ct. H.R. Dec. 15, 2015). It is difficult to determine if this represents a movement back to a procedural focus or whether the ECtHR was troubled by the fact that the investigating judge made the decision to not inform the defendant, even though it had reason to know that the victims would not return to Germany for the trial.

370. *Crawford*, 541 U.S. at 59.

371. See discussion *supra* Section II.B.

there are sufficient counterbalancing factors, are highly fact-specific inquiries. Additionally, recent trends in these jurisdictions have lessened the differences between them.

Recent decisions of the ECtHR, with its movement away from the previous bright-line “sole or decisive” rule, and the U.S. Supreme Court’s fact-specific inquiry into the “primary purpose” of an interrogation, have resulted in conflicting decisions.³⁷² Meanwhile, Canadian appellate courts have begun to provide more particularized criteria for assessing reliability, which is resulting in more uniform decisions. However, some have noticed that this is unwittingly creating doctrine that is beginning to replicate the rigid rules the principled approach was designed to replace.³⁷³

B. Case Comparisons and Outcome Predictions

The following section contains a prediction of how the key cases in each jurisdiction would be decided if they were brought in the other two jurisdictions.

I. Ohio v. Clark

The young boy’s statements to his teachers would likely not be admissible if this trial were to take place in Canada. L.P.’s statements would not be admissible under the traditional Canadian hearsay rules, because like the young girl in *Khan*, his statements were not contemporaneous with the event. Finding that the statements would not be admissible under an established hearsay exception, Canadian courts would then assess the admissibility under the principled approach.³⁷⁴ Although L.P.’s statements would be found reasonably necessary, they are not reliable.

The admission of L.P.’s statements at trial would be found reasonably necessary on two grounds: (1) because L.P. will not be found competent to testify at the trial;³⁷⁵ and (2) because they are needed to ascertain the truth—in other words, they are a critical piece of evidence identifying the defendant as his abuser. However, as mentioned above, it is unlikely that a Canadian court would find the statements to his teachers to be reliable, based on a review of the facts

372. Two areas where American courts have produced conflicting opinions are autopsy reports and evidence in sexual abuse cases. See, e.g., Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports—A “Testimonial”*, 74 LA. L. REV. 117, 171 (2013) (forensic autopsy reports); Julia Chapman, *Nursing the Truth: Developing a Framework for Admission of Sane Testimony Under the Medical Treatment Hearsay Exception and the Confrontation Clause*, 50 AM. CRIM. L. REV. 277, 302 (2013) (sexual abuse cases).

373. See discussion *supra* Section II.B.4.

374. See discussion *supra* Section II.B.

375. The transcript of the Ohio competency hearing provides indisputable evidence that L.P. was not able to understand or respond to the simple questions he was asked. See *supra* note 124 and accompanying text. Section 16.1 of the Canadian Evidence Act provides that persons under the age of fourteen are presumed incompetent to testify unless “they are able to understand and respond to questions.” Can. Evid. Act, R.S.C. 2005, c. 32, s. 27, § 16.1(3). It also requires a court to conduct a hearing if it is concerned about the capacity of the child to testify. *Id.* § 16.1(5).

and circumstances surrounding the making of the statements. First, he did not make the statement naturally and without prompting, a key factor cited by the *Khan* Court.³⁷⁶ Second, he did not appear to understand the teachers' questions or how to respond to them. Third, he gave a variety of different responses to these questions and to the questions asked by the state's child welfare worker. Based on this, it is likely that he would fail the *Khelawon* test—whether the declarant's statements would change on cross-examination.

Furthermore, although *Khelawon* allows the use of corroborating evidence to establish reliability, corroborating evidence in the form of physical evidence of his injuries would not serve to corroborate L.P.'s statements because he merely identified the perpetrator, without describing how these injuries occurred. Finally, the other evidence that was produced at trial, rather than supporting the reliability of L.P.'s statement identifying Clark as his abuser, suggests a different conclusion. The fact that L.P.'s mother had her parental rights to three previous children terminated due to abuse and neglect, L.P. was in her custody the day before his teachers noticed his injuries, and she refused to return to Ohio from Washington after the social worker informed her that doctors and the police were involved all suggest that L.P.'s mother may have been responsible for his injuries.

