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Admissibility as Cause and Effect: Considering Affirmative Rights under the Confrontation Clause

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ADMISSIBILITY AS CAUSE AND EFFECT: CONSIDERING AFFIRMATIVE RIGHTS UNDER THE CONFRONTATION CLAUSE

By John G. Douglass[*]

I. INTRODUCTION

"Confrontation" bespeaks action. We picture two gunslingers facing off on a dusty Tombstone street. In the setting of a courtroom, we imagine the punch and counterpunch of a vigorous cross-examination. But when prosecutors offer hearsay in evidence, the law of confrontation paints a different picture. Courts treat hearsay as a fixed object for critical examination at trial under the microscopic focus of two lenses: one crafted by the law of evidence and another, almost identical, fashioned under the Confrontation Clause.[1] The hearsay is either reliable or not; it comes in or stays out. Under this approach, confrontation is not an active process for testing hearsay. It is a passive screen that separates "good" hearsay from "bad" hearsay. Under this approach, the Confrontation Clause is not a rule of procedure. It is a rule of evidence.[2]

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[*] Professor of Law, University of Richmond. This essay is a slightly expanded version of the work in progress that I presented at the Conference on Evidence of the Association of American Law Schools ("AALS") in Alexandria, Virginia, June 2002. I wish to express my thanks to Professor Elizabeth Marsh and the AALS Conference Planning Committee for their kind invitation, and to the Conference participants for their many thoughtful comments and questions.

1. For a more detailed treatment of the development of the United States Supreme Court's current approach to confrontation and hearsay, see John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 197-206 (1999) [hereinafter Douglass, *Beyond Admissibility*].

2. The Court's treatment of the Confrontation Clause as a rule excluding unreliable hearsay has been the subject of continuous and largely critical commentary for decades. Among the many excellent critiques is Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988). Professor Jonakait argues that the Court's treatment of the Clause has rendered it a "minor adjunct of evidence law." *Id.* at 622.

But rules of evidence do not exist in a vacuum. Trial lawyers think strategically. And strategic thinking starts long before trial. Rules for admitting evidence inside the courtroom affect the parties' strategic choices outside of court. A rule excluding hearsay from an available declarant, for example, may lead a litigant to produce that declarant to provide the same evidence through live testimony at trial.[3] Conversely, choices before or outside of trial can make the admissibility of evidence more, or less, fair to an opponent. For example, a party's choice to give notice and provide discovery regarding a potentially admissible hearsay statement may allow an opponent a better opportunity to meet that hearsay with contradictory or impeaching evidence at trial.[4]

In this essay, I first examine some of the strategic choices spawned by the Supreme Court's "microscopic" focus on reliability in confrontation-hearsay cases. Rather than promoting the value at the core of the Confrontation Clause—the adversarial testing of prosecution evidence—the Court's approach leads to choices that ignore that value. While the Court scrutinizes hearsay under the microscope of reliability, it leaves the parties free to ignore and even to avoid available opportunities for effective confrontation of the hearsay declarant. At the same time, the Court's constitutional definition of reliability—which it equates with "firmly rooted" hearsay exceptions[5]—has encouraged prosecutors to offer, and trial courts to admit, an increasing variety of less reliable hearsay

I argue for a different approach to hearsay and confrontation: an approach that promotes different strategic choices.[6] The Confrontation Clause, I suggest, offers more than the "negative" right to exclude unreliable hearsay. It encompasses the "affirmative" right to subject prosecution evidence—including hearsay evidence—to a process of

3. *See, e.g.*, FED. R. EVID. 804(b). Courts and commentators sometimes refer to this notion as a rule of "preference" for live testimony. *See id.*, advisory committee's notes.

4. This is the principle at play in Federal Rule of Evidence 807, which admits hearsay under a "residual" exception, but requires advance notice to the opponent. *See* FED. R. EVID. 807. In an earlier work, I argued for an expansion of such a notice requirement to cover broader categories of hearsay. *See* John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2152-60 (2000) [hereinafter Douglass, *Balancing Hearsay*].

5. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

6. In an earlier article, I explored the strategic choices spawned by the Court's treatment of confrontation challenges to the hearsay statements of accomplices. *See* John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797 (2001) [hereinafter Douglass, *Confronting the Reluctant Accomplice*].

adversarial testing. And it may require prosecutors or courts to take affirmative steps before trial, where those steps are necessary to provide a defendant a fair opportunity to challenge hearsay admitted in evidence at trial. Such steps might include notice and discovery regarding the prosecution's hearsay evidence, ordering separate trials for codefendants where one has uttered hearsay statements inculpating another, depositions of hearsay declarants unable to testify at trial, and even use immunity for hearsay declarants who are unavailable to testify only because they invoke a Fifth Amendment privilege.[7]

If courts recognize and enforce these affirmative confrontation rights, then different strategic choices will emerge. Prosecutors must respect those rights or risk exclusion of hearsay. And defendants must assert those rights or risk waiving their objection to hearsay under the Confrontation Clause. The constitutional debate over hearsay will shift away from its current narrow focus on reliability and toward a broader concern with the adversarial right to test prosecution evidence. In sum, the confrontation debate will be about promoting confrontation, not about avoiding it.

II. THE COURT'S APPROACH: THE CONFRONTATION CLAUSE AS A RULE OF EVIDENCE

A. Confrontation and Hearsay: The Basic Dilemma

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[8] When a prosecution witness testifies at trial, the basic meaning of the confrontation right is simple enough. The witness physically "confronts" the defendant when she testifies in the defendant's presence.[9] Of course, "confrontation" means more than

7. I call such steps "affirmative rights," because they encompass more than the "negative right" to exclude hearsay from evidence. Indeed, I suggest that a defendant's affirmative right to challenge hearsay is separate from, and in addition to, any right he may have to exclude hearsay under the rules of evidence or the Confrontation Clause. But, as I argue later in this essay, the "negative" right to exclude evidence can give courts the necessary leverage to require "affirmative" steps by the prosecutor. *See infra* text at notes 88-90.

8. U.S. CONST. amend. VI.

9. While physical, face-to-face confrontation is an element of the confrontation right in the typical case, the Court has found reasons to relax that requirement where necessary to accommodate other interests. *See, e.g.*, Maryland v. Craig, 497 U.S. 836,

passively watching while a prosecution witness launches her accusations. The heart of confrontation is the right to challenge the witness, to test her credibility and accuracy. Thus, the confrontation right includes an "adequate opportunity"[10] to cross-examine witnesses who testify against the accused.

But if the "witness against" the accused is a hearsay declarant who never enters the courtroom, there is—literally—no "confrontation."[11] Even more important, there is no opportunity to cross-examine. Still, it would be impractical to try most criminal cases without admitting some hearsay. And there has never been a time in our history where American courts barred all prosecution hearsay because it was not subject to confrontation.[12] So confrontation and hearsay pose an apparently insoluble dilemma. Hearsay seems incompatible with the confrontation right. Yet—as a practical matter—criminal trials need hearsay.

Unfortunately, neither the Sixth Amendment text nor its history offers a clear answer to this dilemma. The text says nothing about hearsay.[13] It does not even tell us whether the nontestifying hearsay

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849-50 (1990) (permitting live, two-way closed circuit television testimony of child witness found incapable of communicating in courtroom testimony).

10. Ohio v. Roberts, 448 U.S. 56, 73 (1980) (citing Mancusi v. Stubbs, 408 U.S. 204, 216 (1972)); Douglas v. Alabama, 380 U.S. 415, 418 (1965); *see also* Davis v. Alaska, 415 U.S. 308, 315-18 (1974).

