The Process-Based Approach to Cross-Examination in Administrative Proceedings

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Hearsay is admissible in administrative proceedings; the subjects of those proceedings have a right to cross-examine the witnesses against them. Together these basic principles of administrative adjudication form a paradox, because hearsay brings unexamined declarations into the hearing room. This Article analyzes three judicial solutions to this paradox: discounting the right to cross-examination as not absolute, restricting the category of cross-examinable witnesses to those testifying in person, and interpreting the right to cross-examination as a right to summon declarants to testify. The last of the three solutions is the most satisfactory. Its practical consequence is that administrative tribunals must take steps to ensure that the subjects of proceedings before them receive meaningful access to subpoena power.

I. THE HEARSAY/*GOLDBERG* PARADOX

Two fundamental rules converge in administrative proceedings. The first is the rule that hearsay is admissible. From its enactment in 1946, the Administrative Procedure Act (APA) has provided that "[a]ny oral or documentary evidence may be received," subject to practical limitations on irrelevant, immaterial, and repetitious material.[1] This approach guides most administrative tribunals,[2] and administrative decisions may stand (in the right cases) even where hearsay is their only basis.[3] The permissive approach to hearsay grew out of the desire for

* Administrative Magistrate, Massachusetts Division of Administrative Law Appeals. This Article describes my thoughts in an unofficial capacity. It does not reflect the views of my colleagues, my employing agency, or even (as the discussion should make clear) binding Massachusetts case law. I thank Marla Blum and Bonney Cashin for helpful feedback, and due process champion J. Mark Gidley for introducing me to *Goldberg*.

1. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559); 5 U.S.C. § 556(d). The roots of this liberal standard predate the APA. *See* Interstate Com. Comm'n v. Baird, 194 U.S. 25, 44 (1904) (stating agencies "should not be too narrowly constrained by technical rules as to the admissibility of proof").

2. *See* Roy D. Brenner, Article, *Hearsay in Federal Administrative Adjudications: An Alternative Path to Reliability*, 27 L.F. 9, 10 (1996) (describing APA standard's applicability in federal proceedings); REVISED MODEL STATE ADMIN. PROC. ACT § 404(1)–(2) (UNIF. L. COMM'N 2010) (recommending admissibility of hearsay in state administrative proceedings).

3. *See, e.g.*, Richardson v. Perales, 402 U.S. 389, 402 (1971) (holding reliable hearsay can satisfy substantial evidence standard in administrative hearings); McKee v. United States, 500 F.2d 525, 528 (Ct. Cl. 1974) (stating "rank hearsay" can suffice "if sufficiently convincing to a reasonable mind"); James P. Rooney, *Evidentiary Issues in Administrative Hearings: Hearsay, Expert Testimony and Prior Proceedings*, 42 BOS. BAR J. 4, 4, 12 (1998) (discussing demise of rule requiring "a residuum of legal evidence").

flexibility and efficiency in administrative proceedings, as well as the growing distrust of the hearsay rules' truth-seeking capabilities, especially in nonjury proceedings.[4]

The second fundamental rule took shape in 1970 in *Goldberg v. Kelly*.[5] Addressing welfare termination proceedings in New York, the Supreme Court announced that the subjects of administrative proceedings must be afforded "procedural due process."[6] Two of the specific guarantees the Court adopted were those of "confrontation and cross-examination."[7] The Court explained: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[8] Subjects of administrative proceedings "must therefore be given an opportunity to confront and cross-examine the witnesses."[9]

Goldberg, which here will refer specifically to its guarantee of cross-examination,[10] lives in fundamental tension to the rule admitting hearsay. Hearsay brings statements made outside the hearing room into evidence.[11] Such statements, by definition, are not cross-examined. An Illinois court thus says that the right to cross-examination "implies" a prohibition on hearsay.[12]

Other courts have elaborated on the problem. In the pre-APA case *Tri-State Broadcasting Co. v. FCC*,[13] the FCC permitted a witness to describe the opinions of various people he had spoken to about the merits of a proposed radio permit.[14] The D.C. Circuit struck down the FCC's decision, explaining: "The testimony admitted was clearly hearsay. . . . Its admission deprived the appellant of the right to cross-examine those . . . whose views [the witness] was reflecting into the record."[15] *Costa v. Fall River Housing Authority*,[16] a much more recent Massachusetts case, considered an agency's decision to terminate housing rights on

4. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 371-74, 386-90 (1942) (arguing common law rules of evidence unsuited to administrative process); Kenneth Culp Davis, *Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689, 689 (1964) (critiquing hearsay doctrine's usefulness to measure reliability).

5. 397 U.S. 254 (1970).

6. *See id.* at 264.

7. *Id.* at 270 (quoting Greene v. McElroy, 360 U.S. 474, 496-97 (1959)).

8. *Id.* at 269-70.

9. *Goldberg*, 397 U.S. at 269-70.

