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John W. Reed, *Editor*

FIGHTING FOR JUSTICE IN THE WAR ON TERROR FROM PORTLAND TO PESHWAR†

Steven T. Wax*

Within a month after September 11, 2001, my office became involved in the war on terror. For some reason, Portland, Oregon, immediately became and has continued to be the site of an unusual series of prosecutions of people who have attempted to and actually joined in plotting terrorist activity. It has also been the site of a number of prosecutions of people who were absolutely innocent. The issues that have arisen in those cases are issues that I think are important to all of us, whether we are U.S. citizens or citizens of other countries. They are issues that have to do with the relationships we enjoy with our governments, issues of human nature, issues about the way we should be treating each other on a daily basis.

What I am going to do this morning is talk to you primarily about one of my clients, Adel Hassan Hamad, a Sudanese hospital administrator who spent more than five years in prison, most of it at Guantanamo Bay. I'm also going to talk about a fellow lawyer, Brandon Mayfield, a Portland attorney who was mistakenly connected with the bombings that took place in Madrid, Spain, in March of 2004.

Meeting Adel Hassan Hamad

Let me start by taking you back to March 3, 2006. It was on that day that I first set foot in the U.S. naval base at Guantanamo Bay. In order to go there, I had to be armed with a security clearance provided by the Federal Bureau of Investigation. Guantanamo was chosen by our government in 2001 as the place where they were going to hold people who had been seized, we were told, on the battlefields in Afghanistan, and it was chosen because it is isolated. It's a military base. There can be no protesters or reporters, and for the first two years that men were held there, not one lawyer was permitted to go there to see his or her client.

When I stepped onto the tarmac in the evening of March 3, armed with the security clearance and also with a theater of war clearance, because our government treats Guantanamo as a theater of war, my colleagues and I were met by a military escort and taken to the Combined Bachelors Quarters, which is a dormitory- or hotel-like structure on the leeward side of Guantanamo

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort at Troon North, Scottsdale, Arizona, March 20, 2009.

* Federal Public Defender, District of Oregon, Portland, Oregon.

Bay. That's where the habeas lawyers stay when we're there to visit with our clients. The next morning I got up and looked out, and for the first time I saw the landscape. I expected to see a tropical paradise, but the part of Cuba where Guantanamo Bay is located is a desert. Its dominant vegetation is cactus.

We visitors got on a rickety old schoolbus and were driven down to the ferry terminal for the ride across the bay to the windward side of the base, which is the core of the base. Most of the prisoners at that point were held in an area called Camp Delta, and even today, most are housed in solitary confinement, locked down twenty-two hours a day.

When we arrived on the windward side of the base, we were met by a military escort and driven through a little town. It could have been anywhere in the southwest United States, or in eastern Oregon, for that matter. We drove past a McDonald's. We drove past a Kentucky Fried Chicken. And those of us from the northwest had our hearts warmed when we passed a Starbucks. Then we drove past subdivisions with quaint names like Sunrise Terrace and Iguana Terrace. We noticed a sign that said, "$10,000 fine if you run over, injure, or kill an iguana," a sign that we habeas lawyers on our way to see our clients viewed with a fair amount of irony and sadness, because it seemed to us that our government was providing more protection to the lizards than it was to our clients.

At one point, we turned a corner on the road and could see off in the distance the chain-link and razor-wire fencing of Camp Delta. We went through another check point, where men and women wearing the uniform of this great country, with fixed machine guns, stopped us and came onto the bus to see who was trying to break into the prison. I thought it was a little peculiar, but we were once again screened. Eventually, after turning a few more corners, we got to what was called Camp Echo, the part of the prison where visits took place back in March of 2006. We went through another screening with a wand like the ones they use at airports–and then had to stand there for forty-five minutes while the guards–nineteen- and twenty-year-old men and women–went through every single piece of paper that the lawyers had brought in to review with their clients. The very peculiar rules under which we are allowed to see our clients in Guantanamo permit the government to inspect all the paperwork we bring in, because we are not allowed to tell our clients anything about the outside world. So you get into arguments: Is this newspaper clipping a story about the outside world, or is it an exhibit in a court pleading? And on that first morning, as we stood in ninety-eight degree heat, dripping wet under the hot sun, we had to wait for the major in charge of the legal division to come and resolve disputes over pieces of paper.

Eventually, we got to the inner courtyard of Camp Echo, where we saw a series of roughly twenty- by forty-foot wooden structures, each with two doors

on the front and each door with a number on it. I was there that morning with assistant defender Pat Ehlers to see Adel Hassan Hamad, one of the seven clients my office had been assigned to represent. Also with me that morning were assistant defenders Bryan Lessley and Chris Schatz, who were there to see one of our Afghan clients. And there were other lawyers from some of the large law firms in this country who had volunteered their time, law firms that had spent literally millions of dollars in this fight. Some have been involved since 2003.

We followed our guard on a little concrete path that led off to the left. The path is surrounded by gravel, and we had been told by the lawyers who came before us, "Don't step off that path. There are land mines in the gravel." I don't know if that is true–I'm not sure our military actually thought these guys would try to make a break, because I couldn't see where they could possibly go–but we stayed on the concrete. We got to door number twelve, and the guard opened the door for me and Pat. The first thing we saw, straight ahead of us, was a little folding table that I think of as a card table. Behind the table was a folding chair, and seated on the folding chair was a very dark-skinned black man. I was somewhat surprised, because all I knew about the man I was going to see was that he was a Sudanese Arab, and I expected to see a person of Mediterranean hue. I have since learned that Sudan is a wonderful melting pot, and the people who define themselves as Arabs in Sudan run the gamut from the darkest black skin that one would find in Africa to the lightest blond that one would find in northern Europe.

Adel Hassan Hamad was wearing white pants, a white shirt, and a white kufi–he is a Muslim–and sat there looking up at us. Then I looked down and saw underneath the table an eye hook screwed into the floor and a chain coming up from the eye hook to a shackle on Adel's leg. And for the two days of that visit, for all the days of all the visits that I had with Adel in Guantanamo, and for all the days of all the visits that all the lawyers had with all their clients there, the clients sat chained to the floor–to my eyes, chained like dogs.

As I mentioned, when I went down there that first time, all I knew about Adel Hassan Hamad was that he was Sudanese and that his primary language was Arabic, and our government had not told me even that much until five months after we had been assigned to the case and the very week that we were heading from Portland to Guantanamo for the first visit. Whenever I asked, "What is he charged with?," or "Why do you believe he is an enemy combatant?," the answer was, "We won't tell you." "How do you expect me to help this man?" "We won't tell you." We got absolutely nothing from our government voluntarily.

As it turned out, the media had filed a Freedom of Information Act suit that was being handled by a judge in New York City. The judge had granted relief

in February of 2006, a few weeks before we went to Guantanamo. And on the very day that we were getting on the plane in Portland, the Department of Defense made a dump of material onto the Internet. While we were flying down to Guantanamo, one of the guys in our office was searching the Internet to see if he could find anything about Adel Hassan Hamad. He found a little, and by telephone we learned the smallest bits of information: that Adel was accused of being a hospital administrator; that he was accused of having delivered food to a refugee camp in Pakistan in 1989; and that he had worked delivering food to another refugee camp where they said perhaps Khalid Sheikh Mohammed's brother had been in charge and perhaps Khalid Sheikh Mohammed had been there visiting his brother when my client was delivering food there in 1988. (You might recall that throughout the 1980s, the Afghans and Soviets were engaged in a war, and our government was funding the Mujahideen.) Those were the allegations about my client that I knew when I walked into that room.

When Pat and I walked in, we were the first potentially friendly faces that Adel had seen in what was then more than three years of imprisonment. He had been held in isolation, with no contact with anyone from the outside world. And, of course, when we walked in, I had to say, "Good morning, Mr. Adel Hassan Hamad. I am a public defender from the United States government, the very government that is imprisoning you. And I'm here to help you." It took us a while to begin to develop some rapport and to start to talk about his life and what he believed was the reason he was there.

Now, I've tried a fair number of emotional cases, as I'm sure many of you have. A number of years ago, when my office first became involved in capital cases, I was told, "Death is different." Until I got into those cases, I didn't understand the emotional overlay that comes when you are representing people who are literally facing execution. The Guantanamo work is different yet again. It is different because Guantanamo is an island of despair. All of my other clients, even those facing execution, have been through a process. There's been a man or a woman wearing a black robe who has told them what they're charged with and what the potential outcome is. But for the men in Guantanamo, that is not the case. There is no process. When they ask, "Why do you hold me?," they are told, "We can't tell you. You just answer our questions."

Before I went to Guantanamo, I had been told–we had all been told–by the former President, Vice President, and Secretary of Defense that *all* of the men in Guantanamo were among the worst of the worst. Our government said *all* of those men had been picked up on the battlefields in Afghanistan and *all* were hardened fighters for al Qaeda or the Taliban. Eventually, the Freedom of Information Act suit led some professors and law students at Seton Hall Law School in New Jersey to put together a study which showed that only eight

percent of the men were ever members of al Qaeda or the Taliban, and fewer than five percent had been picked up on the battlefields of Afghanistan–not even one out of twenty.

When that study was published, our government was not happy and commissioned a group of professors at West Point to tell us the truth. That group of West Point professors concluded that about a third of the prisoners were actually members of al Qaeda or the Taliban. A third, wow! That's four times what the Seton Hall group found. But it's still only one out of three, not *all*; and the truth undoubtedly lies somewhere in between the Seton Hall eight percent and the West Point one-third.

The experience of representing Adel–the privilege I had as an American lawyer to go to Guantanamo and the emotions triggered–had a powerful impact on me. I'm not a writer. I'm a lawyer. I write legalese, which is boring. But when I got on the plane after my second Guantanamo visit, I just started writing, and eventually wrote a book called *Kafka Comes to America*. I want to read one excerpt from that book, because I think it will give you some idea of the emotional impact of what is happening to these men, these human beings, in Guantanamo.

> It was difficult when Pat and I had to leave at the end of the second day of our visit. Pat and I were about to go back to the larger world, but Adel was headed back to the loneliness of Camp Delta. Pat said his good-bye and shook Adel's hand. I said good-bye in English and Arabic, "*Salaam Alechem*," and shook Adel's hand.
>
> I turned to get my papers, but before I could pick them up, Adel asked, "When will I go home?"
>
> "We can only promise that we will fight for you in every way we can," I told him.
>
> Adel's eyes, which had been so calm for most of the meeting, started to darken. He reached out again and shook my right hand at first with his right hand but then with both. Tears welled up in his eyes. He could see the ray of hope that had entered the cell with us beginning to die with our leaving. I put my left hand over our joined hands and we stood there looking at each other. There was no sound in the cell; I am not sure anyone was even breathing.[1]

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[1] STEVEN T. WAX, KAFKA COMES TO AMERICA 111-12 (2008).

Brandon Mayfield's Story

Now I'm going to take you back two more years, to talk briefly about Brandon Mayfield, because what happened to Brandon, the U.S. citizen and lawyer, links him to the men in Guantanamo. On March 11, 2004, ten bombs exploded on four commuter trains during the morning rush hour in Madrid, Spain. One hundred ninety-one people were killed, and more than two thousand people were injured. Among the dead were three Americans. The Spanish national police found a bag of unexploded detonators in a van that was parked near one of the train stations, and they lifted some fingerprints from that bag, but they couldn't find a match. They sent those prints out electronically, through Interpol, to law enforcement agencies around the world. Within a week, our FBI said, "We've got your man–Brandon Mayfield. Born in Oregon, raised in Kansas. Born a Christian, converted to Islam. Lawyer, practicing in Portland, Oregon." The FBI took the information to the Department of Justice, which went to the Foreign Intelligence Surveillance Court. They got authorization to use the "sneak-and-peek" provisions of the Patriot Act to break into Brandon's home and law office and install electronic devices on his computers in his home and law office. They got permission to get DNA swabs and to copy the hard drives on his computers. They also started traditional round-the-clock surveillance on Brandon, his wife, and three children.

May 6 of 2004: the knock on the door of Brandon's law office. It was the FBI, armed with a material witness warrant stating that Brandon was being arrested because he was wanted in connection with the bombings in Madrid, Spain. The warrant listed capital prosecution as the subject matter of the investigation, because the United States takes jurisdiction for the deaths of American citizens in terrorist acts, even overseas.