11. Of course, there are cases where the declarant testifies and is immediately subject to cross-examination. In such cases, the Court has found no conflict between the prosecution's use of hearsay and the defendant's confrontation right. Cross-examination satisfies the right. *See* United States v. Owens, 484 U.S. 554 (1988); Delaware v. Fensterer, 474 U.S. 15 (1985); Nelson v. O'Neil, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149 (1970).

12. *See* Mattox v. United States, 156 U.S. 237, 243-44 (1895) (noting that "from time immemorial" dying declarations "have been treated as competent testimony."). For an eighteenth-century history of the hearsay rules, see James W. Jennings, *Preserving the Right to Confrontation – A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 746 (1965) ("[T]he established [hearsay] exceptions had gone through a gradual and at times confusing development by the 1790's, and others were still in the process of being refined."). *See also* JOHN HENRY WIGMORE, 5 EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 12-28 (Chadbourn rev. 1974).

13. The Sixth Amendment provides:

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

U.S. CONST. amend. VI.

declarant is a "witness" at all. Of course, if the declarant is not a "witness against" the accused, our hearsay dilemma disappears. The Clause simply would not apply to hearsay. It would serve only to prescribe an adversarial process for taking live evidence in a courtroom: essentially the process of cross-examination.[14] But that approach would open the door to easy abuse. Prosecutors could circumvent the basic right of cross-examination by having witnesses testify in private depositions, or through written affidavits, then bringing that collection of hearsay to court as the government's case in chief while keeping available witnesses at a distance. So the Clause must apply when the government uses at least some forms of hearsay.[15]

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14. Wigmore reached this conclusion:

> The net result, then, under the constitutional rule, is that, *so far as testimony is required under the hearsay rule to be taken infrajudicially*, it shall be taken in a certain way, namely, subject to cross-examination—not secretly or ex parte away from the accused. The Constitution does not prescribe what kinds of testimonial statements (dying declarations or the like) shall be given infrajudicially—this depends on the law of evidence for the time being—but only what mode of procedure shall be followed—i.e. a cross-examining procedure—in the case of such testimony as is required by the ordinary law of evidence to be given infrajudicially.

WIGMORE, *supra* note 12, §1397(3), at 159. Justice Harlan ultimately agreed. *See* Dutton v. Evans, 400 U.S. 74, 93-94 (1970) (Harlan, J., concurring) ("I have . . . become convinced that Wigmore states the correct view . . . .").

15. One plausible reading of the Sixth Amendment text may be that some, but not all, hearsay declarants are "witnesses against" the accused. If a declarant testifies in a setting designed to create evidence for use at a criminal trial—as in a grand jury or an affidavit prepared for the prosecutor—then he has become a "witness against" the accused. If his out-of-court statement occurs in a different setting—as when a patient tells his doctor about the assault that caused his wounds—then he may be a "witness" to the assault, but he is not a "witness against" the accused when he makes his out-of-court statement. At least two members of the Court have advanced this view. *See* White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring) ("Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions."); Maryland v. Craig, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting) (contending that "witnesses against" the accused are only those witnesses to events who later give testimony against an accused). Professors Amar and Friedman advocate a similar approach. *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1038-43 (1998); Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045-49 (1998). Their reading of the constitutional text offers some distinct advantages. It allows for the use of a broad spectrum of admissible hearsay, as long as the government had no hand in creating it. But it prohibits the government from orchestrating out-of-court testimony, then using that testimony to circumvent the basic guaranty of cross-examination at trial. Further, this reading comports with one of our basic notions about the purpose of the Bill of Rights. The Framers sought to protect us against abuse by the government, not against slings and arrows that might assail us from other quarters. *See* Margaret A.

History sheds only a little light on the dilemma.[16] The history of the Confrontation Clause, as Professor Friedman remarks, "[is] famously obscure."[17] But even that obscure history suggests one safe conclusion. At a minimum, the Clause was intended to prohibit trial by ex parte affidavits or depositions where the accused had no opportunity to see and question his accusers.[18] Thus, it seems safe to conclude that a declarant who provides "testimony" in a government-orchestrated proceeding—like a grand jury or deposition—is a "witness against" the accused. Happily, then, the historical evidence comports with our common-sense conclusion that the Clause cannot be circumvented by allowing the government to generate hearsay as a substitute for live testimony. Still, we are left with other important questions and no clear historical answers. Does the Clause apply only to government-sponsored, out-of-court statements, or does it go further? And regardless of what out-of-court statements it reaches, does the Clause serve as a rule of evidence that excludes such statements? Or does it operate as a rule of procedure that calls upon the government to produce the declarant?[19] Finally, like so many constitutional provisions, does the Clause allow for exceptions to its basic prohibitions? Can we "balance" away some of its protections when they conflict with other interests?

The Court's early confrontation-hearsay opinions offer few

Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 561-62 (1992) (arguing that the Confrontation Clause requires a heightened standard for admitting hearsay statements elicited by government agents).

16. For useful accounts of the history of the Clause, see Berger, *supra* note 15, at 567-86; Graham C. Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. FLA. L. REV. 207, 208-15 (1984).

17. Friedman, *supra* note 15, at 1022. Justice Harlan wrote that "the Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause." California v. Green, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring).

18. In its first confrontation-hearsay opinion, the Court wrote, "The primary object of [the Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . ." Mattox v. United States, 156 U.S. 237, 242 (1895).

19. Writing for the Court in *California v. Green*, 399 U.S. 149 (1970), Justice White argued that, "objections occasioned by this practice [of trial by affidavit] appear primarily to have been aimed at the failure to call the witness to confront personally the defendant at his trial. So far as appears, in claiming confrontation rights no objection was made against receiving a witness' out-of-court depositions or statements, so long as the witness was present at trial . . . ."). *Id.* at 157.

answers. Those cases dealt almost exclusively with hearsay in the form of testimony from prior judicial proceedings. In those circumstances, the Court did not have to decide whether the Clause reached all hearsay, or only some forms of government-created hearsay. It was easy enough to assume—as the Court did—that a declarant who had testified in an earlier judicial proceeding was a "witness against" the accused at trial and that the Clause applied. The principal issue in those early cases was simply the adequacy of a defendant's opportunity to cross-examine in the earlier proceeding.[20] Then came *Ohio v. Roberts*.[21]

B. Ohio v. Roberts: Reliability and "Firmly Rooted" Hearsay Exceptions Become Surrogates for Confrontation

In *Roberts*, the trial court admitted into evidence a transcript of the preliminary hearing testimony of a government witness who disappeared before trial. Defense counsel cross-examined the witness at the preliminary hearing. Consistent with its earlier opinions, therefore, the Court might have decided Roberts' confrontation claims simply by addressing the adequacy of his opportunity to cross-examine. But the Court went further. It outlined a "general approach" to determine the validity of all hearsay exceptions[22] under the Confrontation Clause:

> [A hearsay statement] is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[23]

The *Roberts* formula was derived through the familiar process of abstracting from a rule, to its supposed purpose, to a new rule aimed to satisfy the same purpose. And as often happens in such a quasi-logical process, something important was lost at each step. The "underlying purpose" of confrontation, the Court reasoned, is "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence."[24] Given that "accuracy" is its purpose, the

20. For an account of the "procedural rights" theme of those early cases, see Douglass, *Beyond Admissibility*, *supra* note 1, at 202-03.

21. 448 U.S. 56 (1980).