10. *See infra* note 48 and accompanying text (identifying other procedural rights protected under *Goldberg*).

11. *See* FED. R. EVID. 801(c) (defining hearsay). Hearsay, in part, is a statement the "declarant does not make while testifying at the current trial or hearing." *Id.*; *see* 2 ROBERT P. MOSTELLER ET AL., MCCORMICK ON EVIDENCE § 246 (Robert P. Mosteller ed., 8th ed. 2020).

12. *See* Chamberlain v. Civ. Serv. Comm'n of Gurnee, 18 N.E.3d 50, 66-67 (Ill. App. Ct. 2014) (stating guarantee of cross-examination "impliedly" entails "a prohibition of hearsay").

13. 96 F.2d 564 (D.C. Cir. 1938).

14. *See id.* at 566.

15. *Id.* at 566-67.

16. 881 N.E.2d 800 (Mass. App. Ct. 2008), *vacated*, 903 N.E.2d 1098 (Mass. 2009).

the basis of a police report and newspaper article indicating that the tenant had engaged in prostitution.[17] The intermediate appellate court wrote:

> *Goldberg* afforded [the tenant] the right to confront and cross-examine adverse witnesses. The housing authority's use of the hearsay information in the report and the newspaper story denied those rights. In effect the police officer and the newspaper reporter testified in absentia and beyond the reach of cross-examination.[18]

Other courts have also recognized the same conflict between administrative adjudication's rules concerning hearsay and cross-examination.[19]

This paradox dissolves in certain jurisdictions and types of proceedings. No U.S. jurisdiction can eliminate the *Goldberg* rule, because *Goldberg* defines obligations applicable to the states through the Fourteenth Amendment.[20] The states can, however, reject the mainstream rule allowing hearsay into administrative proceedings. The hearsay/*Goldberg* paradox is thus absent in jurisdictions such as Georgia, where "hearsay is not appropriate evidence even in an administrative proceeding."[21] The paradox is similarly absent from proceedings before any specific administrative agency that excludes hearsay.[22]

Types of proceedings in which the paradox does not arise are those in which the Supreme Court has tamped *Goldberg* down. There is no hearsay/*Goldberg* paradox in prison disciplinary proceedings, because *Wolff v. McDonnell*[23] held

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17. *Id.* at 802, 804.

18. *Id.* at 809.

19. *See, e.g.*, Ortiz v. Eichler, 616 F. Supp. 1066, 1067 (D. Del. 1985) (addressing "whether [the agency's] practice of admitting and considering hearsay evidence at administrative hearings violates plaintiffs' rights to confront and cross-examine adverse witnesses"), *aff'd*, 794 F.2d 889 (3d Cir. 1986); Brown v. Macy, 222 F. Supp. 639, 642 (E.D. La. 1963) (observing, "whenever hearsay evidence is admissible in an administrative agency proceeding, the quid pro quo is the restriction of the right to cross examine"), *aff'd*, 340 F.2d 115 (5th Cir. 1965); *In re* Claim of Evans, 678 N.Y.S.2d 696, 696 (App. Div. 1998) (upholding administrative law judge's discretionary exclusion of hearsay to protect "fundamental right of cross-examination").

20. *See* Goldberg v. Kelly, 397 U.S. 254, 255 (1970) (discussing requirements arising from Due Process Clause of Fourteenth Amendment).

21. Neal v. Augusta-Richmond Cnty. Pers. Bd., 695 S.E.2d 318, 322 (Ga. Ct. App. 2010). The same is true in most, but not all, North Dakotan administrative tribunals. *See* Stalcup v. Job Serv. N.D., 592 N.W.2d 549, 553 (N.D. 1999) (identifying one statute requiring agencies to obey state rules of evidence and another statute exempting particular agency). Other jurisdictions mention a general prohibition on hearsay in administrative proceedings but seem to apply something closer to the "residuum" rule, under which hearsay cannot form the *only* basis of the agency's decision. *See, e.g.*, Chamberlain v. Civ. Serv. Comm'n of Gurnee, 18 N.E.3d 50, 67 (Ill. App. Ct. 2014) (holding admission of hearsay impermissible but not reversible); Kimble v. Ill. State Bd. of Educ., 16 N.E.3d 169, 184-85 (Ill. App. Ct. 2014).

22. *See* Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 5-6 (1987) (discussing degrees to which various federal tribunals adhere to Federal Rules of Evidence); William H. Kuehnle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 832-34 (2005).

