

2001

Confronting the Reluctant Accomplice

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ARTICLES

CONFRONTING THE RELUCTANT ACCOMPLICE

*John G. Douglass**

The Supreme Court treats the Confrontation Clause as a rule of evidence that excludes unreliable hearsay. But where the hearsay declarant is an accomplice who refuses to testify at defendant's trial, the Court's approach leads prosecutors and defendants to ignore real opportunities for confrontation, while they debate the reliability of hearsay. And even where the Court's doctrine excludes hearsay, it leads prosecutors to purchase the accomplice's testimony through a process that raises equally serious questions of reliability. Thus, the Court's approach promotes neither reliability nor confrontation.

This Article advocates an approach that applies the Confrontation Clause to hearsay declarants in much the same way it applies to testifying witnesses. Rather than exclude unreliable hearsay, the Clause guarantees fair adversarial testing of hearsay. Prosecutors cannot introduce accomplice hearsay without using available means to bring about real confrontation. Defendants cannot rely on confrontation rights that they are not willing to exercise. And courts must take a harder look when accomplices assert a blanket right not to testify. Rather than pitting hearsay against confrontation, this approach embraces solutions which allow both hearsay and confrontation.

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INTRODUCTION

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.¹

[N]either side wants a co-conspirator as a witness.²

In *Lilly v. Virginia*, the United States Supreme Court held that Virginia violated Ben Lilly's right of confrontation when the trial judge admitted in evidence a tape-recorded confession of Lilly's accomplice.³ In that jailhouse confession the accomplice—Lilly's younger brother, Mark—identified Lilly as the triggerman in a murder.⁴ Later, having discovered the value of silence, Mark asserted his Fifth Amendment privilege and refused to testify at Lilly's trial. The trial court nevertheless allowed the prosecutor to introduce Mark's confession under the hearsay exception for statements against penal interest. The Supreme Court unanimously reversed, though it could not summon a majority for any element of its Sixth Amendment reasoning.⁵

1. U.S. Const. amend. VI.

2. *United States v. Inadi*, 475 U.S. 387, 397 n.7 (1986).

3. 527 U.S. 116, 139–140 (1999).

4. Over a two day period in 1995, Ben and Mark Lilly, along with Mark's roommate, Gary Barker, participated in a crime spree that included burglary, armed robbery, kidnapping, and carjacking, and ultimately ended in homicide. *Id.* at 120. On the night of the arrest, police questioned all three separately, and all gave statements. *Id.* Ben Lilly never mentioned the murder, and claimed that the other two had forced him to participate in the other crimes. *Id.* Barker and Mark Lilly each identified Ben as the mastermind and—most important—as the triggerman in the killing. *Id.* at 120–21.

Ben Lilly was charged with a host of crimes, including capital murder. The major issue at Lilly's trial was his role in the shooting. The capital murder charge, and hence the penalty of death, hinged on a finding that Lilly was the shooter. See *Harrison v. Commonwealth*, 257 S.E.2d 777, 779 (Va. 1979) (noting that, under Virginia capital murder provision dealing with killings in course of armed robbery, only triggerman can be guilty of capital offense).

Barker pled guilty and became the principal prosecution witness at Ben Lilly's trial. At the time of that trial, Mark still faced multiple charges himself. When called as a prosecution witness, he asserted a Fifth Amendment privilege and refused to testify. *Lilly*, 527 U.S. at 121. The trial court declared him an unavailable witness and allowed the prosecution to introduce his tape recorded confession, implicating Ben Lilly as the murderer. *Id.* at 121–22.

5. The Court unanimously reversed Lilly's conviction and remanded the case to the Supreme Court of Virginia to assess whether the Sixth Amendment violation was harmless error. 527 U.S. at 139–40. Justice Stevens wrote the plurality opinion, joined by Justices Souter, Ginsburg, and Breyer. Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, wrote an opinion concurring in the judgment. Justices Scalia and Thomas each wrote brief opinions concurring in the judgment. Justice Breyer added a concurring opinion of his own. In the jumble of opinions, there is no five-Justice majority for anything except a finding of jurisdiction and the ultimate judgment. As a result, *Lilly* produced no clear rule for determining when—or if—a nontestifying accomplice's "blame-shifting" confession might be admitted against his criminal colleagues.

Somewhere in a Virginia prison,⁶ perhaps Ben Lilly appreciates the irony at the heart of his case. Lilly won a new trial because of Mark's absence from the witness stand. Yet neither prosecution⁷ nor defense⁸ really seems to have wanted Mark as a witness. At trial, and before trial, both parties passed up opportunities to confront the reluctant accomplice. In other words, the confrontation issue that perplexed the Court seems, in retrospect, easily avoidable. The pretrial choices of prosecution and defense suggest that both parties preferred a confrontation *issue* to a real *confrontation*.

That contradiction—the parties' apparent disdain for real confrontation in the midst of a Confrontation Clause debate—may seem extraordinary. But *Lilly* is not unusual in that respect. It is only the most recent in a line of cases that have exposed, but seldom addressed, the uncomfortable irony of a Confrontation Clause doctrine that no longer seems con-

6. On remand, the Supreme Court of Virginia affirmed Lilly's convictions for carjacking, robbery, abduction, and related firearms offenses, finding that the Confrontation Clause violation was harmless with respect to those charges. *Lilly v. Commonwealth*, 523 S.E.2d 208, 210 (Va. 1999). It reversed the capital murder conviction and remanded for a new trial. *Id.* Thereafter, Lilly entered a guilty plea to a charge of first degree murder. In doing so, he avoided the death penalty and was sentenced to life imprisonment without parole.

7. The prosecutor's pretrial strategy appears calculated to keep Mark off the witness stand. The prosecutor made a quick deal to assure Barker's cooperation and testimony. But he treated Mark differently. Shortly after Lilly's trial, Mark pled guilty to first degree murder and received a sentence of forty-nine years. Brief for Petitioner at 6, *Lilly*, 527 U.S. 116 (No. 98-5881). It seems likely that the prosecution chose to delay Mark's trial or plea in order to deter him from taking the stand at Ben's trial, changing his story and exonerating Ben. See Lisa K. Garcia, *Slaying Suspect's Trial Starts Today*, *Roanoke Times*, Oct. 15, 1996, at A1 (noting that the sequence of trials allowed "the state the option of charging Mark Lilly as the trigger man if he change[d] his story during his brother's trial and trie[d] to take the blame").

8. In his brief to the Supreme Court, Lilly argued that Mark was not truly unavailable to testify, because the prosecutor could have tried and sentenced him before Ben went to trial, thereby extinguishing Mark's Fifth Amendment claims. *Lilly*, 527 U.S. at 124 n.1; Brief for Petitioner at 21. But Lilly cited nothing in the record to suggest that he raised that objection at trial, that he ever questioned Mark's blanket assertion of a Fifth Amendment privilege, or that he asked to explore the possibility of even limited cross-examination.

It appears, then, that Ben Lilly made no effort at or before trial to explore opportunities for real confrontation. Post-trial events suggest, however, that Mark might have testified, at least about the homicide itself, with little real risk of self-incrimination. The record shows that Mark Lilly testified on his brother's behalf at a post-trial hearing. *Lilly*, 523 S.E.2d at 212 (Kinser, J., dissenting). Curiously, Mark's belated testimony about the homicide included virtually nothing to suggest that—had he testified at trial—his testimony would have created a substantial risk of self-incrimination. Mark recanted his earlier statement implicating Ben as the killer. He claimed instead that he was vomiting at the time and could not say who had committed the murder. Brief for Petitioner at 19, *Lilly*, 527 U.S. 116 (No. 98-5881).

Of course, only the Lilly brothers know for sure whether Mark's apparent reluctance to testify at trial reflected genuine fear of self-incrimination, or whether it was a choice calculated to support Ben Lilly's trial strategy.

cerned with confrontation.⁹ Today's Confrontation Clause is essentially a rule of evidence. It allows "reliable" hearsay even in the absence of in-court confrontation.¹⁰ It excludes "unreliable" hearsay even though the declarant may be available for such confrontation. This means that the Court now protects the right of confrontation only through surrogates.¹¹ Judicial determination of reliability has become the surrogate for cross-examination. And categorical, "firmly rooted" hearsay exceptions are the surrogates for any real assessment of reliability.¹²

To see how far the Confrontation Clause has drifted from its moorings, consider what was debated—and what was ignored—in *Lilly*. In the name of confrontation, the Court might have considered how the prosecutor could have encouraged or compelled Mark to testify without serious risk of self-incrimination, and without serious compromise to the government's future case against Mark. The Court might have considered whether the government's pretrial tactics led to Mark's absence from the witness stand in the first place. And, if confrontation really mattered, the Court might have evaluated what a cross-examination of Mark would have accomplished or whether the same information could have been produced for the jury through other means. But the Court never considered those questions. Indeed, the parties themselves showed little interest in

9. See, e.g., *United States v. Inadi*, 475 U.S. 387, 399–400 (1986) (holding that coconspirator hearsay statements were admissible notwithstanding availability of declarant, in a case where both prosecution and defense apparently chose not to call declarant as witness); *Dutton v. Evans*, 400 U.S. 74, 88 n.19 (1970) (noting that defense counsel conceded that he could have subpoenaed declarant but had chosen not to do so); see also *Lowery v. Collins*, 988 F.2d 1364, 1368–70 (5th Cir. 1993) (holding that defendant does not waive confrontation right by declining to call available but adverse declarant to testify).

10. In *Ohio v. Roberts*, the Court adopted the "general approach" which has guided its confrontation-hearsay opinions ever since. 448 U.S. 56, 65–66 (1980). The *Roberts* Court stated:

[A hearsay statement] is admissible [under the Confrontation Clause] 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.

Id. at 66. In other words, statements within "firmly rooted" hearsay exceptions, like dying declarations or business records, are automatically admissible under the Confrontation Clause because their reliability is "inferred." Other hearsay may be admissible, but only in exceptional cases. For a more detailed analysis and critique of the *Roberts* formula, see John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 *Geo. Wash. L. Rev.* 191, 203–19 (1999) [hereinafter *Douglass, Beyond Admissibility*].

11. In many cases—like *Lilly*'s—the Court begins with the unfortunate assumption that confrontation is impossible where the declarant appears unavailable. See *Lilly*, 527 U.S. at 124 n.1. "Reliability" then becomes a surrogate for actual confrontation of the hearsay declarant. In other cases, despite the availability of the declarant, the Court has simply found confrontation unnecessary in light of the supposed reliability of the hearsay. See, e.g., *White v. Illinois*, 502 U.S. 346, 355–57 (1992); *Inadi*, 475 U.S. at 399–400.

12. *Roberts*, 448 U.S. at 66; see also *supra* note 10.

them.¹³ Instead, the *Lilly* opinions focus on the definition, limits, and historical pedigree of the hearsay exception for statements against penal interest. The debate over the right of confrontation was reduced to an argument over hearsay labels. Confrontation, the procedural right expressed in the Sixth Amendment, was lost in the historical dust.

The Court unanimously reversed *Lilly*'s conviction for capital murder, but produced no majority opinion on any Sixth Amendment issue.¹⁴ The fractured Court reflects the decades long tension between the Court's typically generous approach to hearsay under the Confrontation Clause,¹⁵ and its suspicion of hearsay confessions by accomplices.¹⁶ The Court has addressed accomplice hearsay at least four times in recent history.¹⁷ Yet, if one were to ask the simple question, "Is an accomplice con-

13. *Lilly*'s brief to the Supreme Court argued that the prosecutor's tactics were designed to keep Mark off the witness stand. Brief for Petitioner at 22, *Lilly*, 527 U.S. 116 (No. 98-5881). But it does not appear that *Lilly* raised that objection at trial or before the Supreme Court of Virginia. *Lilly*'s petition for certiorari treated Mark as an unavailable witness. *Lilly*, 527 U.S. at 124 n.1.

14. In essence, the *Lilly* Court split in its effort to determine whether an accomplice's statements against interest, which nonetheless implicate an accused, fall within a "firmly rooted" hearsay exception and thus can be admitted automatically under the *Roberts* formula. Writing for a plurality of four, Justice Stevens found that an accomplice's "blame-shifting" out of court statements were presumptively unreliable and thus did not fall within a "firmly rooted" exception to the hearsay rule. *Lilly*, 527 U.S. at 134 (plurality opinion). Writing for three members, Chief Justice Rehnquist contended that Mark *Lilly*'s confession was not a statement against interest at all. He held out the possibility that some "genuinely self-inculpatory" accomplice confessions may fall within the firmly rooted exception for statements against penal interest. *Id.* at 146 (Rehnquist, C.J., concurring in the judgment). Justices Scalia and Thomas wrote separate concurring opinions. They argued that the Confrontation Clause forbids use at trial of "testimonial material," including confessions to police during custodial interrogation, unless the declarant is produced for cross-examination. *Id.* at 143 (Scalia, J., concurring in the judgment); *id.* at 143-44 (Thomas, J., concurring in the judgment).

15. Under the formula announced in *Roberts*, the Confrontation Clause allows any hearsay that falls within a "firmly rooted" exception to the hearsay rule, even though the declarant is never subject to cross-examination. 448 U.S. at 66. With the exception of statements against interest, the Court has held—or at least suggested in dictum—that virtually every categorical hearsay exception identified in the Federal Rules of Evidence is "firmly rooted." See Douglass, *Beyond Admissibility*, *supra* note 10, at 210 ("Except for statements against interest, 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.").

16. See *Lee v. Illinois*, 476 U.S. 530, 541 (1986) ("[T]he Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants."); *Bruton v. United States*, 391 U.S. 123, 135-36 (1968) (noting that accomplice confessions implicating accused are "inevitably suspect").

17. See *Lilly*, 527 U.S. at 127-40; *Williamson v. United States*, 512 U.S. 594, 605 (1994) (addressing admissibility of accomplice hearsay under Federal Rule of Evidence 804(b)(3) and declining to reach Confrontation Clause issue); *Lee*, 476 U.S. at 541-46 (holding that trial court violated Confrontation Clause by admitting custodial confession of accomplice incriminating defendant); *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (rejecting Confrontation Clause challenge to admissibility of hearsay statement made by accomplice to another inmate and implicating defendant).

fession admissible?" the members of today's Court would provide at least three different answers.¹⁸ Lilly's case was closely followed by Confrontation Clause scholars in the hope that it might bring some order to this troubled corner of Sixth Amendment doctrine.¹⁹ But the case proved an exercise in futility, leaving Justice Breyer to ponder an uncertain future: "[T]he fact that we do not reevaluate the link [between the Confrontation Clause and hearsay] in this case does not end the matter. It may leave the question open for another day."²⁰

The Court's Confrontation Clause formula for admitting or excluding hearsay has been subject to scholarly criticism for decades²¹ and from a variety of angles.²² Contributing to that debate is only partly my pur-

In addition, the Court has decided a series of cases involving the admission of a nontestifying codefendant's confession in a joint trial. See *Gray v. Maryland*, 523 U.S. 185, 188 (1998); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Cruz v. New York*, 481 U.S. 186, 193 (1987); *Bruton*, 391 U.S. at 123–24. Arguably, the cases in the *Bruton* line are distinguishable from *Lilly*. In the *Bruton* cases, the confessions were admitted only against the accomplice codefendants who made them. The principal question in those cases was whether admission of the confession—or some redacted version—prejudiced the nonconfessing defendant.

18. See *supra* note 14; *infra* text accompanying notes 103–114.

19. Professors Margaret Berger and Richard Friedman filed an amicus brief as counsel for the American Civil Liberties Union and the ACLU of Virginia. Both are distinguished confrontation hearsay scholars. For examples of their work in this area see Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 *Minn. L. Rev.* 557 (1992); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 *Geo. L.J.* 1011 (1998). A major aim of the brief was to convince the Court to change its general course in confrontation-hearsay cases. Brief Amicus Curiae of the American Civil Liberties Union at 29, *Lilly*, 527 U.S. 116 (No. 98-5881) ("The Court could reach the proper result in this case without revisiting its approach to the Confrontation Clause. But to do so would just be to put one more patch on a tattered garment.")

In the brief, Professors Friedman and Berger argued for a "categorical approach" where application of the Confrontation Clause would not depend upon the reliability of hearsay. Rather, they contended, "the Clause states a fundamental procedural protection, and applies categorically to certain types of hearsay." *Id.* at 20. One category to which the Clause might apply, they suggested, is "testimonial" hearsay, such as court or grand jury testimony, affidavits, or even confessions made to police. *Id.* at 21. Another category might be evidence which the government had a hand in producing, like confessions or affidavits generated by police or prosecutorial questioning. *Id.* at 23–24. Mark Lilly's statements, of course, fall in both categories.

20. *Lilly*, 527 U.S. at 142–43 (Breyer, J., concurring).

21. A vast array of critical literature preceded *Roberts*. There, the Court noted "an outpouring of scholarly commentary" and justified its own path by "the mutually critical character of the commentary." *Ohio v. Roberts*, 448 U.S. 56, 66–68 n.9 (1980) (citing nineteen law review articles which were, in some respect, critical of the Court's confrontation-hearsay decisions).

22. One frequent—and, I believe, accurate—criticism is that a reliability based approach simply mirrors the law of evidence, rendering the Confrontation Clause redundant and essentially meaningless. See, e.g., Douglass, *Beyond Admissibility*, *supra* note 10, at 195 ("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."); Randolph N. Jonakait, *Restoring the Confrontation Clause to the*

pose in this Article. My aims are both narrower and broader. As the Court did in *Lilly*, I want to focus narrowly on the problem of hearsay from the reluctant accomplice: the suspect—like Mark Lilly—who “fingers” his criminal associates in a jailhouse confession, then invokes his Fifth Amendment privilege to avoid testifying at trial.²³ The reluctant accomplice is worthy of special attention for a number of reasons, not the least of which is that his story appears so often as a critical piece of evidence in criminal trials. Most important for our purposes, the reluctant accomplice holds a unique place among hearsay declarants. Unlike most declarants, his live testimony can be purchased. His silence is a bargaining chip which the prosecutor has the power to redeem if the price is right.²⁴

For that reason, the problem of accomplice hearsay requires a broader perspective than the Court has adopted in its confrontation-hear-

Sixth Amendment, 35 UCLA L. Rev. 557, 622 (1988) (arguing that Confrontation Clause has become a “minor adjunct of evidence law”); Charles R. Nesson & Yochai Benkler, Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause, 81 Va. L. Rev. 149, 174 (1995) (rejecting Court’s reliance on “arcane rules of evidence” to establish constitutional doctrine).

Another criticism is that the Court essentially missed the boat when it first applied the Confrontation Clause to exclude garden variety hearsay at all. Under this view, hearsay declarants are not “witnesses against” the accused within the meaning of the Sixth Amendment unless they make statements in a “testimonial” setting. But when the Clause applies to such hearsay, it applies strictly, prohibiting the use of hearsay without regard to reliability unless the declarant is produced for cross-examination. See *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring) (asserting that “Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”); *Maryland v. Craig*, 497 U.S. 836, 864–65 (1990) (Scalia, J., dissenting) (contending that phrase, “witnesses against him,” denotes only witnesses to events who later give testimony against accused). For a more complete discussion of this “testimonial hearsay” position, see *infra* text accompanying notes 253–58.

Professor Margaret Berger has suggested a somewhat different approach, based on the theory that a principal aim of the Confrontation Clause was to prevent the manufacturing of evidence in secret proceedings controlled by the government. She argues that the Clause requires a heightened standard for admitting hearsay statements elicited by government agents. See Berger, *supra* note 19, at 561–62.

23. Throughout this Article, I will use the term “reluctant accomplice” to refer to an accomplice who asserts the Fifth Amendment to avoid testifying against his criminal confederates. A related Confrontation Clause issue arises in joint trials, where the out of court confession of one nontestifying codefendant implicates the other defendant. See *Bruton v. United States*, 391 U.S. 123, 123 (1968). Joint trials represent a prosecutorial choice that forecloses most, if not all, meaningful opportunities to confront the nontestifying accomplice. In my view, it is that choice, not the reliability or unreliability of the hearsay, that should result in exclusion of any part of the hearsay confession that implicates a codefendant. See *infra* text accompanying note 274.

24. See, e.g., *United States v. Singleton*, 165 F.3d 1297, 1301 (10th Cir. 1999) (en banc) (“From the common law, we have drawn a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leniency.”).

say opinions.²⁵ By the time a case like *Lilly* reaches the Court, the issue is limited to one of admissibility: Did the trial court properly admit the accomplice's out-of-court statement implicating the accused?²⁶ But hearsay does not arrive at trial by happenstance. Typically, the accomplice's story arrives in the form of hearsay as the result of three critical pretrial choices: the choice of the accomplice to "take the Fifth"; the choice of the prosecutor not to immunize or entice the accomplice into live testimony; and the choice of the defense to attack the hearsay itself rather than to question the accomplice's silence or the prosecutor's tactics.²⁷ In confrontation-hearsay cases, prosecutors and defendants almost never challenge, and courts seldom second-guess, an accomplice's blanket assertion of a Fifth Amendment privilege to avoid testifying.²⁸ And it is

25. The Supreme Court is constrained to review the record it receives and the issues raised in a petition for certiorari. This Article is not a criticism of the *Lilly* Court for failing to address issues that were not before it. Instead, it is a criticism of the way in which the Court's Sixth Amendment doctrine consistently removes the most important questions from consideration.

26. All of the Court's confrontation-hearsay cases are about the admissibility of hearsay. See, e.g., *White*, 502 U.S. at 346 (considering admissibility of hearsay statements by child victims of sexual abuse); *Idaho v. Wright*, 497 U.S. 805, 816 (1990) (same); *Lee v. Illinois*, 476 U.S. 530, 531 (1986) (considering admissibility of accomplice's hearsay confession); *Roberts*, 448 U.S. at 56 (considering admissibility of preliminary hearing testimony of absent declarant). Only a few cases even mention the process which led the government to use hearsay in the first place. See, e.g., *Barber v. Page*, 390 U.S. 719, 723-25 (1968) (excluding hearsay where government failed to produce declarant from federal prison); *Motes v. United States*, 178 U.S. 458, 474 (1900) (excluding hearsay where declarant disappeared after government released him from jail and failed to monitor him). Very few cases even note the possibility that a defendant might have some means available to confront a hearsay declarant. See *United States v. Inadi*, 475 U.S. 387, 397 (1986) (noting that defendant could have subpoenaed declarant and cross-examined him pursuant to Federal Rule of Evidence 806).

27. I use the term "pretrial" to describe choices that typically occur before trial. In a given case, however, they may come about during trial. In any event, they are choices separate from, and typically prior to the trial court's decision to admit or exclude hearsay.

28. *Lilly* apparently took no steps to test his brother's blanket assertion of the Fifth Amendment. See *supra* note 8. Without addressing the pretrial conduct of the prosecutor or the defendant's opportunity to question Mark's Fifth Amendment claims, the *Lilly* Court simply assumed that Mark was unavailable to testify at all. *Lilly v. Virginia*, 527 U.S. 116, 124 n.1 (1999).

The record in *Lilly* is typical of most confrontation-hearsay cases in this respect. My own research has not uncovered any case where the prosecutor offered an accomplice's hearsay confession and the defendant mounted a challenge to the accomplice's assertion of a Fifth Amendment privilege. And, for reasons explained in more detail in Part II of this article, prosecutors have no incentive to question the scope of an accomplice's privilege once they choose to offer hearsay in evidence. See *infra* text accompanying notes 213-236.

By contrast, in other contexts not involving accomplice hearsay, challenges to a witness's broad assertion of a Fifth Amendment privilege are more common. See, e.g., *Hoffman v. United States*, 341 U.S. 479, 479 (1951) (reversing contempt conviction where government had successfully challenged grand jury witness's assertion of privilege); *In re Grand Jury Proceedings*, 13 F.3d 1293, 1295-96 (9th Cir. 1994) (rejecting grand jury witness's assertion of privilege); *Resnover v. Pearson*, 965 F.2d 1453, 1461-62 (7th Cir.

familiar gospel that the power to immunize a witness or to bargain in exchange for testimony is the prosecutor's alone.²⁹ Courts almost never look behind the exercise of that power, even where the prosecutor's decisions seem calculated to make confrontation impossible.³⁰ Confrontation-hearsay opinions seldom discuss these pretrial choices. Confrontation Clause scholarship has largely ignored them.³¹ Yet—as *Lilly*

1992) (rejecting defendant's claim that trial court failed to inquire into validity of Fifth Amendment claim by potential defense witness).

29. E.g., *United States v. Lugg*, 892 F.2d 101, 104 (D.C. Cir. 1989) ("The cases are legion and uniform that only the Executive can grant statutory immunity, not a court."). The federal use-immunity statute provides that a District Court "shall issue" an order compelling testimony, "upon the request of the United States attorney." 18 U.S.C. § 6003(a) (1994). The effect of such an order is to grant use immunity. See id. § 6002 ("[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . ."). In essence, then, the statute entrusts the immunity-granting decision to the prosecutor.

Some decisions suggest, however, that courts retain the power to compel prosecutors to exercise their immunity-granting powers in "extraordinary circumstances." E.g., *Lugg*, 892 F.2d at 104. For opposing views on the power of courts to grant immunity at the request of defendants, compare Note, *The Sixth Amendment Right to Have Immunity Granted to Defense Witnesses*, 91 Harv. L. Rev. 1266, 1280 (1978) [hereinafter Note, Sixth Amendment] (arguing for right to have use immunity granted), with Richard L. Stone, Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139, 141 (1983) (arguing against right to have use immunity granted).

In other cases, while acknowledging that the power to grant use immunity rests with the prosecutor, some courts have imposed burdens on the government as a consequence of its failure to immunize a witness. See, e.g., *United States v. Salerno*, 937 F.3d 797, 806–07 (2d Cir. 1991) (holding that exculpatory grand jury testimony was admissible at defendant's request since grand jury witnesses were not "unavailable" for cross-examination by government, as they could have been immunized at trial), rev'd, 505 U.S. 317 (1992).

30. See, e.g., *Lilly*, 527 U.S. at 124 n.1 (declining to address prosecution's timing of trial); cf. *United States v. Perkins*, 138 F.3d 421, 423–24 (D.C. Cir. 1998) (declining to order use immunity of potential defense witness despite witness's letter claiming threats by prosecutor). But cf. *United States v. Flores*, 985 F.2d 770, 780–83 (5th Cir. 1993) (reversing district court's decision to allow hearsay where witness's unavailability is due solely to invocation of Fifth Amendment in response to actual or threatened prosecution).

31. Most confrontation-hearsay scholarship focuses on the question of admissibility and, as a result, devotes little attention to pretrial choices which frame the confrontation-hearsay dilemma. See, e.g., Akhil Reed Amar, Foreword: Sixth Amendment First Principles, 84 Geo. L.J. 641, 693–97 (1996) [hereinafter Amar, Sixth Amendment First Principles] (arguing that Confrontation Clause excludes only hearsay statements made in trials, depositions, or affidavits); Jonakait, *supra* note 22, at 622 (arguing that Confrontation Clause excludes hearsay unless prosecutor can show that cross-examination is not reasonably likely to lead "jury to weigh the evidence more favorably to the accused"); Nesson & Benkler, *supra* note 22, at 173 (arguing that hearsay is admissible under Confrontation Clause only when independently corroborated).

One exception is Professor Berger's work, which focuses on the process that creates the hearsay statement itself. Berger, *supra* note 19, at 561–62 (arguing that Confrontation Clause is designed in part to prevent government creation of evidence in secret). Another exception is Professor Van Kessel's comprehensive study which justifies the hearsay rule as necessary to compensate for deficiencies in the American adversarial process. Gordon Van

demonstrates—these pretrial decisions of accomplice, prosecutor and defense determine the hearsay landscape at trial, and frame the Confrontation Clause issues that have proved so troublesome for decades.

Conversely, the treatment of hearsay at trial under the Court's Sixth Amendment doctrine has profound impacts on these pretrial choices. Pretrial dealings between prosecutors and accomplices are the subject of intense and continuing debate.³² Deals with "snitches" in exchange for testimony have been condemned by some as an affront to truth³³ and defended by others as essential to uncovering the most serious crimes.³⁴ A change in Confrontation Clause doctrine might reshape the way prosecutors deal with accomplices as potential witnesses, at least in the significant number of cases where the accomplice has "spilled" some of his story long before trial. But the Court has never addressed this connection, and scholars have dealt with cooperating witnesses and accomplice hearsay as two separate worlds.³⁵ My effort here is to explore the natural link between the two.

Kessel, Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach, 49 *Hastings L.J.* 477, 544 (1998). Somewhat akin to Professor Berger's approach, Professor Van Kessel's theory would put tighter controls on hearsay created in contacts with government investigators, but would allow expanded use of "nonadversary-created" hearsay. *Id.* Professor Van Kessel notes the dangers of "party-produced" evidence, including statements by witnesses prepared or pressured by prosecutors, and argues that hearsay and confrontation rules "are particularly important in controlling prosecutorial overreaching in the creation and production of testimonial evidence from informers and accomplices." *Id.* at 503, 508.

