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Beyond Admissibility: Real Confrontation, Virtual Cross-Examination and the Right to Confront Hearsay

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"If the only tool you have is a hammer, every problem will look like a nail."[1]

Introduction

It is hard to imagine the following scene in an American courtroom:

> [Witness is sworn.]
>
> *Prosecutor*: Please state your name.
>
> *Defense Counsel*: Objection, your honor. The testimony we expect from this witness is unreliable. She has a motive to lie and previously gave two different versions of the events surrounding this case.
>
> *The Court*: Objection sustained. I find there are insufficient indicia to establish the reliability of this testimony and therefore will excuse the witness. She will not be permitted to testify.

This scene smacks of fiction because American courts do not screen witnesses based on reliability before they testify. Subject to the rules of competency,[2] courts do not bar witnesses from testifying on the grounds that they are likely to be mistaken or even deceitful.[3] Instead, the adversarial process

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1 The quotation, though widely attributed to Mark Twain, does not appear in any of his prominent published works. In more recent times, similar maxims have been attributed to American psychologist, Abraham Maslow, author of MOTIVATION AND PERSONALITY (1954).

2 *See* FED. R. EVID. 601. The Due Process Clause also imposes restraints on the admission of wholly unreliable prosecution evidence. *See* Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 598 (1978) ("[D]irect testimony is admissible as long as it possesses 'sufficient aspects of reliability' to be intelligently evaluated by the jury for its proper weight.") (quoting Manson v. Brathwaite, 432 U.S. 98, 106 (1977)).

3 *See* Walters v. McCormick, 122 F.3d 1172, 1176-77 (9th Cir. 1997) (finding that the trial court did not err in allowing the trial testimony of a four-year-old child who gave inconsistent answers at a competency hearing regarding her ability to tell the truth); United States v. Zizzo, 120 F.3d 1338, 1347-48 (7th Cir. 1997) (finding that a court is not required to strike the testimony

of direct and cross-examination equips the jury with the tools to make its own assessment of the credibility and accuracy of in-court testimony.

Equally implausible would be a similar scene, with the opposite outcome:

> *Defense Counsel*: Objection, the testimony we are about to hear is unreliable.
>
> *Prosecutor*: Your honor, this witness has no motive to lie. Further, she has given consistent and detailed statements about this crime in the past.
>
> *The Court*: I agree. Objection overruled. I find sufficient indicia that the witness is reliable. Based on that finding, I will permit the testimony. Further, because the testimony is reliable, we will dispense with cross-examination.

The second scene is as implausible as the first, because the court does not allow the defendant to challenge the testimony, whether reliable or not, through cross-examination, "one of the safeguards essential to a fair trial" in an adversarial system.[4] Indeed, the flat prohibition of cross-examination of a prosecution witness is a classic violation of the Confrontation Clause of the Sixth Amendment.[5]

As peculiar as these fictional scenes appear in their treatment of a courtroom witness, they mirror the approach dictated by the Supreme Court when the "witness" is a hearsay declarant. The Confrontation Clause provides a right to confront witnesses, not to silence them.[6] Nevertheless, when the

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of a government witness, a lifelong criminal and a convicted perjurer, who conceded during cross-examination that the oath meant nothing to him); *see generally* Delaware v. Fensterer, 474 U.S. 15, 21-22 (1985) (per curiam) ("The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.").

Courts were not always so generous:

> At common law, interested parties such as defendants, their spouses, and their coconspirators were not competent witnesses. "Nor were those named the only grounds of exclusion from the witness stand; conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors."

United States v. Scheffer, 118 S. Ct. 1261, 1273-74 (1998) (Stevens, J., dissenting) (footnotes omitted) (quoting Benson v. United States, 146 U.S. 325, 336 (1892)).

4 Pointer v. Texas, 380 U.S. 400, 404 (1965) (quoting Alford v. United States, 282 U.S. 687, 692 (1931)).

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

6 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 defence.

U.S. CONST. amend. VI.

prosecution offers a hearsay[7] statement in evidence, Supreme Court precedent leads trial courts to apply the Confrontation Clause as a rule of evidence, either admitting or excluding hearsay.[8] The out-of-court statement must pass the constitutional test of "reliability" or the court will exclude it altogether. If the court admits the statement, the case typically proceeds without exploring means of testing the credibility or accuracy of the declarant's statement.[9] The court's finding of "reliability" simply replaces any

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7 For purposes of Confrontation Clause analysis, the Court has defined "hearsay" as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." Lee v. Illinois, 476 U.S. 530, 543 n.4 (1986) (quoting EDWARD CLEARY, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 246 (2d ed. 1972)). The Court has held that an out-of-court statement, not offered to prove the truth of the matter asserted, "raises no Confrontation Clause concerns." Tennessee v. Street, 471 U.S. 409, 414 (1985).

Rule 801(c) of the Federal Rules of Evidence provides that "[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(d) excludes from the definition of hearsay several types of statements that otherwise literally would fall within the definition. The Rule provides that certain prior statements of a witness (Rule 801(d)(1)), and admissions by a party-opponent (Rule 801(d)(2)), including coconspirator statements (Rule 801(d)(2)(E)), are "not hearsay." FED. R. EVID. 801(d). The Court has treated coconspirator statements, when offered to prove the truth of the matter asserted, as hearsay statements for the purpose of Confrontation Clause analysis. *See* United States v. Inadi, 475 U.S. 387, 399 n.12 (1986) ("Federal Rule of Evidence 801 characterizes out-of-court statements by coconspirators as exemptions from, rather than exceptions to, the hearsay rule. Whether such statements are termed exemptions or exceptions, the same Confrontation Clause principles apply."). Consistent with the Court's approach, this Article considers the term "hearsay" to include those statements "exempted" from the definition by Rule 801(d).

8 *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 815-18 (1990); Ohio v. Roberts, 448 U.S. 56, 66 (1980); *Pointer*, 380 U.S. at 407-08. *See generally* 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 as a constitutional test for reliable evidence has rendered the Clause largely meaningless, a "minor adjunct of evidence law." *Id.* at 622. Properly interpreted, Professor Jonakait argues, the Clause instead "assures the right to the adversarial testing of the prosecution's evidence." *Id.* The analysis in Part II of this Article accords in large measure with Professor Jonakait's views, and further demonstrates how the Court has continued, in the decade since Professor Jonakait's article, to allow the law of evidence to absorb the Confrontation Clause even more completely. Professor Jonakait's conclusion, however, like that of virtually every other commentator on the Clause, ultimately looks to exclusion of evidence as the proper constitutional remedy. He writes:

> The confrontation clause gives the accused the right to exclude all out-of-court statements when the declarant is not produced except when the prosecutor establishes the lack of a reasonable probability that the accused's cross-examination of the declarant would have led the jury to weigh the evidence more favorably to the accused.

Id. This Article contends that the exclusionary approach itself is the heart of the problem.

9 For reasons described in Part III-B of this Article, defense counsel seldom pursue available opportunities to impeach hearsay declarants, despite evidentiary rules such as Rule 806 of the Federal Rules of Evidence, which facilitate such impeachment. *See* Hon. Anthony M. Brannon, *Successful Shadowboxing: The Art of Impeaching Hearsay Declarants*, 13 CAMPBELL L. REV. 157, 158 (1991) (noting trial lawyers' "virtual total neglect" of opportunities to impeach hearsay declarants); Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 OHIO ST. L.J. 495, 495 (1995) (noting that Rule 806 is "overlooked by lawyers"); *cf.* Fred Warren Bennett, *How to Administer the "Big Hurt" in a*

"confrontation." In effect, the Court gives us two very different Confrontation Clauses: one for live witnesses and another for hearsay.

Modern confrontation-hearsay law is about everything but confrontation. It is about admissibility, reliability, and the historical roots of hearsay exceptions. It is seldom about taking an available declarant and putting her on the witness stand to confront the defendant. It is almost never about alternative means by which a defendant might impeach an unavailable declarant. As a result, most confrontation-hearsay opinions end just when the process of confrontation ought to begin: when the evidence is put before the jury.

Once the hearsay is in evidence, modern confrontation-hearsay law suggests that the Confrontation Clause serves no further purpose. "[W]here proffered hearsay has sufficient guarantees of reliability," the Supreme Court tells us, "the Confrontation Clause is *satisfied*."[10] Taken literally, that is an astonishing statement in an adversarial system of justice. Once "reliable" prosecution hearsay is in evidence, how can the right of confrontation be satisfied any more than it is satisfied when the prosecution completes its direct examination of a "reliable" witness in the courtroom? Whatever role the Confrontation Clause might play in regulating the admission of hearsay, there is no sound basis for concluding that the Clause has no further role once hearsay is admitted. In an adversarial system, the confrontation battle merely begins when a prosecution witness testifies. Because of the Court's long history of "exclusionary thinking," however, we have no experience with a Confrontation Clause that looks beyond the issue of admissibility and provides for the adversarial testing of the hearsay declarant.

A new approach to this old confrontation-hearsay dilemma, an approach that looks beyond admissibility, is more critical today than ever before, for two reasons. First, as an exclusionary rule,[11] the Confrontation Clause might

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Criminal Case: The Life and Times of Federal Rule of Evidence 806, 44 CATH. U. L. REV. 1135, 1141-64 (1995) (describing "nine methods to impeach a witness' credibility").

Basic summaries of the confrontation-hearsay dilemma typically begin with the statement that "confrontation" of the hearsay declarant is impossible. *See, e.g.*, Christopher K. DeScherer & David L. Fogel, Project, *Sixth Amendment at Trial, Twenty-fifth Annual Review of Criminal Procedure*, 84 GEO. L.J. 713, 1237 (1996) ("The admission of hearsay evidence against a defendant implicates the Sixth Amendment because the defendant cannot confront the out-of-court declarant.") (footnote omitted).

10 White v. Illinois, 502 U.S. 346, 356 (1992) (emphasis added).

11 This Article uses the term "exclusionary rule" in its most basic sense: to describe a rule that excludes evidence. Of course, one typically uses the term to describe the remedy of suppression of evidence that courts impose for some violations of Fourth and Fifth Amendment rights. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (excluding evidence obtained by searches and seizures in violation of the Constitution).

Courts and commentators generally do not refer to the Confrontation Clause as an exclusionary rule, presumably because the Clause differs in a major respect from other exclusionary rules. The Fourth and Fifth Amendment exclusionary rules exclude evidence for reasons that are generally unrelated to the accuracy or truthfulness of the evidence itself; in part, at least, the rules exclude evidence to deter the police from future violations of constitutional rights. *See* United States v. Leon, 468 U.S. 897, 913 (1984). *But see id.* at 929-43 (Brennan, J., dissenting) (questioning the validity of the deterrence rationale). The Confrontation Clause, on the other hand, excludes "unreliable" evidence for the purpose of protecting the rights of the defendant who is on trial when the evidence is offered. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980). For

have reached the end of its useful life. The Supreme Court insists that the Confrontation Clause requires exclusion of some evidence that otherwise is admissible under the hearsay rules.[12] But while the Court has struggled for decades to carve out an exclusionary niche for the Confrontation Clause that somehow differs from the law of evidence,[13] that effort has produced a constitutional rule that excludes a slice of hearsay so thin that the application of the rule now seems little more than a theoretical possibility.[14] Many have debated that the Court has cut too thin or too thick a slice, but the problem is deeper than that. By treating the Confrontation Clause as a rule that excludes unreliable hearsay, the Court has doomed the rule to redundancy with the law of evidence in the great majority of cases. After thirty years, it is worth asking at least whether the Clause should deal with hearsay in a fundamentally different way.[15]

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that reason, the Clause largely has escaped the principal criticism aimed at other exclusionary rules: exclusion lets the guilty go free. *See Leon*, 468 U.S. at 907. As an exclusionary rule based on reliability, the Confrontation Clause at least aims to protect the accuracy of the guilt-determining process, albeit in a manner that largely is controlled by the hearsay rules in any event.

12 *See* Idaho v. Wright, 497 U.S. 805, 814 (1990).

13 Those efforts have given rise to such widespread and diverse criticism that the Court has justified its own path by "the mutually critical character of the commentary." Ohio v. Roberts, 448 U.S. 56, 66-68 n.9 (1980). The problem of identifying hearsay that properly may be excluded under the Confrontation Clause has been regarded as one of the more perplexing dilemmas of constitutional criminal law. *See, e.g.*, Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1012 (1998) (calling the issue one of "pervasive perplexity"); Graham C. Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. FLA. L. REV. 207, 207 (1984) (referring to the question as an "intractable problem").

14 The Court insists that the Confrontation Clause retains vitality as something more than the mirror image of the hearsay rules. *See Wright*, 497 U.S. at 814 ("The Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule."). *Wright* leaves a Sixth Amendment exclusionary rule, however, that forbids only hearsay that (1) falls outside of the vast area defined by traditional, "firmly rooted," hearsay exceptions; and (2) when viewed in context with other corroborating evidence, appears reliable and therefore admissible under a residual exception; but (3) when viewed in isolation from such corroborating evidence, does not inspire a court to identify any particular basis for reliability. *See infra* text accompanying notes 138-143. That is a "thin slice" indeed.

15 Despite the variety of critical comments spawned by the Court's confrontation-hearsay opinions, one common thread runs throughout the debate. Virtually all scholarly commentary frames the question as a conflict over admission or exclusion of hearsay. The list is too long to include here. In *Roberts*, the Court chronicled that "outpouring of scholarly commentary." 448 U.S. at 66 n.9. Since *Roberts*, a number of excellent works have continued the debate over the limits of admissibility. *See, e.g.*, Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 693-97 (1996) (arguing that the Confrontation Clause applies only to testifying witnesses and to declarants who testify through ex parte depositions or affidavits); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 561-62 (1992) (arguing for a higher standard of admissibility for statements elicited by prosecutors or other government agents); Friedman, *supra* note 13, at 1026 (arguing that the Confrontation Clause applies only to "testimonial statements," excluding such statements absent confrontation of the declarant, with no exception for "reliable" hearsay); Jonakait, *supra* note 8; Lilly, *supra* note 13; Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149, 173 (1995) (rejecting the Court's reliance on "arcane rules of evidence" to define the constitutional rule and arguing that hearsay is admissible under the Clause only when (1) the trial court "has made an independent foundational finding that the hearsay is competent and (2) the hearsay is independently corroborated").

Second, a new approach offers a more flexible tool for dealing with the changing world of hearsay than an all-or-nothing constitutional rule addressing only admissibility. Hearsay exceptions have expanded throughout history.[16] More hearsay is coming to modern litigation, and generally for good reasons.[17] Modern courts find a wide range of hearsay to be closer in time to actual events, more spontaneous, and at least as reliable as the carefully rehearsed in-court testimony of many modern trials.[18] The increasingly international nature of criminal prosecution puts new strains on traditional hearsay exceptions.[19] The constitutional exclusionary rule for unreliable hearsay has not served to stem the tide of new and expanded hearsay exceptions, and a rigid wall of exclusion is probably a bad idea in any event. Instead, defendants need a new tool for contending with the increasing variety of admissible hearsay.

This article suggests that the new tool may come from an old source: the Sixth Amendment itself. The Confrontation Clause gives a defendant the right "to be confronted with the witnesses against him." Despite serious arguments to the contrary, the Court has insisted that hearsay declarants are "witnesses against" the defendant.[20] This Article contends that if declarants are "witnesses," then the Sixth Amendment should treat them like witnesses. The defendant's confrontation right, then, is not to exclude the declarant's unreliable testimony. The law of evidence and the Due Process Clause[21] can handle that task. The defendant's right is to "confront" the witnesses, to subject their hearsay "testimony" to adversarial challenge, and to impeach the declarant just as fully as he might seek to impeach a testifying witness. If the hearsay declarant is available to testify, the Confrontation Clause should provide for real confrontation if the defendant really wants it. Rather than screening for "reliability," the confrontation inquiry should focus on when, how, and by whom the declarant will be put on the witness stand. If the hearsay declarant is unavailable to testify, the inquiry should focus on available means to subject that hearsay to adversarial testing. Both the common

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16 *See* JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE 542-46 (4th ed. 1992) [hereinafter MCCORMICK].

17 The Federal Rules of Evidence provided the impetus for much of the modern liberalization of rules of admissibility in general, and hearsay exceptions in particular. *See* Faust F. Rossi, *The Silent Revolution*, *in* THE LITIGATION MANUAL 640, 641 (John G. Koeltl ed., 1989). In anticipation of additional hearsay exceptions, the drafters renumbered the Federal Rules, effective December 1, 1997, to move the "residual exception" from Rules 803(24) and 804(b)(5) to the new Rule 807. The change was made "to facilitate additions to Rules 803 and 804." FED. R. EVID. 807 advisory committee's note.

18 *See* United States v. Inadi, 475 U.S. 387, 395 (1986) (finding that in-court testimony by a coconspirator "seldom will reproduce . . . the evidentiary value of his statements during the course of the conspiracy").

19 *See* United States v. Salim, 664 F. Supp. 682, 686-89 (E.D.N.Y. 1987) (holding a deposition by written interrogatories taken pursuant to French law to be admissible under both the "former testimony" exception and the residual exception).

20 *See* White v. Illinois, 502 U.S. 346, 352 (1992). *See generally infra* text accompanying notes 179-181.

21 The Due Process Clause prohibits the use of hearsay evidence that is too unreliable for a jury to evaluate rationally. *See* Westen, *supra* note 2, at 598 & n.89. *See generally infra* text accompanying notes 210-213.

law and the modern rules of evidence recognize a process for impeaching absent hearsay declarants.[22] That process—which this Article calls "virtual cross-examination"—offers effective opportunities for challenging hearsay testimony, sometimes more effective because of—not in spite of—the absence of the declarant. Despite this potential, defendants largely have ignored that process in the past, in part because it has been preempted by exclusionary thinking.

Part I of this Article describes how the Court turned the Confrontation Clause into a rule excluding unreliable hearsay, culminating in the 1980 decision in *Ohio v. Roberts*, in which the Court set out the "general approach" that dominates confrontation-hearsay analysis today.[23] Part II assesses the application of the Court's exclusionary rule in the two decades since *Roberts*, a period during which the Confrontation Clause largely has merged with, and disappeared into, the law of evidence, in the process losing its significance as an independent protection for the accused in an adversarial system. Part III argues that the Court's choice of an exclusionary rule as the tool for protecting the confrontation right has the practical effect of limiting the scope of that right, while preempting the use of any alternative means of protecting it. Part IV argues that both the text and the history of the Sixth Amendment support a different approach: not a rule excluding unreliable hearsay, but an affirmative right to "confront" hearsay, to impeach the hearsay declarant, and to challenge hearsay testimony through any reasonably available means. Finally, Part V explores the scope and the practical application of that right to confront hearsay. That Part discusses a defendant's burdens and opportunities in creating a real, face-to-face confrontation when the declarant is available. It assesses the practical advantages and disadvantages of "virtual cross-examination," the process of impeaching an absent declarant.

As a rule of admissibility, the Confrontation Clause today has little impact on criminal trials, despite the increasing use of hearsay. If the Clause is to retain a life independent of the law of evidence, then the Clause must reach beyond the question of admissibility. Instead of asking when the Confrontation Clause requires exclusion of otherwise admissible evidence, perhaps the better question is the one most often overlooked: "How can the defendant challenge hearsay?" By exploring creative answers to that question, courts may find in many cases that the old exclusionary rule simply becomes unnecessary. Exclusion of evidence might become the remedy of last resort, not the premise from which the entire debate begins.

I. How the Confrontation Clause Became a Rule of Evidence, Excluding "Unreliable" Hearsay

The Sixth Amendment tells us that a defendant has a right to "be confronted with the witnesses against him."[24] When a prosecution witness appears at trial, the basic meaning of that right seems clear enough. First, it

22 *See* FED. R. EVID. 806; MCCORMICK, *supra* note 16, at 541; Bennett, *supra* note 9, at 1136.

23 448 U.S. 56, 65 (1980).

24 U.S. Const. amend. VI.

means that the defendant should be present in the courtroom when the witness testifies.[25] It also means that the jury should see and hear the witness so that the jurors can assess the credibility of the witness for themselves based on her demeanor while testifying.[26] Most important, the Court has said, it means that the defendant should have an opportunity to cross-examine the witness.[27] In essence, the Confrontation Clause creates a right to an adversarial process: a right to see, hear, and test prosecution witnesses through cross-examination and live scrutiny by a jury.

Hearsay, however, throws a wrench into that process. If the "witness," a hearsay declarant, never enters the courtroom, then testing seems impossible. The defendant cannot cross-examine her. The jury cannot assess her demeanor. If the process of confrontation is unattainable, what do we do about hearsay?

The law of evidence answers that question with a pragmatic compromise. The basic hearsay rule provides that out-of-court statements, the truth of which cannot be tested, should not come before the jury to prove that truth.[28] But then the basic rule gives way to practicality. Some hearsay is necessary, or at least very convenient, at trial. Moreover, much hearsay seems likely to be just as reliable as live testimony.[29] So necessity (or convenience) gives rise to exceptions to the basic rule. And for the most part, judgments about reliability define those exceptions under the law of evidence.[30]

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25 *See* Kentucky v. Stincer, 482 U.S. 730, 740 (1987) (holding that a defendant must be present at any stage of a trial where his presence would enhance his opportunity for cross-examination); Diaz v. United States, 223 U.S. 442, 454-55 (1912) (holding that a defendant has the right to be present at all stages of his trial, from impaneling the jury to the verdict).

26 *See* Maryland v. Craig, 497 U.S. 836, 857 (1990). In *Craig*, the Court held that a defendant's right to face-to-face confrontation sometimes must give way to an "important public policy" as long as the "reliability of the testimony is otherwise assured." *Id.* at 850. The Court allowed the victim in a child abuse prosecution to testify by way of closed circuit television—the witness's televised image was visible to both the defendant and the jury.

27 *See* California v. Green, 399 U.S. 149, 157-64 (1970); Pointer v. Texas, 380 U.S. 400, 404 (1965) ("It cannot seriously be doubted . . . that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."); Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."); Mattox v. United States, 156 U.S. 237, 242-43 (1895).

28 *See* FED. R. EVID. 801(c).

29 *See* White v. Illinois, 502 U.S. 346, 355-56 (1992) (asserting that the factors contributing to the reliability of spontaneous declarations and statements for purposes of medical diagnosis "cannot be recaptured even by later in-court testimony"); United States v. Inadi, 475 U.S. 387, 395 (1985) (arguing that the in-court testimony of a coconspirator may be less reliable than hearsay). *See generally* Nesson & Benkler, *supra* note 15, at 152 ("We bring witnesses to testify at trial from memory of events that may have taken place two or three years before, even though we have depositions or statements taken mere hours or days after the event. We bring expert witnesses to testify at trial when there is no reason to believe that the information they convey orally will be any more accurate or comprehensive than what they would convey in a written report. Indeed, the very opposite is likely.").

30 *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980). *But cf.* Nesson & Benkler, *supra* note 15, at 157 (arguing that the true basis for some hearsay exceptions is their "rhetorical force" as narratives more than their inherent trustworthiness).

There are good reasons, however, why the Confrontation Clause need not respond to the hearsay dilemma with the same compromise forged by the law of evidence. For one thing, the law of evidence is all about admissibility. The Confrontation Clause, at least on its face, is not. It is about process. For another, the hearsay rule has exceptions. The Confrontation Clause does not.

Nevertheless, the temptation to merge the two has always been great. After all, they both address the same evil: trial by absent, untested witnesses. As Justice Harlan once commented, it is "not unnatural" to assume that they both should employ the same method—exclusion of unreliable hearsay—to combat a common enemy.[31] The Court has not been able to avoid that temptation. This "exclusionary thinking" under the Confrontation Clause began in the Court's first hearsay/confrontation case.

A. Mattox v. United States*: "Necessity" Transforms a Rule of Procedure into a Rule Admitting "Reliable" Hearsay*

In 1895, *Mattox v. United States*[32] presented the Court with its first Confrontation Clause challenge to the admission of hearsay against a criminal defendant. Mattox had been tried and convicted of murder.[33] His conviction was reversed on appeal.[34] After a second trial resulted in a hung jury, Mattox was tried a third time.[35] Two key government witnesses had died in the two years since the first trial.[36] At the third trial the court admitted into evidence the court reporter's transcript of the deceased witnesses' testimony—complete with cross-examination—from the first trial.[37]

The *Mattox* opinion is remarkable because of what it does not do. Mattox assigned as error in the court below the "admitting to the jury the reporter's notes of the testimony of two witnesses at the former trial."[38] The Supreme Court never seriously questioned the notion that it should apply the Confrontation Clause as a rule governing admissibility or exclusion of hear-

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31 Dutton v. Evans, 400 U.S. 74, 94-95 (1970) (Harlan, J., concurring).

> The conversion of a clause intended to regulate trial procedure into a threat to much of the existing law of evidence and to future developments in that field is not an unnatural shift, for the paradigmatic evil the Confrontation Clause was aimed at—trial by affidavit—can be viewed almost equally well as a gross violation of the rule against hearsay . . . . But however natural the shift may be, once made it carries the seeds of great mischief for enlightened development in the law of evidence.

Id. (footnote omitted). Justice Harlan's concurring opinion in *Evans* is the only occasion where a member of the Court argued that courts should not apply the Confrontation Clause as a rule excluding hearsay. The opinion represented a major change from his earlier view, announced only six months before, that the Clause was a "preferential" rule that required the prosecution to produce available declarants whose hearsay statements it wished to use at trial. *See Green*, 399 U.S. at 174-75 (Harlan, J., concurring).

32 156 U.S. 237 (1895).

33 *See id.* at 237.

34 *See* Mattox v. United States, 146 U.S. 140 (1892).

35 *See Mattox*, 156 U.S. at 251 (Shiras, J. dissenting).

36 *See id.* at 240.

37 *See id.*

38 *Id.* at 238.

say. Instead, the Court implicitly accepted the defendant's framing of the issue, allowing the confrontation question to become a battle over admissibility.

But initially at least, the Court did not equate admissibility with the reliability of hearsay. Instead, it focused on the defendant's procedural rights. The right of cross-examination is the heart of the opinion. "The primary object of the constitutional provision," the Court wrote, "was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . ."[39] In the end, the Court's holding was relatively simple. The transcripts were admissible because the defendant had an adequate opportunity to test the prosecution's witnesses through cross-examination.[40] Although the Court implicitly treated the Confrontation Clause as a rule of admissibility, the standard for admissibility rested upon satisfaction of the basic procedural right of cross-examination.

The Court might have stopped there, but the lure of the law of evidence proved irresistible. The right of confrontation, like many other provisions in the Bill of Rights, the Court observed, is "subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit."[41] In interpreting those provisions, the Court found that "[s]uch exceptions were obviously intended to be respected."[42] What were the "exceptions?" The court looked to the hearsay rules for its answer:

> [T]here could be nothing more directly contrary to the letter of the [Confrontation Clause] than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice.[43]

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39 *Id.* at 242. A handful of confrontation-hearsay cases in the decades that followed *Mattox* focus on cross-examination as the central guarantee of the Confrontation Clause. *See, e.g.*, Dowdell v. United States, 221 U.S. 325, 330 (1911) (finding that the Confrontation Clause was intended "particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination"); Kirby v. United States, 174 U.S. 47, 55 (1899) ("[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.").

40 *See Mattox*, 156 U.S. at 244 ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.")

41 *Id.* at 243.

42 *Id.*

43 *Id.* at 243-44.

Mattox, of course, was neither a dying declaration case nor a case involving an out-of-court statement not subject to cross-examination. Nevertheless, the Court's dictum signaled the basic shift that would dominate Confrontation Clause analysis a century later. It was one thing for the Court to hold that prior cross-examination satisfied the procedural rights guaranteed by the Confrontation Clause. It was quite another for the Court to allow "exceptions" to the right of confrontation altogether and further to equate those exceptions with the hearsay rules. In doing so, the Court fundamentally changed its characterization of the Clause from an affirmative guarantee of procedural rights to a substantive rule for admitting or excluding evidence. If "exceptional" types of hearsay, like dying declarations, constituted "exceptions" to the right of confrontation, then there would be no need to assess the adequacy of the procedures available to the defendant to challenge such evidence. The procedural rights protected by the Clause simply would not apply to those exceptional cases. Admissibility of hearsay would become an all-or-nothing issue.

The Court then took one more step for good measure. It argued by analogy that prior testimony given under oath and subject to cross-examination was constitutionally admissible because it was just as reliable as a dying declaration:

> [T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight as if made under oath, there is equal if not greater reason for admitting testimony of his statements which were made under oath.[44]

By answering questions that were not before it, the *Mattox* Court gave birth to modern confrontation-hearsay analysis.[45] The procedural right of

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44 *Id.* at 244.

45 Ironically, the Court missed an opportunity to consider a Sixth Amendment right to impeach a hearsay declarant in *Mattox* itself. In an effort to impeach the testimony of one of the deceased declarants, Mattox sought to call two witnesses of his own to testify that, after the first trial, the declarant had made statements admitting that his testimony at the earlier trial was false, having been induced by "threats made to him in the corridors of the court-house." *See id.* at 245. The trial court refused to permit the impeaching testimony of the two defense witnesses. *See id.* at 238. The court convicted Mattox a second time. *See id.*

In the Supreme Court, Mattox argued that the trial court erred in refusing to admit the testimony of the two defense witnesses. *See id.* at 244. The Court rejected the argument, reasoning that the law of evidence prohibited the use of a prior inconsistent statement to impeach a witness without laying a foundation by inquiring of the witness whether he in fact had made the statement. *See id.* at 250. In disposing of the second issue purely as a matter of the law of evidence, the majority opinion never mentioned the Confrontation Clause. Despite prodding from three dissenters, *see id.* at 251-61 (Shiras, J., dissenting), the Court bypassed this early opportunity to articulate an affirmative Sixth Amendment right to impeach a hearsay declarant. Instead, the Court restricted its Confrontation Clause analysis to the admissibility of prosecution evidence and never sought to link that issue with the question posed by the defendant's proffered impeachment testimony. In so doing, the Court established a pattern that it never has broken. In the one hundred years since *Mattox*, the Court's opinions in confrontation-hearsay cases uniformly define the question before the Court as one of the admissibility of hearsay state-

confrontation would give way to "exceptions." Long-recognized exceptions to the hearsay rule would qualify as exceptions to the right of confrontation. In the same manner, courts would admit out-of-court statements that were just as reliable as those covered by the traditional exceptions without finding a constitutional violation.