23. 418 U.S. 539 (1974).

such proceedings exempt from the right to cross-examination.[24] *Morrissey v. Brewer*,[25] while reiterating the right to cross-examination in parole revocation proceedings, added the parenthetical caveat that this right yields if "the hearing officer specifically finds good cause for not allowing confrontation."[26] Under *Gagnon v. Scarpelli*,[27] the same caveat applies in probation revocation proceedings.[28] In the probation and parole settings, the paradox is therefore limited to cases lacking "good cause" to dispense with cross-examination.[29]

II. THREE SOLUTIONS

Courts have taken several approaches to confronting the hearsay/*Goldberg* paradox. These include discounting the right to cross-examination as not absolute, restricting the category of cross-examinable witnesses to those testifying in person, and interpreting the right to cross-examination as a right to subpoena any out-of-court declarants.[30]

A. Discounting the Cross-Examination Right

Some courts have tackled the paradox by favoring hearsay's admissibility and discounting the right to cross-examination as "not absolute." An archetype of this approach is *Beauchamp v. De Abadia*,[31] arising from a Puerto Rico proceeding to withhold a medical license.[32] The putative physician complained on appeal that statements of two adverse witnesses were admitted as hearsay through

24. *Id.* at 564. The states are free to reject the *Wolff* exception to *Goldberg*. Alaska, for instance, recognizes "[a]n inmate's right . . . to confront adverse witnesses." James v. State, Dep't of Corr., 260 P.3d 1046, 1052-53 (Alaska 2011). The paradox re-arises in such jurisdictions, assuming they adhere to the majority rule making hearsay admissible.

25. 408 U.S. 471 (1972).

26. *Id.* at 488-89.

27. 411 U.S. 778 (1973).

28. *Id.* at 782, 786 (applying *Morrissey* to probation revocation context).

29. The Supreme Court has held more generally that the quantum of "process" that is "due" depends on the nature of the interests at stake. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976). *Mathews* and its progeny focus principally on the procedures required *prior* to any agency action, leaving intact the full slate of protections that must be provided at *some* point in time. *See id.* at 339-40 (emphasizing elaborate procedures provided after termination and discerning no due process violation); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (upholding limitations on employees' pretermination rights in light of availability of full post-termination hearing). One semi-administrative context in which the *Goldberg* rights appear not to be applicable at any juncture is brief schoolhouse suspensions. *See* Goss v. Lopez, 419 U.S. 565, 583-84 (1975) (requiring only "effective notice and [an] informal hearing permitting the student to give his version of the events" when suspension did not exceed ten days); Wagner v. Fort Wayne Cmty. Schs., 255 F. Supp. 2d 915, 926 (N.D. Ind. 2003) (collecting cases descending from *Goss*). In that setting, and any others governed by the same analysis, there also is no hearsay/*Goldberg* paradox.

30. *See infra* Sections II.A-C (discussing three approaches to paradox). Some judicial opinions recite both halves of the paradox without attempting a reconciliation. *See, e.g.*, Addona v. Adm'r, Unemployment Comp. Act, 996 A.2d 280, 285 (Conn. App. Ct. 2010); Tolman v. Salt Lake Cnty. Att'y, 818 P.2d 23, 29 (Utah Ct. App. 1991).

31. 779 F.2d 773 (1st Cir. 1985).

32. *Id.* at 774.

an investigator's testimony.[33] Addressing the argument, the First Circuit recognized the hearsay/*Goldberg* paradox implicitly, stating: "The principle that hearsay evidence is admissible in administrative proceedings would be vitiated if a party could object to its admission on the ground that he was denied his right to cross-examination."[34] This observation is as true as its corollary—that the right to cross-examine witnesses is vitiated when an agency relies on hearsay.

The First Circuit then rejected the physician's claim that the licensing agency violated his right to cross-examination, explaining that "[t]he right to cross-examination, although important and useful, is not absolute."[35] In support of this analysis, the court cited *Wolff*.[36] Other decisions adopt the same analysis.[37]

The foundations of this approach in the case law are shakier than they may seem. In a literal sense, it is true that *Wolff* rendered *Goldberg* not absolute, but it did so by recognizing the exceptional nature of prison life. As Judge Friendly wrote, "the *Wolff* decision rests heavily on the special problems of according the full gamut of procedural rights within a prison."[38] The animated core of *Wolff*'s concerns is worth recalling:

> Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace . . . . The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake.[39]

The *Wolff* Court's thorough reliance on the unusual circumstances that make cross-examination dangerous in prison is a powerful indication that the Court intended the right to cross-examination to remain vital elsewhere. That case's holding and analysis do not suggest any limitation on this right in routine administrative settings, such as *Beauchamp*'s license-withholding proceeding.

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33. *Id.* at 775.

34. *Id.* at 775-76.

35. *Beauchamp*, 779 F.2d at 776.

36. *Id.* (citing Wolff v. McDonnell, 418 U.S. 539, 568-69 (1974)). *See generally supra* notes 23-24 and accompanying text (discussing *Wolff* holding).