32. See *infra* note 153.

33. As Chief Justice Warren noted in *Hoffa v. United States*:

This type of informer and the uses to which he was put in this case evidence a serious potential for undermining the integrity of the truth-finding process in the federal courts. Given the incentives and background of [the cooperating witness], no conviction should be allowed to stand when based heavily on his testimony. And that is exactly the quicksand upon which these convictions rest

385 U.S. 293, 320 (1966) (Warren, C.J., dissenting); see also Barry Scheck et al., *Actual Innocence* 126–57 (2000) (documenting cases of false testimony by cooperating "snitches" and calling for rules requiring, among other steps, the recording of all conversations between informants and police or prosecutors).

34. "Notwithstanding all the problems that accompany using criminals as witnesses, however, the fact of the matter is that police and prosecutors cannot do without them—period." Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 *Hastings L.J.* 1381, 1390 (1996); see also *Hoffa*, 385 U.S. at 311 (noting prosecutor's dependence on informers).

35. There is a growing literature on cooperating accomplices, including first hand accounts from judges and trial lawyers who have experience dealing with such witnesses. See, e.g., Daniel C. Richman, *Cooperating Clients*, 56 *Ohio St. L.J.* 69, 77–78 (1995) (describing risks and rewards of cooperation); Trott, *supra* note 34, at 1398–1413 (presenting circuit judge's advice to prosecutors on negotiation with accomplice witnesses); J. Richard Johnston, *Plea Bargaining in Exchange for Testimony: Has Singleton Really Resolved the Issues?*, *Crim. Just.*, Fall 1999, at 24 (noting the uncertainty of such "snitching" agreements and the role of defense lawyers in reducing such uncertainty). For an historical perspective on the practice of "snitching" in exchange for

This Article focuses on pretrial choices: how they are affected by, and how they might affect, our constitutional approach to hearsay from the reluctant accomplice. This is the most realistic way to frame a complex problem. The problem of hearsay from the reluctant accomplice poses more than a narrow question of reliability, or an even narrower question of the historical pedigree behind the hearsay exception for statements against penal interest. The problem involves the clash of three interests: the government's interest in full presentation of evidence at trial,³⁶ the accomplice's right to avoid self-incrimination, and the defendant's right to confront witnesses against him. In the pretrial setting, all three players make choices that can put those interests in conflict, or bring them into relative harmony, once the case goes to trial. In my view, a coherent approach to the problem of accomplice hearsay requires consideration of all three interests.

Part I evaluates the Court's approach on its own terms. When the Court excludes accomplice hearsay, it acts on the premise that the accomplice's blame-shifting statements are unreliable.³⁷ That premise may make sense as a starting point. But the Court's reliability analysis ends too soon because it fails to account for the pretrial choices that result from an exclusionary rule. Exclusion of evidence creates a vacuum. And prosecutors, who must shoulder the burden of proof at trial, abhor an evidentiary vacuum. Where blame-shifting hearsay is likely to be excluded at trial, the prosecutor will seek something else to take its place. In most cases that "something else" will be equally blame-shifting live testimony from the same accomplice.³⁸ Typically, by the time of his live testimony, the accomplice will have closed a deal with the government.

leniency, see Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1, 8-13 (1992). Professor Weinstein's excellent study examines the recent history and current "overuse" of cooperating accomplices by prosecutors. Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 568-69 (1999). Another recent commentator addresses the imbalance between prosecution and defense in their power to induce cooperation. Korin K. Ervig, Note, *Establishing an Equal Playing Field for Criminal Defendants in the Aftermath of United States v. Singleton*, 49 Duke L.J. 1371, 1400 (2000). But none of that literature discusses accomplice hearsay.

A handful of articles, both before and after *Lilly*, have dealt specifically with hearsay from accomplice declarants. But, like the Court, those writers have tended to address the reliability of accomplice hearsay in isolation, without reference to broader concerns with the reliability of accomplices as witnesses. See, e.g., Benjamin E. Rosenberg, *The Future of Codefendant Confessions*, 30 Seton Hall L. Rev. 516, 517-18 (2000); Welsh S. White, *Accomplices' Confessions and the Confrontation Clause*, 4 Wm. & Mary Bill Rts. J. 753, 755 (1996).

36. Actually, the government has dual interests. It seeks evidence to prove the guilt of the defendant. But it must do so without jeopardizing its prosecution of the accomplice, or without paying too high a price for his cooperation and testimony.

37. See *Lilly v. Virginia*, 527 U.S. 116, 131 (1999) (plurality opinion) (arguing that accomplice confessions which implicate an accused are "inherently unreliable"); *Lee v. Illinois*, 476 U.S. 530, 541 (1986) (same).

38. Of course, the practice of seeking testimony from cooperating accomplices is not limited to cases where such testimony replaces inadmissible hearsay. Today's federal

His live testimony will be well compensated and his story well rehearsed. When it comes to confrontation, this may be the preferred result.³⁹ If the accomplice testifies, the defendant can cross-examine. But tested by the Court's own standard of reliability, there is little reason to conclude that even the cross-examined testimony of most accomplices is inherently more reliable than most accomplice hearsay, especially after the prosecutor has purchased and polished that testimony in preparation for trial.

In fact, the reliability equation may be even more complex. Excluding accomplice hearsay may have unintended "ripple effects" in the pre-trial setting.⁴⁰ When the law excludes hearsay as an option, it increases the prosecutor's need for live testimony to prove the same facts. That adds to the bargaining power of the reluctant accomplice and drives up the price the prosecutor must pay for his testimony.⁴¹ In a perverse way, therefore, excluding accomplice hearsay may actually diminish the reliability of courtroom testimony, by adding to the accomplice's incentive to favor the government. This is not to say, of course, that the Court should admit all blame-shifting hearsay. But if reliability is the Court's concern, I question whether it accomplishes anything by excluding blame-shifting hearsay in favor of equally blame-shifting live testimony from an accomplice who has joined forces with the government.⁴²

Part II shifts the focus from reliability to confrontation. That Part considers whether the Court's approach promotes pretrial choices which are likely to bring about effective confrontation of the accomplice at trial. The Court's doctrine falls short here as well. Even after *Lilly*, the Court's

practice is overrun with cooperating accomplices who testify in an effort to get relief from guideline sentences. See Weinstein, *supra* note 35, at 563–64.

39. Indeed, the Court's principal justification for allowing live testimony of cooperating accomplices is that confrontation itself will uncover the truth. See *Hoffa*, 385 U.S. at 311 ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.")

40. The notion that rules of constitutional criminal procedure may have secondary, unintended, and often counterintuitive consequences has been demonstrated in a variety of contexts, most elegantly by Professor Stuntz in the Fourth Amendment arena. See William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 *Geo. Wash. L. Rev.* 1265, 1266–67 (1999) (arguing that Fourth Amendment privacy protections tend to channel police investigation into areas where residents enjoy less privacy, especially poor and minority communities); William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 *Harv. J.L. & Pub. Pol'y* 443, 451–55 (1997) (arguing that Fourth Amendment exclusionary rule skews criminal litigation by, among other things, diverting defense resources from central factual contests).

41. Usually the higher "price" takes the form of a more lenient sentence recommendation, or a reduced charge. See *infra* text accompanying notes 204–209.

42. Ironically, in *Lilly*, the jury which heard Mark Lilly's "unreliable" hearsay also heard equally blame-shifting testimony from the second accomplice, Gary Barker, who testified pursuant to a plea agreement which allowed him to avoid a potential death sentence. Barker's story—blaming Ben Lilly for the shooting—was essentially the same as Mark's "unreliable" hearsay. See *Lilly v. Commonwealth*, 499 S.E.2d 522, 528–29, 534 (Va. 1998) (noting that Barker's testimony corroborated Mark's statements).

doctrine neither predictably excludes nor predictably admits accomplice hearsay.⁴³ However, one thing is predictable under the Court's analysis: The admissibility of a given statement depends upon its reliability. And reliability, in turn, depends largely upon the hearsay label attached to the statement.⁴⁴ By treating the Confrontation Clause as an exclusionary rule for unreliable hearsay, the Court has marginalized the procedural rights—in-court, face-to-face confrontation and cross-examination—which the Clause was designed to protect in the first place. The Court's approach invites both prosecutors and defendants to ignore confrontation in their pretrial decisions because they both know that the ultimate admissibility of hearsay will depend upon something else: its supposed reliability.

The impact of that approach is especially troublesome when it comes to prosecutors. In most American jurisdictions, they have the power to immunize, and thereby compel, live testimony.⁴⁵ But the Court's focus on reliability gives them peculiar incentives when it comes to the exercise

43. *Lilly* failed to achieve a majority on the critical issue of whether any accomplice confessions may fall within a firmly rooted hearsay exception. At best, then, *Lilly* is precedent for a narrow constitutional rule excluding blame-shifting, out-of-court statements that do *not* genuinely inculpate the declarant. See John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 *Fordham L. Rev.* 2097, 2130 (2000) [hereinafter *Douglass, Balancing Hearsay*] (“[*Lilly*] leaves lower courts with considerable leeway to admit ‘genuinely self-inculpatory’ hearsay statements from accomplices.”); Rosenberg, *supra* note 35, at 549 (“*Lilly* was unable to muster a majority on the critical questions of whether statements against penal interest are ‘firmly rooted hearsay exceptions,’ and whether, even if they are not, they may have ‘sufficient indicia of reliability’ to satisfy the Confrontation Clause.”); Note, *The Supreme Court, 1999 Term—Leading Cases: Criminal Law and Procedure*, 113 *Harv. L. Rev.* 233, 241 (1999) [hereinafter Note, 1999 Supreme Court Term] (arguing *Lilly* “should have no precedential impact on either non-custodial confessions or custodial confessions that are genuinely self-inculpatory”). In addition, under the *Roberts* formula, accomplice hearsay will still be admissible if it carries other “particularized guarantees of trustworthiness.” *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

44. See Douglass, *Beyond Admissibility*, *supra* note 10, at 210–14 (noting the “primacy of labels” in the Court’s confrontation-hearsay analysis); Note, 1999 Supreme Court Term, *supra* note 43, at 243 (explaining that, even after *Lilly*, “the constitutional right of confrontation may hinge on what label the prosecution chooses to put on the hearsay statement”).

45. The federal immunity statute provides that, upon application of the United States Attorney, the court “shall” issue an order compelling a witness to testify. 18 U.S.C. § 6003. The effect is to grant “use immunity” for testimony compelled by the order. See 18 U.S.C. §§ 6002–6003 (1994). See generally *Kastigar v. United States*, 406 U.S. 441, 443–44 (1972) (tracing history of power to compel testimony). Prosecutors may accomplish a similar result through contract, by entering into an “immunity agreement” with a cooperating witness. See *United States v. Thompson*, 25 F.3d 1558, 1562 (11th Cir. 1994) (noting that “basic principles of contract law” govern immunity agreements).

Unlike most states, Virginia does not have a comprehensive use immunity statute applicable to most offenses. As a result, the *Lilly* prosecutor had fewer options to induce or compel Mark to testify. Of course, he still had the power to induce testimony through a plea bargain. He exercised that power to turn Gary Barker into a witness, but withheld it from Mark Lilly, leaving him on the sideline until Ben’s trial was over. See *supra* note 7.

of that power. Where there is a realistic likelihood that hearsay will be admitted based solely on its reliability, the prosecutor has little incentive to consider immunity or other tactics aimed at bringing about confrontation. Instead, the Court's approach offers the prosecutor an incentive to structure her hearsay arguments—and perhaps even the hearsay evidence itself⁴⁶—to fit within the Court's approved hearsay labels.⁴⁷ She can then offer the hearsay in evidence while ignoring the potential for—or even discouraging—live testimony from the accomplice. Where successful “labeling” seems less likely, on the other hand, the prosecutor's best option is to forget the hearsay and buy the loyalty of the accomplice as a cooperating witness for trial. Without a cooperation agreement to maintain control of the accomplice, a “cold” grant of immunity is too great a risk for the prosecutor.⁴⁸ Under the Court's approach, nothing promotes a third option: presenting hearsay along with the live, unvarnished testimony of

46. Mark Lilly's testimony was taped, so that it was reproduced verbatim at trial. But much, probably most, hearsay is recounted at trial by a third party, typically by the police officer who arrested and interrogated the accomplice. At trial, it is related only in substance, not verbatim. Under the Court's hearsay “labeling” approach, the officer's characterization of the accomplice's statements can make a difference when it comes to admissibility. For example, an accomplice's hearsay statement, “Ben and I agreed to kill the victim,” may be regarded as genuinely self inculpatory and therefore admissible. By contrast, the hearsay statement, “Ben said we should kill the victim and I went along,” may be considered—by some courts at least—as primarily blame shifting and not admissible. A testifying officer without verbatim notes and with a recollection only of the substance of the confession might truthfully report the statement either way. Ironically, the officer who testifies to the first, more general description, is more likely to see the court admit the hearsay. The more specific version is less likely to pass muster under the Confrontation Clause.

47. Before *Lilly*, prosecutors enjoyed a high degree of success in offering hearsay by squeezing it within traditional hearsay exceptions, even when it did not precisely fit within the exception's traditional boundaries. This process of “pigeonholing” new hearsay within old labels allows prosecutors to take advantage of the automatic admission of “firmly rooted” hearsay under the *Roberts* formula. See *supra* note 10. Several of the Court's opinions—at least implicitly—endorse such pigeonholing. See, e.g., *White v. Illinois*, 502 U.S. 346, 357–58 (1992) (admitting hearsay statements of child abuse victim as spontaneous declarations and as statements for purposes of medical diagnosis, even though lower courts had expanded such exceptions beyond traditional limits); *Bourjaily v. United States*, 483 U.S. 171, 178 (1987) (admitting coconspirator statements as within “firmly rooted” hearsay exception while modifying the exception itself to eliminate foundational requirement of independent evidence of conspiracy). For a more detailed discussion of this “pigeonholing” phenomenon and its tendency to liberalize the admission of hearsay, see Douglass, *Beyond Admissibility*, *supra* note 10, at 210–14.

Lilly will not end the practice of pigeonholing hearsay. At most, it will narrow the target for prosecutors who seek to pigeonhole an accomplice's confession within the exception for statements against penal interest. See *infra* text accompanying notes 227–228.

48. Statistics suggest that prosecutors are increasingly wary of obtaining testimony through a “cold” grant of use immunity—that is, by obtaining an order compelling testimony under 18 U.S.C. § 6003, without entering into a cooperation agreement with the accomplice. Requests by federal prosecutors for § 6003 orders increased almost every year from 1973 through 1986, the year before the Sentencing Guidelines took effect. After peaking at 2550 in 1986, such requests declined in number every year through 1996, when

an immunized accomplice who has not become a sycophant of the prosecutor. In other words, the Court's reliability formula promotes a choice between unfronted hearsay or unrealistic confrontation. Neither seems especially satisfactory from the perspective of a court or jury charged with finding the truth.

In the case of the reluctant accomplice, the rules of evidence compound the confrontation problem. Statements against penal interest are admissible only where the declarant is "unavailable."⁴⁹ That rule was designed to create a preference for live testimony.⁵⁰ If the confessing accomplice is available, the theory goes, he should be called as a witness and his hearsay excluded. But for a prosecutor who possesses a favorable hearsay statement from an accomplice who will make an unsavory or unpredictable witness at trial, the rule may have the opposite effect. It gives the prosecutor an incentive to keep the witness "unavailable."

When considered in conjunction with the law of evidence, then, the Court's approach to accomplice hearsay may create incentives for prosecutors to avoid confrontation of the accomplice. As for the defendant, since admissibility is purely a function of reliability, he can raise a confrontation challenge to hearsay even though actual confrontation with his accomplice is the last thing he wants to happen at trial. He can assert the right with no concern that he may really have to exercise it.

Part III offers a different approach to the problem of confronting the reluctant accomplice, an approach designed to encourage pretrial decisions more likely to result in real confrontation at trial, without increasing the pressure on prosecutors to purchase live testimony. The Sixth Amendment says nothing about reliability; indeed, it says nothing about hearsay.⁵¹ I argue that the Confrontation Clause is not an exclu-

there were only 1493 requests. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 418 tbl.5.1 (1996).

By contrast, since the Guidelines took effect, prosecutors have made increased use of plea and cooperation agreements. The Guidelines grant prosecutors sole discretion to file a sentence reduction motion based on a defendant's "substantial assistance" to the government in the investigation or prosecution of others. See U.S. Sentencing Guidelines Manual § 5K1.1 (2000). Such motions typically follow plea agreements by cooperating accomplices who agree to testify against their confederates. In 1989, the first year data was collected, only 3.5% of federal sentencing involved downward departures based on "substantial assistance"; by the mid 1990s, that figure had risen and held steady at around 19%. Weinstein, *supra* note 35, at 563-64 (citing Sentencing Comm'n, 1996 Sourcebook of Federal Sentencing Statistics 39 fig.G (1996)).

In sum, perhaps largely because of the powers granted prosecutors under section 5K1.1, we have seen a gradual, but substantial, shift in prosecutorial tactics away from *compulsion* of testimony and toward *purchase* of testimony.

49. Fed. R. Evid. 804(a), 804(b)(3).

50. John W. Strong, McCormick on Evidence: Hornbook Series 389 (5th ed. 1999).

51. "The language [of the Confrontation Clause] is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay . . ." Dutton v. Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring).

sionary rule for unreliable hearsay. The laws of evidence⁵² and of Due Process⁵³ are intended to handle that chore. Instead, I suggest, the Confrontation Clause creates a procedural right to challenge prosecution evidence, whether that evidence takes the form of live testimony at trial or of hearsay. When hearsay is admitted in evidence, regardless of its reliability, the Clause allows a defendant to test that evidence through an adversarial process.⁵⁴

In the specific case of the reluctant accomplice, I argue, the Clause requires prosecutors to use reasonably available means to promote effective testing of the accomplice's story. At a minimum, the right of confrontation means that a prosecutor cannot use hearsay while pursuing pretrial strategies which unnecessarily limit the opportunity for cross-examination.⁵⁵ It means that a prosecutor cannot simply ignore her immu-

52. The Federal Rules of Evidence and the law of evidence in every state contain prohibitions on the use of hearsay. See, e.g. Fed. R. Evid. 802. In large measure, exceptions to the hearsay rule are intended to designate categories of hearsay statements that are sufficiently reliable to be placed before the trier of fact even in the absence of cross-examination. Strong, *supra* note 50, at 389.

Whether the recognized, categorical exceptions to the hearsay rule actually succeed in separating reliable from unreliable hearsay is, of course, subject to question:

[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 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 . . . ? 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 22, at 156-57. Ironically, the Court has attached its own constitutional standard of reliability to the questionable standards set by "firmly rooted" hearsay exceptions. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

53. In his seminal work on the Sixth Amendment, Professor Westen argues that the Due Process Clause, not the Confrontation Clause, is the proper source of the constitutional protection against unreliable evidence. Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 *Harv. L. Rev.* 567, 598 (1978). Evidence is constitutionally admissible, he contends, if it "possesses 'sufficient aspects of reliability' to be intelligently evaluated by the jury for its proper weight." *Id.* (quoting *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)).

54. In an earlier article, I explored the constitutional pedigree of that right, which I have described as a "right to confront hearsay." Douglass, *Beyond Admissibility*, *supra* note 10, at 224-40.

55. Decisions which affect the opportunity for confrontation may include the choice of the order of multiple prosecutions, the joinder or severance of multiple defendants, the timing of trials and sentencings, and the offering or withholding of plea agreements.

nity-granting powers where use immunity is the only means to bring about confrontation. In addition, at the risk of Fifth Amendment blasphemy, I argue that it means taking a hard look at the accomplice's blanket assertion of a privilege not to testify. Further, it requires defendants to avail themselves of procedures for testing hearsay, at the risk of forfeiting the right.⁵⁶ Under this approach the admissibility of hearsay—as far as the Confrontation Clause is concerned—has nothing to do with reliability. Instead, courts wield the constitutional power to exclude hearsay only as a sanction to compel the prosecution to act where necessary to allow for fair testing of hearsay.

One result of this approach is to change the incentives of prosecution and defense in the pretrial setting. Reliability is no longer the relevant Sixth Amendment battleground. If a prosecutor wants to use hearsay, then she must find a way to allow for fair adversarial challenge. If a defendant asserts his confrontation right, then he should seek to exercise that right. If we give both parties a reason to seek confrontation, rather than merely to debate hearsay labels, we may find that the initial silence of the reluctant accomplice is less of a barrier than we presume it to be. In many cases, without resorting to purchase or polish, we can have confrontation.⁵⁷

56. Of course, the first step is to demand confrontation. And the first step in confronting the accomplice-declarant is to put him on the witness stand, and attempt cross-examination. See, e.g., Fed. R. Evid. 806 (entitling party against whom hearsay is admitted to examine declarant "as if under cross-examination"). Where the accomplice asserts a Fifth Amendment privilege, I contend, defendant must take the additional step of proffering—out of the jury's presence—at least the basic subject matter of his intended cross-examination, so that the court may make an informed decision whether proposed cross-examination actually conflicts with the accomplice's right against self-incrimination. See *infra* text accompanying notes 310–329.

57. Confrontation is, of course, not possible where accomplices are tried together in a single trial. In such cases, the Court has held, a defendant is denied his right of confrontation when a nontestifying codefendant's hearsay confession contains statements implicating him in the crime. *Bruton v. United States*, 391 U.S. 123, 126 (1968).

The approach to accomplice confessions outlined in this Article would not change the result in cases like *Bruton*. Indeed, the approach proposed here would strengthen the position of defendants objecting to such hearsay. Under the Court's approach, some accomplice-codefendant confessions will be admissible, *Bruton* notwithstanding, because the confessions meet the Court's test for "reliability." By contrast, I would exclude the accomplice confession not because it is unreliable—though perhaps it is. Instead, I would exclude the hearsay confession simply because the government, by its affirmative choice to indict and try the defendants together, has made it impossible to confront the reluctant accomplice.

I. THE DARK SIDE OF THE COURT'S RELIABILITY FORMULA: A CONSTITUTIONAL PREFERENCE FOR THE VARNISHED TRUTH

Accomplices make the best witnesses. After all, the first qualification for "witnessing" is perception.⁵⁸ Since most criminal activity is carried out in secret, accomplices have a unique advantage: They see and hear the defendant plan and commit the crime. For that reason, accomplices often provide the most complete and most compelling evidence in a criminal case. Sometimes, they provide the only direct, eyewitness account. Without information from cooperating accomplices, many crimes would never be prosecuted at all.⁵⁹

Accomplices also make the worst witnesses.⁶⁰ They are, by their own admission, criminals. Worse yet, they are mercurial criminals: turncoats who have sold their loyalty to save themselves.⁶¹ Accomplice-witnesses are mercenaries. The government purchases their testimony in a court sanctioned process that would itself be criminal if pursued by anyone other than the prosecutor.⁶² Then their testimony is prepared and polished behind closed doors before the government marches them out to face a jury.⁶³

58. See Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

59. See, e.g., *United States v. White*, 27 F. Supp. 2d 646, 649 (E.D.N.C. 1998) (noting that without the power to offer inducements in exchange for testimony, "the government would be unable to . . . effectively proceed in the thousands of cases each year in which it relies on witnesses who testify in return for leniency"); *United States v. Reid*, 19 F. Supp. 2d 534, 537 (E.D. Va. 1998) (noting government reliance on inducements in exchange for testimony).

60. Often, "snitches" are believed only insofar as their testimony can be corroborated by independent evidence, and then only with reluctance and disdain. Sometimes, even when accomplice-witnesses are believed, their mere participation taints a prosecution to the point that a judge or jury rejects the case out of disgust. See Trott, *supra* note 34, at 1388.

61. See *id.* at 1383 ("Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law."); Weinstein, *supra* note 35, at 565 ("Because disloyalty is at the heart of cooperation, snitching engenders almost universal moral ambivalence . . .").

62. Under federal law, under most circumstances and for most litigants, offering anything of value to a witness in exchange for testimony is a criminal offense. See 18 U.S.C. § 201(c)(2) (1994). A recent flurry of federal cases has confirmed that federal prosecutors are, in effect, exempt from that statute, at least with respect to most forms of inducement. See, e.g., *United States v. Anty*, 203 F.3d 305, 306 (4th Cir. 2000); *United States v. Barnett*, 197 F.3d 138, 144 (5th Cir. 1999); *United States v. Albanese*, 195 F.3d 389, 394 (8th Cir. 1999); *United States v. Singleton*, 165 F.3d 1297, 1301 (10th Cir. 1999) (*en banc*) (*Singleton II*).

63. See Trott, *supra* note 34, at 1396 ("If you decide to call an informer as a witness, you will end up spending much time with him preparing for his testimony."); Van Kessel, *supra* note 31, at 508 ("Defense attorneys often complain that prosecutors and other law enforcement officials in preparing their witnesses use suggestive techniques to mold or strengthen their testimony.").

Simultaneously prized and despised, accomplices are among the most ubiquitous players on the stage of the modern criminal trial. And their use as government witnesses has grown in recent years.⁶⁴ Still, they are among the most reluctant witnesses. Out of concern that their words will become the tool of their own prosecution, or out of an even more paralyzing fear of retribution from former colleagues in crime,⁶⁵ most accomplice-witnesses would prefer to avoid the stage altogether.⁶⁶ Since the Fifth Amendment often shields an accomplice from the duty to testify, juries seldom hear from him unless his story is coerced through a grant of immunity, induced by a favorable plea bargain, or—as in *Lilly*—presented to the jury in the form of hearsay.

The Court's treatment of live testimony from the reluctant accomplice differs substantially from its approach to hearsay. As *Lilly* demonstrates, the Court remains leery of accomplice hearsay.⁶⁷ By contrast, the Court has set few boundaries to limit live testimony from even the most unsavory of accomplices.⁶⁸ Perhaps that difference in treatment makes sense if we set out to protect the procedural right of in-court confrontation and cross-examination. But as the Court's Confrontation Clause doctrine has drifted farther from the protection of procedural rights, and

64. See John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & Pol'y 423, 424 n.9 (1997) (noting increase in cooperating defendants brought about by federal Sentencing Guidelines); Weinstein, *supra* note 35, at 563–64 (same).

65. Fear of retaliation, more than fear of prosecution, may be the biggest inhibitor of cooperation by accomplices. See Steven S. Nemerson, *Coercive Sentencing*, 64 Minn. L. Rev. 669, 734 (1980).

66. As *Lilly* demonstrates, however, it is not uncommon for an accomplice to discover the value of silence belatedly. In the first hours following arrest, in the company of skilled interrogators, suspects regularly “finger” their criminal associates in hopes of winning the favor of police. Only after a night's sleep and a conference with counsel do they realize that they may have given away information that they could have sold for a premium. The Fifth Amendment, and the rule against hearsay, then become the accomplice's most valuable bargaining chips. If the prosecutor wants to use his statements to convict another, she must pay to turn the accomplice into a witness.

67. *Lilly v. Virginia*, 527 U.S. 116, 131–34, 143–45 (1999). Three times in the last fifteen years, the Court has considered constitutional or evidentiary objections to accomplice hearsay. It has rejected, or at least limited, the evidence each time. See *id.*; *Williamson v. United States*, 512 U.S. 594, 600–01 (1994); *Lee v. Illinois*, 476 U.S. 530, 546–47 (1986).

68. Prosecutors violate the Due Process Clause, not to mention the rules of ethics, if they knowingly offer perjured testimony, *Pyle v. Kansas*, 317 U.S. 213, 216 (1942); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), or if they knowingly allow false evidence to go uncorrected after it appears at trial. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). But the Court has found no Due Process violation when the government makes use of paid informers to gather evidence and to testify, even when such witnesses testify to avoid criminal charges or obtain their own freedom from jail. See *Hoffa v. United States*, 385 U.S. 293, 311 (1966). Indeed, the Court's sanctioning of the practice is more than a century old. *Benson v. United States*, 146 U.S. 325, 333–37 (1892); *The Whiskey Cases*, 99 U.S. 594, 599 (1878).

toward a rule of evidence based on reliability, that explanation becomes less satisfying.

A. *The Court's Approach: Reliability and Hearsay Labels*

1. *Hearsay Labels as Surrogates for Confrontation: The Ohio v. Roberts "General Approach."* — For over a century, the Court has struggled to make sense out of hearsay under the Sixth Amendment.⁶⁹ On its face, the Confrontation Clause seems simple enough. The accused has a right "to be confronted with the witnesses against him."⁷⁰ At trial, that means he has a right to be present,⁷¹ to physically see, hear, and be seen by the prosecution's witnesses,⁷² and—most critically in the Court's view—to cross-examine those witnesses.⁷³ But when the prosecution offers hearsay, the "witness against" the accused is a hearsay declarant⁷⁴ who typically never enters the courtroom.⁷⁵ The accused, it would appear, has no opportunity to confront that declarant-witness.