It would take most of a century, however, before a majority of the Court would embrace the "reliability" theme of *Mattox*. For the next seventy years, the Court had relatively few opportunities to consider hearsay under the Confrontation Clause.[46] The pace quickened after *Pointer v. Texas*,[47] where the Court held that the confrontation right applied in state prosecutions.[48] Through the 1960s and the 1970s, with one notable exception,[49] the Court's confrontation-hearsay opinions dealt primarily with hearsay in the form of testimony from prior judicial proceedings.[50] Because the defendant in each of those cases had some opportunity to cross-examine the declarant in an

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ments. *See, e.g.*, White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990); Ohio v. Roberts, 448 U.S. 56 (1980); Pointer v. Texas, 380 U.S. 400 (1965).

46 *See* Salinger v. United States, 272 U.S. 542, 547-48 (1926) (finding no confrontation violation where letters were not received in evidence for the truth of matters asserted); Dowdell v. United States, 221 U.S. 325, 330 (1911) (holding that the court and the clerk certifying the record of trial proceedings for appeal are not "witnesses" under the Confrontation Clause); Motes v. United States, 178 U.S. 458, 471 (1900) (holding that the admission of the prior testimony of witness whose absence from the trial is brought about by negligence of prosecution violates the Confrontation Clause); Kirby v. United States, 174 U.S. 47, 60 (1899) (finding that in a prosecution for receiving stolen goods, the Clause prohibits the government from proving the stolen character of goods by introducing the record showing conviction of the thief in an earlier proceeding).

47 380 U.S. 400 (1965).

48 *See id.* at 403. *Pointer*, the Court's first significant confrontation-hearsay opinion of the modern era, relied exclusively on the deprivation of cross-examination to find a Sixth Amendment violation. *See id.* at 407. The government had introduced at trial the transcript of the testimony from a preliminary hearing at which the defendant had not been represented by counsel. *See id.* Justice Black's opinion for the Court is perhaps best known for its holding that the Sixth Amendment right of confrontation is made applicable to the states by "incorporation" through the Fourteenth Amendment. *See id.* at 403-05.

49 *See* Dutton v. Evans, 400 U.S. 74, 77-78 (1970).

50 *See, e.g.*, Mancusi v. Stubbs, 408 U.S. 204 (1972) (testimony from an earlier trial); California v. Green, 399 U.S. 149 (1970) (statement by a witness at a preliminary hearing); Barber v. Page, 390 U.S. 719 (1968) (same); *Pointer*, 380 U.S. at 401 (same). In the same period, the Court considered several Confrontation Clause challenges in cases in which the hearsay declarant actually had appeared at trial, had testified, and had been subject to some form of cross-examination about his earlier out-of-court statement. In each case, the defendant asserted that even his opportunity for in-court cross-examination of the declarant failed to satisfy the Confrontation Clause because of the unwillingness, evasiveness, or forgetfulness of the witness when asked questions about the out-of-court statement. The Court upheld such a challenge in *Douglas v. Alabama*, 380 U.S. 415, 419 (1965), where the declarant had asserted his Fifth Amendment privilege and simply had refused to answer questions. The Court found no confrontation violation in three later cases in which the witness had answered the cross-examiner's questions, although the answers might have been limited to "I don't know" or "I can't recall ever making that statement." *See* United States v. Owens, 484 U.S. 554 (1988) (an assault victim with a head trauma and memory loss was unable to recall the attack or the circumstances under which he made a prior statement identifying the assailant); Delaware v. Fensterer, 474 U.S. 15 (1985) (an expert witness was unable to recall the basis of his opinion); Nelson v. O'Neil, 402 U.S. 622 (1971) (a witness denied making a prior statement). In each case, the Court found an "adequate opportunity" to cross-examine the declarant.

earlier proceeding, the Court typically focused on the adequacy of that opportunity as the test for a violation of the Sixth Amendment.[51] The "procedural rights" theme—the narrow holding in *Mattox*—sufficed to decide those cases.

The one exception was the 1970 case of *Dutton v. Evans*.[52] The trial court admitted the testimony of a jailhouse informant, who related the out-of-court statement of the defendant's alleged accomplice in a murder.[53] The accomplice/declarant did not testify and was not subject to cross-examination by the defendant.[54] In upholding Evans's conviction, Justice Stewart's plurality opinion brought the reliability theme to center stage. He found no denial of the right of confrontation because the circumstances surrounding the out-of-court statement made it sufficiently reliable for the jury to consider:

> These circumstances go beyond a showing that Williams [the accomplice/declarant] had no apparent reason to lie to Shaw [the jailhouse informant]. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.[55]

Despite Justice Stewart's repeated protests that the Sixth Amendment did not constitutionalize hearsay rules,[56] his opinion implicitly equated reliable hearsay with two exceptions to the hearsay rules: spontaneous utterances and statements against penal interest. Such reliable hearsay required "no confrontation of the declarant."[57] Eighty-five years after *Mattox,* the Court seemed poised to embrace the notion that at least some hearsay exceptions provided exceptions to the right of confrontation.

B. Ohio v. Roberts*: The Reliability Theme Prevails*

A decade later, in *Ohio v. Roberts*,[58] the Court took the final step in transforming the Confrontation Clause into an evidentiary rule excluding un-

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51 *See Owens*, 484 U.S. at 557; *Fensterer*, 474 U.S. at 19-22; *Nelson*, 402 U.S. at 629.

52 400 U.S. 74 (1970).

53 *See id.* at 74.

54 *See id.* at 74-75.

55 *Id.* at 89. It is ironic, to say the least, that the Court used the particular hearsay statements at issue in *Dutton v. Evans* as the basis for its first Confrontation Clause decision that based the admissibility of hearsay on the reliability of the hearsay statement. Although the plurality opinion found sufficient "indicia of reliability" to admit the jailhouse informant's testimony, two concurring Justices found the admission of the statement "harmless" for precisely the opposite reason. Justice Blackmun's concurring opinion noted that "the claimed circumstances of its utterance are so incredible that the testimony must have hurt, rather than helped, the prosecution's case." *Id.* at 90 (Blackmun, J., concurring).

56 *See id.* at 82 ("[T]his Court has never indicated that the limited contours of the hearsay exception in federal conspiracy trials are required by the Sixth Amendment's Confrontation Clause."); *id.* at 86 ("[T]he Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now.") (footnotes omitted).

57 *Id.* at 89.

58 448 U.S. 56 (1980).

reliable hearsay. As in *Mattox*, the Court took that step by answering unnecessary questions. Like *Mattox*, *Roberts* involved prior testimony by a declarant who became unavailable for trial. Like *Mattox*, *Roberts* was a case that ultimately turned upon the adequacy of the defendant's opportunity to cross-examine the declarant at the earlier proceeding.[59] In keeping with the holdings in its earlier Confrontation Clause opinions, the Court could have decided the case based solely on the adequacy of the defendant's right to cross-examine the hearsay declarant in a prior proceeding. Instead, Justice Blackmun's majority opinion chose to set out a "general approach" to "determine the validity of all . . . hearsay exceptions" under the Confrontation Clause.[60] In the opening sentence describing that "general approach," the Court characterized the Confrontation Clause, in the most explicit terms, as an exclusionary rule: "[t]he Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay."[61]

The Court then established necessity and reliability as the twin pillars of admissibility.[62] The "rule of necessity," the Court noted, reflects "the Framers' preference for face-to-face accusation."[63] To satisfy that preference, the Confrontation Clause requires the government to "produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[64] Anticipating some of the practical difficulties of an absolute rule of necessity, however, the Court hedged. The rule of necessity would apply only "in the usual case."[65] The opinion's principal focus was the second pillar, reliability. The Court took pains to reconcile the "reliability" requirement with its earlier opinions extolling the virtues of cross-examination: "Since there was an adequate opportunity to cross-examine [the witness], and counsel . . . availed himself of that opportunity, the transcript . . . bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'"[66] The effect was subtle, but significant. No longer the "primary object" of the Confrontation

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59 *See id.* at 70-73. The trial court in *Roberts* admitted a transcript of the preliminary hearing testimony of a witness who had disappeared before trial. *See id.* at 60. In denying the defendant's Confrontation Clause challenge, the Supreme Court found that defense counsel's questioning of the witness at the preliminary hearing "clearly partook of cross-examination as a matter of *form*," *id.* at 70, and that "counsel was not 'significantly limited in any way in the scope or nature of his cross-examination.'" *Id.* at 71 (quoting California v. Green, 399 U.S. 149, 166 (1970)).

60 *Id.* at 64-65. In framing the question as one regarding the "validity of . . . hearsay exceptions," the Court implicitly endorsed the notion that the Confrontation Clause would operate as an exclusionary rule.

61 *Id.* at 65.

62 *See id.*

63 *Id.*

64 *Id.* "Unavailability" proved to be a short-lived component of the "general approach." *See* United States v. Inadi, 475 U.S. 387, 392-94 (1986); *infra* Part II.A. *See generally* Jonakait, *supra* note 8, at 561-70 (criticizing *Inadi*'s suggestion that the defendant could produce the available declarant when the defendant wished to cross-examine her.).

65 *See Roberts*, 448 U.S. at 65. The Court cited *Evans* as a case in which "the utility of trial confrontation [was] so remote that [the Court] did not require the prosecution to produce a seemingly available witness." *Id.* at 65 n.7 (citing Dutton v. Evans, 400 U.S. 74 (1970)).

66 *Id.* at 73 (quoting Mancusi v. Stubbs, 408 U.S. 204, 216 (1972)). *Stubbs* also was a prior testimony case in which the Court found no violation of the defendant's confrontation right

Clause, the right to cross-examine became merely one of the "indicia of reliability" that made hearsay constitutionally admissible. The reliability theme, born in *Mattox* and nourished by the plurality in *Dutton v. Evans*, had come of age.

Ohio v. Roberts completed the transformation of the Confrontation Clause from a guarantee of procedural rights into a rule of evidence that excludes unreliable hearsay. Equally important, the *Roberts* opinion made explicit what had been merely implicit in *Dutton v. Evans*. It defined "reliable" hearsay by reference to established hearsay exceptions: "The Court has applied this 'indicia of reliability' requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"[67]

In a passage that became the starting point for its subsequent confrontation-hearsay opinions, the Court added:

> [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.[68]

That brief passage has dominated confrontation-hearsay analysis ever since.[69] Following that formula, a trial court first must determine whether the hearsay statement falls within a "firmly rooted" exception to the hearsay rule. If the court finds such "roots," the inquiry ends; there is no constitutional violation.[70] If the hearsay falls outside of a "firmly rooted" exception, it is "presumptively unreliable" and, therefore, presumptively inadmissible.[71] A court then moves to the second step of the reliability inquiry and considers whether sufficient "particularized guarantees of trustworthiness" nonetheless appear in the circumstances surrounding the statement. Unless the Court finds such "particularized guarantees," it must exclude the statement.[72]

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when there was adequate opportunity to cross-examine the declarant at an earlier trial. *See Stubbs*, 408 U.S. at 216.

67 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

68 *Id.*

69 *See* Puleio v. Vose, 830 F.2d 1197, 1205 (1st Cir. 1987) ("Since *Roberts* was announced, federal appellate courts have marched in near-perfect unison to the *Roberts* tune.").

70 *See, e.g.*, White v. Illinois, 502 U.S. 346, 355 & n.8, 357 (1992) (finding that both spontaneous declarations and statements for purposes of medical diagnosis are "firmly rooted" exceptions to the hearsay rule and that statements falling within such exceptions may be admitted without violating the Confrontation Clause); Bourjaily v. United States, 483 U.S. 171, 183-84 (1987) (holding that a coconspirator's statements fall within "firmly rooted" hearsay exception; no independent assessment of reliability is required).

71 *See* Idaho v. Wright, 497 U.S. 805, 818 (1990) (finding that statements falling within Idaho's "residual hearsay exception," identical to Federal Rule of Evidence 803(24), are "presumptively unreliable") (quoting Lee v. Illinois, 476 U.S. 530, 543 & 544 n.5 (1986) (holding that a codefendant's confession is "presumptively unreliable" and rejecting the argument that the statement fits the "firmly rooted" exception for "declarations against penal interest")).

72 *See id.* at 825-27. In *Wright*, the Court engaged in an extensive analysis of the circumstances surrounding the hearsay statements of a child who was the victim of sexual abuse, con-

Roberts completed the shift, begun in *Mattox*, that changed the Confrontation Clause from a procedural right to a substantive rule of evidence. Since *Roberts*, the Court has adhered to its "general approach" in dealing with all hearsay, not just prior testimony. Reliability has become the surrogate for cross-examination. "Firmly rooted" hearsay exceptions are the surrogate for reliability. The Confrontation Clause is simply an exclusionary rule for unreliable hearsay, and the law of evidence largely defines the rule.

II. The Fate of the Confrontation Clause After Ohio v. Roberts*: An Exclusionary Rule That Excludes Almost Nothing*

Almost twenty years after *Roberts*, it is hard to conclude that the Confrontation Clause, as an exclusionary rule, has much practical impact on hearsay in criminal trials. Today, the first pillar of *Roberts*, the "rule of necessity," excludes nothing that the hearsay rules would admit in evidence. Its second pillar, the "reliability" test, has limited effect largely because the vast majority of admissible hearsay now fits within "firmly rooted" exceptions and, therefore, is effectively exempt from any constitutional reliability assessment. In an ironic twist, the exclusionary rule of *Roberts* probably has encouraged, rather than inhibited, the expansion of traditional hearsay exceptions. In the few cases in which hearsay falls outside of firmly rooted exceptions, the Court's open-ended standard for identifying "particularized guarantees of trustworthiness" has been, at best, an unpredictable barrier to experiments with nontraditional hearsay. In *Dutton v. Evans*, the first case in this century in which the Court seized upon "reliability" as the standard for admitting or excluding prosecution hearsay, Justice Marshall wrote in dissent, "If 'indicia of reliability' are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all."[73] Almost thirty years later, that question looks prophetic. The "general approach" of *Roberts* has evolved into an exclusionary rule that excludes very little.

A. The Court Retreats from the Rule of "Necessity"

The first element in *Roberts'* general approach was "a rule of necessity."[74] The Court characterized the approach as a "preference" for live testimony over hearsay.[75] Because the live version is the "preferred" version, the rule excludes hearsay unless the prosecution produces the declarant or proves that she is unavailable.[76]

As a general proposition, the rule of necessity was short-lived. Six years after *Roberts*, in *United States v. Inadi*,[77] the Court ruled that coconspirator

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cluding that there were not sufficient "particularized guarantees of trustworthiness" to admit the statements without violating the Confrontation Clause. *See id.*

73 Dutton v. Evans, 400 U.S. 74, 110 (Marshall, J., dissenting).

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

75 *See id.*

76 *See id.*

77 475 U.S. 387 (1986).

statements are admissible notwithstanding the availability of the declarant.[78] At its next opportunity, in *White v. Illinois*,[79] the Court retreated further, stating that the unavailability of the declarant was a predicate to admissibility "only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."[80]

After *Inadi* and *White*, the Confrontation Clause "rule of necessity" has no real impact on the admission of hearsay. The rule now applies only to former testimony. Under the law of evidence, in both federal and state courts, former testimony is admissible now, as it was before *Roberts*, only when the declarant is unavailable.[81] In the end, the *Roberts* rule of necessity has no application independent of the law of evidence.[82]

B. *Firm Roots Everywhere: The Hearsay Exceptions Swallow the Confrontation Clause*

Under the general approach of *Roberts*, a "firmly rooted" hearsay exception defines a class of hearsay statements so reliable that cross-examination would add very little to the jury's ability to assess them.[83] Given these theoretical origins, one might expect that the two decades since *Roberts* would have produced a test for distinguishing "firm" from "not so firm" roots

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78 *See id.* at 399-400.

79 502 U.S. 346 (1992).

80 *Id.* at 354. The Court gave three reasons for its retreat. First, aside from prior testimony, the Court found no reason to prefer live testimony over hearsay. Coconspirator statements, spontaneous declarations, and statements for purposes of medical diagnosis—those at issue in *Inadi* and *White*—the Court wrote, "are made in contexts that provide substantial guarantees of their trustworthiness." *Id.* at 355. The circumstances that make them reliable "cannot be recaptured" in the courtroom. *See id.* at 356. For that reason, such hearsay "may justifiably carry more weight with a trier of fact than a similar statement [in] the courtroom." *Id.* In other words, the rule of preference now was turned on its head; some hearsay might be preferable to live testimony. Second, the Court argued, as applied to much hearsay, the rule of necessity was simply impractical. Imagine, for example, trying to lay the foundation for a corporate financial ledger as a business record by demonstrating the unavailability of, or producing in court, every individual who provided information recorded in the ledger. The Court wanted no part of a rule that inconvenient. *See id.* at 355. Third, the Court saw little hardship to defendants in limiting the rule. If a defendant really wants to cross-examine the declarant, the Court noted, "the Compulsory Process Clause and evidentiary rules permitting a defendant to treat witnesses as hostile will aid defendants in obtaining a declarant's live testimony." *Id.* (footnote omitted).

81 *See* FED. R. EVID. 804(b)(1); MCCORMICK, *supra* note 16, at 516.

82 As a practical matter, the *Roberts* "rule of necessity" probably had little impact from the start. When the Court announced the *Roberts* decision, FED R. EVID. 803(1-23) enumerated twenty-three hearsay exceptions that applied whether or not the declarant was available. Strictly applied, the *Roberts* rule of necessity would have rendered all of those exceptions unconstitutional as applied to available declarants in criminal cases. There is little indication that lower courts applied *Roberts* to effect such a fundamental change in the law of evidence. The issue seems to have crystallized first in coconspirator hearsay cases. Following *Roberts* and before *Inadi*, three United States Courts of Appeals imposed an unavailability requirement on coconspirator hearsay. *See* United States v. Inadi, 748 F.2d 812, 818 (3d Cir. 1984); United States v. Lisotto, 722 F.2d 85, 88 (4th Cir. 1983); United States v. Ordonez, 722 F.2d 530, 535 (9th Cir. 1983). The Supreme Court put an abrupt end to that trend when it decided *Inadi*.

83 *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980); *see also* Idaho v. Wright, 497 U.S. 805, 820-21 ("Our precedents have recognized that statements admitted under a 'firmly rooted' hearsay exception are so trustworthy that adversarial testing would add little to their reliability.").

based on the likely reliability of statements falling within a given exception. Instead, the Court's standards—if there really are any standards at all[84]—show little concern for reliability.[85] The common-law hearsay exception for coconspirator statements, for example, developed for reasons wholly apart from any notion of the inherent trustworthiness of the statements of one thief or murderer to another.[86] Nevertheless, the Court readily anointed coconspirator statements as a "firmly rooted" exception.[87] Conversely, statements against penal interest, excepted from the hearsay rule purely on the basis of their supposed reliability,[88] have yet to receive the Court's final blessing as "firmly rooted."[89] The Court quickly dismissed the "residual," or "catch-all,"

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84 *Roberts* offered four examples of "firmly rooted" exceptions—dying declarations, cross-examined prior-trial testimony, and the business and public records exceptions—that apparently possessed such solid foundations. *See Roberts*, 448 U.S. at 66 n.8. Beyond that, the Court gave no guidance for identifying firmly rooted hearsay exceptions, apparently preferring the gradual development of standards on a case-by-case basis.

85 If the Court had adopted standards based on realistic assessments of reliability, the results might have been quite different. Professors Nesson and Benkler have argued that cultural evolution and increased understanding of human psychology have undermined the empirical basis for believing that many traditional hearsay exceptions bear any real relation to reliability:

> [M]any exceptions have worn too thin to remain convincing. . . . Consider, for instance, the dying declarations exception, which arises from the cultural experience of "facing one's Maker" as a moment of truth. But in a culture that only grows more cynical about the authenticity of religious experience, the exception loses its rhetorical force. Dying declarations no longer evoke the image of a person making a solemn statement on the death bed, before a confessor, surrounded by family members. Instead, we more commonly envision a drugged, whispering patient in an impersonal hospital, alone except for a detective holding a little black book and straining to hear a name gasped against the flow of pure oxygen. The contemporary image lacks the comforting effect of the traditional one.
>
> As knowledge of human psychology becomes more sophisticated and widely disseminated, that discomfort extends to more of the hearsay exceptions. Do we still believe that people excited by an upsetting event are more likely to tell the truth than to exonerate themselves . . . from blame? Do we still believe that a plaintiff is more likely to tell the truth to the physician hired to testify as an expert at the plaintiff's trial than to any other person whose testimony does not fit another hearsay exception?

Nesson & Benkler, *supra* note 15, at 156 (footnotes omitted).

86 *See* Bourjaily v. United States, 483 U.S. 171, 189 (1987) (Blackmun, J., dissenting) ("[U]nlike many common-law hearsay exceptions, the coconspirator exemption . . . was not based primarily upon any particular guarantees of reliability or trustworthiness . . . ."); David S. Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384 (1972); *cf.* FED. R. EVID. 801(d)(2) advisory committee's note ("Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission.") (citations omitted).

87 *See Bourjaily*, 483 U.S. at 183.

88 *See* FED. R. EVID. 804(b)(3) advisory committee's note ("The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.") (citing Hileman v. Northwest Eng'g Co., 346 F.2d 668 (6th Cir. 1965)); MCCORMICK, *supra* note 16, at 528.

89 *See* Williamson v. United States, 512 U.S. 594, 605 (1994) ("[W]e need not decide whether the exception for declarations against interest is 'firmly rooted' for Confrontation

exception, the only exception in the Federal Rules that explicitly requires a finding of trustworthiness as a condition to admissibility, as lacking firmness of roots.[90]

History, rather than reliability, generally has driven the Court's decisions identifying "firmly rooted" hearsay exceptions. Even the search for historically adequate "roots," however, has been less than exacting.[91] The Court has relied upon a rather amorphous mix of chronological age and widespread acceptance—a sort of historical popularity contest. The Court's test is so generous that virtually all recognizable hearsay exceptions have passed. Applying this approach, the Court has ruled that the exceptions for coconspirator statements,[92] spontaneous declarations,[93] and statements for purposes of medical diagnosis[94] are "firmly rooted." In dictum at least, the Court similarly has recognized the firm roots of the exceptions for public records, business records, dying declarations, and prior trial testimony subject to cross-examination.[95] Following the Court's example, federal and state appellate courts have been quick to fill in the few remaining gaps, finding sufficiently firm roots in the exceptions for recorded recollection,[96] admis-

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Clause purposes."); Lee v. Illinois, 476 U.S. 530, 544 n.5 (1986) ("We reject respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis.").

90 *See* Idaho v. Wright, 497 U.S. 805, 817-18 (1990).

91 *Mattox* had offered a theory for identifying exceptions to the confrontation right: "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted .... Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected." United States v. Mattox, 156 U.S. 237, 243 (1895). Consistent with *Mattox*, the modern Court might have defined "firmly rooted" hearsay exceptions as those that were "recognized ... before the adoption of the constitution." The Court has not followed that course, and with good reason. The task of identifying which hearsay exceptions the Framers "recognized," and in what form they were recognized, is itself a highly uncertain enterprise. *See* California v. Green, 399 U.S. 149, 177-78 & n.12 (1970) (Harlan, J., concurring) (contrasting Professor Heller's view that the dying declaration exception was the only recognized hearsay exception when the Sixth Amendment was ratified, *see* FRANCIS H. HELLER, THE SIXTH AMENDMENT 105 (1951), with Wigmore's conclusion that several hearsay exceptions predated the Constitution, *see* 5 JOHN HENRY WIGMORE, EVIDENCE § 1397, at 130 (3d ed. 1940)).

92 *See Bourjaily*, 483 U.S. at 183. The Court cited a long tradition of admitting coconspirator statements, established by the Court for over 150 years. *See id.* (citing United States v. Gooding, 12 U.S. (1 Wheat) 460 (1827)).

93 *See White*, 502 U.S. at 346, 355 n.8. In recognizing the firm roots of the spontaneous declaration exception, the Court noted that the exception is "at least two centuries old," and that it is "recognized under Federal Rule of Evidence 803(2) and in nearly four-fifths of the States." *Id.*

94 *See id.* Curiously, the *White* Court made no reference to history when it blessed the exception for statements made for purposes of medical diagnosis or treatment. It found "firm roots" because the exception appears in the Federal Rules (Rule 803(4)) and is "widely accepted among the States." *Id.*

95 *See* Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980).

96 *See* Hatch v. Oklahoma, 58 F.3d 1447, 1467 (10th Cir. 1995); United States v. Picciandra, 788 F.2d 39, 42-43 (1st Cir. 1986).

sions by an agent,[97] statements regarding the declarant's state of mind,[98] and the *res gestae* exception.[99]

Only once has the Court found that a hearsay exception lacked "firm roots." In *Idaho v. Wright*, the Court held that "residual" hearsay exceptions[100] do not partake of any "tradition of reliability" and, therefore, should not be treated as "firmly rooted."[101] Except for statements against interest,[102] the *Roberts* formula effectively exempts from constitutional scrutiny hearsay statements that bear the label of any exception recognizable by students of the law of evidence. 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.[103]

C. *Pigeonholing Hearsay into Expanding Exceptions: The Primacy of Labels*

On its face, the *Roberts* opinion treats firmly rooted exceptions as if they were fixed targets with easily recognizable boundaries. In truth, they are not. Hearsay exceptions have tended to expand over time, as legislatures and courts redefine them.[104] Categories of hearsay that bear a common label can vary significantly from one jurisdiction to another.[105] *Roberts* described the hearsay rule and its exceptions as "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists."[106] The remarkable irony of the past two decades is that after making that obser-

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97 *See* United States v. Saks, 964 F.2d 1514, 1525 (5th Cir. 1992).

98 *See* United States v. Veltmann, 6 F.3d 1483, 1493-94 (11th Cir. 1993).

99 *See* Williams v. Melton, 733 F.2d 1492, 1495 (11th Cir. 1984).

100 *See* FED. R. EVID. 807 (formerly Rules 803(24) and 804(b)(5)).

101 *See* Idaho v. Wright, 497 U.S. 805, 817-18 (1990). Of course, like the exception for statements for purposes of medical diagnosis, residual hearsay exceptions appear in the Federal Rules, *see* FED. R. EVID. 807 (formerly Rules 803(24) and 804(b)(5)), and are "widely accepted" by the states. *See, e.g.*, CAL. EVID. CODE § 1350 (West 1995). The *Wright* Court neither paused to struggle with such a comparison nor considered the irony that the residual exception is the only exception that requires a trial court to make an explicit finding of "trustworthiness" before admitting the hearsay.

102 The Court has not explicitly declared statements against penal interest to be a firmly rooted exception. The Court skirted the issue in *Lee v. Illinois*, 476 U.S. 530, 544 n.5 (1986). In *Williamson v. United States*, 512 U.S. 594, 605 (1994), in dictum, the Court left little doubt that it now views the exception as firmly rooted. *See infra* note 135.

103 *See* Garrison Keiller, *Monologue Excerpt* (visited October 5, 1998) <http://phc.mpr.org/chat/1997/001_children/hearts.shtml>. The reference is to the weekly "sign-off" comment of host Garrison Keiller, from "Lake Wobegon, where all the women are strong, all the men are good looking, and all the children are above average."

104 *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 176-81 (1987) (holding that FED. R. EVID. 104(a) modified the traditional "bootstrapping" rule of *Glasser v. United States*, 315 U.S. 60, 74-75 (1942), which required independent evidence of conspiracy as a foundation for the admission of coconspirator statements). *See generally* Rossi, *supra* note 17, at 645-48.

105 *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 80-81 (1970) (comparing Georgia's hearsay exception for coconspirator statements with the federal version).

106 Ohio v. Roberts, 448 U.S. 56, 62 (1980) (quoting Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)).

vation in *Roberts*, the Court has elevated traditional hearsay exceptions—the "patches" in that "crazy quilt"—to a position of constitutional primacy.

The Court justified its generous treatment of firmly rooted exceptions because they "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"[107] Given that rationale, logic would dictate that hearsay falling outside of the traditional "foundations" of firmly rooted exceptions would not enjoy the same treatment, even though a court or legislature might expand historical boundaries to encompass new hearsay within a category which still bore a traditional label. But the 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. Indeed, *Roberts* might actually have encouraged that expansion. By elevating firmly rooted exceptions to constitutional significance, *Roberts* created an incentive for litigants to "pigeonhole" more hearsay into those exceptions, thereby avoiding a separate inquiry into the reliability of particular hearsay statements.[108] The hearsay "tail" now wags the constitutional "dog."[109]

The Court has promoted this trend by giving constitutional finality to the label that a trial court affixes to a hearsay statement, with little heed to the process that affixes the label in the first place. Once a trial court places hearsay within the "pigeonhole" of a firmly rooted hearsay exception, the Court appears content to end its constitutional inquiry, even though the particular

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107 *Id.* at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

108 Prior to *Wright*, for example, a state trial court admitted hearsay accounts of a child's complaints of abuse under a non-traditional hearsay exception. *See* Dana v. Department of Corrections, 958 F.2d 237, 238-39 (8th Cir. 1992). After the Supreme Court decided *Wright*, the Eighth Circuit affirmed the denial of federal habeas relief by finding that the statement would have been admissible under Minnesota's expanded version of the traditional exception for statements for medical diagnosis and treatment. *See also* State v. Larson, 472 N.W.2d 120, 126 (Minn. 1991) (en banc); Allison C. Goodman, Note, *Two Critical Evidentiary Issues in Child Sexual Abuse Cases: Closed-Circuit Testimony by Child Victims and Exceptions to the Hearsay Rule*, 32 AM. CRIM. L. REV. 855, 882 (1995) ("The Supreme Court's holding in *White* [*v. Illinois*] has had the further effect of encouraging courts to interpret 'firmly rooted' hearsay exceptions much more broadly than in previous years."). As an example, the Note cites cases extending the exception for statements made for purposes of medical diagnosis to include a child's statements regarding the identity of the abuser, *id.* at 882 n.202 (citing United States v. George, 960 F.2d 97, 99 (9th Cir. 1992); State v. Meeboer, 484 N.W.2d 621, 629 (Mich. 1992); Betzle v. State, 847 P.2d 1010, 1020-21 (Wyo. 1993)), and a case easing time limitations that traditionally limited the exception for spontaneous declarations. *See id.* (citing Dezarn v. State, 832 P.2d 589, 590 (Alaska Ct. App. 1992)). In fact, the ruling of the trial court and the Appellate Court of Illinois in *White v. Illinois* might represent an example of the same phenomenon: expanding traditional hearsay exceptions—both the spontaneous declaration and the medical diagnosis exceptions—to bring hearsay statements within a "firmly rooted" exception. *See infra* notes 110-122 and accompanying text.