Brandon made his first appearance in court with a friend of his, a fellow Muslim and a civil attorney who realized this was not something that he could handle. Judge Jones, a federal judge in Oregon, called my office that afternoon and asked if we could take the case. The next morning, senior assistant defender Chris Schatz and I went to meet Brandon. We were armed with the material witness warrant and the affidavit in support of it. And what that affidavit said is important for all of us to keep in mind. It started with listing probable cause for Brandon's arrest based on the fingerprint identification by the FBI, but it didn't stop there. It went on to say that there was probable cause to arrest Brandon Mayfield because he's a Muslim. It described the observations of him attending a mosque in Portland, Oregon. It said that he married an Egyptian woman who is also a Muslim. And in the next paragraph, it said that there was probable cause to arrest Brandon because he is a lawyer who had represented

a jihadist from Portland who had been convicted of a terrorist offense several years ago. (He had represented the "jihadist" in child custody matters.) The next paragraph–if the previous ones weren't offensive enough–said there was probable cause to arrest Brandon because a client held strong anti-American and anti-Semitic views. In my career I have represented a fair number of people who held views with which I did not agree, but here was the United States government telling a federal judge that a man should be arrested in part because of the views of a client.

The first day that Chris Schatz and I sat down with Brandon, the Guantanamo linkage arose, because we had to tell Brandon that two weeks before his arrest, the Solicitor General of the United States had argued to the United States Supreme Court, in the first round of Guantanamo cases involving Rasul and Hamdi and Padilla, that the President had the authority, on his own say-so, to seize and imprison people indefinitely, and that the federal courts had no jurisdiction to review the legality of the President's actions–that the writ of habeas corpus was not available to challenge the legality of these seizures. Because of this, Chris and I had to tell Brandon that he might not be there the next day.

Fortunately for Brandon, and fortunately for all of us, the United States Attorney in Oregon did not take Brandon out of the justice system. We did start an incredible battle about discovery and all sorts of stuff; but two weeks later, the Spanish said to the FBI, "You know, guys, you're wrong; that's not Brandon Mayfield's print." And, to their credit, the United States Attorney and the head of the FBI in Portland immediately moved for Brandon's release.

But, to *their* discredit, Attorney General John Ashcroft and top officials in the FBI told a very different tale to Congress. They testified that Brandon's arrest had been made because they were working from a bad copy of a partial print. That was, plainly and simply, not true. I have the print in my office, and I've worked on it with experts. Also, the FBI convened a panel of international experts that issued a report stating there was nothing wrong with the print; the misidentification was entirely operator error. More specifically, these experts said two things about this error that take me back to Adel Hassan Hamad: First, the FBI abandoned the scientific method in its review of the print; second, the FBI succumbed to big case pressure.

What did these experts mean? They were telling us that the FBI was so intent on solving this horrific crime in Madrid that they started acting as though they had blinders on. They couldn't see anything that didn't conform to their sense and view of what the facts were. That is the same mind-set that put Adel Hassan Hamad in Guantanamo.

Adel's Long Journey

Over the course of that first weekend with Adel, he told us his life story. He had grown up in Sudan, where his father was a medical man, although not a doctor. Adel would go out on rounds with his dad. His parents believed in education and sent him to Egypt, where he got a degree in engineering. He returned to Sudan in the early 1980s and was fortunate enough to get a job as an air conditioning engineer. But that wasn't what he wanted to do with his life; he wanted to help people. In 1986, he got a job working with a Kuwaiti charity that ran camps in Pakistan and Afghanistan, for refugees of the Afghan-Soviet war. The charity had a wonderful benefit–a month-long vacation to go home to Sudan every year. He went home the first year, got married, and took his wife back to Pakistan, where they were spending most of their time. They had four lovely daughters, and over the next several years he earned a master's degree and rose to the point where he was doing administration. In 2000, he got a job with a Saudi-funded charity and became the administrator of a hospital in Chamkani, Afghanistan; but in September of 2001, after the attacks on the World Trade Center and Pentagon, all foreign employees at the hospital were ordered to leave Afghanistan because their safety could not be guaranteed. Adel returned to Pakistan.

In June of 2002, Adel and his family went home for their month's vacation. Adel's father-in-law died, and Adel and his wife made the decision that his wife and daughters would stay at home. He got back to Pakistan on July 16 and went to work on July 17. In the middle of that night, he heard a noise at about 1:30 in the morning. He was living on the second floor of a duplex that was surrounded by a fence or wall. When he heard the noise, he looked out the window and saw heavily armed men swarming over the wall. About half of the men went to the downstairs apartment of Adel's neighbor, an Algerian with official United Nations refugee status. The other half stormed into Adel's apartment. The man leading the Pakistanis asked for his identification, and Adel showed his passport, his visa, and his work permit. Everything was in order, and the Pakistani looked at a blond American who had stayed in the background but was the real leader of the team and said, "He has proper papers." The blond American said, "Take him."

Adel told us that he spent six months in the hellhole of a Pakistani prison, and lost roughly sixty-five pounds. Then, one night in January of 2003, the Pakistanis flew him to the United States Air Force Base in Baghram, Afghanistan, and turned him over to the Americans. There, on a cold Afghan night, he was taken outside, his clothes were cut off, and he was kicked and beaten. Then he was dragged into the prison, given a set of rough clothes, and

forced to *stand* for three days and three nights. No sleep. Every time he'd nod off or begin to sit down, one of the men or women wearing the uniform of our great country would bang on his cell door to make sure that he did not sit or sleep.

Then the interrogation began. Adel wasn't beaten, but he was hooded, chained with handcuffs and leg shackles, jerked, pushed, and insulted, and questioned for hours, several times a day. Over and over, Adel Hassan Hamad told his captors precisely what he later told me. After several days of this, Adel collapsed and was taken to the prison hospital.

Adel was fortunate–he was a strong man, and he survived. Three men who were in the prison at about the same time died, and the death certificate for one of them showed that he died from blunt force injuries to his lower extremities that complicated coronary artery disease. In March, Adel was flown to Guantanamo Bay. There, he repeatedly told his captors the same things he had told the interrogators in Afghanistan, and the same things he later told me.

The reality of my life as a criminal defense attorney is that when I meet a client and hear his story on day one, I often hear, "I'm innocent, Mr. Wax." But on day two or day twenty or day two hundred, the client sometimes has a slightly different perception of reality that's more consistent with what the prosecutors are saying. I had no idea whether Adel was telling me the truth, so my team planned to do what we do with all our clients–test his story–but we had a problem: The rules under which we were seeing Adel prohibited us from taking notes back to the office and using them unless we allowed the government lawyers to review them, because presumptively everything Adel told us was classified. With Adel, we made the decision that everything would be shown to the government, so we got to take our notes.

We started our investigation. We called Adel's brother-in-law, whose phone number Adel had been able to recall. His brother-in-law, his wife, and his oldest daughter started confirming his account. A University of Oregon exchange student was working with us for our Afghan clients, helping with translation, and he got so invested in these cases that he said he was going to have some of his friends in Kabul track down Dr. Nagibullah, the doctor who had been the medical director of the hospital where Adel was the administrator. We got the doctor on the phone one day, and he said he remembered Adel Hassan Hamad. In his beautiful Afghan English, he said, "He [Adel] was a very nice man. Always in a good mood, joking." And he remembered ping-pong; he said he was good at ping-pong, but Adel always won, and he was "a good winner."

That summer, I sent a team of investigators and lawyers into the war zone in Afghanistan and Pakistan, on behalf of Adel and three of our other clients. They came back with scores of hours of sworn videotaped statements confirming everything that Adel had told us. But what could we do with all of

this information? Remember, I'd had to tell Brandon Mayfield that the Bush administration was arguing that there was no jurisdiction in the federal courts. The Supreme Court had rebuked the Bush administration in June of 2004, but they did it on statutory grounds. So in 2005, Congress passed the Detainee Treatment Act, stripping the federal courts of jurisdiction. In June of 2006, the Supreme Court again told Bush he was wrong, and Congress reacted by passing the Military Commissions Act, stripping the federal courts of jurisdiction. So we had a lot of wonderful evidence and no place to go.

We decided to go to the court of public opinion. The Center for Constitutional Rights organized a major press conference in New York City and invited us to join, which we did via satellite. We and other lawyers told the world the story of our clients and their innocence. We got stories into the *Washington Post*, and *New York Times*, and on CNN–but our clients continued to rot in prison. Then one of the young guys in the office said to me, "Steve, we've got to go another level. Let's put the story on YouTube." I looked at him and said, "What's that?" I learned about YouTube, and our office put together a video called "Guantanamo Unclassified." It rose to the number one spot on the YouTube political chart. Yet, our clients rotted in prison. We put out another YouTube video. Our clients rotted in prison.

Some prisoners did go home. They went home through diplomatic and political moves. Almost all the British prisoners went home first. The Germans, the Australians, and the French–citizens of our allies–went home. Most of the Saudis and most of the Kuwaitis went home, because their countries have oil. But the prisoners from Syria, Yemen, and Sudan–the less favored countries–remained.

In the spring of 2007, William Teesdale, an attorney-investigator in our office, and I got on the plane to travel to the Islamic Republic of Sudan to meet with "the butchers of Darfur," to say to them, "You have some innocent men in Guantanamo. Try to do something to get them home." It was a fascinating experience. For their own geo-political reasons, they opened their doors to us. We met with various high-level officials, gave lectures and press conferences, and testified before legislative groups. On one especially interesting day, we were in the foreign ministry, where all eight of the top men were lined up. They asked, "What would you like?" We replied, "We are here to tell you about Adel Hassan Hamad." "Oh, we know about him. We've seen him on YouTube."

After we left, the Sudanese government took the first steps. At the end of August, the state minister came to Washington and negotiated with Deputy Secretary of State Negroponte. They talked about Darfur, they talked about Guantanamo, and they talked about Adel Hassan Hamad. In December of 2007, Adel finally went home and was reunited with his family.

Our fight goes on. Adel and our three Afghan clients are home, but our Syrian and Yemeni clients are not. We go on now in court because in June of 2008, for the third time, the Supreme Court told the Bush administration it was wrong, and this time, in the *Boumediene* case,[2] they based it on constitutional grounds. The Court focused on the centrality of habeas corpus in the Constitution and determined that the writ of habeas corpus requires the judiciary to look into the legality of this type of detention. So we have had some hearings, and this will play out over the next several months.

Conclusion

My work on these terrorism-related cases has not made me an expert on terrorism, but it has made me keenly aware of this: We as lawyers are given a gift, and we're given a privilege–to help people. To help people in many different ways, in many different types of cases. I was given the privilege of going to Guantanamo to fight for the rule of law and to fight for my individual clients. And that's something I treasure, and something I think all lawyers should treasure. And whenever I get really angry about what has been done by our government in my name as a U.S. citizen, I also remember this: I am a federal public defender. I wrote the book on my own time (or my wife's time), from 4:00 to 6:00 in the morning and from 8:00 to 10:00 at night; but the work I did for Brandon and Adel and the work I do for the men still in Guantanamo is on your time. We are truly a unique country in funding a federal defender system and in unleashing (I use that word advisedly) people such as myself to fight the government on the most important issues of the day. And that makes me proud not only to be a lawyer but also to be an American.

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2 Boumediene v. Bush, 553 U.S. ___ (2008) (Nos. 06-1195, 06-1196).

THE OPTIMISM OF UNCERTAINTY†

John W. Reed*

When I last spoke to you, we were in the middle of the presidential primary campaign, and I took as the subject of my remarks the predominant theme of that season. The subject was change. Initially and most prominently the idea of change was at the heart of the Obama campaign, but it swiftly became the theme and catchword of all of the other campaigns. If as voters we took the candidates' promises to heart, we could not stay as we were, because a vote for any of the candidates was a vote for change. Both in the primaries and in the general election, it was impossible to vote against change.

So we voted. And so we got change. But unhappily, the change we got is not the change we sought. Clearly the course of our lives in these past four months has been characterized both individually and corporately by a change imposed on us, rather than change sought by our leaders or by us. Indeed, many of the changes we voted for–in education, in public health, and environment, in access to the economic and social middle class, in energy independence–those very changes are imperilled by the almost unimaginable magnitude of the changes in the economy of this nation and of the world. It's a rare front page or newscast that does not feature the vocabulary of economic distress: foreclosure, bailout, bankruptcy, layoff, pyramid scheme, moral hazard, and, of course, fraud.

We didn't vote for those changes, but they are full upon us nevertheless, and there is great distress. The magnitude of all this is almost incomprehensible.

Our Profession in This Difficult Time

Lawyers as a class may be affected by these troubles less than some other categories of workers. Indeed, in some specialties–bankruptcy practice and securities fraud, for example–one may profit in the short term from the terrible dislocation. But we are not immune. And the word is not good in large sectors of the profession, especially in transactional practice, where there are now fewer transactions to practice. One has only to look at the *ABA Journal*'s on-line daily newsletter, *Law News Now*, to get a notion of how severe the downturn is in the legal profession. Let me read you a sampling of January and February headlines from *Law News Now*. The last day of January, the headline was "January's Carnage –1,381 layoffs." On February 13, the headline was

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"Bloody Thursday–Six Major Law Firms Axe Attorneys." The article listed cuts of about 500. On February 24, the headline was "Law Firm Consultant: I've Never Seen It So Bad." And the carnage goes on into this month. Last week, the headline was "731 Lawyers and Staff Laid Off Today at Morgan Lewis, K & L Gates and White & Case," and the newsletter said, "That brings the total number of law firm lay-offs at well-known partnerships in the ten day period starting on February 27 to close to 2,500."