69. The problem of applying the Confrontation Clause to hearsay is among the most perplexing dilemmas of constitutional criminal procedure. See, e.g., Friedman, *supra* note 19, at 1012 (calling issue a "pervasive perplexity"); Graham C. Lilly, Notes on the Confrontation Clause and *Ohio v. Roberts*, 36 U. Fla. L. Rev. 207, 207 (1984) (describing issue as "intractable problem").

70. U.S. Const. amend. VI.

71. *Kentucky v. Stincer*, 482 U.S. 730, 739–40 (1987).

72. See *Maryland v. Craig*, 497 U.S. 836, 846–47 (1990). In *Craig*, the Court found no Confrontation Clause violation in a state-court procedure which allowed a child witness to testify via live closed-circuit television, subject to full cross-examination, where the trial court made a finding that the child would suffer severe emotional distress if required to testify in the physical presence of the defendant, her alleged abuser. *Id.* at 840–42. Noting that physical confrontation was among the "core of the values" protected by the Clause, the Court nevertheless held that the right could give way in the face of another "important public policy" as long as the reliability of the testimony was assured. *Id.* at 847–50.

73. See, e.g., *Olden v. Kentucky*, 488 U.S. 227, 231–33 (1988) (*per curiam*) (finding violation of confrontation right where rape defendant was denied opportunity to cross-examine victim regarding cohabitation with boyfriend); *Davis v. Alaska*, 415 U.S. 308, 316–18 (1974) (finding confrontation violation where defendant was not permitted to cross-examine witness regarding possible bias).

74. Whether some, or all, hearsay declarants should be regarded as "witnesses against" the accused for Sixth Amendment purposes is, of course, a major source of controversy. See *infra* text accompanying notes 253–258. For the moment at least, the Court insists that hearsay declarants are, in fact, "witnesses against" the defendant. See *White v. Illinois*, 502 U.S. 346, 352–53 (1992) (rejecting a claim, advanced by the Department of Justice, that only declarants who provide formal "testimonial" statements are "witnesses against" the accused).

75. Of course, some hearsay declarants do testify at trial. When that occurs, the Court has not applied the Confrontation Clause as a rule excluding hearsay. Rather, the Court has simply treated testifying declarants like other witnesses. Defendant's right is to "confront" and to cross-examine them. See, e.g., *United States v. Owens*, 484 U.S. 554, 560 (1988); *Nelson v. O'Neil*, 402 U.S. 622, 626 (1971); *California v. Green*, 399 U.S. 149, 164 (1970). In my view, these "testifying declarant" cases signal a doctrinal approach that should apply to all hearsay. If declarants are "witnesses," then the Clause provides the right to treat them like witnesses. See Douglass, *Beyond Admissibility*, *supra* note 10, at 226–27 (discussing testifying-declarant cases); *infra* text accompanying notes 259–263.

Thus, the right of confrontation seems inherently at odds with hearsay. Yet both English and American criminal courts admitted some forms of hearsay well before and long after ratification of the Sixth Amendment.⁷⁶ Indeed, it took more than a hundred years before the confrontation-hearsay dilemma even surfaced in the United States Supreme Court.⁷⁷ From the start, for both practical and historical reasons,⁷⁸ the Court declined to apply the Confrontation Clause as a rule prohibiting all hearsay against criminal defendants. Instead, in its first constitutional brush with hearsay in 1895, the Court allowed the evidence where “the substance of the constitutional protection is preserved” through actual cross-examination of the declarant in an earlier proceeding.⁷⁹

Eighty-five years later, in an opinion far more sweeping than necessary, the Court spelled out a formula to determine when hearsay satisfies the “substance” of the Sixth Amendment. In *Ohio v. Roberts*, the Court reasoned that the “underlying purpose” of the confrontation right is “to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence.”⁸⁰ Since “accuracy” is the goal, the Court continued, the Clause allows hearsay that is “marked with such trustworthiness that ‘there is no material departure from the reason of the general rule.’”⁸¹ Next, the *Roberts* Court married the constitutional measure of “trustworthiness” to the law of evidence: “[C]ertain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’”⁸² Finally, the Court summed up its “general approach” to hearsay under the Sixth Amendment in a formula that has dominated confrontation-hearsay analysis ever since:

[A hearsay statement] is admissible only if it bears adequate “indicia of reliability.” Reliability can be inferred without more in a

76. See *Mattox v. United States*, 156 U.S. 237, 243–44 (1895) (noting that “from time immemorial [dying declarations] have been treated as competent testimony”). For a more detailed view of the development of hearsay rules before and during the American constitutional period, see James W. Jennings, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. Pa. L. Rev. 741, 746–47 (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 John Henry Wigmore, *Evidence in Trials at Common Law* § 1364, at 12–28 (James H. Chadbourn ed. 1974) (tracing history of hearsay rule from 1500s).

77. See *Mattox*, 156 U.S. at 240–44.

78. The *Mattox* Court recognized that some hearsay had to be permitted, and historically had been permitted, “simply from the necessities of the case.” *Id.* at 244.

79. *Id.* In *Mattox*, defendant had been twice tried for murder. His first conviction was reversed on appeal and his second trial resulted in a hung jury. Before his third trial, two government witnesses died. The trial court admitted the court reporter’s transcript of their testimony from the first trial. *Id.* at 237–40. The Supreme Court found no confrontation violation, principally because cross-examination at the earlier trial preserved “the substance of the constitutional protection.” *Id.* at 244.

80. 448 U.S. 56, 65 (1980).

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

82. *Id.* at 66 (quoting *Mattox*, 156 U.S. at 244).

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.⁸³

Thus, in the Court's Sixth Amendment world, reliability is the surrogate for confrontation, and "firmly rooted" hearsay exceptions are surrogates for reliability.

2. *Accomplice Confessions Under the Roberts Formula.* — The *Roberts* formula has proved convenient—probably too convenient—for courts faced with confrontation challenges to prosecution hearsay. Where hearsay falls within a firmly rooted exception, there is no need for separate constitutional scrutiny. By determining admissibility under the law of evidence, the court automatically determines admissibility under the Sixth Amendment.⁸⁴ In the two decades since *Roberts*, the Court has made the process even easier by identifying as "firmly rooted" virtually any hearsay exception with a name recognizable to students of the law of evidence.⁸⁵ As a result, the Confrontation Clause has posed little impediment during a period of unprecedented expansion in the world of admissible hearsay.⁸⁶ Arguably, the Court's approach to confrontation has even accelerated that expansion.⁸⁷

83. *Id.*

84. Literally applied, the *Roberts* formula does not provide for automatic admission of hearsay within a firmly rooted exception. *Roberts* says that reliability "can be inferred without more" in cases of such hearsay. *Id.* It does not say that reliability "must be" inferred. Nevertheless, both the Supreme Court and lower courts have treated admissibility as automatic, once hearsay falls within a firmly rooted exception. See, e.g., *White v. Illinois*, 502 U.S. 346, 356 (1992).

85. Only once with respect to the "residual" or "catch-all" exception—which is not really a categorical hearsay exception at all, see Fed. R. Evid. 807—has a majority of the Court declared that a hearsay exception is *not* firmly rooted. See *Idaho v. Wright*, 497 U.S. 805, 817–18 (1990). In its holdings or in dictum, the Court has blessed the firm roots of the exceptions for coconspirator statements, *Bourjaily v. United States*, 483 U.S. 171, 183 (1987), spontaneous declarations, *White*, 502 U.S. at 355 n.8, statements for purposes of medical diagnosis, *id.*, public records, *Roberts*, 448 U.S. at 66 n.8, business records, *id.*, dying declarations, *id.*, and prior testimony, *id.* Lower courts have filled most of the gaps. See, e.g., *Hatch v. Oklahoma*, 58 F.3d 1447, 1467 (10th Cir. 1995) (recorded recollection); *United States v. Picciandra*, 788 F.2d 39, 42–43 (1st Cir. 1986) (same); *United States v. Veltmann*, 6 F.3d 1483, 1493–94 (11th Cir. 1993) (statements regarding declarant's state of mind); *United States v. Saks*, 964 F.2d 1514, 1525 (5th Cir. 1992) (statements by an agent); *Williams v. Melton*, 733 F.2d 1492, 1495 (11th Cir. 1984) (*res gestae* exception).

86. A variety of factors, principally the promulgation of the Federal Rules of Evidence in 1975, have brought about a significant liberalization of the hearsay rules in the last quarter century. See Ronald J. Allen, *A Response to Professor Friedman: The Evolution of the Hearsay Rule to a Rule of Admission*, 76 Minn. L. Rev. 797, 800 (1992); Faust F. Rossi, *The Silent Revolution*, in *The Litigation Manual: A Primer for Trial Lawyers* 640, 645–53 (John G. Koelt ed., 2d ed. 1989). In an earlier article, I argued that—contrary to popular perceptions—the admissibility of hearsay has expanded more rapidly in criminal than in civil litigation, and more rapidly in favor of prosecutors than criminal defendants. Douglass, *Balancing Hearsay*, *supra* note 43, at 2106–33.

87. Douglass, *Beyond Admissibility*, *supra* note 10, at 210–14.

The process has proved remarkably efficient except for one glaring exception: accomplice confessions. Since *Roberts*, the Court has addressed accomplice confessions three times.⁸⁸ It has yet to tell us how they fit within the *Roberts* formula. In *Lee v. Illinois*, the trial court relied on an accomplice's jailhouse confession implicating Lee in a murder.⁸⁹ On appeal, the state characterized the hearsay as a statement against penal interest.⁹⁰ A sharply divided Court reversed Lee's conviction. In a brief footnote, the Court simply brushed aside the *Roberts* formula, finding that the hearsay category of statements against penal interest "defines too large a class for meaningful Confrontation Clause analysis."⁹¹ Eight years later, in *Williamson v. United States*, the Court faced a similar case where accomplice confessions had been admitted under Federal Rule of Evidence 804(b)(3) as statements against penal interest.⁹² There the Court avoided the constitutional issue by narrowing the application of the federal hearsay exception itself.⁹³ Nevertheless, the Court signaled the likely constitutional result under the *Roberts* formula when it noted in dictum 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."⁹⁴ In short, the Court suggested that if the accomplice statement legitimately falls within the hearsay exception, it will satisfy the Sixth Amendment as well.⁹⁵

Roberts, *Lee*, and even *Williamson* left the lower courts in a muddle. The federal circuits split in their effort to determine whether the hearsay exception for statements against interest was "firmly rooted."⁹⁶ State

88. See *Lilly v. Virginia*, 527 U.S. 116, 134 (1999); *Williamson v. United States*, 512 U.S. 594, 605 (1994) (declining to reach Confrontation Clause issue); *Lee v. Illinois*, 476 U.S. 530, 546 (1986) (holding that trial court violated Confrontation Clause by admitting custodial confession of accomplice incriminating defendant). A decade before *Roberts*, a divided Court rejected a Confrontation Clause challenge to a hearsay statement made by an accomplice, not to the police, but to another inmate. *Dutton v. Evans*, 400 U.S. 74, 74 (1970).

89. 476 U.S. at 531.

90. *Id.* at 544 n.5.

91. *Id.*

92. 512 U.S. at 599–600.

93. *Williamson* held that Federal Rule of Evidence 804(b)(3), the exception for statements against interest, only encompasses those portions of an accomplice's narrative that are "genuinely self-inculpatory." *Id.* at 600–01, 605.

94. *Id.* at 605 (quoting *Lee*, 476 U.S. at 543).

95. At least one commentator disagrees with that interpretation of *Williamson*. 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 should not view the exception for statements against penal interest as "firmly rooted").

96. Compare, e.g., *United States v. Keltner*, 147 F.3d 662, 671 (8th Cir. 1998) (admitting statements against interest as within a firmly rooted hearsay exception), *Neuman v. Rivers*, 125 F.3d 315, 319 (6th Cir. 1997) (same), *United States v. Trenkler*, 61 F.3d 45, 62 (1st Cir. 1995) (same), and *United States v. York*, 933 F.2d 1343, 1363 (7th Cir. 1991) (same), with *Crespin v. New Mexico*, 144 F.3d 641, 648–49 (10th Cir. 1998) (noting

courts were similarly divided.⁹⁷ Some lower courts skirted the issue, admitting accomplice hearsay case by case on the basis of a confusing array of "particularized guarantees of trustworthiness."⁹⁸ Others seemed disinclined to permit such hearsay.⁹⁹

Then came *Lilly*. The Supreme Court of Virginia found that Mark Lilly's confession fit easily within the *Roberts* formula.¹⁰⁰ Mark's tape recorded statement, taken as a whole, clearly implicated him in a robbery and an abduction, possibly even a homicide. Applying Virginia evidence law, the court found that Mark's entire statement properly fell within Virginia's hearsay exception for statements against penal interest, despite the fact that some portions were self-serving attempts to shift blame toward his brother.¹⁰¹ Further, the court unanimously held, the exception for statements against penal interest is firmly rooted and, therefore, Mark's hearsay statements were admissible under *Roberts*.¹⁰²

The United States Supreme Court reversed, unanimously.¹⁰³ But the Court was far from unanimous in its application of *Roberts*. Speaking for four members, Justice Stevens wrote that accomplice statements which shift or spread blame to a defendant are not within a firmly rooted hearsay exception and are, in fact, presumptively unreliable.¹⁰⁴ Speaking for three—or perhaps four¹⁰⁵—members, Chief Justice Rehnquist insisted that "genuinely self-inculpatory" statements against interest, even those

that statements against interest are not within a firmly rooted hearsay exception), *LaGrand v. Stewart*, 133 F.3d 1253, 1266–67 (9th Cir. 1998) (same), and *United States v. Flores*, 985 F.2d 770, 780 (5th Cir. 1993) (same). A few courts had chosen a middle ground, suggesting that some subcategory of statements against interest might qualify as "firmly rooted." E.g., *United States v. Matthews*, 20 F.3d 538, 546 (2d Cir. 1994).

97. Compare *People v. Newton*, 966 P.2d 563, 574 (Colo. 1998) (holding that exception for statements against interest is not firmly rooted), *Franqui v. Florida*, 699 So.2d 1312, 1319 (Fla. 1997) (same), and *State v. Kimble*, 688 So.2d 552, 564–65 (La. Ct. App. 1996) (same), with *People v. Wilson*, 21 Cal. Rptr. 2d 420, 424 (Cal. Ct. App. 1993) (same), and *Lilly v. Commonwealth*, 499 S.E.2d 522, 534 (Va. 1998) (holding exception is firmly rooted).

98. See, e.g., *Latine v. Mann*, 25 F.3d 1162, 1167 (2d Cir. 1994) (finding statement trustworthy where accomplice spoke to friend, with little time to fabricate, and statement inculpated accomplice as well as defendant); *United States v. Nazemian*, 948 F.2d 522, 530–31 (9th Cir. 1991) (finding statement trustworthy where corroborated by independent evidence and closely intertwined with self-inculpatory statements); *State v. Wilson*, 918 P.2d 826, 837–38 (Or. 1996) (finding hearsay trustworthy where accomplice made highly detailed statement, at home, to friend, voluntarily).

99. See, e.g., *United States v. Flores*, 985 F.2d 770, 781 (5th Cir. 1993) (declining to find accomplice's grand jury testimony sufficiently reliable to satisfy Confrontation Clause).

100. *Lilly v. Commonwealth*, 499 S.E.2d at 534.

101. *Id.* at 533 (citing *Chandler v. Commonwealth*, 455 S.E.2d 219, 224–25 (Va. 1995)).

102. *Id.* at 534.

103. *Lilly v. Virginia*, 527 U.S. 116, 116–19 (1999).

104. *Id.* at 131 (plurality opinion).

105. Justices O'Connor and Kennedy joined the Chief Justice's opinion. *Id.* at 144. Although Justice Thomas did not join that opinion, he wrote "I agree with THE CHIEF

that implicate an accused, may fall within a firmly rooted exception and hence may be admitted automatically under the Confrontation Clause.¹⁰⁶ Mark Lilly's statements did not qualify for such treatment, the Chief Justice argued, because the relevant portions which implicated Ben Lilly in the murder simply were not against Mark's penal interest.¹⁰⁷ Further, the Chief Justice wrote, Mark's statements were made under custodial interrogation by police, a factor which raised "special suspicion" about their reliability in light of an accomplice's "strong motivation" to exonerate himself in the eyes of the police by implicating another.¹⁰⁸

3. *The Lilly Solution: Subdividing the Labels.* — In the brief introductory segment of his opinion that gained a majority of the Court, Justice Stevens wrote: "Our concern that [Virginia's] decision represented a significant departure from our Confrontation Clause jurisprudence prompted us to grant certiorari."¹⁰⁹ But even that starting point seems doubtful. Justice Stevens was quick to challenge the Virginia Supreme Court's conclusion that statements against penal interest fit within a firmly rooted exception under the *Roberts* formula.¹¹⁰ In doing so, however, he conveniently ignored the standardless ease with which the Court has endorsed other hearsay exceptions with no more solid "roots."¹¹¹ For

JUSTICE that the Clause does not impose a 'blanket ban on the government's use of accomplice statements that incriminate defendant.'" *Id.* at 143 (Thomas, J., concurring).

106. *Id.* at 146. The Chief Justice wrote: "This case . . . does not raise the question whether the Confrontation Clause permits the admission of a genuinely self-inculpatory statement that also inculcates a codefendant, and our precedent does not compel the broad holding suggested by the plurality today." *Id.* The Chief Justice relied on *Williamson v. United States*, where the Court held that the federal hearsay exception for statements against interest encompasses only the "genuinely self-inculpatory" portions of a longer narrative. *Id.* (citing *Williamson v. United States*, 512 U.S. 594, 600-01 (1994)). There the Court suggested in dictum that such self-inculpatory statements possess the "particularized guarantees of trustworthiness" required to satisfy the Confrontation Clause. *Williamson*, 512 U.S. at 605 (quoting *Lea v. Illinois*, 476 U.S. 530, 543 (1986)).

In essence, the Chief Justice holds out for the view that those "statements against interest" that satisfy the Federal Rules will likewise satisfy the Confrontation Clause. The Chief Justice's championing of the Federal Rules of Evidence as the constitutional standard of admissibility is ironic in light of the view he expressed in dissent in *Chambers v. Mississippi*, 410 U.S. 284, 308 (1973) (Rehnquist, J., dissenting). There he condemned the Court's "constitutionalization of the intricacies of the common law of evidence." *Id.* (citation omitted).

107. *Lilly*, 527 U.S. at 146 (Rehnquist, C.J., concurring).

108. *Id.* (internal quotation marks omitted).

109. *Id.* at 123 (plurality opinion).

110. *Id.* at 130-34.

111. The historical pedigree for accomplice hearsay implicating an accused is no doubt debatable. Indeed, statements against *penal* interest, as distinguished from statements against *proprietary* interest, were not encompassed within the hearsay exceptions for most jurisdictions until well into the twentieth century. *Chambers*, 410 U.S. at 299; *Donnelly v. United States*, 228 U.S. 243, 273 (1913). But the "roots" of that exception are no less "firm" than those of many hearsay categories approved by the Court in other post-*Roberts* opinions. In fact, the Court has approved virtually every hearsay exception listed in the Federal Rules, with no consistent standard for assessing whether history, widespread

his part, Chief Justice Rehnquist attacked the state court's formalistic "labeling" of Mark's hearsay as a statement against penal interest for purposes of constitutional analysis.¹¹² But other post-*Roberts* opinions have blessed lower courts that did the same thing: pigeonholed new forms of hearsay within established hearsay labels to avoid constitutional scrutiny. Indeed, the Court itself has unabashedly stretched historical hearsay labels in an effort to fit new hearsay within old "firmly rooted" exceptions.¹¹³ In truth, Virginia's approach was more a mirror image of the Court's jurisprudence than a departure from it. The real concern in *Lilly* arose when the Court looked in the mirror and saw how easily an accomplice's blame-shifting statements fit within the *Roberts* formula.

Rather than acknowledge the futility of an approach that elevates hearsay labels to the status of constitutional doctrine, however, at least seven members of the Court continued down that same dead end street. They simply added more hearsay labels. For purposes of assessing reliability, Justice Stevens divided statements against penal interest into three subcategories.¹¹⁴ But statements in two of his categories do not implicate the confrontation right at all.¹¹⁵ As a result, he ended where he started: by concluding that statements by an accomplice implicating an accused are inherently unreliable and presumptively inadmissible. His subcategories add nothing to the constitutional analysis.¹¹⁶ For his part, Chief Justice Rehnquist labeled two subcategories of statements against interest which he suggested might qualify as "firmly rooted" under the *Roberts*

acceptance, or something else is necessary to make for sufficiently "firm" roots. Douglass, *Beyond Admissibility*, supra note 10, at 209 ("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.")

112. *Lilly*, 527 U.S. at 145 (Rehnquist, C.J., concurring).

113. In *White v. Illinois*, for example, the Court blessed spontaneous declarations and statements for purposes of medical diagnosis as firmly rooted exceptions, but failed to note that both exceptions had expanded significantly in recent years to encompass a variety of hearsay outside of traditional limits. 502 U.S. 346, 355–56 n.8 (1992). Likewise, in *Bourjaily v. United States*, the Court held that coconspirator statements fall within a firmly rooted exception. 483 U.S. 171, 182–83 (1987). At the same time, the Court redefined the exception to allow for the admission of hearsay without independent proof of conspiracy. *Id.* at 178. The Court has seemed content to endorse traditionally labeled hearsay categories as "firmly rooted," with little concern that the categories no longer retain their historical limits.

114. *Lilly*, 527 U.S. at 127 (plurality opinion) (dividing statements against penal interest into (1) voluntary admissions; (2) exculpatory evidence offered by the defendant; and (3) statements offered by the prosecution to establish guilt of an alleged accomplice of the defendant).

115. With regard to the first category, if the prosecutor offered defendant's statement as an admission, defendant would have no Confrontation Clause right—and, of course, no interest—to cross-examine himself. Regarding the second category, the defense would have no reason to cross-examine the declarant of exculpatory hearsay.

116. See Note, 1999 Supreme Court Term, supra note 43, at 240 ("[T]he plurality's subcategorization does nothing more than point out the obvious: some declarations against penal interest raise Confrontation Clause issues and some, by definition, do not.")

formula: (1) “genuinely self-inculpatory” statements that nonetheless implicate an accused;¹¹⁷ and (2) statements not made under police interrogation.¹¹⁸ In essence, the Rehnquist approach is merely a refinement of *Roberts*, an effort—much as in *Williamson*—to narrow the broad exception for statements against interest to encompass a constitutionally palatable measure of hearsay.¹¹⁹ As a result, Rehnquist’s approach only extends *Roberts*’s weakness to a greater level of detail. Any approach based on hearsay labels is subject to manipulation by prosecutors and trial courts. The post-*Roberts* history of unabashed “pigeonholing” of hearsay should have been enough to deter the Court from more of the same. Moreover, it is far from clear that the Chief Justice’s subcategories represent a class of hearsay more reliable than the general category of statements against interest.¹²⁰

In sum, *Lilly* should have convinced the Court that hearsay labels are an inadequate substitute for a realistic assessment of reliability. Further, the case should have awakened the Court to the notion that a Confrontation Clause jurisprudence based on hearsay labeling is too easily subject

117. *Lilly*, 527 U.S. at 146 (Rehnquist, C.J., concurring). As examples, the Chief Justice cited Court of Appeals opinions which addressed statements inculcating both the declarant-accomplice and the defendant equally. See *id.* (citing *United States v. Keltner*, 147 F.3d 662, 670 (8th Cir. 1998); *Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir. 1996)).

118. *Lilly*, 527 U.S. at 146–47.

119. The difference, of course, is that in *Williamson* the Court simply narrowed its construction of the federal rules. See *Williamson v. United States*, 512 U.S. 594, 600–01 (1994). In *Lilly*, a state prosecution, the Court was forced to address the breadth of the hearsay exception on constitutional terms.

120. Limiting admissible hearsay to the subcategory of “genuinely self-inculpatory” statements makes some sense when it comes to reliability. After all, the notion that a statement will genuinely subject the declarant to some loss or penalty forms the basis for the hearsay exception. But the making of genuine admissions is also a technique of clever liars. Worse yet, subcategorizing statements, as the Chief Justice proposes, inevitably leads to the redaction or even manipulation of raw evidence. It is hard to say, for example, that a jury has a more accurate impression of hearsay when it hears only that “genuinely self-inculpatory” part of a tape where the accomplice says, “Dan and I killed Vince,” rather than the complete narrative where the accomplice spells out the details of their respective roles.

The Chief Justice’s notion that “statements to fellow prisoners” or “confessions to family members,” *Lilly*, 527 U.S. at 147, are inherently more reliable than statements to police is particularly suspect for at least four reasons. First, though an accomplice’s statement to police is almost always motivated by the interest in self-preservation, at least that motive is discernable to a judge or jury evaluating the hearsay. The motives for shading or embellishing stories told to jailhouse snitches or family members may be far more difficult to unearth. Second, the theory supporting the exception for statements against interest—the notion that most people will not make statements that will prove harmful to their own interests unless such statements are true—seldom comes into play when the “confession” is to a family member or friend. The confessor does not expect any adverse consequence from the confession to a confidant. He is just as likely to be bragging as to be purging his soul. Third, accomplices who confess to police typically expect that police will investigate the accuracy of what they say. For cooperators motivated purely by self-interest, fear of being caught in a lie may be the best motivator for honesty. Finally, hearsay related in court by jailhouse snitches or defendants’ family members raises serious concerns about the motives and credibility of that hearsay-relating witness.

to manipulation and near random results.¹²¹ But the shock of recognition proved too weak, or the comfort and convenience of the *Roberts* formula too strong. The Court just clashed over new labels.

B. *Reliability is Relative: Considering the Alternatives to the Accomplice's Hearsay Confession*

In *Lilly*, at least seven Justices agreed on a simple notion: purely blame-shifting jailhouse confessions by an accomplice are unreliable. Surrounded by police and offered an opportunity to “help yourself,” or an admonition not to “take the full rap,” an accomplice may have a near irresistible urge to say whatever he believes will further his cause. No member of the Court could accept a constitutional rule that automatically admitted such statements in evidence.

I share the Court's basic distrust of blame-shifting accomplices. But even if we accept the logic of the Court's “general approach,” it seems that the Court has skipped a step by making the easy leap from its premise—blame-shifting confessions are unreliable—to its conclusion that blame-shifting confessions are constitutionally inadmissible. If reliability has any legitimacy as a measure of the confrontation right, it is only as a substitute for the real thing: confrontation. After all, that is how the reliability formula got started. Hearsay is admissible, the Court said in *Roberts*, where it is just as reliable as cross-examined testimony.¹²² Under the Court's own reasoning, then, reliability is a comparative concept. Hearsay is only one side of the reliability equation. On the other side is the live, cross-examined testimony of the same declarant.

In the case of accomplice hearsay, that comparison is of more than theoretical importance. It reflects, and affects, the real choices that prosecutors make before trial. When the law of evidence or the law of confrontation is likely to exclude hearsay, prosecutors typically have the means to turn hearsay into live testimony. They simply have to choose

121. Under the *Roberts* approach, it is the hearsay label, rather than any realistic assessment of reliability, that ultimately makes the difference in most cases. In *White v. Illinois*, for example, the Court allowed hearsay statements from a small child, recounting instances of abuse to her babysitter, her mother, a police officer, a nurse, and a physician, all of whom questioned the child in an effort to investigate the complaint. 502 U.S. 346, 349–50 (1992). By contrast, in *Idaho v. Wright*, the Court excluded similar hearsay statements made by a child to a physician. 497 U.S. 805, 826–27 (1990). It is difficult to draw factual distinctions suggesting the hearsay in *White* was likely to be more reliable than the hearsay in *Wright*. Instead, the difference in the results is best explained by the different labels attached to the hearsay. The statements in *White* were admitted under Illinois' generous version of the exceptions for spontaneous declarations and for statements for purposes of medical diagnosis. *White*, 502 U.S. at 350–51. In *Wright*, the trial court admitted the hearsay under the residual, or catch-all, exception. 497 U.S. at 811–12. The “firmly rooted” hearsay in *White* passed the *Roberts* test. The non-firmly rooted hearsay in *Wright* did not.

122. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (“[T]he Clause countenances only hearsay marked with such trustworthiness that ‘there is no material departure from the reason of the general rule.’” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934))).

their tactics, and the price they are willing to pay. In many cases, prosecutors will have three alternatives to hearsay. First, the prosecutor may control the timing and order of prosecutions.¹²³ She may elect to indict, convict, and sentence the accomplice before proceeding against others, in an effort to limit the accomplice's Fifth Amendment privilege and clear the way for live testimony.¹²⁴ Second, the prosecutor may immunize the accomplice and obtain an order compelling him to testify.¹²⁵ Third, the prosecutor may offer the accomplice a deal: typically an opportunity to plead guilty to a much reduced charge with a reduced sentence in exchange for pretrial cooperation and trial testimony.¹²⁶ Rational prosecutors, of course, will take into account the Court's confrontation doctrine and the law of evidence in choosing whether to pursue one or more of these alternatives before trial. Where the law makes it less likely that important hearsay will be admitted in evidence, the prosecutor becomes more likely to find an alternative.

The dealmaking alternative has become the most popular among prosecutors.¹²⁷ That approach gives the prosecutor the most effective control over the witness. The prosecutor purchases not only the testimony, but also the opportunity to prepare the accomplice to testify. And

123. Of course, the prosecutor's power to control the sequence of trials is not absolute. Ultimately, the court controls the scheduling of its own docket. Unless the prosecutor delays in charging one accomplice—an option often foreclosed by rules limiting the time between arrest and indictment, e.g., 18 U.S.C. § 3161(b) (1994)—she may not always be able to choose which accomplice goes to trial first.

124. U.S. Dep't of Justice, United States Attorneys' Manual, § 9-27.600(B)(1)(a), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm# (last visited October 10, 2001) (on file with the *Columbia Law Review*) [hereinafter U.S. Attorneys' Manual] (“[I]f time permits, the person may be charged, tried, and convicted before his/her cooperation is sought in the investigation or prosecution of others. Having already been convicted himself/herself, the person ordinarily will no longer have a valid privilege to refuse to testify . . .”). The dissent in *Singleton II* offered this alternative as a means to obtain accomplice testimony untainted by deals exchanging testimony for leniency. See *United States v. Singleton*, 165 F.3d 1297, 1309 (10th Cir. 1999) (en banc) (Kelly, J., dissenting). For prosecutors in many cases, however, this option proves impractical. The Court has rejected the notion that a defendant's Fifth Amendment privilege expires once he is convicted. *Mitchell v. United States*, 526 U.S. 314, 325–27 (1999) (citing *Estelle v. Smith*, 451 U.S. 454, 462–63 (1981)). Until sentenced, a defendant may still have a legitimate fear that his statements might be used against him. *Id.* Moreover, in many cases, a defendant may be convicted of, or plead guilty to, one offense, yet still face at least the theoretical risk of prosecution for other related offenses. As a result, the option of compelling an accomplice's testimony by waiting until his legitimate Fifth Amendment concerns have been removed is often impractical.

125. See *supra* note 29. The option of compelling testimony under use immunity was not available to the prosecutor in *Lilly*, since Virginia does not have a comprehensive use immunity statute.

126. Deals involving the exchange of leniency for testimony have become commonplace throughout the American criminal justice system. See Weinstein, *supra* note 35, at 563–65.

127. See *supra* note 48.

an accomplice who undergoes hours of pretrial preparation is more predictable, and hence more valuable, than one who is forced to testify under a simple grant of immunity.¹²⁸

For their part, most accomplices prove willing to sell.¹²⁹ The confessing accomplice is unique among hearsay declarants in at least one critical respect: He has committed crimes which he has confessed in the presence of the police. Almost by definition, then, the confessing accomplice is a declarant over whom the prosecutor holds tremendous leverage. The threat, or the reality, of his own prosecution and sentencing offers a tremendous inducement for the confessing declarant to cooperate as a witness for the prosecution at trial.¹³⁰

In sum, where the law of confrontation is likely to exclude “unreliable” blame-shifting hearsay from an accomplice, prosecutors and accomplices are likely to make pretrial choices to fill that evidentiary void. Most often, they will fill it by making a deal for equally blame-shifting live testimony. For that reason, the notion of comparative reliability—hearsay versus cross-examined testimony—which rests at the heart of the *Roberts* formula is probably an accurate reflection of the world of accomplice confessions. But the *Lilly* Court never completed the comparison. If reliability is the Court’s aim, then it asked the wrong question in *Lilly*. The real question is not simply whether blame-shifting hearsay from an accomplice is unreliable. The complete question is whether the hearsay version is likely to be less reliable than the purchased and polished testimony that most likely will take its place.¹³¹

128. Of course, the dealmaking alternative benefits the prosecutor in other ways as well. It usually leaves her with an assured conviction of the accomplice—albeit to a reduced charge or sentence—and avoids the time consuming and unwieldy process of sequencing trials to circumvent an accomplice’s invocation of the Fifth Amendment.

129. About one in five federal defendants is sentenced following a “substantial assistance” motion by the government. U.S. Sentencing Comm’n, 1996 Sourcebook of Federal Sentencing Statistics 39 fig.G (1997), available at <http://www.ussc.gov/annrpt/1996/fig-g.pdf> (on file with the *Columbia Law Review*); supra note 48.

130. In federal cases, the Sentencing Guidelines have enhanced the power of prosecutors to persuade accomplices to cooperate. Many accomplices find that a “substantial assistance” motion under Guidelines section 5K1.1 is their only hope of obtaining a sentence below the prescribed guideline and below an otherwise applicable mandatory minimum sentence. Weinstein, supra note 35, at 573–78. Typically, the government has exclusive control over the filing of such a motion. See U.S. Sentencing Guidelines Manual § 5K1.1 (2000) (providing for downward departure “[u]pon motion of the government”). Where the accomplice has confessed and faces an overwhelming case against him, his only choices may be to please the government or to accept the full sentence prescribed by the Guidelines.

131. In this respect, the *Lilly* opinions fall short of the Court’s analysis in earlier cases where the Court explicitly compared the reliability of certain hearsay to that of cross-examined courtroom testimony. See, e.g., *White v. Illinois*, 502 U.S. 346, 355–56 (1992) (noting that factors supporting admissibility of spontaneous declarations and statements for obtaining medical care “cannot be recaptured even by later in-court testimony”); *United States v. Inadi*, 475 U.S. 387, 395 (1986) (finding that courtroom testimony by a

C. *Pick Your Poison: Blame-Shifting Hearsay or the Well Paid, Well Rehearsed Accomplice Witness?*

The law of evidence assumes that self-condemnation is reliable. The hearsay exception for statements against interest rests on "the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."¹³² *Lilly* is not the first case to point out, however, that the traditional assumption fails to capture the reality of most jailhouse confessions by accomplices.¹³³ No doubt some confessions stem from true remorse, from a genuine urge not to delay the inevitable, or even from a selfless desire to free others from false suspicion. But the typical motives of the confessing accomplice seldom reach that lofty plane. More often, the confession, taken as a whole, seems calculated to benefit the confessor by shifting primary criminal responsibility to another. When it comes to reliability, the fact that parts of the confession are self-inculpatory is almost incidental. It is difficult to "finger" your criminal colleague without admitting some participation in the crime yourself. Indeed, a clever "snitch" understands that the occasional admission of culpability can enhance the likelihood that the government will buy what he has to sell.¹³⁴ It is hardly surprising, therefore, that the Court finds blame-shifting hearsay confessions unreliable. Though such confessions may contain an element of self-condemnation, self interest is most often the motivating factor.¹³⁵

Of course, the same self interest motivates courtroom testimony by accomplices. The accomplice testifies to avoid jail, to reduce his own sentence, and sometimes even to save his life. Like the jailhouse confession, his courtroom testimony is blame-shifting, or at least blame-sharing. That

coconspirator "seldom will reproduce . . . the evidentiary value of his statements during the course of the conspiracy").

132. Fed. R. Evid. 804(b)(3) advisory committee's note (citing *Hileman v. Northwest Eng'g Co.*, 346 F.2d 668, 669-70 (6th Cir. 1965)). Justice Stevens echoed this assumption in *Lilly*: "The exception [for statements against interest] is founded on the broad assumption 'that a person is unlikely to fabricate a statement against his own interest at the time it is made.'" *Lilly v. Virginia*, 527 U.S. 116, 126-27 (1999) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 299 (1973)).

133. See, e.g., *Lee v. Illinois*, 476 U.S. 530, 541 (1986); *Bruton v. United States*, 391 U.S. 123, 136 (1968).

134. In the words of the Court, "'One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.'" *Lilly*, 527 U.S. at 133 (quoting *Williamson v. United States*, 512 U.S. 594, 599-601 (1994)).

135. Often the self-inculpatory elements are no more than an acknowledgment of the self-evident fact that the police have caught the accomplice red-handed. When the accomplice believes that denial of guilt would be futile, it is unlikely that he regards even the self-inculpatory portions of his statement as being adverse to his interests. More likely, in confirming what the police already know about his own guilt, the accomplice is merely trying to convince police that he is knowledgeable and accurate when he describes his colleague's more culpable role in the offense.

is why the prosecutor wants him as a witness in the first place.¹³⁶ However, there are significant differences between the hearsay confession and the live, purchased version. To complete the reliability comparison that the *Lilly* Court omitted, we need to consider those differences. The most obvious difference, of course, is that courtroom testimony is live, in full view of the jury, and—most important—subject to cross-examination. But before we turn to cross-examination,¹³⁷ we should understand two other important differences: (1) the differing incentives of accomplices who confess to police following arrest and of those who become cooperating witnesses at trial, and (2) the effect of pretrial witness preparation.

1. *Incentives.* — We can begin with the notion that both the jailhouse confession and the accomplice's courtroom testimony are motivated primarily by self interest: that is, the accomplice "confesses" or testifies in order to save himself.¹³⁸ The incentive to implicate another for purposes of self preservation is the disease that threatens the integrity of all accomplice information, whether hearsay or live testimony.¹³⁹ There is, however, one major difference. Often, by the time the accomplice appears at trial as a cooperating witness, that disease has progressed dramatically. The incentive has increased for two reasons.

First, the cooperating witness has committed himself. He has surrendered any resistance to his own prosecution and placed his fate in the hands of the prosecutor. Typically, his agreement to testify is merely one part of a more comprehensive agreement. That agreement was carefully

136. In rare cases prosecutors may find evidentiary uses for accomplice confessions that are not blame-shifting at all. In a case charging defendant with receipt of stolen property, for example, the prosecutor may wish to offer the thief's confession merely to establish that the goods were stolen.

137. See *infra* text accompanying notes 192–201.

138. It is, at a minimum, curious that the law of evidence is even more skeptical of accomplice confessions when they exculpate a defendant than when they inculpate him. See Fed. R. Evid. 804(b)(3) (providing that such statements offered to exculpate the accused are not admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement"). As the Court once observed:

Common sense would suggest that [an accused accomplice] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large.

Washington v. Texas, 388 U.S. 14, 22–23 (1967).

139. "Accomplice plea agreements tend to produce unreliable testimony because they create an incentive for the accomplice to shift blame to the defendant or other coconspirators." Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 *Cornell L. Rev.* 800, 802 (1987). For this reason, when accomplices testify in exchange for leniency, it is typical for courts to instruct the jurors that they should weigh such testimony with particular caution. See *United States v. Singleton*, 165 F.3d 1297, 1309 (10th Cir. 1999) (Kelly, J., dissenting) (*Singleton II*) (noting that cautionary jury instructions are an inadequate protection against unreliable accomplice testimony); see also Trott, *supra* note 34, at 1421–23 (quoting a sample accomplice-witness instruction).

drafted by the prosecutor for the purpose of maintaining maximum leverage over the cooperating accomplice.¹⁴⁰ Most often, the cooperator has agreed to plead guilty to a specified charge. He has probably waived a host of collateral rights, including any right to appeal his sentence.¹⁴¹ Most important of all, before he testifies, he typically has entered his guilty plea and is awaiting his own sentencing.¹⁴² He knows that the same prosecutor who questions him as a witness will speak at his own sentencing. He has no alternative but to be as “cooperative” as possible. By contrast, while the recently arrested accomplice has an incentive to curry favor with the police, he has not committed his fate entirely into their hands. The possibility of a successful defense, even though remote, remains exactly that: a possibility. To some degree, he remains an adversary. He has not yet signed on to the law enforcement team. In sum, he has an incentive to help himself, but that incentive is tentative. His cooperation is begrudging.

Second, the law encourages prosecutors and police to offer more powerful inducements to cooperating witnesses than to the recently arrested accomplice. The law of confessions treats such inducements with caution, while the law regarding cooperating witnesses places virtually no limit on the incentives that may lead an accomplice to testify. When police interrogate the accomplice following his arrest, they generally seek evidence for two purposes: (1) to convict the accomplice himself; and (2) to identify and convict any colleagues he may implicate. To satisfy their first purpose, police must follow the rules that will make the accomplice’s confession admissible in his own trial. Accordingly, they must read him his Miranda rights and obtain a waiver.¹⁴³ Further, they must be cautious to avoid explicit promises of leniency or other benefits in order to induce the confession. While such promises do not per se invalidate a custodial confession,¹⁴⁴ they can be important factors when a court ulti-

140. For a list of considerations for prosecutors in drafting plea-and-cooperation agreements, see Ann C. Rowland, *Effective Use of Informants and Accomplice Witnesses*, 50 S.C. L. Rev. 679, 685–86 (1999).

141. Federal plea agreements now routinely include waiver-of-appeal provisions. For a discussion of the validity of such waivers, see Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist’s Guide to Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2029–32 (2000).

142. Federal prosecutors and cooperating accomplices typically follow this sequence for two reasons. First, it creates maximum control over the cooperating witness, who has committed himself entirely by entering his own guilty plea. Second, by delaying sentencing until after his testimony, the cooperating accomplice has an opportunity to impress the sentencing judge by demonstrating that he upheld his end of the bargain, testified fully, and produced results helpful to the prosecution.

143. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

144. See, e.g., *United States v. Pierce*, 152 F.3d 808, 812–13 (8th Cir. 1998) (holding confession voluntary despite officer’s comment that defendant could “get off pretty easy” if he cooperated); *United States v. Dillon*, 150 F.3d 754, 758 (7th Cir. 1998) (finding confession voluntary despite agent’s promise to inform prosecutor of cooperation); *United*

mately passes judgment on the voluntariness of the confession.¹⁴⁵ In the context of custodial interrogation, therefore, police learn to avoid explicit promises and to rely instead on more general suggestions that cooperation will benefit the suspect.

By contrast, the law imposes virtually no restraint on the inducements a prosecutor may offer to obtain the trial testimony of a cooperating witness.¹⁴⁶ Prosecutors may offer money,¹⁴⁷ immunity from criminal charges,¹⁴⁸ substantial sentence reductions,¹⁴⁹ and—in capital cases—even life itself¹⁵⁰ as inducements to testify. In the celebrated prosecution of Jimmy Hoffa, the Supreme Court rejected a Due Process challenge to the testimony of a witness whose cooperation was secured by release from jail, freedom from serious felony charges in both state and federal courts, and financial compensation.¹⁵¹ The annals of American criminal trials

States v. Byram, 145 F.3d 405, 407–08 (1st Cir. 1998) (holding confession voluntary despite officer's assurance that defendant was not in danger of prosecution).

145. See, e.g., Clanton v. Cooper, 129 F.3d 1147, 1158–59 (10th Cir. 1997) (holding confession involuntary where agent promised leniency and lied about evidence against accused); United States v. Rogers, 906 F.2d 189, 191 (5th Cir. 1990) (holding confession involuntary where officer's inducements were combined with other factors).

146. Indeed, nothing prohibits prosecutors from actively creating their leverage in the first instance. It is not uncommon for prosecutors to initiate charges against lower level accomplices for the principal purpose of pressuring them into “flipping” against a more culpable crime boss. See United States v. Paguio, 114 F.3d 928, 930 (9th Cir. 1997) (holding that indicting defendant's fiancée and son for the purpose of pressuring them to testify did not violate Due Process); Van Kessel, *supra* note 31, at 510.

147. See United States v. Anty, 203 F.3d 305, 311 (4th Cir. 2000); United States v. Albanese, 195 F.3d 389, 394–95 (8th Cir. 1999); United States v. Garcia Abrego, 141 F.3d 142, 151 (5th Cir. 1998).

148. The federal immunity statute provides for use immunity upon motion by the prosecutor. See 18 U.S.C. § 6003. Further, prosecutors may enter into use immunity agreements or even nonprosecution agreements which are enforceable as contracts. See United States v. Thompson, 25 F.3d 1558, 1562 (11th Cir. 1994); cf. Santobello v. New York, 404 U.S. 257, 262 (1971) (holding that plea agreements are enforceable as contracts). The Department of Justice authorizes its prosecutors to enter into nonprosecution agreements where “cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.” U.S. Attorneys' Manual, *supra* note 124, at § 9-27.600(A).

149. See United States v. Singleton, 165 F.3d 1297, 1301 (10th Cir. 1999) (en banc) (Singleton II) (noting the long established practice of testimony under a plea bargain that promises a reduced sentence); United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (same). The Federal Sentencing Guidelines expressly provide for downward sentencing departures based on cooperation in the investigation or prosecution of others. See U.S. Sentencing Guidelines Manual § 5K1.1 (2000). The Guidelines include testimony among the forms of cooperation to be rewarded. *Id.*

150. In *Lilly*, for example, Gary Barker avoided potential capital charges by pleading guilty and agreeing to testify. Brief for Petitioner at 5, *Lilly v. Virginia*, 527 U.S. 116 (1999) (No. 98-5881).

151. The *Hoffa* informant, Edward Partin, was jailed in Baton Rouge, Louisiana, on state charges and was under federal indictment for embezzling union funds. See *Hoffa v. United States*, 385 U.S. 293, 297–98 (1966). Federal agents arranged his release from jail, after which he met with Hoffa in Nashville, Tennessee, and obtained evidence regarding Hoffa's efforts to bribe jurors in his own ongoing labor racketeering trial. Hoffa was later

are filled with examples of witnesses even more handsomely rewarded for their cooperation, while courts scarcely bat an eye.¹⁵² A recent flurry of federal decisions has made it clear that neither federal witness tampering statutes nor the Constitution stand in the way of such inducements from prosecutors, even though comparable conduct would be criminal if practiced by others.¹⁵³ Federal law now accords prosecutors unparalleled

charged and convicted of jury tampering. Partin, the government's principal witness, was never prosecuted for his state or federal offenses, and his wife was paid \$1200 by the government. *Id.* at 296–98. Among other claims on appeal, Hoffa argued that the government violated his right to Due Process through the use of a witness who had such clear motives to lie. The Court rejected the claim. Justice Stewart wrote for the Court:

The petitioner is quite correct in the contention that Partin, perhaps even more than most informers, may have had motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible. The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.

Id. at 311.

152. Among the more notorious cooperators of recent years was Salvatore (“Sammy the Bull”) Gravano, whose testimony helped secure convictions of Mafia bosses John Gotti and John Gambino. Gravano, who admitted committing over a dozen murders, received a substantially reduced sentence and a spot in the federal witness protection program which, characteristically, he later abused by committing new drug distribution crimes. See Jerry Seper, ‘Sammy the Bull’ and Son Plead Guilty to Drug Charges, *Wash. Times*, May 26, 2001, at A3. Another infamous cooperator was convicted spy John Walker, who testified at the trial of his confederate, Jerry Whitworth. Walker himself received a life sentence, but his cooperation netted more lenient treatment for his son, Michael, whose potential life sentence was reduced to twenty-five years. See *Trott*, *supra* note 34, at 1426. There are cases, however, where coddling of cooperators has exceeded the tolerance of courts and resulted in dismissal of criminal charges based on government misconduct. The most notorious recent example may be the thwarted prosecutions of El Rukn gang members in Chicago, where cooperating witnesses were allegedly given drugs and alcohol, and allowed to have sex in prison and in prosecutors’ offices. *United States v. Burnside*, 824 F. Supp. 1215, 1226–30, 1241–42, 1272 (N.D. Ill. 1993); Jeffrey Toobin, *Capone’s Revenge: How Far Can a Prosecutor Go to Secure Crucial Testimony from Plea Bargainers?*, *New Yorker*, May 23, 1994, at 46, 46.

153. Troubled by the growing parade of accomplices who testify under favorable plea agreements with the government, a Tenth Circuit panel sparked a national debate by ruling that federal prosecutors violate the criminal anti-gratuity statute, 18 U.S.C. § 201(c)(2), when they offer leniency in exchange for testimony. *United States v. Singleton*, 144 F.3d 1343, 1348, 1358 (10th Cir. 1998) (*Singleton I*), vacated, 144 F.3d 1361 (10th Cir. 1998). The en banc court quickly reversed course, noting that offers of leniency by prosecutors in exchange for testimony are “ingrained in our criminal justice system.” *Singleton II*, 165 F.3d at 1301. *Singleton I* spawned a wave of litigation, which ultimately resulted in decisions from several federal Courts of Appeals, all of which held that prosecutors do not violate section 201(c)(2) by entering into plea agreements which provide potential sentencing benefits as a result of testimony. See, e.g., *United States v. Hunte*, 193 F.3d 173, 175–76 (3d Cir. 1999); *United States v. Condon*, 170 F.3d 687, 688–89 (7th Cir. 1999). In the wake of the *Singleton* cases, some courts have gone an additional step, ruling that the prosecutor does not violate section 201(c)(2) by offering monetary payments to cooperating informants who later testify at trial. See, e.g., *United States v. Anty*, 203 F.3d 305, 311 (4th Cir. 2000); *United States v. Barnett*, 197 F.3d 138, 145 (5th Cir. 1999); *United States v. Albanese*, 195 F.3d 389, 395 (8th Cir. 1999).

power to reward cooperators or punish accomplices who refuse to testify for the government.¹⁵⁴ In answer to the question, "How much can the prosecutor pay for cooperation?" it is hardly an exaggeration to answer, "Whatever it takes."

In sum, when we assess reliability, there is no reason to favor the live testimony of a cooperating accomplice over a blame-shifting jailhouse confession on the basis of the incentives which may shape, and shade, the accomplice's story. If anything, the incentive to favor the government is stronger by the time the accomplice finds his way to the witness stand.

2. *Polishing Testimony*. — In the British legal system, the rules of ethics prohibit barristers from discussing the case with witnesses before trial.¹⁵⁵ In the American system, witness preparation is an art form.¹⁵⁶ American prosecutors are among its most practiced and capable artists.¹⁵⁷ Cooperating accomplices receive much of their artistic attention.¹⁵⁸ As a result, the testimony presented to a jury may bear only a distant relation to the far less calculated version captured on a police videotape in the hours after an arrest. A prominent defense attorney in the Oklahoma City bombing case once remarked, "The Government has a room at the Marriott Hotel in which witnesses are transmogrified. I

154. In federal courts, tough sentencing guidelines and mandatory penalties have raised the stakes for criminal defendants, especially for drug crimes. See 21 U.S.C. § 841 (1994). At the same time, the Guidelines have given prosecutors sole discretion to file "substantial assistance" motions which often provide defendants their only way out of those sentences. See U.S. Sentencing Guidelines Manual, § 5K1.1 (2000). As a result, the "market" for cooperation has become "overheated." Weinstein, *supra* note 35, at 564.

155. See The General Standards, Code of Conduct of the Bar of England and Wales ¶ 6.1.5 (1990).

156. American texts on trial advocacy offer detailed instruction in the art of witness preparation. See, e.g., Steven Lubet, *Modern Trial Advocacy* 29–30, 79–81 (2d ed. 1997); Thomas A. Mauet, *Trial Techniques* 474–79 (4th ed. 1996).

157. My comment is not intended to suggest a general disregard for the ethical standards of prosecutors. Indeed, my own experience with colleagues in two United States Attorneys' Offices, on an Independent Counsel's staff, and throughout the Department of Justice would suggest quite the opposite. And others, more experienced than I, share that view. See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *Fordham L. Rev.* 1695, 1702 (2000) ("[N]otwithstanding the sporadic wimps and whiners, the occasional Batmen and blockheads, from what I have known of prosecutors and former prosecutors, I consider them by and large the flower of the bar."). But see Michael Higgins, *Fine Line*, A.B.A. J., May 1998, at 52, 53 (commenting that coaxing or helping a witness to lie is common among both criminal defense lawyers and prosecutors).

Obviously, an unethical prosecutor can wreak havoc on justice through the process of witness preparation. But the larger problem is not unethical prosecutors. It is a system of rules which allow and even encourage counsel to present carefully scripted, polished trial testimony that is usually several generations removed from its original form. In truth, the good faith and professionalism of prosecutors—even more than the right of cross-examination—is probably the accused's greatest protection against false testimony by accomplices. But in an adversarial system, this puts a heavy load on fallible human beings who must simultaneously seek both truth and convictions.

158. Trott, *supra* note 34, at 1396.

wish I had a room where I could do that to people.”¹⁵⁹ The statement is not an exaggeration.

One of the most troubling characteristics of accomplice hearsay is that the police have a hand in creating it; and often they create it in secret.¹⁶⁰ Blame-shifting confessions emerge from jailhouse interrogations where government agents, shielded from adversarial scrutiny, coax an accomplice into implicating others. The circumstances sound too much like the Star Chamber, where Crown prosecutors labored behind closed doors to procure confessions from accomplices.¹⁶¹ The typical result in Star Chamber prosecutions was a signed statement crafted for use at the trial of a coconspirator, with little way of knowing just how the statement came into being.¹⁶²

There are many dangers in jailhouse confessions induced in secret by government agents. One is that the accomplice simply becomes a mouthpiece of the prosecution. Directed by leading questions, asked simply to confirm what the police “already know,” the accomplice may do nothing more than parrot the results of other police investigation.¹⁶³ The danger in such a confession is multiplied because the accomplice has “tailored” his confession to fit the independent evidence. When the hearsay is presented in court, his story may appear to be corroborated when,

159. The statement comes from Michael E. Tigar, lead defense counsel for defendant Terry Nichols. Jo Thomas, *Oklahoma Bomb Defense Accuses U.S. of Misconduct*, N.Y. Times, Jan. 4, 1997, at A7.

160. In her richly annotated article, Professor Berger argues that fear of secret, nonadversarial creation of evidence was a principal factor giving rise to the Confrontation Clause. See Berger, *supra* note 19, at 572–75.

161. *Id.* at 569–70.

162. The Supreme Court has traced the genesis of the American confrontation right to reactions against this form of “trial by affidavit” in general and to the celebrated treason prosecution of Sir Walter Raleigh in particular. *California v. Green*, 399 U.S. 149, 156–57 (1970). Though some commentators question that connection, 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), my own view is that the Court’s historical account is essentially accurate. Douglass, *Beyond Admissibility*, *supra* note 10, at 235–36 (discussing evidence that American colonists “bristled against attempts by George III to revive elements of the inquisitorial system”).

163. Police often induce confessions by confronting a suspect with evidence intended to show that denials would be futile. See, e.g., *United States v. Cody*, 114 F.3d 772, 776 (8th Cir. 1997) (holding confession voluntary where police confronted defendant with cocaine, scale, and gun seized from dumpster near his house); *Green v. Scully*, 850 F.2d 894, 903–04 (2d Cir. 1988) (finding confession voluntary where police informed defendant that his fingerprints matched those in victim’s apartment).

Indeed, the tactic often includes exaggeration or outright lies about the evidence already in police hands. See Peter Carlson, *Cops, Suspects and the New Art of Interrogation*, *Wash. Post Mag.*, Sep. 13, 1998, at 6, 19 (“[Y]ou’ve got to convince him that lying is futile. So it’s time for you to start lying, too.”). Though the use of false statements to induce confessions may reflect on the voluntariness of a confession, there is no constitutional rule prohibiting the tactic. See, e.g., *Lucero v. Kerby*, 133 F.3d 1299, 1311 (10th Cir. 1998) (holding confession voluntary even though police falsely stated that defendant’s fingerprints were found in victim’s home).

in fact, the opposite is true. The supposedly corroborating facts have created his story in the first place.¹⁶⁴

In theory, live accomplice testimony should remove that danger. Indeed, one theory behind the confrontation right is that trial confrontation requires the government to create testimonial evidence in real time, in full view of the defendant, the jury, and the public.¹⁶⁵ In theory at least, both adversaries—prosecution and defense—get to hear the raw, original, first-hand account of the witness. They both get a fair opportunity to dig for the truth.¹⁶⁶ In a system where cooperating witnesses undergo hours of careful preparation by the prosecutor, however, the reality of accomplice testimony seldom resembles that theory.

Moreover, in many cases, the accomplice's courtroom testimony has undergone an even more secret process of creation than the typical jailhouse confession. In fact, most police interrogation is far less secretive than most prosecutorial witness preparation. Mark Lilly's confession was tape recorded and offered verbatim at trial.¹⁶⁷ Many police departments routinely tape record, or even videotape, interrogations.¹⁶⁸ Almost all police are trained to take notes during such interviews and most make a regular practice of memorializing them in investigative reports. When the prosecution offers the hearsay confession, those tapes, reports, and often even notes are discoverable.¹⁶⁹ By contrast, few prosecutors even

164. Ben Lilly raised such an objection to Mark's hearsay, arguing that police induced Mark to implicate Ben by statements they made before the interrogation. After first interviewing Barker, police began their discussion with Mark by telling him, "[t]hey said you didn't do it." Brief for Petitioner at 6 n.1, *Lilly v. Virginia*, 527 U.S. 116 (1999) (No. 98-5881).