109 On occasion, an appellate court does manage to resist the temptation to allow the pigeonholing of hearsay within a firmly rooted exception to determine the outcome of a confrontation challenge. *See, e.g.*, Puleio v. Vose, 830 F.2d 1197, 1207 (1st Cir. 1987) ("Plainly, the mere fact that a state court, in admitting evidence, tucks it into a pigeonhole which bears the label of a time-honored hearsay exception cannot be entirely dispositive.").

hearsay statement might have fallen outside of the historical limits of the exception.

White v. Illinois provides the clearest example of the Court's tacit endorsement of this "pigeonholing" approach.[110] White was convicted of sexual assault upon a four-year-old girl.[111] Although the child did not testify, the trial court admitted testimony from her babysitter, her mother, a police officer, a nurse, and a physician, all of whom recounted the child's statements regarding the nature of the assault and the identity of the assailant.[112] The trial court admitted the statements under Illinois's version of the hearsay exceptions for spontaneous declarations and statements made for purposes of medical diagnosis.[113] On appeal, White contended that the statements fell outside of the traditional boundaries of those exceptions because (1) the "spontaneous" declarations occurred forty-five minutes after the event and were made in response to questioning, not volunteered and (2) the statements to the doctor and the nurse related details of the offense that were not directly relevant to any medical treatment.[114] The Appellate Court of Illinois rejected those arguments, but went well beyond the traditional boundaries of the spontaneous declarations and medical diagnosis exceptions in doing so. The court relied on a recent decision of the Illinois Supreme Court, relaxing the requirements of spontaneity and immediacy in cases of "spontaneous declarations" by child victims of sexual abuse.[115] The statements to medical personnel, the Appellate Court found, were admissible under a 1988 revision to the Illinois Code, which the court characterized as a "new hearsay exception" intended to broaden the definition of statements for purposes of medical diagnosis beyond traditional restraints.[116] In short, the Illinois courts quite explicitly admitted nontraditional hearsay under expanded hearsay exceptions that still bore traditional labels.

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110 502 U.S. 346 (1992). *Bourjaily v. United States*, 483 U.S. 171 (1987), offers a similar example. Bourjaily challenged the admissibility of certain coconspirator statements under Federal Rule of Evidence 801(d)(2)(E), and further argued that admission of the statements violated the Confrontation Clause. *See id.* at 176, 181. In ruling on the evidentiary issue, the Court abandoned the traditional "bootstrapping" rule that had required trial courts to look only at independent evidence of conspiracy, rather than the alleged coconspirator's statements themselves, in order to determine the existence of the conspiracy, a foundational fact necessary for the admission of the coconspirator's statements. *See id.* at 178. The Court found that Federal Rule of Evidence 104(a) effectively eliminated the traditional restriction. *See id.* at 176-81. After declaring the hearsay admissible, the Court quickly rejected the Confrontation Clause challenge, because the hearsay fell within the exception for coconspirators' statements, a "firmly rooted" hearsay exception. *See id.* at 181-84. In dissent, Justice Blackmun, the author of *Roberts*, argued:

> [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 coconspirator's statement, as the Confrontation Clause surely demands.

Id. at 186 (Blackmun, J., dissenting).

111 *See White*, 502 U.S. at 349.

112 *See id.* at 349-50.

113 *See id.* at 350-51.

114 *See* People v. White, 555 N.E.2d 1241, 1249, 1251 (Ill. App. 1990).

115 *See id.* at 1246-50 (citing People v. Nevitt, 553 N.E.2d 368 (Ill. 1990)).

116 *Id.* at 1251.

In the Supreme Court, only those labels mattered. A unanimous Court found the two hearsay exceptions "firmly rooted" and simply applied the *Roberts* rule to dispense with further inquiry under the Confrontation Clause: "We . . . see no basis in *Roberts* . . . for excluding . . . evidence embraced within such exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment."[117] The Court never paused to consider just how the various statements happened to be "embraced within" the two "firmly rooted" exceptions or whether the boundaries of the exceptions had expanded beyond their recognized "roots." Instead, "[w]e take as a given," the Court wrote, "that the testimony properly falls within the relevant hearsay exceptions."[118] The hearsay statements came to the Court bearing the proper labels. The labels carried the day.

A trial judge's incentive to pigeonhole hearsay within a favorably labeled category becomes even more apparent when one contrasts the standard of review on appeal that applies to evidentiary rulings with the standard applied to a finding of "particularized guarantees of trustworthiness" for Confrontation Clause purposes. Appellate courts typically review a trial court's evidentiary rulings under an abuse of discretion standard.[119] For that reason, a court's decision to admit hearsay at the fringes of a traditional exception is spared an exacting review on appeal. That is exactly what occurred in the Appellate Court of Illinois on White's initial appeal.[120] By contrast, if the trial court adopts a narrower view of the traditional hearsay exceptions, but nonetheless admits the hearsay under the residual or "catch-all" exception, the appellate treatment is entirely different. An appellate court may review the evidentiary ruling only for abuse of discretion.[121] But because the trial court has not fit the hearsay within a firmly rooted exception, the appellate court must undertake its own, independent review for "particularized guarantees of trustworthiness," with no requirement to defer to the discretion of the trial court.[122] Reversal becomes a more likely possibility.

Idaho v. Wright is a prime example. There, an Idaho trial court admitted the testimony of a physician, recounting hearsay statements of a three-year-old victim of sexual abuse.[123] The State offered and the court admitted the evidence under Idaho's residual hearsay exception, identical to then Federal

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117 *White*, 502 U.S. at 357. Even before the Court's ruling in *White*, Professor Berger noted the trend of expanding hearsay exceptions, particularly in child sexual abuse cases, and posed the question, later answered in *White*, whether the Court nonetheless would view such hearsay as "firmly rooted." Berger, *supra* note 15, at 606 n.198.

118 *White*, 502 U.S. at 351 n.4.

119 *See, e.g.*, *White*, 555 N.E.2d at 1250.

120 *See id.*

121 *See* State v. Valencia, 924 P.2d 497, 502 (Ariz. Ct. App. 1996).

122 *See* Idaho v. Wright, 497 U.S. 805, 818-22 (1990). The "pigeonholing" incentive might be even greater in state prosecutions. Fitting hearsay within a firmly rooted exception might offer a convenient means to minimize successful collateral attacks. When federal courts review state convictions on habeas corpus petitions, the courts will not overturn state evidentiary rulings—giving deference to findings of fact—but will review de novo the question of "reliability" under the Confrontation Clause. *See, e.g.*, Earnest v. Dorsey, 87 F.3d 1123, 1131 (10th Cir. 1996); Myatt v. Hannigan, 910 F.2d 680, 685 (10th Cir. 1990).

123 *See Wright*, 497 U.S. at 809-11.

Rule of Evidence 803(24).[124] That evidentiary ruling was subject to review only for abuse of discretion.[125] But because the court did not deem the residual hearsay exception to be "firmly rooted," Wright's Confrontation Clause challenge required a heightened standard of review. Applying the *Roberts* formula, first the Idaho Supreme Court and then the United States Supreme Court undertook their own factually detailed, independent assessments of "particularized guarantees of trustworthiness." Both courts found the hearsay insufficiently trustworthy.[126]

To explain the differing results in *White* and *Wright*, it is tempting, but not very satisfying, to draw fine factual distinctions between the circumstances under which the two child declarants made their hearsay statements and to conclude that the statements were more reliable in one case than in the other. The major difference between the two cases, however, is that the trial court in *White* managed to fit the statements into hearsay exceptions with traditional labels, but the trial court in *Wright* did not. The lesson of *White* and *Wright* is that hearsay labels matter.[127] The appellate process rewards creative attempts to pigeonhole hearsay within firmly rooted exceptions, even if the effort requires an expansion of the exceptions at the margin.[128]

D. *Non-"Firmly Rooted" Hearsay: Searching for "Particularized Guarantees of Trustworthiness" in No Particular Direction*

Despite the tendency of courts to "pigeonhole" hearsay into firmly rooted exceptions, some hearsay admissible under the law of evidence still falls outside such categories. Residual or "catch all" hearsay exceptions are not "firmly rooted."[129] A number of states have legislated new hearsay exceptions, often specifically designed for cases of sexual or other abuse of chil-

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124 *See id.* at 811-12.

125 *See* State v. Wright, 775 P.2d 1224, 1225 (Idaho 1989); State v. Giles, 772 P.2d 191, 192, 194 (Idaho 1989) (explaining that Giles was Wright's codefendant, but filed a separate appeal).

126 *See Wright*, 497 U.S. at 818-27 (1990); *State v. Wright*, 775 P.2d at 1230.

127 Although it is possible to explain the outcome of the two cases by noting factual differences in the circumstances surrounding the statements, that effort seems unconvincing. There is little reason to believe that the three-year-old in *Wright* felt any less inclined to tell the truth to her doctor than did the four-year-old in *White*. Although the questioning by medical personnel in *White* might have been more "open-ended" than the leading questions of Dr. Jambura in *Wright*, *compare* People v. White, 555 N.E.2d 1241, 1245 (Ill. App. Ct. 1990), *with Wright*, 497 U.S. at 809-12, 818, that factor was not controlling in *Wright*, *see* 497 U.S. at 818, and was not even mentioned in the *White* opinion. There is certainly no reason to conclude that a jury, fully apprised of the circumstances of each child's statement, would be any better equipped to evaluate the truthfulness of one rather than the other. Nevertheless, the Court drew a constitutional line between the two. The hearsay "label" made the ultimate difference.

128 Perhaps the one departure from this "pigeonholing" effect has been the hearsay exception for statements against penal interest; confrontation concerns actually might be responsible for narrowing the exception. *See* Williamson v. United States, 512 U.S. 594, 599-600 (1994). First, the *Williamson* Court took pains to confine the exception within narrow limits. *See id.* at 600-04. The Court then strongly suggested that the exception, as redefined, would be "firmly rooted." *See id.* at 605.

129 *See* Idaho v. Wright, 497 U.S. 805, 817-18 (1990).

dren or elderly victims.[130] At least for the moment, the exception for statements against penal interest lacks clear endorsement as a firmly rooted exception.[131] In all these cases, the *Roberts* formula dictates that the hearsay statement must satisfy a Sixth Amendment standard of reliability that is, in theory at least, independent of any standard created by the law of evidence. Under the second stage of the *Roberts* reliability test, absent "particularized guarantees of trustworthiness," the Confrontation Clause excludes such hearsay.[132] This second step theoretically maintains a constitutional throttle on legislative or judicial decisions that seek to admit statements beyond the fringes of traditionally admissible hearsay.

Since *Roberts*, the Court has decided only two Confrontation Clause challenges to non-firmly rooted hearsay and has excluded the evidence on both occasions. At first glance, then, the rulings in *Lee v. Illinois*[133] (dealing with purported statements against interest) and in *Idaho v. Wright*[134] (dealing with the residual hearsay exception) suggest that the Confrontation Clause remains a significant constitutional check on new forms of hearsay. But that appearance is deceptive. The Court's subsequent redefinition of statements against penal interest probably makes that exception "firmly rooted," relegating *Lee*'s constitutional ruling to the shadows of the law of evidence.[135]

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130 *See, e.g.*, ALASKA STAT. § 12.40.110 (Michie 1996); CAL. EVID. CODE § 1228 (West 1995); COLO. REV. STAT. § 13-25-129 (1997); DEL. CODE ANN. tit. 11, § 3513 (1995); GA. CODE ANN. § 24-3-16 (1995); ILL. COMP. STAT. 5/115-10 (West 1992); MD. CODE ANN. of 1957, § 775 (1996). *Cf.* UNIF. R. EVID. 807.

131 *See supra* note 85; *infra* note 132.

132 Ohio v. Roberts, 448 U.S. 56, 66 (1980).

133 476 U.S. 530 (1986).

134 497 U.S. 805 (1990).

135 In *Williamson v. United States*, 512 U.S. 594 (1994), the Court held that Federal Rule of Evidence 804(b)(3), the federal version of the exception for statements against interest, applies only to those portions of a narrative that are "genuinely self-inculpatory" and not to other "collateral" portions of the same statement. *See id.* at 600-01, 605. Although the *Williamson* Court avoided deciding the Confrontation Clause challenge, the opinion took pains to note that "the very fact that a statement is genuinely self-inculpatory—which our reading of Rule 804(b)(3) requires—is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Id.* at 605. That dictum clearly signals that statements against interest admissible under Rule 804(b)(3), "genuinely self-inculpatory" statements, are constitutionally "trustworthy" without further scrutiny. For practical purposes, *Williamson* turned statements against penal interest into a firmly rooted hearsay exception. If challenged today, the law of evidence would exclude the hearsay at issue in *Lee*, with the Confrontation Clause merely as a redundant back-up. *But see* John J. Capowski, *Statements Against Interest, Reliability, and the Confrontation Clause*, 28 SETON HALL L. REV. 471, 479-80 (1997) (contending that even after *Williamson*, courts will not treat statements against interest as "firmly rooted").

Lee involved an accomplice's confession that inculpated the defendant. *See Lee*, 476 U.S. at 531. The state argued that the confession was admissible as a statement against penal interest, a hearsay exception that the prosecution contended was "firmly rooted." *See id.* at 544 & n.5. The Court never accepted the state's characterization of the evidence as a statement against interest and, therefore, never squarely addressed the question whether that hearsay exception is firmly rooted. *See id.* Instead, the majority noted that the category of statements against penal interest "defines too large a class for meaningful Confrontation Clause analysis." *Id.* at 544 n.5. The Court then moved directly to the *Roberts* analysis of "particularized guarantees of trustworthiness," and ultimately found none. *See id.* at 146. Viewed broadly, *Lee* holds that the Confrontation Clause prohibits the admission of the hearsay statement of an accomplice which appears to

Despite the Court's insistence in *Wright* that "[t]he Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule,"[136] the lower courts have found ample flexibility in *Wright*'s standard of reliability to admit most hearsay that the residual exception allows.[137]

In cases applying the residual hearsay exception, *Wright* has limited impact because it requires a constitutional assessment of reliability virtually identical to that which the law of evidence already requires. To admit a statement under the residual hearsay exception, a trial court must satisfy itself that the evidence possesses "circumstantial guarantees of trustworthiness" that are "equivalent" to those that gave rise to the other hearsay exceptions set out in the Rules.[138] Residual hearsay, therefore, must be just as reliable as, say, a dying declaration or an excited utterance. Of course, under the "firmly rooted" hearsay approach of *Roberts*, statements falling within almost all of the enumerated exceptions are conclusively presumed reliable and are admitted without further constitutional scrutiny. Once a court has found a statement with "circumstantial guarantees of trustworthiness" that are "equivalent" to those which make "firmly rooted" hearsay admissible under the Confrontation Clause, simple logic would dictate that such a statement is itself constitutionally admissible.[139] Not surprisingly, based on that logic, commentators prior to *Wright* concluded that any statement properly admitted under the residual exception automatically would satisfy the "particularized guarantees of trustworthiness" requirement of *Roberts*.[140]

In theory, *Wright* evaded that logic by ruling that the constitutional search for "particularized guarantees of trustworthiness" may not take into account corroborating evidence beyond the circumstances of the statement.[141] Because the test for trustworthiness under the residual hearsay exception does not include such a limit, *Wright* made it logically possible that a statement corroborated by independent evidence and properly admissible under that exception might nonetheless fail the constitutional test for trustworthiness. In practice, despite the result and the rhetoric of *Wright*, the

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shift blame to the defendant. In *Lee*, one might argue, the Court at last established a clear constitutional rule of exclusion, independent of the law of evidence, for an important category of hearsay statements. In light of the Court's ruling in *Williamson*, however, the law of evidence seems once again to preempt the constitutional standard.

136 *Wright*, 497 U.S. at 814.

137 *See, e.g.*, United States v. Shaw, 69 F.3d 1249 (4th Cir. 1995); United States v. Accetturo, 966 F.2d 631, 635-36 (11th Cir. 1992); United States v. Ellis, 951 F.2d 580, 583 (4th Cir. 1991); *see also* Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. L. REV. 925, 933 (1992).

138 *See* Fed. R. Evid. 807; *Wright*, 497 U.S. at 817-18.

139 Of course, there remain possibilities for avoiding this logic where hearsay is admitted under state "residual hearsay" exceptions where either the residual exception itself or the underlying "enumerated" exceptions differ materially from the standard of the federal rules.

140 *See* Jonakait, *supra* note 8, at 573 ("*Roberts*'s language seems designed to guarantee that if hearsay is properly admitted under a residual exception, it will not violate the confrontation clause"); David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 898 (1982) ("[S]atisfaction of the residual exceptions amounts to satisfaction of the confrontation clause.").

141 *See Wright*, 497 U.S. at 819-24.

Confrontation Clause today almost never dictates a result different from that obtained under the residual hearsay exception itself.[142] The reason is that *Wright*'s constitutional "niche" is remarkably small. Except in cases where corroborating evidence is the most important factor establishing trustworthiness, it is exceedingly unlikely for a court to find the same statement "trustworthy" for the purposes of the residual hearsay exception, but not "trustworthy" for Confrontation Clause purposes. And, corroboration is seldom the only factor a court may identify to support "trustworthiness." Aware that corroborating evidence is unhelpful in the constitutional analysis after *Wright*, creative prosecutors and trial courts have little difficulty identifying other "particularized guarantees of trustworthiness."[143]

In the end, *Wright*'s potential impact as an exclusionary rule for nontraditional hearsay is limited because its test for "reliability" under the Confrontation Clause is simply too vague to effectively limit any court that otherwise is inclined to admit a hearsay statement under the law of evidence. *Roberts* required "particularized guarantees of trustworthiness," without offering a hint as to what such guarantees might be. The *Wright* Court clearly ruled that independent corroboration is not such a guarantee.[144] But the Court expressly declined to formulate a standard to determine what is.[145] In-

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142 Numerous appellate opinions that find evidence properly admitted under a residual exception also find such evidence sufficiently reliable to satisfy the constitutional demand for "particularized guarantees of trustworthiness." *See, e.g.*, United States v. Earles, 113 F.3d 796, 800-01 (8th Cir. 1997) (admitting the grand jury testimony of an unavailable witness under the residual exception); United States v. Ismoila, 100 F.3d 380, 393 (5th Cir. 1996) (admitting credit card holders' affidavits of lost or stolen cards under the residual exception); *Shaw*, 69 F.3d at 1254 (admitting the testimony of an unavailable witness from the trial of a coconspirator under the residual exception); United States v. Clarke, 2 F.3d 81, 84 (4th Cir. 1993) (admitting the suppression hearing testimony of an unavailable witness under the residual exception); *Accetturo*, 966 F.2d at 633-35 (admitting written statements given to police by extortion victim under the residual exception.); State v. Grube 531 N.W.2d. 484, 489-90 (Minn. 1995) (admitting affidavits detailing prior spouse abuse under the residual exception). Occasionally, appellate courts find that a lower court improperly admitted testimony in violation of the "reliability" standards of both the residual hearsay exception and the Confrontation Clause. *See, e.g.*, United States v. Dent, 984 F.2d 1453, 1462-63 (7th Cir. 1993) (finding that grand jury testimony was inadmissible under the residual exception.). Cases holding that a trial court properly admitted hearsay under a residual exception, but that the court admitted the hearsay in violation of the Confrontation Clause are practically nonexistent. *Wright* seems to stand alone in that regard.

143 *See, e.g.*, *Earles*, 113 F.3d at 800-01 (finding particularized guarantees sufficient to admit the grand jury testimony of an unavailable witness, because the statement was made under oath, never was recanted, was based on personal knowledge, and was not contradicted by extrinsic evidence); *Accetturo*, 966 F.2d at 633-36 (finding particularized guarantees when an unavailable witness gave statement in his own handwriting, to police, voluntarily, knowing that the police would investigate further, while the events were fresh in his mind, and when his fear of the defendants and the desire for protection left him with no motive to lie); State v. Dunlap, 930 P.2d 518, 537 (Ariz. Ct. App. 1996) (finding particularized guarantees sufficient to admit the grand jury testimony of a deceased witness, because the witness made the statement under oath, had personal knowledge, did not recant, and had no motive to lie). *Cf.* Myatt v. Hannigan, 910 F.2d 680, 685 (10th Cir. 1990) (finding, prior to *Wright*, the hearsay statement of a child to be sufficiently reliable based on an expert witness's assessment that the child was capable of telling the truth and had not been induced to lie); *see also* cases cited *infra* notes 152, 154, 156.

144 *See Wright*, 497 U.S. at 822.

145 The Court "decline[d] to endorse a mechanical test for determining 'particularized guarantees of trustworthiness.'" *Id.*

stead, *Wright* offered a nonexclusive list of appropriate factors for courts to consider in determining reliability. The factors include "spontaneity and consistent repetition," "mental state of the declarant," and "use of terminology unexpected of a child of similar age."[146] Although the Court required an "affirmative reason, arising from the circumstances in which the statement was made" as a basis for finding reliability, the most flexible and expansive of the reliability factors—a "lack of motive to fabricate,"—requires no affirmative showing at all.[147] Indeed, such a "factor" simply shifts the burden to the defendant to show a "motive to fabricate" in order to establish a Confrontation Clause violation.[148] Leaving even more room for creativity in the lower courts, the opinion adds "courts have considerable leeway in their consideration of appropriate factors."[149] As a practical matter, the *Wright* standard for trustworthiness is no standard at all. Trial courts must consider the "totality of circumstances" surrounding a hearsay statement, ignore potentially corroborating evidence, and then ask whether the declarant was "particularly likely to be telling the truth when the statement was made."[150] It would have been simpler, and no less precise, if the Court had said, "Let the evidence in if it looks reliable."

Lower courts searching for "particularized guarantees of trustworthiness" have managed only to prove that reliability is in the eye of the beholder. While one court might rely on a particular factor to establish trustworthiness, another court might treat that same factor as evidence of likely fabrication. In cases involving the hearsay statements of child sexual abuse victims, for example, some courts regard especially young children as highly unreliable and inclined to fantasize.[151] Others find that the innocence of the youngest victims leaves them with no motive to lie.[152] Some courts look skeptically upon any statements a suspect makes to police, fearing the declarant's motive to shift blame from himself.[153] Others find comfort in the fact that the police are listening, taking notes, and as far as the declarant knows, are likely to investigate further and to "check out" his information.[154] Plea or immunity agreements, in the view of some courts, provide motives to

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146 *See id.* at 821-22.

147 *See id.* at 821.

148 At least one court has found a "lack of motive to lie" in the face of evidence showing such a motive. *See Accetturo*, 966 F.2d at 635-36 (finding no motive to lie, despite testimony that the declarant might have fabricated the kidnapping story to avoid usurious debt).

149 *Wright*, 597 U.S. at 822.

150 *Id.*

151 *See* Gregory v. North Carolina, 900 F.2d 705, 707 (4th Cir. 1990).

152 *See* Dana v. Department of Corrections, 958 F.2d 237, 239 (8th Cir. 1992). *Cf.* United States v. Dorian, 803 F.2d 1439, 1445 (8th Cir. 1986) ("Indeed . . . a declarant's young age is a factor that . . . mitigates in favor of the trustworthiness and admissibility of her declarations.").

153 *See* Latine v. Mann, 25 F.3d 1162, 1166-67 (2d Cir. 1994); United States v. Matthews, 20 F.3d 538, 545-46 (2d Cir. 1994). Indeed, such skepticism is at the heart of the Court's ruling in *Lee v. Illinois*, 476 U.S. 530, 541 (1986), and also played a role in *Williamson v. United States*, 512 U.S. 594, 601 (1994). *See generally* Welsh S. White, *Accomplices' Confessions and the Confrontation Clause*, 4 WM. & MARY BILL RTS. J. 753 (1996) (arguing that accomplices' confessions to police are almost always unreliable).

154 *See* United States v. Accetturo, 966 F.2d 631, 635 (11th Cir. 1992); United States v. Ellis, 951 F.2d 580, 583 (4th Cir. 1991).

fabricate in order to "curry favor" with authorities.[155] Others note that such agreements require honesty as an explicit condition to any benefit and thereby reduce the incentive to lie.[156] In short, *Wright*'s test for "particularized guarantees of trustworthiness" offers something for everyone. As an exclusionary rule that purports to establish a constitutional barrier against unreliable hearsay, independent of the law of evidence, however, it is too malleable to have much of an effect.

III. How the Exclusionary Rule Stifles the Confrontation Right

If the worst that can be said of the Confrontation Clause as an exclusionary rule is that it is redundant, then there may be little reason to re-examine the rule. After all, one might say, two reasons to exclude unreliable evidence are better than one. As Fourth Amendment scholarship reveals, however, an exclusionary rule may have "ripple effects" that are not always obvious, and not always benign.[157] In the Fourth Amendment context, scholars argue convincingly that the choice of exclusion as a remedy changes and limits the substance of the right.[158] That same effect seems apparent in the Confrontation Clause context, and for similar reasons.

A. The Exclusionary Rule Skews, and Shrinks, the Right of Confrontation

Although courts and critics often separate right from remedy for analytical purposes, the two are in fact interdependent. As a leading Fourth Amendment scholar observed, "the remedy tends to shape the right."[159] The history of Fourth Amendment protection since *Mapp v. Ohio*[160] has been, for the most part, marked by limitations and exceptions.[161] The exclusionary rule has influenced that process (1) because of the context in which it presents the substantive issues and (2) because of the hard choice it imposes on courts. First, because of the exclusionary rule, courts define Fourth Amendment rights in response to motions to suppress evidence. Suppression hearings arise only where the police actually discover evidence, typically physical evidence that is both highly reliable and highly incriminating. Such a setting is hardly the most likely to evoke judicial sympathy toward the "victim" of a search or seizure. Second, because of the exclusionary rule, Fourth Amendment cases present courts with an all-or-nothing choice. If a judge finds a Fourth Amendment violation, she must suppress all of the evidence

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155 *See* United States v. Gomez-Lemos, 939 F.2d 326, 333 (6th Cir. 1991); United States v. Fernandez, 892 F.2d 976, 983 (11th Cir. 1989).

156 *See* United States v. Clark, 2 F.3d 81, 84-85 (4th Cir. 1993); *Ellis*, 951 F.2d at 583 (4th Cir. 1991); State v. Dukes, 544 N.W.2d 13, 19 (Minn. 1996).

157 *See* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 443 (1997).

158 *See id.* For another critical perspective on the Fourth Amendment exclusionary rule, see Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL'Y 457 (1997); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

159 Stuntz, *supra* note 157, at 443.

160 367 U.S. 643 (1961).

161 *See, e.g.*, Pennsylvania Bd. of Probation & Parole v. Scott, 188 S. Ct. 2014, 2020-21 (1998); United States v. Leon, 468 U.S. 897, 992 (1984); Nix v. Williams, 467 U.S. 431, 442 (1984).

discovered as a result of the violation, no matter how severe the crime, how crucial the evidence, or how limited the police transgression.[162] There is no middle ground, no graduated sanction. That hard choice can lead judges to qualify or limit Fourth Amendment rights. As one judge wrote, "[W]hen something less draconian than the exclusionary rule is restored as a remedy for an unreasonable search and seizure, then the judiciary will be less inclined to interpret the Fourth Amendment in the narrowest possible fashion . . . ."[163]

Since *Roberts*, the history of the Confrontation Clause likewise has been the story of a shrinking right. As in the Fourth Amendment context, the exclusionary rule has contributed to that shrinkage, both because of the context in which the rule puts confrontation issues, and because of the all-or-nothing choice the rule imposes. Because courts apply the Confrontation Clause as an exclusionary rule, defendants raise confrontation challenges as objections to the introduction of evidence. Confrontation claims almost always follow on the heels of unsuccessful hearsay objections. In that context, a court properly reaches a Confrontation Clause issue only when it already has determined that hearsay is admissible under the law of evidence. That determination stems from at least an implicit finding that the evidence is reliable. In effect, the confrontation challenge begins with a strike against it. As in the Fourth Amendment arena, the natural consequence is to restrict the scope of the confrontation right.

Like the Fourth Amendment exclusionary rule, the Confrontation Clause presents courts with an all-or-nothing choice. Although the tension between protecting a defendant's rights on the one hand and presenting complete information to a jury on the other might be diminished somewhat when the evidence consists of an out-of-court statement rather than a tangible object like a gun, that tension is still quite real.[164] A court's reluctance to exclude might be overwhelming when the declarant is an eye witness or a victim of the crime—like a sexually abused child—whose statements are critical to any prosecution. Not surprisingly, those are the types of cases where courts seem most willing to find exceptions to both the hearsay rules and the right

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162 *See, e.g.*, *Mapp*, 367 U.S. at 655.

163 Stephen J. Markman, *Six Observations on the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 425, 428 (1997).

164 The price of exclusion can be just as high under the Confrontation Clause as under the Fourth Amendment. Excluding the out-of-court statements of a dead or unavailable eye witness can gut a prosecution just as effectively as excluding the murder weapon found under a defendant's bed. And in at least one respect, that price is harder to justify in the Confrontation context. The "deterrence" rationale that supports Fourth Amendment exclusion is largely missing from Confrontation Clause cases. Typically, the confrontation issue arises through no fault of the prosecution or police. Indeed, the issue might arise even though the government would much prefer to proceed through live testimony than through hearsay. Often there is, in short, nothing to deter.