By the way, if you aren't a reader of the ABA's *Law News Now*, you may not know that it is really a *People* magazine for lawyers, with some news and much gossip. Or maybe more accurately, a grocery check-out line tabloid newspaper–a lot of sex and violence (which reminds me of the critic's complaint about Lawrence Welk's music: "too much sax and violins"). Let me give you three illustrative headlines: "California Courtroom Melee: Defendant Stabs Judge, Is Shot Dead by Detective"; "Playboy Model Sues Sharon Osbourne, Claims Assault"; and (one that really fits the *People* magazine model) "Philippine Lawyer Disbarred for Infidelity." I read that third one, of course. The lawyer had left his wife and twelve children to live with another woman, with whom also he had some children. The remarkable thing is that his wife sought to have him disbarred back in 1975, but the court didn't act for thirty-three years because he failed to appear for a hearing! Incidentally, the integrated bar in the Philippines had recommended only a three-month suspension.

But back to the profession's woes. It isn't just the lay-offs and the downsizing. There are consequences for the health and nature of the legal profession and the justice system: for example, courts with shorter hours and courts that have suspended jury trials, all as cost-saving measures. There are predictions that lawyers' work will be broken up into discrete elements, with more of it assigned to support staff or outsourced, or even performed by computers.

So there is a lot of change. And the more of these reports we read, and the more we consider their significance, the more uncertain we become. Almost all of the pronouncements from the White House, from the Congress, from Wall Street, and from the pundits say, in one way or another, that they don't know whether any particular remedial measure will be efficacious, that they don't know what will happen next, that the future is uncertain. Uncertainty is everywhere. The banking system, health care, education, manufacturing, retail trade, the press–their futures are all uncertain.

The Lawyer's Advantage in a Time of Uncertainty

Uncertainty is generally regarded as a bad thing. We don't like uncertainty. It's human nature. We don't want questions, we want answers. As I hear the

repeated plaint that now, more than ever, the future is uncertain, I remember a statement about uncertainty attributed to the late Edmund Borchard of Yale Law School that, though puzzling at first, has meant more and more to me over the years. The statement: An optimist is a person who believes that the future is uncertain.

I'd like you to think about that for a moment. "An optimist is a person who believes that the future is uncertain." In a way, that's a chilling statement, and its truth is not immediately obvious. Indeed, some would think that uncertainty is the hallmark of the pessimist, not the optimist.

But a little reflection will bring us to an understanding that uncertainty about the future necessarily means that the future is not foreordained and that it remains to be affected by what you and I do–that we have a role to play in determining the shape of that future. Therefore, as talented and privileged men and women, most of us with training in law and all of us with influence in our communities, we have a chance–I daresay a duty–to bring about that better future, about which we can therefore be optimistic.

Let me explore that thought with you. If there is any category of human beings able to deal productively with uncertainty, it ought to be lawyers. Most of us have had exposure to the humanities, particularly as undergraduates, where the study is not of answers but of questions, a study not so much of facts but of meaning. And then our training as lawyers taught us to reject easy answers in favor of searching and persistent inquiry.

Some years ago, when school dances still had chaperones, there was a University of Michigan Law School dance, and one of the young law students there had his fiancé with him. And again in a kind of etiquette that has largely gone out of style, he sought to introduce his fiancé to the chaperones, a law professor and his wife. During their conversation, the young woman asked the wife, "What's it like being married to a lawyer?" After a moment's reflection she replied, "Oh, for the joy of one uncontested statement." (There's more to the story. That marriage, unfortunately, came apart and in due course the law professor remarried. Some years later, when one of our mutual colleagues was leaving Ann Arbor to live in Florida, there was a farewell party. As we all were visiting before dinner, I somehow had occasion to relate that story to several younger colleagues, at which point the new wife, a lovely lady, joined the group. I immediately neutralized the story by leaving out names, and when I came to the punch line, she said, "Oh, how true, how true!")

That background of questioning and of doubting and of arguing, and the legal training that led to our licensure impose on us an inescapable responsibility to use our talents in the service of our clients, our profession, and our society, seeking to resolve all these uncertainties in the direction of justice. Law, after all, is the infrastructure of liberty and of justice and of civilization, and we

are obliged to strengthen and renew that infrastructure. Martin Luther King, Jr., once said that "the arc of the moral universe is long but it bends toward justice"; but there is so often injustice that the truth of Dr. King's assertion seems uncertain itself. That uncertainty, however, offers room for hope because the outcome is not foreordained; and with that hope, you and I can work optimistically toward that end.

There are many uncertainties in our profession about concepts less broad than justice. For example, what about the uncertain future of the civil jury? Its decline is due to many factors, as you well know, but prominent among them is the metastatic growth of summary judgment. But while the jury seems in decline, prominent voices are being heard in support of its competency as a fact finder and, lately, in its support as a vital part of our scheme of government. For example, Jack Weinstein, the well respected New York federal judge, author of a major text on the law of evidence and a longtime professor at Columbia Law School, recently made this interesting comment about the jury's function:

> [T]he overall trend, led by the Supreme Court, is reducing the community's input into rules of law as applied in court by attenuating the jury's role.[1]

And then he posed a rhetorical question:

> Do the Sixth and Seventh Amendments to the Constitution still guarantee a people's oversight of the courts through juries–the equivalent of voters exercising supervision over the other branches of government?[2]

So quite aside from the arguments in favor of the jury as fact finder, we are being reminded that the jury has two other functions, identified by Judge Weinstein–first, serving as a voice of the people about the rules of law, and, second, serving as an overseer of the court.

With the future of the jury uncertain but its importance undiminished, then, as Professor Borchard points out, we are able to be optimists about it, since we can, and must, work for its retention and improvement.

There is uncertainty also about a second principal concern of the Barristers Society. That concern is the future of the adversary system as more and more controversies are relegated to alternative modes of resolution. With privatization and bureaucratization of dispute resolution, parties' interests are often sacrificed to the desire for quick and simple disposition; and results, not being moored to known precedents, are often idiosyncratic. (Did you read the

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1 Jack B. Weinstein, *Finding Facts and Making Judgments*, 38 SETON HALL L. REV. 867, 869 (2009).
2 *Id.* at 869-70.

redefinition of "arbitrator"? It is the short order cook at Arby's who now works for McDonald's.)

Because we believe that the future of the adversary system is uncertain, again according to Borchard's principle we can be optimists about its continuing vitality, since we will seek to be its guardian.

I've mentioned just two particular uncertainties about the law, choosing them because they are among the purposes of the Barristers Society, of which you and I are a part. There are of course other uncertainties about the law that one can identify–threats to judicial independence, costs of legal services, rights to privacy in an electronic age, the tension between national security and constitutional and human rights. These and other issues of importance continue to evolve and continue to have uncertain outcomes. And so there is reason to hope. An optimist, I say once more, is a person who believes the future is uncertain.

THE ROLE OF THE BARRISTERS

Much of what needs to be done to resolve these uncertainties favorably, as we move along the arc of justice, as the needle moves toward the goal of justice, can and will be done by each of you individually. I want now to ask you whether there is a role to be played by this entity of which we are all a part, the International Society of Barristers.

Much of our lives since the end of World War II has been lived in a culture that emphasized the freedom and rights of the individual. All of us believe that we have unalienable rights to life, liberty, and the pursuit of happiness, and we tend to interpret those rights to mean we can do pretty much anything we want. We love the idea of freedom. More than one generation in my lifetime can be fairly labeled a "me" generation. It might also be called an "Adam Smith generation," which wants to believe that the greatest good is achieved when each individual pursues his own self-interest.

In this same era, perhaps as a corollary, we have lost faith in institutions–the church, schools, government, charities, and especially now the financial system–and with good reason, as these institutions one after another have betrayed us or simply lost vitality and played a diminished role in society, leading us into an age characterized by a tremendous ambivalence and ambiguity. The legal profession is, of course, one of those institutions. Though it has retained much of its character and essence, most of us see it as having lost some of its luster as it has become more and more commercial. In our own trial lawyer field of resolving conflict, we see traditional mechanisms diminished or eliminated in the interest of efficiency or economy. We often see civility rejected as a value. We see litigation costs used as a weapon. And on

and on. You know better than I the litany of problems in the court systems and the trial profession. And we both know that the future of the profession and its components is uncertain.

But as members of that profession, we're debtors to those who have gone before, obligated to give new life to its traditions, and obligated to find new and better ways to reach its goal of justice. The question is how to do that. Each lawyer here has an individual obligation to improve our profession, but is there a role, as I asked a moment ago, for the Barristers as an institution within an institution? From our beginning forty-four years ago, we have insisted that we are not a cause organization. We have mounted no large project, created no program, established no task force. We stand for preservation of the jury, for maintaining a muscular adversary system, and for supporting the independence of the judiciary. But we do not throw the Society into the fight. The Society has made grants to other organizations in support of the improvement of trial advocacy, grants to public interest lawyers such as public defenders, grants to support improvements in the way juries operate, grants to make advocates available to children caught up in the judicial system, and the like; but the Society has not directly done these things. Additionally, we count on our members to participate as individuals in many forums and movements where the Society's principles and purposes are pursued. In support of that end, we come together in these annual meetings, where, in the words spoken to you last Monday by Jack Liber, we come to heal the wounds of battle and to gird ourselves for the contests ahead.

Most notably, we come together to remember and reclaim the ideals and high purposes that brought us to the bar. We come together to broaden our interests that we may serve the cause of justice more profoundly and wisely. We meet unhurriedly, in order that there may be opportunity to reflect on our professional lives and pay attention to important and serious things. We come together, not pridefully, to affirm that we stand for excellence and integrity and honor. And we hope to be a kind of yeast that would give rise to excellence and integrity and honor in those colleagues and adversaries with whom we interact, day by day. We hope that we will be considered good men and women, knowing however that goodness does not consist of one or even a few good acts.

A friend told me some years ago of his encounter with a Chicago cab driver who had known Al Capone and was tremendously impressed by and made much of the fact that Al Capone had given a twenty dollar tip to a lunch counter waitress. That was an act of goodness, of course, but surely he was not a good man. And by the way, the Bible doesn't use the term "good Samaritan"; he's just called a Samaritan. We have applied the term "good" because we happen

to know of one good act that he did. It reminds me of the man who, when asked if he had been faithful to his wife, said, "Yes, frequently."

We do have individual roles, but we need the encouragement and strength that come from being with like-minded people. In John Updike's words, "There is something to be said for belonging to a group whose members are willing to stake it all on the same bet." Or as Robert Fulgham put it in his little book *All I Really Need to Know I Learned in Kindergarten*, "When you go out into the world, watch out for traffic, hold hands, and stick together." That encouragement and that strength were never more needed than now, as the nations of the world appear to be standing on a precipice, uncertain about the future. And we live in the middle of change. But what an opportunity! What an exciting time! As the architect David Rockwell has said, "What's life-giving is doing something you don't know the answer to before you begin." It's the optimism of uncertainty.

And what steps do we take as we move into that uncertain future? It's like the beginning of a nighttime automobile trip. The headlights never show all the way to the destination, only just far enough to deal with our reaction time. We can't see all the way to the goals we have for ourselves in our profession. But we can see far enough to take the actions we need to take. As Barristers, we meet here and are met. We get our commitments clarified. And we do so communally, seeking to know and befriend and support each other, knowing that the world is too dangerous for anything but truth and too small for anything but love.

CROSS-EXAMINATION: SEEMINGLY UBIQUITOUS, PURPORTEDLY OMNIPOTENT, AND "AT RISK"†

Jules Epstein*

The cross was here,
The cross was there,
The cross was all around:

It cracked and growled,
And roared and howled
Like noises in a swound![1]

Cross-examination is regarded as the sine qua non of the American trial system. According to one legendary scholar of the *art* of this mode of interrogation, it is alleged to be a practice "as old as the history of nations."[2] While the validity of the historic claim made by Francis Wellman is open to serious dispute,[3] in both this country and across the world, the centrality of cross-examination to accurate fact-finding retains its mythic and precedential value. Justices and judges of courts at all levels continue to find cross-examination not only a necessary, but also a sufficient method of confronting a variety of trial evidence and burdens.[4] As Wigmore once trumpeted, it remains in the eyes of the law, as in those of many practitioners and scholars, "the greatest legal engine ever invented for the discovery of truth."[5]

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† Reprinted, with permission, from 14 Widener Law Review 429 (2009).

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1 With apologies to Samuel Taylor Coleridge's *Rime of the Ancient Mariner*.