165. Berger, *supra* note 19, at 561-62.

166. Cross-examination, the Court tells us, is the "greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158 (quoting 5 John Henry Wigmore, *Evidence* §1367). One wonders whether the Court had in mind the often counterproductive efforts mounted by defense counsel faced with well rehearsed, "transmogrified" cooperating witnesses.

167. *Lilly*, 527 U.S. at 121-22.

168. Policies in Alaska and Minnesota call for routine taping of all police station interrogations. Carlson, *supra* note 163, at 23. Canadian rules require police and prosecutors to record all conversations with cooperating accomplices. Scheck et al., *supra* note 33, at 157.

169. *Brady v. Maryland*, 373 U.S. 83, 86 (1963), requires the prosecution to disclose exculpatory information where it is material to the defense. And *Giglio v. United States*, 405 U.S. 150, 154 (1972), extends that rule to information that may impeach government witnesses. The rule applies equally where the government "witness" is a hearsay declarant. *United States v. Williams-Davis*, 90 F.3d 490, 513-14 (D.C. Cir. 1996); *United States v. Hawryluk*, 658 F. Supp. 112, 116-17 (E.D. Pa. 1987).

In federal courts, Rule 16(a)(1)(C) of the Rules of Criminal Procedure requires pretrial disclosure of "[d]ocuments and [t]angible [o]bjects" which are "intended for use by the government as evidence in chief at the trial." Fed. R. Crim. P. 16(a)(1)(C). Tape recorded or written hearsay statements should be covered by the Rule.

The application of other discovery principles to hearsay is more problematic. The Jencks Act requires federal prosecutors to provide the defense with prior written or recorded statements of government witnesses. 18 U.S.C. § 3500 (1994). But courts are

consider videotaping or tape recording their pretrial witness interviews. Police or investigating agents may take notes, but most prosecutors discourage the creation of formal reports documenting those meetings.¹⁷⁰ A doctrine akin to a prosecutor's work product privilege—formalized in federal practice by Rule 16 of the Rules of Criminal Procedure and by the Jencks Act—typically prevents discovery of notes generated in those sessions.¹⁷¹ Indeed, it is common for prosecutors to spend dozens of pretrial hours with cooperating witnesses without creating one word of discoverable material.¹⁷²

There is an obvious danger that police, either intentionally or inadvertently, will induce an accomplice to tailor his post-arrest statements to suit what the police already know. But that danger is not unique to hearsay. Indeed, that danger actually increases as a cooperating witness is prepared for his trial testimony.¹⁷³ Even if prosecutors and police take pains

divided in determining whether hearsay declarants are "witnesses" within the meaning of the Act. Compare *Williams-Davis*, 90 F.3d at 512-13 (holding hearsay declarant is not a "witness" under the Jencks Act), with *United States v. Mills*, 810 F.2d 907, 910 (9th Cir. 1987) (finding that declarants are "prospective government witnesses"). At a minimum, however, when a police officer or government agent testifies to relate hearsay statements, the officer is a government "witness," and her prior written statements, including her memoranda and notes, are discoverable. *United States v. Welch*, 810 F.2d 485, 490-91 (5th Cir. 1987).

For a more detailed discussion of the application of the rules of criminal discovery to cases involving prosecution hearsay, see Douglass, *Balancing Hearsay*, *supra* note 43, at 2160-74.

170. Federal courts have held that the Jencks Act allows prosecutors to instruct agents not to take notes during witness interviews. *United States v. Brimage*, 115 F.3d 73, 76 (1st Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1288-89 (1st Cir. 1996).

171. See Jencks Act, 18 U.S.C. § 3500 (requiring the government to produce "statements" defined as the written, recorded, or transcribed statements of witnesses); Fed. R. Crim. P. 16(a) (2) ("*Information Not Subject to Disclosure*. . . [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case."). Numerous courts have held that the government is not required to disclose notes or memoranda recording the substance of interviews with government witnesses. E.g., *Goldberg v. United States*, 425 U.S. 94, 105-06 (1976); *United States v. Donato*, 99 F.3d 426, 433 (D.C. Cir. 1996).

172. Prosecutors are trained to avoid "creating Jencks material." Of course, pretrial grand jury appearances by cooperating witnesses do create discoverable transcripts. But that testimony is usually the tip of a pretrial iceberg of earlier witness preparation. The grand jury testimony itself may be carefully scripted and deliberately vague, to avoid creating details useful for impeachment. Often, the real purpose of that grand jury appearance is to "lock in" the cooperating witness to the testimony that the prosecutor needs at trial. And, of course, nothing prevents the calculated use of leading questions before a grand jury. As a result, instead of creating a raw, unpolished version of the accomplice's story, the grand jury appearance is simply another tool for controlling and directing the version that ultimately evolves at trial.

173. Time is an important factor in the transmogrification of accomplice witnesses. Police may have a few hours to induce the accomplice to "come clean" in the jailhouse. But with key cooperating witnesses in major cases, prosecutorial polishing of cooperators may be measured in weeks or months.

to avoid “tainting” their witness with information from other sources, the danger of tailoring testimony is almost unavoidable. It is exceedingly difficult to discuss a case with a potential witness without exposing information that will assist the witness in avoiding an impeachable contradiction at trial.¹⁷⁴

In many cases, the most significant tailoring of testimony takes place before the prosecutor ever talks to the accomplice. The “proffer” process—the typical process that precedes any cooperation agreement—almost assures that some tailoring will occur. Most prosecutors will not agree to reduced charges or a reduced sentence for the accomplice until they know what testimony he can provide.¹⁷⁵ They will not “buy a pig in a poke.”¹⁷⁶ Instead, most prosecutors will offer a limited form of use immunity to allow the accomplice, along with his counsel, to summarize the information the accomplice would provide under a cooperation agreement.¹⁷⁷ But the proffer session is far less spontaneous than a jailhouse confession. Typically it comes after the accomplice’s counsel has made her own efforts to prepare her client. Before that preparation occurs, competent counsel will have performed some investigation. Normally, she will have received a significant volume of information from the prosecutor in discovery.¹⁷⁸ And she will share that information with her client.

174. Prosecutors and agents are advised not to inform the cooperating witness of details based on independent investigation. See Trott, *supra* note 34, at 1404; Rowland, *supra* note 140, at 681–82. But almost any pretrial interview will guide the witness to some degree. Merely showing the witness an exhibit that he will be asked to identify at trial will often have that effect. If the witness had doubts, or was shaky on a detail, his trial testimony will naturally become more self-assured and detailed when he sees the document or photo that will back up—or improve upon—his story.

175. See U.S. Attorneys’ Manual, *supra* note 124, at § 9-27.620 (“In order to be in a position adequately to assess the potential value of a person’s cooperation, the prosecutor should insist on an ‘offer of proof’ or its equivalent from the person or his/her attorney.”); Trott, *supra* note 34, at 1402; Weinstein, *supra* note 35, at 584–87, 585 n.80.

176. A “poke”, in the context of this familiar expression, is an opaque bag or sack that would necessarily limit one’s objective evaluation of livestock.

177. Normally, such “queen for a day” agreements provide that the government will not use the defendant’s statements directly against him in the government’s case in chief, while reserving the right to pursue leads based on defendant’s disclosures. Weinstein, *supra* note 35, at 586 n.80; see also *United States v. Mezzanatto*, 513 U.S. 196, 203–10 (1995) (holding that such agreements validly waive Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6), which would otherwise prohibit evidentiary use of disclosures made during plea bargaining).

178. Prosecutors often will provide informal discovery early in a case in an effort to convince defense counsel and defendant to accept a plea agreement. See Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 *Fordham Urb. L.J.* 553, 554 (1999) (“[T]he practice of many U.S. Attorney’s Offices is to offer earlier and broader discovery to the defense.”). That discovery may include potential trial exhibits, witness statements and even investigative reports that the formal rules of discovery would otherwise not require to be disclosed. See *United States v. Murphy*, 569 F.2d 771, 773 n.5 (3d Cir. 1978) (noting the prevailing practice among prosecutors to provide Jencks material earlier than the rules require). Before advising her client to plead guilty and cooperate, then, the accomplice’s counsel

In her conferences with the accomplice, she is likely to question any aspects of her client's story that diverge from the government's version. Whether intended to do so or not, this process practically assures that the potential cooperator has an opportunity to polish his story before the prosecutor hears it for the first time. And as for secrecy, this process is protected by the accomplice's attorney-client privilege.

In the days awaiting his trial testimony, the cooperator is likely to be exposed to case related details from a variety of sources other than prosecutors and police. He may learn helpful details through news accounts, family visits, conferences with his own counsel, and, of course, the always active jailhouse "grapevine." All of these sources can assist the cooperator to tailor details of his trial testimony to coincide with other evidence in the case.¹⁷⁹ As a result, opportunities for surprising or impeaching the accomplice at trial disappear. The cooperating witness has far more time, and more varied opportunities, to become "tainted" by outside information than the accomplice induced to talk shortly after his arrest. And most of the "tainting" information will be undocumented and hence never known to the defense.

In short, secret development and tailoring of evidence are not concerns that uniquely affect the reliability of accomplice hearsay. There are equal, if not greater, dangers throughout the process that prepares and polishes the live courtroom testimony of a cooperating accomplice. "Trial by affidavit" rightfully raises concerns about the reliability of hear-

may know most of the details of the prosecutor's case. And she normally will share those details with her client.

Indeed, it is arguable that prosecutors have a constitutional obligation to disclose some information, particularly exculpatory evidence, before entering into a plea agreement. Compare Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 *Hastings L.J.* 957, 1006-23 (1989) (arguing that *Brady v. Maryland* requires such disclosure in plea bargaining), with John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 *Emory L.J.* 437, 487-509 (2001) [hereinafter Douglass, *Fatal Attraction*] (arguing that *Brady* is ineffective and perhaps even counterproductive as a rule of pre-plea disclosure).

179. In *Actual Innocence*, the authors recount an astonishing performance by Leslie Vernon White, a veteran snitch who demonstrated to law enforcement agents his methods for assembling the information necessary to back up a convincing story:

A deputy provided White with the name of another inmate, the fact that he was a murder suspect, and a telephone. In twenty minutes, White showed his stuff. He made five phone calls and collected enough inside information about the other inmate to claim with credibility that the man had confessed. Posing as a bail bondsman, White called the inmate reception center; as an assistant district attorney, he called the D.A.'s record room, then the D.A.'s witness coordinator, the sheriff's homicide office, and the actual D.A. handling the case. He rang the coroner's office, in the guise of a cop, and learned about mortal injuries to the victim.

With the facts he gathered during these chats, White knew enough about the murder to make up a confession on behalf of an inmate whom he had neither seen nor spoken to.

Scheck et al., *supra* note 33, at 128.

say. After thorough trial preparation carried out in secret, however, even the live testimony of the cooperating witness may be little more than "trial by talking affidavit." There is little reason to conclude that it will be more reliable than hearsay. There is, however, at least one reason to fear that juries will be more inclined to accept it as true. They will hear it from the lips of the well polished, "transmogrified" accomplice.¹⁸⁰

3. *Comparing Apples to Apples: The Relative Value of Cross-Examination.* — For all of its obvious shortcomings, an accomplice's hearsay confession may be less subject to adversarial polishing, less carefully tailored to match independent evidence, and less subject to coercion than the version most likely to emerge as trial testimony when hearsay is excluded from evidence. The jailhouse hearsay version may be more spontaneous and certainly is closer in time to actual events. If we look only at the circumstances which produce the evidence, we have ample reason to question the reliability of accomplice hearsay. But we may have even greater reason to question the polished version presented in trial testimony.

So far, however, we have neglected a critical step in our comparison. We cannot complete our reliability comparison until we consider the impact of cross-examination.¹⁸¹ After all, the Court has suggested that the very purpose of cross-examination is to promote reliability in the fact finding process.¹⁸² The accomplice's courtroom testimony may be carefully tailored and rehearsed, but the defense still gets its chance to probe beneath that veneer at trial. And hearsay, it seems, is not subject to that kind of courtroom challenge.

Or is it? If our aim is to compare hearsay to live testimony, we must make sure to compare apples to apples. Our reliability equation should

180. By contrast, jurors exposed to hearsay will know that they are receiving secondhand goods. "[H]earsay evidence may be introduced more safely than direct testimony because the former carries its deficiencies on its face and is subject to the judge's instructions with respect to its weight." Westen, *supra* note 53, at 599. For studies suggesting that juries discount hearsay testimony, see Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 *Minn. L. Rev.* 683, 688-98 (1992); Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 *Minn. L. Rev.* 655, 656-58 & 657 nn.11-12, 658 n.13 (1992) (recounting results of three studies).

181. In theory, the Court admits hearsay without confrontation only where hearsay is just as reliable as cross-examined, live testimony. Hearsay which fits recognizable, "firmly rooted" exceptions, the Court tells us, is sufficiently reliable to be presented to juries without cross-examination. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). If we are to exclude accomplice hearsay for lack of cross-examination, then it must be because we expect cross-examination of the accomplice to accomplish more than, for example, cross-examination of the child who tells her doctor about sexual abuse or cross-examination of the bank customer who blurts out a description of the suspect in the moments after a robbery. The Court seems willing to dispense with cross-examination as "surplusage" in those cases of "reliable" hearsay. Presumably, it expects cross-examination to make more of a difference in the case of a testifying accomplice.

182. *Id.*

account for the fact that hearsay is subject to impeachment, just like live testimony.¹⁸³ Indeed, an absent accomplice may be an easier target of impeachment than a well prepared, testifying cooperator. The appropriate comparison then, is not between cross-examined trial testimony and untested hearsay; it is between cross-examined trial testimony and hearsay that likewise has been subjected to an adversarial process of impeachment. Below, I will examine that comparison.

a. *Impeaching Accomplice Hearsay.* — Once hearsay has been admitted in evidence, the adversarial game is not over. The Federal Rules of Evidence,¹⁸⁴ the law of evidence in most states,¹⁸⁵ and the Confrontation Clause itself all permit an adversary to impeach hearsay in much the same manner that he might impeach live testimony: by proving, or sometimes simply suggesting, facts which demonstrate bias, corruption, self interest, faulty memory, or inaccurate perception by the witness.¹⁸⁶ In the case of accomplice hearsay, the principal basis for impeachment—the accomplice's self interest in avoiding prosecution or minimizing punishment—is typically subject to proof whether the accomplice testifies or not. Sometimes, as in Mark Lilly's case, the inducements may be embedded in the hearsay statements themselves.¹⁸⁷ The rules requiring disclosure of promises and inducements apply equally whether the accomplice is a live witness or an absent hearsay declarant.¹⁸⁸ If the police promised leniency to induce a confession, that inducement must be disclosed to the defense, just like the plea agreement that motivates testimony from the cooperating accomplice.¹⁸⁹ And proof of those inducements typically does

183. For a detailed description of the process of impeaching an absent hearsay declarant, see Douglass, *Beyond Admissibility*, supra note 10, at 251–60; see also Fred Warren Bennett, *How to Administer the "Big Hurt" in a Criminal Case: The Life and Times of Federal Rule of Evidence 806*, 44 *Cath. U. L. Rev.* 1135, 1142–63 (1995) (illustrating impeachment of absent hearsay declarant); Hon. Anthony M. Brannon, *Successful Shadowboxing: The Art of Impeaching Hearsay Declarants*, 13 *Campbell L. Rev.* 157, 160–78 (1991) (describing use of Rule 806 in impeaching nontestifying declarant); Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 *Ohio St. L.J.* 495, 525–30 (1995) (same).

184. *Fed. R. Evid.* 806.

185. Most states have provisions similar to Rule 806. Jack B. Weinstein et al., 4 *Weinstein's Evidence* 806-14 to 806-17 (1996); cf. *Unif. R. Evid.* 806 (1974) (nearly identical to *Fed. R. Evid.* 806).

186. See Mauet, supra note 156, at 241–59.

187. In Mark's tape recorded dialogue with police, an interrogator suggests that unless Mark breaks "family ties," his brother, Ben, "may be dragging you right into a life sentence." *Lilly v. Virginia*, 527 U.S. 116, 121 (1999).

188. The *Brady* and *Giglio* rules requiring disclosure of exculpatory and impeaching evidence apply to hearsay declarants as well as to testifying witnesses. See supra note 169.

189. Of course, jailhouse inducements typically will not include the disclaimers and qualifying language which prosecutors are so careful to include in their written plea agreements with cooperating witnesses. The principal value of those written disclaimers, of course, is to minimize the impeachment value of the agreements. In fact, many written cooperation agreements appear to bolster, rather than impeach, the cooperator's credibility. Rowland, supra note 140, at 685–86.

not require the presence of the accomplice at trial. Defense counsel can call on the police to testify about inducements that they offered. In most cases, the other classic approaches to impeachment are likewise available even though the accomplice never enters the courtroom. The accomplice's criminal record, "bad acts," prior inconsistent statements, history of mental illness, past drug usage, and other facts which may impact his credibility often are available and subject to proof in his absence.¹⁹⁰

Moreover, in one important respect impeachment in absentia offers a significant advantage to the opponent of accomplice hearsay. It is largely risk free. In live cross-examination, a cooperating accomplice is well prepared to explain and minimize impeaching facts.¹⁹¹ By contrast, when the accomplice is an absent hearsay-declarant, defense counsel gets the last word. He can prove the impeaching facts without fear of contradiction, denial or explanation by the absent accomplice-declarant.

b. *Cross-Examination of the Polished Accomplice.* — Impeachment of the accomplice-declarant in absentia may sound like a sterile process. As a practical matter, however, both its substance and its likelihood of success may be little different than in cross-examination of a live witness.¹⁹² Real cross-examination seldom matches the popular fantasy: a no-holds-barred assault on a confounded liar who breaks down on the witness stand and confesses his deceit.¹⁹³ Instead, most cross-examination is a tightly controlled process with limited aims and much less dramatic results. Typically, the cross-examiner's questions are not really questions at all; they are assertions of fact which the witness simply admits or denies.¹⁹⁴ They are not aimed at discovering new information. Indeed, the last thing the cross-examiner wants to hear is a new, unexpected fact.¹⁹⁵

190. Rule 806 allows the opponent of hearsay to attack the declarant's credibility "by any evidence which would be admissible . . . if declarant had testified as a witness." Fed. R. Evid. 806. In the case of a prior inconsistent statement, Rule 806 exempts the opponent from the requirement that the witness be given an opportunity to deny or explain the inconsistency. *Id.*

191. See 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.").

192. For the views of an experienced trial lawyer and an able jurist on the virtues of cross-examination in absentia, see Bennett, *supra* note 183, at 1168; Brannon, *supra* note 183, at 158–59.

193. The reality of most cross-examinations is perhaps more aptly described by one of its ablest teachers, Irving Younger, in his popular lecture. Commenting upon counsel's typical disappointment at the results of cross-examination, Younger remarked, "You wanted the ground to open underneath you and swallow you up . . . You had embarrassed yourself." Irving Younger, *The Art of Cross-Examination* 16 (1976).

194. By prohibiting leading questions, the rules of evidence insure that direct examination is a witness centered process. By contrast, cross-examination is a counsel centered process. Counsel asks nothing but leading questions, and often gets little more than a yes, or no, or a shrug from the witness. See Lubet, *supra* note 156, at 117–19.

195. Professor Mauet notes:

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

Most questions in cross-examination rest upon facts already known to the questioner, especially facts that can be proved independently if denied by the witness.¹⁹⁶ As a matter of substance, then, most of the facts typically proved from the mouth of the cross-examined accomplice are precisely the facts that a defendant could prove to impeach accomplice hearsay.¹⁹⁷ In live cross-examination, there is admittedly some impeachment value in hearing such facts from the mouth of the witness himself. But often that value is more than offset by the explanation that the well rehearsed witness has been prepared to give.

Of course, there is more to cross-examination than proof of facts. In live cross-examination, the accomplice-witness must respond on the spot to evidence which may contradict or limit his testimony. Denials, explanations, and changes in testimony all impact his credibility, as do the sweat on his brow and the shift in his eyes throughout the process. Hesitant or fumbling reactions to a courtroom surprise can harm his credibility more than his prior convictions or the promises that led the accomplice to testify.¹⁹⁸

But the very polishing process that serves to make accomplice testimony less reliable in the first place also serves to make demeanor less useful for impeachment, and less accurate in assessing truth. Surprise is seldom attainable with cooperating accomplices. The accomplice knows the important questions on cross-examination because the prosecutor has already asked them three times in pretrial interviews. And the answers have become a little smoother each time. The polishing process can transmogrify demeanor just as it can smooth out gaps and contradictions

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.

Mauet, *supra* note 156, at 220. In the case of cooperating accomplices, defense counsel may be especially cautious in cross-examination. Experienced counsel knows that a well prepared accomplice seldom volunteers impeaching facts. To the contrary, he is more likely to explode a "land mine" of damaging testimony when defense counsel strays into unpredictable areas of questioning.

196. "[N]ever ask a question to which you do not already know the answer." Younger, *supra* note 193, at 23.

197. For example, the accomplice's physical presence and live testimony normally would not be necessary to prove his prior convictions, prior inconsistent statements, history of mental illness, or past drug abuse. And if defense counsel had no independent evidence of such impeaching facts, it is unlikely that he would ever discover them in the first instance by engaging in a blind "fishing expedition" on cross-examination.

198. The Court has noted the significance of witness demeanor in cross-examination, where the witness is compelled "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, 242-43 (1895). Likewise, Blackstone recognized the value of spontaneous answers in open court: "[T]he 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* *373.

in the substance of accomplice testimony. The purely visual effect of that process can be stunning. Shoulder-length hair gives way to a conservative trim. Fearsome tattoos disappear behind a well-pressed shirt sleeve. Courtroom attire—not too casual, not too formal—replaces orange prison garb or a grease-stained T-shirt.¹⁹⁹ Even language patterns can go through a Pygmalian-like transformation before trial. Four letter words take on additional syllables and a softer edge. As a result, the defendant may confront his accomplice at trial, but he may not recognize the person who speaks from the witness stand.

Under the most spontaneous circumstances, trial demeanor is an inconsistent barometer of witness credibility.²⁰⁰ In the case of a well prepared accomplice, demeanor may be a useless measure at best, and a misleading one at worst. The *Lilly* jury may have gotten a more realistic impression of Mark Lilly from the tape recording of his frightened, still intoxicated voice on the night of his arrest²⁰¹ than it would have gotten from seeing the well scrubbed, sober version in the courtroom months later.

In sum, drawing generalizations about the likely impact of cross-examination may be a haphazard process at best. But the Court's approach invites just such a process. The *Roberts* formula asks the question, "Is the hearsay just as reliable as the cross-examined version?"²⁰² With respect to accomplice hearsay, the *Lilly* Court answered "no" without fully exploring the problem. Though most of the Justices were appropriately skeptical about blame-shifting confessions, none of them considered the alternative. Yet a close look at live testimony from the cooperating accomplice can make hearsay look rather benign by comparison. Prosecutors have virtually limitless power to offer inducements to cooperating witnesses.

199. "Prepare the witness for his courtroom appearance. Decide on what he should wear. Jurors expect neat, conservatively dressed witnesses, with clothes appropriate to the witness' background. For most witnesses this means a suit or jacket and tie." Mauet, *supra* note 156, at 475–76. The physical "polishing" of otherwise disreputable witnesses is one reason for the familiar trial tactic of offering in evidence, and enlarging to near life-size, a photograph of the witness in his more natural habitat, dress and hairstyle. Such photographs are favorite props during closing arguments. Of course, this tactic works equally well when the "witness" is an absent hearsay declarant.

200. Most empirical studies suggest that witness demeanor is a misleading measure of truthfulness. Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 *Neb. L. Rev.* 1157, 1189 (1993); Olin Guy Wellborn III, *Demeanor*, 76 *Cornell L. Rev.* 1075, 1091 (1991) (suggesting that transcripts are superior to live testimony as a basis for credibility judgments). See generally Hon. James P. Timony, *Demeanor Credibility*, 49 *Cath. U. L. Rev.* 903, 907 (2000) (arguing that expert behavioral scientist testimony can enhance a jury's ability to assess credibility based on demeanor).

201. While a videotape would have offered an even better view of Mark's demeanor, it seems likely that the audiotape would have captured the slurring of his voice, reflecting the degree of his intoxication. Likewise, the audiotape would reflect pauses, false starts, and the pace and pitch of Mark's voice, all factors which may have provided more accurate clues to credibility than would the responses of a well rehearsed witness.

202. See *supra* text accompanying note 122.

Pretrial polishing of accomplice testimony is commonplace, and largely shielded from adversarial scrutiny. Cross-examination may give the defense a fighting chance to show deceit or exaggeration. But the polishing process itself reduces the likelihood of successful impeachment. And, at least as a general proposition, efforts to impeach hearsay may provide just as strong a chance of exposing deception.²⁰³ We are right to be concerned about both accomplice hearsay and cooperating accomplice testimony. When it comes to reliability, however, there is no clear reason to fear one more than the other.

D. *Boosting the Price for the Varnished Truth: How Excluding Hearsay May Decrease the Reliability of the Accomplice's Courtroom Testimony*

A prosecutor needs admissible evidence to convict. When she can predict that crucial hearsay will not be admitted in evidence, she will look for something else to take its place. Often that search will lead her to make a deal with the accomplice in exchange for his live testimony.²⁰⁴ Excluding accomplice hearsay, then, may just replace one form of unreliable evidence with another. But the problem may not end there. Excluding accomplice hearsay may actually affect the quality of the live version that replaces it. Simply stated, when we remove the prosecutor's option to use hearsay, we increase the bargaining power of the accomplice. As a result, the prosecutor must pay more for his testimony. And the more she pays the accomplice to testify, the greater his incentive to lie.

Skilled negotiators understand that bargaining power does not stem from wealth, position, charm, or bluster. It comes from having alternatives.²⁰⁵ It makes no sense to accept a deal if you have an alternative that is better, or less expensive. Accordingly, a negotiator's best alternative to a negotiated agreement—his BATNA—often defines how much he is willing to pay or to accept to conclude the negotiation.²⁰⁶ A buyer will not pay \$50,000 for a Mercedes when he can get the same model next door for \$45,000. Even if there is only one Mercedes on the market, the availability of Fords and Chevrolets will exert at least a little limiting pressure

203. As a general proposition, it is hard to see how cross-examination of accomplice witnesses would be of greater value in exposing truth than would cross-examination of some other classes of hearsay declarants whose "reliable" hearsay the Court allows. See, e.g., *White v. Illinois*, 502 U.S. 346, 346 (1992) (allowing hearsay statements of child describing incidents of alleged abuse).

204. The step from exclusion of hearsay to "purchase" of live testimony from the cooperating accomplice, of course, is not an automatic one. In some cases, that purchase will prove impossible or unpalatable, leading the prosecutor to dismiss the case, negotiate a plea favorable to the defendant, or take the risk of trying the weaker case. Sometimes the prosecutor may find a different source for the same evidence, perhaps even a different cooperating accomplice. But experience suggests that the "purchase" of testimony from an accomplice will be the most popular choice among prosecutors. See *supra* text accompanying notes 128–131.

205. Roger Fisher & William Ury, *Getting to Yes* 106–07 (Bruce Patton ed., 1981).

206. BATNA is an acronym developed by Professors Fisher and Ury. *Id.* at 104.

on its price. Having an alternative increases the buyer's bargaining power.

The same phenomenon controls negotiations between prosecutors and potential cooperating witnesses. Consider a case like *Lilly*, where the prosecutor has an interest in the live testimony of an accomplice, but has a taped, blame-shifting statement from the same accomplice. As long as the prosecutor holds the option to use hearsay, the accomplice is in a weaker bargaining position. The prosecutor may prefer the live version, but if the price becomes too high, she is likely to retreat to her BATNA—the hearsay. When the law of evidence or of confrontation removes the hearsay option, however, the market for cooperation changes.²⁰⁷ Now, if the prosecutor cannot buy the accomplice's testimony, the only alternative may be to dismiss the case against his criminal colleague. Suddenly, the value of testimony has gone up. The likely result is a deal where the cooperator wins greater concessions—typically a lower sentence—in exchange for his cooperation.²⁰⁸

A system which influences prosecutors to pay higher prices for cooperation reduces the reliability of already unreliable accomplice testimony. That testimony is suspect from the beginning because the accomplice can gain a benefit by implicating others, even where he must lie to do so. And the greater the benefit, the greater the incentive to shade his story to favor those who pay him.²⁰⁹ In other words, a well paid cooperator is

207. As a matter of simple logic, of course, keeping hearsay as an option does not eliminate the option of live testimony. But the law of evidence seldom leaves prosecutors with the option of offering an accomplice's hearsay confession *and* the live, compelled testimony of the same accomplice. The option typically does not exist because the accomplice-declarant must be "unavailable" in order for his confession to be admitted under the hearsay exception for statements against interest. See *infra* text accompanying notes 228–231.