37. *See, e.g.*, *In re* Nichols v. VanAmerongen, 901 N.Y.S.2d 437, 440 (App. Div. 2010) (relying on *Beauchamp*'s reasoning); *In re* Schultz, No. 21116-9-III, 2003 WL 21761860, at *4 (Wash. Ct. App. July 31, 2003) (referring to *Wolff* for proposition confrontation and cross-examination not required in administrative hearings). Some courts also cite in this context to *Mathews*. *See* Cent. Freight Lines, Inc. v. United States, 669 F.2d 1063, 1068 (5th Cir. 1982) (citing *Mathews* and stating "[c]ross-examination is . . . not an absolute right in administrative cases"); Costa v. Fall River Hous. Auth., 903 N.E.2d 1098, 1110-11 (Mass. 2009).

38. Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1296 n.146 (1975).

39. 418 U.S. at 561-62.

Morrissey and *Gagnon* do address proceedings outside the prison discipline context, namely revocations of parole and probation.[40] Both types of proceedings concern the execution of penal sentences already imposed on individuals convicted of crimes. There is good reason to support a robust right to cross-examination in those settings,[41] but they also seem significantly different from the mine run of administrative matters (i.e., those not involving adjudicated crimes). Perhaps more importantly, *Morrissey* and *Gagnon* reiterate that the right to cross-examination *does* persist, *except* where "the hearing officer specifically finds good cause for not allowing confrontation."[42] Even if this caveat applies beyond the parole and probation contexts, it is an exception. To bless the admission of hearsay *without* insisting on "good cause" is to turn the Supreme Court's parenthetical caveat into the rule.

For related reasons, the *Beauchamp* approach fails to offer a meaningful, principled precedent of its own. *Beauchamp* called the right to cross-examine witnesses "important and useful,"[43] but it declined to enforce that right. If there was no error in depriving Mr. Beauchamp of the opportunity to cross-examine the agency's witnesses, then there is no obvious setting in which that opportunity remains guaranteed. Decisions such as *Beauchamp* leave *Goldberg* hollow.

One justification offered for this outcome is the thesis that the Fourteenth Amendment's operative touchstone is "reliability." Thus, in *Costa*, the Massachusetts Supreme Judicial Court walked back the intermediate appellate court's holding that the admission of hearsay violated the right to cross-examination, stating: "'Unlike the confrontation clause, due process demands that evidence be reliable in substance' . . . . [R]eliability, not cross-examination, is the 'due process touchstone.'"[44] This line of analysis suffers from two key weaknesses.

The first is the precariousness of depending on reliability. In *Crawford*, overturning the rule that reliable hearsay can be admitted in *criminal* cases, the Supreme Court offered a devastating critique of reliability as a weight-bearing principle:

> Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting." The Virginia

40. *See supra* notes 25-28 and accompanying text.

41. *See* Friendly, *supra* note 38, at 1296 (stating high level of procedural protection appropriate in proceedings to revoke parole or probation given potential for deprivation of liberty).

42. Morrissey v. Brewer, 408 U.S. 471, 489 (1972); *see* Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973) (applying same rule, drawn from *Morrissey*).

43. Beauchamp v. De Abadia, 779 F.2d 773, 776 (1st Cir. 1985).

44. Costa v. Fall River Hous. Auth., 903 N.E.2d 1098, 1109 (Mass. 2009) (quoting Crawford v. Washington, 541 U.S. 36, 61 (2004); and then Commonwealth v. Given, 808 N.E.2d 788, 794 n.9 (Mass. 2004)).

> Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime . . . while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, while that same court, in another case, found a statement more reliable because two years had elapsed.[45]

Due process provides poor guarantees when its only yardstick is so amorphous and unpredictable.[46]

The other vice of displacing cross-examination with a judge's determination of reliability is that this approach departs from *Goldberg*'s core values. *Goldberg* repetitively championed "procedural due process," a phrase that flirts with redundancy to underscore its nonsubstantive nature.[47] The specific guarantees that *Goldberg*, *Morrissey*, and *Gagnon* set forth are self-consciously structural: In addition to cross-examination, they include written notice of the agency's accusations, an in-person hearing, the opportunity to hire counsel, a neutral decision maker, and a written decision.[48] *Even if* these devices are designed primarily to achieve a reliable result, the Court did not suggest that a judicial determination of reliability could provide an adequate substitute.[49] And it is more natural to interpret *Goldberg* and its progeny as driving not only toward reliable results, but also toward a process built to be seen and experienced as just. Justice Frankfurter highlighted this aspiration in a McCarthy-era opinion, saying: "The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . [A] better way [has not] been found [than an opportunity to be heard] for generating the feeling, so important to a popular government, that justice has been done."[50] A judicial reliability determination does not provide these benefits.

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45. 541 U.S. at 63 (citations omitted).

46. A four-to-three majority of the Massachusetts Supreme Judicial Court declined to worry about this aspect of *Crawford* in *Given*, reasoning that *Crawford*'s analysis "rests almost exclusively on the historical background of the confrontation clause and the particular concerns motivating its ratification." *Given*, 808 N.E.2d at 794 n.9.