Exclusion under the Confrontation Clause makes more sense when the Clause is not merely a "back stop" for the law of evidence, but where it serves a purpose similar to the deterrent function of other exclusionary rules. *See* Motes v. United States 178 U.S. 458, 471 (1900) (finding the confrontation right to be violated by admitting hearsay when the declarant's absence was the result of the government's culpable neglect). For a discussion of the appropriate application of the Confrontation Clause for this purpose, see *infra* text accompanying notes 295-295.

of confrontation.[165] At the same time, those are the cases where the defendant's need to challenge such statements is most critical. A remedy "less draconian" than exclusion might permit a court to admit probative evidence, and yet still permit a defendant an effective means to challenge the prosecution's hearsay evidence.

B. The Exclusionary Remedy Leads Defendants to Ignore, or Even Avoid, Possibilities for Effective Confrontation

Professor William Stuntz has argued that the Fourth Amendment exclusionary rule skews criminal litigation by diverting scarce resources, often at the defendant's expense, from the central factual issues in a criminal case.[166] In a system in which appointed counsel and public defenders with heavy dockets represent the vast majority of defendants, defense counsel's *time* is in short supply. By creating even a remote possibility of a high reward—exclusion of critical evidence—in exchange for a limited expenditure of time—usually a rather brief suppression hearing—the exclusionary rule diverts defense counsel's time and attention from the more central problems of contesting guilt or mitigating punishment.[167] In a system of limited resources, litigation over suppression of evidence might occupy time, effort, and attention out of proportion to any benefits to the few defendants who win the exclusion "lottery," and at the expense of the many others who lose not only the suppression motion, but also the opportunity to contest other matters more central to the issues of guilt, innocence, or punishment.[168]

Experience suggests that the exclusionary rule skews Confrontation Clause analysis in a similar way. A remarkably consistent characteristic of confrontation-hearsay litigation is what is missing. The "confrontation" argument almost always begins and ends with the question of admissibility. The reported cases seldom discuss how, or if, the defendant might challenge hearsay once it is admitted—how he might impeach or "confront" a hearsay declarant who is not in the courtroom when the evidence is received.[169] Indeed,

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165 *Compare* White v. Illinois, 502 U.S. 346 (1992) (finding no Confrontation Clause violation in admission of hearsay statements of victim), United States v. Accetturo, 966 F.2d 631 (11th Cir. 1992) (same), *and* Dana v. Department of Corrections, 958 F.2d 237 (8th Cir. 1992) (same), *with* Lee v. Illinois, 476 U.S. 530 (1986) (finding a Confrontation Clause violation where the hearsay declarant was an accomplice), *and* United States v. Gomez-Lemos, 939 F.2d 326 (6th Cir. 1991).

166 *See* Stuntz, *supra* note 157, at 451-55.

167 *See id.*

168 *See id.* Noting the overwhelming workload of most public defenders and the relatively low "caps" on fees for court-appointed counsel, Professor Stuntz argues:

> In a world in which most defense counsel must severely ration the claims they make, . . . suppression motions presumably displace something else. The most obvious "something else" is factual argument, argument about the merits of the criminal charge. That kind of argument is more likely to require non-trivial investigation by defense counsel than exclusionary rule claims. It is also costlier to pursue.

Id. at 453.

169 The only exceptions to this pattern in the Supreme Court's opinions are brief passages in two cases dealing with available hearsay declarants. *See* White v. Illinois, 502 U.S. 346, 355 (1992) ("[T]he Compulsory Process Clause and evidentiary rules permitting a defendant to treat witnesses as hostile will aid defendants in obtaining a declarant's live testimony.") (footnote

in more than a few reported cases, defendants complaining of the denial of confrontation have foregone the opportunity to put an *available* declarant on the witness stand for cross-examination, preferring instead to stake their chances on the appeal of a ruling denying their constitutional objection to admissibility.[170]

The exclusionary rule itself is at least partly to blame for skewing confrontation-hearsay litigation into this pattern that ignores possibilities for confronting hearsay. As in the Fourth Amendment arena, the remedy of exclusion diverts both the time and the focus of defense counsel to the question of admissibility and away from matters more closely related to the testing of truth in the courtroom.[171] When courts and litigants focus on exclusion as the remedy for preserving confrontation rights, they ignore alternative means for challenging or testing hearsay statements that are admitted in evidence. And because the Confrontation Clause now excludes very little hearsay, few defendants are likely to win the exclusionary "jackpot," even though many devote considerable time and energy to their constitutional challenges. That time and energy could be spent on efforts to discredit the hearsay in the eyes of the jury.

Still, in a system populated by more than a few creative and zealous criminal defense attorneys, diversion of effort alone is an insufficient explanation for what is missing from most confrontation-hearsay battles. An element of tactical choice plays a role as well. Here, and the exclusionary rule further skews Confrontation Clause litigation. By offering an incentive to battle over exclusion, the rule can create a tactical disincentive for counsel to pursue actual confrontation or any alternative means of attacking prosecution hearsay. In some cases, for example, defense counsel might anticipate that the declarant, if available, likely would make a sympathetic impression on a jury. Although defense counsel might readily raise a confrontation argument to exclude the hearsay, actual confrontation might be the last thing the defendant really wants. In other cases, experienced defense counsel might believe, probably correctly, that juries discount hearsay evidence to begin with.[172] In those instances, counsel might see little value in efforts to impeach the declarant. And if the real aim is exclusion, then confrontation,

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omitted); United States v. Inadi, 475 U.S. 387, 397 (1986) ("If respondent independently wanted to secure [the declarant's] testimony, he had several options available, particularly under Federal Rule of Evidence 806 . . . ."). Even in these cases, the Court looks not to the right of confrontation, but to the Compulsory Process Clause and to Rule 806 to establish a right to impeach the declarant. The Court never has addressed the issue as an aspect of the confrontation right. *See infra* text accompanying notes 265-274.

170 *See, e.g.*, *Inadi*, 475 U.S. at 390; Dutton v. Evans, 400 U.S. 74, 88 n.19 (1970). *See infra* note 174 and accompanying text.

171 The diversion of attention away from confrontation and toward questions of admissibility may have another cause as well: lawyers are taught to look at the Confrontation Clause as part of the law of evidence. *See* Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 341 (1981).

172 Empirical research confirms the view of many trial lawyers that jurors tend to discount hearsay. *See* Peter Miene, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 691 (1992); Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655, 656-58 (1992).

or something closely approximating confrontation, does not help the argument. By demanding and winning any opportunity to confront the declarant—either in person or through alternative means—defense counsel diminishes the likelihood that the trial court will exclude the evidence.[173] Barring the all-out victory of exclusion, counsel might prefer a "pure" denial-of-confrontation issue for de novo review on appeal, rather than a record showing that counsel sought and obtained the functional equivalent of confrontation. As long as trial courts treat exclusion as the appropriate means of protecting the confrontation right, instead of insisting on consideration of other means, there will be a value for some defendants in not pursuing those alternatives. In effect, the exclusionary rule can put defense counsel in a position where the rational choice is to value the confrontation *issue* more than the *confrontation* itself.[174]

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173 Because defendants seldom take advantage of opportunities to impeach absent hearsay declarants, there are few cases that assess the impact of such impeachment on the question of "reliability" under the Confrontation Clause. *United States v. Salim*, 664 F. Supp. 682 (E.D.N.Y. 1987), is one such case. In assessing the trustworthiness of a foreign deposition, Judge Weinstein took into account the defendant's opportunity, under Rule 806, to offer testimony regarding the deponent's demeanor at the deposition. *See id.* at 691-93.

174 *Inadi* offers an almost comic example of the backward incentives that result from the Court's exclusionary thinking. The government charged and convicted Inadi for conspiracy to manufacture methamphetamine. *See Inadi*, 475 U.S. at 388-89. At trial, the government offered in evidence several audio tapes that contained statements of coconspirators, including one Lazaro who was alive, reasonably close by, and at least reluctantly willing to testify. *See id.* at 390. Over the defense's objection, the court admitted the tapes under Federal Rule of Evidence 801(d)(2)(E). *See id.* Inadi then raised his Confrontation Clause objection, arguing under *Roberts* that the Clause prohibited the introduction of hearsay unless the government first demonstrated that the declarant was unavailable. *See id.* The trial court asked defense counsel if she wanted the government to produce the witness, and counsel responded only that she would ask her client. *See id.* The government subpoenaed Lazaro, who then failed to appear, claiming "car trouble." *See id.* Neither the government nor Inadi made any further effort to bring Lazaro to court. *See id.* The defense merely renewed its Confrontation Clause objection, which the court overruled, finding that coconspirator statements satisfied the reliability requirements of *Roberts* and therefore are admissible even without actual confrontation of the declarant. *See id.* at 390-91.

Inadi demonstrates the backward approach to confrontation-hearsay litigation that results from exclusionary thinking. The government apparently had no interest in Lazaro as a witness and made only a perfunctory effort to secure his presence. The defendant, who could have issued his own subpoena and insisted on further efforts to produce Lazaro, never even answered the Court's simple question, "Do you want him to testify?" While vigorously debating the defendant's right to exclude evidence in the absence of confrontation, both parties struggled mightily to avoid the very confrontation that the defendant claimed to seek. In effect, exclusionary thinking turned the confrontation-hearsay debate into a game of Sixth Amendment "chicken," with both parties engaging in brinksmanship over an admissibility ruling, rather than making serious efforts to confront an available declarant.

Inadi is not an aberration. The *Inadi* Court noted, "[T]he 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." *Id.* at 397 n.7. Similarly, in *Dutton v. Evans*, 400 U.S. 74 (1970), the Court noted, "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." *Id.* at 88 n.19. *See also* Lowery v. Collins, 988 F.2d 1364, 1368-70 (5th Cir. 1993) (holding that the defendant does not waive his Confrontation Clause rights by refusing to call an adverse declarant to the witness stand).

In sum, treating the Confrontation Clause as an exclusionary rule raises more than just a concern over keeping relevant information from juries. Just as in the Fourth Amendment setting, the rule has "ripple effects." The natural aversion of courts to excluding pertinent information from trial leads to a narrow construction of the confrontation right, particularly when the information to be excluded already has passed the test of the law of evidence. In addition, either through the diversion of counsels' energies or through deliberate tactical choice, the exclusionary rule discourages defendants from pursuing other means available to challenge prosecution hearsay. The end result is a Confrontation Clause that serves little purpose in modern criminal trials. The Clause excludes very little hearsay and almost never is invoked as an affirmative right to challenge admissible hearsay.

IV. Beyond Exclusion: The Confrontation Clause as a Right to Confront Hearsay

Because its confrontation-hearsay opinions focus exclusively on admissibility, the Court has not considered what right the Confrontation Clause provides for a defendant to impeach or "confront" a nontestifying declarant once hearsay is admitted in evidence. This section explores that question by looking to the text and the history of the Confrontation Clause and by considering the Clause in context with the other guarantees in the Sixth Amendment. That review demonstrates that the notion of an affirmative constitutional right to confront a hearsay declarant fits well with the language, history, and basic purposes of the Sixth Amendment, perhaps more easily than does the right to exclude unreliable hearsay.

A. The Text

> *"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."*[175]
>
> "Truth is not always in a well."[176]

Perhaps the best way to begin, then, is by observing the obvious. The plain text of the Sixth Amendment creates a right "to be confronted with" witnesses. The text says nothing of excluding a witness's testimony. Likewise, although the hearsay rule and many exceptions, along with the term "hearsay" itself were known well to the Framers,[177] the Sixth Amendment does not mention "hearsay." As Justice Harlan wrote, "The language [of the Confrontation Clause] is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay . . . ."[178]

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175 U.S. Const. amend. VI.

176 EDGAR ALLAN POE, *The Murders in the Rue Morgue*, *in* THE COMPLETE TALES AND POEMS OF EDGAR ALLAN POE 141, 153 (1975). The quoted passage is an observation of Poe's central character and investigator of the murder, C. Auguste Dupin.

177 *See* Mattox v. United States, 156 U.S. 237, 243 (1895); JOHN HENRY WIGMORE, 5 EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 12-27 (Chadbourn rev. 1974).

178 *Evans*, 400 U.S. at 95 (Harlan, J., concurring).

In looking at the apparent gap between the text of the Confrontation Clause and the modern application of the Clause as a rule excluding unreliable hearsay, several members of the Court and distinguished scholars have argued that the Court made a wrong turn in assuming that the Clause applies at all to most hearsay. The Court's error, they say, comes in its interpretation of the phrase, "witnesses against" the accused. The most appropriate definition of the noun, "witness," they argue, is "one who testifies in a judicial proceeding."[179] Under a strict reading, the "witnesses against" an accused, therefore, are only those persons who actually testify against him in court. The right of confrontation, then, would consist of the right to see, hear, and cross-examine witnesses who appear in the courtroom, whether they speak from personal knowledge or based on hearsay. Generally, the Confrontation Clause would not be concerned with hearsay at all, because the declarant is not a "witness against" the accused. To avoid direct circumvention of the basic rule, and in keeping with the Clause's history as a rule barring inquisitorial practices, proponents of this view would expand the definition of "witnesses" slightly, in order to cover persons who indirectly give "testimony" for use at trial through affidavits or through some form of ex parte examination.[180] Though this position has strong historical and scholarly support, the

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179 Justice Scalia first outlined this view in dissent in *Maryland v. Craig*, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting). *Craig* was not a confrontation-hearsay case. It involved the testimony of a live witness, a child abuse victim, through closed-circuit television. *See id.* at 840. Justice Scalia argued that the confrontation-hearsay cases were inapposite in that context, but in doing so, he first outlined his view of the meaning of the Sixth Amendment's text:

> The Sixth Amendment does not literally contain a prohibition upon [hearsay], since it guarantees the defendant only the right to confront "witnesses against him." As applied in the Sixth Amendment's context of a prosecution, the noun "witness"—in 1791 as today—could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," *i.e.* "[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." The former meaning (one "who knows or sees") would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses *against him*." The phrase obviously refers to those who give testimony against the defendant at trial.

Id. at 864-65 (citations omitted).

180 In an amicus brief filed in *White v. Illinois*, 502 U.S. 346 (1992), the Justice Department urged the Court to adopt the view that Confrontation Clause rights apply only to in-court testimony and to certain forms of "testimonial" hearsay created in anticipation of a criminal trial—for example, affidavits, depositions, and prior testimony. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 18-20, White v. Illinois, 502 U.S. 346 (1992) (No. 90-6113). The government's position rested primarily on the historical evidence suggesting that the Framers intended for the Clause to prevent "prosecuting a defendant through the presentation of *ex parte* affidavits, without the affiants ever being produced at trial." *White*, 502 U.S. at 352; *see also id.* at 363 (Thomas, J., concurring). In the government's view, a hearsay declarant who does not make a statement knowing that the statement might be used in a criminal prosecution is not a "witness against" the accused within the meaning of the Sixth Amendment. *See* Brief for the United States, *supra*, at 20. The government's position effectively would exclude most "garden-variety" hearsay from any application of the Confrontation Clause. With minimal analysis of the historical merits of the government's position, the majority in *White* rejected it with the simple statement that it "comes too late in the day to warrant reexamination" of the Court's many earlier opinions that, at least implicitly, had taken the broader view that "witnesses against" an accused generally included hearsay declarants. *See id.* at 353. Justice Thomas wrote

Court gave it a rather perfunctory burial in *White v. Illinois*.[181] The notion that a hearsay declarant is a "witness against" an accused, therefore, seems firmly entrenched as a starting point for analysis of the Sixth Amendment text.

Even given that premise, however, it does not follow that the Confrontation Clause is designed to exclude hearsay from criminal trials. If the declarant is a "witness against" an accused, then the Clause grants a right to "confront"—not a right to silence or exclude—that witness. Further, it does not follow at all from the text that the confrontation right is somehow "satisfied" once reliable hearsay is admitted. The most direct reading of the Clause would provide that if the declarant is a "witness"—reliable or not—we must treat her like a witness, or at least as much like a witness as possible, and allow the defendant a reasonable opportunity to "confront" her.

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a concurring opinion, joined by Justice Scalia, urging a more thorough consideration of the government's position. *See id.* at 358, 364-65 (Thomas, J., concurring).

The leading scholarly proponent of the argument is Professor Akhil Reed Amar. *See* Akhil Reed Amar, *Foreward: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 647 (1996). Professor Amar writes:

> Not all out-of-court declarants within the meaning of the so-called hearsay rule are "witnesses" within the meaning of the Confrontation Clause. In the Fifth Amendment Self-Incrimination Clause, "witness" means a person who physically takes the stand to testify, or (to prevent government evasion of the spirit of the clause) a person whose out-of-court affidavit or deposition (prepared by the government for in-court use) is introduced as in-court testimony. In the Sixth Amendment the word "witness" means the same thing, and for the same reason. Once we see this, the Court's current Confrontation Clause conundrum vanishes. The clause means what it says, and the strict rule it lays down makes sense as a rule.

Id. at 647. *See also* Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE 89-144 (1997); Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045 (1998).

In a recent work, Professor Richard Friedman advocates a variant of this view. *See* Friedman, *supra* note 13. He argues that the Clause does not apply to all hearsay. *See id.* at 1013. He contends, however, that it applies somewhat more broadly than to "formal" testimonial materials such as affidavits or depositions. *See id.* at 1038-39. Professor Friedman would extend the meaning of "witness" under the Sixth Amendment to any declarant who gives a statement with the intention that it be used in a criminal prosecution. *See id.* at 1038-43. He would apply the rule strictly, dispensing with any assessment of reliability and forbidding the government from using such hearsay without giving a defendant an opportunity to cross-examine the declarant. *See id.* at 1029.

While the views of Professors Amar and Friedman have both historical and textual appeal, the *White* Court's quick rejection of similar arguments advanced by the Department of Justice probably stems from more than the concern that they "come[ ] too late in the day." *White*, 502 U.S. at 353. The principal problem with reading hearsay declarants out of the definition of "witnesses" under the Confrontation Clause, as Professor Amar would do, is that it leaves government hearsay untested, or at least that it leaves defendants without the most obvious constitutional basis for insisting that hearsay, like live testimony, must be subject to adversarial challenge. The principal problem with the Court's view, on the other hand, is that it calls the declarant a "witness," but then fails to treat her like other witnesses. In advocating a "right to confront hearsay," this article seeks to avoid both problems by taking seriously the defendant's right to test prosecution hearsay, a right to treat the declarant as the "witness" which the Court insists that she is.

181 *See White*, 502 U.S. at 353 & n.5.

There is a line of Confrontation Clause cases, almost three decades old, in which the Court applied the Clause exactly in that fashion. Not surprisingly, the declarants in those cases were, in fact, prosecution witnesses.[182] They appeared in court and related their own prior out-of-court statements.[183] What is the accused's confrontation right when the declarant testifies? It is the right to treat the declarant like any other witness: Confront her; cross-examine her about the out-of-court statement, or anything else permitted in the normal course of cross-examination.

Significantly, the Court's approach to the testifying declarant has nothing to do with the reliability of the hearsay statement. The statement is admissible as substantive evidence of the "truth" that it imparts, although the declarant now disavows it. The reliability of hearsay statements is no concern of the Confrontation Clause in these cases: "We do not think such an inquiry is called for," the Court tells us, "when a hearsay declarant is present at trial and subject to unrestricted cross-examination."[184] When the declarant testifies, the Court simply applies the constitutional command according to its plain terms.

Now consider a slightly different case. The hearsay declarant is sitting at home, or perhaps even at the courthouse, available to testify. The prosecution elects not to call her to the witness stand, but instead offers her out-of-court statement in evidence. The statement satisfies an exception to the hearsay rule, but the defendant objects, claiming that admission of the hearsay will violate his right to confront the declarant. In light of the Court's treatment of *testifying* declarants, the treatment of declarants *available* to testify would seem like a simple matter. Admit the hearsay, if the rules of evidence permit it. And if the defendant wants a confrontation, give him what he asks for. Make the prosecution put the declarant on the stand and let the defendant cross-examine her. This view, in essence, is the "rule of necessity" announced in *Roberts*.[185] It fits nicely with the constitutional text. The Clause creates a right "to be confronted with" the witness. It is phrased in the passive voice, arguably by design. The phrase suggests a defendant's right to have the confrontation come to him. It is, after all, the prosecution's burden to call the witnesses who will prove its case.[186]

This literal reading of the text, however, suffers from a major weakness: it can make a trial terribly inconvenient. Most hearsay exceptions apply

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182 *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).

183 Perhaps the most frequent example of this category is the declarant who at first tells the police or a grand jury that the defendant "did it," but who then gets cold feet at trial. *See, e.g., Green*, 399 U.S. at 150-51. She changes, or conveniently forgets, her original story. If she testifies at trial and is subject to cross-examination, the law of evidence permits the prosecution to offer her original story as substantive evidence. *See* FED. R. EVID. 801(d)(1).

184 *Owens*, 484 U.S. at 560.

185 *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980). *See supra* text accompanying notes 61-65.

186 The Sixth Amendment identifies two separate "witness-related" rights. The Confrontation Clause speaks in the passive voice: the right of the accused to "be confronted with" witnesses "against him." U.S. CONST. amend VI. The Compulsory Process Clause speaks in the active voice: the right "to have compulsory process for obtaining witnesses in his favor." *Id.*

whether or not the declarant is available.[187] They are designed that way, in part, for reasons of convenience. The business records exception is a good example. If the prosecution had to produce every declarant who contributed the original information in bank, payroll, telephone, and other business records, then most simple larceny or fraud prosecutions would take weeks to try. Applied across the board, a strict rule of necessity would render unconstitutional all the hearsay exceptions in Federal Rules of Evidence 801 and 803, as applied when the declarant is available. Obviously concerned with that prospect after *Roberts*, the Court quickly compromised on its general rule of necessity, ultimately limiting the rule to hearsay in the form of prior testimony.[188]

That compromise makes sense as a practical matter. The Court's approach still requires the government to produce an available declarant before using her former testimony, which essentially prevents the government from using a calculated strategy of building a case by creating hearsay testimony.[189] This approach roughly adheres to the "core" historical purpose of the Confrontation Clause: preventing the inquisitorial practice of trial by affidavit or by ex parte examination.[190] At the same time, this approach avoids

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187 *See* FED. R. EVID. 801(d)(2), 803.

188 *See* White v. Illinois, 502 U.S. 346, 354 (1992). *See supra* Part II.A. The Court's retreat in *Inadi* and *White* from an unavailability requirement, or a "rule of necessity," mirrored the shift by Justice Harlan twenty years earlier. Although convinced that the historical evidence was "amorphous," Justice Harlan originally had argued that "the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce any available* witness whose declarations it seeks to use in a criminal trial." *Green*, 399 U.S. at 174 (Harlan, J., concurring). He did not accept the limitation that hearsay declarants generally are not "witnesses" within the meaning of the Clause. *See id.* at 175. Only six months later he retreated from his original position, largely because an across-the-board requirement for the government to produce any available hearsay declarant "would be unduly inconvenient and of small utility." *See* Dutton v. Evans, 400 U.S. 74, 95-96 (1970). The prospect of requiring the government to produce hearsay declarants in order to introduce business records, public records, and learned treatises appeared "difficult, unavailing or pointless." *See id.* at 96.

189 In limiting the unavailability rule to cases of former testimony, the Court said, "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White*, 502 U.S. at 354. The Court has not had further occasion to define "prior judicial proceeding." It would be entirely consistent with *White*'s analysis for that phrase to encompass grand jury testimony, affidavits, and ex parte depositions. Unlike coconspirator statements, spontaneous declarations, and statements for purposes of medical diagnosis—the statements at issue in *White* and *Inadi*—none of those statements possess evidentiary significance that flows from the context in which it was made and which "cannot be recaptured" in court. *See id.* at 356. And unlike the situation with business records, for example, the practical burden of imposing an unavailability requirement on hearsay stemming from quasi-judicial settings would be slight.

190 *See infra* text accompanying notes 215-227. Perhaps more than coincidentally, the Court's retreat from the unavailability requirement in *White* came close to giving the Department of Justice what it sought through its amicus brief. Instead of restricting altogether the application of the Confrontation Clause to prior testimony, as the Department had sought, the Court restricted only the application of the *Roberts* rule of necessity or "unavailability requirement." *See White*, 354 U.S. at 353-54. The Court still applies its "reliability" analysis to garden-variety hearsay, which the Department sought to exempt altogether from Confrontation Clause coverage. Because the Court deems virtually all hearsay exceptions that apply to available declarants to be "firmly rooted," *compare* FED. R. EVID. 801(d)(2), *and* 803, *with supra* Part II.B,

the considerable systemic burden of requiring the government to produce every available hearsay declarant as a predicate to the use of any hearsay. And by placing on the defendant the burden of initiating confrontation with many available declarants, it avoids the backwards set of tactical incentives that have created battles over admissibility, in the name of the confrontation right, when confronting the declarant was the last thing that defendant really wanted.[191] Undoubtedly, it is less convenient for defendants than a rule that required them to do nothing but object to the admission of hearsay. Properly applied, however, a rule providing that defendants must request a subpoena to invoke the confrontation right should not work serious hardship on defendants.[192] In essence, the rule requires that a defendant mean what he says when he asks for confrontation.

Equally important, the Court's compromise fits with a plausible reading of the Sixth Amendment text. The defendant's right is "to be confronted with" witnesses.[193] The use of the passive voice leaves the text ambiguous. It does not specify who must bring about the confrontation, as would a rule stating, for example, "In all criminal prosecutions, the prosecutor must confront the accused with the witnesses against him." In light of the practical consequences of a strict rule of necessity, it makes sense to conclude that this ambiguous text sets no rigid rule defining when, how, and by whom the witness must be produced. Moreover, in most instances, it is not the defendant alone who brings about the confrontation with a declarant whom he subpoenas. After all, it is the court—not the defendant—that issues the subpoena and, where necessary, enforces it.

There is one element in the Court's treatment of available declarants, however, that bears little relation to the constitutional text. Under the "general approach" defined in *Roberts*, the Court still screens hearsay for "relia-

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however, the Court's reliability test excludes very little hearsay in such cases. In short, although the Court explicitly rejected the Justice Department's argument, it gave the Department practically all that it asked for.

191 *See supra* note 174.

192 Requesting and serving subpoenas are part and parcel of a defendant's normal pretrial preparation. The government will bear the cost of subpoenaing a witness for indigent defendants. *See* FED. R. CRIM. P. 17(b). There are significant dangers, however, in shifting to defendants the burden of initiating confrontation, and courts applying the Clause in cases of available declarants must take care that the right to obtain the declarant's presence is not illusory. This Article argues that the Confrontation Clause itself requires the government to take affirmative steps to assist in the production of the declarant if a subpoena alone does not suffice. *See infra* Part V.A.2. Further, without discovery relating to hearsay declarants, defendants might be seriously disadvantaged. *See infra* Part V.C. Of course, typical rules of discovery do not require the government to disclose before trial the names of its expected witnesses. *See, e.g.*, FED. R. CRIM. P. 16; 18 U.S.C. § 3500 (1994) (Jencks Act). *But cf.* FED. R. EVID. 807 (requiring pretrial notification of an intention to use "residual hearsay"). Although the Confrontation Clause might not require pretrial discovery of the government's intention to use hearsay, any realistic application of the right to confront hearsay must take into account the information provided to a defendant before trial. The prosecution would violate the right of confrontation, for example, if it failed to disclose the identity or whereabouts of the declarant and then successfully argued at trial that the defendant was too late in attempting to subpoena a witness about whom he knew nothing before trial.

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

bility" even where the declarant is available to testify.[194] That approach is inconsistent with the Court's treatment of hearsay from a testifying declarant. It is a vestige of the Court's "exclusionary thinking." If a defendant has available the opportunity for in-court confrontation, there is no reason to invoke a constitutional exclusionary rule that exists only as a poor substitute for real confrontation.

When the declarant actually testifies or is available to testify at trial, the Confrontation Clause can—quite literally—mean what it says: the right is to "confront" the declarant, not to exclude hearsay. When the declarant is unavailable, however, a literal application of the text seems impossible. How can the defendant "confront" someone who isn't there?

One way out, of course, would be to exclude all hearsay. The Court quickly dismissed that alternative in *Mattox* as a matter of "necessit[y]."[195] Another appealing solution might be to define "witnesses" under the Clause in a way that avoids the problem: hearsay declarants are not "witnesses." In *White*, however, the Court renounced that alternative as well.[196] Instead, since *Mattox*, the Court has chosen a different method to deal with the perceived impossibility of confronting hearsay: it simply has created "exceptions" to the right.[197] Because the purpose of the Clause, as the Court defines it, is to "augment accuracy in the factfinding process,"[198] the Court makes exceptions for reliable hearsay. The Court justifies screening hearsay for reliability, then, as the best available substitute for confrontation.

As a matter of interpreting constitutional text, however, this approach is not especially satisfying. The text says nothing of hearsay or reliability. The Clause on its face has no exceptions.[199] Equally important, this approach skips a step—it embraces reliability as a substitute for confrontation without considering whether another alternative might serve just as well, without departing so sharply from the text of the Clause.

There is an alternative. It requires us to question the original assumption that it is impossible to "confront" an unavailable declarant. It makes sense to question that assumption. After all, why should we conclude so readily that the Framers left us with an explicit constitutional command to do the impossible? If the Court insists on a broad construction of the term "witness" to include hearsay declarants, then shouldn't our reading of the re-

194 For example, in *White*, after setting aside the unavailability requirement, the Court held that the hearsay at issue was reliable, because it fell within the firmly rooted exceptions for spontaneous declarations and statements for purposes of medical diagnosis. *See White*, 502 U.S. at 357.

195 *See* Mattox v. United States, 156 U.S. 237, 243 (1895).

196 *See White*, 502 U.S. at 353; *supra* notes 179-181 and accompanying text.

197 *See Mattox*, 156 U.S. at 243; *supra* notes 41-45 and accompanying text.

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

199 *See* Amar, *supra* note 15, at 647:

> At common law, the traditional hearsay "rule" was notoriously un-ruly, recognizing countless exceptions to its basic preference for live testimony; and more recent statutes have proliferated exceptions. But the words and grammar of the Confrontation Clause are emphatically rule-ish: "In *all* criminal prosecutions, the accused *shall* enjoy the *right* . . . to *be confronted* with *the* witnesses against him"—no ifs, ands, or buts.

maining text take into account the reality that declarant "witnesses" sometimes die, disappear, or refuse to testify? Given that reality, it makes sense to construe the term "confront" to include whatever form of "confrontation" is possible for such "witnesses."