208. Of course, a long list of other factors can affect the willingness of both prosecutor and cooperator to make a deal. The prosecutor's willingness to offer sentencing concessions may be limited by organizational policies, sentencing guidelines, a sense of equity, or a concern over public reaction to a deal that looks too "sweet." The cooperator may not be willing to sell at all, especially if his fear of retribution by his confederates outweighs his fear of long imprisonment. But at the margins, prosecutors will have to pay more for cooperation where they have no realistic option of proving the same facts through hearsay.

209. I am not aware of empirical studies which demonstrate that stronger inducements lead to lies more often than weak inducements. But, based purely on logic and human nature, the proposition makes sense. Experienced prosecutors recognize that greater inducements pose a greater threat to truth. That is one of the reasons that prosecutors are cautioned to "[d]rive a [h]ard [d]eal" in their dealings with potential cooperating witnesses. Trott, *supra* note 34, at 1392. A sweetheart deal will be perceived—accurately—as an invitation for falsehood. Indeed, this perception accounts in part for the rule in *Giglio v. United States* requiring prosecutors to reveal any agreement which provides benefits to a witness in exchange for testimony. 405 U.S. 150, 154 (1972).

The notion that strong inducements can lead to false condemnation arises in other contexts as well. A frequent criticism of plea bargaining is that the most favorable bargains are offered in the weakest cases, and that some inducements can be strong enough to induce guilty pleas even from innocent defendants. The result, critics argue, is that plea

likely to be more “cooperative” than a poorly compensated one.²¹⁰ The end result is another irony. The Court excludes accomplice confessions in the name of reliability. But its exclusionary rule can make false trial testimony more likely. This does not mean that excluding accomplice hearsay is necessarily a bad thing, or that admitting such hearsay is always a good thing. My point is more limited. To the extent that it excludes accomplice hearsay in the name of reliability, I doubt that the Court achieves its goal.

II. AVOIDING CONFRONTATION OF THE RELUCTANT ACCOMPLICE: A GAME OF CHICKEN AND A CATCH-22

In Part I, my focus was the Court’s focus: reliability. The Court’s approach may not serve that goal very well in cases of accomplice hearsay. But it may still serve the goal of the Confrontation Clause if it encourages prosecutors to sign deals with accomplices and put them on the witness stand. Even a staged confrontation, one might argue, is better than none at all. Since the *Lilly* decision imposes some limit on accomplice hearsay, we can at least give it credit for enticing a few accomplices off the sidelines and onto the field, even if they join the prosecution team before play begins.

But there is another side to *Lilly*. Hearsay—even blame-shifting hearsay from an accomplice—is still admissible under *Roberts* and *Lilly* as long as it satisfies the Court’s standard of reliability.²¹¹ And despite the result in *Lilly*, a prosecutor still improves the odds of admissibility if she can fit hearsay within the exception for statements against penal interest.²¹² But this side of the Court’s confrontation-hearsay formula can in-

bargaining is a poor vehicle for separating the guilty from the innocent. E.g., Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 60 (1968); McMunigal, *supra* note 178, at 989–91; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 2000 (1992). If strong inducements can lead to false self-condemnation, no doubt they can lead to false condemnation of others.

210. Cf. Weinstein, *supra* note 35, at 580 (suggesting that defendants with exposure to higher sentences have a greater motivation to “snitch”).

211. Even hearsay that falls outside of a firmly rooted exception is admissible if the circumstances provide “particularized guarantees of trustworthiness.” *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). In *Lilly*, the plurality undertook an independent review of the circumstances surrounding Mark Lilly’s confession and found no such “guarantees.” *Lilly v. Virginia*, 527 U.S. 116, 135–39 (1999) (plurality opinion). The Chief Justice argued that the case should be remanded to allow the Supreme Court of Virginia to make that determination in the first instance. *Id.* at 148–49 (Rehnquist, C.J., concurring). Lower court rulings after *Lilly* demonstrate that this option remains viable for prosecutors. E.g., *United States v. Papajohn*, 212 F.3d 1112, 1118–20 (8th Cir. 2000) (admitting grand jury testimony of unavailable accomplice based upon circumstantial guarantees of trustworthiness).

212. The Court has yet to summon a majority to determine whether the exception for statements against interest, properly limited to “genuinely self-inculpatory” statements, is a firmly rooted exception. The Court suggested as much in *Williamson*. *Williamson v. United States*, 512 U.S. 594, 605 (1994). In *Lilly*, Chief Justice Rehnquist and at least two other Justices seem to hold out for that result. See *Lilly*, 527 U.S. at 145–46 (Rehnquist,

fluence pretrial choices in a perverse way. It can lead prosecutors and defendants to ignore confrontation.

A. *The Game of Chicken: How the Court Allows Prosecution and Defense to Ignore Confrontation While Arguing About Confrontation*

Lilly is not the first case where the Court has decided a Confrontation Clause battle between parties who showed little interest in confrontation at trial. It is not even the starkest example of that phenomenon. In *Dutton v. Evans*, a case dealing with an accomplice's jailhouse confession implicating the accused, defense counsel candidly informed the Court at oral argument that he could have subpoenaed the accomplice-declarant for testimony at trial, but "concluded that this course would not be in the best interests of his client."²¹³ In *United States v. Inadi*, the government introduced hearsay statements of a nontestifying coconspirator who was within the trial court's subpoena power and who never asserted a claim of privilege.²¹⁴ The government made a half-hearted effort to subpoena the coconspirator, but abandoned the effort when the witness claimed "car trouble" and failed to appear for trial.²¹⁵ Though the trial court offered to have the coconspirator produced as a witness, defense counsel never responded to the offer.²¹⁶ Instead, she chose to pursue a Confrontation Clause challenge to the admission of the hearsay. In affirming the conviction, the Supreme Court observed, "[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."²¹⁷ But the parties' collective disinterest in confrontation did not change the Court's approach. Like most of the Court's confrontation-hearsay opinions,²¹⁸ *Dutton* and *Inadi* both turned on the Court's assessment of the reliability

C.J., concurring). At a minimum, the Chief Justice suggests, those statements against interest that are "genuinely self-inculpatory," *id.* at 146, and perhaps those statements made outside of custodial interrogation as well, *id.* at 146-47, should fit within a firmly rooted exception. Even after *Lilly*, therefore, prosecutors improve the odds of admissibility by offering the "genuinely self-inculpatory" portions of an accomplice confession under the exception for statements against interest. Likewise, they improve their odds by relying on the same exception when offering accomplice statements made outside of custodial interrogation. The results in a handful of post-*Lilly* cases confirm the value of that strategy. See, e.g., *United States v. Boone*, 229 F.3d 1231, 1233-34 (9th Cir. 2000) (affirming conviction where trial court admitted accomplice's statements against interest made to girlfriend); *United States v. Shea*, 211 F.3d 658, 668-69 (1st Cir. 2000) (admitting statements against interest made to friends).

213. 400 U.S. 74, 88 n.19 (1970).

214. 475 U.S. 387, 390 (1986).

215. *Id.*

216. *Id.*

217. *Id.* at 397 n.7.

218. Since *Roberts*, all of the Court's confrontation-hearsay cases have turned on the question of reliability, with one important exception: cases where the hearsay declarant actually testified. *United States v. Owens*, 484 U.S. 554, 560 (1988) ("We do not think such an inquiry [into reliability] is called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination."); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

of hearsay. It did not matter that confrontation was—quite literally—within reach of both parties.

Prosecutors and defendants are skittish about accomplices as witnesses, and for good reason.²¹⁹ In preparing for trial, pragmatic lawyers prefer to avoid potentially damaging surprises. From the defense perspective, no witness carries greater potential for damage than an accomplice. The accomplice simply knows too much. And few witnesses are less predictable. The accomplice is caught in a tug-of-war. On one side is his loyalty to—or perhaps his fear of—the defendant. On the other is his fear of the prosecutor and the court, whose charging and sentencing decisions will take into account anything he may say as a witness. Where that tension will lead may be anybody's guess. But few defendants seem anxious to bet on its outcome. As a result, in-court confrontation with his accomplice is often the last thing the defendant really wants, no matter how proficient his counsel may be at cross-examination. His protests under the Confrontation Clause are aimed at excluding hearsay, not at promoting a confrontation.²²⁰

Prosecutors fear accomplice-witnesses for similar reasons. The law enforcement lexicon describing cooperating accomplices contains a variety of colorful terms, none of which is a synonym for “hero” or “solid citizen.”²²¹ Prosecutors accept cooperators as a necessary, though distasteful, cost of the business of investigating crime and proving criminal charges.²²² Of course, prosecutors have more power than defendants to control, or at least to predict, the substance of accomplice testimony because the law allows them to pay for it. The purchase price usually guarantees an opportunity to inspect the goods, and perhaps even to repair damaged goods before use at trial. Still, prosecutors rightly fear that an unsavory witness may taint their whole case.²²³ Where an alternative is available, prosecutors will be quick to seize it. And a hearsay confession can provide that alternative. A prosecutor will choose hearsay where (1) it proves what she needs to prove, and (2) it is likely to be more convincing than the live version. At the margins, therefore, she will opt for hearsay when it is most probative and when it comes from an accomplice who

219. See *supra* text accompanying notes 61–66.

220. Other factors may contribute further to the tendency of defendants to favor challenges to admissibility over serious efforts to confront or impeach an available declarant. Particularly for poorly funded defense counsel with limited time, a constitutional challenge to admissibility is ordinarily less difficult and less time consuming than the factual investigation necessary to mount an effective cross-examination of the accomplice. Douglass, *Beyond Admissibility*, *supra* note 10, at 221–23. And, where the odds of successful impeachment seem low, a defendant's best tactical choice may be to avoid confrontation of the accomplice altogether, thus preserving his “*Lilly*” issue for appeal. *Id.*

221. The terms most favored by prosecutors and police have evolved from the ancient “stool pigeon,” to the long popular “snitch,” to the more pejorative “scumbag” or “dirt ball.”

222. Trott, *supra* note 34, at 1390–91.

223. *Id.* at 1388–90.

is likely to make the worst impression as a live witness.²²⁴ In other words, she will choose hearsay in those cases where live confrontation could make the most difference.

This kind of risk aversion can lead both parties to avoid confrontation with an unpredictable accomplice. And the law of confrontation provides little counterweight to that tendency. Because confrontation-hearsay doctrine boils down to an exclusionary rule for unreliable hearsay, a defendant can raise a Confrontation Clause objection even though the declarant may be sitting outside the courtroom and willing to testify.²²⁵ For her part, the prosecutor may answer that objection without making any effort to bring the accomplice-declarant to the witness stand, even when she has the power to do so at little or no risk to other prosecutorial interests. In opting to use hearsay, of course, she must calculate the likelihood of admissibility. But that calculation does not require her to consider whether confrontation is possible and how she might bring it about. Indeed, she does not improve her chance of admitting a favorable hearsay statement if she offers to immunize the accomplice.²²⁶ Instead, she must consider only whether the hearsay meets the Court's test for reliability. Normally, that means assessing whether the hearsay, or critical parts of it, can fit within a firmly rooted exception to the hearsay rule.

Prosecutors are accustomed to approaching confrontation-hearsay issues from that perspective. Ever since *Roberts* elevated "firmly rooted" hearsay exceptions to the status of constitutional shibboleth, prosecutors have proved adept at pigeonholing an increasing variety of hearsay within established exceptions to assure its admissibility under the Confrontation Clause.²²⁷ The fragmented decision in *Lilly* did not end the practice of pigeonholing accomplice hearsay to suit the constitutional standard. At best, it refined the rules. Today's prosecutors offer in evidence "genu-

224. Mark Lilly could probably serve as poster child for this class of accomplice-declarant.

225. Both *United States v. Inadi*, 475 U.S. 387, 399–400 (1986), and *Dutton v. Evans*, 400 U.S. 74, 88 n.19 (1970), are examples. See *supra* note 9.

226. By immunizing the declarant or otherwise bringing about confrontation, she may lose the right to offer favorable hearsay under the exception for statements against interest. See *infra* text accompanying notes 231–232.

227. I use the term "pigeonholing" to describe the practice of insuring the admissibility of hearsay under the Confrontation Clause by arguing that it falls within a traditional "firmly rooted" hearsay exception, even after the boundaries of the traditional exception have been expanded by modern re-interpretation. For a more complete discussion of the phenomenon and its impact on the generally expanding world of admissible hearsay, see Douglass, *Beyond Admissibility*, *supra* note 10, at 210–14; see also *supra* text accompanying note 118.

Lilly itself is an example of the pigeonholing tactic. The prosecution sought constitutional blessing for Mark Lilly's confession by labeling the entire, rambling narrative a "statement against interest," even though most of it was an effort to deny responsibility and shift blame for the most serious crimes. See *Lilly v. Virginia*, 527 U.S. 116, 144–45 (1999) (Rehnquist, C.J., concurring).

inely self-inculpatory” statements against interest, or “non-custodial” statements against interest.²²⁸ In other words, rather than promoting confrontation of accomplices, *Lilly* may only have encouraged prosecutors to think harder about hearsay labels.²²⁹

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

B. *The Catch-22: How the Law of Evidence Discourages Confrontation of the Reluctant Accomplice*

The Court’s Sixth Amendment doctrine allows prosecution and defense to ignore confrontation while they debate hearsay labels. But the problem deepens when we take into account the law of evidence. To satisfy the Confrontation Clause, prosecutors must rely on the law of evidence. And to satisfy the law of evidence, prosecutors must avoid confrontation. In combination, the law of evidence and the Court’s confrontation doctrine have created a Catch-22.²³⁰ Here is why.

228. See *supra* notes 211–212.

229. The notion of pigeonholing hearsay to satisfy the Confrontation Clause may involve more than the clever structuring of evidentiary argument. It may also lead prosecutors and police to structure the hearsay evidence itself in order to fit within acceptable hearsay labels. I am not suggesting that the Court’s doctrine encourages the creation of false evidence. To the contrary, the process of structuring hearsay can be accomplished quite legitimately by a well informed interrogator. Knowing that only genuinely self-inculpatory portions of a jailhouse confession are admissible, a patient interviewer can frame questions that are likely to lead to admissible answers that will still prove useful against a colleague in crime. The results may be admissible under the Court’s standards, though the answers may be no more reliable than Mark Lilly’s, and no more subject to confrontation by the defense at trial.

Structuring law enforcement tactics to satisfy confrontation and hearsay doctrine is nothing new, and it is not unique to the jailhouse interview of an accomplice. The potential admissibility of hearsay is one reason why medical personnel are encouraged—and sometimes trained—to question child victims of sexual abuse about the identity of the perpetrator and the circumstances of the abuse. A police officer may ask the same questions, but the answers may not be admitted as “statements for purposes of medical diagnosis,” even though the child-declarant may perceive no difference in the circumstances surrounding the two interviews.

230. A “Catch-22” is a dilemma wherein the steps necessary to achieve an outcome necessarily result in the defeat of that outcome. It is a trap, a “no win” situation. The term derives from the popular novel, *Catch-22*, by Joseph Heller. The central character, an American bombardier named Yossarian, seeks to avoid flying further bombing missions

For two decades, the *Roberts* formula has encouraged prosecutors to characterize accomplice confessions as statements against penal interest. Though the target may be a little smaller after *Lilly*, the incentive remains to pigeonhole hearsay within that exception. But to satisfy the hearsay exception for statements against interest, the prosecutor must demonstrate that the declarant is “unavailable.”²³¹ An accomplice who validly asserts his Fifth Amendment privilege and refuses to testify is “unavailable” within the meaning of the rule.²³² In many cases, the prosecutor may have the power to immunize a reluctant accomplice with no realistic risk to future prosecutions. But the prosecutor cannot pursue that option if she wants to use the hearsay. Instead, to win the use of favorable hearsay, she must make sure the accomplice remains “unavailable.” She can satisfy the law of evidence only by avoiding confrontation.²³³

On the surface, that may not seem like too much of a problem. If she can get the live testimony, one might ask, why does the prosecutor—or the jury for that matter—need the hearsay? But the problem is not that simple. An immunized accomplice provides no guarantee that his courtroom testimony will sound anything like the hearsay version. Without a deal for full cooperation, he remains a hostile, unpredictable witness. If granted use immunity and compelled to speak, he is just as likely to disclaim his earlier version as to confirm it.²³⁴ Aside from paying for his testimony, the prosecutor’s only option for reproducing the original version will be to offer the hearsay in evidence. And there is the catch.

over Italy during World War II. He discovers that a flyer can get himself grounded if he is crazy. Then he learns the catch:

“Sure, there’s a catch,” Doc Daneeka replied. “Catch-22. Anyone who wants to get out of combat duty isn’t really crazy.”

There was only one catch and that was Catch-22, which specified that a concern for one’s own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn’t, but if he was sane he had to fly them. If he flew them he was crazy and didn’t have to; but if he didn’t want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

“That’s some catch, that Catch-22,” he observed.

Joseph Heller, *Catch-22* 55 (Scribner Paperback Fiction ed., 1996) (1955).

231. Fed. R. Evid. 804(b)(3). Virginia’s hearsay exception for statements against interest, like that of most states, applies only where the declarant is unavailable. *Lilly v. Commonwealth*, 499 S.E.2d 522, 533 (Va. 1998) (citing *Ellison v. Commonwealth*, 247 S.E.2d 685, 688 (Va. 1978)). See generally 2 Strong, *supra* note 50, § 320, at 330 (noting that most states require that declarant be unavailable).

232. Fed. R. Evid. 804(a)(1); *Lilly v. Commonwealth*, 499 S.E.2d at 533.

233. Ironically, the unavailability requirement in the law of evidence was designed to establish a “preference” for live testimony. 2 Strong, *supra* note 50, § 253, at 127.

234. Mark Lilly did exactly that. Once he reached his own plea bargain with the government, Mark testified at his brother’s sentencing and recanted much of his earlier statement. See *supra* note 8.

Under the law of evidence, that option means the prosecutor must avoid confrontation. The accomplice must remain unavailable.²³⁵

The Court's approach to confrontation encourages a prosecutor to embrace the hearsay exception for statements against interest. Once she takes that course, the law of evidence offers the prosecutor a limited choice: hearsay *or* confrontation. There is no room in the law of evidence for a different choice: hearsay *and* confrontation.²³⁶ As a result, juries hear from accomplices in two kinds of cases: (1) cases like *Lilly*, *Dutton*, and *Inadi*, where the jury hears the hearsay version without confrontation, and (2) cases where prosecutors make a deal to purchase accomplice testimony. We almost never see a third case: where the jury hears the hearsay version *and* the defendant has a real confrontation with his accomplice, untainted by deals with the government. That is the case where the jury hears evidence more like the investigators hear it, before it has been packaged and polished. That case may offer the jury the best opportunity to sift through conflicting stories and arrive at the truth. But that case is caught in the Catch-22 between the law of evidence and the law of confrontation.

Changing the hearsay rules—by eliminating the “unavailability” requirement for statements against interest—might *allow* that approach.²³⁷

235. There is a way out of the Catch-22, though it is unpopular with prosecutors. A prosecutor may forsake the penal interest exception and attempt to admit the hearsay under the residual exception, which applies whether or not the declarant is available. See Fed. R. Evid. 807. But to satisfy that exception and the Confrontation Clause as well, she must demonstrate “particularized guarantees of trustworthiness” in the circumstances surrounding the statement. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Generally, that is a riskier proposition for prosecutors than aiming for a “firmly rooted” hearsay exception. Compare *Idaho v. Wright*, 497 U.S. 805, 816–18 (1990) (disallowing hearsay statements of child abuse victim offered under residual exception), with *White v. Illinois*, 502 U.S. 346, 348–49 (1992) (allowing almost identical statements offered under firmly rooted exceptions for spontaneous declarations and statements for purposes of medical diagnosis). Still, both before and after *Lilly*, prosecutors have convinced a number of courts to find “particularized guarantees” to support a wide variety of hearsay. See *United States v. Papajohn*, 212 F.3d 1112, 1118–20 (8th Cir. 2000) (admitting grand jury testimony of unavailable accomplice based upon circumstantial guarantees of trustworthiness); see also *Douglass*, *Balancing Hearsay*, *supra* note 43, at 2120–23 (documenting success of prosecutors in persuading federal courts to admit hearsay under residual exception).

236. Currently, the Federal Rules allow a prosecutor to offer hearsay as substantive evidence where it is inconsistent with the witness's courtroom testimony and where the hearsay statement was given under oath in another proceeding. Fed. R. Evid. 801(d)(1)(A). Most accomplice confessions will not satisfy the Rule, however, because few are given under oath. Sometimes, Rule 801(d)(1)(A) provides a means to offer accomplice hearsay given in grand jury testimony where the prosecutor calls the witness only to be surprised when he recants his earlier version. Nevertheless, in the absence of such surprise, many courts still cling to the “voucher” rule prohibiting a party from impeaching his own witness. See *I Strong*, *supra* note 50, at 58.

237. Another means to allow hearsay and confrontation would be to adopt a provision similar to Rule 503(b) of the Model Code of Evidence, which allows hearsay whenever the declarant “is present and subject to cross-examination.” Model Code of Evidence R. 503(b) (1942). Some critics argue that the Model Rules approach would allow prosecutors

But we would need a different set of incentives under the Confrontation Clause to *encourage* that result. Those incentives would arise, I believe, if we treated the Clause not as a right to exclude unreliable hearsay, but as a right to confront whatever hearsay the law of evidence might permit. In Part III, I will outline the contours of that right. Then I will suggest how it might affect the pretrial decisions that determine the hearsay landscape of criminal trials.

III. CONFRONTING THE RELUCTANT ACCOMPLICE

A. *Missing the Point of the Confrontation Clause*

The Court treats the Confrontation Clause as an exclusionary rule for unreliable hearsay.²³⁸ I believe it is both less and more than that. Both the law of evidence and the Due Process Clause stand as protections against unreliable hearsay in criminal cases. Treating the Confrontation Clause as an exclusionary rule has made it redundant, and largely useless, as a constitutional protection.²³⁹ Worse yet, treating the Clause as a rule of evidence has led courts and parties to ignore its value as an adversarial right that can and should play an important role even after hearsay is admitted in evidence. The Court has gone so far as to suggest that the confrontation right is “satisfied” once reliable hearsay is admitted.²⁴⁰ In my view, the confrontation right is no more satisfied in that circumstance than it would be by allowing a reliable prosecution witness to testify without cross-examination.

Neither the text nor the history of the Sixth Amendment makes the Court’s approach inevitable. The history of the Confrontation Clause is

to craft carefully prepared hearsay statements, then simply tender an uncooperative declarant for cross-examination. See Fed. R. Evid. 801(d) advisory committee’s note. I suggest that the Model Rules approach makes a great deal more sense than the current rules which, as I have described, actually encourage prosecutors to avoid confrontation of potentially available declarants. Where prosecutors can obtain live testimony for direct examination, tactical considerations usually will dictate that they do so. A live witness is simply more convincing than hearsay. See *supra* note 180. And where both hearsay and the live witness are available, why not let the jury hear both? A jury will have a better chance at arriving at the truth when it knows both what the accomplice first said to police and what he now has to say in court, subject to cross-examination.

238. Confrontation-hearsay issues are framed in terms of admissibility before they ever reach the Supreme Court. See *supra* text accompanying notes 26–27. Perhaps it is not surprising, then, that all of the Court’s Confrontation Clause opinions approach hearsay from the same perspective. They view the Clause as a rule of evidence: a constitutional “super-hearsay” rule which either admits or excludes particular hearsay statements. See, e.g., *Wright*, 497 U.S. at 814 (“The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.”).

239. See Douglass, *Beyond Admissibility*, *supra* note 10, at 206 (“The ‘general approach’ of *Roberts* has evolved into an exclusionary rule that excludes very little.”); Jonakait, *supra* note 22, at 622 (arguing that the Court’s approach has reduced the Confrontation Clause to the role of “minor adjunct of evidence law”).

240. *White*, 502 U.S. at 356.

notoriously unilluminating.²⁴¹ Justice Harlan, probably the Court's most thorough student of that history, wrote that the "Confrontation Clause comes to us on faded parchment."²⁴² His observation has stood the dual tests of time and intense academic scrutiny. Able scholars have sifted through that history, with few conclusive results.²⁴³ My own view is that the Framers may not have intended for the Clause to exclude any hearsay at all.²⁴⁴ The Clause was probably intended—at least in part—to forbid trial by *ex parte* affidavit.²⁴⁵ But history does not tell us whether such a prohibition requires exclusion of hearsay, or whether even "testimonial" hearsay like an affidavit might be admissible as long as the government produces the declarant to testify in person.²⁴⁶ The Framers may have left the admissibility of hearsay to the law of evidence.²⁴⁷ If they considered hearsay at all in adopting the Clause, they may have intended only a right to produce available declarants for cross-examination.²⁴⁸ At any rate, there is little historical evidence that the Clause was intended to constitutionalize the hearsay rule and its exceptions which, in effect, is what the *Roberts* formula has done.²⁴⁹

241. Friedman, *supra* note 19, at 1022 ("The origins of the Clause are famously obscure.").

242. *California v. Green*, 399 U.S. 149, 173–74 (1970) (Harlan, J., concurring).

243. For two excellent accounts of the available historical material, see Berger, *supra* note 19, at 567–86; Lilly, *supra* note 69, at 208–15.

244. In an earlier article, I offered my own interpretation of the Clause's ambiguous history. See Douglass, *Beyond Admissibility*, *supra* note 10, at 234–40. What follows here is a summary of those views.

245. The Court seems to accept this view. *Green*, 399 U.S. at 156–57; *Mattox v. United States*, 156 U.S. 237, 242–43 (1895); see also *Lilly v. Virginia*, 527 U.S. 116, 140–41 (1999) (Breyer, J., concurring); *White*, 502 U.S. at 365 (Thomas, J., concurring).

246. The *Mattox* Court, for example, described the aim of the Clause as preventing the use of *ex parte* affidavits "in lieu of" live testimony and cross-examination. *Mattox*, 156 U.S. at 242. The *Mattox* Court seems not to have contemplated the possibility of some form of out-of-court statement *in addition to* live, cross-examined testimony.

247. That was Wigmore's conclusion:

The Constitution does not prescribe what kinds of testimonial statements (dying declarations or the like) shall be given infractionally—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 infractionally.

5 Wigmore, *supra* note 76, § 1397(a), at 159.

248. After reviewing the "amorphous backdrop" of Sixth Amendment history, Justice Harlan concluded that "the Confrontation Clause . . . 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).

In a celebrated turnabout less than a year later, Justice Harlan backed away from that position, fearing that it would be impractical to require production of available declarants in many cases where hearsay was routinely accepted in the absence of confrontation. *Dutton v. Evans*, 400 U.S. 74, 95–96 (1970) (Harlan, J., concurring) (noting that production of declarant would be "unduly inconvenient and of small utility" in cases involving, e.g., business records).

249. The notion that the Confrontation Clause might track the hearsay rule, and its exceptions, appears first in dictum in the Court's earliest confrontation-hearsay opinion.

The text of the Sixth Amendment says nothing about excluding hearsay.²⁵⁰ The defendant's right is "to be confronted with the witnesses against him."²⁵¹ Still, when it comes to hearsay, that language poses a dilemma which seems naturally to lead to exclusion. If the "witness" is a hearsay declarant, how can the accused "confront" him? And if the accused cannot confront the declarant, then how can we allow hearsay at all? Excluding all hearsay offers a straightforward way to protect the right of confrontation. But the Court has never been willing to adopt such a rule, for both historical and practical reasons.²⁵² Instead, for more than a century, the Court has simply made exceptions to the rule when hearsay is sufficiently reliable. And for the last twenty years, the exceptions have tracked the law of evidence.

Textually at least, there is another way out of the dilemma. A declarant may be a "witness" in the sense that he is an observer of events. But, perhaps he is not a "witness against the accused" until he testifies. This construction of the Sixth Amendment text—which has been advanced by the Department of Justice,²⁵³ supported by prominent academics,²⁵⁴ and endorsed by Justices Scalia and Thomas²⁵⁵—would split the confrontation-hearsay pie along relatively clear lines. On one side would be "testimonial" hearsay. If a declarant testifies in a formal proceeding designed to create evidence for use at a criminal trial—as in grand jury testimony, an affidavit, or perhaps even in a jailhouse confession—then he is a "witness against" the accused. The Confrontation Clause would forbid use of

See *Mattox*, 156 U.S. at 243 (noting that confrontation right is "subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit," then identifying dying declaration as an example of such an exception).