47. Goldberg v. Kelly, 397 U.S. 254, 255, 263-64 (1970) (using phrase "procedural due process" four times).

48. *Id.* at 267-71; Morrissey v. Brewer, 408 U.S. 471, 489 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973).

49. *See Crawford*, 541 U.S. at 68-69 (holding judicial determination of testimonial statement's reliability insufficient to satisfy constitutional demand of confrontation); *see also Goldberg*, 397 U.S. at 267-71 (discussing due process requirements of notice and opportunity to hire counsel without mention of reliability); *Morrissey*, 408 U.S. at 489 (listing due process requirement of in-person hearing and neutral decision maker without discussion of reliability); *Gagnon*, 411 U.S. at 786 (detailing entitlement to written report without reference to reliability determination).

50. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

The approach that jettisons the right to cross-examination as not absolute, even if it espouses reliability as an alternative touchstone, thus honors neither *Goldberg*'s doctrine nor its underlying values.

B. Limiting the Cross-Examination Right to In-Person Witnesses

Some courts have resolved the hearsay/*Goldberg* paradox by holding that the right to cross-examination is limited to witnesses appearing to testify in person. Under this approach, *Goldberg* continues to serve a real purpose, by preventing show hearings at which the agency's case is presented unchallenged.

An example is the Louisiana case *DMK Acquisitions & Properties, LLC v. City of New Orleans*,[51] where a company challenged a New Orleans agency's determination that the company's property had become a public nuisance following Hurricane Katrina.[52] On appeal, the company challenged the agency's reliance on written reports of a nontestifying inspector.[53] The appellate court rejected that argument on the grounds that the company "was not denied the right to cross-examine the witnesses . . . *who testified at the hearing*."[54] Other courts have expressed the same attitude.[55]

This approach to the problem is ultimately more clever than satisfying. It seems engineered to repel *Goldberg*-based appeals, but not to advance a coherent program. The primary function of cross-examination is to probe the veracity and weight of witness testimony.[56] The testimony of absent witnesses may be no less probe worthy. Reliable results and procedural justice are both likely to suffer if the agency can make its case untestable by absenting its witnesses.

This leads to the next problem, which is one of practical incentives. A rule limiting the cross-examination right to in-person witnesses encourages administrative agencies to leave their witnesses at home. Agency enforcers may be driven to insulate their cases by presenting evidence through investigators or affidavits. The quality of the evidence supporting administrative decisions will

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51. 124 So. 3d 1157 (La. Ct. App. 2013).

52. *Id.* at 1159.

53. *Id.* at 1164.

54. *Id.* at 1167 (emphasis added). The appellate court recast the company's cross-examination-based argument as a claim to a violation of the state's residuum doctrine. *See id.*

55. *See, e.g.*, Costa v. Fall River Hous. Auth., 903 N.E.2d 1098, 1108-09 (Mass. 2009) (interpreting state regulation to limit cross-examination right to "only those persons who actually appear and testify as 'witnesses'"); Beauchamp v. De Abadia, 779 F.2d 773, 775 (1st Cir. 1985) (deeming opportunity "to cross-examine all of the persons who testified . . . at the hearing" sufficient); State v. Wright, 456 N.W.2d 661, 664 (Iowa 1990) (interpreting state statute to guarantee "[c]ross-examination of witnesses *who are available*"). Apparently with the same concept in mind, some state statutes protect a right "to cross-examine *witnesses who testify*" at administrative hearings. *See, e.g.*, MASS. GEN. LAWS ch. 30A, § 11(3) (2020) (emphasis added); COLO. REV. STAT. § 24-4-105(4)(a) (2021).

56. *See* Brenner, *supra* note 2, at 9-10 (discussing value of cross-examination for probing narration, sincerity, perception, and memory); Pierce, *supra* note 22, at 15 (explaining cross-examination allows opponents of proffered evidence to demonstrate its unreliability).

suffer. It is difficult to believe that any adjudicatory system would consciously support this incentive structure.

A closer question is whether, within the context of *Goldberg*'s "opportunity to confront and cross-examine adverse witnesses,"[57] it is textually reasonable to interpret the word "witnesses" as limited to in-person testifiers. *Black's* offers two definitions of the word "witness," both extending beyond in-person testimony: The first includes "[s]omeone who sees, knows, or vouches for something," whereas the second covers "someone who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit."[58] Similarly, of the two definitions offered in the *Corpus Juris Secundum*, one is limited to in-person testimony, but the other includes "all persons from whose lips testimony is extracted to be used in any judicial proceeding."[59] With these sources in mind, it is at least questionable whether an interpretation of "witnesses" as limited to in-court testifiers is most natural.