Like the Canadian courts, the ECtHR would likely find that L.P.'s statements should not have been admitted at Clark's trial. Applying the three prong test set out in *Al-Khawaja & Tahery*: (1) whether there was a good reason for the absence of the witness at trial; (2) whether the evidence of the witness was the sole or decisive basis for the conviction; and (3) whether there were sufficient counterbalancing factors to overcome the prejudice to the defendant resulting from the admission of untested hearsay, the ECtHR would likely conclude that admission of the statements violate the defendant's right to a fair trial under Article 6 of the Convention.³⁷⁷

With respect to the first two elements, there undoubtedly existed a good reason for L.P.'s absence from trial—he was not competent to testify. Furthermore, Clark's conviction clearly was based solely or decisively on the admission of L.P.'s statements naming him as the perpetrator. In fact, the prosecutor repeatedly referred to L.P.'s statements in his closing argument, and the Ohio Supreme Court found that admission of these statements was reversible error, which required finding that the error affected the outcome of the trial. Additionally, there does not appear to be any other significant evidence that would diminish the effect of these statements.

As to *Al-Khawaja & Tahery*'s third element, the ECtHR would likely conclude that there were not sufficient counterbalancing factors present in this case to overcome the prejudice to the defendant resulting from the admission of these untested hearsay statements. In making this determination, the ECtHR

376. See *supra* note 189 and accompanying text.

377. See discussion *supra* Section II.C.3.a.

would first assess the reliability of the statements, which will be determined principally by the existence of corroborating evidence. As previously noted, although medical evidence was presented as to L.P.'s physical injuries, the evidence was pertinent only to the type of injuries he suffered. It did not support the conclusion that Clark inflicted the injuries. As to the other factors relevant to the ECtHR's analysis, it does not appear that the trial judge gave cautionary instructions to the jury regarding these statements, nor was there a prior opportunity for the defendant to test L.P.'s statements at or before the trial.

2. *Schatschaschwili v. Germany*

U.S. courts would likely reach the same conclusion as the ECtHR and find that the women's statements should not have been admitted at trial. Like Sylvia Crawford's statements in *Crawford v. Washington*, L. and O.'s statements would be found to be testimonial because they were given at a formal police interrogation, as well as at a hearing before an investigating judge. Under *Crawford*, these testimonial statements can only be admitted if the witnesses were unavailable³⁷⁸—which they were since they had left Germany and refused to return for the trial—and if the defendant had a prior opportunity for cross-examination. In this case, the defendant was not afforded this opportunity for cross-examination, since the German investigating judge refused to provide the defendant with notice of the hearing.

In contrast, it appears likely that these statements would be admissible in Canada even though the defendant did not have an opportunity to challenge the evidence. The hearsay statements would be necessary since the witnesses were unavailable at trial. Furthermore, applying factors identified in *Khewalton*, it is likely that the statements would be found to be reliable on several grounds.³⁷⁹ The women did not appear to have a motive to lie. As the victims, they had personal knowledge of the events surrounding the robbery. There was also corroborating evidence to support their statements, including the testimony of their friends and neighbor to whom they had relayed the details of the robbery; the defendant's admissions that he had been in their apartment; and the data and recordings from the cell phone and GPS system.

3. *R. v. Khelawon*

Unlike the Canadian courts, courts in the United States are not required to assess the reliability of the statements the alleged victim made to his caregiver, his physician, or to the police in which he identified the manager of the nursing home as his abuser. Therefore, assuming these statements would not fit within an exception to the hearsay rules, only the videotaped statements that he made to the police would be found to be testimonial and therefore not admissible at

378. See discussion *supra* Section II.A.2.

379. See discussion *supra* Section II.B.3.

trial.³⁸⁰ Conversely, the other statements would not be testimonial because, under *Davis* and *Bryant*, an objective declarant in his position would not think that the statements made to his caregiver or to his physician would likely be used in a subsequent criminal prosecution.

In contrast, the ECtHR would likely find that admission of his statements violated the Convention. First, they would be considered sole or decisive evidence because his statements appear to be the only evidence identifying the defendant as the perpetrator. Second, these untested statements would violate the Convention because there does not appear to be sufficient counterbalancing factors present in this case. Moreover, although there were other nursing home residents who similarly claimed that the defendant had abused them, which was a factor the *Al-Khawaja & Tahery* Court found significant, the very same facts were not found to constitute a sufficient counterbalancing factor in the recent *Schatschaschwili* decision. Rather, the ECtHR found the more important consideration to be the fact that there was no opportunity for the defendant to cross-examine the victim who was the only eyewitness to the events. The same is true in this case, Khelawon had no opportunity to cross-examine the only eyewitness since the elderly declarant died before the trial.