250. As Justice Harlan commented, "The language is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay . . ." *Dutton*, 400 U.S. at 95 (Harlan, J., concurring).

251. U.S. Const. amend. VI.

252. Historically, it seems unlikely that the Confrontation Clause was intended to exclude all hearsay, since many forms of hearsay passed without complaint in English and Colonial courts during the American constitutional period. See *supra* note 76. And as a practical matter, many trials would prove almost impossible without some exceptions to a rigid rule against hearsay. It is hard to imagine any form of complex, commercial litigation in the absence of a rule allowing business records, for example.

253. See Brief for the United States as Amicus Curiae Supporting Respondent at 9–10, *White v. Illinois*, 502 U.S. 346 (1992) (No. 90-6113).

254. See, e.g., Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 *Geo. L.J.* 1045, 1045–50 (1998); Friedman, *supra* note 19, at 1038–43 (arguing that "witnesses against" the accused include any declarants who make statements intended to be used in a criminal prosecution).

255. See *White*, 502 U.S. at 365 (Thomas, J., concurring) ("[The Confrontation Clause] is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."); *Maryland v. Craig*, 497 U.S. 836, 864–65 (1990) (Scalia, J., dissenting) (contending that the phrase, "witnesses against him," denotes only those witnesses to events who later give testimony against an accused).

such testimonial hearsay without regard to reliability.²⁵⁶ On the other side of the constitutional line would be all other "garden variety" hearsay, like business records or spontaneous declarations: statements written or uttered in nontestimonial settings with no intention that they serve as evidence against an accused. The Confrontation Clause simply would not deal with such statements because the declarant would not be a "witness against" the accused. Nontestimonial hearsay would be admissible, or not, depending solely on the law of evidence. This approach, its proponents suggest, comports not only with the Sixth Amendment text,²⁵⁷ but also with the historical evidence that the Framers' main Confrontation Clause target was the infamous Star Chamber practice of trial by affidavit.²⁵⁸

The Court has rejected this approach, based largely on the *Roberts* line of precedent,²⁵⁹ but has never addressed its merits. Though I believe the *Roberts* reliability-based formula is seriously flawed, I am no more optimistic about the Scalia-Thomas "testimonial hearsay" approach. First, I have little confidence that excluding hearsay really eliminates the risk of manufactured evidence. In the case of accomplices, it simply converts that evidence into an equally manufactured but probably more dangerous form: the live testimony of a polished cooperator.²⁶⁰ Second, one need not exclude hearsay to protect against Star Chamber-like abuses. In the celebrated treason prosecution to which some have traced the right of confrontation, Sir Walter Raleigh did not seek to exclude the out of court confession of his alleged accomplice, Lord Cobham, who implicated Raleigh in a plot against the Crown. Instead, Raleigh demanded confrontation. "[L]et Cobham be here, let him speak it. Call my accuser before my face, and I have done."²⁶¹ If Raleigh's argument is our model, then we should seek an approach that allows for both hearsay and confrontation.²⁶² Third, and most important, the Scalia-Thomas approach shortchanges the adversarial right at the core of the Confrontation

256. See *White*, 502 U.S. at 365 (Thomas, J., concurring).

257. See Amar, Sixth Amendment First Principles, *supra* note 31, at 647.

258. See Brief for the United States as Amicus Curiae Supporting Respondent at 6, *White*, 502 U.S. 346 (No. 90-6113); Berger, *supra* note 19, at 503; Friedman, *supra* note 19, at 1023-25.

259. See *White*, 502 U.S. at 353 (noting that the testimonial hearsay argument "comes too late in the day" in light of the *Roberts* line of cases).

260. See *supra* text accompanying notes 125-135.

261. Trial of Sir Walter Raleigh for High Treason, 1603, 2 Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Time 1, 16 (R. Bagshaw ed., 1809).

262. The Court appeared to accept this view in *California v. Green*. Justice White, writing for the majority, noted that objections to the practice of trial by affidavit appear primarily to have been aimed at the failure to call the witness to confront personally the defendant at his trial. So far as appears, in claiming confrontation rights no objection was made against receiving a witness' out-of-court depositions or statements, so long as the witness was present at trial

399 U.S. 149, 157 (1970).

Clause. At heart, the confrontation right is the right to an adversarial process for testing evidence.²⁶³ If most hearsay declarants are not “witnesses,” then we have deprived defendants of a constitutional basis for insisting that hearsay, like live testimony, must be subject to adversarial challenge. To me, that is a high price to pay for the convenience of a bright line rule which neither the text nor the history of the Sixth Amendment really requires.

The *Lilly* Court seems poised on the edge of a choice between the *Roberts* reliability based formula and the Scalia-Thomas view that only declarants of “testimonial” hearsay are “witnesses against” the accused.²⁶⁴ I believe either choice would be a mistake. There is a third approach, consistent with the text, history, and—most important—the fundamental purpose of the Confrontation Clause. Hearsay declarants are “witnesses against” the accused. We simply must learn how to treat them like witnesses.

B. *The Right to Confront Hearsay*

When courts and parties debate the reliability of hearsay, they are missing the point about confrontation. The right of confrontation does not guarantee reliable evidence.²⁶⁵ After all, there is no guarantee that a cross-examined witness is telling the truth. Conversely, the Confrontation Clause allows cross-examination even where it may discredit an honest and accurate witness. Instead, the Clause guarantees a process of adversarial challenge to prosecution evidence. That process may or may not produce reliable evidence, but it is designed at least to give the defendant a fighting chance to expose the flaws in prosecution testimony. In the

263. Justice Scalia himself recognized this basic starting point in *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (“[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence . . .”).

264. The concurring opinions of Justices Scalia and Thomas adhere to the “testimonial hearsay” view. *Lilly v. Virginia*, 527 U.S. 116, 143 (1999) (Scalia, J., concurring); *id.* at 143–44 (Thomas, J., concurring). Much of Justice Breyer’s concurring opinion is devoted to that theory, though he ultimately concludes that a full reevaluation of the Court’s approach must await “another day.” *Id.* at 143 (Breyer, J., concurring). The opinions of Justice Stevens and the Chief Justice, however, adhere to the *Roberts* “general approach” for assessing hearsay based on reliability. See *id.* at 124–25 (plurality opinion); *id.* at 144–48 (Rehnquist, C.J., concurring).

265. Indeed, there is little about the Sixth Amendment as a whole that suggests its aim is reliability. The Amendment calls for an “impartial” jury, not a jury of experts most likely to arrive at a reliable conclusion. U.S. Const. amend. VI. It calls for the right to compulsory process, a right which entitles the accused to obtain all witnesses “in his favor,” whether they be reliable citizens or convicted perjurers. See *Washington v. Texas*, 388 U.S. 14, 18–19 (1967) (invalidating a Texas rule that prohibited defendant from calling an accomplice as a witness). And it provides a right to counsel: a counsel who has the obligation to impeach even “reliable” witnesses where the opportunity arises. See *United States v. Wade*, 388 U.S. 218, 256–57 (1967) (White, J., concurring in part and dissenting in part) (noting defense counsel’s obligation to defend the guilty as well as the innocent).

case of a live witness, that process is easy enough to define. It involves testing the witness through face to face cross-examination under the penetrating glare of a jury.²⁶⁶

Hearsay, unfortunately, has led the Court to drift away from the process at the core of the confrontation right. The Court strayed first from confrontation to reliability, then from reliability to "firmly rooted" hearsay exceptions.²⁶⁷ The result is a sterile debate over hearsay labels, while living, breathing hearsay declarants cool their heels in silence outside of the courtroom. The Court first rationalized this drift as a matter of necessity.²⁶⁸ But necessity is a poor excuse when no one has really explored whether confrontation is possible. And even when live cross-examination is impossible, why should we drift so far? Would it not make more sense to look for a process that still involves the adversarial testing of hearsay?

That process, I believe, is how the Confrontation Clause deals with hearsay. The Sixth Amendment creates a right to confront hearsay.²⁶⁹ It creates a right for the defense to treat hearsay declarants like the "witnesses," which the Court insists that they are. Where the law of evidence allows the prosecutor to present hearsay, the Confrontation Clause allows the defense to subject that hearsay to adversarial challenge, to attempt to impeach, contradict or limit the declarant's "testimony" like that of any other witness. If the declarant is available, the right is simple enough. The defendant can demand confrontation and get it.²⁷⁰ If the declarant might be made available through reasonable efforts—as in the case of many reluctant accomplices—then the defendant has a right to those efforts.²⁷¹ And if the declarant is truly unavailable—as with declarants who

266. See 5 Wigmore, *supra* note 76, § 1395, at 150 ("The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." (emphasis omitted)).

267. See *supra* text accompanying notes 82–88.

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

269. Part III.B of this article describes the basic contours of the right to confront hearsay. In an earlier article, I offered a more detailed description of the elements of that right. Douglass, *Beyond Admissibility*, *supra* note 10, at 241–71.

270. My own view of the right to confront available declarants is akin to the view originally expressed by Justice Harlan in *California v. Green*. See 399 U.S. 149, 174 (1970) (Harlan, J., concurring); see also *supra* note 248. I would add, however, that in the case of available declarants, we should expect the defendant to exercise the right by demanding confrontation and exercising the right of confrontation. As a general rule, that should address Justice Harlan's later concerns that it would be impractical to require the government to produce all available hearsay declarants as a predicate to the admissibility of hearsay. *Dutton v. Evans*, 400 U.S. 74, 95–96 (1970) (Harlan, J., concurring) (noting that production of the declarant would be "unduly inconvenient and of small utility" in some cases). There should be no reason to produce even an available declarant where defendant asserts no plausible interest in cross-examination as, for example, in most cases involving business or public records.

271. Such efforts may include moving for a compulsion and use immunity order, at least where immunity poses no realistic threat to the government's legitimate interest in prosecuting the accomplice. See *infra* text accompanying notes 330–338.

have died or disappeared—then the defendant has a right to any available means to impeach the declarant in absentia.²⁷²

Under this approach, courts would not exclude, or admit, hearsay under the Confrontation Clause on the basis of its supposed reliability. When considering an accomplice confession, then, the question for the court and the parties would not be, “Is it reliable?” The law of evidence, and the Due Process Clause,²⁷³ would settle that question. Instead, the proper question under the Confrontation Clause would be, “What steps can we take to allow for a fair challenge to the hearsay?” To the extent that exclusion of evidence might be considered at all, it would be as leverage. That is, a court might exclude hearsay if the government took steps that blocked confrontation, or failed to take steps that would allow for confrontation.²⁷⁴ Conversely, a court would be free to deny a confrontation challenge from a defendant who declined to take advantage of an available opportunity to exercise the right.²⁷⁵

An approach that measured the confrontation right by a defendant’s opportunity to mount a fair challenge to prosecution hearsay would encourage pretrial choices unlike those we now see. Confrontation-hearsay debates would take on a very different flavor. They would have little to do with reliability and hearsay labels. Instead, they would focus on confrontation.

C. *Reconsidering Pretrial Choices in Light of the Right to Confront Hearsay*

By the time we see them in appellate courts, confrontation-hearsay issues are all about the admissibility of hearsay. The cases only reach the

272. See *supra* text accompanying notes 185–192; see also Douglass, *Beyond Admissibility*, *supra* note 10, at 251–60.

273. One reason for applying the Confrontation Clause as a rule excluding unreliable hearsay stems from a fear that, without constitutional restraint, the states would be free to admit any hearsay that prosecutors found convenient. My own view is that such fear is unfounded and misdirected. For one thing, *Lilly* notwithstanding, today’s Confrontation Clause has evolved into an exclusionary rule that excludes very little. Douglass, *Beyond Admissibility*, *supra* note 10, at 206. Indeed, it seems likely that the Court’s approach to confrontation has actually hastened the expansion of hearsay exceptions in state courts. *Id.* at 206, 211. For another, the Constitution already includes an outer limit on unreliable evidence: the Due Process Clause. Westen, *supra* note 53, at 598 (arguing that Due Process Clause excludes prosecution evidence where it does not possess “‘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))); see also *Dutton*, 400 U.S. at 99 (1970) (Harlan, J., concurring) (judging admission of evidence under Due Process Clause).

274. For example, although the court may not have the power to require the government to grant use immunity to a witness, the court can put the government to a choice between granting use immunity on the one hand, or foregoing use of the accomplice’s hearsay confession on the other.

275. In light of the general aversion of many defendants to facing their accomplices in court, see *supra* text accompanying notes 219–220, it seems likely that a number of Confrontation Clause objections to hearsay would simply evaporate when trial courts responded to such challenges by offering defendants exactly what they asked for: a real confrontation.

appellate stage after the government has offered hearsay, the defendant has objected, the trial court has overruled the objection, and the jury has found the defendant guilty.²⁷⁶ But if we could turn the clock back to the moment when the government offered the hearsay in evidence, or—even better—to the days before trial when the prosecution was contemplating the use of hearsay, we would see a broader range of issues. The question which the Court sees as an all or nothing contest over admissibility is really a conflict among three important interests: (1) the prosecution's interest in proving its case against the defendant,²⁷⁷ (2) the accomplice's interest in avoiding self-incrimination, and (3) the defendant's interest in confronting the accomplice.

If we look at the problem of reluctant-accomplice hearsay from this perspective, then we may see a broader range of solutions than simply admitting or excluding hearsay. Conflict among competing rights is common in our constitutional system.²⁷⁸ In many contexts, courts resolve such conflicts through the balancing of interests.²⁷⁹ Better yet, courts sometimes find ways to accommodate potentially competing interests and avoid conflict altogether. If our approach to the Confrontation Clause gave parties a reason to seek real confrontation, then a variety of conflict resolving solutions appear.

276. With one partial exception, all of the Court's confrontation-hearsay opinions, including *Lilly*, fit this pattern. The partial exception is the Court's first confrontation-hearsay case: *Mattox v. United States*, 156 U.S. 237 (1895). To the extent that *Mattox* considered the admissibility of the transcript of testimony from an earlier trial, it is merely the first in a long line of cases considering the admissibility of hearsay under the Confrontation Clause. But *Mattox* presented another issue as well. Once the trial court admitted the hearsay, defendant sought an opportunity to impeach the deceased declarant by calling two defense witnesses to testify that, after *Mattox's* first trial, the declarant had made statements admitting that his original testimony was false, having been induced by "threats made to him in the corridors of the court-house." *Id.* at 245. The Court disposed of the claim under the law of evidence, never mentioning the Confrontation Clause. *Id.* at 250. That was the Court's first, and so far only, opportunity to articulate an affirmative constitutional right to impeach a hearsay declarant. Despite prodding from the dissent, see *id.* at 251-61 (Shiras, J., dissenting), the Court bypassed the opportunity.

277. Actually, the government's interests are a bit more complex. In all likelihood, the government will seek to convict and punish both the defendant and his accomplice. A grant of immunity might put future prosecution of the accomplice at risk. A plea and cooperation deal with the accomplice avoids that risk, but at the price of a reduced sentence. The use of hearsay avoids both problems for the government, but that choice risks exclusion of probative evidence or—even worse—reversal on appeal, if the government miscalculates in forecasting the admissibility of hearsay at trial.

278. In the First Amendment arena, for example, the Court has faced conflicts between the right of some citizens to engage in religious speech and the rights of others under the Establishment Clause. E.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837-38 (1995).

279. The Court has resolved Fourth Amendment claims, for example, by balancing a citizen's interest in privacy against a variety of societal interests. E.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995) (weighing a student athlete's interest in privacy from drug testing against a school's "special" need to address drug abuse crisis).

1. *"Speak No Evil": Reconsidering the Accomplice's Silence.* — In some, perhaps even most, cases of accomplice hearsay, courts presume a conflict that may not exist. When the accomplice-declarant asserts his Fifth Amendment privilege, courts seldom examine his claim in detail.²⁸⁰ Instead, they simply assume he is unavailable for cross-examination.²⁸¹ And, as we have seen, current Confrontation Clause doctrine gives the parties little incentive to challenge that assumption.²⁸² As a result, the reluctant accomplice takes the Fifth and walks away in silence. We typically do not know what the defense would have asked on cross-examination or how the accomplice would have answered. The entire confrontation-hearsay argument often rests on an untested foundation: the notion that admission of hearsay will create a direct conflict between the accomplice's Fifth Amendment right to silence and the defendant's Sixth Amendment right to cross-examine him. In fact, the conflict is not as certain as it might first appear, because the Fifth and Sixth Amendment rights at stake are not absolute.

There is, of course, no Fifth Amendment right to "silence."²⁸³ The accomplice has a right not to be compelled to be a witness against himself

280. In *Lilly*, for example, the Supreme Court of Virginia simply asserted that "a declarant is unavailable if the declarant *invokes* the Fifth Amendment privilege to remain silent." *Lilly v. Commonwealth*, 499 S.E.2d 522, 533 (Va. 1998) (emphasis added) (quoting *Boney v. Commonwealth*, 432 S.E.2d 7, 10 (Va. Ct. App. 1993)). In his brief to the United States Supreme Court, Lilly argued that "although Mark Lilly was technically unavailable at trial because of his assertions of his Fifth Amendment rights, the timing of his trial was within the Commonwealth's control." Brief for Petitioner at 22, *Lilly v. Virginia*, 527 U.S. 116 (1999) (No. 98-5881). In other words, though Lilly contended the state was responsible for making Mark "unavailable," Lilly never questioned the validity or scope of Mark's blanket claim of Fifth Amendment privilege. The Supreme Court simply brushed the issue aside, noting, "[w]e assume, however as petitioner did in framing his petition for certiorari, that to the extent it is relevant, Mark was an unavailable witness for Confrontation Clause purposes." *Lilly*, 527 U.S. at 124 n.1.

It is typical in confrontation-hearsay cases that neither the trial court nor the parties question the accomplice's blanket assertion of a Fifth Amendment privilege. See, e.g., *United States v. Papajohn*, 212 F.3d 1112, 1116 (8th Cir. 2000) (noting that accomplice refused to testify at trial and trial court therefore "declared [accomplice] an unavailable witness").

281. On the surface, at least, the assumption seems reasonable. He is, by his own admission, an accomplice in the crime charged. So, it appears, he must have a legitimate fear that his testimony will incriminate him.

282. See *supra* text accompanying notes 226–229.

283. The popular notion that the Fifth Amendment is essentially a right to silence stems from *Miranda v. Arizona*, where the Court held that before custodial interrogation police must inform the suspect that he has "the right to remain silent." 384 U.S. 436, 479 (1966). Further, the Court has held that prosecutors may not use a suspect's post-arrest, post-*Miranda* silence against him at trial. *Doyle v. Ohio*, 426 U.S. 610, 618–19 (1976). But neither *Doyle* nor *Miranda* creates a comprehensive Fifth Amendment right to be silent at all times and in all circumstances. The *Miranda* "right to silence" is essentially a form of protection against the inherently coercive nature of custodial police interrogation. *Miranda*, 384 U.S. at 448. But courtrooms are different than police stations.

in a criminal case.²⁸⁴ That means that the state may not force incriminating statements from his lips, then use them as a tool of his own prosecution. If a statement is not incriminating, then he can be compelled to speak.²⁸⁵ Likewise, even an incriminating statement can be compelled if it is not to be used against him.²⁸⁶

Similarly, the defendant's Sixth Amendment right to cross-examine government witnesses is not absolute. Instead, the Constitution guarantees an "adequate opportunity" to cross-examine.²⁸⁷ Courts routinely, and constitutionally, limit cross-examination that is redundant, harassing, irrelevant, pointless, or unfairly prejudicial.²⁸⁸ Indeed, they may limit otherwise legitimate cross-examination where it conflicts with other important interests and where the defendant nonetheless has a fair chance to test the credibility and accuracy of the witness.²⁸⁹

A real conflict of Fifth and Sixth Amendment rights exists only where (1) an adequate opportunity to cross-examine requires (2) incriminating answers from the accomplice which (3) the government needs to convict or punish the accomplice. That confluence of events does not arise in all accomplice hearsay cases. Indeed, the conflict probably did not exist in *Lilly*, though the trial court did not know that until Mark testified at sentencing.²⁹⁰ My suspicion is that, if courts could examine these questions

284. The Fifth Amendment states, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

285. See *Rogers v. United States*, 340 U.S. 367, 374-75 (1951).

286. See *Kastigar v. United States*, 406 U.S. 441, 453-54 (1972).

287. *United States v. Owens*, 484 U.S. 554, 557 (1988); see also *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("Generally speaking, 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.").

288. See *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (holding that confrontation right is not violated by restricting cross-examination on matters of marginal relevance); *United States v. Tipton*, 90 F.3d 861, 888-89 (4th Cir. 1996) (restricting cumulative cross-examination); *Miranda v. Cooper*, 967 F.2d 392, 402 (10th Cir. 1992) (holding that court properly restricted cross-examination which lacked any factual basis).

289. *United States v. Gil*, 58 F.3d 1414, 1421 (9th Cir. 1995) (restricting cross-examination regarding location of surveillance in order to protect legitimate government interests in future investigations); *United States v. Balliviero*, 708 F.2d 934, 943 (5th Cir. 1983) (restricting use on cross-examination of transcript of witness's sentence reduction hearing where use would jeopardize ongoing investigation).

290. When Mark testified at sentencing, he denied seeing his brother shoot the murder victim, claiming instead that he was vomiting next to the car at the time. Brief for Petitioner at 19, *Lilly v. Virginia*, 527 U.S. 116 (1999) (No.98-5881). It seems likely, therefore, that on the most critical point at issue in Ben Lilly's trial, Mark could have testified with no legitimate fear of self-incrimination. At worst, his "vomiting" story would have been incriminating only to the extent that it acknowledged his presence at the scene of the murder, a fact which he had already admitted to the police.

Obviously, wide ranging cross-examination could have ventured into areas of legitimate concern to Mark. But—because the parties and the court never attempted to explore the issue—we will never know whether a constitutionally adequate cross-examination might have occurred without exposing Mark to a legitimate risk of further incrimination.

in every case, an irreconcilable conflict would arise in very few. In other words, most confrontation-hearsay conflicts involving a reluctant accomplice could be avoided if courts gave them a closer look.

Before considering how courts might examine potential conflicts in the real world of trials, imagine a world where omniscient courts could read the minds of the parties and of the reluctant accomplice. In that world, the court could know what questions the defense would ask, and how the accomplice would answer, if hearsay were admitted in evidence and the accomplice were put on the witness stand for cross-examination. Our hypothetical omniscient court could determine whether those answers posed a realistic likelihood of incriminating the accomplice in light of everything the government already knew about him. If courts could do all that, I suspect, they seldom would find irreconcilable conflicts between the defendant's right of cross-examination, the accomplice's right to avoid incriminating himself, and the government's ability to convict and punish the accomplice.

One reason for my optimism lies in the principal circumstance that gives rise to reluctant-accomplice hearsay cases in the first place: The accomplice has already confessed to the police.²⁹¹ Given that circumstance, the chances of meaningful self-incrimination through trial testimony are limited, as are the odds that the government would have any realistic need to use what the accomplice might say on cross-examination. If the accomplice merely repeats what he said to the police, then he has done little to deepen his already deep state of "incrimination."²⁹² If, on the other hand, he recants his confession and denies participation in the crime or—like Mark Lilly²⁹³—denies knowledge or memory of the crime, then his testimony is not likely to be incriminating.²⁹⁴ A cross-examina-

291. The term "confession," in this context, may be misleading. Given our earlier definition of the reluctant accomplice, see *supra* text accompanying note 23, the most we can say with confidence is that he has given a post-arrest statement to police, that the statement implicates his criminal confederate, and that the statement may fall within an exception to the hearsay rule—most likely the exception for statements against interest. In most cases, of course, that jailhouse statement will implicate the accomplice in at least some aspect of the same criminal wrongdoing in which he implicates his confederate.

292. Where a witness has disclosed facts voluntarily, and is later called upon to testify to the same, or related, facts, the Fifth Amendment issue becomes "whether the question present[s] a reasonable danger of further criminalization in light of all the circumstances, including any previous disclosures." *Rogers v. United States*, 340 U.S. 367, 374 (1951).

293. See *supra* note 8.

294. Of course, his new version may be a lie. But the Fifth Amendment privilege only applies where a truthful answer would tend to incriminate the witness. It does not protect him against a later prosecution for perjury. See *Kastigar v. United States*, 406 U.S. 441, 448, 459 (1972); see also 18 U.S.C. § 6002 (1994). One could argue, perhaps, that a witness who testifies to a new, true version of events may subject himself to prosecution for making earlier false statements to police, at least in jurisdictions which criminalize such statements. See 18 U.S.C. § 1001 (1994) (criminalizing the making of false statements in a matter within the jurisdiction of a federal agency). But, for the reluctant accomplice, that is hardly a realistic outcome. After all, the government has chosen to offer his hearsay statement in evidence for its truth.

tion that elicited any of these responses would pose little real risk to the accomplice's Fifth Amendment rights.²⁹⁵

The only substantial risk to the accomplice arises if his answers on cross-examination would implicate him in a more serious version of the crime or provide new evidence which the government needs to prove his guilt. Experience and human nature suggest that few accomplices are likely to take the stand and acknowledge greater guilt than they already have confessed.²⁹⁶ But in the few cases where an accomplice's testimony would provide new or more deeply incriminating evidence, the Fifth Amendment should—and would—protect the accomplice against that risk.

Of course, even that risk need not create an irreconcilable conflict of rights. That conflict is avoidable as long as the government chooses not to use that new evidence in any later prosecution of the accomplice.²⁹⁷ In federal courts and in most states, the government can make that choice by granting use immunity to the accomplice.²⁹⁸ Admittedly, use immunity can be a sensitive issue for a variety of reasons, which are explored below. For the moment, it will suffice to observe that most prosecutors in most cases could grant use immunity to the reluctant accomplice and offer him up for cross-examination with no real risk to any subsequent prosecution of the accomplice.

There are other important reasons why most cross-examination of most accomplice-witnesses is unlikely to create irreconcilable conflicts between Fifth and Sixth Amendment rights. One reason is the typical subject matter of cross-examination of an accomplice. A great deal of that cross-examination has nothing to do with the crime for which defendant is on trial, and nothing to do with any crime for which the accomplice is likely to be prosecuted. Instead, cross-examination often aims to impeach the accomplice by demonstrating bias toward the defendant, prior convictions, prior inconsistent statements, a self-serving motive, or an untrustworthy character. Because these questions have nothing to do with

295. The test for determining when a witness may legitimately assert a Fifth Amendment privilege is a generous one—for witnesses. The witness may refuse to answer when a truthful response “would furnish a link in the chain of evidence needed to prosecute” him for a crime. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). The privilege is not automatic, however. “The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination.” *Id.* Instead, the privilege applies “where the witness has reasonable cause to apprehend danger from a direct answer.” *Id.*

296. The much more likely outcome may be the Mark Lilly approach: convenient loss of memory. But that would be sufficient to allow a defendant an adequate opportunity for cross-examination. See *United States v. Owens*, 484 U.S. 554, 557–60 (1988). Indeed, it would suggest to the jury ample reason to hesitate in relying on the accomplice's earlier statements. See *id.* at 558 (“[A] defendant seeking to discredit a forgetful expert witness is not without ammunition, since the jury may be persuaded that ‘his opinion is as unreliable as his memory.’” (quoting *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985))).

297. *Kastigar*, 406 U.S. at 453.

298. See 18 U.S.C. §§ 6001–6003; see also *supra* notes 29, 45.

the crime in most cases, the accomplice usually can respond with no legitimate fear of incrimination. For example, had Mark Lilly faced such cross-examination, he might have acknowledged—as he later did—that he was drunk when he made his hearsay confession.²⁹⁹ He might have admitted that he had reasons to favor his roommate—Gary Barker, the third participant in the homicide—over his brother, Ben. He might have admitted that police made subtle threats that he could face the death penalty if he failed to implicate Ben. He might have acknowledged prior convictions, disreputable acts, or prior inconsistent statements. All of that would be typical in the cross-examination of an accomplice witness, and none of it would have posed a serious Fifth Amendment concern for Mark Lilly.

Of course, some impeachment may involve efforts to implicate the accomplice-witness in other crimes. In drug prosecutions, for example, it is common for defense cross-examination to prove—or at least suggest—involvement of the accomplice in drug transactions not at issue in the trial. But courts have had little trouble reconciling Fifth and Sixth Amendment rights in that context. Courts often disallow cross-examination on “other crimes” or “collateral matters” in deference to the Fifth Amendment rights of an accomplice-witness.³⁰⁰ The Confrontation Clause guarantees an “adequate opportunity” to cross-examine, not an unfettered right to cross-examine on every matter that may affect credibility.³⁰¹ Thus, in the case of impeachment by other crimes, courts have accommodated Fifth and Sixth Amendment rights by ruling that the right of cross-examination must yield.