If we approach the Clause from that perspective, another possibility becomes apparent. The verb "confront" means "to face," as one might physically face a testifying witness in a courtroom. But the verb connotes a particular kind of "facing": facing as in "challenge."[200] Although it might be literally impossible to face an absent declarant, it is possible to challenge her testimony in most, if not all, of the same ways that one might challenge the testimony of a live witness. A declarant's absence does not preclude a defendant from presenting the jury with, for example, the declarant's prior inconsistent statement, her earlier conviction for perjury, the deposited check that shows she was bribed, or the driver's licensing record showing her poor vision.[201] A declarant's absence does not preclude a thorough cross-examination of the live witness who recounts the hearsay, in a manner calculated to expose the weaknesses and gaps in the secondhand information that the jury has heard. If we read the verb "confront" to include a right to "challenge" hearsay testimony, then we have a Clause that no longer commands us to do the impossible. Instead, the Clause simply tells us to treat the declarant as the "witness" which the Court insists that she is.

This view is no less consistent with the purposes of the Confrontation Clause than is the Court's exclusionary rule. While one aim of confrontation is to augment the accuracy of fact-finding at trial, the Clause seeks that goal only indirectly. Its more immediate purpose is not to ensure the reliability of evidence but rather to ensure the adversarial testing of evidence. Cross-examination is the principal means by which the Clause achieves that testing.[202] Cross-examination does not guarantee reliable evidence. Indeed, both direct and cross-examination might be peppered with lies, half-truths, and accidental inaccuracies. Instead, the aim of the testing process is to give the jury the tools to decide for itself what is truth and what is not.

Viewed in this manner, then, the Confrontation Clause does not serve as a rule of exclusion based on reliability. Instead, the Clause guarantees a right

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200 *See* THE MERRIAM-WEBSTER DICTIONARY (1995 ed.) ("Confront *vb* 1: to face esp. In challenge: OPPOSE."). A reading of the term "confront" that encompasses means other than face-to-face confrontation for challenging prosecution evidence is consistent with the central purpose of the Clause. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 71 (1987) (Brennan, J. dissenting) ("The right of a defendant to confront an accuser is intended fundamentally to provide an opportunity to subject *accusations* to critical scrutiny."); *Roberts*, 448 U.S. at 65 (explaining that the "underlying purpose" of the Clause is "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence.").

201 *See infra* Part V.B.1.

202 *See* Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."); Mattox v. United States, 156 U.S. 237, 242-43 (1895). As Wigmore put it, "The main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination*. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination . . . ." 5 WIGMORE, *supra* note 177, § 1395, at 150.

to confront hearsay. When a prosecution witness testifies at trial, the Clause guarantees an "adequate" opportunity to cross-examine. The Clause provides the same right when the witness is an absent hearsay declarant. An "adequate" opportunity is one that serves the purposes of adversarial testing, one which, in the words of the Court, "afford[s] the trier of fact a satisfactory basis for evaluating the truth of the [out-of-court] statement."[203]

At a minimum, compared to the Court's starting place—the assumption that confronting an absent declarant is simply impossible—this interpretation is a much more productive place to begin. If a defendant has a right to challenge hearsay, then confrontation-hearsay analysis does not begin and end with the question of admissibility. Rather, admissible or not, hearsay is subject to challenge. This approach does not leave the Confrontation Clause at the mercy of the law of evidence, because no hearsay exception creates an "exception" to the confrontation right. And this view provides for a consistent reading of the Sixth Amendment text, whether the "witness" is on the stand or is an absent declarant. This approach gives us one Confrontation Clause; not two.

There are other sound reasons, founded in the constitutional text, to read the Confrontation Clause as a right to challenge, but not to exclude, hearsay. Most notably, the Clause is found in the Sixth Amendment. The drafters chose to place the confrontation right in the same sentence, in the same amendment, with the rights to counsel, to compulsory process, and to trial by jury.[204] Read together, those rights have little to do with the reliability of evidence or even with the accuracy of the ultimate verdict. Defense counsel has no obligation to present only "reliable" evidence. In fact, she has an obligation to seek to impeach even "reliable" witnesses when that opportunity presents itself.[205] The defendant is entitled to compulsory process to secure witnesses, without regard to their reliability. The Compulsory Process Clause creates a right for the defendant to "present [his] version of the facts," whether reliable or not.[206] The Sixth Amendment does not require a "reliable" jury, a well-educated jury, or the jury most likely to reach an "accurate" verdict. Indeed, we select jurors with calculated randomness. An important

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203 *See* California v. Green, 399 U.S. 149, 161 (1970).

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

205 *Cf.* United States v. Wade, 388 U.S. 218, 256-57 (1967) (White, J., concurring and dissenting):

> Law enforcement officers . . . must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. . . . But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty.

206 *See* Washington v. Texas, 388 U.S. 14, 19 (1967). In *Washington*, the defendant sought to call an accomplice as a witness, but a Texas rule of evidence which made a co-indicted accomplice incompetent to testify on behalf of the defendant prohibited the defendant from doing so. *See id.* at 16-17. The Court held that the rule violated the defendant's right, under the Compulsory Process Clause, to call witnesses in his favor. *See id.* at 23. In essence, the Court found that the compulsory process right overrode the state rule of evidence, even though the state rule aimed to exclude unreliable evidence. *See id.* at 22-23; *see also* Westen, *supra* note 2, at 591-92 (discussing the Court's rationale in *Washington*).

qualification is their ignorance of the facts to be litigated before them.[207] The Constitution commands an "impartial" jury.[208] Viewed as a whole, the Sixth Amendment does not appear—in a direct way—to be concerned that any particular form of evidence, or even any verdict, is accurate. If the Confrontation Clause is a rule that excludes unreliable evidence, the drafters certainly put it in a peculiar place.[209]

Finally, if we expand our view beyond the Sixth Amendment to the full text of the Bill of Rights, we find one final reason to reject an exclusionary approach to the Confrontation Clause in favor of a right to confront hearsay. The Due Process Clause is itself a constitutional limit on unreliable evidence. In criminal cases, due process is essentially an overriding principle of fairness. The Due Process Clause works together with trial by jury to ensure fairness. Most "element[s] of untrustworthiness" in criminal trial evidence are the "customary grist for the jury mill."[210] But due process does protect against evidence that a jury cannot evaluate rationally.[211] Prior to the Warren Court's embrace of the Fourteenth Amendment "incorporation" theory, the Due Process Clause provided the only constitutional standard for determining admissibility of prosecution hearsay outside of the federal courts.[212] Given the ubiquitous nature of "firmly rooted" hearsay exceptions and the Court's essentially standardless test for "particularized guarantees of trustworthiness," it is hard to see that an exclusionary rule based solely on Due Process standards of reliability would offer any lesser protection for defendants than does the Court's current approach.[213] For present purposes, it is

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207 *See* Mu'Min v. Virginia, 500 U.S. 415, 431 (1991).

208 *See* U.S. Const. amend. VI.

209 *Cf.* 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. . . .").

210 Manson v. Brathwaite, 432 U.S. 98, 116 (1977) ("We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of . . . testimony that has some questionable feature.").

211 *See* Estelle v. Williams, 425 U.S. 501, 503-05 (1976); Dutton v. Evans, 400 U.S. 74, 99 (1970) (Harlan, J., concurring). Professor Westen argues that the Constitution provides a single standard of admissibility; that evidence is constitutionally admissible if it "possesses 'sufficient aspects of reliability' to be intelligently evaluated by the jury for its proper weight." *See* Westen, *supra* note 2, at 598 (quoting *Manson*, 432 U.S. at 106). He concludes that the Due Process Clause is the proper source of that standard, *id.* at 598-600, and that it makes no sense to apply a separate standard to hearsay under the Confrontation Clause:

> [T]here is no reason to believe that hearsay is generally so much less reliable [than some kinds of direct testimony] that it requires a separate constitutional standard of admissibility.
>
> But even if hearsay evidence *is* less reliable, there is no reason to apply a different standard of admissibility. The due process test already accounts for the fact that evidence may contain "element[s] of untrustworthiness," and the hearsay character of evidence is simply one of the circumstances to be considered in assessing its probative value.

Id. at 598-99 (quoting United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977)).

212 *See* West v. Louisiana, 194 U.S. 258, 262 (1904).

213 *Compare* discussion *infra* Part II.B, C & D, *with* United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (applying the Due Process standard to evidence of similar crimes admitted under Federal Rule Evidence 413 in a sexual abuse prosecution and noting that the court would

enough to recognize what the presence of the Due Process Clause might tell us about the confrontation right: even as a constitutional rule excluding unreliable hearsay, the Confrontation Clause is redundant.

B. History

Most discussions of the history of the Confrontation Clause begin with disclaimers.[214] Perhaps the greatest danger in interpreting that history, then, is to draw firm conclusions at all. In light of the limited historical evidence, it is safest to contemplate only what is plausible. Accordingly, this section aims to make only two limited points. First, it is not at all clear from history that the Framers intended for the Confrontation Clause to exclude any hearsay from criminal trials. Second, it is even less certain that the Framers aimed to adopt the hearsay rule and its exceptions as a matter of constitutional law, although that is essentially the way that today's Court applies the Confrontation Clause. If the Framers were concerned with hearsay at all when they adopted the Clause, it is at least equally plausible to conclude that they left admissibility to the law of evidence and created in the Confrontation Clause a right to challenge all prosecution evidence, including hearsay evidence.

The Framers said little about confrontation when they adopted the Bill of Rights,[215] but they were not writing on a blank slate. They were aware of a history of struggle to resist inquisitorial procedures in English courts, and they were anxious to preserve for themselves the adversarial system of trial that their English ancestors had won from the Crown.[216] The struggle began two centuries before the time of the American Constitution.

The practice of live testimony, *viva voce*, by witnesses at an open trial in the presence of the accused was widespread in early English common-law courts and was a distinguishing, and treasured, feature of the English system.[217] In a number of politically charged sixteenth- and seventeenth-cen-

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hold Rule 413 unconstitutional under the Due Process Clause if the lower court had not applied the safeguards embodied in Rule 403 to protect the defendant from unfairly prejudicial evidence).

214 *See, e.g.*, California v. Green, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) ("[T]he 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."); Friedman, *supra* note 13, at 1022 ("The origins of the Clause are famously obscure.").

In keeping with tradition, this Article includes a disclaimer of its own. This Article is not, and does not purport to be, an exhaustive effort in original research into the history of the Clause. Far more able scholars, upon whose work this Article gratefully draws, have performed that effort in painstaking detail. Several relatively recent works with excellent accounts of the available historical evidence have proved especially helpful. *See id.* at 1022-24; Berger, *supra* note 15, at 567-86; Lilly, *supra* note 13, at 208-15.

215 There was no substantive debate over the Clause when the First Congress passed its resolution proposing the Bill of Rights. *See* 1 Annals of Congress 756 (1789) (reprinted in 5 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 262-63 (1987)); *Green*, 399 U.S. at 175-76 (1970) (Harlan, J., concurring).

216 *See* Berger, *supra* note 15, at 580-86. Professor Berger's article is a rich source for accounts of the American colonists' views on confrontation and on the adversary system in general. She attributes particular significance to the influence of Blackstone's *Commentaries*, a text in high demand in the Colonies during the decade of American independence. *See id.* at 581-84.

217 *See* Friedman, *supra* note 13, at 1023-24 & n.69 (citing *inter alia* the Case of the Union of

tury trials for the crime of treason, the English monarchy sought to impose inquisitorial procedures, similar to those of the civil-law courts of Continental Europe. In these "State Trials," some of which were conducted before the infamous Star Chamber, the prosecution typically relied on depositions, affidavits, or written statements procured by examining magistrates or officers of the Crown.[218] The trials consisted of the reading of such statements followed by a colloquy, an argument, between the prisoner and either the Crown's counsel or the court.[219] Not surprisingly, such prosecutions "occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face."[220] By the middle of the seventeenth century, the reaction to these abuses served to reaffirm a common-law right of confrontation in criminal trials. The practice of "trial by affidavit" diminished after the abolition of the Star Chamber in 1641 and largely had disappeared by 1700.[221]

The Court has traced the beginnings of the American confrontation right to this period of English history.[222] Although some scholars question whether events occurring as much as two hundred years earlier would have weighed on the minds of late-eighteenth-century Americans,[223] there is good reason to believe that the connection is real. The lawyers and statesmen who proposed and debated the American Constitution and the Bill of Rights undoubtedly were familiar with this history.[224] During the pre-Revolutionary period, they perceived themselves as victims of Star Chamber-like practices.[225] Their own writings demonstrate that they bristled against attempts

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the Realms, 72 Eng. Rep. 908, 913 (K.B. 1604) ("For the Testimonies, being viva voce before Judges in open face of the world, . . . was much to be preferred before written depositions by private examiners or Commissioners.")).

218 *See Green*, 399 U.S. at 156-57 (recounting the English practice of trying defendants by ex parte affidavit); Berger, *supra* note 15, at 569-70.

219 *See Green*, 399 U.S. at 176-77 & n.9; 9 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 225-27 (3d ed. 1994); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 325-26 (London, Macmillan 1883) ("[T]he whole trial, in fact, was a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning."); Berger, *supra* note 15, at 569-70.

220 James F. Stephen, *Criminal Procedure from the Thirteenth to the Eighteenth Century*, *in* 2 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY 443, 491 (1908), *quoted in* Berger, *supra* note 15, at 570. The most prominent example was the 1603 trial of Sir Walter Raleigh for treason. *See infra* notes 230-234 and accompanying text.

221 *See* Berger, *supra* note 15, at 570; Friedman, *supra* note 13, at 1024; 5 WIGMORE, *supra* note 177, § 1364, at 23 & n.47.

222 *See Green*, 399 U.S. at 156-57.

223 *See* Kenneth W. Graham Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n.4 (1972) (suggesting that the notion that "the evils of the Raleigh trial led in some way to the Sixth Amendment" might not be "anything other than a convenient but highly romantic myth"); *see also Green*, 399 U.S. at 177-78 (Harlan, J., concurring) (questioning the connection of the Raleigh trial's abuses to the Confrontation Clause).

224 *See supra* note 216.

225 The colonists' ire was directed at the vice-admiralty courts established by the British to punish violations of acts restricting the colonists' rights in international trade. *See* Lilly, *supra* note 13, at 211. Professor Lilly describes the nature of the colonists' objections:

> Initially, the colonial common law courts had jurisdiction over these offenders.

by George III to revive elements of the inquisitorial system in penalty proceedings in the vice-admiralty courts in the 1760s.[226] In short, there is a strong reason to believe that the Framers placed a high value on the right of confrontation that had originated in the common-law courts and that had survived the battles in the Star Chamber. Despite the absence of direct commentary on the issue during the adoption and ratification of the Bill of Rights, logic suggests that the Confrontation Clause was the means chosen to perpetuate that common-law practice.

History, then, permits one reasonably safe conclusion: the Clause was intended—at least in part—to prohibit trials by ex parte affidavit or by deposition when a court denied an accused any opportunity to challenge his accusers face-to-face. Thus, more than a hundred years after the Bill of Rights, the Court probably was correct when it wrote, "The primary object of [the Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . ."[227]

But this is only a starting point; there is more to the historical puzzle. If we conclude that the Framers' only aim was to stop inquisitorial "trials by affidavit," we plausibly might decide that the Clause applies only to "witnesses" who testify in court or from whom the government, in something akin to the inquisitorial fashion, has obtained "testimony" in a form equivalent to affidavits or to ex parte depositions. But as we have seen, the Court rejected that view with little apparent concern for historical analysis.[228] Even if the Framers meant to include declarants as "witnesses," however, we still are left with two historically plausible possibilities that either (1) do not

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> The earlier prosecutions were conducted in the traditional adversarial mode, which included examination of witnesses in open court and trial by jury. The significance of the latter, coupled with British apprehension that colonial juries were unwilling to convict fellow colonists, led Parliament to enlarge the jurisdiction of the vice-admiralty courts. These courts sat without a jury and their procedure was based upon civil law. The colonists strenuously objected to this mode of trial which in England was carefully restricted.

Id. (footnotes omitted).

226 George Mason, author of the Virginia Declaration of Rights, from which drafters of the Bill of Rights directly derived the Confrontation Clause, complained that the King had created a "civil law court," depriving the colonists of the rights that Englishmen enjoyed in the common-law courts. *See* 1 KATE MASON ROWLAND, THE LIFE OF GEORGE MASON 1725-1792, 383 (1892), *quoted in* Lilly, *supra* note 13, at 211. John Adams, who defended John Hancock in a penalty proceeding in the vice-admiralty courts in 1768, condemned the practice of the "[e]xamination of witnesses upon Interrogatories" in that court. *See* 2 LEGAL PAPERS OF JOHN ADAMS 207 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). Popular publications from both the pre-Revolutionary period and from the time of the Constitutional debates attack the inquisitorial practices of civil-law courts and extol the virtues of the common-law practice. *See* Berger, *supra* note 14, at 583 n.108.

227 Mattox v. United States, 156 U.S. 237, 242 (1895); *see also Green*, 399 U.S. at 156:

> [T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.

228 *See* White v. Illinois, 502 U.S. 346, 352-53 (1992).

require exclusion of hearsay at all, or (2) provide for exclusion, not because of unreliability, but only as a means to induce the government to produce available witnesses.

One possibility is that the Clause guarantees only the right to "confront" an available witness, but does not require exclusion of his hearsay testimony. If the Star Chamber was on the minds of the Framers, then this view is entirely plausible. The Star Chamber battles focused on confrontation, not on exclusion of hearsay. For example, in the 1603 prosecution of Sir Walter Raleigh for treason, probably the most famous of the State Trials, the Crown accused Raleigh of conspiring with Lord Cobham to overthrow King James.[229] The Crown's principal evidence was Cobham's "confession"—an ex parte examination before the Privy Council—and a letter that Cobham later wrote.[230] Raleigh did not call for exclusion of the confession. Instead, he protested, "let Cobham be here, let him speak it. Call my accuser before my face, and I have done."[231] His demand was for confrontation, not for the exclusion of evidence. Indeed, Raleigh seemed to concede that the out-of-court confession would remain before the court.[232] The same pattern holds true in at least some of the other celebrated State Trials.[233] Exclusion was not the issue.[234] The accused demanded "confrontation."

A second plausible interpretation of history equates with the *Roberts* Court's original "rule of necessity"—the Clause requires exclusion of hearsay only when the declarant is available but is not called by the government as a witness. Conversely, under this view, when the declarant is unavailable, the Confrontation Clause would not restrict the admissibility of hearsay. Here, exclusion is not based on the unreliability of the hearsay statements.[235] Instead, the threat of exclusion serves as a spur to require the government to

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229 *See* 1 STEPHEN, *supra* note 219, at 333.

230 *See id.*

231 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE TIME 1783, at 1, 16 (London, R. Bagshaw, 1809) [hereinafter "STATE TRIALS"].

232 "[L]et [Cobham] be produced, and if he will yet accuse me or avow this Confession of his, it shall convict me and ease you of further proof." *Trial of Sir Walter Raleigh*, *in* 1 CRIMINAL TRIALS 400, 427 (London, Charles Knight 1832).

233 *See* 1 STATE TRIALS, *supra* note 233, at 875-76 (discussing the trial of Sir Nicholas Throckmorton); 9 HOLDSWORTH, *supra* note 219, at 216 (same); 3 STATE TRIALS, *supra* note 231, at 1315-22 (trial of John Lilburn and John Wharton); 1 STATE TRIALS, supra note 233, 483, 492 (trial of Sir Thomas Seymour); 1 STATE TRIALS, supra note 233, 515, 520 (1551). *But see* 5 WIGMORE, *supra* note 177, § 1364, at 23 ("[M]arkedly by the middle of the 1600s . . . the notion tends to prevail, and gradually becomes definitely fixed, that *even an extrajudicial statement under oath should not be used* if the deponent can be personally had in court.").

234 Justice White, writing for the Court in *California v. Green*, 399 U.S. 149 (1970), noted this distinction and attributed significance to it:

> But objections occasioned by this practice [of trial by ex parte 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.

235 *See* Lilly, *supra* note 13, at 213 ("[T]he common law right of confrontation diverged from the hearsay rule in this particular: the declarant's presence was always preferred even

produce the testimony in the preferred form: through a live witness in court. The Clause "functions as a rule of preference requiring the presence of the declarant, if available."[236]

There is historical support for this view both from the American Colonial period and from the earlier State Trials. John Adams wrote that the ex parte examinations of witnesses in a criminal case "ought not to be read [in court] *if they can be produced*, viva voce."[237] Presumably, Adams's qualified language suggests that he was more willing to accept the use of hearsay when the declarant could not be produced. Wigmore cites a handful of State Trial reports through the mid-seventeenth century that admitted the depositions of unavailable witnesses against criminal defendants.[238] Although the practice of trial by affidavit diminished after the abolition of the Star Chamber in 1641, English courts in criminal cases during, and beyond, the time of the drafting of the Bill of Rights continued to admit in evidence the statements of deceased witnesses made during ex parte examinations by coroners or justices of the peace, notwithstanding the absence of cross-examination.[239] In sum, even as the confrontation right developed over the two centuries before the American Constitution, the English courts proved reluctant to grant an exclusionary remedy in cases in which the declarant's unavailability would deprive the court of the witness's evidence altogether.

When the Court formulated its "general approach" in *Roberts*, however, the Court merely ignored the ambiguities in this history. The *Roberts* opinion began with the bald assertion that "[t]he historical evidence leaves little doubt . . . that the Clause was intended to exclude some hearsay."[240] To the extent that the Court has relied on history at all to justify its exclusionary rule, it has reached two conclusions that deserve critical attention. First, the Court has equated the Confrontation Clause to the common-law right of confrontation. It first took that step in *Mattox* and repeated it in later confrontation-hearsay cases.[241] Second, the Court has equated that common-law right

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though his statement may be sufficiently trustworthy to fall within a hearsay exception and thus be admissible in his absence.").

236 *See id.* at 215.

237 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 226, at 341 (emphasis added) ("The Examination of the Prisoner himself (if not on oath) may be read as Evidence against him; but the Examination of others (though not on oath) ought not to be read if they can be produced, viva voce.").

238 5 WIGMORE, *supra* note 177, § 1364, at 23 n.47.

239 *See id.* at 25 & n.51 (citing, *inter alia*, King v. Buckworth, 84 Eng. Rep. 252 (K.B. 1669) (admitting, in a perjury prosecution, the testimony of a deceased witness from the trial in which the perjury occurred); 1 HALE, PLEAS OF THE CROWN 306 (ca. 1680) (finding that information upon oath before a justice of the peace is admissible in felony trials)).

240 Ohio v. Roberts, 448 U.S. 56, 63 (1980) (citing California v. Green, 399 U.S. 149, 156-57 & nn.9-10). Curiously, this passage from *Green* not only fails to support the Court's categorical assertion, but it actually contradicts the assertion in part. The cited passage ends by concluding, "Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Green*, 399 U.S. at 158.

241 *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895); Salinger v. United States, 272 U.S. 542, 548 (1926) ("The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that

of confrontation to the hearsay rule. Again, the Court first made this connection in *Mattox*, where the Court analogized a hearsay exception—dying declarations—to exceptions to the confrontation right.[242] Attempting to leave some shred of independent life in the Confrontation Clause, the *Roberts* Court slightly modified that approach to provide that only "firmly rooted" hearsay exceptions, or those exceptions with equivalent guarantees of trustworthiness, would pass muster under the Clause.[243]

There is historical support for the Court's first step—the notion that the Framers aimed to adopt the common-law right of confrontation for their new Constitution. Justice Story maintained that the Confrontation Clause "follow[ed] out the established course of the common law in all trials for crimes."[244] It requires a much greater leap, however, to equate that common-law right of confrontation to the wholesale "incorporation" of the hearsay rule and its exceptions.

It seems at least equally plausible that the Framers viewed the accused's right of "confrontation" as something separate and distinct from the evidentiary rule against "hearsay." The few legal treatises that were available to eighteenth-century lawyers treat the basic rules of hearsay separately from the problem of relying upon ex parte affidavits in criminal cases.[245] The hearsay rule and its exceptions are, and were in 1791, principles of evidence that applied generally to all parties in all cases, not just to the government in criminal cases.[246] Because generous hearsay exceptions are just as likely to favor the defendant as the government, there is little reason to believe that the Framers feared the development of hearsay exceptions as a likely source of state tyranny. Although eighteenth-century Americans wrote about the abuses of the Star Chamber, there is no historical evidence that they railed against the Crown's excessive use of, for example, dying declarations or coconspirator statements.

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provision . . . is to continue and preserve that right, and not to broaden it or disturb the exceptions.").

242 *See Mattox*, 156 U.S. at 243-44.

243 *See Roberts*, 448 U.S. at 66.

244 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 664 (Carolina Academic Press 1987) (1833).

245 Blackstone praised the common-law system of the "open examination of witnesses" when "the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled." 3 WILLIAM BLACKSTONE, COMMENTARIES *345. Beyond its discussion of confrontation, Blackstone's *Commentaries* do not address the law of evidence at all. *See* Berger, *supra* note 15, at 584 & n.110.

In its chapter "Of Evidence," Hawkins's 1724 treatise addresses the matter of ex parte examinations as a question apart from the admissibility of "hearsay." *See* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 429-31 (1724). Hawkins first addresses the question, "[w]here the Confession of the Defendant or the Depositions of others out of Court may be allowed as Evidence" and recounts a series of opinions holding, for the most part, that ex parte examinations before a justice of the peace or a coroner are admissible only if the witness either is dead or is clearly unavailable. *See id.* at 429-30. In the next section, he addresses the apparently separate question, "How far Hearsay is Evidence." *See id.*

246 *See* Dutton v. Evans, 400 U.S. 74, 97 n.4 (1970) (Harlan, J., concurring) (citing 1 JOHN HENRY WIGMORE, EVIDENCE § 4, at 16-17).

Finally, the "incorporation of hearsay rules" approach suggests that the Framers chose to "freeze" the law of hearsay as it existed in 1790, and to subject any further development of hearsay doctrine to the laborious process of constitutional amendment. That would be an extremely peculiar choice for a group of lawyers and statesmen who were familiar with the evolutionary process by which common-law courts developed and modified the rules of evidence generally and the hearsay rules in particular.[247] By making such a choice, in effect, they would have arrested the common-law process that they so admired, and that had produced the right of confrontation in the first place.

In short, there are more than a few plausible historical reasons to conclude that the Framers left the admissibility of hearsay to the law of evidence.[248] That does not mean, however, that they intended to leave the accused defenseless in the face of hearsay evidence. Rather, the Framers drafted a Sixth Amendment that includes a host of rights intended to ensure an adversarial challenge to prosecution evidence. If they considered hearsay at all in relation to those rights, there is no reason to conclude that the Framers would have considered such rights to be inadequate for challenging prosecution hearsay. Certainly in the case of available declarants, they had an historical point of reference in Raleigh's case that highlighted actual confrontation, rather than exclusion.[249] Even in the case of deceased or absent declarants, the common law offered some examples of adversarial challenges to admissible hearsay. Although that historical evidence is slim, the practice of impeaching hearsay declarants is probably as old as the notion of exceptions to the hearsay rule. Some of the earliest hearsay exceptions provoked adversarial responses, and the common-law courts allowed an opponent to present both prior inconsistent statements and adverse character evidence to impeach dying declarations and other hearsay testimony.[250] In sum, even without a Sixth Amendment limit on admissibility, the Framers would not have considered defendants powerless to challenge hearsay.

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247 *See* James W. Jennings, Note, *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* 5 WIGMORE, *supra* note 177, § 1364, at 12-28.

248 This was Wigmore's 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.

5 WIGMORE, *supra* note 177, § 1364, at 159. Justice Harlan is the only member of the Court to have embraced that view explicitly. *See Evans*, 400 U.S. at 93-94 (Harlan, J., concurring) ("I have . . . become convinced that Wigmore states the correct view . . . .").

249 *See supra* text accompanying notes 230-234.

250 *See* 3A WIGMORE, *supra* note 177, § 1033, at 1037-39 & n.2 (Chadbourn rev. 1970).

V. Defining and Applying the Right to Confront Hearsay

Once we move beyond the question of admissibility, the right of confrontation is fundamentally the same whether it applies to a testifying prosecution witness or to a hearsay declarant. The defendant's right is to "confront," to challenge the credibility and accuracy of, a witness either through live in-court cross-examination when the declarant is available or through any available alternative means to challenge hearsay when she is not. To understand the scope of that right as it relates to hearsay declarants as "witnesses," we should look first at how the Court has applied the right when a witness testifies for the prosecution at trial.

When a prosecution witness testifies, the confrontation right is not self-executing. The defendant must affirmatively exercise it. Thus, a defendant waives the right if he elects not to cross-examine the witness.[251] Likewise, he waives the right if the defendant himself takes steps to avoid confrontation.[252] The Clause guarantees only an opportunity to cross-examine. It is up to the defendant to seize the opportunity.

That opportunity is subject to reasonable limits. Courts may limit cross-examination if it is irrelevant,[253] cumulative,[254] or merely for the harassment of a witness[255] Nevertheless, the legitimate aims of cross-examination, which are quite broad, define the scope of the confrontation right. Cross-examination aims to elicit details—details omitted from direct examination—for the purpose of demonstrating inconsistencies or qualifications in the witness's testimony.[256] Cross-examination also aims more broadly at the impeachment of the witness; that is, it aims to elicit facts showing that the witness either is mistaken or lying, or both.[257] Thus, a court violates a defendant's Confrontation Clause rights if it impedes a defendant's opportunity to inquire into the details of the case, or to impeach the witness by eliciting facts relating to her perception, memory, bias, or integrity.[258]

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

252 *See* United States v. Thai, 29 F.3d 785, 814-15 (2d Cir. 1994) (finding no confrontation violation when defendant ordered someone to murder the witness); United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985) (finding the confrontation right to be waived when the defendant killed the witness).

253 *See* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (finding no confrontation violation when the lower court had restricted cross-examination on matters of marginal significance).

254 *See* United States v. Laboy-Delgado, 84 F.3d 22, 29 (1st Cir. 1996) (restricting cumulative cross-examination).

255 *See* Miranda v. Cooper, 967 F.2d 392, 402 (10th Cir. 1992) (finding that the lower court properly restricted cross-examination that lacked any factual basis).