2 Francis L. Wellman, The Art of Cross-Examination 7 (4th ed. 1936).

3 *See infra* Part I.A.

4 *See*, *e.g.*, Dixon v. United States, 126 S. Ct. 2437 (2006) (Breyer, J., dissenting). In *Dixon*, two justices found the power of cross-examination sufficient to overcome the problems occasioned by making the Government bear the burden of disproof in a duress defense. Justice Breyer noted that "unless the defendant testifies, it could prove difficult to satisfy the defendant's burden of *production*; and, of course, once the defendant testifies, cross-examination is possible." *Id.* at 2454.

The courts' continued emphasis on the power of cross-examination to address seemingly insurmountable burdens is discussed *infra* Part II.

5 California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 John Henry Wigmore, Evidence in Trials at Common Law § 1367 (3d ed. 1940)).

The pervasiveness of this cannot be doubted. A LEXIS search using the terms "greatest w/2 legal w/3 engine w/12 truth," conducted January 13, 2007, in the state and federal case combined database, resulted in 483 "hits." At the same time, the search reveals that reliance on this encomium did not occur in a reported decision until 1908. *See* People v. Billis, 58 Misc. 150, 152 (N.Y. Sup. Ct. 1908).

Whether cross-examination is at the heart of the Sixth Amendment's confrontation guarantee[6] is not provable, in substantial part, because of the lack of contemporaneous documentation of the Framers' motivations and intentions regarding this component of the Bill of Rights.[7] Nonetheless, it cannot be denied that cross-examination is viewed as a core aspect of the trial process, both criminal and civil, and its use and purported power are omnipresent in the American adjudicative system. Indeed, this role is confirmed in the abundance of literature (both fictional[8] and educational) involving cross-examination, and its increasing prominence in the law school curriculum.[9]

This article confirms the exalted status cross-examination has achieved and arguably retains in the American trial and fact-finding process, while simultaneously identifying its frailties: its ineffectiveness as a truth-discerning tool in varying contexts; trends in constitutional law that will eliminate the requirement of cross-examination for expanding categories of witnesses; and the impact of technology and popular media on the learning processes and expectations of jurors. Particularly because of the transformation of hearsay law and the continuing trend toward visual rather than aural learning and knowledge accumulation, cross-examination may play a reduced role in the trial process and its form may need to be reinvented.

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6 The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

7 Justice Harlan's observation that "the Confrontation Clause comes to us on faded parchment" is oft-cited and frequently deemed accurate. *Green*, 399 U.S. at 173-74 (Harlan, J., concurring). *See*, *e.g.*, John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 868 n.205 (1996); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 562 (1992) ("Little information exists about precisely what the concept of confrontation signified in the seventeenth and eighteenth centuries in England and the colonies."); Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1269 (2003) ("[T]he Framers left us little or no direct indication of what the confrontation right meant to them[.]"); Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 332 n.181 (1981) (maintaining that the Confrontation Clause was only debated for five minutes before its adoption). In Irving Brant's *The Bill of Rights: Its Origin and Meaning* (1965) there is no discussion of why the Framers included this right and no quotation from the debates addressing it. *See id.*

8 The prominence of "courtroom fiction" in popular literature can be seen as yet another confirmation of the pivotal truth-determining role attributed to cross-examination. Jon L. Breen annotates nearly 800 book-length novels and short-story compilations "that have significant portions devoted to trials and other courtroom proceedings." JON L. BREEN, NOVEL VERDICTS: A GUIDE TO COURTROOM FICTION iv (2d ed. 1999); *see also* Terry White, *Introduction* to JUSTICE DENOTED: THE LEGAL THRILLER IN AMERICAN, BRITISH, AND CONTINENTAL COURTROOM LITERATURE xvii (Terry White ed., 2003).

9 *See infra* Part I.D.

I. THE ORIGINS OF CROSS-EXAMINATION AS A CORE TRIAL TOOL

A. The Antecedents of American Trial Cross-Examination

There is no veracity to Francis Wellman's claim that "[t]he system [of adversarial cross-examination] is as old as the history of nations."[10] There may have been *confrontation* rights as early as ancient Rome, where "[a]nonymous accusations were not actionable, because, among other things, the accused . . . had the right to confront his accuser,"[11] but these rights did not involve cross-examination and may have been more of an investigative tool, rather than a trial procedure.[12]

The roots of cross-examination are more easily traced to England and the development of its adversarial trial process. A recognition of the importance of cross-examination was developed in French criminal justice theory in the late sixteenth-century writings of Pierre Ayrault, who emphasized the desirability of cross-examination as a complement to the face-to-face rendering of an accuser's testimony.[13]

According to McCormick, as early as 1668 a court rejected an out-of-court statement because "the other party could not cross-examine the party sworn."[14] Professor Langbein tracked this as the transition from "[t]he oath-based system [that] presupposed the witness's fear that God would damn a perjurer. . . . [to] the new order [that] substituted its faith in the truth-detecting efficacy of cross-examining."[15] In his exceptional tracing of the history of adversary cross-examination, Professor Langbein dates the acceptance or institutionalizing of defense cross-examination in non-treason cases to the 1730s.[16] Langbein found cross-examination to be a necessary (albeit, in his view, ill-desired[17]) response to three occurrences in the English trial system: the growing use of lawyers to present prosecutions in both the investigative and trial stages; the reward system that offered bounties to those who provided testimony establishing that

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10 WELLMAN, *supra* note 2, at 7.

11 David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 364 (2002) (alteration in original) (quoting JOSEPH PLESCIA, THE BILL OF RIGHTS AND ROMAN LAW 84 (1995)).

12 Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 211 (2005) ("While Roman law did recognize a procedure bearing that name, it was not a trial device but an investigative tool resembling a modern police lineup.").

13 Frank R. Herrman & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 540-43 (1994) (discussing the writings of Pierre Ayrault, found in L'ORDRE, FORMALITÉ ET INSTRUCTION JUDICIAIRE 1.5 (1588)).

14 MCCORMICK ET AL., MCCORMICK ON EVIDENCE 728 (Edward W. Cleary ed., 3d ed. 1984) (quoting 2 Rolle's Abr. 679, pl. 9 (1668)).

15 JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 246 (2003).

16 *Id.* at 168.

17 Professor Langbein views the two-party adversary system as a "poor proxy for truth-seeking." *Id.* at 332.

a crime reached the severity (or degree of financial loss) to qualify as a felony and thus invited fraudulent testimony, the corrupt motive of which required cross-examination as an antidote; and "the crown witness system for obtaining accomplice evidence in gang crimes, a prosecutorial technique that created further risks of perjured testimony."[18]

B. Cross-Examination in American Law

Although there was *some* cross-examination in early American trials, the historic record for ascertaining whether the Framers' intent in adopting the Confrontation Clause was to enshrine cross-examination as a constitutional right is skimpy, diffuse, and potentially contradictory. In his extensive treatment of this subject, Professor Randolph N. Jonakait acknowledges that the evidence of both the Framers' intent and the contemporaneous practice at the time of the adoption of the Confrontation Clause is "scanty," with only limited references in the constitutional debates.[19] Professor Jonakait posits that the confrontation right of cross-examination reflects the ascendance and acceptance of the role of lawyers in American colonial and early post-independence trials:

> The suggestion here is that America had adopted an adversary system, with defense cross-examination at its core, by the time of the Bill of Rights. This contention is supported by the transformation defense counsel brought to English criminal procedure, America's early acceptance of a full right to counsel, and America's creation of a public prosecutor. An adversary system was also consistent with new American concepts about crime, a government of checks-and-balances, and how society should be ordered.[20]

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18 *Id.* at 4.

19 Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 116 (1995).

20 *Id.* at 108. The importance of the role of counsel in defining the intent of the confrontation right is also accepted by Professors Friedman and McCormack:

> [T]he Americans did not simply draw on English law. American criminal procedure developed in a distinctive way. The right to counsel in felony trials developed far more quickly in America than in England, and with it rose an adversarial spirit that made the opportunity for confrontation of adverse witnesses especially crucial.

Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1206-07 (2002). *See also* Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 742-744 (1993). As Professor Mosteller explains:

> Enactment of the Sixth Amendment occurred just as evidence law was rapidly developing. . . . [A]n emphasis on cross-examination was ascending. . . .
> . . .
> . . . It is likely, however, that because they were acting in the midst of a century in which the adversary system was expanding on many fronts, the Framers were looking forward to a doctrine with the right of cross-examination preeminent . . . .

Id. (footnotes omitted).

It cannot be disputed that cross-examination had become a signal feature of trials in the late colonial and early post-Revolution period. As one scholar explained in the early nineteenth century:

> The Law never gives credit to the bare assertion of any one, however high his rank or pure his morals, but always requires the sanction of an oath: [] It further requires his personal attendance in Court, that he may be examined and cross examined by the different parties; . . . for the relation of one who has no other knowledge of the subject than the information he has received from others, is not a relation upon oath; and, moreover, the party against whom such evidence should be permitted would be precluded from his benefit of cross examination.[21]

At the same time, cross-examination was not necessarily ubiquitous or even commonplace. There are contentions, with documentary support, that cross-examination was either completely absent from or underutilized in many trials in the first years of the republic.[22] These are extrapolated from the brevity of trials and the great number of cases resolved on a single day. Each phenomenon precludes cross-examination, at least as we know it today, from either occurring or playing a significant role in the trial process. It may also reflect the absence of counsel from many of those matters. Nonetheless, the role of cross-examination grew and was recognized as cognate with and a critical component of the guarantee of confrontation.

C. The Court and the Importance of Cross-Examination

The Supreme Court has always considered cross-examination in a criminal case a core component of the confrontation right, even though the historic record does not fully support such a claim. Although it did not speak on the subject until 1895, in the still-consequential decision of *Mattox v. United States*[23] the Court explained that "[t]he substance of the constitutional

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21 THOMAS PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 10-11 (John P. Thompson ed., 3d ed. 1809); *see also id*. at 8-9 (discussing best evidence), 9-10 (discussing the oath). The earlier (1801) version of the *Compendium*, in its discussion "Of The Examination Of Witnesses," explained that after a witness's direct examination "[t]he counsel retained on the other side, next cross-examines the witness, and the witness not being supposed so friendly to his client as the party by whom he is called, he is not restrained to any particular mode of examination." THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 135 (Garland Publ'g, Inc. 1979) (1801).

22 *See*, *e.g.*, James D. Rice, *The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681-1837*, 40 AM. J. LEGAL HIST. 455, 463 (1996); CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772-1804, at 39-40 (1987); Jeremy A. Blumenthal, Comment, *Reading The Text of The Confrontation Clause: "To Be" or Not "To Be"?*, 3 U. PA. J. CONST. L. 722, 733-34 (2001).

23 Mattox v. United States, 156 U.S. 237 (1895).

protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of. . . ."[24] Civil cases were thought to require the same: Cross-examination was at the core of the fact-finding process.[25]

Continued allegiance has been paid to this principle.[26] As the Court explained more than three decades ago,

> The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.[27]

In sum, despite the absence of clear proof of the Framers' intent, cross-examination has been consistently held as inherent in the confrontation guarantee. Thus the right has been constitutionalized in criminal cases, affirming its centrality to the American adversarial process.[28]

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24 *Id*. at 244. *See also* Kirby v. United States, 174 U.S. 47 (1899):

> [A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.

Id. at 55.

25 Pennsylvania v. Wheeling & Belmont Bridge Co., 50 U.S. (9 How.) 647, 659 (1850) (Daniel, J., dissenting) ("[T]he question of nuisance or no nuisance is one proper for the cognizance of a court of law, to be determined by a jury upon the testimony of witnesses confronted and cross-examined before a jury in open court, and under its supervision.").

26 *See*, *e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 106 (1934):

> [T[he privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts and in prosecutions in the state courts is assured very often by the Constitutions of the states. For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held.

Id. (citations omitted).

27 Faretta v. California, 422 U.S. 806, 818 (1975). The Court has elsewhere described the right of cross-examination as "implicit" in the Constitutional guarantee:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." . . . But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.

Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (internal citations omitted).

28 Except for the hearsay cases, discussed below, confrontation analysis involving cross-examination has addressed the scope of that right, and not the underlying premise that cross-examination is a core protection and process. *See*, *e.g.*, Davis v. Alaska, 415 U.S. 308, 316-319 (1974) (affirming the right to cross-examine as to bias); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (same); Olden v. Kentucky, 488 U.S. 227, 232-33 (1988) (emphasizing the right to cross-examine a rape complainant regarding the defense theory and the bias implicated thereby).