22. *Id.* at 64-65 (quoting California v. Green, 399 U.S. 149, 162 (1970)).

23. *Roberts*, 448 U.S. at 66 (quoting FED. R. EVID. 807).

24. *Roberts*, 448 U.S. at 65.

Court continued, "the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'"[25] Finally, the Court wrote, "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"[26] In other words, beginning with an assumption that confrontation and hearsay were inherently incompatible, the Court embarked upon a search for second-best alternatives to the fundamental right to "test adverse evidence" through cross-examination. "Indicia of reliability" became a surrogate for cross-examination. "Firmly rooted hearsay exceptions" substituted for any real measure of reliability.

In only a few sentences, the Court had strayed considerably from its initial observation that the Clause ensures "an effective means to test adverse evidence." At the end of its sequence of substitutes, the Court emerged with a rule that essentially equated the Confrontation Clause with the hearsay rule and its many exceptions. Or at least its "firmly rooted" exceptions.

C. *"Firmly Rooted" Exceptions after Roberts—The "Lake Wobegone"[27] Theory of Reliability*

Under *Roberts*, at least in theory, "firmly rooted" hearsay exceptions encompass only those statements reliable enough to render cross-examination an empty formalism.[28] It would make sense, then, to apply *Roberts*' presumption of reliability to a limited list of hearsay exceptions that define a class of statements of unquestioned trustworthiness. Further, given *Roberts*' reliance on the "solid foundations" of "firmly rooted" hearsay exceptions[29]—presumably a reference to historical roots and foundations—it would make sense to limit the presumption of reliability to hearsay that falls within the

25. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)).

26. *Roberts*, 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

27. "In short, the Court's test for firmly rooted hearsay exceptions has been as demanding as the I.Q. tests administered to the fictional children of Lake Wobegon, and the result has been the same: all turn out to be above average." *See* Douglass, *Beyond Admissibility*, *supra* note 1, at 210 (citing Garrison Keiller, *Monologue Excerpt*, *at* http//phc.mpr.org/activities/chats-1997/100197_children_hearts.html) (last visited October 5, 1998).

28. *See Roberts*, 448 U.S. at 65.

29. *Id.* at 66.

traditional core of those exceptions, rather than to forms of "fringe" hearsay that have become admissible as traditional exceptions have expanded in recent history.[30] But neither limit has emerged in the two decades since *Roberts*.

To the contrary, the post-*Roberts* Court has welcomed most hearsay exceptions with little scrutiny of their historical roots or their real connection to reliability. The Court has presumed the reliability of hearsay within the exceptions for coconspirator statements,[31] spontaneous declarations,[32] and statements for purposes of medical diagnosis.[33] More remarkable, the Court has accepted such hearsay as "firmly rooted" even after the traditional boundaries of those exceptions have been expanded to accommodate a broader range of less reliable hearsay.[34] With no clear standard for assessing the reliability or historical pedigree of particular hearsay exceptions, the lower courts have been quick to follow the Court's lead, finding sufficiently firm roots for most exceptions.[35]

Virtually any statement admissible under the law of evidence now satisfies the requirements of the Confrontation Clause, with one notable exception. In the decades since *Roberts*, the Court has decided three cases involving hearsay statements made by a defendant's accomplice where the government argued that the evidence was admissible under the hearsay exception for statements against interest.[36] Each time the Court held the evidence inadmissible. Each time the Court expressed

30. For an account of the expanding world of admissible hearsay offered by prosecutors, see Douglass, *Balancing Hearsay, supra* note 4, at 2106-32.

31. Bourjaily v. United States, 483 U.S. 171, 183 (1987).

32. White v. Illinois, 502 U.S. 346, 355 n.8 (1992).

33. *Id.*

34. "[T]he Court has not applied its 'general approach' to fix hearsay exceptions within their historical boundaries. Instead, the Court has bent the constitutional limits as the hearsay exceptions themselves have expanded . . . . The hearsay 'tail' now wags the constitutional 'dog.'" Douglass, *Beyond Admissibility, supra* note 1, at 211.

35. *See, e.g.*, Hatch v. Oklahoma, 58 F.3d 1447, 1467 (10th Cir. 1995) (recorded recollection); United States v. Veltmann, 6 F.3d 1483, 1493-94 (11th Cir. 1993) (state of mind exception); United States v. Saks, 964 F.2d 1514, 1525 (5th Cir. 1992) (admission by agent); United States v. Picciandra, 788 F.2d 39, 42-43 (1st Cir. 1986) (recorded recollection); Williams v. Melton, 733 F.2d 1492 (11th Cir. 1984) (res gestae exception).

36. *See* Lilly v. Virginia, 527 U.S. 116 (1999) (holding that admission of accomplice's blame-shifting hearsay statements violated Confrontation Clause); Williamson v. United States, 512 U.S. 594, 605 (1994) (holding hearsay inadmissible under Fed. R. Evid. 804(b)(3), while declining to reach the Confrontation Clause issue); Lee v. Illinois, 476 U.S. 530, 541 (1986) (holding that trial court violated the Confrontation Clause by admitting the custodial confession of an accomplice incriminating the defendant).

concerns with the reliability of accomplice confessions that shift blame to a defendant. But even after three tries, the Court has yet to say just how accomplice confessions fit within the *Roberts* formula.[37]

III. EFFECTS OF THE COURT'S APPROACH: AVOIDING CONFRONTATION WHILE EXPANDING THE WORLD OF ADMISSIBLE HEARSAY

Rules of evidence affect the parties' strategic choices before and outside of trial. The *Roberts* formula—which admits or excludes hearsay based on its connection to a "firmly rooted" hearsay exception—promotes choices that do little to serve the core purpose of the Confrontation Clause: to allow adversarial testing of prosecution evidence. And despite its purportedly strict test for reliability, the *Roberts* approach does little to limit admissible hearsay. Indeed, it may have encouraged strategies that have expanded some widely-used exceptions to the hearsay rule.

A. Avoiding Confrontation while Debating Confrontation

By making reliability, and ultimately "firmly rooted hearsay exceptions" the touchstone of admissibility, the Court has marginalized the adversarial right to test hearsay evidence. Few admissibility decisions turn upon the parties' efforts—or lack of efforts—to produce available declarants or to take other steps that may allow for the fair adversarial testing of hearsay. In making strategic choices, prosecutors and defense counsel ignore real opportunities for confrontation because they know that the admissibility of hearsay depends on something else: its supposed reliability. As a result, both parties are free to debate confrontation issues while ignoring available opportunities for real

37. In *Lilly v. Virginia*, 527 U.S. 116 (1999), the last of the three, the Court unanimously reversed a conviction based in part on an accomplice's blame-shifting confession. But the Court failed to achieve consensus in applying the *Roberts* formula. For a four-member plurality, Justice Stevens wrote that accomplice statements which implicate a defendant are not within a firmly rooted hearsay exception. Instead, he argued, such blame-shifting statements are presumptively *un*reliable. *See Lilly*, 527 U.S. at 131 (plurality opinion). Concurring in the result along with two other Justices, Chief Justice Rehnquist maintained that "genuinely self-inculpatory" statements fall within a firmly rooted exception and qualify as reliable under the Confrontation Clause, even though they may contain elements that inculpate an accused. *Id.* at 146 (Rehnquist, C.J., concurring). Further, the Chief Justice argued, statements against interest may qualify as "firmly rooted" where they are not made to the police under custodial interrogation. *Id.*

confrontation.[38]