256 *See* 5 WIGMORE, *supra* note 177, § 1368, at 2336-37 ("[A] witness, on his direct examination, discloses but a part of the necessary facts. That which remains suppressed or undeveloped may be of two sorts, (a) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (b) the facts which diminish the personal trustworthiness of the witness.").

257 *See id.*; Davis v. Alaska, 415 U.S. 308, 316 (1974).

258 *See* Olden v. Kentucky, 488 U.S. 227, 231 (1988) (finding that the trial court violated the Confrontation Clause by prohibiting the defendant in a rape case from cross-examining the victim regarding her cohabitation with her boyfriend); *Davis*, 415 U.S. at 316-17 (finding that the lower court violated the defendant's confrontation right by preventing him from cross-examining

The Clause, of course, does not guarantee the success of cross-examination at trial.[259] Thus, a defendant's confrontation right is not violated when cross-examination results only in confirming that a witness is a pillar of truth. Likewise, the Court has found no violation when a witness's inability to answer most questions with anything beyond, "I don't know," or "I can't remember," largely frustrates cross-examination.[260] In sum, when a witness testifies at trial, the Confrontation Clause guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[261]

The Court tells us that a hearsay declarant is a "witness" for purposes of the confrontation right.[262] This final section explores the scope and practical application of the right to "confront" that declarant "witness." The section deals separately with available and unavailable declarants not because the right is fundamentally different in each case, but because of the obvious practical differences in the nature of the "confrontation." In either case, however, the roadmap for defining the right should be the same. A defendant's right to confront hearsay should, as closely as possible, mirror his opportunity to challenge a testifying prosecution witness.

A. Confronting Available Declarants—The Right to Real Confrontation

When a hearsay declarant is available to testify, a defendant has an opportunity for real confrontation—face-to-face cross-examination in the courtroom. Under *Roberts*' general rule of necessity, the government must provide that opportunity in order to use hearsay from an available declarant.[263] As we have seen, the Court quickly compromised that general rule. After *Inadi* and *White*, the government must produce an available declarant only where it seeks to use her former testimony.[264] The Court does not impose that burden on the government, however, as a condition to admissibility of any other form of hearsay.

Inadi and *White* offer both good news and bad news for defendants seeking support in the Sixth Amendment for a right to confront an available hearsay declarant. The good news is that the Court recognizes some right for the

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a witness about possible bias or prejudice); United States v. Pritchett, 699 F.2d 317, 321 (6th Cir. 1983) (finding that the lower court violated the defendant's Confrontation Clause rights by restricting cross-examination regarding the source of drugs, when the questions related to facts supporting the defendant's theory of the case).

259 *See* United States v. Owens, 484 U.S. 554, 560 (1988) ("[S]uccessful cross-examination is not the constitutional guarantee.").

260 *See id.* at 559-60 (finding that the defendant's confrontation right was not violated by the admission of an assault victim's hearsay identification of the defendant when, on cross-examination, the victim suffered memory loss and was unable to remember seeing the assailant or to recall the circumstances of the out-of-court identification); Delaware v. Fensterer, 474 U.S. 15 (1985) (finding no violation of the Confrontation Clause when, on cross-examination, an expert was unable to recall the theory upon which his opinion was based).

261 *Id.* at 20, *quoted in Owens*, 484 U.S. at 559, *and* Kentucky v. Stincer, 482 U.S. 730, 739 (1987).

262 *See* White v. Illinois, 502 U.S. 346, 352-53 (1992).

263 *See* Ohio v. Roberts, 448 U.S. 56, 65-66 (1980).

264 *See White*, 502 U.S. at 353-54.

defendant to pursue that confrontation. *Inadi* tells us that "if [the defendant] independently wanted to secure [the declarant's] testimony, . . . [t]he Compulsory Process Clause would have aided [him] in obtaining the testimony." and Federal Rule of Evidence 806 would permit the defendant to question that declarant "as if under cross-examination."[265] The bad news, of course, is that the Court finds that right in the Compulsory Process Clause and in the Rules of Evidence, not in the Confrontation Clause. Ironically, it seems, the Confrontation Clause plays no role in bringing about real confrontation of the declarant.[266]

It is too early, however, to draw that broad conclusion from *Inadi* and *White*. After all, both cases are products of the Court's exclusionary thinking. Both address the issue of unavailability only as "a condition to admission" of hearsay.[267] Neither case presented the Court with the question of a

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265 United States v. Inadi, 475 U.S. 387, 397 (1986) (footnote omitted); *see also White*, 502 U.S. at 355.

266 In a thoughtful critique of *Inadi*, Professor Jonakait argues that a defendant's opportunity to subpoena a hearsay declarant is no substitute for a requirement that the prosecution produce available witnesses. *See* Jonakait, *supra* note 8, at 613-22. He argues that such a view improperly ignores the distinction between the compulsory process right to obtain witnesses "favorable" to the defense and the defendant's right to confront "witnesses against" him. *See id.* at 613-14. As a result, he argues, the *Inadi* view would require a defendant to make a showing that a declarant is both "favorable" and material before she could be subpoenaed, *id.* at 614 & n.150, a view that would mean that "the accused does not generally have a constitutional right to compel the presence of a person who has uttered incriminating hearsay." *Id.* at 614. Professor Jonakait expresses further concerns about the practical burdens that such a rule would place on defendants, who may not have a right to discover the identity of hearsay declarants before trial, and who may not have the practical ability to locate and to serve a subpoena on the declarant. *See id.* at 615-22.

If the Court applied *Inadi* and *White* in the fashion that Professor Jonakait fears, then the decisions indeed would leave precious little of a confrontation right in cases of available declarants. This Article suggests that such a reading of *Inadi* and *White* is unnecessary. Those cases merely shift to the defendant the burden of initiating confrontation in cases in which the prosecution uses hearsay, other than former testimony, from an available declarant. The cases do not address, however, the standard that a defendant must meet in order to call a hearsay declarant as a witness. And neither *Inadi* nor *White* explores issues such as discovery relating to hearsay declarants, nor any rights that a defendant might have to government assistance in producing available declarants when a subpoena alone is insufficient. Indeed, if courts shift to the defendant the burden of initiating confrontation, then—to address the concerns appropriately raised by Professor Jonakait—they must take seriously a defendant's right to learn the declarant's identity, to obtain her presence, and to cross-examine her in a manner, and at a point during the trial, that most closely would duplicate cross-examination of a live witness. *See infra* Part V.

267 *See White*, 502 U.S. at 348-49:

> In this case, we consider whether the Confrontation Clause of the Sixth Amendment requires that, before a trial court admits testimony under the "spontaneous declaration" and "medical examination" exceptions to the hearsay rule, the prosecution must either produce the declarant at trial or the trial court must find that the declarant is unavailable.

Id.; see Inadi, 475 U.S. at 391 ("We granted certiorari to resolve the question whether the Confrontation Clause requires a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying coconspirator . . . .") (citation omitted).

In both cases the defendants raised constitutional objections to the introduction of hearsay evidence. The defendants, however, neither demanded that the hearsay declarant testify nor made any attempt to produce or to call the declarant as a witness. As a result, the only issue before the Court in both cases was the admissibility of hearsay. The Court never needed to

defendant's right to pursue confrontation with an available declarant because, like so many defendants, neither Inadi nor White vigorously sought an in-court showdown with the declarant. Although the Court's dictum regarding Compulsory Process and Rule 806 might be true as far as it goes, it is by no means a clear pronouncement from the Court that the confrontation right plays no role in securing and defining a defendant's opportunity to challenge an available declarant.

Such a rule would be inconsistent both with the Sixth Amendment and with the Court's own decisions in two important respects. First, it would be inconsistent with the Court's treatment of testifying declarants. When a hearsay declarant actually testifies at trial, the Court quite clearly tells us to treat her like any other witness.[268] The confrontation right does not disappear just because hearsay is admitted. A defendant has the right to cross-examine a declarant-witness about the details of her hearsay statement, and about any other matter that might serve to impeach her credibility. A court that unduly restricts that cross-examination violates the Confrontation Clause.[269] If that same declarant were not called as a prosecution witness, but instead appeared in court at a defendant's request only after the prosecution had introduced the same hearsay statements in evidence, then surely a defendant is entitled to the same opportunities for impeachment. And if a court sought to limit that impeachment, then the Confrontation Clause, not the Compulsory Process Clause, would be the standard by which to judge that limitation.[270] It would make no sense to give the defense any less of an opportunity to challenge the declarant because the prosecution had managed to prove its case through hearsay, without calling the declarant to the stand in the first place.

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answer some fundamental questions about a defendant's right to confront an available declarant once the hearsay is admitted: What if a subpoena fails to produce the declarant? Must the government assist a defendant to locate and produce her? When does she testify? What form of questions may counsel ask? What discovery rights does a defendant have with respect to a hearsay declarant? An objective observer, un-schooled in the Court's confrontation-hearsay jurisprudence, might find these issues much more central to the matter of "confrontation" than, for example, the historical roots of the coconspirator hearsay rule. Because *Inadi* and *White* address only admissibility, however, the opinions have little to say about confrontation.

268 *See* United States v. Owens, 484 U.S. 554, 558-61 (1988); Delaware v. Fensterer, 474 U.S. 15, 19-22 (1985); *supra* text accompanying notes 182-184.

269 *See* Olden v. Kentucky, 488 U.S. 227, 231 (1988) (per curiam); Davis v. Alaska, 415 U.S. 308, 316-17 (1974).

270 *Compare Davis*, 415 U.S. at 316-17, *with* United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). The Confrontation Clause guarantees the right to an opportunity for effective cross-examination and is violated when the trial court prohibits defense cross-examination from exposing any "facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *See Davis*, 415 U.S. at 318. Although there is relatively little law considering a defendant's right, under the Compulsory Process Clause, to present favorable evidence, *see* Washington v. Texas, 388 U.S. 14, 19 (1967), it seems clear that such a right is more limited than a defendant's right to cross-examine a prosecution witness on any matter reasonably related to credibility. Indeed, the Court has suggested that the Compulsory Process standard is violated only if a "defendant [is] deprived of 'testimony [that] would have been *relevant* and *material*, and . . . *vital* to the defense.'" *Valenzuela-Bernal*, 458 U.S. at 867 (quoting *Washington*, 388 U.S. at 16 (1967)).

Second, a rule that would deprive the Confrontation Clause of any role in defining a defendant's right to challenge an available declarant would run afoul of *White*. The Sixth Amendment speaks of two rights regarding witnesses. The Confrontation Clause provides a right "to be confronted with the witnesses against" an accused.[271] The Compulsory Process Clause, by contrast, provides a right "to have compulsory process for obtaining witnesses in his favor."[272] *White* tells us, for good or for ill, that a hearsay declarant is a "witness against" the accused.[273] It would be anomalous, therefore, to look only to the Compulsory Process Clause to define a defendant's rights with respect to such a "witness."[274]

These observations return the discussion to a fundamental point: the right of confrontation does not end when a hearsay declarant testifies. It is critical to recognize that the confrontation right survives the initial question of admissibility because, in some cases at least, its protections are broader than those afforded by the Compulsory Process Clause and by the law of evidence. At a minimum, that confrontation right includes (1) the right to call a hearsay declarant as a witness simply because she is the declarant of "testimony" already introduced by the government, whether or not she meets the Compulsory Process standard for witnesses "favorable" to the defense; (2) the right to good-faith efforts by the government to locate and to produce a hearsay declarant if a subpoena alone does not suffice; and (3) the right to a cross-examining form in questioning the declarant.[275]

1. The Right to Call a Hearsay Declarant as a Witness

"The Sixth Amendment," the Court has written, "does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses." [276] The Compulsory Process Clause applies only to "witnesses in [the defendant's] favor."[277] To show a violation of his right to compulsory process, the Court has held, a defendant must "make some plausible showing" that the witness he seeks to produce is likely to give testimony that is (1) material and (2) favorable to the defense.[278] If an indigent defendant seeks subpoenas at the government's expense, the Federal Rules mirror that limitation.[279]

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

272 *See id.*

273 *See* White v. Illinois, 502 U.S. 346, 353 (1992).

274 *See* Jonakait, *supra* note 8, at 614 n.151 (criticizing *Inadi's* logic because it "recognizes only one right when the Constitution created two").

275 To meaningfully exercise the right to confront an available declarant, a defendant also must be accorded the same discovery rights with respect to a hearsay declarant as for any other prosecution "witness." *See infra* Part V.C.

276 United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

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

278 *See Valenzuela-Bernal*, 458 U.S. at 867.

279 *See* FED. R. CRIM. P. 17(b) (stating that a court shall issue a subpoena for an indigent defendant "upon a satisfactory showing that . . . the presence of the witness is necessary to an adequate defense"). In fact, the language of this rule seems even more restrictive than the Court's words in *Valenzuela-Bernal*.

Where the "witness" is a hearsay declarant whose "testimony" the government has already succeeded in putting before the jury, however, the showing required by the Compulsory Process Clause is too restrictive. In the first place, the issue of materiality has already been determined in large measure by the government's choice to offer the hearsay and the court's finding that it is admissible. Given that predicate, for purposes of the confrontation right, anything is "material" that a defendant might choose to pursue on cross-examination if the declarant appeared as a prosecution witness. The notion of "materiality" thus includes a declarant's ability to perceive and to remember the facts conveyed through the hearsay statements and to add detail. It includes anything reasonably calculated to impeach credibility. It even includes a witness's demeanor before the jury if she does nothing other than relate the same facts contained in the hearsay statement.[280] In short, almost by definition, that declarant's testimony will meet the test of "materiality." Second, requiring a defendant to show in advance that his examination of a hearsay declarant would prove "favorable" to the defense is inconsistent with the right of confrontation at trial. At trial, defense counsel may cross-examine without proving in advance that his examination will result in successful impeachment. As a practical matter, it often may be difficult for counsel to predict in advance what facts she might elicit on cross-examination. The Confrontation Clause guarantees the opportunity to inquire nonetheless.[281] It would be anomalous to place additional restrictions on that opportunity simply because a court allowed the government to proceed by way of hearsay evidence.

If the declarant is a "witness against" the accused, then a defendant's right to bring her before the jury for cross-examination arises simply because she is the declarant, not because of an independent showing that cross-examination is likely to succeed. In effect, this approach does nothing more than put a defendant in the same position that he would have occupied if the prosecution had offered live testimony rather than hearsay. As a practical matter, this approach seems unlikely to impose on courts and on prosecutors the kinds of burdens that the Court sought to limit in *Inadi* and *White* when it retreated from a general rule requiring the government to produce any available hearsay declarant. First, the confrontation right is not self-executing, a defendant must invoke the right. Experience suggests that, purely by tactical choice, defendants will prefer to avoid real confrontation more often than to invite it.[282] Moreover, after *Inadi* and *White*, defendants must invoke the right by obtaining and by serving a subpoena.[283] Few defendants will go to that trouble without some reason for believing that it will matter. Finally, to

280 *But cf.* United States v. Accetturo, 783 F.2d 382, 388-89 (3rd Cir. 1986) (finding that the lower court faced with a large volume of evidence at a pretrial detention hearing, properly refused to compel the attendance of defense witness when the defendant sought the witness's presence only because visual observation might lead the jury to find the witness unreliable).

281 *See* Davis v. Alaska, 415 U.S. 308, 316 (1974) (stating that a cross-examiner may "delve into the witness' story to test the witness' perceptions and memory"); Henry v. Speckard, 22 F.3d 1209, 1214-15 (2d Cir. 1994) (finding that the lower court violated the Confrontation Clause by refusing to allow defense counsel to explore possible bias of a child witness).

282 *See supra* note 174 and accompanying text.

283 *See supra* note 266 and accompanying text.

the extent that a defendant seeks to abuse the opportunity to obtain the presence of hearsay declarants for cross-examination, the court retains the same power it would have to restrict any cross-examination designed purely for delay, harassment, or other improper purpose.[284]

2. *Government Assistance in Producing the Declarant*

Because *Inadi* and *White* address the issue of availability only as a predicate to the admissibility of hearsay, they shift to the defendant only the burden of initiating confrontation.[285] If a defendant wants confrontation, he must ask for it. Just as he may waive confrontation of a courtroom witness by choosing not to cross-examine her, a defendant may waive confrontation of an available declarant by failing to demand her presence.[286] Under *Inadi* and *White*, a defendant must make that demand by requesting a subpoena and by taking reasonable steps to locate and bring the witness to court.

The Court retreated from its general "rule of necessity," requiring the government to produce all available hearsay declarants, because the rule imposed substantial, and largely unnecessary, burdens on the courts and on the government.[287] There is an equivalent danger, however, in leaving defendants entirely to their own devices in bringing a declarant to the courtroom.[288] Requesting a subpoena normally should impose little burden on a defendant. But a subpoena may not always suffice to bring about confrontation. Declarants may be hard to locate or impossible to produce without information or resources available only to the government. It would be a mistake to read *Inadi* and *White* in a manner that absolves the government of all constitutional responsibility for bringing available declarants to the courtroom. When a defendant seeks real confrontation, the Sixth Amendment requires the government to be more than a passive observer to his exercise in futility.

A comparison with the compulsory process right proves the point. When a defendant seeks to call a witness in his behalf, the Compulsory Pro-

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284 *See* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (dictum) (finding that a court does not violate the confrontation right by restricting cross-examination on matters of marginal significance).

285 Professor Westen summarized the distinction between the Compulsory Process right to "have compulsory process" to obtain witnesses "in favor" of the accused, and the Confrontation Clause right to "be confronted with" the "witnesses against" the accused.

> [T]he significance of the dichotomy is simply that it allocates between the prosecution and the defense the burden of taking the initiative in identifying the witnesses to be produced—placing on the prosecution the burden of confronting the defendant with witnesses "against" him, and placing on the defendant the burden of identifying and requesting the production of witnesses "in his favor."

Westen, *supra* note 2, at 602. After *White v. Illinois*, 502 U.S. 346 (1992), of course, the allocation of burdens that Professor Westen described has changed. Except in cases of former testimony, the Court now places on the defendant the burden of initiating confrontation with an absent declarant. *See id.* at 353-57.

286 *See* United States v. Burton, 937 F.2d 324, 329 (7th Cir. 1991).

287 *See White*, 502 U.S. at 356-57; United States v. Inadi, 475 U.S. 387, 397-99 (1986).

288 Professor Jonakait notes with concern the practical difficulties facing defendants in attempting to produce hearsay declarants. *See* Jonakait, *supra* note 8, at 614-16. These concerns highlight the need to give the right to confront hearsay a realistic construction that includes both discovery rights and the right to government assistance when necessary to produce a declarant.

cess Clause gives him more than the right to obtain a subpoena and to hope that it works. The right extends to witnesses beyond a state's subpoena powers.[289] It includes the right to require the government to use available coercive and persuasive means to bring a witness to court.[290] Although the right does not require the government to accomplish the impossible, it compels the government to make good faith efforts to obtain the presence of available witnesses for the defense.[291]

Although the constitutional source of the right to obtain the presence of an available hearsay declarant, a "witness against" the accused, rests more comfortably in the Confrontation Clause, the government's obligation to assist in that effort should be at least equivalent to its obligations under the Compulsory Process Clause. Surely the government can have no less of an obligation to assist in producing a hearsay declarant, whose statements the government itself has used in evidence, than in producing a defense witness whom the government had no role in choosing. For most purposes, of course, it might not matter which Clause one prefers to identify as the source of the right; the result is the same. Whether based on the Confrontation Clause or its "fraternal twin,"[292] the Compulsory Process Clause, a defendant has a right to the reasonable assistance of the government in producing hearsay declarants when a subpoena alone does not suffice. A defendant is not "on his own" to produce available hearsay declarants any more than he is left to his own powers to produce defense witnesses.

In the end, a defendant's right to bring an available declarant to court offers an indirect path to a Sixth Amendment rule excluding some hearsay. Except in cases of former testimony, the government need not produce an available declarant as a precondition for the admission of her hearsay statements.[293] Where the defendant's subpoena fails, however, the government may be required to assist in efforts to produce the declarant.[294] If the government fails to exercise good faith in making such efforts, the only effective sanction might be exclusion of the hearsay.[295] In this respect, *Inadi* and

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289 *See* United States v. Theresius Filippi, 918 F.2d 244, 247 (1st Cir. 1990); Westen, *supra* note 2, at 588.

290 *See Filippi*, 918 F.2d at 247 (finding that the government violated the defendant's compulsory process right by failing to request a special interest parole from the Immigration and Naturalization Service to enable the attendance of a defense witness); Westen, *supra* note 2, at 588 & n.54 (citing, *inter alia*, United States v. Sanchez-Rodriguez, 475 F.2d 61, 64 (9th Cir. 1973) (finding that the government satisfied the Compulsory Process Clause by allowing the defense to send an investigator to Mexico to persuade a witness to attend the trial)).

291 *See Filippi*, 918 F.2d at 247; Westen, *supra* note 2, at 588. *Cf.* United States v. Gutierrez, 931 F.2d 1482, 1491-92 (11th Cir. 1991) (finding no compulsory process violation when the government made a reasonable, but unsuccessful, effort to locate a witness).

292 Amar, *supra* note 15, at 695.

293 *See* White v. Illinois, 502 U.S. 346, 354 (1992).

294 *See supra* note 297 and accompanying text.

295 Invoking the exclusionary sanction for this purpose has added benefits. If the government expects to use hearsay to prove an important fact at trial, but fails to provide a defendant with both notice and discovery regarding the location and the identity of the declarant, if known to the government, then the government takes a significant risk in introducing the hearsay in evidence. At a minimum, it risks some delay at trial while the defendant attempts to subpoena the witness. Even if the court admits the evidence, the government's subsequent failure to make

White leave open the prospect that the Sixth Amendment may operate as an exclusionary rule of a different sort: not as a rule of evidence excluding unreliable hearsay, not even as a rule of necessity, or "preference," making a showing of unavailability an automatic precondition to the admission of prosecution hearsay, but as an exclusionary rule under the court's supervisory power when the government drags its feet in bringing about a confrontation that a defendant desires but cannot obtain through subpoena.[296]

3. *The Right to "Hostile" Questioning*

The right to cross-examination is the core of the Confrontation Clause.[297] And the cross-examination guaranteed by the Sixth Amendment means more than simply facing a witness and asking her what happened. Cross-examination, quite literally, involves "confrontation." The cross-examiner confronts a witness with facts—typically through leading questions and sometimes with documentary or physical evidence—and demands an immediate response. The power of cross-examination, the Court often has recognized, comes in large measure from this process of hostile questioning, a process of "testing the recollection and sifting the conscience of the witness."[298]

Even when a witness appears at trial, testifies before the jury, and is questioned by defense counsel, a court may violate the defendant's confrontation right by denying the defense an opportunity to this hostile form of questioning an adverse witness. *Chambers v. Mississippi*[299] offers the clearest

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good faith efforts, if necessary, to locate and to produce the witness might lead to a successful defense motion to strike the hearsay or, if the evidence is sufficiently important, to a mistrial. Prosecutors who expect to use hearsay to prove significant facts, therefore, would be well advised to inform defendants of that expectation well before trial, thereby allowing the defense to request and to serve a timely subpoena. Of course, when the defense chooses to subpoena a hearsay declarant, the likely result in many cases will be a change of strategy by the prosecutor, who would not want the jury to perceive him as the party seeking to "hide" the witness from the jury. In such cases, the defense's subpoena may induce the prosecutor to put the declarant on the stand.

296 In enforcing its "rule of necessity" even before *Roberts*, the Court made it clear that the government's neglect to use available means to produce a hearsay declarant would render hearsay constitutionally inadmissible. *See* Barber v. Page, 390 U.S. 719, 723, 725 (1968) (excluding hearsay under the Confrontation Clause because the government made no effort to obtain a hearsay declarant from federal prison); Motes v. United States, 178 U.S. 458, 474 (1900) (excluding hearsay under the Confrontation Clause when a witness's absence was due to government negligence in releasing the witness from jail and in failing to monitor him). Under the approach suggested in this Article, government neglect essentially would have the same effect. After *Inadi* and *White*, the main difference would be a requirement that a defendant take the first step, except in cases of former testimony, to demand the presence of a witness and to back-up the demand with a subpoena.

297 *See* Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."); Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination."); Mattox v. United States, 156 U.S. 237, 242-43 (1895); *see also* 5 WIGMORE, *supra* note 177, § 1367, at 158 ("[I]f the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution.").

298 *See Mattox*, 156 U.S. at 242.

299 410 U.S. 284 (1973).

example of such a violation. There, a defendant charged with murder sought to prove that another man, Gable McDonald, was the true culprit.[300] McDonald, in fact, had confessed under oath to the murder.[301] When the state failed to call McDonald as a witness, the defense put him on the stand and succeeded in offering the sworn confession in evidence.[302] Under prosecution questioning, McDonald promptly repudiated the confession.[303] When the defense then sought permission to examine McDonald "as an adverse witness," the trial court denied the request under Mississippi's then-existing "voucher" rule that prohibited a party from impeaching its own witness.[304] The Supreme Court reversed the conviction, in part because the trial court had denied the defendant the hostile form of questioning typically associated with cross-examination. "The right of cross-examination," the Court wrote, "is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation"[305] Under *Chambers,* then, the right to a hostile form of questioning does not evaporate simply because the defendant calls the witness.[306]

Inadi is certainly correct when it says that a defendant has the "option," provided by Federal Rule of Evidence 806, to call a hearsay declarant to the stand and question her as if she were on cross-examination.[307] But that right to a cross-examining form in questioning that declarant is more than an option under the Federal Rules of Evidence. It is a criminal defendant's constitutional right.[308]

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300 *See id.* at 289.

301 *See id.* at 287.

302 *See id.* at 291.

303 *See id.*

304 *See id.* at 291-94.

305 *Id.* at 295. Although the opinion ultimately rests upon a finding that Chambers's trial violated the Due Process guarantee of a fair trial, the Court's views on due process stem directly from the confrontation right in the Sixth Amendment. "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* at 294.

306 Professor Amar reaches the same conclusion, but with different reasoning. He challenges the Court's view that a hearsay declarant is a "witness against" an accused and argues accordingly that the Confrontation Clause does not apply to most hearsay. *See* Amar, *supra* note 15, at 691-97. Nevertheless, he finds a right to "hostile questioning," in appropriate circumstances, inherent in the Compulsory Process Clause: "[T]he very notion of *compulsory* process suggests the possibility of an obvious conflict of interest between the witness and the accused." *Id.* at 696 n.214.

307 *See* FED. R. EVID. 806 ("If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.").

308 It could be argued that the confrontation right should encompass other aspects of trial procedure typically available when a defendant cross-examines a prosecution witness. One important aspect, for example, might be the defendant's typical right to cross-examine a witness immediately after direct examination. The opportunity to impeach while the witness's direct testimony is fresh in the jury's mind might have important advantages over a process that requires a defendant to wait until the end of the government's case before calling the declarant for what would be, in effect, a cross-examination. *See* Jonakait, *supra* note 8, at 619-20. Professor Westen contends, "the right of a defendant to *interrupt* the state's presentation of evidence by cross-examining prosecution witnesses is at the core of the sixth amendment right of confrontation." Peter Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of*

In summary, there is life in the Confrontation Clause for dealing with available declarants, even after *Inadi* and *White*. That life stems from viewing the Clause not as a rule of admissibility, but as an affirmative right to confront hearsay. *Inadi* and *White* require a defendant to be serious in his demand for confrontation, and to back up that demand with a subpoena, but they do not erase the basic right to confront hearsay. A defendant has the right to confront a hearsay declarant not because he can show in advance that cross-examination would prove "favorable" to the defense, but simply because the hearsay declarant is a "witness against" him. When a subpoena alone is insufficient to produce a declarant, the government still has an obligation to make good faith efforts to assist in producing her. When the declarant appears, the Confrontation Clause preserves the right to a cross-examining form of questioning. In short, a defendant is entitled to the opportunity to treat a hearsay declarant like any other prosecution witness.

B. The Right to "Confront" Unavailable Declarants

It seems sensible enough to speak of a "right to confront hearsay" when a defendant can bring a hearsay declarant to the courtroom and cross-examine her like any other witness. But how can a defendant cross-examine someone who never testifies? As we have seen, the apparent impossibility of confronting the unavailable declarant was what led the Court to an exclusionary rule in the first place.

The right to confront a hearsay declarant means little unless there is some realistic means to pursue the right. In addressing the problem of unavailable declarants, this section begins with practical considerations. It first attempts to demonstrate that the notion of "confronting" an unavailable declarant is neither impossible nor unprecedented. Though it is a much neglected art, able defense attorneys can successfully impeach absent declarants in much the same way that they can cross-examine in-court witnesses. Indeed, often the impeachment process actually benefits from the absence of the declarant. This section begins with a practical look at that process of "virtual cross-examination." Then the section returns to the Confrontation Clause and examines the scope of the constitutional right to use that process to "confront" an unavailable declarant.

1. The Art and Efficacy of Virtual Cross-Examination

Prosecution hearsay offers what a bombardier might call a "target rich environment." Hearsay, after all, is vulnerable to begin with. It comes before the jury with its most obvious weakness already exposed; jurors know they are getting secondhand information.[309] Nevertheless, few defense attor-

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Evidence in His Defense, 66 CAL. L. REV. 935, 983 (1978). It is difficult to argue, however, that the Sixth Amendment commands this strict order of proof in every criminal case. *See* United States v. Cutler, 676 F.2d 1245, 1248-49 (9th Cir. 1982) (finding that the trial court did not violate the Confrontation Clause by delaying cross-examination of a witness about related crimes until after the defendant testified).