That narrow interpretation becomes more dubious in light of *Crawford*. Courts insist that *Crawford*'s holding is limited to the criminal context,[60] and that much is clear from the opinion. But there is still a terminology lesson to be drawn from *Crawford*'s interpretation of the Sixth Amendment's phrase, "witnesses against" (someone).[61] As an abstract matter, "[o]ne could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in between."[62] In selecting the "in-between" option, *Crawford* drew not only on legal history but also on *Webster's*, stating that the Sixth Amendment

> [A]pplies to "witnesses" against the accused—in other words, those who "bear testimony." 2 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid*. An 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.[63]

57. Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

58. *Witness*, BLACK'S LAW DICTIONARY (11th ed. 2019).

59. 97 C.J.S. *Witnesses* § 1 (1957).

60. *See, e.g.*, Coe v. Strong, No. 13-CV-6088, 2014 WL 4540226, at *7 (W.D. Wash. Sept. 11, 2014) (stating *Crawford* and its progeny have limited relevance "outside a criminal trial"). *See generally* Hannah v. Larche, 363 U.S. 420, 440 n.16 (1960) (holding Sixth Amendment's protections "specifically limited to 'criminal prosecutions'").

61. Crawford v. Washington, 541 U.S. 36, 42-43 (2004).

62. *Id.*

63. *Id.* at 51.

Crawford's "in-between" category treats as "witness" testimony all "testimonial" statements. Although the term "testimonial" has no exhaustive definition,[64] it means something very close to the quoted language: "a formal statement to government officers."[65]

If the Sixth Amendment's phrase "witnesses against" an accused extends beyond the individuals testifying in person, then it is difficult to see—at least as a textual matter—why *Goldberg*'s phrase "adverse witnesses" would not also reach beyond the hearing room. The Fifth, Sixth, and Fourteenth Amendments differ in their particular guarantees, but there is no obvious reason why their concerns would be implicated by different categories of "witnesses." Indeed, *Crawford*'s "in-between" group of testimonial statements may provide a sounder universe of statements for *Goldberg* purposes than *Black's* broadest alternative—someone "who sees, knows, or vouches for something"[66]—which would reach virtually *every* kind of statement. As applied in *Costa*, this *Crawford*-based interpretation of *Goldberg* would view the police officer's report, but not the reporter's article, as testimony generating a cross-examination right.[67]

Whatever the optimal definition of "witnesses" is in the *Goldberg* context, a definition limited to in-person testifiers is weak on both policy and language. It is therefore an unattractive method of dissolving the paradox.

C. Equating the Cross-Examination Right with Subpoena Power

A third solution to the paradox is the thesis that providing the subject of the administrative proceeding an adequate opportunity to *subpoena* those witnesses, even if that power goes unused, satisfies *Goldberg*'s demand for an "opportunity to . . . cross-examine adverse witnesses."[68]

Powerful support for this approach comes from *Richardson v. Perales*, best known for retiring the "residuum" rule.[69] One of the claims of error advanced by Mr. Perales, an applicant for disability benefits, was that he "lack[ed] . . . opportunity to cross-examine the reporting physicians."[70] The Supreme Court easily rejected the argument, noting that Mr. Perales "did not take advantage of the

64. *See id.* at 68 ("leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial'"); Michigan v. Bryant, 562 U.S. 344, 357-59 (2011) (emphasizing absence of any clear classification of "testimonial" statements).

65. *Crawford*, 541 U.S. at 51; *see* Williams v. Illinois, 567 U.S. 50, 84 (2012) (stating testimonial statements "prepared for the primary purpose of accusing a targeted individual").

66. *See Witness*, BLACK'S LAW DICTIONARY (11th ed. 2019).

67. Costa v. Fall River Hous. Auth., 903 N.E.2d 1098, 1104, 1111 (Mass. 2009) (discussing admission of newspaper article and police report). The Massachusetts Supreme Judicial Court reached the mirror-image conclusion that the police report was admissible (as reliable), but the newspaper article was not. *Id.*

68. Goldberg v. Kelly, 397 U.S. 254, 269-70 (1970).

69. Richardson v. Perales, 402 U.S. 389, 410 (1971) (holding hearsay can satisfy substantial evidence standard).

70. *Id.* at 404.

opportunity afforded him under [the social security regulations] to request subpoenas."[71]

There are two different ways to read the significance of an individual's failure to subpoena absent declarants. This omission could be interpreted as a forfeiture of an otherwise valid claim of error (i.e., that the declarant should have been cross-examined).[72] But an alternative viewpoint is that no error occurs in the first place if an individual receives and rejects the opportunity to subpoena declarants. *Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission*,[73] another Massachusetts case, involved a challenge to the suspension of a cocktail lounge's liquor license.[74] The primary evidence at the administrative hearing was a transcript from a prior trial, at which a minor, Holly Kozec, admitted to drinking at the lounge.[75] The Supreme Judicial Court rejected a *Goldberg*-inspired claim, explaining:

> The licensees could have called Kozec as a witness and examined her regarding the events to which her transcribed testimony related. They were entitled to a subpoena, if necessary, to compel Kozec's attendance and testimony. The licensees chose not to call Kozec and rested on the stipulated testimony of other witnesses.[76]