C. *The Strengths and Weaknesses of the Doctrines*

In criminal trials, the state's interest in the successful prosecution of criminal offenses and the corresponding need for evidence stands alongside the need to assure a level playing field in which a defendant's right to challenge the evidence is of paramount importance. The three distinct confrontation doctrines that have developed in the United States, Canada, and the European Court of Human Rights, along with the changes that each of these doctrines have undergone in the previous two decades, reflect the difficulties courts encounter as they struggle to balance the competing interests at stake. This final section addresses the strengths and weaknesses of each of these approaches and ends with a brief discussion of what the U.S. Supreme Court can learn from these other jurisdictions.

Canadian courts adopted the principled approach to the admission of hearsay statements in the 1990s in response to a perceived need to improve the prosecutions of sexual offenses. The result was a doctrine that courts apply on a case-by-case basis with the focus placed on the dual elements of necessity and reliability.³⁸¹ One strength of the principled approach is its requirement of necessity. Hearsay statements should not be admissible in criminal trials unless it can be clearly demonstrated that the declarant is unavailable to testify at the trial.

However, the principled approach has two significant flaws. The first is the case-by-case approach, under which the doctrine of *stare decisis* carries little

380. There did not appear to be an ongoing emergency at the time.

381. See discussion *supra* Section II.B.

legal weight in a court's determination regarding the admission of evidence. The resulting lack of uniform justificatory standards has serious deleterious effects on a defendant's right to a fair trial.

The second significant weakness of the principled approach is the importance that reliability plays in the decision to admit untested hearsay evidence along with the use of corroborating evidence as indicia of reliability. It is interesting to note that Canadian courts adopted this approach at a time when it was being seriously questioned in the United States—*Ohio v. Roberts* focus on reliability as the key factor in determining the admissibility of hearsay evidence—and that would be abandoned by the U.S. Supreme Court a little over a decade later, on grounds that it failed to adequately protect a defendant's rights.

The serious flaws associated with the reliability approach have been recognized by the Grand Chamber of the ECtHR and the U.S. Supreme Court alike. These particular quotes were previously introduced in this Article, but warrant repeating here. The ECtHR noted:

Experience shows that the reliability of evidence, including evidence which appears cogent and convincing, may look very different when subjected to a searching examination. . . . The Court's assessment of whether a criminal trial has been fair cannot depend solely on whether the evidence against the accused appears prima facie to be reliable, if there are no means of challenging that evidence once it is admitted.³⁸²

Additionally, Justice Scalia fittingly posited the following: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty."³⁸³

The U.S. Supreme Court's Confrontation Clause jurisprudence too has important strengths and considerable weaknesses. With *Crawford*, the Court correctly moved from a reliability-based approach, to one intended to protect the enumerated right to confrontation plainly set out in the Sixth Amendment. Further, the Court's bright-line rule—that the Constitution demands unavailability and a prior opportunity for cross-examination—stems directly from the plain language of the Amendment. However, in the cases following *Crawford*, the Court has struggled to produce legal doctrine consistent with these principles. The Court's sole focus on determining whether a hearsay statement is testimonial, along with its associated primary purpose test, is seriously defective for the reasons previously addressed in this Article.³⁸⁴ The principle defect of the testimonial doctrine is the foundational premise that a statement becomes "testimony" at the time it is made, rather than the point in time at which the evidence is proffered at trial.

Like Canada and the United States, the doctrine developed by the European Court of Human Rights has its strengths, but also has important weaknesses. In

382. *Al-Khawaja & Tahery v. United Kingdom*, 2011-VI Eur. Ct. H.R. 191, at 251, § 142.