309 *See* Westen, *supra* note 2, at 599 ("[T]he hearsay character of evidence is simply one of the circumstances to be considered in assessing its probative value. Indeed, hearsay evidence may be introduced more safely than direct testimony because the former carries its deficiencies

neys take the opportunity to attack hearsay once it is in evidence.[310] Either through deliberate tactical choices, or simply as a result of precedent and inertia, our traditional approach to hearsay and confrontation is mired in exclusionary thinking. Whether one consults reported case law, or basic texts on trial advocacy, little is said of the impeachment of hearsay declarants.[311]

That omission, however, is not born of impossibility. Indeed, the few experienced jurists and trial attorneys who have examined the issue see the impeachment of hearsay declarants as a land of missed opportunity:

> As a trial judge, . . . I sometimes wonder at what seems to me the passing up of golden opportunities by the able advocate. Foremost among these lost opportunities is the virtual total neglect to do anything about the other side's hearsay once it has been admitted by the trial judge into evidence.
>
> True enough, the able advocate fought valiantly against the hearsay admission; but, having lost that position, he does not fall back to the next logical position—impeaching the hearsay declarant.[312]

Though seldom used, tools for attacking hearsay already exist. The most prominent weapon is Federal Rule of Evidence 806, which permits an opponent of hearsay to attack the credibility of the declarant "by any evidence which would be admissible for those purposes if declarant had testified as a witness."[313] Numerous states have virtually identical rules.[314] The practice codified in Rule 806 was well known to the common law.[315] It is more than an historical curiosity. In the words of one very able criminal defense lawyer, Rule 806 is "an invaluable tool for trial lawyers."[316]

Rule 806 and similar provisions allow for a process that this Article calls "virtual cross-examination." In essence, it is the process of placing in evidence prior statements of the declarant, documents, physical evidence, character evidence, and other testimony that aims to impeach the hearsay

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on its face and is subject to the judge's instructions with respect to its weight."). For studies suggesting that juries properly discount the value of hearsay testimony, see Rakos & Landsman, *supra* note 172, and Miene, Park & Borgida, *supra* note 172.

310 *See* Brannon, *supra* note 9, at 158.

311 *See* STEVEN LUBET, MODERN TRIAL ADVOCACY (2d ed. 1997) (making no mention of impeachment of hearsay declarants); THOMAS A. MAUET, TRIAL TECHNIQUES 264 (4th ed. 1996) (devoting one-half page to the impeachment of hearsay declarants); ROBERT E. KEETON, TRIAL TACTICS AND METHODS (2d ed. 1973) (making no mention of impeachment of hearsay declarants).

312 Brannon, *supra* note 9, at 158.

313 FED. R. EVID. 806.

314 For a comprehensive listing of comparable state statutes, *see* JACK B. WEINSTEIN & MARGARET A. BERGER, 4 WEINSTEIN'S EVIDENCE 806-14 through 806-17 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997). *Cf.* UNIF. R. EVID. 806 (1974) (identical to FED. R. EVID. 806 except in the numbering of the cross-references to Rule 801).

315 *See* Carver v. United States, 164 U.S. 694, 697-98 (1897) (citing numerous decisions in state courts); Rex v. Ashton, 2 Lewin, Crown Cas. 147 (1837). *See generally* 3A WIGMORE, *supra* note 177, §§ 884-88, at 651-53 (Chadbourn rev. 1970).

316 *See* Bennett, *supra* note 9, at 1168. Professor Bennett has enjoyed a distinguished career as a trial lawyer, including a successful tenure as the Federal Public Defender for the District of Maryland.

declarant. In many cases, defense counsel can present the impeaching evidence to the jury through and during the testimony of the government witness who relates the hearsay.[317] Handled in that manner, virtual cross-examination appears much like the cross-examination of the declarant might look and sound if the declarant testified in court.

To appreciate the efficacy of, and the limitations of, virtual cross-examination, it helps to consider the aims, the method, and the tactics of traditional cross-examination. Wigmore describes two basic aims of cross-examination. The first is to elicit "the remaining and qualifying circumstances of the subject of testimony,"[318] in other words, contradictory facts or details left out or underemphasized in direct examination that will contradict or qualify a witness's direct testimony. The second is to elicit impeaching facts, "facts which diminish the personal trustworthiness or credit of the witness."[319]

Cross-examination puts both contradictory and impeaching facts before the jury directly in three ways and inferentially in a fourth. First, the cross-examiner presents the fact in the form of a question. In reality, good cross-examiners seldom really ask questions at all. Their questions actually are assertions of fact that, if properly framed, the witness has no choice but to acknowledge.[320] Because the jury first hears the contradictory or impeaching fact from the mouth of counsel, the question itself, including its volume, timing, and phrasing, often carries as much persuasive power as the witness's answer, which often involves little more than a nod of acknowledgment. For this reason, the drama of cross-examination is closely akin to that of closing argument. Second, the jury learns the impeaching or contradictory fact when the witness answers. Of course, on live cross-examination, the witness can deny, qualify, or evade. If the question and answer alone, then, do not prove the target fact, then the cross-examiner can resort to a third method. Either during the cross-examination, or after calling another witness, counsel can demonstrate the impeaching or contradictory fact through independent "extrinsic" evidence, such as the transcript of a prior inconsistent statement or

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317 For a series of hypothetical cross-examinations demonstrating this approach, see Bennett, *supra* note 9, at 1142-63.

318 5 WIGMORE, *supra* note 177, § 1368, at 37 (emphasis omitted); *see* Davis v. Alaska, 415 U.S. 308, 316 (1974) (noting that a cross-examiner is permitted to "delve into the witness' story"); MAUET, *supra* note 311, at 218 (explaining that the two purposes of cross-examination are "[e]liciting favorable testimony" and "discredit[ing] the witness").

319 5 WIGMORE, *supra* note 177, § 1368, at 37 (emphasis omitted); *see Davis*, 415 U.S. at 315 (stating that a cross-examiner is "allowed to impeach, i.e., discredit, the witness"); MAUET, *supra* note 311, at 218.

320 *See* MAUET, *supra* note 311, at 225:

> During cross-examination you [the cross-examiner] are the person who should make the principal assertions and statements of facts. The witness should simply be asked to agree with each of your statements. By phrasing your questions narrowly, asking only one specific fact in each question, you should be able to get "yes," "no," or short answers to each question. Keep in mind that whenever the witness is given the chance to give a long, self-serving answer, he will.

Another prominent trial advocacy text describes the technique as follows: "The best questions on cross-examination are not questions at all. Rather, they are propositions of fact that you put to the witness in interrogative form. You already know the answer—you simply need to produce it from the witness' mouth." LUBET, *supra* note 311, at 105.

the record of a criminal conviction.[321] Finally, the jury might infer the contradictory or impeaching fact from the demeanor of the witness who, in theory at least, is reacting spontaneously to a question delivered without warning.[322]

The tactics of cross-examination are well known to trial lawyers. The first principle of cross-examination is caution. Because the witness is typically adverse, cross-examination generally presents more pitfalls than opportunities. Effective cross-examination rarely involves an open-ended question designed to elicit new and unanticipated information from a witness. "Fishing expeditions" more likely end with a "hook" in the cross-examiner than in the witness. Instead, trial lawyers learn that they should "never, never ask a question to which [they] do not already know the answer."[323] The key to cross-examination is control of the witness. Good trial lawyers maintain that control with narrowly framed, leading questions that are based on known facts.[324] To guard against the evasive or downright deceitful witness, those questions generally stem from facts that, if denied by the witness, the cross-examiner can prove independently. Thus, effective preparation for cross-examination requires counsel to assemble her "ammunition" or "material": the documents, physical evidence, prior witness statements, and any other factual material that counsel might need to correct, control, and direct an evasive witness.[325]

With this basic outline of the aims, methods, and tactics of cross-examination, we can begin to appreciate the opportunities that exist for effective "virtual cross-examination" when the "witness" is an absent declarant whose "testimony" comes before the jury as hearsay. Whether defense counsel's aim is to present "contradictory" details left out of the hearsay statement or to present "impeaching" facts about the declarant, such facts generally stem from counsel's factual investigation into sources beyond the hearsay state-

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321 *See* MAUET, *supra* note 311, at 260-64; LUBET, *supra* note 311, at 152-53.

322 In describing the goals of cross-examination, the Court in *Mattox* noted the significance of witness demeanor. Cross-examination, the Court wrote, compels the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242 (1895). In a similar vein, Blackstone recognized the utility in requiring spontaneous answers in open court: "[T]he occasional questions of the judge, the jury, and the counsel, propounded to the witness on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled . . . ." 3 Blackstone, *supra* note 245, at *345, *quoted in* Berger, *supra* note 15, at 583.

323 IRVING YOUNGER, THE ART OF CROSS-EXAMINATION 23 (American Bar Ass'n, Section of Litigation Monograph, Series No. 1, 1976). Professor Mauet describes the tactic this way:

> Play it safe. Many witnesses will seize every opportunity to hurt you. Cross-examination is not a discovery deposition. This is not a time to fish for interesting information or to satisfy your curiosity. Its sole purpose is to elicit favorable facts or minimize the impact of the direct testimony. Accordingly, your cross-examination should tread on safe ground. Ask questions that you know the witness should answer in a certain way, or, because he might not give exactly the expected answer, questions that you know you can handle his response to.

MAUET, *supra* note 311, at 220.

324 *See* LUBET, *supra* note 311, at 109-27.

325 *See id.* at 90-92. *Cf.* Pennsylvania v. Ritchie, 480 U.S. 39, 67 (Brennan, J., dissenting) ("A crucial avenue of cross-examination . . . may be foreclosed by the denial of access to material that would serve as the basis for this examination.").

ment itself. Such facts typically come from other, more detailed prior statements by the same declarant or from documents authored or acknowledged by the declarant.[326] Often, counsel may obtain independent evidence of inducements or relationships of the declarant that might show bias, or physical or mental characteristics of the declarant that would affect perception, memory, or communication. Just as with a live witness, counsel preparing to confront a hearsay declarant must assemble the same type of "material" as a basis for framing questions and, where necessary, proving contradictory and impeaching facts.

In a well-controlled cross-examination, counsel often reduces the witness to a "foil," simply confirming the facts posited in narrowly framed leading questions.[327] In virtual cross-examination, of course, the declarant is never on the witness stand at all. But the prosecution must call some witness through whom to relate the hearsay. Normally, that will be the witness most familiar with the circumstances surrounding the hearsay statement. In many instances, that witness provides the necessary "foil" for most questions. Counsel thus will have much the same initial opportunity for putting impeaching facts before the jury—that is, by stating them in the form of questions—that counsel has in "real" cross-examination. The principal difference, of course, is that the virtual cross-examiner's questions are phrased in the third person, rather than the second person: "Ten minutes after the shooting, she said the gunman had blond hair. Isn't that right?" rather than "You said the gunman had blond hair. Correct?" The substance of the impeaching fact, however, is the same.

The second method of putting impeaching facts before the jury, through a witness's answer, can be effective in virtual cross-examination despite, or even because of, the absence of the declarant. A hearsay declarant, of course, cannot answer questions if she is not present. But the testifying witness often will be in a position to provide responses equally favorable, if not more favorable, to the cross-examiner. An investigating police officer relating an accomplice's hearsay statement, for example, often may be a witness to additional, contradictory, or more detailed statements by the same declarant. When the "material" for cross-examination is the officer's report, he can do no more than acknowledge that the declarant made inconsistent statements.[328] He cannot explain or qualify the inconsistency as the declarant

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326 *See* LUBET, *supra* note 311, at 108-09.

327 "Foil . . . 4: a person . . . that makes another seem better by contrast." THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1980).

328 For an illustration of impeachment of an absent declarant by an inconsistent statement, see Bennett, *supra* note 9, at 1160-62.

Of course, successful impeachment by prior inconsistent statement requires that the defense have access, typically through discovery from the government, to the other statements by the hearsay declarant. *See infra* Part V.C. Although the application of discovery rules to hearsay declarants is largely an uncharted area, it is at least clear under the Jencks Act that when an investigating agent recounts hearsay statements made by an out-of-court declarant, the officer's own report in which he records those statements is "Jencks material" under the theory that the report is a written statement of the agent. *See* United States v. Welch, 810 F.2d 485, 489-91 (5th Cir. 1987). Once the agent testifies on direct examination, his written statements are discoverable. *See* 18 U.S.C. § 3500(b) (1994).

might if she appeared as a witness. In this respect, the "answering" component of virtual cross-examination can be more controllable, and hence more likely to be favorable to the cross-examiner, than its counterpart in real cross-examination.[329] Effective virtual cross-examination, of course, is not limited to impeachment by prior inconsistent statement. The technique can be just as effective when the subject matter relates to the hearsay declarant's ability to perceive or remember, or to her bias, prejudice, prior convictions, or "bad acts."[330] When the testifying witness has knowledge of such facts, he will have no choice but to admit them. Unlike the declarant, he will have little ability to explain them away. In effect, the testifying witness who has related only hearsay becomes a "sitting duck" for the cross-examiner, where the declarant herself might have proved a "moving target."[331]

When the cross-examiner uses the third means of proving impeaching facts, through independent, "extrinsic" sources, virtual cross-examination is little different from traditional impeachment by extrinsic evidence. Once a court has admitted the hearsay evidence, opposing counsel may call an adverse character witness or introduce a record of prior convictions, prior inconsistent statements, or other materials that contradict or impeach the hearsay.[332] Again, a defendant has the advantage of impeaching an absent declarant who cannot explain away the impeaching evidence.

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329 *See* Haywood v. Wolff, 658 F.2d 455, 464 (7th Cir. 1981) ("Indeed, [the defendant] may well have benefitted from the fact that [the hearsay declarant] was not present to explain what only appeared to be inconsistencies.").

In some early opinions, an absent declarant's inability to explain inconsistencies was considered to be a valid reason for denying this method of impeachment. *See, e.g.*, Mattox v. United States, 156 U.S. 237, 244-50 (1895); *see also supra* note 45. Applying the traditional rule of evidence that a party may not impeach a witness by prior inconsistent statement without first laying a foundation by asking the witness whether he made the statement, *see id.* at 345, the *Mattox* Court upheld the trial court's refusal to allow the testimony of two defense witnesses who were prepared to claim that the hearsay declarant had recanted in their presence. *See id.* at 244-50. The Court quickly cabined its position only two years later in *Carver v. United States*, 164 U.S. 694 (1897), limiting it to cases where the "witness had . . . been examined and cross-examined upon a former trial," largely because adherence to the traditional rule would preclude a defendant's only opportunity to challenge an absent declarant. *See id.* at 698.

Federal Rule of Evidence 806 explicitly dispenses with the traditional requirement: "Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." FED. R. EVID. 806.

330 *See* Bennett, *supra* note 9, at 1142-63; Brannon, *supra* note 9, at 160-76.

331 *Cf.* Richard H. Underwood, *The Limits of Cross-Examination*, 21 AM. J. TRIAL ADVOC. 113, 121 (1997) ("[I]n the real world, witnesses are not clay pigeons. They can move, and some can shoot back.").

332 *See* United States v. Moody, 903 F.2d 321, 329 (5th Cir. 1990) (stating that the trial court should have permitted the defendant, under Rule 806, to call an adverse character witness to impeach an absent declarant); United States v. Brainard, 690 F.2d 1117, 1127-28 (4th Cir. 1982) (Widener, J., concurring in part and dissenting in part) (finding that the trial court should have admitted a prior inconsistent statement under Rule 806 to impeach an absent declarant); United States v. Salim, 664 F. Supp. 682, 692 (E.D.N.Y. 1987) (noting that a testifying witness's observations regarding an absent declarant's demeanor were admissible under Rule 806 to impeach the declarant); State v. Valencia, 924 P.2d 497, 505 (Ariz. Ct. App. 1996) (finding the prior inconsistent statement of a declarant to be admissible under Arizona's version of Rule 806).

In some instances, a defendant's opportunity to present extrinsic evidence should be greater

Although it might often be as effective as, and less risky than, live cross-examination, virtual cross-examination has some obvious limitations. First, when the declarant is absent, and is likely to possess information not available from any other source, the cross-examiner may have no means to discover theretofore unknown, and potentially exculpatory information. The missing declarant cannot "fill in the blanks" left out of her hearsay statement. Even in these situations, however, virtual cross-examination can be a useful tool. The mere fact that a testifying witness must answer, "I don't know," when confronted with a barrage of questions seeking additional detail will confirm to the jury the limited value of the hearsay.[333] Moreover, the missed opportunity to "fish" for unknown details might be of limited value in any event. The "discovery" potential of cross-examination is probably overrated. No doubt an occasional defense benefits when a witness blurts out an unexpected detail. Far more often, however, the cross-examiner whose aim is discovery merely manages to bury his own case with answers that he wishes the jury had never heard.[334]

Virtual cross-examination falls short of live confrontation in one other obvious respect. The jury cannot observe the declarant's demeanor in response to questioning. Live cross-examination of an important prosecution witness can provide the most dramatic moments of a criminal trial. The jury expects a battle, a "confrontation" between witness and advocate. They want to see how the witness reacts, how she "holds up" when counsel probes at the details of her story. To some degree, the jury might pick the winner and the

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when impeaching an absent declarant than when impeaching a live witness. Impeachment with evidence of "bad acts" is an example. *See* Bennett, *supra* note 9, at 1155.

333 Imagine a hypothetical example of "virtual cross-examination" of a police officer under such circumstances:

> Defense Counsel: Now Officer Smith, you say Ms. Declarant said she saw Mr. Defendant running from the scene of the crime?
>
> Witness: Yes.
>
> Defense Counsel: I see from your report, Officer Smith, that she did not tell you where she was standing when she observed the crime scene. Correct?
>
> Witness: Correct. She didn't say.
>
> Defense Counsel: And she didn't tell you where the lights were either, did she?
>
> Witness: No.
>
> Defense Counsel: She didn't say how far away she was?
>
> Witness: No.
>
> Defense Counsel: Or whether she was wearing her glasses?
>
> Witness: No.
>
> Defense Counsel: Or how long she observed this person who was running?
>
> Witness: No.

This example could continue for pages. The odds are strong that such a cross-examination will prove more effective in the declarant's absence, because she would be in a position to provide the harmful details if she appeared in person.

334 Professor Lubet describes the odds of successful "fishing":

> Fishing questions are the ones that you ask in the hope that you might catch something. It has been said before and it is worth repeating here: Do not ask questions to which you do not know the answers. For every reason that you have to think that the answer will be favorable, there are a dozen reasons you haven't thought of, all of which suggest disaster.

LUBET, *supra* note 311, at 121-22. *See also* MAUET, *supra* note 311, at 220.

loser in that battle based on how things are said as much as on what things are said. Virtual cross-examination cannot supply that drama of spontaneous reaction to hostile questioning.

Even that most obvious shortcoming, however, may prove to be less of a disadvantage than it first appears. As a practical matter, witness demeanor is seldom essential, and is sometimes downright misleading, as a means of identifying truth.[335] It has limited value for at least two reasons. The first is the infinite variety of human personality. The reactions of witnesses to the pressures of cross-examination as reflected in their outward demeanor are simply too variable to provide a reliable indicator of credibility. As McCormick observes, "It is, in truth, quite doubtful whether it is not the honest but weak or timid witness, rather than the rogue, who most often goes down under the fire of a cross-examination."[336] Others share that observation.[337] The second

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335 Although one should not ignore the value of this "demeanor factor", the Court has treated this factor as desirable, but not essential, as a constitutional matter. For example, though the *Mattox* Court initially noted that a jury's observation of witness demeanor is an important component of confrontation, in its next breath the Court dispensed with any constitutional requirement that the jury actually see the hearsay declarant. *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895). If observation of a witness's demeanor were the *sine qua non* of all admissible hearsay, then juries never would hear a word of hearsay from unavailable declarants. The Court has dismissed that notion as "unintended and too extreme." *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980).

336 McCormick, *supra* note 16, at 41.

337 One classic text on cross-examination observes:

> Although the demeanor of the witness often helps illuminate the truth or falsity of testimony, it may do just the opposite. An unscrupulous lying witness, well trained, may not betray himself by his manner. He may look the jury square in the eye; he may have an excellent poker face. . . .
>
> A disturbed neurotic may appear to be a serene and accurate witness, at worst only an eccentric. . . .
>
> An aged and dignified witness may suffer lapses of memory which he cleverly conceals, even from himself, filling in the gaps with falsities, but he may impress a jury.

J. W. Ehrlich, The Lost Art of Cross-Examination 46-47 (1970).

Because of the interest in polygraphs, research into "lie-catching" is extensive. *See* William J. Yankee, *The Current Status of Research in Forensic Psychophysiology and Its Application in the Psychophysiological Detection of Deception*, 40 J. Forensic Sci., No. 1, at 63 (1995). Although the accuracy of trained polygraphers using sophisticated equipment is subject to serious question, the accuracy of untrained jurors in detecting deception based on demeanor is probably little better than a roll of the dice. *See* Paul Ekman, Telling Lies 162 (1985) ("Most liars can fool most people most of the time. Our research, and the research of most others, has found that few people do better than chance in judging whether someone is lying or truthful.").

Even more troubling, it is perhaps as likely, if not more likely, that inappropriate "demeanor factors" based on racial or cultural stereotypes play a larger role in assessing credibility than do "legitimate" clues drawn from a witness's demeanor on the stand. For a fictional, but telling account of such false impressions, consider how American jurors might have mistaken self-control for defiance in the demeanor of a young Japanese defendant in the years following World War II:

> The accused man sat so rigorously in his chair, so unmovable and stolid. He did not appear remorseful. He did not turn his head or move his eyes, nor did he change his expression. He seemed to Ishmael proud and defiant and detached from the possibility of his own death by hanging. It reminded him . . . of a training lecture he'd listened to at Parris Island. The Japanese soldier, a colonel had explained, would die fighting before he would surrender.

reason is that, in modern trial practice, a witness's courtroom demeanor often is rehearsed. There may be little real spontaneity in the courtroom confrontation. Few important witnesses appear in court without having undergone hours, if not days, of preparation by counsel.[338] Often, witnesses are grilled in the conference room far more extensively than they are in the courtroom. Before witnesses testify at trial, they become critics of their own demeanor on videotape. At trial, a jury thus sees and hears only the "polished" version.[339] In short, there is no reason to conclude as a general matter that live testimony, even on cross-examination, is any more "spontaneous" than most hearsay, or that a witness's demeanor on the stand is a predictable barometer of truth.

That reality, of course, is no reason to abandon the right of cross-examination when a witness is available.[340] It does suggest, however, that—as a tool in a search for truth when declarants are unavailable—virtual cross-examination may not stand too far behind the "real thing." Moreover, the demeanor factor need not disappear entirely even when a hearsay declarant is absent from the courtroom. Virtual cross-examination may offer an opportunity to explore even the declarant's demeanor. In some instances, the witness who relates the hearsay also can relate the declarant's nervousness, delay, or evasiveness in making the hearsay statements.[341]

Finally, when it comes to witness demeanor, virtual cross-examination offers one clear advantage over the real thing. A major risk in live cross-examination is simply that the jury will like the witness more than the lawyer. The sobering reality for trial lawyers is that the sympathies of the jury are usually on the side of the witness, not the cross-examiner.[342] An attempt to impeach a live human being in front of an audience is fraught with the risk

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. . . .

> Kabuo Miyamoto rose in the witness box so that the citizens in the gallery saw him fully—a Japanese man standing proudly before them . . . The citizens in the gallery were reminded of photographs they had seen of Japanese soldiers. The man before them was noble in appearance, and the shadows played across the planes of his face in a way that made their angles harden; his aspect connoted dignity. And there was nothing akin to softness in him anywhere, no part of him that was vulnerable. He was, they decided, not like them at all, and the detached and aloof manner in which he watched the snowfall made this palpable and self-evident.

DAVID GUTERSON, SNOW FALLING ON CEDARS 344, 412 (1995).

338 *See* MONROE H. FREEDMAN, *Counseling the Client: Refreshing Recollection or Prompting Perjury, in* THE LITIGATION MANUAL: A PRIMER FOR TRIAL LAWYERS 491 (John G. Koeltl ed., 1989); MAUET, *supra* note 310, at 89.

339 Mr. Ehrlich observes: "People come before a jury with their cases prepared and give evidence which they have determined they will give. Like untidy housekeepers, many people come before the judge and jury with clean floors; all the dirt is hidden under the rug." EHRLICH, *supra* note 337, at 53. Indeed, it was in part the greater spontaneity of some hearsay in comparison to some in-court testimony that led the Court in *Inadi* and *White* to retreat from a strict "unavailability" requirement. *See supra* Part II.A.

340 *See* Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1092 (1991) (arguing that live confrontation remains important to the perception of fairness, even if demeanor is a poor indicator of credibility).

341 *See* United States v. Salim, 664 F. Supp. 682, 691-92 (E.D.N.Y. 1987) (noting that the court reporter testified that a declarant was "on the verge of tears" during her deposition).

342 *See* Richard H. Underwood, *The Limits of Cross-Examination*, 21 AM. J. TRIAL ADVOC.

that counsel, perceived as the attacker, will lose more in credibility and sympathy than the witness.[343] Virtual cross-examination virtually eliminates that risk and replaces it with an advantage. Most humans, by nature, are more easily convinced to disbelieve and even to dislike someone that they do not encounter in person than someone that they meet face-to-face. Virtual cross-examination gives counsel the great advantage of blaming falsehood or mistake on an easy target: an absent declarant whom the jury never sees.

2. *Virtual Cross-examination and the Confrontation Clause*

If the prosecution is allowed to prove some part of its case through hearsay, and the declarant's absence prevents the defendant from cross-examining her in the traditional way, then fairness dictates that the court provide the defendant with whatever reasonable opportunity is available to compensate for that loss. In essence, the defendant should have a chance to replicate cross-examination as closely as circumstances allow.

This notion of fairness is not new; it forms the basis for the common-law rule that permits an opponent to offer evidence to impeach a hearsay declarant.[344] Over a century ago, three dissenting Justices in *Mattox* recognized this principle and connected it directly to the right of confrontation:

> If, then, the right of the accused to confront the witnesses against him, although formally secured to him by the express terms of the Constitution . . ., may be dispensed with because of the death of a witness, it would seem justly to follow that neither should that death deprive the accused of his right to put in evidence . . . to show that the witness was unworthy of belief . . . .[345]

Although a majority of the Court has never explicitly placed this principle of fairness on a constitutional footing, that conclusion stems naturally from the Court's insistence that a hearsay declarant is a "witness against" an accused. Given that starting point, it follows from the language of the Clause itself that a defendant's right is to "confront" such a witness. Further, because the Court has identified cross-examination as a "primary interest" secured by the confrontation right,[346] and because a defendant literally cannot cross-examine an unavailable declarant face-to-face, it would only compound constitutional concerns to deny a defendant at least an opportunity for the closest available substitute. Although the Supreme Court never has faced this issue

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113, 122 (1997) (quoting FRANCIS WELLMAN, THE ART OF CROSS-EXAMINATION 30 (1903)); MAUET, *supra* note 311, at 217 ("In the cross-examination game, ties go to the witness.").

343 *See* Janeen Kerper, *Killing Him Softly with His Words: The Art and Ethics of Impeachment with Prior Statements*, 21 AM. J. TRIAL ADVOC. 81, 83 (1997) ("[I]f the impeachment fails, or the point turns out to be a trivial one, the attorney, rather than the witness, loses credibility.").

344 *See* 3A WIGMORE, *supra* note 177, § 884, at 651-52 (Chadbourn rev. 1970).

345 Mattox v. United States, 156 U.S. 237, 260 (1895) (Shiras, J., dissenting). A few years later, the Court recognized the same principle, not as a constitutional matter, but in a ruling construing the law of evidence: "As these [hearsay] declarations are necessarily *ex parte*, we think the defendant is entitled to the benefit of any advantage he may have lost by the want of an opportunity for cross-examination." Carver v. United States, 164 U.S. 694, 698 (1897).

346 *See* Douglas v. Alabama, 380 U.S. 415, 418 (1968).

directly, at least three United States Courts of Appeals have. All have agreed that the right to impeach an absent hearsay declarant is founded in the Confrontation Clause.[347] The only counterweight to this authority might be the Court's dictum in *White*, that the confrontation right is "satisfied" when hearsay is reliable.[348] As we have seen, however, taken literally that dictum would put the Court at odds both with its treatment of testifying declarants under the Confrontation Clause and with its conclusion that all declarants are "witnesses against" an accused.[349]

In the federal courts at least, the basic right to impeach a hearsay declarant already exists without resort to the Constitution. Rule 806 of the Federal Rules of Evidence states:

> When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.[350]

In essence, Rule 806 provides for the process of virtual cross-examination as described in the previous section.

The process outlined in Rule 806 is more than a rule of evidence; the process is an essential component of the defendant's Sixth Amendment right to confront hearsay.[351] Recognizing the constitutional status of the right has important consequences: Congress could not limit the protections of Rule 806 for criminal defendants without violating the Sixth Amendment. Because the Court long ago "incorporated" Confrontation Clause protections as an element of the Due Process Clause of the Fourteenth Amendment,[352] the

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347 *See* United States v. Barrett, 8 F.3d 1296, 1299 (8th Cir. 1993) (finding that the trial court violated the Confrontation Clause by preventing the defendant from using a child-declarant's statements from a competency hearing to impeach hearsay testimony); United States v. Moody, 903 F.2d 321, 329 (5th Cir. 1990) (finding that the trial court violated the defendant's Confrontation Clause rights by preventing the defendant from calling a character witness to impeach an absent declarant); Smith v. Fairman, 862 F.2d 630, 637-38 (7th Cir. 1988) (finding that the trial court violated the defendant's Confrontation Clause rights by refusing to admit the prior inconsistent statement of the hearsay declarant. *Cf.* United States v. Burton, 937 F.2d 324, 329 (7th Cir. 1991) (finding that the trial court did not violate the defendant's Confrontation Clause right by denying the use of criminal history to impeach a hearsay declarant, because the defendant waived his confrontation right by failing to demand confrontation of the available hearsay declarant).

348 *See* White v. Illinois, 502 U.S. 346, 356 (1992).

349 *See supra* text accompanying notes 267-274.

350 FED. R. EVID. 806.

351 *See supra* Part IV.

352 *See* Pointer v. Texas, 380 U.S. 400, 403 (1965) ("We hold today that the Sixth Amend-

constitutional rights embodied in Rule 806 apply with equal force in state prosecutions. Accordingly, defendants may raise violations of those rights on federal habeas corpus review of state convictions or on certiorari to the United States Supreme Court.[353]

As a rule of evidence, Rule 806 provides only for the admission of impeaching evidence that satisfies the other rules of evidence. As a protection guaranteed by the Constitution, however, the right to confront hearsay prevails over evidentiary rules which unduly restrict its reach.[354] In other words, when a prosecution witness testifies at trial, the Confrontation Clause "trumps" any rules of evidence that deprive a defendant of an adequate opportunity to explore the witness's perception, memory, bias, motives, or integrity. Courts must give the Clause equal breadth when the witness is a hearsay declarant.