This phenomenon, avoiding confrontation while debating confrontation, accurately describes the parties' strategic choices in many post-*Roberts* cases raising confrontation-hearsay issues. The Court's opinions offer a series of examples. The clearest may be *United States v. Inadi*.[39] At trial, the government offered audio tapes containing statements of a coconspirator, Lazaro. Defendant objected, arguing that use of the hearsay statements deprived him of the right to confront Lazaro. Following the *Roberts* approach, the trial court ultimately resolved the issue by holding that coconspirator statements fell within a "firmly rooted" exception that satisfied the Court's reliability standard.[40] Lost in the debate over reliability was Lazaro himself, who was alive, subject to subpoena, and who had never asserted any claim of privilege. At trial, defense counsel failed even to answer the court's simple question, "Do you want him [Lazaro] to testify."[41] For its part, the government made only half-hearted efforts to bring Lazaro to court after he claimed "car trouble."[42] The irony of Lazaro's availability and his absence did not escape notice in the Supreme Court. In affirming Inadi's conviction, the Court observed, "the actions of the parties in this case demonstrate what is no doubt a frequent occurrence in conspiracy cases—neither side wants a coconspirator as a witness."[43] In effect, the prize at the heart of the debate – confrontation of the hearsay declarant—was easily available to either party; yet neither party cared to grasp it.

Inadi does not stand alone. In *Dutton v. Evans*,[44] the trial court

38. In an earlier article, I discussed the phenomenon of avoiding confrontation in cases involving hearsay from accomplices:

> In sum, by consistently ignoring confrontation in its constitutional analysis, the Court has invited prosecutors and defendants to ignore confrontation as a tactical choice. Since admissibility turns entirely on reliability, both parties can calculate their Confrontation Clause strategies without regard for real opportunities to confront the accomplice or to impeach his hearsay. As a result, confrontation-hearsay arguments often become a game of Sixth Amendment "chicken," with both parties pursuing an all-or-nothing battle over the reliability—and, hence, the admissibility—of hearsay, while neither is really anxious to see the accomplice on the witness stand.

Douglass, *Confronting the Reluctant Accomplice, supra* note 6, at 1850.

39. 475 U.S. 387 (1986).

40. *Id.* at 399-400.

41. *Id.* at 388-89.

42. *Id.* at 390.

43. *Inadi*, 475 U.S. at 397 n.7.

44. 400 U.S. 74 (1970).

admitted an accomplice's jailhouse confession implicating Dutton. While vigorously pursuing a claim that admission of the hearsay denied Dutton the right of confrontation, defense counsel candidly acknowledged that he could have called the accomplice-declarant as a witness but elected not to do so.[45] In *White v. Illinois*,[46] the trial court admitted hearsay statements from a child declarant. The Court entertained defendant's Confrontation Clause claims, even though the defense made no effort to call the child as a witness. And the Court allowed the hearsay, even though the trial court never found that the prosecutor had exhausted efforts to make the child available to testify in person.[47] Likewise in *Lilly v. Virginia*,[48] the Court's most recent confrontation-hearsay opinion, both parties passed up opportunities to confront the accomplice-declarant whose hearsay statements were the focus of their debate.[49] In the final analysis, it did not matter that confrontation may have been available if either party had wanted it. The relevant debate, in the eyes of the Court, was all about reliability and "firmly rooted" hearsay exceptions.

This phenomenon of avoiding confrontation extends beyond cases where the hearsay declarant may be literally, physically available for in-court confrontation. The law of evidence offers a wealth of opportunities for adversarial testing of hearsay even where the declarant is unavailable.[50] In the debate over confrontation and hearsay, one

45. *Id.* at 88 n.19 ("Counsel for Evans informed us at oral argument that he could have subpoenaed [the declarant] but had concluded that this course would not be in the best interests of his client.").

46. 502 U.S. 346 (1992).

47. In *White*, the prosecutor at least tried to call the child as a witness, but ultimately failed when the child suffered emotional breakdowns. *Id.* at 350. The defense made no effort to call the witness. *Id.* And the trial court never made a finding that the child was unavailable. *Id.* The Supreme Court ultimately ruled that no finding of unavailability was required for admission of the hearsay. *White*, 502 U.S. at 354.

48. 527 U.S. 116 (1999).

49. *See* Douglass, *Confronting the Reluctant Accomplice*, *supra* note 6, at 1800 nn. 7, 8.

50. Federal Rule of Evidence 806 provides that an opponent of hearsay may attack the credibility of the declarant "by any evidence which would be admissible for those purposes if declarant had testified as a witness." Many states have comparable statutes. *See, e.g.*, JACK B. WEINSTEIN, ET AL., 4 WEINSTEIN'S EVIDENCE 806-14, 806-17 (1996); *cf.* UNIFORM RULES OF EVIDENCE Rule 806 (1974) (virtually identical to Fed. R. Evid. 806). Experienced judges and trial advocates have extolled the virtues of Rule 806. *See* Fred Warren Bennett, *How to Administer the "Big Hurt" in a Criminal Case: The Life and Times of Federal Rule of Evidence 806*, 44 CATH. U. L. REV. 1135, 1168 (1995) (calling Rule 806 an "invaluable tool" for trial lawyers); Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56

might expect that such opportunities would become a natural focus. After all, where live cross-examination may be impossible, shouldn't it matter if an effective substitute is available for testing the credibility and accuracy of the declarant? Shouldn't it matter if the defendant can effectively impeach the declarant with prior inconsistent statements, criminal convictions, bad acts, evidence of bias and other impeaching material in much the same way he might impeach a live witness? But after *Roberts*, in considering objections to hearsay, the Court has never weighed the likely effectiveness of opportunities to impeach an absent declarant.[51] And nothing in the *Roberts* formula gives defendants any incentive to pursue such opportunities.[52]

In sum, the Court has given us a confrontation-hearsay doctrine that has little to do with confrontation. As a result, when making strategic choices that frame confrontation-hearsay issues at trial, the parties need not—and typically do not—make choices that lead to confrontation.

B. Expanding the World of Admissible Hearsay

A natural effect of a rule excluding hearsay would be to encourage would-be proponents of hearsay to seek other means to prove their cases. In theory at least, hearsay exceptions that apply only where the declarant is "unavailable" are designed with just such an effect in

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OHIO ST. L. J. 495 (1995); Hon. Anthony M. Brannon, *Successful Shadowboxing: The Art of Impeaching Hearsay Declarants*, 13 CAMPBELL L. REV. 157, 158 (1991) (noting trial lawyers' neglect of "golden opportunities" to impeach hearsay declarants). For a detailed account of the art and efficacy of "virtual cross-examination, *i.e.*, the practice of impeaching an absent hearsay declarant, see Douglass, *Beyond Admissibility*, *supra* note 1, at 251-60.

51. Twice the Court has considered a criminal defendant's right to impeach a hearsay declarant, but both times the issue turned on interpretation of the law of evidence. *See* Carver v. United States, 164 U.S. 694 (1897); Mattox v. United States, 156 U.S. 237, 244-50 (1895).