The *Salisbury* court then described the right to cross-examination as "not self-executing."[77] An equally sound formulation would be that due process guarantees only an "opportunity" to cross-examine the witnesses, one which the licensees received. A Connecticut court said essentially that in a worker's compensation case; a physician's hearsay letter was admitted against an employing business, but the employer, having made no effort to examine the physician, was deemed to have received "the opportunity for cross examination that due process requires."[78]

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71. *Id.*

72. *See, e.g.*, Travers v. Balt. Police Dep't, 693 A.2d 378, 389 (Md. Ct. Spec. App. 1997) (holding appellant "effectively waived his right to complain" by failing to subpoena declarant); Bennett v. Nat'l Transp. Safety Bd., 66 F.3d 1130, 1137 (10th Cir. 1995) (stating appellant "cannot ascribe error" having foregone "available opportunities for cross-examination"); Hudson v. Heckler, 755 F.2d 781, 784 (11th Cir. 1985) (reasoning appellant "chose to waive her right" to cross-examine declarant).

73. 517 N.E.2d 830 (Mass. 1988).

74. *Id.* at 830.

75. *Id.*

76. *Id.* at 833 (citations omitted).

77. *Embers of Salisbury*, 517 N.E.2d at 833.

78. *See* Aetna Ambulance Serv., Inc. v. Adm'r, Unemployment Comp. Act, No. CV-06-4021166-S, 2012 WL 6634912, at *5 (Conn. Super. Ct. Nov. 28, 2012); *see also* Edgecomb v. Hous. Auth., 824 F. Supp. 312, 316 (D. Conn. 1993) (observing "in *Perales* . . . the claimant had an opportunity to cross-examine but failed to take advantage of it"); Wright v. Comm'r of N.Y. State Dep't of Motor Vehicles, 189 A.D.2d 767, 769 (N.Y. App. Div. 1993) (observing "petitioner was free to subpoena any witness he desired to question").

The primary benefit of this solution to the hearsay/*Goldberg* paradox should be apparent. This approach does not discount the right to cross-examination. It acknowledges the good reasons to probe statements of absent declarants and does not encourage administrative enforcers to intensify their reliance on hearsay. This approach honors *Goldberg* by demanding that a subject of a proceeding who *wants* to cross-examine the adverse witnesses must receive an opportunity to do so.

It may be less obvious that this approach takes seriously the divide between criminal and administrative proceedings, and specifically the rule allowing administrative tribunals to rely on hearsay. It is important to see what *Crawford* demands and *Goldberg* does not. In criminal cases, the admission of testimonial hearsay requires "unavailability and a prior opportunity for cross-examination."[79] Unavailability is a key demand: Whenever a witness *is* available, his or her out-of-court statements cannot be introduced.[80] This demand is absent from the administrative context (under this third solution to the paradox). An agency may therefore introduce for its truth, and an adjudicator may rely upon, an out-of-court statement of a readily available witness whom the parties simply do not wish to call. Out-of-court statements of a person who *does* end up testifying also can be considered for their truth.[81] In short, whereas criminal cases require the witness to be present, administrative proceedings require the witness only to be procurable.[82]

The distinction between *Crawford*'s demand for actual presence and *Goldberg*'s demand for an *opportunity* to call the declarant may still appear more theoretical than practical. It may seem likely that subjects of administrative proceedings will subpoena *all* out-of-court declarants to testify. But both experience and strategic considerations suggest otherwise. As an anecdotal datapoint, the discussion so far has referenced at least eight cases in which the subjects of administrative actions failed to call absent declarants.[83] Such cases often reflect strategy more than inadvertence. A litigant often will suspect that, on the stand, the witness will only emphasize the same testimony that otherwise would be offered indirectly. In such circumstances, the indirect testimony may be less damaging, and more susceptible to attacks focused on credibility and weight (which

79. Crawford v. Washington, 541 U.S. 36, 68 (2004).

80. *See id. Crawford* did not focus directly on whether out-of-court statements of a *testifying* witness can be introduced for their truth. *See id.* at 59 (discussing "statements of witnesses absent from trial"). In practice, such statements often are admitted for other purposes, such as impeachment. *See* MOSTELLER ET AL., *supra* note 11, at § 33.

81. *See* FED. R. EVID. 801(d)(1) (noting testifying witness's prior out-of-court statement not hearsay if witness subject to cross-examination). This may be what the Seventh Circuit meant when it said that hearsay "is generally admissible in administrative proceedings, and may supply substantial evidence . . . so long as there has been an opportunity for cross-examination." Karroumeh v. Lynch, 820 F.3d 890, 898 (7th Cir. 2016).

82. *Cf.* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009) (stating, in *criminal* cases, "the ability to subpoena the [declarants] . . . is no substitute for the right of confrontation").