Moreover, when rules of evidence developed in contemplation of actual cross-examination include restrictions that a defendant cannot meet in the case of an absent declarant, such restrictions themselves might violate the confrontation right. A classic example is the traditional rule prohibiting impeachment by inconsistent statement until the witness has an opportunity to deny or explain the inconsistency.[355] If the witness is a declarant who never appears at trial, then a defendant has no means to let the declarant deny or explain the inconsistency. A court that prohibited impeachment under the traditional rule, however, would deprive the defendant of a critical impeachment opportunity that would exist if the witness were present. Under these circumstances, the Sixth Amendment should prohibit the prosecution from having its cake and eating it too. The state cannot rely on the necessity of a declarant's absence to relax the fundamental requirement for cross-examination, but then prohibit a defendant from compensating for the loss brought on by that same necessity.[356]

Another example is the rule prohibiting "extrinsic evidence" of a witness's "bad acts" as a means of attacking credibility. The Federal Rules, and most (if not all) states, prohibit such extrinsic evidence, but generally permit a cross-examiner to ask a witness about specific instances of conduct relevant to truthfulness.[357] If the declarant never testifies, however, the defense has

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ment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.").

353 *See generally* Smith v. Fairman, 862 F.2d 630 (7th Cir. 1988) (habeas corpus petition challenging a state court's refusal to admit evidence impeaching a hearsay declarant).

354 *Cf.* Davis v. Alaska, 415 U.S. 308, 318-20 (1974) (finding that the confrontation right required the state court to allow cross-examination based on a juvenile criminal record despite a state statute making such records confidential).

355 *See* Mattox v. United States, 156 U.S. 237, 244-50 (1895); *see also supra* note 45.

356 *See Smith*, 862 F.2d at 638; Carver v United States, 164 U.S. 694, 698 (1897); Bennett, *supra* note 9, at 1156-60. Federal Rule Evidence 806 avoids this problem by explicitly eliminating the foundational requirement that a cross-examiner give a declarant an opportunity to explain or to deny the prior statement.

357 *See* FED. R. EVID. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . .").

no means to effect this form of impeachment without resort to extrinsic evidence. A flat rule forbidding such impeachment in the case of an absent declarant violates the Confrontation Clause when the rule precludes a valid line of impeachment that would be available if the hearsay declarant had testified.[358]

Evidence of demeanor offers a third example. Courts normally would not permit a defendant to call one witness to report his observations of the demeanor of another witness.[359] Rather, the jury is left to its own observations. When the jury cannot observe the declarant, however, a court might need to permit "demeanor evidence" in order to give full effect to the defendant's right to confront hearsay.[360]

The constitutional right to impeach a hearsay declarant encompasses procedural issues beyond the scope of evidentiary rules like Rule 806. For example, although Rule 806 addresses a party's right to "attack" a hearsay declarant's credibility with "evidence which would be admissible" if the declarant had testified, the Rule says nothing about the timing of that attack.[361] One advantage of live cross-examination is its immediacy. The effort to impeach a witness begins as soon as direct examination ends, when the witness's statements are still fresh in the jury's mind. At least one commentator has argued that "the right of a defendant to *interrupt* the state's presentation of evidence by cross-examining prosecution witnesses is at the core of the sixth amendment right of confrontation."[362] A virtual cross-examiner sometimes will have that same advantage where he can address impeaching questions and elicit knowledgeable answers during cross-examination of the same prosecution witness who relates the hearsay statements. But defense counsel might not always be so lucky. He might need to call other witnesses to relate or to authenticate impeaching evidence that, had the hearsay declarant testified, counsel could have presented through the hearsay declarant herself.

While the Confrontation Clause supports a defendant's effort to confront hearsay in the manner most closely resembling real cross-examination,[363] the clause probably does not support a hard and fast rule on the timing of that impeachment. Such a rule would be broader than the right to confront a testifying witness. Although immediate cross-examination is the

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358 *Cf. Davis*, 415 U.S. 308 (finding that the trial court violated the defendant's confrontation right by denying an opportunity to pursue impeachment based on the witness's possible bias). Interpreting the Federal Rules of Evidence without addressing the constitutional issue, the Second Circuit achieved the same result. *See* United States v. Friedman, 854 F.2d 535, 569-70 (2d Cir. 1988) (stating that Rule 806 permits the impeachment of an absent hearsay declarant through extrinsic evidence of specific instances of conduct, despite the limitation to the contrary in Rule 608(b)).

359 *See* United States v. Barnard, 490 F.2d 907, 912-13 (9th Cir. 1973) (prohibiting expert testimony that a government witness was a liar, based in part on the expert's observation of the witness's live testimony); *cf.* United States v. Scheffer, 118 U.S. 1261, 1266-67 (1998) (upholding a per se rule against polygraph evidence based, in part, on the government's interest in preserving the "jury's core function of making credibility determinations in criminal trials")

360 *Cf.* United States v. Salim, 664 F. Supp. 682, 691-92 (E.D.N.Y. 1987) (allowing evidence of a hearsay declarant's demeanor under Rule 806).

361 *See* FED. R. EVID. 806.

362 *See* Westen, *supra* note 308, at 981-83.

363 *See supra* Part IV.

universally accepted practice, trial courts maintain some degree of discretion to delay some elements of cross-examination even for live witnesses.[364] Moreover, if the declarant never testifies, it might be impossible to know which evidence would have been admissible during real cross-examination and which would have required a later witness to lay a foundation.[365] Borrowing a page from the Court, then, perhaps the most one can say is that the Clause establishes a "preference" for immediate impeachment. Courts should allow a defendant to pursue virtual cross-examination as soon as practicable after the admission of hearsay, absent a good reason to delay the process.[366]

C. *Discovery and Other Pretrial Rights Regarding Hearsay Declarants*

1. *Discovery Rights*

Effective cross-examination begins before trial, with the collection and organization of raw material. A witness's prior statements, criminal convictions, psychological history, financial records, or personal relationship with the accused, among many other pieces of information, provide the "ammunition" that the cross-examiner will use at trial. As a practical matter, the lion's share of a defense counsel's pre-trial investigation often involves the collection and the analysis of such material for cross-examination.

A great deal of that material typically rests in government hands. For that reason, a defendant's right to discovery from government files is critical to the effective exercise of the right to cross-examine adverse witnesses.[367] With respect to testifying prosecution witnesses, the Due Process Clause and a variety of statutes and court rules grant defendants access to such material either before or during the trial.[368] Though it remains an open question, the

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364 *See* United States v. Cutler, 676 F.2d 1245, 1248-49 (9th Cir. 1982) (finding that the trial court did not violate the Confrontation Clause by delaying the cross-examination of a witness).

365 For example, a document or written statement contradicting the witness would be admissible during cross-examination only if the witness under cross-examination were able to authenticate the document. *See* FED. R. EVID. 901. Although counsel might inquire on cross-examination about the document or the written statement, he could not present the evidence until he successfully laid a foundation through a witness who could provide the necessary authentication. Impeachment by an adverse character witness is another example. Such witnesses typically testify some time after the witness whom they attack. In these situations, then, not all of the elements of impeachment of even a live witness always will occur immediately after direct examination.

366 In some instances at least, the rules of evidence themselves will permit immediate presentation of evidence that impeaches a hearsay declarant. For example, if the government introduces the hearsay in the form of a written or a recorded statement, a defendant is entitled to introduce in evidence "*at that time* . . . any other part [of the statement] or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." FED. R. EVID. 106 (emphasis added).

367 "[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).

368 *See, e.g.*, FED. R. CRIM. P. 16; 18 U.S.C. § 3500 (1994) (Jencks Act); Brady v. Maryland, 373 U.S. 83, 84-87 (1963).

Confrontation Clause also might guarantee such discovery rights.[369] The effective exercise of the right to confront hearsay requires that courts accord defendants the same discovery rights in relation to nontestifying hearsay declarants.

The Due Process Clause requires the government to disclose to the defendant information that is "favorable" to the defense and "material" to the issues of guilt or punishment.[370] Such "*Brady* material" includes information that defense counsel could use to impeach a prosecution witness.[371] Because, as the Court insists, a hearsay declarant is a "witness against" an accused, the government's obligations under *Brady v. Maryland*[372] and *Giglio v. United States*[373] should extend equally to material that would serve to impeach a hearsay declarant. The Supreme Court never has addressed this issue, perhaps because so few defendants make *Brady* requests regarding hearsay declarants. The few lower courts that have considered the issue, however, readily have extended *Brady* and *Giglio* to encompass hearsay declarants.[374] Indeed, scrupulous adherence to *Brady* might be even more important in the case of a hearsay declarant. Because the declarant never appears in court, the danger of undiscovered contradictions is even greater.

A defendant's right to discover impeaching *Brady* material is critical to the effective exercise of the right to confront hearsay. But *Brady* and *Giglio* have rather narrow limits. They are Due Process Clause, not Confrontation Clause, opinions. Under the due process analysis, evidence is "material" to the defense "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[375] Accordingly, courts have not construed *Brady* and *Giglio* to require the automatic disclosure of a witness's prior statements.[376] This limitation turns out to be an important one. Although some prior statements by government witnesses obviously contradict their direct testimony on an important issue, such clear contrast is rare. The possibilities of impeachment through omission or change in emphasis are often subtle.[377] Thus, prior

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369 *See* People v. Hammon, 938 P.2d 986, 992 (Cal. 1997) (noting, in light of the division of views by the Court in *Ritchie*, that "it is not at all clear 'whether or to what extent the confrontation or compulsory process clauses . . . grant pretrial discovery rights to the accused'" (quoting People v. Webb, 862 P.2d 779, 794 (Cal. 1993))); *see also infra* text accompanying notes 387-392.

370 *See Brady*, 373 U.S. at 87.

371 *See* Giglio v. United States, 405 U.S. 150, 153-55 (1972).

372 373 U.S. 83 (1963).

373 405 U.S. 150 (1972).

374 *See* United States v. Williams-Davis, 90 F.3d 490, 513 (D.C. Cir. 1996); United States v. Hawryluk, 658 F. Supp. 112, 117 (E.D. Pa. 1987); Cook v. State, 940 S.W.2d 623, 625-27 (Tex. Crim. App. 1996).

375 Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

376 *See id.* at 57-58.

377 In the Court's seminal opinion on the discovery of witness statements, Justice Brennan wrote for the majority:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission

statements not subject to disclosure under *Brady* may still have value to a cross-examiner.

In federal courts at least, this limitation is offset by the Jencks Act, which entitles a defendant, following the direct testimony of a government witness, to require disclosure of "any statement" of any "witness called by the United States."[378] Unlike *Brady*, the Jencks Act is not limited to identifiably "exculpatory" statements and thus encompasses a broader range of potentially useful material for cross-examination. A defendant's right to the discovery of such "*Jencks* material" for testifying witnesses raises two important, and heretofore unanswered, questions for counsel contemplating the impeachment of an absent hearsay declarant. Does the Jencks Act extend to statements of hearsay declarants?[379] Does the Confrontation Clause itself create a right to discover the declarant's prior statements?

To accord federal defendants the same opportunity to confront hearsay declarants as to confront live witnesses, the answer to the first question must be "yes." The Jencks Act provides for the discovery of a witness's statements "[a]fter a witness called by the United States has testified on direct examination."[380] For Confrontation Clause purposes at least, the Court tells us that a hearsay declarant is a "witness against" an accused.[381] The hearsay declarant's "testimony," in the form of hearsay, is offered in evidence in the government's case-in-chief. As an exercise in interpreting statutory language, then, it takes no large leap to conclude that a declarant is a "witness called by the United States" under the Jencks Act and that she has in effect "testified on direct examination" once the government has introduced her hearsay statements.[382] Further, it is entirely consistent with the history and the aims of the Jencks Act to extend its coverage to hearsay declarants. Congress

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> from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Jencks v. United States, 353 U.S. 657, 667 (1957).

378 *See* 18 U.S.C. § 3500(b) (1994); *see also* FED. R. CRIM. P. 26.2 (implementing *Jencks* and providing for reciprocal discovery). Many state codes include roughly comparable provisions. *See, e.g.*, ALASKA STAT. § 12.45.060 (Michie 1996); KAN. STAT. ANN. § 22-3213 (1995); N.Y. CRIM. PROC. LAW § 240.45 (McKinney 1993); TENN. CODE ANN. § 40-17-120 (1997).

379 To date, only one United States Court of Appeals has addressed a defendant's right to discover a hearsay declarant's statements under the Jencks Act. *See* United States v. Williams-Davis, 90 F.3d 490, 512-13 (D.C. Cir. 1996). The United States Court of Appeals for the District of Columbia Circuit held that the statements were not discoverable as Jencks material, though hearsay declarant statements might be discoverable under *Brady* if they are material and favorable to the defense. *See id.*

380 18 U.S.C. § 3500(b) (1994).

381 *See* White v. Illinois, 502 U.S. 346, 353 (1992).

382 *But see Williams-Davis*, 90 F.3d at 512-13. The analysis in *Williams-Davis* is open to question. There, the court relied almost entirely on a line of cases that denied discovery of nontestifying coconspirator statements under Rule 16(a)(1)(A). *See id.* The issue in those cases is entirely different. The defense claim to discovery in those cases rests upon the probably erroneous view that coconspirator statements are discoverable as a defendant's own statements under the theory that Federal Rule of Evidence 801(d)(2)(E) treats them as such for purposes of the law of evidence. *See id.* The rationale for the discovery of the statements of a hearsay declarant under the Jencks Act, Federal Rule of Evidence 806, and the Confrontation Clause rests on the entirely different premise that the statements are statements of the declarant, who

passed the Jencks Act largely to establish both time limits and subject-matter limits on the discovery rights announced by the Court in *Jencks v. United States*.[383] In effect, the Jencks Act balances a defendant's need for impeachment material against the "concern for witness intimidation, subornation of perjury, and other threats to the integrity of the trial process" that might accompany earlier disclosure.[384] Extending *Jencks* to hearsay declarants would not upset that balance.[385] In fact, witness intimidation and subornation of perjury are lesser concerns when a "witness" never testifies in person. The substance of the hearsay is already fixed before it is repeated at trial. The declarant's already-told story cannot be changed through intimidation or persuasion.[386] At the same time, the need for disclosure might be even greater when a witness is a nontestifying declarant. The full record of the witness's prior statements might be the only source for impeaching and contradictory detail.

Whether the Constitution creates *Jencks*-like discovery rights regarding statements of hearsay declarants, or of any government witness, is a different matter. Indeed, the Court never has authoritatively decided whether the Confrontation Clause creates discovery rights at all. The Court came close in *Pennsylvania v. Ritchie*, in which a four-Justice plurality ruled that the Confrontation Clause is not "a constitutionally compelled rule of pretrial discov-

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has been rendered a "witness" by the government's choice to offer the hearsay declarant's out-of-court statements in evidence.

383 353 U.S. 657 (1957). In *Jencks*, the Court ordered the government to provide the defense an opportunity to inspect all the statements of the two principal government witnesses. *See id.* at 668-69. The opinion neither provided a timetable for discovery nor clearly defined the category of witness "statements" that were discoverable. Congress quickly filled in these gaps with the Jencks Act, defining "statement" to include only "written" or "recorded" statements, including grand jury testimony, *see* 18 U.S.C. § 3500(e), and providing that courts were not to order discovery until a witness had testified on direct examination. *See id.*; Palermo v. United States, 360 U.S. 343, 349, 351-53 (1959).

Although the Court based its decision in *Jencks* on its supervisory powers, *see Pennsylvania v. Richie*, 480 U.S. 39, 68 (1987) (Brennan, J., dissenting), the Confrontation Clause clearly influenced the exercise of those powers. As Justice Brennan pointed out, "'it would be idle to say that the commands of the Constitution were not close to the surface of the decision.'" *Id.* at 68 (quoting Palermo v. United States, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring in the result)). For that reason, it makes sense to construe the phrase "witness called by the United States" under the statute in a manner consistent with the Court's construction of the term "witness against" an accused under the Sixth Amendment.

384 *See Williams-Davis*, 90 F.3d at 513 (quoting United States v. Tarantino, 846 F.2d 1384, 1414 (D.C. Cir. 1988)).

385 In practice, Department of Justice attorneys typically produce "Jencks material" before trial, largely to avoid the inevitable delays that would occur upon producing a large volume of witness statements and grand jury testimony at the conclusion of each witness's direct examination. In addition, when an investigating agent relates hearsay from a declarant whose statements the agent has recorded in his own written report, the Jencks Act makes that report discoverable as a "statement" of the testifying agent. *See* United States v. Welch, 810 F.2d 485, 490 (5th Cir. 1987).

386 There remains the problem of retaliation toward a hearsay declarant, which might occur even though it would have no effect on the substance of already-made out-of-court statements. That problem, however, should not preclude discovery at trial. The Jencks Act would compel that discovery only after a court admitted the hearsay in evidence, a point at which the potential for retaliation already has arisen. *See* 18 U.S.C. § 3500(a) (1994).

ery."[387] In large measure, the plurality reached that conclusion based on an observation that "the right to confrontation is a trial right."[388] Three Justices disagreed. Concurring in the result, Justice Blackmun noted that "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."[389]

Although a full exploration of the Confrontation Clause as a discovery rule is beyond the scope of this Article, the problem of confronting a hearsay declarant offers an additional perspective on that issue. Regardless of the merits of *Ritchie* as it relates to live witnesses, the view that confrontation is only a "trial right" carries less force when applied to hearsay declarants. Some declarants never testify at trial, though the Court insists that they are "witnesses" for Sixth Amendment purposes.

In effect, such declarant witnesses "testify" before the trial begins, and the content of their "testimony" becomes fixed when they make their hearsay statements. Given that reality, it is artificially restrictive to insist that a defendant's right to "confront" that declarant arises only at trial and does not extend to pre-trial mechanisms, including discovery, that might be necessary to preserve the confrontation right. It is not hard to imagine a case in which the only effective opportunity for "confronting" a terminally ill declarant, for example, might arise before trial and outside of the courtroom. As a general proposition, it is unfair to permit the prosecution to introduce that hearsay at trial, and yet to resist pre-trial discovery of the identity of that witness and thereby avoid pre-trial efforts to preserve her testimony under cross-examination.[390] If the plurality in *Ritchie* is correct in its view that confrontation is

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387 *See* 480 U.S. at 52. In *Ritchie*, a defendant charged with sexual offenses against his daughter sought pretrial discovery of the contents of a Pennsylvania Children and Youth Services file that contained records of an investigation into the alleged abuse, including statements by the daughter, who later became the state's principal witness at trial. *See id.* at 43-44. The trial court denied discovery on the basis of a Pennsylvania statute that rendered such files privileged. *See id.* (citing PA. STAT. ANN., tit. 11, § 2215 (West 1986)). The Pennsylvania Supreme Court found that the denial of discovery violated Ritchie's rights under both the Confrontation Clause and the Compulsory Process Clause. *See* Commonwealth v. Ritchie, 502 A.2d 148, 153 (Pa. 1985).

388 *See Ritchie*, 480 U.S. at 52. Rejecting both the Confrontation Clause and the Compulsory Process Clause claims, Justice Powell wrote for the plurality that the Due Process Clause provides sufficient protection through required disclosure of evidence favorable to the accused and material to guilt or punishment. *See id.* at 57 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)).

389 *Id.* at 61-62 (Blackmun, J., concurring). Justice Brennan, joined by Justice Marshall, wrote a dissenting opinion. *See id.* at 66-72 (Brennan J., dissenting). Justice Stevens wrote a separate dissent, joined by Justices Brennan, Marshall, and Scalia, questioning the Court's jurisdiction over a nonfinal judgment. *See id.* at 72-78.

390 Applying confrontation as a pretrial right in this context both to discover the identity of a hearsay declarant and to preserve her testimony under cross-examination would only put a defendant on an equal footing with the government. The government generally will have an opportunity to preserve testimony through pretrial depositions when it anticipates a witness's absence. *See* FED. R. CRIM. P. 15(a).

Professor Amar makes the related argument that the Compulsory Process Clause should provide defendants with the same opportunity to preserve the testimony of defense witnesses that the government enjoys for prosecution witnesses. *See* Amar, *supra* note 15, at 695.

only a trial right, however, then the prosecution would win on all counts, and a court would admit the hearsay in evidence as long as it met the Court's test for "reliability." It seems more consistent with the aims of the Sixth Amendment[391] to extend the right to discovery, and other pre-trial mechanisms, where necessary[392] to preserve a meaningful right of confrontation at trial.

2. *The Right of Access and Preservation*

One such pre-trial mechanism that might solve many confrontation hearsay problems is the videotaped deposition. When a prosecutor can anticipate the absence of a critical witness for the government, he typically has access to some means to obtain and to preserve that government testimony.[393] When a defendant can anticipate the unavailability of a witness "in favor" of the defense, the right to compulsory process likewise encompasses the right to preserve for trial the testimony of that witness.[394] In cases where the government expects to prove a critical part of its case through hearsay, the confrontation right should provide no less of an opportunity for pre-trial or out-of-court access to a hearsay declarant and for preservation of her testimony.

"Real" out-of-court confrontation often will be the closest available substitute for in-court cross-examination. In essence, that confrontation can turn "unavailable" declarants into "available" witnesses. Some "unavailable" declarants are unavailable only in the sense that the court finds them unable to testify at trial. They may be in a foreign country, beyond subpoena power. They may be hospitalized and unable to travel to court. Like the declarants in *Idaho v. Wright*[395] and *White v. Illinois*,[396] they may be young children who prove incapable of communicating effectively in court, though they apparently have conveyed intelligible information to family members, doctors, and

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391 Justice Powell's view that confrontation is purely a "trial right" and does not affect discovery is too restrictive for another reason. This view is inconsistent with the Court's approach to other Sixth Amendment rights. The adversarial process envisioned by the Sixth Amendment begins well before trial. The Sixth Amendment right to counsel clearly attaches before trial. *See* Kirby v. Illinois, 406 U.S. 682, 688 (1972) (finding that the right to counsel attaches upon the initiation of adversarial proceedings). Compulsory Process rights generally are exercised with the issuance of subpoenas well before trial. *See* FED. R. CRIM. P. 17. Often, it is only through the pretrial exercise of these rights that the adversarial process at trial is protected. *See* United States v. Wade, 388 U.S. 218, 236-37 (1967) (finding that defense counsel's presence at a pretrial line-up is required to preserve a meaningful right to cross-examine identification witness at trial).

392 A flat constitutional rule requiring pretrial disclosure of all statements of a hearsay declarant is both unlikely and inadvisable. There is no such rule for testifying witnesses, and the Jencks Act requires only disclosure at trial. *See* 18 U.S.C. § 3500 (1994). Indeed, there is no strict requirement setting the timing of discovery under *Brady*. For the same reasons that gave rise to the Jencks Act, competing concerns over witness safety require flexible rules and trial court discretion in governing the timing of disclosure. The key point, however, is to recognize that the confrontation right should apply before and outside of trial when necessary to preserve a meaningful exercise of the right at trial.

393 *See* FED. R. CRIM. P. 15.

394 *See* Amar, *supra* note 15, at 695. Federal Rule of Criminal Procedure 15 already provides defendants with the right to obtain pretrial depositions in appropriate cases.

395 497 U.S. 805, 824-25 (1990).

396 502 U.S. 346, 349, 356 (1992).

police before the trial. In many cases, although they cannot testify in person at trial, such declarants are able to answer questions in a different setting or at a different time. Whether through a deposition under oath or, in the case of a child witness, in a more informal setting, such declarants might be "available" out-of-court for an exchange of questions and answers duplicating, or roughly approximating, cross-examination.[397]

If the confrontation right is not limited to the question of admissibility, but rather includes an adversarial right to challenge prosecution hearsay through alternative means, then the confrontation right should encompass the right to bring about such alternative "confrontations" and to preserve them for presentation to the jury. The technology of video and audio tape can bring such out-of-court confrontations before a trial jury in full detail and in living color. In truth, the problem of the absent or the unavailable hearsay declarant is, and should be, a diminishing one in a world of air travel, teleconferencing and videotape.[398] Exclusionary thinking, however, hinders, rather than promotes, creative use of these alternatives.

D. Putting the Exclusionary Rule in its Place

A defendant's right to confront hearsay is no more and no less than the right to treat a hearsay declarant like the "witness," which the Court now insists that she is. But in large measure, that is a right that the law of evidence, now reflected in Rule 806, has always provided. In the end, does this "new" approach really offer anything that will change the way that courts and litigants conduct criminal cases?

The answer to this question comes in two related parts. First, although the law of evidence long has recognized tools for challenging hearsay, those tools largely have been ignored. If nothing else, treating the Confrontation Clause as an affirmative right to challenge hearsay, and not as an exclusionary rule, provides defendants with the necessary incentive to use those available tools. If courts allow the creative use of Rule 806, if courts order discovery relating to hearsay declarants, if courts require the government to support defendants' efforts to bring available declarants to the witness stand, and finally, if courts consider the availability of these tools before excluding hearsay evidence, then defendants will use those tools, rather than "playing chicken" with the exclusionary rule.[399] Development of the hearsay rules might go its own way, as it has in any event under the Court's current approach. But as more hearsay evidence is admitted, courts should encourage defendants to pursue available opportunities to challenge it.

Second, treating the Confrontation Clause as a right to challenge hearsay should do more than simply encourage the use of tactical options available under the law of evidence. It should change the way that courts look at

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397 UNIF. R. EVID. 807, although it allows for the admission of certain hearsay statements by child declarants who are unable to testify at trial, includes a provision requiring that "the court shall, at the request of the defendant, provide for further questioning of the minor in such manner as the court may direct." UNIF. R. EVID. 807(b).

398 *See* Fredric I. Lederer, *Technology Comes to the Courtroom, And . . .*, 43 EMORY L.J. 1095 (1994).

399 *See supra* note 174 and accompanying text.

hearsay from the beginning. Once hearsay satisfies the standard for admissibility under the law of evidence, a defendant's Confrontation Clause objection should not lead to a rehashing of the reliability question. Instead, the Court's first questions to the defense should be, "Is the declarant available; and if so, do you want her here?" If the answer to both questions is "yes," then the defendant's subpoena request should be forthcoming (if not already made), under penalty of waiving the right, but with the court's assurance that the government will pay a high price if it fails to assist when necessary to produce the hearsay declarant. If the declarant is unavailable, then the court should invite defense counsel to use the tools available to challenge hearsay in the same way that the court might invite cross-examination of a live witness. Of course, the court must give that "virtual cross-examination" the same latitude, and support it with the same discovery rights, that it would accord the defense in real cross-examination.

The question of exclusion should become a constitutional issue only after the court has made that opportunity available to the defense. Taking into account alternative methods available to impeach a hearsay declarant, the court should consider—under the Due Process Clause, not the Confrontation Clause—whether the hearsay at issue can be "intelligently evaluated by the jury for its proper weight."[400] Applied in this manner, the exclusionary rule would be a remedy of last resort, the ultimate constitutional backstop when a court is convinced that the process of adversarial testing, and the common sense of juries, will not suffice. Treating the Confrontation Clause as a right to confront hearsay will put the exclusionary remedy in its proper place.

Conclusion

For a century, American courts have approached constitutional challenges to prosecution hearsay as if the Confrontation Clause offered only a single tool: the tool of exclusion. That tool, of course, is the same one wielded by the law of evidence, and the Court has wielded it for essentially the same reason: to exclude unreliable hearsay from evidence. In retrospect, at least, we now can see that the choice of that tool has left us with a Clause that largely has disappeared as an independent protection for the accused.

The reason for that disappearance may be harder to see. It is not because the Confrontation Clause has imposed narrow constitutional limits on the admissibility of hearsay. More hearsay is admissible in criminal trials today than ever before, and the process of expanding exceptions to the hearsay rule is likely to continue without much impact from the constitutional "hammer" of the Confrontation Clause. The reason is that the Court's constitutional standard for admitting hearsay has proved as flexible as the expanding hearsay exceptions themselves. In some instances, the constitutional exclusionary rule might even have encouraged the expansion.

This article, of course, is not about limiting the use of hearsay in criminal cases. Admission of probative evidence, as a general proposition, is desirable, and a great deal of hearsay might be more reliable than well rehearsed

400 *See* Westen, *supra* note 2, at 598.

testimony from the witness stand. Instead, this article is about using a different tool for contending with whatever hearsay the law of evidence may admit, today or in the future. Simply put, that tool should be the one that the Sixth Amendment explicitly prescribes: confrontation.

If the Confrontation Clause is ever to become more than a redundancy, then we must move beyond exclusionary thinking and expand our notion of confrontation to encompass a broad, affirmative right to challenge hearsay. When a hearsay declarant is available, there is little reason to pause over the issue of reliability. Instead, courts should be serious about providing the defendant with an opportunity for real confrontation, if he really wants that confrontation. When the declarant is unavailable, confrontation-hearsay analysis should not begin with the assumption that confrontation is impossible. Effective challenge to hearsay often is possible despite, or sometimes especially because of, the physical absence of the declarant from the courtroom. The art of "virtual cross-examination" has potential that remains largely untapped because exclusionary thinking has left that tool on the shelf. Courts should consider the efficacy of that tool, instead of moving automatically to the question of reliability. Finally, to ensure the meaningful exercise of the right to confront a hearsay declarant, defendants will need the same raw material that constitutional and statutory rules of discovery provide with respect to all prosecution witnesses.

In the end, the right to confront hearsay offers more than just a tactical opportunity for defense counsel. It is not simply a "fall-back" position when the court rules for the government on the issue of admissibility. Rather, it should affect the way courts approach confrontation issues from the beginning. It can preempt exclusionary thinking by changing the starting point for analysis. Instead of asking, "Is the hearsay reliable?"—the same question that the law of evidence asks—a court should begin by considering a defendant's opportunity to challenge the hearsay.

If creative and vigorous exercise of the right to confront hearsay can equip the jury with adequate information for it to make a fair assessment of the out-of-court statement, then the "hammer" of exclusion is unnecessary. The tool of confrontation, the one written into the Sixth Amendment, will do the job.