52. Of course, even without a constitutional incentive to pursue confrontation, we might expect defendants who lose the battle over admissibility of hearsay to beat a tactical retreat to the "second-best" choice of impeaching the hearsay declarant under Rule 806 and similar provisions. But experience suggests that defendants typically forego that opportunity. *See* Brannon, *supra* note 50, at 158. The reasons, I have suggested elsewhere, may be tactical choices by defendants that (1) impeachment is unnecessary because juries discount hearsay, or that (2) impeachment may diminish the likely success of arguments to exclude hearsay and the likelihood of appellate reversal from decisions admitting hearsay. In other words, defense counsel may "value the confrontation *issue* more than the *confrontation* itself." Douglass, *Beyond Admissibility*, *supra* note 1, at 222-23.

mind.[53] In *Roberts* itself, the Court initially applied the same theory in its Confrontation Clause analysis. The government could rely on hearsay only where the live version was unavailable.[54] But the Court quickly recognized the practical difficulties of a rule requiring the presence of the declarant in so many cases where the law of evidence had never imposed such a limit. Only a few years after *Roberts*, the Court retreated, admitting "firmly rooted," and, therefore, "reliable" hearsay in most cases without regard to the availability of the declarant.[55]

By making "firmly rooted" hearsay exceptions the test for admissibility under the Confrontation Clause without regard to the availability of the declarant, the Court encouraged a new kind of strategic thinking by prosecutors. Since the Court had linked confrontation rights to the hearsay rules, prosecutors had an added incentive to pursue strategies that might liberalize the hearsay rules themselves. Not surprisingly then, *Roberts* quickly led prosecutors to pigeonhole[56] more and more hearsay into "firmly rooted" exceptions and thereby to avoid a separate constitutional inquiry.[57] Courts and legislatures readily obliged such creativity by expanding the boundaries of traditional exceptions in order to admit more hearsay.[58] Over the

53. *See* FED. R. EVID. 804(b), advisory committee's note ("The rule [requiring unavailability as a condition for admitting hearsay] expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant."). Unfortunately, rules requiring unavailability can create a different kind of incentive where one party retains some control over the availability of a witness, as a prosecutor may do by granting or withholding use immunity. A prosecutor in possession of favorable hearsay from a reluctant declarant may choose to withhold immunity, and thereby keep the declarant "unavailable," in order to make the hearsay admissible. The prosecutor "can satisfy the law of evidence only by avoiding confrontation." Douglass, *Confronting the Reluctant Accomplice, supra* note 6, at 1851.

54. Ohio v. Roberts, 448 U.S. 56, 65 (1980).

55. The first step in that retreat came in *United States v. Inadi*, 475 U.S. 387 (1986), where the Court ruled that coconspirator statements were admissible notwithstanding the availability of the declarant. *Inadi*, 475 U.S. at 399-400. Six years later, in *White v. Illinois*, 502 U.S. 346 (1992), the Court held that unavailability was a Sixth Amendment prerequisite only for admission of prior testimony. *White*, 502 U.S. at 354.

56. For a more extensive discussion of the "pigeonholing" of new hearsay into old exceptions after *Roberts*, see Douglass, *Beyond Admissibility, supra* note 1, at 210-14.

57. The incentive exists because, under the *Roberts* analysis, firmly rooted exceptions offer a safe harbor from Confrontation Clause challenges. *See Roberts*, 448 U.S. at 66. The convenience of *Roberts* is hard to resist. Two issues—hearsay and confrontation—get turned into one.

58. *White v. Illinois*, 502 U.S. 346 (1992), offers a good example. There, an

objections of Justice Blackmun,[59] the author of *Roberts*, the Court gave at least its implicit blessing to that expansion, treating the newly expanded categories of hearsay as "firmly rooted" nonetheless.[60] Suddenly, "firm roots" took on a distinctly modern look: new hearsay had become old hearsay.

As a result, the *Roberts* approach—which seems designed to keep prosecution hearsay within traditional limits – probably had the opposite effect on the law of evidence. Instead of excluding hearsay at the margins of traditional "firmly rooted" exceptions, courts expanded the margins to embrace more hearsay. Post-*Roberts* decisions at all levels—including several from the Supreme Court itself—simply put old labels onto new forms of hearsay. And *Roberts* made those labels matter more than ever before. The *Roberts* formula, originally designed to admit hearsay with "solid foundations" of reliability, had made it easier for hearsay of marginal reliability to pass constitutional muster.

IV. AN "EFFECTIVE MEANS TO TEST ADVERSE EVIDENCE": THE CONFRONTATION CLAUSE AS A RIGHT TO CONFRONT HEARSAY

The *Roberts* formula does not promote confrontation. It promotes traditional hearsay labels as a talisman for reliable hearsay, and it substitutes reliability for the adversarial right at the core of the

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Illinois trial court had admitted a child's hearsay statements under the exceptions for spontaneous declarations and for statements made for purposes of medical diagnosis. *White*, 502 U.S. at 350. The Appellate Court of Illinois affirmed, but in doing so it acknowledged that it had relaxed traditional limits on the admissibility of spontaneous declarations, People v. White, 555 N.E.2d 1241, 1246-50 (Ill. App. 1990), and that it had relied on a "new hearsay exception" enacted in 1988 to expand the "medical diagnosis" exception beyond its historical boundaries, *White*, 555 N.E.2d at 1251.

59. *See* Bourjaily v. United States, 483 U.S. 171, 186 (1987) (Blackmun, J., dissenting) ("[B]ecause the Court alters the traditional hearsay exemption . . . I do not believe that the Court can rely on the 'firmly rooted hearsay exception' rationale [of *Roberts*], to avoid a determination whether any 'indicia of reliability' support the co-conspirator's statement, as the Confrontation Clause surely demands.").

60. *See id.* Bourjaily challenged the admissibility of coconspirator statements under Federal Rule of Evidence 801(d)(2)(E), and further argued that their admission violated the Confrontation Clause. In its ruling on the evidentiary issue, the Court abandoned the traditional rule which had required trial courts to find independent evidence of conspiracy before admitting a co-conspirator's statements. The Court found that Federal Rule of Evidence 104(a) eliminated the traditional restriction. *Id.* at 176-81. Despite the fact that it had expanded the traditional exception only a few pages earlier in order to accommodate the government's hearsay, the Court found that the statements fell within the "firmly rooted" exception. *Id.* at 181-84. The Court gave similar treatment to Illinois' newly expanded hearsay exceptions in *White*. *See* 502 U.S. at 357.

Confrontation Clause. Because those substitutes are what matters in today's confrontation-hearsay debates, the strategic choices of prosecution and defense simply ignore confrontation and focus on hearsay labels. The result is a confrontation doctrine that has little to do with confrontation. In other words, confrontation-hearsay analysis is consumed with the "negative" right to exclude unreliable hearsay. I argue that it should focus instead on the "affirmative" right to "confront" hearsay: the right to subject hearsay to adversarial testing just as we test live testimony through cross-examination.[61]

The "underlying purpose" of confrontation, according to *Roberts*, is "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence."[62] That starting point is almost, but not quite, correct. Augmenting accuracy may be an indirect result of the confrontation right; but it is not the right itself.[63] The Confrontation Clause does not guarantee reliable evidence. Even a cross-examined witness may lie and his lies may escape detection. Conversely, we allow—indeed we expect—defense counsel to cross-examine even the most reliable witnesses. Instead, as the *Roberts* Court recognized before it began its hunt for surrogates, the right to confront witnesses is the right to "an effective means to test adverse evidence."[64] That is what the confrontation right means when a live witness testifies for the prosecution.[65] And, I suggest, it means the same thing when the "witness against" the defendant is a hearsay declarant. Where the law of evidence allows prosecutors to use hearsay, the Confrontation Clause grants defendants an opportunity to challenge it: that is, an opportunity to impeach or contradict the declarant's "testimony" just like testimony from any other witness.