83. *See supra* notes 69-78 and accompanying text.

are fair play, since the opposing party also could call the witness). *Goldberg*'s willingness to permit available witnesses to testify in absentia—so long as the *opportunity* to call them exists—thus translates into an appreciable increase in agencies' real-life reliance on hearsay.

Another practical gap may arise between the judicial and administrative treatments of hearsay. As discussed earlier, the "witnesses" for *Goldberg* purposes might not include *all* out-of-court declarants, but instead only those making statements in testimonial encounters.[84] That premise would mean that non-testimonial statements are free from both *Crawford* and *Goldberg*. Traditional hearsay rules will mean that many such statements are nevertheless inadmissible in judicial proceedings—but not in administrative proceedings. *Costa*'s newspaper article, for example, might be excludable in court but properly admissible in an administrative hearing.

One last issue worth addressing is the character of the access to subpoena power sufficient to satisfy *Goldberg*. When witnesses are available to testify voluntarily, no such power seems necessary. In other circumstances, subpoenas need to be available,[85] as they commonly are.[86] Subpoenas also must be enforceable: Where they are disregarded, it is hard to say that anyone received a true "opportunity" to cross-examine the witnesses.[87] Subpoena power cannot be used effectively, and therefore does not create an "opportunity" for cross-examination, unless the identities of the absent declarants are disclosed in a timely manner.[88] Lastly, administrative tribunals may need to take measures to ensure that litigants—especially unrepresented ones—are aware of the subpoena power they possess. "Opportunities" a litigant does not know about are not very meaningful in real-world terms.[89]

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84. *See supra* notes 64-66 and accompanying text.

85. *See* Costa v. Fall River Hous. Auth., 881 N.E.2d 800, 809-10 (Mass. App. Ct. 2008) (stating right to question witnesses becomes "meaningless" if governing regulations "do not provide the participant with the right to subpoena witnesses"), *vacated*, 903 N.E.2d 1098 (Mass. 2009); *see also* Edgecomb v. Hous. Auth., 824 F. Supp. 312, 316 (D. Conn. 1993) (holding recipients of housing assistance denied right to cross-examination where section 8 procedures did not "provide participants with the right to subpoena witnesses").

86. *See* REVISED MODEL STATE ADMIN. PROC. ACT § 410 (UNIF. L. COMM'N 2010) (prescribing rules for subpoenas in state administrative proceedings).

87. *See* Aguirre v. San Bernardino City Unified Sch. Dist., 170 Cal. Rptr. 206, 215 (Ct. App. 1980) (stating absence of subpoena power cannot excuse denial of rights to confrontation and cross-examination), *vacated*, 654 P.2d 242 (1982). *But see* Rispoli v. Waterfront Comm'n of N.Y. Harbor, 961 N.Y.S.2d 105, 106 (App. Div. 2013) (deeming issuance and violation of subpoena "good cause" for dispensing with cross-examination). It is important to recognize that, in practice, subpoenas issued by administrative agencies can be onerous and costly to enforce.

88. *See* Friendly, *supra* note 38, at 1286 (emphasizing importance of disclosing adverse witnesses' identities).

89. *See* Hudson v. Heckler, 755 F.2d 781, 784-85 (11th Cir. 1985) (citing cases where administrative law judges had duty to instruct appellants of cross-examination right but discerning no such duty where paralegal assisted subject of proceedings).

Practically speaking, the following measures seem prudent:[90] (a) advising the parties well in advance of the evidentiary hearing of their right to subpoena or call material witnesses, including adverse witnesses; (b) requiring the parties to identify, still in advance of the hearing, any individuals whose out-of-court declarations they intend to rely upon; and (c) suspending proceedings in the event that one party proffers a reasonable need for hearsay declarations and the other party is pursuing reasonable efforts to compel the declarant's attendance.[91]

III. CONCLUSION

The Supreme Court in *Goldberg* granted the subjects of administrative proceedings a right to cross-examine the witnesses against them. This holding remains good law in most administrative proceedings. Administrative tribunals and reviewing courts should embrace the *Goldberg* right to cross-examination. They should do so in a manner that celebrates the type of structural, procedural justice that fosters popular and personal perceptions of legitimacy. This Article suggests that, in this corner of *due* process, *compulsory* process is key.

90. These suggestions observe the convention of offering the administrative agency the same procedural protections afforded to its adversary. As a constitutional matter, however, *Goldberg* does not suggest that agencies are entitled to due process.

91. In some cases, it may be necessary to exclude declarations of witnesses who remain unavailable despite good efforts to summon them. *See In re* Claim of Evans, 678 N.Y.S.2d 696, 697 (App. Div. 1998) (holding administrative law judge properly excluded hearsay statements to protect right to cross-examination). *But see Rispoli*, 961 N.Y.S.2d at 106 (affirming admission of unexamined hearsay where declarant violated subpoena).