Even in the arena of hearsay, where cross-examination of the nonpresent declarant is nonexistent,[29] the Court evinced a loyalty to the adversarial process by conditioning the admissibility of hearsay on the reliability of the out-of-court declaration that purportedly rendered cross-examination nugatory. Such was the rationale for the Court's seminal holding in *Ohio v. Roberts*.[30] The minimalization or abandonment[31] of the reliability standard of *Roberts* in *Crawford v. Washington*,[32] and its replacement with a "testimonial/nontestimonial" standard, derive from a continued allegiance to the rootedness of cross-examination in the adversarial process:

> The historical record also supports [the] proposition[] that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. . . . As the English authorities . . . reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.[33]

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29 Even here, the Rules of Evidence seek to effectuate cross-examination by allowing extrinsic impeachment of the hearsay declarant to the same extent as if he/she were being cross-examined. *See* FED. R. EVID. 806.

30 *See* Ohio v. Roberts, 448 U.S. 56, 65-66 (1980) (internal quotations and citations omitted):

> The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection."

31 In *Crawford v. Washington*, the Court left open whether the *Roberts* reliability test survived for the class of hearsay deemed nontestimonial. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." Crawford v. Washington, 541 U.S. 36, 68 (2004).

In its subsequent holding in *Davis v. Washington*, the Court seemingly discarded the *Roberts* test entirely when it held that "other hearsay, . . . subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause" and "[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter." Davis v. Washington, 547 U.S. 813, 821, 824 (2006). After *Davis*, lower courts divided as to whether the reliability standard still must be met for nontestimonial hearsay. *Compare* Albrecht v. Horn, 471 F.3d 435, 463 (3d Cir. 2006) ("Unless and until the Supreme Court holds otherwise, *Roberts* still controls nontestimonial statements."), *with* United States v. Feliz, 467 F.3d 227, 231 (2d Cir. 2006) ("The Supreme Court, however, in *Davis* made clear that the right to confrontation only extends to testimonial statements, or, put differently, the Confrontation Clause simply has no application to nontestimonial statements.").

What Davis may have left ambiguous was resolved in *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007). There, the Court made clear that "the Confrontation Clause has no application to [nontestimonial hearsay statements] and therefore permits their admission even if they lack indicia of reliability." *Id.* The impact on hearsay admissibility occasioned by *Whorton* is detailed in Jules Epstein, *Avoiding Trial by Rumor: Identifying the Due Process Threshold for Hearsay Evidence After The Demise of the* Ohio v. Roberts *"Reliability" Standard*, 77 UMKC L. Rev. 119 (2008) [hereinafter Epstein, *Avoiding Trial by Rumor*].

As is discussed below, as the *Roberts* test has been abrogated for all nontestimonial hearsay, such a ruling will plant the seeds for a serious diminution in the role of cross-examination in adversary fact-finding. *See infra* Part III.A.

32 *Crawford*, 541 U.S. at 36.

33 *Id.* at 53-54. The *Crawford* Court continued: "Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 60 n.9.

In sum, as to all witnesses who actually testify, and to at least a core aspect of hearsay, cross-examination is the sine qua non of the adversary adjudicative process.

D. Cross-Examination and the Academy

The significance of cross-examination as not merely a process but a learnable skill that is essential to successful litigation and adjudication has received confirmation in both law school curricula and the geometric growth of cross-examination treatises, training manuals, and similar publications for both the law student and lawyer. In the law school arena, the roots of this education are found in the apprenticeship model of legal education of the eighteenth and nineteenth centuries,[34] but that approach to advocacy training was limited by both the trainer's availability and skill base[35] *and* by the institution's general commitment to the Harvard method of appellate case reading as the template for law school instruction.[36] While there are reports of early in-school programs to teach advocacy dating as far back as 1917,[37] it is clear that the proliferation has been in the past two decades.

One stimulus for this expansion was the American Bar Association's MacCrate Report. In 1996, this report resulted in the amending of the ABA standards for law school accreditation to include the following language: "The law school shall offer to all of its students . . . an educational program designed to provide that its graduates possess basic competence in legal analysis and reasoning, oral communication, legal research, problem-solving and written communication."[38] As was reported in 2001, "[i]n the last five years, lawyering skills programs moved from virtual obscurity to legal education's center stage."[39] This drastic alteration to the Harvard model persists today.

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34 Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1, 6-7 (1993).

35 *Id.* at 7.

36 Gary A. Munneke, *Legal Skills for a Transforming Profession*, 22 PACE L. REV. 105, 123-24 (2001). Professor Munneke discusses the predominance of this model:

> The basic structure of legal education as it exists today, an exercise in evaluating appellate cases and analyzing legal opinions through a core curriculum[,] was popularized at Harvard Law School beginning in 1870. By the turn of the century, this method had become the dominant model for legal education throughout the United States.

Id.

37 *See* William Eleazer, *Trial Advocacy at Stetson: The First 100 Years*, 30 STETSON L. REV. 243, 244 (2000).

38 Leslie L. Cooney & Lynn A. Epstein, *Classroom Associates: Creating a Skills Incubation Process for Tomorrow's Lawyer*, 29 CAP. U. L. REV. 361 n.3 (2001) (quoting ABA SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 302(a)(ii) (1994)).

39 *Id*. at 361; Munneke, *supra* note 36, at 125 ("In the 1990s, many law schools developed a legal skills curriculum and experimented with a variety of new pedagogical approaches to the teaching of practice skills. Skills education today has assumed a life of its own."). Using one oft-cited measure of recognition, the *U.S. News and World Report's* annual "best of" evaluation of law schools includes a discrete category ranking the ten best schools in teaching trial advocacy. *See America's Best Graduate Schools*, *2007 Edition*, U.S. NEWS & WORLD REPORT, Dec. 2006, at 46.

Cross-examination's centrality and status are also confirmed in the availability of publications designed to teach and improve trial lawyering skills. Contrary to what one might anticipate, the publication of these texts was not a trickle that only recently became a deluge; rather, they have been in abundance since the end of the nineteenth century.[40] Today, the law student and lawyer have ample available texts, including subspecialty presentations that apply psychological research to witness examination and advocacy.[41] If the academy needed nudging, the practitioners were already "on board" with their practice guides, realizing cross-examination was core—and mastering it was essential.[42]

II. THE PERCEPTION OF CROSS-EXAMINATION AS OMNIPOTENT (OR PANACEA)

Cross-examination is not merely accorded historic or structural importance in the adversary process; it is also regarded as a panacea, a cure-all[43] for any type of evidence or witness (lay or expert) with which the lawyer and litigant are confronted. Cross-examination has been ruled sufficiently potent to respond to the introduction of questionable expert testimony,[44] a witness with no memory

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40 Robert A. Mead, "*Suggestions of Substantial Value": A Selected, Annotated Bibliography of American Trial Practice Guides*, 51 KAN. L. REV. 543 (2003) (listing and briefly summarizing a large number of advocacy texts dating from the late 1800s).

41 Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 LAW & PSYCHOL. REV. 301, 301 (2005) ("Since the 1970s, volumes of scientific literature have been published on trial advocacy and the psychological principles associated with jury persuasion.").

42 The fascination with lawyers, if not with the specific practice of cross-examination, has been a dominant feature in American fiction. *See generally* Marlyn Robinson, *Collins to Grisham: A Brief History of the Legal Thriller*, 22 LEGAL STUD. F. 21 (1998). For a list of articles surveying popular culture's presentation of and response to lawyering, *see* Marlyn Robinson, *The Lawyer in Popular Culture: A Biography*, http://tarlton.law.utexas.edu/lpop/popbib2.html.

43 The term "cure-all" does not imply that cross *will* successfully address the problem—rather, it is recognized that this is all one is entitled to and that it *might*, in appropriate cases, suffice:

> [T]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." . . . The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons . . . .

United States v. Owens, 484 U.S. 554, 559-60 (1988) (alteration in original) (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987)).

44 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595-96 (1993):

> Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

Id.

of an event,[45] and the vexing problem of eyewitness identification.[46] Lower courts have justified the denial of funds for expert assistance when requested by indigent defendants by ruling that cross-examination of the government expert will suffice.[47]

This treatment of cross-examination as the palliative of choice has its flaws, not merely in its expectation that cross-examination without other resources can fairly respond to an expert witness. The mythic status of cross-examination in this regard actually impedes accurate fact-finding because leading questions are not always an appropriate or sufficient tool for truth finding. Courts have not acknowledged these limitations, which are found particularly in cases involving a defense of mistaken identification. Other problematic circumstances include cases where the witness is lying or mistaken but no impeaching evidence such as a prior inconsistent statement or criminal record exists; where a scientific laboratory has conducted flawed tests or discarded contradictory results;[48] or where an accepted scientific technique is presented

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45 *Owens*, 484 U.S. at 560 ("The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success . . . . They are, however, realistic weapons.").

46 *See* Watkins v. Sowders, 449 U.S. 341, 348 (1981):

> [W]hile identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the "integrity"—of the adversary process.
>
> Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification . . .

Id. (quoting Manson v. Brathwaite, 432 U.S. 98, 113 n.14 (1977)).

47 Paul C. Giannelli, Ake v. Oklahoma: *The Right to Expert Assistance in a Post*-Daubert*, Post-DNA World*, 89 CORNELL L. REV. 1305, 1356 (2004) ("[I]n rejecting a due process right to retest, several courts [have] reasoned that the defendant's opportunity to cross-examine the prosecution's expert witnesses provides sufficient protection."). As one court contended:

> Defendant is unable to show that denial of the expert witness funding resulted in either abuse or prejudice. His argument rests on the premise that DNA evidence is so scientifically complex and technically specialized that it is beyond the ability of most attorneys to understand and adequately defend against. His argument for state-funded expert witness assistance would be persuasive if this premise were valid. However, we disagree with his contention that the average attorney is ill-equipped to defend against this type of evidence. To the contrary, law libraries—i.e., law journals, practitioners' guides, annotated law reports, CLE materials, etc.—are teeming with information and advice for lawyers preparing to deal with DNA evidence in trial. Even a cursory perusal of the literature in this area reveals copious lists of questions for defense attorneys to use in cross-examinations and other strategies for undermining the weight of DNA evidence.

State v. Huchting, 927 S.W.2d 411, 419-420 (Mo. Ct. App. 1996).

48 Periodically, forensic laboratories have been exposed for shoddy or improper testing protocols. *See*, *e.g.*, Jennifer L. Eckroth, *Tainted DNA Evidence and Post-Conviction Reversals in Houston, Texas: Suggested Solutions to Curb DNA Evidence Abuse*, 31 AM. J. CRIM. L. 433, 434 (2004) ("Several crime labs across the United States have become the focal point of investigations involving the intentional or negligent abuse of DNA evidence to convict criminal defendants.").

As Professor Brown has observed, "Contamination of samples and poor chains of custody can be hard to identify in forensic analysis, as can analytical errors arising from arcane interpretive methodologies, signal-detection theory errors, inadequately calibrated equipment, negligence, or fraud." Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1602 (2005).

as reliable, only to be proved inaccurate years later after further research and new scientific developments.[49]

The genesis of cross-examination was as a tool to expose dishonesty,[50] and thus it lacks utility when confronting the honest-but-mistaken witness, the paradigm found in eyewitness identification cases. Because eyewitnesses often do not have "impeachable" backgrounds and undeniably testify from the purest of motives (the goal being to put the actual perpetrator, usually a stranger towards whom there is no animus, in jail), and because eyewitnesses cannot tell us what they do not themselves know—i.e., that their identifications may

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49 The concern that much forensic science overstated its conclusions was validated in February 2009, with the release of the report *Strengthening Forensic Science in the United States: A Path Forward* by the National Academy of Sciences (NAS). That report concluded that "[w]ith the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." NAT'L RESEARCH COUNCIL, NAT'L ACAD. OF SCIS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at S-5 (2009).

Even preceding the release of the NAS report, problems in forensic evidence were becoming manifest. After years of providing expert testimony matching a crime scene bullet to a particular "batch" from a manufacturer, via a process known as Comparative Bullet Lead Analysis (CBLA), the F.B.I. in 2005 renounced the practice:

> [T]he FBI in 2002 commissioned the National Research Council of the National Academies of Science (NRC) to evaluate the conclusions being drawn by its employees . . . . The FBI suspended CBLA testing while the review was pending. In February 2004, the NRC rendered a 113-page report, entitled *Forensic Analysis: Weighing Bullet Lead Evidence*, which evaluated CBLA against each *Daubert* criteria and determined that the conclusions drawn from CBLA do not meet the scientific reliability requirements established by *Daubert/Kumho*. . . .
>
> Following a fourteen-month review of the findings and recommendations of the NRC, the FBI Laboratory announced on September 1, 2005, that it would no longer conduct CBLA tests.

Ragland v. Commonwealth, 191 S.W.3d 569, 578-79 (Ky. 2006) (internal citations omitted).