This approach is easy enough to envision when the declarant is available for live testimony.[66] Why should we treat the Confrontation

61. *See* Douglass, *Beyond Admissibility, supra* note 1, at 224-40 (arguing that the Confrontation Clause creates a right to "confront" hearsay, that is to subject otherwise admissible hearsay to a process of adversarial testing).

62. *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980).

63. *See* Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) ("[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence . . . .").

64. *Roberts*, 448 U.S. at 65.

65. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 315-18 (1974); Brookhart v. Janis, 384 U.S. 1, 3-4 (1966).

66. In cases where the declarant actually testifies, the Court readily has reached this conclusion. *See* United States v. Owen, 484 U.S. 554, 558-61 (1988); Delaware v. Fensterer, 474 U.S. 15, 19-22 (1985); Nelson v. O'Neil, 402 U.S. 622, 628-29 (1971);

Clause as a standard for "reliable" hearsay when confrontation is—literally—possible? If defendant wants confrontation, then let him have confrontation. When the declarant is available, the simple answer to the confrontation dilemma is to call the declarant as a witness if the defendant wants to cross-examine. Members of the Court have skirted this solution on a few occasions, but never fully embraced it. In *Inadi*, the Court noted that calling the declarant would resolve the defendant's concerns, but then—inaccurately, I suggest—assigned that right to the Compulsory Process Clause.[67] Months before *Inadi*, Justice Harlan had argued that history called for a similar approach: "[T]he Confrontation Clause," he wrote, "reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial."[68] He later backed away, believing it impractical to require production of the declarant in many cases where hearsay had been routinely admitted without calling the declarant.[69] In my view, Justice Harlan's practical dilemma is less severe than he imagined.[70] And his basic idea is sound. Where the declarant is available and hearsay is admitted, the Confrontation Clause allows a defendant to demand confrontation, and to get it.

But what about cases where the declarant is truly unavailable: where he is dead, unable or unwilling to testify, or far beyond the court's subpoena power? The Court's confrontation-hearsay decisions start with the assumption that "confrontation" is impossible in such

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California v. Green, 399 U.S. 149, 158-59 (1970).

67. United States v. Inadi, 475 U.S. 387, 397 (1986) ("If [defendant] independently wanted to secure [the declarant's] testimony ... [t]he Compulsory Process Clause would have aided [him] in obtaining the testimony."). *Inadi*'s reliance on Compulsory Process, I contend, is misplaced. *See* Douglass, *Beyond Admissibility*, *supra* note 1, at 244.

68. *See* California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring).

69. *See* Dutton v. Evans, 400 U.S. 74, 95-96 (1970) (Harlan, J., concurring) (arguing that producing the declarant would be "unduly inconvenient and of small utility" in cases of, e.g., hearsay admitted as a business record).

70. The practical inconvenience of producing every available hearsay declarant for all prosecution hearsay is greatly diminished if we require a defendant to assert his confrontation right in the first instance, and then to exercise that right. As a practical matter, that would resolve the issue in most cases. Few defendants are likely to care about confrontation with, for example, a series of clerks who enter the data supporting most admissible business records. Indeed, as *Inadi* and *Dutton*, and perhaps *White* and *Lilly*, suggest, most defendants would prefer to avoid actual confrontation with most declarants most of the time. And courts are well equipped to deal with frivolous demands to produce witnesses whom the defense shows no real interest in cross-examining.

cases.[71] So the Court turns to reliability as a surrogate for the real thing that, it assumes, is beyond reach. In my view, we should not jump so quickly to the conclusion that effective means of "confrontation" are impossible just because the declarant is not physically available. And, if we are to turn to a surrogate for physical confrontation, then we should consider the next best alternative. We should treat the Confrontation Clause as a right to any available means to subject even absent declarants to a process of adversarial testing. If we did so, we would have a doctrine that, as a practical matter, grants defendants more effective tools for responding to hearsay than are currently available under the *Roberts* formula for admitting "reliable" or "firmly rooted" hearsay. And we would restructure strategic choices in a way that promoted the core value of confrontation.

V. PROMOTING DIFFERENT STRATEGIC CHOICES: AFFIRMATIVE CONFRONTATION RIGHTS OUTSIDE OF TRIAL

When presented with prosecution hearsay, courts following the *Roberts* formula must ask, "Is it reliable?" or—even more narrowly—"Is it within a firmly rooted exception?" I suggest that a better question would be, "What steps have been taken, and what steps can we now take, to allow for a fair adversarial challenge to this hearsay?" Courts asking that question would not be engaged in a passive, microscopic analysis of hearsay. They would challenge the defendant to exercise the very confrontation rights he claimed to assert. And they would challenge the prosecutor to respect those rights. The Confrontation Clause would encompass "affirmative rights" to steps before and outside of trial, where such steps were necessary to allow for the fair adversarial testing of hearsay at trial.

71. Beginning with *Mattox v. United States*, 156 U.S. 237, 240-41 (1895), the Court has always framed the confrontation-hearsay issue as a question of admissibility, assuming that hearsay and confrontation were simply incompatible. *See* Douglass, *Beyond Admissibility*, *supra* note 1, at 230. As a result, the Court's confrontation-hearsay cases begin with the premise that some categories of hearsay must fall within an "exception" to the basic rule requiring confrontation. *See Mattox*, 156 U.S. at 243 (noting that the right of confrontation is "subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit.").

A. The Case for Affirmative Confrontation Rights that Reach Beyond the Trial

We often use the trial process in general, and the rules of admissibility in particular, as a means for enforcing rights that govern conduct outside of trial. The Fourth Amendment's exclusionary rule is a prime example,[72] as is the doctrine excluding confessions obtained in violation of *Miranda*.[73] Conversely, in deciding whether the trial process—including its rules of admissibility—is fair, we often consider the impact of conduct and choices made outside of trial. Under *Brady v. Maryland*,[74] for example, we reversed a conviction where the prosecutor's pretrial decision not to disclose exculpatory evidence caused us to lose confidence in the result at trial.[75]

There are equally obvious cause-and-effect connections between the basic Sixth Amendment right to a fair, adversarial trial on the one hand, and a variety of pretrial events on the other. A number of the Court's Sixth Amendment rulings pay heed to those connections. The right to counsel, for example, attaches not just at the start of trial, but at the moment defendant is formally charged with a crime.[76] It encompasses the pretrial right to an adequate opportunity to prepare for trial.[77] It calls for counsel's presence at critical pretrial proceedings that may affect the right to effective cross-examination at trial.[78] At least one of the Sixth Amendment's guarantees—the defendant's right to "compulsory process for obtaining witnesses in his favor"[79]—deals explicitly with a process that begins before and outside of trial in order to assure presentation of a defense at trial. Indeed, the Sixth

72. *See* Mapp v. Ohio, 367 U.S. 643 (1961). Of course, there remains the debate whether the *only* right protected by the Fourth Amendment exclusionary rule is a right that exists outside of trial. *See* United States v. Leon, 468 U.S. 897, 931-32 (1984) (Brennan, J., dissenting).

73. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

74. 373 U.S. 83, 87-89 (1963).

75. *See* United States v. Bagley, 473 U.S. 667, 678 (1985) (noting that exculpatory evidence left undisclosed by a prosecutor is "material" where nondisclosure "undermines confidence in the outcome.").

76. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972) (holding that right to counsel attaches "at or after the [time that] adversary judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.").

77. *See* Powell v. Alabama, 287 U.S. 45 (1932).