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

384. See discussion *supra* Section II.A.

its early decisions, the ECtHR practiced a strict interpretation of Article 6 of the Convention and employed a bright-line rule. It consistently held that if the untested hearsay evidence was found to be the sole or decisive evidence against the defendant at trial, the admission of this evidence in criminal trials violated a defendant's right to a fair trial under Article 6, unless the witness was shown to be unavailable to testify at trial and there had been a prior opportunity for cross-examination.³⁸⁵

There is much to be said for bright-line rules, particularly because they result in predictable and uniform jurisprudence. However, courts are tempted to—and frequently will—detour from these rules principally in cases involving vulnerable victims. In recent cases, the ECtHR altered its position in what appears to be a response to the harsh criticism directed at it from the Supreme Court of the United Kingdom following the Fourth Chamber's decision in *Al-Khawaja & Tahery*.

In departing from its bright-line rule, the Grand Chamber modified the rules to allow for the admission of untested hearsay that is the sole or decisive evidence against the defendant if there are “sufficient counterbalancing factors” to overcome the prejudice to the defendant from the admission of this evidence.³⁸⁶ The fact that a witness might not be available would not, standing alone, prohibit the admission of the statements. Additionally, the ECtHR introduced the notion that corroborating evidence should be taken into account in the determination of whether the hearsay is the sole or decisive evidence. Finally, regarding the issue of whether there are sufficient counterbalancing factors, corroborating evidence should be considered among the other evidence that a court looks to in resolving the question.³⁸⁷

With that said, a significant strength of the ECtHR's doctrine remains its focus on the strength of the proffered evidence.³⁸⁸ The UKSC was highly critical of using the sole or decisive rule as the dispositive factor, commenting that it is difficult to make this determination at the beginning of a trial,³⁸⁹ but this argument is wrong. Judges, including common law judges, are more than capable of assessing the strength of a particular piece of evidence at the beginning of, or during, a trial.³⁹⁰ In fact, the U.S. Federal Rules of Evidence recognize this and require the judge to function as a gatekeeper, and in this

385. See discussion *supra* Section II.C.1.

386. *Al-Khawaja & Tahery*, 2011-VI Eur. Ct. H.R. at 253, § 147.

387. See discussion *supra* Section II.C.3.a.

388. Although U.S. courts similarly evaluate the strength of the evidence, this analysis comes into play on appeal from a conviction. Those courts will decide whether there was reversible error, which requires a determination of whether the error complained of was outcome determinative. See, e.g., *California v. Green*, 399 U.S. 149, 162–63 (1970).

389. See *R v. Horncastle* [2009] UKSC 14 [108], [87]–[90].

390. See *supra* note 218 and accompanying text; accord 5 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 702:5 (7th ed. 2016).

regard, mandate judges to make many decisions affecting the admissibility of evidence that require this type of evaluative assessment.³⁹¹

The ECtHR has been soundly criticized, and rightly so, for its use of corroborating evidence. As noted previously, Professor Heffernan criticizes the ECtHR for using corroborating evidence as both a factor in the determination of the sole or decisive evidence and as a factor in evaluating the sufficient counterbalancing factors; she correctly notes that they are “flip-sides of the same coin.”³⁹² Under this approach, the stronger the corroborating evidence, the less likely the hearsay will be found sole or decisive, resulting in the admission of the evidence. The other side of the coin shows that the stronger the corroborative evidence, the more likely the court will find sufficient counterbalancing factors that support admission.³⁹³ The opposite is also true: the weaker the corroborative evidence, the more likely the hearsay evidence will be sole or decisive, and the less likely that the court will find sufficient counterbalancing factors. Therefore, the use of corroborative evidence as a counterbalancing factor appears meaningless since it has no effect on the overall analysis.

Conversely, there are two important factors that the ECtHR includes in determining counterbalancing factors. The first factor is whether the defense had a prior opportunity to question the unavailable hearsay declarant. It is important to note the marked differences in the Grand Chamber’s opinions in *Al-Khawaja & Tahery* and *Schatschaschwili*—what appears to be a shift away from the ECtHR’s use of corroborative evidence and a renewed emphasis on the ability to cross-examine the prosecution’s witnesses.³⁹⁴ The second important counterbalancing factor is whether the trial court approached the question of untested evidence with caution, specifically whether the judge provided adequate instructions to the jury as to the weight that should be assigned to this evidence.³⁹⁵

There are some important lessons that the U.S. Supreme Court can take from these other jurisdictions. First, like Canada and the ECtHR, the Court should retain the unavailability requirement and admit untested hearsay only upon a showing by the prosecutor that the declarant is unavailable to testify at trial.