The second instance involved arson investigation. New advances in fire causation investigation have cast substantial doubt on expert testimony in arson cases that for years was considered unchallenged science. *See*, *e.g.*, Emilie Lounsberry, *Arson Science – To the Rescue?: Advances Give Hope to Those Who Say They Were Wrongly Convicted*, PHILA. INQUIRER, Jan. 14, 2007, at A18 ("New methods of analysis and computer simulation are transforming arson investigators' understanding of how fires start and spread. Some of the old axioms have been debunked; other have been shown to be true much of the time, but not always.").

50 *See supra* text accompanying notes 12-16. Dean Wigmore viewed cross-examination as the essence of the trial and truth-seeking process in the United States. He viewed its capabilities more broadly, presuming it capable of serving two ends: proving untruths *and* completing the story by eliciting facts that "remain[ed] suppressed or undeveloped [on direct examination] . . . [including] the remaining and qualifying circumstances of the subject of testimony, *as known to the witness*." 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1368, at 36-37 (3d ed. 1974) (emphasis added). Neither facility applies in eyewitness cases.

suffer from own-race-bias,[51] weapons-focus,[52] or distortion caused by stress[53] or by post-event information[54]—cross-examination alone cannot expose the mistaken identification.

The failure of courts to acknowledge that cross-examination cannot expose these variables or elucidate their impact on the witness's perception, memory, and recall is prevalent. Time and again, courts have precluded expert witnesses from testifying, concluding (without any consideration of the inherent limits of cross-examination) that this tool alone is sufficient to expose a mistaken identification. A typical[55] pronouncement in this regard is that of the Florida Supreme Court. While adhering to a rule of "discretionary" admissibility of expert testimony in identification cases, that court has emphasized that "a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony."[56]

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51 Psychological research has persuasively demonstrated a heightened risk of mistaken identifications when the victim or witness and the perpetrator are of different races. *See generally* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001). *See also* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, ANN. REV. PSYCHOL., 2003, at 277, 280-281 ("[T]he evidence is now quite clear that people are better able to recognize faces of their own race or ethnic group than faces of another race or ethnic group."); Otto H. MacLin et al., *Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition*, 7 PSYCHOL. PUB. POL'Y & L. 134, 135 (2001); Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1822-23 (2003).

Because of this, in *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999), the New Jersey Supreme Court required a jury instruction directing jurors to treat cross-racial identification testimony with caution.

52 "Weapons focus" is the phenomenon of a crime witness or victim unconsciously directing his/her attention away from the perpetrator's face and towards an actual or perceived weapon. Elizabeth F. Loftus et al., *Some Facts About "Weapon Focus*," 11 LAW & HUM. BEHAV. 55, 55-62 (1987).

53 High stress, a typical condition in violent crime cases, increases the unreliability of subsequent identifications. *See* Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265 (2004).

54 Post-event information can come from police interviews or crime witness receipt of information from the media or other sources that taints or reconfigures the witness's memory of the perpetrator's appearance. *See* Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546 (1978); Elizabeth F. Loftus, *Make-Believe Memories*, 58 AM. PSYCHOLOGIST 867 (2003) (describing her early research on how tainted questioning of a witness can corrupt her/his memory); Elizabeth F. Loftus & Hunter G. Hoffman, *Misinformation and Memory: The Creation of New Memories*, 118 J. EXPERIMENTAL PSYCHOL. 100, 100-04 (1989).

55 That limited admission and approval of discretionary exclusion are the norm nationally is clear. *See* Thomas Dillickrath, Comment, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059, 1061 (2001) ("[W]hile ostensibly following the 'majority' [discretionary admission] rule, actual policy of courts so disfavors this type of evidence that many courts are actually operating in a nearly per se exclusionary manner. The courts in many jurisdictions have never overruled the trial judge's discretionary exclusion of misidentification testimony, thereby sending a message that almost inherently disqualifies this testimony.").

56 McMullen v. State, 714 So. 2d 368, 371 (Fla. 1998), *quoting* Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983).

Indeed, this thinking remains current and potent. As the Tenth Circuit asserted in 2006:

> [O]utside these specialized circumstances, expert psychological testimony is unlikely to assist the jury—skillful cross-examination provides an equally, if not more, effective tool for testing the reliability of an eyewitness at trial. . . . Jurors, assisted by skillful cross-examination, are quite capable of using their common-sense and faculties of observation to make this reliability determination.[57]

The mistaken-identification case illustrates the dangers of treating cross-examination as omnipotent and sufficient to accurate fact adjudication.[58]

III. The "At Risk" Status of Cross-Examination

Our Constitution has not been amended, the right to counsel in criminal cases remains intact, and trials continue in the adversarial mode. Nonetheless, two developments in the law of hearsay–the continuing impact of electronic media and the turn from a reading culture to a visual information culture–raise questions about the role and efficacy of cross-examination in the adversarial trial.

A. Nontestimonial Hearsay and the Removal of Reliability Limits

The successive decisions of *Crawford v. Washington*, *Davis v. Washington*, and *Whorton v. Bockting* raise the specter of there being no constitutional restrictions on state evidentiary rules that admit "nontestimonial hearsay evidence."[59] If indeed the *Ohio v. Roberts* reliability test has been eliminated, states are free to craft any number of new hearsay exceptions, all of which will permit the increased admission of statements without cross-examination either at their making or at the time of trial. The sole requirement will be that the hearsay be nontestimonial, a definition which the Supreme Court has made expansive in *Davis*:

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57 United States v. Rodriguez-Felix, 450 F.3d 1117, 1125 (10th Cir. 2006).

58 For a more complete treatment of this issue, *see* Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727 (2007).

59 *See* Ohio v. Roberts, 448 U.S. 56, 65-66 (1980). The potential for a minimal due process standard for evaluating admissibility of nontestimonial hearsay not within the reach of the Confrontation Clause is discussed in Epstein, *Avoiding Trial by Rumor*, *supra* note 31.

> 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.[60]

The *Davis* Court left for another day "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"[61] However, both *Crawford*'s narrow definition of "witness" as a bearer of testimony and its explicit distinction that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"[62] imply that most statements made to private citizens will be nontestimonial, and thus subject solely to state hearsay rules.

These distinctions have been seized on by lower courts, which have read expansively the *Davis* criterion of emergency statements as nontestimonial[63] and have emphasized any conceivable purpose for the interview as non-interrogation to remove hearsay declarations from *Crawford'*s confrontation strictures.[64] Both the de-constitutionalizing of admissibility standards for nontestimonial hearsay and the expansive definition being applied to that

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60 Davis v. Washington, 547 U.S. 813, 822 (2006).

61 *Id.* at 823 n.2.

62 Crawford v. Washington, 541 U.S. 36, 51 (2004).

63 *See, e.g.*, United States v. Clemmons, 461 F.3d 1057, 1060-61 (8th Cir. 2006):

> When the officers arrived at the scene, Williams was lying in front of a neighbor's house, suffering from multiple gunshot wounds. Officer Lester further testified that his purpose in speaking to the victim was, "[t]o investigate, one, his health to order him medical attention and, two, try[ ] to figure out who did this to him." Any reasonable observer would understand that Williams was facing an ongoing emergency and that the purpose of the interrogation was to enable police assistance to meet that emergency. Accordingly, because Williams's statements were nontestimonial, they do not implicate Clemmons's right to confrontation.

Id. (citations omitted) (alterations in original); s*ee also* State v. Holdbrook, No. CA2005-11-482, 2006 WL 3183706, 2006-Ohio-5841, at ¶ 61-62 (Ohio Ct. App. Nov. 6, 2006) (internal citation omitted) (statements made to police arriving at scene about where shots had previously been fired from were nontestimonial). *Clemmons* is arguably at odds with *Davis*, which distinguished between questions "not seeking to determine . . . 'what is happening,' but rather 'what happened.'" *Davis*, 547 U.S. at 830.

64 Illustrative of this point is *State v. Stahl*, 111 Ohio St. 3d 186, 855 N.E.2d 834 (2006):

> [T]he state in the instant case seeks to introduce a statement made by a victim to a *medical professional* during an emergency-room examination identifying a person who allegedly raped her. Though made in the presence of a police officer, the identification elicited during the medical examination came to a medical professional in the ordinary course of conducting a medical examination, and no *Miranda* warnings preceded its delivery. Unlike *Crawford*, this case does not involve police interrogation. . . . Mazurek's statements to [the nurse] do not fall within [*Crawford's* list of testimonial hearsay], and we decline to expand that list to include statements made to a medical professional for purposes of receiving medical treatment or diagnosis.

Id. at ¶ 18.

hearsay and the expansive definition being applied to that category of out-of-court statements will permit trials to be conducted with significant testimony never subjected to the testing of cross-examination.[65]

B. The Forfeiture Doctrine Resuscitated

The doctrine of forfeiture by wrongdoing, which admits hearsay without cross-examination if the defendant was in some way culpable in procuring the declarant's absence, is of long standing[66] and codified in the Federal Rules of Evidence[67] and many state evidence codes.[68] Viewed as an equitable principle rather than one requiring a knowing waiver of a constitutional right,[69] its status was reinvigorated and scholars were prompted to explore (and suggest extensions to) the doctrine's borders after *Crawford*, in which Justice Scalia reminded us that classifying hearsay as testimonial in no way precluded its application.[70]

Id. at ¶ 18.

[65] This new potential has already received scholarly acknowledgment. Professor Lininger explicitly urges "an expansion of statutory hearsay law" while proposing some countervailing statutory confrontation/reliability standard. Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 275, 299-310 (2006). *See also* Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of* Crawford, 105 COLUM. L. REV. 2409 (2005) (arguing that *Crawford* may necessitate revising this hearsay exception but calling for a statutory reliability mandate if *Ohio v. Roberts* is no longer applicable to nontestimonial hearsay).

[66] The principle was articulated by the United States Supreme Court as early as 1879:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Reynolds v. United States, 98 U.S. 145, 158 (1879).

[67] The Federal Rules of Evidence approve admission of a statement "against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." FED. R. EVID. 804(b)(6).

[68] CAL. EVID. CODE § 1350 (West 1995); DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); 725 ILL. COMP. STAT. ANN. 5/115-10.2a (West 2004) (limited to domestic violence prosecutions); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); PA. R. EVID. 804(b)(6); S.D. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6).

[69] *Cf.* Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938) (requiring that waivers of constitutional rights be knowing, intelligent, and voluntary).

[70] "[T]the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." Crawford v. Washington, 541 U.S. 36, 62 (2004).

of the evidence[71] and that it need not be the defendant on trial who procured the declarant's unavailability.[72] Although the United States Supreme Court has limited forfeiture to cases where the prosecution can prove that it was the defendant's intent to procure the witness's unavailability,[73] a majority of the Court believes intentionality can be found in a pattern of abuse showing that the accused "intended to dissuade a victim from resorting to outside help, and includ[ing] conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions."[74]

This forfeiture paradigm had previously been advanced by scholars, who sought to elasticize the range of conduct that would be found to have procured the declarant's unavailability, with particular emphasis on the dynamics of prolonged spousal or child abuse as satisfactory causes for a finding of forfeiture:

> [I]n many, if not most, cases of victimless domestic violence prosecution, a batterer's conduct *over time* has caused the victim's unavailability. . . . It may well be that, if forfeiture is rightly conceptualized, domestic violence prosecutors will frequently be able to prove to a judge's satisfaction that the defendant's misconduct procured the victim's unavailability. This would suggest, however, not that the principle of forfeiture is being

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71 *See*, *e.g.*, United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002) ("[W]e join the other circuits which have held that the preponderance-of-the-evidence level is correct."); State v. Meeks, 88 P.3d 789, 794 (Kan. 2004) ("[W]here waiver by misconduct is an issue, the burden of proving that the defendant procured the absence of the witness is upon the State by a preponderance of the evidence."); *but cf.* People v. Giles, 19 Cal. Rptr. 3d 843, 849 (Cal. Ct. App. 2004) (applying a clear and convincing evidence standard but leaving open whether the preponderance standard is all that is constitutionally required); Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 809-810 (2005) (endorsing use of forfeiture doctrine in domestic violence cases with a preponderance standard).

72 This doctrine of implied waiver has been applied to co-conspirators with no actual involvement in, or pre-event knowledge of, the act that ensured the declarant's unavailability. *See*, *e.g.*, United States v. Thompson, 286 F.3d 950, 965 (7th Cir. 2002) ("By limiting coconspirator waiver-by-misconduct to those acts that were reasonably foreseeable to each individual defendant, the rule captures only those conspirators that actually acquiesced either explicitly or implicitly to the misconduct.").

73 *See* Giles v. California, 128 S. Ct. 2678, 2689 (2008) ("[U]nconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying . . . the testimony was excluded unless it was confronted or fell within the dying-declaration exception.").

74 *Id.* at 2693. Concurring in part, Justices Souter and Ginsburg emphasized that "the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help[.]" *Id.* at 2695 (Souter, J., concurring). The dissenters in *Giles* agreed with Justice Souter's domestic violence forfeiture thesis. *Id.* at 2708 (Breyer, J., dissenting).