78. *See* United States v. Wade, 388 U.S. 218 (1967).

79. *See* U.S. CONST. amend. VI.

Amendment's opening phrase, "in all criminal *prosecutions*,"[80] seems calculated to reach conduct before and beyond the time and place of a criminal trial.

In order to secure the right to effective confrontation at trial, courts and parties may need to take steps before and outside of trial. Several of the Court's early confrontation-hearsay opinions implicitly rely on that cause-and-effect connection, excluding hearsay at trial not based on its unreliability, but as a sanction where the government neglected pretrial opportunities to bring about confrontation at trial. In *Barber v. Page*,[81] for example, the Court excluded hearsay under the Confrontation Clause where the government made no effort to secure the attendance of a declarant who was in prison. A century ago, in *Motes v. United States*,[82] the Court likewise excluded hearsay where declarant's absence at trial was due to government negligence in releasing him from jail and failing to monitor him.

In sum, the notion of an affirmative right to confront hearsay—a right that would create pretrial obligations for prosecutors and exclude evidence as a sanction for ignoring those obligations—is hardly unprecedented. It is consistent with the Court's treatment of other Sixth Amendment guarantees, and with the constitutional text. At least in cases where declarants were subject to government control, and before the modern Court's preoccupation with reliability, it was a right which the Court readily recognized and enforced.

B. Defining Affirmative Rights under the Confrontation Clause

The project of defining limits for constitutional principles is typically illuminated by reported cases where the litigants themselves have struggled over such limits. But the right to confront hearsay offers a different challenge. Because the *Roberts* reliability-based formula has so thoroughly preempted the field of confrontation-hearsay litigation, we are left largely to fend for ourselves. In the paragraphs that follow, I do not pretend to exhaust this subject.[83] Instead, I will offer a few basic

80. *See id.* (emphasis added).
81. 390 U.S. 719, 723 (1968).
82. 178 U.S. 458, 471 (1900).
83. For an application of the affirmative "right to confront hearsay" in the specific case of accomplice-declarants, see Douglass, *Confronting the Reluctant Accomplice*, *supra* note 6, at 1859-74. For a more general introduction to the concept of affirmative confrontation rights outside of trial, see Douglass, *Beyond Admissibility*, *supra* note 1, at 264-71.

observations that, I hope, will contribute to a continuing discussion.

First, I suggest a simple starting point: at a minimum, the prosecutor should do no harm.[84] Where the government elects to offer hearsay, courts should scrutinize prosecutorial choices that may inhibit confrontation. Choices that restrict a defendant's opportunity to test hearsay should likewise diminish the government's opportunity to prove its case through hearsay. In other words, the government should not have its (hearsay) cake and eat it too. The problems of joinder and trial order illustrate the point. In cases involving multiple defendants, prosecutors enjoy considerable discretion in deciding whether to indict and try defendants together or separately, and in what order to prosecute separate cases. But, as *Lilly*[85] demonstrates, those choices can determine whether one defendant-declarant is available to testify at the trial of a codefendant, or whether a pending charge will leave the declarant to assert his Fifth Amendment privilege while the government offers his hearsay in evidence.[86] As a general rule, the Sixth Amendment does not govern a prosecutor's charging decisions. But it should prevent joinder or trial order calculations from becoming tools for insuring the "unavailability" of accomplice declarants when the government has accomplice hearsay at its disposal.[87]

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84. *Motes* illustrates this point. There, the government had effective control of an incarcerated witness, but chose to release him and took no steps to monitor him. He disappeared before trial and the prosecution offered his hearsay statements from earlier testimony. The Court excluded the hearsay, at least in part because the government's negligence had deprived defendant of an opportunity for confrontation. *See Motes*, 178 U.S. at 471.

85. *See* Lilly v. Virginia, 527 U.S. 116 (1999).

86. In *Lilly*, defendant's brother, Mark Lilly, was called as a witness by the prosecutor, but became "unavailable" to testify when he asserted his Fifth Amendment privilege. The court then allowed the prosecutor to introduce a tape recorded hearsay statement in which Mark implicated the defendant as triggerman in a murder. *Lilly*, 527 U.S. at 122. In retrospect at least, the prosecutor's strategy seems calculated to keep Mark off the witness stand. Before Ben Lilly's trial, the prosecutor had entered a plea bargain to obtain the cooperation and testimony of another accomplice-witness. But it treated Mark Lilly differently, perhaps calculating that brotherly loyalty might diminish Mark's value as a live witness. Shortly after Ben Lilly's trial, Mark pled guilty to first degree murder and received a sentence of forty-nine years. *See* Brief for Petitioner at 7, Lilly v. Virginia, 527 U.S. 116 (1999). It seems likely that the prosecution chose to delay Mark's trial or plea in order to deter him from taking the stand at Ben's trial, changing his story and exonerating Ben. *See id.* (prosecution kept the "option of charging Mark Lilly as the trigger man if he change[d] his story during his brother's trial and trie[d] to take the blame.") (citing Lisa K. Garcia, *Slaying Suspect's Trial Starts Today*, THE ROANOKE TIMES, Oct. 15, 1996, at A2).

87. While the Court's decision in *Lilly* obviously limits the government's opportunity to rely on blame-shifting hearsay from an accomplice, as the prosecution

Second, hearsay should carry a price. The price should be whatever is necessary to maintain a fair adversarial balance. Prosecutors seeking to rely on hearsay should be required to take any steps reasonably necessary to allow the defense an opportunity for effective testing of that hearsay, even where such steps exceed a prosecutor's typical obligations or intrude on otherwise discretionary decisions. And exclusion of hearsay can be an appropriate means to compel such steps. For example, the decision to grant use immunity to a witness normally is within the prosecutor's discretion. Indeed, under typical immunity statutes, courts have no power to grant use immunity without a motion from the government.[88] But imagine the case, like *Lilly*, where the prosecution offers hearsay from a declarant who is unavailable to testify only because he asserts his Fifth Amendment privilege. Now the balance of immunity-granting power has shifted. The court can put the government to a choice: Grant use immunity to the declarant, or forego the use of hearsay.[89] In many cases, that immunity may be granted with no real risk to the government. And it can restore the right of confrontation with the simple stroke of a pen. It is, in short, a reasonable price for maintaining an adversarial process where the government seeks to rely on hearsay.

Third, a defendant who asserts a confrontation right should attempt to exercise that right. At first blush, this suggestion may seem to turn the Sixth Amendment guarantee upside down. After all, the right "to *be* confronted" with government witnesses seems to call for nothing in the way of action from the defense. But even when a prosecution witness

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had attempted to do in *Lilly* itself, the decision has not eliminated the problem. As post-*Lilly* decisions in lower courts are beginning to demonstrate, a considerable variety of accomplice hearsay is still admitted. *See* United States v. Papajohn, 212 F.3d 1112, 1118-20 (8th Cir. 2000) (admitting grand jury testimony of unavailable accomplice based upon circumstantial guarantees of trustworthiness); United States v. Boone, 229 F.3d 1231, 1233-34 (9th Cir. 2000) (affirming conviction where trial court admitted accomplice's statements against interest made to girlfriend); United States v. Shea, 211 F.3d 658, 669 (1st Cir. 2000) (admitting statements against interest made to friends).

88. *See, e.g.*, 18 U.S.C. §§ 6002-03 (1994).