If our omniscient court could forecast the cross-examination of the reluctant accomplice, it might discern still another reason why real Fifth and Sixth Amendment conflicts are unlikely. This reason arises from the nature of cross-examination itself. Cross-examination is a cautious process—perhaps especially cautious when the witness is a former accomplice of the defendant. Cross-examiners control witnesses by asking leading questions, based on known facts, and primarily based on facts that can be proved independently if denied by the witness.³⁰² Witnesses seldom volunteer new information on cross-examination. As long as cross-examination follows this familiar pattern, then the real risk to the accomplice’s Fifth Amendment interests is small, for a simple reason: The privilege applies to his answers, not to the questions. He has no Fifth Amendment protection that would prohibit the prosecutor from learning, and even using against him, the facts asserted in the cross-examiner’s ques-

299. See Brief for Petitioner at 4–5, 14, *Lilly v. Virginia*, 527 U.S. 116 (1999) (No. 98-5881).

300. See, e.g., *United States v. Curry*, 993 F.2d 43, 45 (4th Cir. 1993) (sustaining government witness’s assertion of Fifth Amendment privilege, and restricting cross-examination regarding “collateral” matter of witness’s recent drug dealing).

301. See *Owens*, 484 U.S. at 557.

302. See *supra* notes 198–203 and accompanying text.

tions and the independent evidence upon which those questions are based.³⁰³ Only the answers are protected, and in most cross-examination, those answers consist of a "yes," a "no," or a shrug.³⁰⁴ Obviously, where the accomplice admits an incriminating fact, the Fifth Amendment would prohibit use of that admission against him. But typically that prohibition will be of little moment to the prosecutor³⁰⁵ because the important fact is available from a source independent of the accomplice's admission.³⁰⁶

Finally, there is one other reason to expect that our omniscient court would find few true conflicts at the heart of most confrontation-hearsay arguments. This reason has to do with the outcome of most cross-examination. Despite popular images to the contrary, experienced trial lawyers share a disappointing secret about their chosen trade: Most cross-examination falls short of expectations.³⁰⁷ Impeaching a witness can be an extraordinarily difficult enterprise. Even for talented advocates, the odds

303. See *Kastigar v. United States*, 406 U.S. 441, 459-60 (1972). In practice, the risk is even further reduced. Most of the independent evidence—the "ammunition" which the cross-examiner would use if the witness denied his assertions of fact—probably comes from the prosecutor in the first place. See *Giglio v. United States*, 405 U.S. 150, 153 (1972) (discussing the responsibility of the prosecutor to disclose impeachment evidence). For a discussion of the application of *Giglio* to hearsay declarants, see Douglass, *Balancing Hearsay*, *supra* note 43, at 2176-84.

304. See *supra* notes 198-200 and accompanying text.

305. Arguably, the prosecution might violate the accomplice's Fifth Amendment rights by making "nonevidentiary" use of his answers, even where the questions themselves provided independent sources to prove the admitted facts. The accomplice's admissions might serve to focus government investigation on particular areas, while his denials might lead the government not to pursue the leads suggested by other questions. Whether this is a valid concern, however, depends upon the extent to which the Fifth Amendment protects against such "nonevidentiary" use. The Court has never addressed that question, and the lower courts have split. Compare *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (finding nonevidentiary uses impermissible), with *United States v. Serrano*, 870 F.2d 1, 16-17 (1st Cir. 1989) (stating that nonevidentiary use of compelled testimony would not offend Fifth Amendment), and *United States v. Mariani*, 851 F.2d 595, 600 (2d Cir. 1988) (noting that no Fifth Amendment violation arises where immunized testimony may have influenced prosecutor's thought process).

Of course, some courts have adopted a remarkably broad definition of "evidentiary" use. In the celebrated case of *Oliver North*, for example, the District of Columbia Circuit found a *Kastigar* violation where government witnesses had listened to immunized testimony and, as a result, may have refreshed or changed their recollection of events. *United States v. North*, 920 F.2d 940, 944-46 (D.C. Cir. 1990). For a critique of the "superstrict" approach at work in *United States v. North*, see Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 879-80 (1995).

306. Requiring the defense to proffer the basic subject matter of anticipated cross-examination, and the independent evidence upon which it would be based, would substantially limit the risk to the government in granting use immunity. It would, after all, establish a record of pre-existing sources of most of the information revealed during cross-examination. See *Kastigar*, 406 U.S. at 460-62 (allowing later prosecution of witness based on evidence derived from sources independent of his immunized testimony).

307. See *supra* note 193.

favor the witness.³⁰⁸ If counsel could review and edit their cross-examinations after the fact, they often would “un-ask” many of their questions. Of course, the Sixth Amendment still guarantees the right to attempt impeachment, even where it may fail. Courts do not, and should not, limit procedural rights simply because they do not always work. My point is more limited. If we had a structure that allowed courts to preview defense cross-examination of an accomplice, and that process demonstrated that a particular line of questioning produced nothing useful to the defense, then we would do no harm to the defendant if we eliminated those questions. Indeed, we would do him a favor.³⁰⁹

Of course, when real courts consider hearsay proffered by the government, they lack the advantage of twenty-twenty foresight. The accomplice takes the Fifth, and we seldom know how much, or how little, he might have said if we compelled him to face cross-examination. We do not know what questions the defense would ask. Indeed, we do not even know for sure whether defense counsel would choose to cross-examine at all. Still, our hypothetical exercise leads in a promising direction. If we had the means to know in advance what defense counsel would ask, and how the accomplice would answer, then we might avoid the conflicts at the heart of most confrontation-hearsay cases. And if knowing their questions and their answers could prove that helpful in even some cases, then the next step seems logical enough. We should ask them.

2. “*Hear No Evil*”: *Reconsidering the Defendant as Potted Plant*. — There is a common misperception that the defense has a constitutional right to do nothing at a criminal trial. That is an overstatement. True, the defendant need not testify.³¹⁰ He need not present evidence.³¹¹ But many of the rights associated with criminal trials require action by the defense. For example, a defendant has a right to be present during trial, but he can waive that right by failing to show up.³¹² The Sixth Amendment guarantees compulsory process for obtaining defense witnesses, but a defendant must make a timely request for a subpoena in order to exercise the right.³¹³ Again, the penalty for inaction is waiver. The same is true of cross-examination. The Confrontation Clause guarantees an opportunity

308. See Mauet, *supra* note 156, at 217 (“[I]n the cross-examination game, ties go to the witness.”).

309. In fact, an *in camera* “dry run” might well convince many defendants to limit their actual cross-examination. The result might be both more effective cross-examination *and* avoidance of the confrontation-hearsay issue altogether.

310. *Harris v. New York*, 401 U.S. 222, 225 (1971).

311. The Due Process Clause assigns the burden of proof to the prosecution to prove all elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

312. See *Taylor v. United States*, 414 U.S. 17, 19 (1973) (*per curiam*) (holding that defendant waived right by failing to return to afternoon session of trial).

313. E.g., *United States v. Tran*, 16 F.3d 897, 905–06 (8th Cir. 1994); *United States v. King*, 762 F.2d 232, 235 (2d Cir. 1985).

to cross-examine. But defense counsel must stand up and seize that opportunity.³¹⁴

Curiously, courts seldom apply this principle when it comes to confronting hearsay. Under the Court's confrontation-hearsay formula, courts seldom even ask a defendant whether he wants to put an available declarant on the stand for cross-examination.³¹⁵ And courts almost never invite the defendant to attempt cross-examination where the government offers hearsay from a reluctant accomplice. Instead, as we have seen, defendants often assert a confrontation right which they have no interest in exercising.³¹⁶ Their real aim is to exclude hearsay. But if we had a confrontation doctrine that treated hearsay declarants just as it treats other witnesses, then we would expect more from defendants than the passive silence of the potted plant. When a prosecution witness testifies at trial, the right of cross-examination is not self-executing. The defendant must choose to cross-examine and must put questions to the witness. The same principle should apply with hearsay declarants.

If the defendant objects to otherwise admissible hearsay on confrontation grounds, then we should give him what he asks for. Where the declarant is available, we should allow the defendant an opportunity to cross-examine.³¹⁷ Where the declarant is an accomplice who asserts a Fifth Amendment privilege, we should at least explore opportunities to proceed in the same manner. That is, we should consider whether the defendant's cross-examination will really threaten the accomplice's Fifth Amendment rights. But to begin that effort, we must first hear what questions the defendant expects to pursue on cross-examination.

Nothing in the Constitution prohibits a court from requiring that much from a defendant who claims that hearsay will violate his confrontation right. Indeed, that is the process which real courts pursue when a

314. See *United States v. Morsley*, 64 F.3d 907, 918 (4th Cir. 1995) (finding no confrontation violation where defense counsel declined to cross-examine coconspirator); *United States v. Howard*, 751 F.2d 336, 338 (10th Cir. 1984) (finding no confrontation violation where defense counsel declined opportunity to cross-examine witness on key points).

315. *United States v. Inadi*, 475 U.S. 387 (1986), is an exception. There, at least, the trial court asked counsel whether she wished to have the declarant produced. But the Court ultimately attached no consequence to defendant's failure to respond to that invitation. *Id.* at 399.

316. See *supra* text accompanying notes 218–226.

317. The *Inadi* Court suggested that the right to call a hearsay declarant as an adverse witness is a byproduct of the Compulsory Process Clause. *Inadi*, 475 U.S. at 397 (“If [defendant] independently wanted to secure [declarant’s] testimony . . . [t]he Compulsory Process Clause would have aided [him] in obtaining the testimony . . .”). I believe that the Court’s sentiment is correct, but that the proper basis for that sentiment lies in the Confrontation Clause. The Compulsory Process Clause addresses only witnesses “in favor” of an accused. To me, it seems inapposite to regard an adverse hearsay declarant as a witness “in favor” of the defendant. The right to put such a witness on the stand for hostile questioning lies more naturally in the Clause guaranteeing the right to confront “witnesses against” the accused. Douglass, *Beyond Admissibility*, *supra* note 10, at 242–45.

prosecution witness asserts the Fifth Amendment privilege during cross-examination.³¹⁸ In those cases, courts do not react by automatically striking the direct testimony of the witness, or by ordering a mistrial. Nor do they simply ignore the right to cross-examine where they conclude the witness is "reliable." Instead, they assess whether the anticipated cross-examination really conflicts with the Fifth Amendment rights of the witness, and whether the conflict really jeopardizes the opportunity for a fair and adequate cross-examination.³¹⁹ And they start by requiring the defendant to proffer the questions he expects to pursue on cross-examination.

Of course, this kind of question-by-question proffer occurs away from the jury.³²⁰ The witness—typically with assistance of his own counsel—identifies which questions he will answer and which will give rise to a claim of privilege. Where the claim has no merit, the court compels an answer. In this manner, the court winnows out the areas of true conflict between Fifth and Sixth Amendment rights. The remaining "safe" areas of cross-examination can then proceed in front of the jury. Often, nothing more is required to accommodate the competing rights of witness and defendant. The areas of true conflict may turn out to be nonexistent, insignificant, or unhelpful to the defense.³²¹ The allowable areas of cross-examination may be sufficient to satisfy the Sixth Amendment right to an adequate opportunity for cross-examination.³²²

The same procedure could be followed just as easily in cases where the "direct" testimony consisted of hearsay from a reluctant accomplice. This process could avoid many instances where courts wrongly presume a conflict between Fifth and Sixth Amendment rights. But some conflicts would remain. Of course, as our hypothetical omniscient court would tell us, we could refine the process further if we could know how the accomplice might answer the proffered questions. Unfortunately, things get stickier at this juncture. We have a chicken-and-egg problem. We need to hear the answers to know if they are really self-incriminating. But incrimination may result from giving the answers.³²³

318. See, e.g., *United States v. Viera*, 819 F.2d 498, 501 (5th Cir. 1987) (noting that the proper procedure in such cases is to "excuse[] the jury, and [to hear] the desired cross-examination").

319. See, e.g., *United States v. Jackson*, 915 F.2d 359, 360 (8th Cir. 1990) (declining to strike testimony where defendant had adequate opportunity for cross-examination despite witness's claim of Fifth Amendment privilege in response to some questions).

320. See, e.g., *Viera*, 819 F.2d at 501.

321. See, e.g., *United States v. Yip*, 930 F.2d 142, 147 (2d Cir. 1991) (declining to strike witness testimony where witness invoked Fifth Amendment privilege only in relation to collateral matters).

322. See, e.g., *United States v. Beale*, 921 F.2d 1412, 1424 (11th Cir. 1991) (refusing to strike testimony where defense amply impeached witness despite his claim of Fifth Amendment privilege); *Jackson*, 915 F.2d at 360 (same).

323. "[I]f the witness, upon interposing his claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be established in

Even this sticky problem, however, is manageable. Courts often address questions of privilege by requiring *ex parte*, *in camera* submissions. Debates over attorney-client privilege are typically resolved in that manner.³²⁴ Courts review *ex parte* submissions from prosecutors as a means to resolve discovery disputes.³²⁵ The same process offers a fair way to adjudicate a potential conflict between the accomplice's Fifth Amendment privilege and the defendant's Sixth Amendment right. Where the government offers otherwise admissible hearsay and the defendant demands confrontation, the court might conduct an *ex parte* proffer in chambers and compel the accomplice to answer. To the extent that any answers may be legitimately self-incriminating, the prosecutor could never use them.³²⁶ Indeed, she would never even hear them absent a use immunity order.³²⁷ To the extent that answers were not incriminating, the court could order the cross-examination to proceed in front of the

court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

324. See Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* 426–27 (1995).

325. In *Pennsylvania v. Ritchie*, for example, the Court suggested *in camera*, *ex parte* review as a means for determining the materiality of information in confidential child custody files which, the defendant contended, contained exculpatory evidence. 480 U.S. 39, 60 (1987).

326. The practical effect of compelling a proffer would be to create the equivalent of use immunity for the accomplice's statements. Since the statements would have been compelled, the government could make no use of them, directly or indirectly. *United States v. Hubbell*, 530 U.S. 27, 39 (2000).

327. As long as the prosecutor was unaware of the answers, the accomplice would remain fully protected, and the government would face no risk that its future prosecution of the accomplice might be "tainted." That risk would arise only if information disclosed in an *in camera*, *ex parte* proffer were somehow leaked to the prosecutor. Then, in any future prosecution of the accomplice, the government would face the burden of proving that its evidence was independently derived. *Kastigar v. United States*, 406 U.S. 441, 461–62 (1972). Still, that seldom would pose a serious risk to the government. See *infra* text accompanying notes 337–338. Despite some suggestions to the contrary, *United States v. North*, 910 F.2d 843, 856 (D.C. Cir. 1990), amended by 920 F.2d 940 (D.C. Cir. 1990), there is no absolute Fifth Amendment protection against prosecution by a government attorney who may have been exposed to immunized testimony. See *United States v. Mariani*, 851 F.2d 595, 600 (2d Cir. 1988) (noting that no Fifth Amendment violation arises where immunized testimony may have influenced prosecutor's thought process); *United States v. Byrd*, 765 F.2d 1524, 1530–31 (11th Cir. 1985) (stating that Fifth Amendment does not protect against nonevidentiary use of immunized testimony in decisionmaking by prosecutors); *United States v. Pantone*, 634 F.2d 716, 720 (3d Cir. 1980) (noting that *Kastigar* does not prohibit prosecutor's "mere access to immunized grand jury testimony").

For a more detailed discussion of the varying approaches of courts in defining the scope of use immunity, see Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 *Tex. L. Rev.* 351, 363–74 (1987); Jerome A. Murphy, *The Aftermath of the Iran-Contra Trials: The Uncertain Status of Derivative Use Immunity*, 51 *Md. L. Rev.* 1011, 1030–31 (1992).

jury. The result would be a further winnowing of the real conflicts from those we only presume to exist.³²⁸

If we required these steps from the defendant and the accomplice, we would see that many confrontation-hearsay cases do not present irreconcilable conflicts between Fifth and Sixth Amendment rights. We could admit an accomplice's confession, allow adequate cross-examination, and preserve both rights. Many confrontation-hearsay problems would simply disappear.

Conflicts between the competing rights of the defendant and the accomplice would remain in those cases where the accomplice has something to say that is both genuinely self-incriminating and necessary for a fair cross-examination. In the starkest case, for example, the accomplice might recant his earlier blame-shifting statements and "take the rap"—or at least more of the "rap"—for the crime charged against the defendant. Short of compromising the right of confrontation, the only choice would be to exclude the hearsay or grant use immunity to the accomplice. If we take the right of confrontation seriously, the Confrontation Clause should compel the prosecution to make that choice.³²⁹

3. "*See No Evil*": *Reconsidering the Government's Responsibility to Promote Confrontation*. — Before the *Roberts* formula made reliability the exclusive focus of Confrontation Clause analysis, the Court sometimes used the power to exclude hearsay for a different purpose. It refused to allow hearsay where the government neglected to use available means to allow

328. In some measure, "pre-screening" a cross-examination would detract from the spontaneity of the examination conducted later in front of the jury. But that disadvantage could be overcome by videotaping the proffer and allowing the defense to use portions of the tape where the difference was significant. Moreover, any disadvantage to the defense from having to disclose its cross-examination strategy in a dry run would be offset by the advantage of discovering the accomplice's responses in the risk free environment of an in camera proceeding.

329. Cases where the accomplice, if cross-examined, would accept blame for the defendant's alleged offense are cases of clear conflict between the accomplice's Fifth Amendment rights and the defendant's right of confrontation. But they are also the cases where cross-examination is most crucial to the defense. In a related context, the Court found a Due Process violation where the defense was denied the opportunity to introduce a third party's hearsay confession to the crime with which the defendant was charged. *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973). The *Chambers* Court further held that the state violated Chambers's right to due process when it applied a "voucher" rule to prohibit the defense from calling the confessing third party to the stand and cross-examining him as an adverse witness. *Id.* at 295–97.

One could argue that a defendant's right to a fair trial is even more seriously impaired when the state relies on an accomplice's blame-shifting confession to convict, while the Fifth Amendment denies the defendant an opportunity to present a blame-accepting confession from the same accomplice. Yet the Court's current approach to confrontation would allow that to happen, as long as the blame-shifting confession satisfied the Court's somewhat unpredictable standards for "reliability." In my view, that is an untenable result. Instead, it makes sense to put the government to a choice: either forego the blame-shifting hearsay, or allow cross-examination of the accomplice under a grant of use immunity.

for confrontation.³³⁰ In those early cases, the exclusionary rule was not just a rule of evidence³³⁰ for screening out unreliable hearsay. It was leverage to require government action. The aim was to promote confrontation.

In the case of a reluctant accomplice, the Confrontation Clause can, and should, function in just that way. When the accomplice takes the Fifth, the government holds the key to his silence. Except in cases of the most recalcitrant accomplice, the prosecutor can bring about confrontation by granting use immunity.³³¹ And in most cases, she can do so with no real risk to the government's legitimate interest in punishing the accomplice for his own crimes. It would seem only natural, then, to condition the use of hearsay on the exercise of that power.

But courts seldom take that approach, in part because they regard immunity decisions as the private domain of prosecutors.³³² Courts do not grant immunity; prosecutors do.³³³ And, with a few limited exceptions, courts do not compel immunized testimony at the request of defendants.³³⁴ For that reason, the notion that a court might order use immunity to allow for defense cross-examination of a hearsay declarant may seem far-fetched. It should not be.

The principal reason for opposing defense-witness use immunity does not apply in most cases of reluctant accomplice hearsay. In other contexts, if defendants routinely could immunize their witnesses, then

330. E.g., *Barber v. Page*, 390 U.S. 719, 723–25 (1968) (excluding hearsay under Confrontation Clause where government made no effort to obtain declarant from federal prison); *Motes v. United States*, 178 U.S. 458, 474 (1900) (excluding hearsay when witness's absence resulted from government negligence in releasing witness from jail and failing to monitor him).

331. See 18 U.S.C. § 6003 (1994); see also *supra* notes 29, 45. Even a grant of use immunity will not always bring about live testimony. A few witnesses will refuse to talk even when ordered to do so. In such cases, the court will find the witness in contempt of its order and typically will jail the witness until he complies with the order and testifies, or until the end of the proceeding in which his testimony is sought. The court can enhance the coercive effect of its order by imposing an additional term of imprisonment for criminal contempt.

332. See, e.g., *United States v. Doe*, 465 U.S. 605, 616 (1984) (“We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request [of the United States Attorney] that the statute requires.”); *United States v. Lugg*, 892 F.2d 101, 104 (D.C. Cir. 1989) (“The cases are legion and uniform that only the Executive can grant statutory immunity, not a court.”).

333. The federal use immunity statute makes this division of labor clear. Courts have the power to compel immunized testimony, but only after the prosecutor moves for such an order. See 18 U.S.C. §§ 6002–6003.

334. A few courts have suggested that the government may be compelled to grant use immunity in extraordinary circumstances. See *Lugg*, 892 F.2d at 104 (noting that a few federal courts “have indicated that courts may intervene in the prosecutorial immunity decision ‘[w]here the prosecutor’s decision not to grant a witness use immunity has distort[ed] the judicial fact-finding process’” (alterations in original) (quoting *United States v. Paris*, 827 F.2d 395, 403 (9th Cir. 1987) (Kozinski, J., dissenting))). For more extensive discussions of defense witness immunity, see Note, Sixth Amendment, *supra* note 29; Stone, *supra* note 29.

they would have the power to grant “immunity baths” to their friends and coconspirators.³³⁵ Their choices undoubtedly would conflict with the prosecutor’s power to choose whom to charge, when to charge, and what to charge. That concern carries little weight, however, when the government offers the hearsay confession of a reluctant accomplice. Immunizing an accomplice whose hearsay statement the government chooses to offer in evidence is critically different from immunizing defense witnesses because it is the prosecution that chooses to use the accomplice’s story in the first place. The government might face a hard choice between granting use immunity on the one hand and foregoing the use of hearsay on the other. But it is still the prosecutor’s choice. And she has a range of other options where the risks of use immunity appear too great.³³⁶

In most cases, use immunity will pose little risk to any future prosecution of the accomplice. Use immunity allows the government to compel testimony, yet still prosecute the accomplice as long as the later prosecution rests on evidence obtained independently of the immunized testimony.³³⁷ In the case of the reluctant accomplice, that will seldom be a difficult feat for a prosecutor. After all, she already has a confession from the accomplice, typically has already charged him, and probably expects to use most of the same evidence against him that she is using in the trial of his colleague in crime. She could immunize the accomplice’s cross-examination with little risk that a later prosecution would fail for lack of independent evidence. And it is easy for her to create a record demonstrating that such evidence is, in fact, independently derived.³³⁸ Indeed,

335. See Note, Sixth Amendment, *supra* note 29, at 1273–74.

336. See *supra* text accompanying notes 126–129.

337. In that circumstance, the Court has told us, immunity is commensurate with the Fifth Amendment right of the witness. In essence, he is in the same position he would occupy if he never testified at all. *Kastigar v. United States*, 406 U.S. 441, 458–59 (1972).

338. The Fifth Amendment protects against the use of derivative evidence. See *United States v. Hubbell*, 530 U.S. 27, 37–38 (2000); *Kastigar*, 406 U.S. at 453–54. And, in any later prosecution of the accomplice, the prosecutor must prove that none of her evidence was derived from immunized testimony. *Id.* When a prosecutor grants use immunity to a witness whom she may later wish to prosecute, therefore, her risk is not so much that the witness will confess to the crime. She can simply avoid using the confession. Instead, her real risk is that the testimony might suggest leads to new evidence. That cat, she may find, is hard to stuff back into the Fifth Amendment bag.

As a practical matter, however, prosecutors can satisfy the requirements of *Kastigar* by making a record of the evidence in their possession *before* the witness gives any immunized testimony. By definition, that evidence is independently derived. This process, called “canning” a case, is familiar to prosecutors. Amar & Lettow, *supra* note 305, at 879. While “canning” may prove quite burdensome in complex cases, e.g., *United States v. North*, 920 F.2d 940, 942–43 (D.C. Cir. 1990) (describing the “canning” process undertaken by the Independent Counsel in advance of Oliver North’s immunized testimony before a congressional committee), it would be simple enough in most cases where the prosecutor possesses an earlier confession from the accomplice, has already assembled the evidence to indict the accomplice, and is prepared for trial in a related case in which the accomplice’s hearsay implicates a criminal colleague.

much of that record will exist in the accomplice's confession itself and the record of the trial of his colleague.

Use immunity could eliminate the confrontation-hearsay conflict in most reluctant accomplice cases. It can allow for hearsay and confrontation, with no risk to the Fifth Amendment rights of the accomplice and minimal risk to the prosecutor. But prosecutors almost never grant use immunity for that purpose. Prosecutors shun use immunity as a means to allow confrontation of hearsay declarants, not because immunity will handicap a later prosecution, but because the prosecutor gets nothing out of it. To the contrary, the law of evidence tells a prosecutor she cannot use the hearsay if she exercises her immunizing powers to allow for confrontation.³³⁹ She is caught in a Catch-22 that will not allow hearsay *and* confrontation.³⁴⁰

If we eliminated that Catch-22 and created new incentives under the Confrontation Clause, then prosecutors would look harder at use immunity and compelled testimony as a means to promote real confrontation.³⁴¹ Use immunity for legitimately self-incriminating cross-examination is an appropriate exchange for accomplice hearsay. It is a lower price than the government typically pays for the polished, in-court testimony of a cooperating accomplice.³⁴² And it is a small price to pay for defendant's right of confrontation.

CONCLUSION

In most cases, the conflict between an accomplice's Fifth Amendment rights and the confrontation rights of the defendant is more limited than we presume it to be. Defendants seldom question that presumed conflict because the law of confrontation gives them no reason to ask. Sometimes at least, they do not ask because they would prefer not to know the answer. For their part, prosecutors seldom use their immunity granting power to resolve that conflict because, ironically, the law of con-

339. See Fed. R. Evid. 804(a)(1).

340. See *supra* text accompanying notes 236-237.

341. Even without changes in the rules of evidence, courts could take steps to encourage confrontation of the reluctant accomplice. Federal Rule of Evidence 807 and comparable state "residual" hearsay exceptions allow courts to admit hearsay having "circumstantial guarantees of trustworthiness" which are "equivalent" to those which support the traditional hearsay exceptions. One relatively easy way to encourage confrontation would be for courts to rule that an out-of-court accomplice confession is admissible when the government puts the declarant on the witness stand for cross-examination. There, the "equivalent" guarantee of trustworthiness would be cross-examination itself. In effect, this approach would represent a judicial circumvention of the Catch-22 that now prevents prosecutors from immunizing declarants as a means of allowing hearsay and confrontation. In addition, courts might promote more effective confrontation by conditioning the admissibility of accomplice hearsay on more complete disclosure of information potentially useful to impeach the accomplice. Douglass, *Balancing Hearsay*, *supra* note 43, at 2174-87.

342. See *supra* text accompanying notes 204-210.

frontation gives them no incentive to make confrontation possible. Stranger still, by prohibiting the use of hearsay from an available declarant, the law of evidence can penalize a prosecutor who seeks to turn a reluctant accomplice into a testifying witness. As a result, our courts have become all too familiar with Confrontation Clause debates that have little to do with confrontation. *Lilly v. Virginia* is merely the latest chapter in that story. It will not be the last.

The current approach to confrontation promotes two equally unsatisfying outcomes. One is an empty debate over hearsay labels, like we see in *Lilly*. The other is a forced marriage of prosecutor and accomplice, like we see in the growing parade of cases featuring transmogrified accomplices as government witnesses. Neither is an attractive choice, if our aim is to promote truth-finding by juries and effective truth-testing by defendants.

In this Article, I have outlined an approach that promotes a different kind of choice: a choice that allows for hearsay and confrontation. On a constitutional level, the foundation for this approach is simple. We should apply the Confrontation Clause to hearsay declarants in the same manner it applies to testifying witnesses. After all, the Court has told us repeatedly that they are all “witnesses against” the accused.³⁴³ We should treat them like witnesses and allow defendants an adequate opportunity to test their stories. On a more practical level, this approach rearranges the perverse incentives that currently dominate pretrial decisionmaking by prosecutors and defendants. It makes confrontation matter in the debate over hearsay. And if it matters to courts, then prosecutors and defendants will value confrontation when shaping their pretrial strategies for dealing with the reluctant accomplice.

I do not pretend that this approach will solve the confrontation-hearsay dilemma in every case involving a reluctant accomplice. But we can at least limit the price our system must pay for the accomplice’s testimony by making hearsay—coupled with unvarnished confrontation—a viable option. And in many cases, we can resolve the clash of competing interests that creates the dilemma in the first place.

343. E.g., *White v. Illinois*, 502 U.S. 346, 352–54, 353 n.5 (1992).