Second, the Court should abandon its recent attempts to reintroduce reliability into its Confrontation Clause doctrine. In *Crawford*, the Court correctly separated the constitutional questions from the evidence issues when it abrogated the rule from *Ohio v. Roberts*. These should remain independent issues especially because confrontation is a right enumerated in the Sixth

391. For instance, Rule 403 requires a court to determine the prejudicial value of a particular piece of evidence in comparison to its probative value determined in light of the other proffered evidence. FED. R. EVID. 403; *see also* FED. R. EVID. 702 (demonstrating an evaluative assessment to the admission of expert testimony).

392. Heffernan, *supra* note 336, at 109.

393. *See* discussion *supra* Section II.C.4.

394. *See supra* notes 329, 369 and accompanying text.

395. *See supra* note 324 and accompanying text.

Amendment. Furthermore, a reliability approach fails to provide adequate protections to defendants for the reasons previously addressed in this Article. The use of corroborating evidence to support the reliability of untested hearsay is fraught with a myriad of issues.

The Court should move from its current singular focus on the primary purpose test. As noted previously,³⁹⁶ this jurisprudence has become a “debacle,” a “mess,” “highly subjective, fact-intensive,” and “malleable” and no longer adequately protects defendants’ Sixth Amendment rights. A modified version of the ECtHR’s doctrine could be adopted in its place. Adopting the sole or decisive evidence rule eliminates the current arbitrary decision-making regarding whether a person is a “witness” at the time he or she makes a statement. In its place would be a rule predicated on the understanding that the hearsay is testimony when it is proffered at the trial. With this understanding, the focus of the inquiry is placed first on assessing the strength of the evidence. Courts, along with the parties involved, need only be concerned about evidence that is likely to result in a defendant’s conviction.

However, unlike ECtHR’s current test, the rule put forth should include only procedural safeguards as counterbalancing factors, with the critical question being whether the defendant was ever afforded an opportunity to question the witness. The right to confrontation is a procedural right that should not be diminished by the substantive evidence present in the case. Although criminal pre-trial procedures in the United States generally do not include the type of judicial investigatory hearings found in many civil law European countries, it is possible to preserve testimony by affording the defendant an opportunity to question a witness at a pre-trial deposition. In cases involving vulnerable witnesses, or where law enforcement fears a witness will not be available at the time of trial, courts can make use of pre-trial depositions, which can provide defendants an opportunity to question the witness. As Professor Hoyano noted, “[t]he right to a fair trial is also an inconvenient right.”³⁹⁷ So too is the enumerated right to confrontation set out in the Sixth Amendment. Enforcing these rights will sometimes result in the exclusion of hearsay statements where a defendant was not afforded an opportunity to challenge the evidence.

IV. CONCLUSION

Three distinct confrontation doctrines have developed in the United States, Canada, and the European Court of Human Rights as courts in these jurisdictions have struggled to balance the state’s interest in the prosecution of criminal offenses with the need to protect a defendant’s right to challenge the evidence presented at trial. The U.S. Supreme Court abandoned its previous reliability approach over twenty years ago because it found the test, in the words of Justice

396. See *supra* notes 144–48 and accompanying text.

397. Hoyano, *supra* note 1, at 28.

Scalia, to be an “amorphous, if not entirely subjective concept.”³⁹⁸ However, its replacement—the testimonial statement approach—has proven to be not only illogical, but indeed turned out to be an amorphous, if not entirely subjective concept that fails to adequately protect a defendant’s Sixth Amendment right to confrontation.

The Canadian principled approach, with its case-by-case assessment of the reliability of evidence, is also deeply flawed. The principled approach fails to provide sufficient guarantees of predictability and uniformity, essential elements of a criminal justice system, which puts the promise of justice contained in the Charter’s right to a fair trial at risk.

Of the three approaches, the doctrine established by the ECtHR best protects an accused’s right not to have untested evidence from non-attending witnesses admitted at trial. Although the ECtHR has been criticized recently for abandoning its bright-line sole or decisive evidence rule, this approach is still favored over the Canadian and U.S. doctrines because it requires an evaluation of the strength of the evidence, which properly recognizes the amount of prejudice a defendant will experience from the admission of the untested evidence. Furthermore, this approach also requires a court to examine the procedural measures that the trial court put in place to offset the prejudice resulting from the admission of the untested hearsay.

398. *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