> incorrectly applied but, rather, that the law is properly accounting for the realities of the uncooperative domestic violence victim.[75]

This article does not purport to assess the constitutional, evidentiary, or social value of these developments and theories in forfeiture doctrine.[76] They are noted for the single purpose of establishing a trend line in cross-examination practice: As with the expansive approach to defining nontestimonial hearsay and the abrogation of the reliability test for such hearsay, more trial evidence will be presented without benefit of cross-examination.

C. Cross-Examination in the Age of Electronic Media

The United States has a significant portion of its population devoted and acclimated to receiving information electronically in a visual format. At the end of 2006, "[t]he average American viewer watche[d] 4 hours and 35 minutes of TV each day, according to a 2006 report from Nielsen Media Research."[77] By contrast, reading time is one-fourth of that.[78]

There is some support for a conclusion that this correlates with shorter attention spans[79] and a greater preference and/or capacity to obtain information visually rather than aurally. Neuroscience shows that the brain may favor such information delivery, as "the physiological predominance of the sense of sight

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75 Deborah Tuerkheimer, Crawford*'s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 49-51 (2006) (footnote omitted); *see also* Andrew King-Reis, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441 (2006).

The same theoretical paradigm has been proposed for child abuse/assault cases. Laurie E. Martin, *Child Abuse Witness Protections Confront* Crawford v. Washington, 39 IND. L. REV. 113, 142 (2005) ("Arguments for application of the forfeiture doctrine in cases where the abuse itself is shown to have procured the child victim's absence are strong. Abusers will commonly tell victims not to tell, threaten the victim, their family, or even pets if the child tells; or abusers will ask others, like family members, to keep the child from telling.").

76 Concerns have been expressed over whether the expansion of forfeiture doctrine will lead to trial by unreliable (as well as un-cross-examined) evidence. *See* Kelly Rutan, Comment, *Procuring the Right to an Unfair Trial: Federal Rule of Evidence 804(B)(6) and the Due Process Implications of the Rule's Failure to Require Standards of Reliability for Admissible Evidence*, 56 AM. U. L. REV. 177 (2006).

77 Michael Wamble, *Stud Spud Man Wins His Second Straight Ultimate Couch Potato Title*, CHI. DAILY HERALD, Jan. 4, 2007, at 3.

78 Surveys indicate that "51 percent of the American population never reads a book over 400 pages after they complete their formal education . . . [and t]he average American reads only eight hours (books, newspapers, magazines, Yellow Pages, etc.) every week." Harvey Mackay, *Smartest People Have Something to Learn*, ALBANY TIMES UNION, Dec. 31, 2006, at E1.

79 *See*, *e.g.*, Dimitri A. Christakis et al., *Early Television Exposure and Subsequent Attentional Problems in Children*, 113 PEDIATRICS 708, 708-13 (2004) (documenting significant attention span deficits in seven-year-olds who engaged in substantial television watching years earlier); Renee Hobbs, *Television and the Shaping of Cognitive Skills*, *in* VIDEO ICONS AND VALUES 33, 36-38 (Alan M. Olson et al. eds., 1991) (describing television's ability to shorten viewers' attention spans).

is indicated by the fact that there are more neurons involved in the visual functioning of the nervous system than in the rest of the senses put together."[80]

Where the science is soft is in identifying quantitatively whether and how this visual focus (and its consequential reduction in attention span) affects juror reception and retention of orally-presented proof.[81] It is contended "that juries remember 85 percent of what they see as opposed to only 15 percent of what they hear."[82] Separately, there is a strong capacity to remember "iconic" visual images.[83]

Separate from worries over the impact on cross-examination of an audience with a more visual focus and its correlated limited attention span are concerns about television *content*. The most discussed fear for trials, the "CSI effect," has anecdotal support for its claim that certain types of programming have altered the expectations of jurors in criminal cases and, for prosecutors, raised the burden of proof by requiring seemingly infallible (*e.g.*, DNA) proof.[84] These experiences have not been borne out in controlled studies,[85] but the concern over television impacting on jurors' beliefs continues to motivate lawyers in designing jury strategy and seeking particular jury instructions. Should such a correlation be proved, cross-examination may require reconfiguring, or CSI-category cases may join the ranks of those[86] where the leading question has diminished utility.

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80 Irvin C. Rutter, *Law, Language, and Thinking Like a Lawyer*, 61 U. CIN. L. REV. 1303, 1329 n.55 (1993) (citing Louis N. Ridenour, *Electronics and the Conquest of Space*, *in* AN OUTLINE OF MAN'S KNOWLEDGE OF THE MODERN WORLD 279, 287 (Lyman Bryson ed., 1960)).

81 The ultimate source for this contention is often a communications specialist or jury consultant. *See*, *e.g.*, Fred H. Cate & Newton N. Minow, *Communicating With Juries*, 68 IND. L.J. 1101, 1114 (1993) (relying for this thesis on the contention of the President of Litigation Communications, Inc).

82 Kristin L. Fulcher, Note, *The Jury as Witness: Forensic Computer Animation Transports Jurors to the Scene of a Crime or Automobile Accident*, 22 U. DAYTON L. REV. 55, 72 (1996) (quoting I. Neel Chatterjee, *Admitting Computer Animations: More Caution and New Approach Are Needed*, 62 DEF. COUNS. J. 36, 43 (1995)). *See also* Cate & Minow, *supra* note 81, at 1114 ("It should come as no surprise that as much as ninety percent of verbal testimony is misunderstood or forgotten completely.").

This phenomenon is significantly altering law school teaching, where the information recipients are the next generation of lawyers who will present cases to jurors and the traditional mode of presentation has been oral. Fred Galves, *Will Video Kill the Radio Star? Visual Learning and the Use of Display Technology in the Law School Classroom*, 2004 U. ILL. J.L. TECH. & POL'Y 195, 202-03 (2004). Galves reiterates that "[i]t is clear that people remember more of what they see than what they hear. Therefore, people retain information communicated through sight and sound better than information conveyed through sound alone." *Id.* (footnote omitted).

83 H. Mitchell Caldwell et al., *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 NOTRE DAME L. REV. 423, 493 (2001). Citing to studies on visual image retention, the authors conclude that "our ability to recall a picture is astounding. Whereas even memorized verbal information is subject to forgetting, iconic (visual) images are relatively permanent, and our capacity for them seems virtually unlimited." *Id.* (footnote omitted).

84 Kit R. Roane, *The CSI Effect*, U.S. NEWS & WORLD REP., Apr. 25, 2005, at 48; Richard Willing, *"CSI Effect" Has Juries Wanting More Evidence*, USA TODAY, Aug. 5, 2004, at 1A.

85 *See* Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429 (2006).

86 *See supra* Part II (discussing the inutility of cross-examination in mistaken identification cases).

The transformation to a visual-information, abbreviated-attention-span society (or a society in which a significant portion of adults has these attributes) does not forecast or imply that cross-examination is in an "at-risk" status. However, it does mandate study of whether these factors require that cross-examination be reconfigured. Such study may require significant adaptation of this art, an evolutionary response that re-imagines cross-examination to be cognizant of the limits of aural reception and the expectations of a visual-information-receptor fact finder. Increased brevity in presentation,[87] incorporation of visuals,[88] and dramatics,[89] may prove essential in ensuring that cross-examination retains some capacity to elucidate and inform, if not to be the "great[] engine" in the search for truth. As one writer has cautioned,

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87 The link between the television-information generation and trial presentation is beginning to appear in advocacy writing. Gary S. Gildin, *Reality Programming Lessons for Twenty-First Century Lawyering,* 31 STETSON L. REV. 61, 63 (2001). Noting that members of "generation X" continue to make up an ever-larger plurality of jurors, Professor Gildin advises that

> the assessment of new strategies for shaping trial presentations to Generation X jurors is accompanied by acknowledgment of the second galvanizing change in society—the rapid rise of new technologies to accumulate and convey knowledge. . . . [W]hile the ultimate object of the trial has remained constant, the twenty-first century lawyer must adapt his or her advocacy to accommodate the new audience, as well as to employ new means of information delivery.

Id.

88 The ABA currently lists six vendors with trial presentation software. ABA Legal Tech. Res. Ctr., *Presentation Software: Comparison Chart, at* http://www.abanet.org/tech/ltre/charts/presentationcomparison.html. *See* Caldwell et al., *supra* note 83, at 509 (calling for "the liberal use of visual aids . . . to make the substance of a case easier for the jury to understand and remember"). Litigators have clearly received this message. In today's courtroom, the PowerPoint presentation is only the beginning. Courts have developed principles of and procedures for the admissibility of computer-generated animations. *See*, *e.g.*, State v. Swinton, 847 A.2d 921, 945 n.30 (Conn. 2004); Pierce v. State, 718 So. 2d 806 (Fla. Dist. Ct. App. 1997); Cleveland v. Bryant, 512 S.E.2d 360 (Ga. Ct. App. 1999); State v. Clark, 655 N.E.2d 795 (Ohio Ct. App. 1995); Harris v. State, 13 P.3d 489, 495 (Okla. Crim. App. 2000); Commonwealth v. Serge, 896 A.2d 1170, 1178 (Pa. 2006); Mintun v. State, 966 P.2d 954, 959 (Wyo. 1998).

Computer software for managing and presenting documents, photos and other exhibits is readily available and in use. According to a 2004 American Bar Association survey of lawyers,

> [t]he most readily available evidence presentation device was a laptop equipped with presentation software (22%). On the other hand, the availability of barcode readers (5%), evidence cameras (10%), and integrated lectern/evidence presentation units (13%), was limited. . . .
>
> Although it would be desirable for the courts to provide hardware, larger firms (over 100 attorneys) are taking matters into their own hands. Digital slide projectors (54%), notebook/laptop with presentation software (82%), and overhead projectors (76%) seem to be a part of the trial attorney[']s arsenal. Growing in availability are evidence cameras (34%) and digital audio recording devices (26%). Even for solo attorneys, a laptop with presentation software (21.4%) is becoming a standard tool of the trade.

ABA Legal Tech. Res. Ctr., *Anatomy of Trial Technology*, *at* http://www.abanet.org/tech/ltre/publications/trialtech.html.

89 One writer has described the "legal management of dramatic effect" that was choreographed in the Timothy McVeigh trial as responsive to the fear of jurors' attention spans waning. Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 674 (1999). Rapping quotes a lawyer who observed the McVeigh trial as opining that "[l]awyers are convinced they need drama and entertainment in an age when attention spans have been diminished by television." *Id.* (quoting Andrew Cohen*, Lessons from the Timothy McVeigh Trial*, MEDIA STUD. J., Winter 1998, at 11.)

> The twenty-first century may dictate that we now structure our speeches (and perhaps our witness examinations as well) not only to place first what we want the jurors to recall, but also to open our presentations by instantly unveiling information that will cause the jurors to become sufficiently interested and refrain from pressing their mental remote control button to tune in to another "station."[90]

Reconfiguring the trial presentation's organization and content is essential not only for attentiveness but for comprehension. Studies have shown that visuals, particularly juror notebooks with copies of expert witness slides and glossies, enhance juror comprehension of complex scientific evidence, such as mitochondrial DNA.[91] The National Center for State Courts has recommended that judges consider providing juror notebooks including "photographs of key witnesses" and "copies of key exhibits" in complex or lengthy cases.[92] Cross-examination will not work by words alone.

IV. CONCLUSION

The mythic power of cross-examination remains enshrined in the American adjudicative process, both criminal and civil.[93] What courts have yet to address are two concerns: the demonstrated limits (if not inutility) of this tool in specific contexts such as mistaken identification cases; and the cost to the truth-determining process if cross-examination is no longer required/permitted in increasing categories of cases with the more expansive use of hearsay.

Lawyers have to reckon with even more. Where cross-examination is no longer available, new skills (investigative and persuasive) will be required to adequately test evidentiary reliability, the sine qua non of the paradigmatic

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90 Gildin, *supra* note 87, at 69. Gildin's urgings do not stand in isolation. James McElhaney's "On Litigation" column admonishes lawyers to "[s]how the jurors–don't just tell them–the story of your case." James McElhaney, *Language Has Its Limits*, A.B.A. J., Feb. 2007, at 18.

91 B. Michael Dann et al., *Can Jury Trial Innovations Improve Juror Understanding of DNA Evidence?*, NAT'L INST. JUST. J., Nov. 2006, *available at* http://www.ojp.usdoj.gov/nij/journals/255/trial_innovations.html.