89. By requiring this choice, courts can allow both hearsay *and* confrontation. Unfortunately, at least where the government relies on the hearsay exception for statements against interest, the law of evidence stands in the way of this solution. When she grants use immunity and thereby makes a declarant available to testify, a prosecutor loses the chance to introduce hearsay under Federal Rule of Evidence 804(b)(3), which requires that the declarant be "unavailable." Current hearsay rules and confrontation doctrine create a Catch-22. The prosecutor can satisfy the rules of evidence only by avoiding confrontation. *See* Douglass, *Confronting the Reluctant Accomplice*, *supra* note 6, at 1850-53.

testifies in person at trial, the right of confrontation is not self-executing. The Sixth Amendment guarantees an opportunity to cross-examine.[90] Still, defendant must seize that opportunity or he waives that right.[91] In my view, we must apply a similar analysis in defining defendant's right to confront hearsay. Otherwise, we are mired in the current system of perverse incentives, where defendants can, and often do, assert the right to confrontations they do not want.[92] If the declarant can be made available, then any defendant who raises a Confrontation Clause objection to hearsay must be prepared to answer "Yes" to the simple question, "Do you want to cross-examine the declarant?" If the declarant is unavailable, then defendant is entitled to use any reasonably available means to impeach him in absentia. Of course, defendant is entitled to make the tactical choice not to pursue such avenues for impeachment. But in ruling on the fairness of admitting hearsay, courts nevertheless should take into account any opportunity the defendant chooses to eschew.

Fourth, information and preparation are the keys to effective adversarial testing of evidence. The affirmative right to test prosecution hearsay, therefore, must include rights to notice and discovery.[93] Effective cross-examination of a prosecution witness begins before trial with the collection of "ammunition": the prior convictions, inconsistent statements, evidence of disreputable acts and other information that will give substance and direction to the cross-examiner's questions.[94] Indeed, most cross-examination has little to do with asking real questions, and a lot to do with exposing that "ammunition" to the jury through "questions" with already predictable answers.[95] Likewise, an effective adversarial assault on the hearsay declarant may depend less on the declarant's presence than on the information a defendant can obtain about the declarant, and about his hearsay statements. At a minimum, discovery rules that apply to prosecution witnesses must

90. *See* Davis v. Alaska, 415 U.S. 308, 315-18 (1974); Douglas v. Alabama, 380 U.S. 415, 418 (1965).

91. *See, e.g.,* United States v. Figueroa, 976 F.2d 1446, 1457 (1st Cir. 1992); United States v. Howard, 751 F.2d 336, 338 (10th Cir. 1984).

92. *See supra* text at notes 39-50.

93. *See* Douglass, *Beyond Admissibility, supra* note 1, at 264-69.

94. "[T]he right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial." Pennsylvania v. Ritchie, 480 U.S. 39, 66 (1987) (Brennan, J., dissenting).

95. *See* STEVEN LUBET, MODERN TRIAL ADVOCACY 105 (2d ed. 1997); THOMAS A. MAUET, TRIAL TECHNIQUES 225 (1996).

apply to hearsay declarants as well.[96] But a fair opportunity to "confront" hearsay may require even more. Even more than the testimony of a live witness, prosecution hearsay carries the potential for surprise. A starting point for a fair adversarial response to hearsay, then, must include reasonable notice that hearsay is coming.[97] And the court's power to exclude hearsay creates the power to condition admissibility on broader discovery. As a "price" for admitting hearsay in the face of a Confrontation Clause objection, courts can and should assure defendants adequate notice and the opportunity to assemble the "ammunition" necessary to challenge it.[98] In addition, in the many cases where a living, breathing hearsay declarant is available for some kind of questioning outside of the trial itself, courts may condition the admission of hearsay on a right to confront and question that declarant. After all, real questioning of a declarant is a better substitute for in-court confrontation than the Court's current substitute: a judicial determination of reliability based on an assessment of the "firm roots" of a given hearsay statement.

Fifth, and finally, some balancing of interests is inevitable in

96. For example, we should treat hearsay declarants as prosecution witnesses and require the government to disclose any information material to their impeachment, just as we do for live witnesses under *Giglio v. United States*, 405 U.S. 150, 154 (1972). Statutory disclosure obligations regarding government witnesses should apply equally to hearsay declarants. *See* Douglass, *Beyond Admissibility, supra* note 1, at 266-69 (arguing for the application of discovery principles under the Jencks Act, 18 U.S.C. § 3500, to hearsay declarants).

97. The Federal Rules of Evidence grant a right of notice to the opponent of hearsay, but only in limited circumstances. *See* FED. R. EVID. 807 (requiring notice from the proponent of "residual" hearsay). For a more extensive discussion of the importance of notice in responding to prosecution hearsay, see Douglass, *Balancing Hearsay, supra* note 4, at 2152-60.

98. Perhaps the most significant doctrinal impediment in applying the Confrontation Clause to the process of pretrial discovery appears in the plurality opinion of Justice Powell in *Ritchie*, 480 U.S. at 39. There, the Court affirmed the trial court's refusal to allow discovery of a state agency's file regarding an investigation into child abuse. Defendant sought the file in an effort to gather information that might prove useful in cross-examining the state's principal witness. In rejecting defendant's claim, Justice Powell wrote that the Confrontation Clause was not "a constitutionally compelled rule of pretrial discovery." *Ritchie*, 480 U.S. at 52. "The right to confrontation," he added, "is a trial right." *Id.* In response, Justice Blackmun's concurring opinion states, "there might well be a confrontation violation if... a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness." *Id.* at 61-62 (Blackmun, J., concurring). Years earlier, Justice Brennan likewise suggested that the Confrontation Clause may be the appropriate source of discovery rights, where prior statements of government witnesses are necessary for effective cross-examination. *See* Palermo v. United States, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring).

defining the extent of a right to test hearsay. As a practical matter, trials require hearsay, and declarants cannot always be produced for live cross-examination. Almost by definition, the hearsay-confrontation dilemma presents a problem of "second-best" choices.[99] The dilemma arises, in its most intractable form, when live cross-examination is impossible. The Court has responded to that dilemma by prescribing a balance based on reliability. But that balance requires us to drift too far from the adversarial core of the confrontation right. The Court balances the practical necessity for hearsay against the confrontation right by asking: "Is the hearsay reliable enough to forego cross-examination?" I suggest a slightly different question to govern the balance: "Does the defendant have a fair opportunity to test the hearsay?" That is, after all, the same kind of question that governs a defendant's right to cross-examine a live witness. Ultimately, it should serve as our guide in defining the right to confront hearsay.

VI. CONCLUSION: FULL CIRCLE FOR CAUSE AND EFFECT

Viewing the Confrontation Clause as a right to test hearsay, rather than as a right to exclude unreliable hearsay, creates a different set of incentives for prosecution and defense. If defendant's right to a fair, adversarial testing of hearsay encompasses affirmative rights outside of trial, then the prosecutor ignores those rights at the risk of exclusion of hearsay. And a defendant who eschews opportunities to exercise those rights has little ground to complain that his confrontation rights have been violated. Under this approach, courts do not look at hearsay under the microscope of "reliability." They must consider how the evidence got to trial in the form of hearsay: how opportunities to test the information were created, ignored, or even destroyed along the way. By doing that much, courts will promote—indeed they will demand—strategic choices outside of trial that foster confrontation at trial.

99. Hearsay rules often are described in terms of a "preference" for live testimony, along with a willingness to tolerate the second-best alternative of hearsay as a matter of necessity in limited cases. *See, e.g.*, FED. R. EVID. 804(b) advisory committee's note; Mattox v. United States, 156 U.S. 237, 243-44 (1895).