92 NAT'L CTR. FOR ST. CTS., JURY TRIAL INNOVATIONS 102-03 (G. Thomas Munsterman et al. eds., 2nd ed. 2006).

93 Although much of the discussion above focuses on confrontation analysis, a purely criminal trial concern, the trend lines shown there will clearly and consistently impact civil litigation as evidence codes expand or judicial decisions expand the admissibility and role of hearsay proof. In addition, the developments noted in Part III.C–the expectations and modes of learning engendered by the role of television and electronic media–have equal applicability to litigation styles in civil practice.

search for the "discovery of the truth" envisioned and extolled by Wigmore. Where cross-examination is to be practiced, it must occur with an awareness of the needs and limits of its audience, one that may prove to be markedly different in capacities and expectations than the fact finders for whom this art was originally developed.

THE ALL-AMERICAN SPORT OF BIPARTISAN BASHING†

Will Durst*

In introducing me, Dan Kelly mentioned that I ran for mayor of San Francisco. He's right; I ran for mayor in 1987. I came in fourth out of eleven, with two percent of the vote, and I spent fifteen hundred dollars. The three guys who beat me each spent a million dollars. So in fiscal efficiency, on a dollar-per-vote basis, I was mayor of San Francisco. But as you know, it doesn't work that way.

This is a difficult time for me as a political comic. Obama is giving me fits, because nobody wants to mock hope. It's like kicking a small, furry, whimpering thing with big eyes. And you *can't* bring up race. But I have to be honest: I'm so proud of this country. I didn't think we could cast aside our prejudices and actually vote for a Harvard Law graduate. Can you imagine somebody coming up to you eight years ago and saying that Bush was going to be such a bad president that we were going to elect a black guy? One named Hussein?

I have to say that I don't think Bush was the worst president ever. We have to remember William Henry Harrison, the ninth president, who gave a three-hour inaugural speech in the rain, caught pneumonia, and died thirty days later. It's going to be hard to approach that sort of cluelessness, although Bush gave it the old college try. Not only did we invade the wrong country and watch New Orleans turn into Atlantis, we also lost a whole planet from the solar system.

For those of us in political comedy, Bush was like the gold standard. Thirty years from now people will be saying, "Yeah, this guy's an idiot, but I'll tell you, he's no George W. Bush." I was just one little cog in Bush's "no comic left behind" program.

There was no "in between" in how people felt about Bush; people either loved him or hated him. The people who hated him did so with a fire that was fueled from below, and they did not understand why he did not spontaneously combust. And the people that loved him still love him, and they will listen to no argument. It doesn't matter what you try to use–logic, reason, math, science, physics, history–nothing has any effect. "I like George Bush 'cause he's like me." You can't argue with that! "He looks like a guy I could have a beer with." True, but we had to take away the car keys.

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort at Troon North, Scottsdale, Arizona, March 20, 2009.

* Political humorist, San Francisco, California; author, The All-American Sport of Bipartisan Bashing: Common Sense Rantings From a Raging Moderate (2008).

With Bush, I didn't even have to write material. I just wrote down what he said. "Our enemies are innovative and resourceful, and so are we. They never stop thinking about new ways to harm our country and our people, and neither do we." He said that, and apparently he meant it. He also said, "I think we agree, the past is over." "More and more of our imports come from overseas." When he's right, he's right. This is my favorite: "The problem with the French is that they don't have a word for entrepreneur." Bless your hearts for laughing at that. That line is why I can't do comedy clubs anymore; when I told that joke in comedy clubs, people just stared at me. "When in Rome, do as the Romanians do." Yes, he did say that! And no, I have no idea what the Romanians do in Rome.

More recently, we've had some excitement in Illinois. You have to love the state of Illinois! Rod Blagojevich, isn't that a great name? It's going to become a verb. "Oh, man, you blagojeviched on me." He's given a bad name to people with bad names. Everybody in America can say "Blagojevich" now. This guy tried to put a U.S. Senate seat up for sale to the highest bidder! That is criminal in a comic book villain kind of a way. All he needs is a nickname. Maybe that is what the hair is for: "The Helmet."

Blagojevich was impeached by the state assembly, by a vote of 114 to 1. And like you, I had to ask, "Who was the one? Was it a gambler who had the over-under at 113?" As most of you know, it was his sister-in-law. That makes sense, because she has to have dinner with the guy. "Sorry, Rod. Gave it a shot. Can you pass the gravy?" Then the Illinois senate found him guilty.

Now, of course, if he's found guilty in court, he might go to prison. If he does, he will be the fourth Illinois governor since 1974 to spend time at the gray-bar hotel, and he will be the second Illinois governor to be in prison at once! They'll have one more governor in prison than they do in Springfield! Illinois is to corruption what L.A. is to plastic surgery and what upper Michigan is to deer ticks. There's something about the capitol building in Springfield–it acts like a halfway house in reverse.

I have to go back to Bush. "Border relations between Mexico and Canada have never been better." You can understand why. And he said this in New Orleans: "We're going to rebuild these levies to equal or greater strength." I'm no engineer, but I'm thinking greater might be "gooder," because that whole equal thing didn't work out that well.

I know what you're thinking. This talk is called "Bipartisan Bashing," and that's in the title of my book, but I don't sound bipartisan. It's Bush, Bush, Bush. But think of my dilemma over the last eight years. George Bush, Dick Cheney, Donald Rumsfeld–it was a lush, tropical rainforest. It was fecund. And what have we had on the Democratic side? Nothing! Howard Dean, Nancy Pelosi, Harry Reid, John Kerry. You can't mock a vacuum. It's like

trying to staple smoke. You can't even accuse the Democrats of being afraid of their own shadow, because they don't cast one. That's why they were so intent on passing the stem-cell bill: Democrats are depending on that research to generate a spine. It doesn't mean much that they weren't caught up in any of the corruption scandals in Congress a couple of years ago. No one bribes Democrats, because they can't get anything done. Besides, if you do give them money, they don't know what to do with it; they put it in the freezer!

Last year was an election year, which was very good for me. This is from Hilary Clinton: "I find it inconceivable that a sitting president of the United States would lie to me." I'm guessing that the pivotal word there was "sitting." Then there was her statement about being under hostile fire in Bosnia. It turns out it wasn't Bosnia, it was her bedroom; and it wasn't her, it was Bill–but you can be sure there was hostile fire. Then when she apologized, she said she "misspoke." Politicians always do that; they don't lie or make a mistake but only misspeak. Don't you wish we could do that? "Why, I'm sorry, your honor, I must have misembezzled." And when Hillary apologized to the press for misspeaking, she said, "Occasionally, you know, I am a human being." I love that, "occasionally"; they exaggerate so often.

Amazingly, her candidacy was still alive in June of last year, which has to do with the way the Democrats run their primary process. The Republicans, as befits their conservative philosophy, use a scorched earth approach. Boom! It's black and white. If you win a state, you win all the delegates and the contest is over quickly. But the Democrats can't do that, because they are the nurturing party. If you win a state, you win some of the delegates, and if you come in second, you win some too. Everybody's a winner in the Democratic party. It's like the Special Olympics. (If Barack can do a joke about it, I can too.) That's why Hillary was still alive in June, even though McCain was all set.

This was my favorite part. Last year the Republicans had nine rich, old, white guys wearing the same suit talking about change. They co-opted Barack's motto of change to the point where Barack had to change his motto to "change you can believe in."

In April, Hillary was on the steps of the Philadelphia Museum of Art, and she said, "In this race, I am Rocky Balboa." She didn't seem to remember that Rocky lost to the black guy, Apollo Creed. If she had thought through her own analogy, she should have figured out what was going to happen.

Politicians are so contained when they're running for president. Then, after they've lost, they go on the talk show circuit, and they're loose and charming. You can't help but think, "Why didn't *that* Bob Dole (or *that* John Kerry or *that* Al Gore) run for president? Why did that other guy run?"

Then there's Barack Obama, a black guy in a white guys' world. He's not just contained, he's depleted-uranium, nuclear-tipped contained. And he's always got that look, the one on the famous poster, like he can see into the near future or like he's posing for the fifth face on Mount Rushmore. Some say he's arrogant, but at least he's smart. We tried arrogant and stupid, and that didn't work.

Fortunately, Joe Biden gives me some material. You know how politicians like to acknowledge local guys in the crowd and tell personal anecdotes about them. At one of Biden's rallies, he recognized a man sitting in the front and said, "Why don't you stand up and let the crowd have a look–oh, you're crippled. Sorry, I forgot." Biden's also the one who said, "Three little letters, ladies and gentlemen! J-O-B-S! Three little letters!" That might explain some of the financial activity.

I just hope this black-white thing doesn't become an issue–because it doesn't make sense. We should be too smart for that by now. Besides, I'm not "white." My *shirt* is white; but if I were that color, I'd scare the hell out of you. I'm some sort of off-white–beige, tawny, maybe ecru. And no one's really "black." Obama certainly isn't; he's mocha. (He did look darker when he was standing next to John McCain, who might be the whitest human on the face of the planet.)

I think I'm the only one, but I wonder if McCain threw the race on purpose. Think about the situation Obama faces. McCain might well have thought, "Let me see. We're losing two wars, we're ten trillion in debt, and Tampa Bay was in the last World Series. This isn't my America." On top of all of that, there's the economy. I don't know about you, but my 401(k) is now just a 1(k). It might be just a (k). When everybody in America knows the name of the Secretary of the Treasury, it isn't good. No one could blame McCain if he decided he didn't want the job.

There is evidence that McCain tried to blow it: Sarah Palin. He met her *once* before he chose her as his running mate. She was like Republican crack. Think about it. For the first two weeks, the Republicans loved her: "Hurrah, Sarah Palin!" Then came the let-down: "Oh, no, Sarah Palin." But for those of us going cold turkey on Bush, she was like a dose of methadone.

Palin isn't going away, either. She's got the book, and she's doing the talk show circuit. How do you keep them down in Wasilla after they've seen Neiman Marcus? (I have a similar problem with my wife, thanks to you. How do you make them check into the Hilton Garden Inn after they've stayed at the Four Seasons?) I will say this for Palin: She can handle a gun better than Dick Cheney could. If you get shot in the face by Sarah Palin, it's no accident.

Did you see Dick Cheney at Obama's inauguration? He looked like Dr. Strangelove. He was sitting in a wheelchair and wearing black gloves. It was

like the enchantment spell wore off an hour early. He *said* he hurt his back moving boxes. But he was the Vice President of the United States, and he had had four myocardial infarctions. Do you really think he moved his own boxes? Maybe they were empty ones that Pandora needed back. Or maybe he realized it was his last day in a government job, and he was trying to weasel workman's comp. That's something I could relate to.

Speaking of weasels, the people running AIG apparently are unclear on the concept of the term "bonus." You give a bonus to the head of a company that lost $62 billion in one quarter?! After AIG took the government bailout money, it sent its executives to lavish spa retreats. They have given a whole new meaning to the term "bank robbery." Those security cameras in bank lobbies are pointing the wrong way.

You lawyers probably love it because you've gone down on the list of the world's most hated professions. Bankers and insurance people used to be less hated than you, but now they have surpassed you. Way to go! The best line of all was from a stock broker in New York. He said, "This is worse than a divorce." When the interviewer asked why, the broker answered, "Well, I'm worth half what I was, and I'm still married." (That gets a much bigger laugh in a dark club.)

With Congress, we are hoping for some bipartisanship, but not one Republican in the House crossed the aisle to vote for the stimulus package. Republicans say, "We want to work with the President." Sure you do–the same way a five-year-old with a magnifying glass wants to work with an ant. But I think most Americans really do want bipartisanship. About twenty percent of Americans are on the far left and another twenty percent are on the far right. The rest of us, sixty percent of us, are in the middle. We outnumber the combined fringes three to two. And yet, when you watch television, you never hear of us. The focus is always on the ideologues, the guys who will not move from either the right or the left.

I understand that there are philosophical differences. A liberal believes that helping others or the greater good will eventually come back and benefit him, and a conservative believes that helping himself will eventually come back and benefit him. (Even conservatives laugh at that joke, because they don't care.) I'll give you an example. Elliot Spitzer flew a hooker from New York to D.C. (as if there weren't enough hookers in D.C.; I can think of 535 off-hand), gave the hooker four grand, and put her up at the Mayflower Hotel. That, my friends, is a liberal. A conservative tries to get it for free in an airport men's room stall, thus demonstrating fiscal responsibility.

Let me finish here with a couple of observations about San Francisco, where I live. I love it. I do. I love it for the food, the views, the climate. And I love the tolerance. I love the fact that it's been a magnet for the disenfranchised.

That's why it was the birthplace of beatniks and hippies and gays. Beatniks and hippies and gays, oh my! Sometimes, though, the city can drive you nuts. For example, you sometimes want just a cheeseburger. You don't need it covered in a mango chutney aioli or a lovely roasted, sun-dried tomato and basil reduction. You know what we call that in the midwest? Catsup! And our governor? I really like Arnold Swarzenegger, and I'll tell you why. He annoys Democrats and Republicans equally, and he can't run for President. Maybe we need a Congress full of people like Arnold. I'll leave you to think about that.