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ESSAY

Confrontation: The Search for Basic Principles

RICHARD D. FRIEDMAN*

INTRODUCTION

The Sixth Amendment to the Constitution guarantees the accused in a criminal prosecution the right "to be confronted with the Witnesses against him." 1 The Confrontation Clause clearly applies to those witnesses who testify against the accused at trial. Moreover, it is clear enough that confrontation ordinarily includes the accused's right to have those witnesses brought "face-to-face," in the time-honored phrase, when they testify. 2 But confrontation is much more than this "face-to-face" right. It also comprehends the right to have witnesses give their testimony under oath and to subject them to cross-examination. 3 Indeed, the Supreme Court has treated the accused's right to be brought "face-to-face" with the witness as secondary to his right of cross-examination. 4

Interpreting the Confrontation Clause as it relates to witnesses at trial presents some difficulties. For example, to what extent does the Confrontation Clause prevent the trial court from limiting the subject matter of cross-examination? 5 To what extent does the witness's failure to testify to the substance of a prior statement mean that the defendant has had an inadequate opportunity to confront the witness if the prior statement is admitted against him? 6 For the most

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1. U.S. Const. amend. VI.
2. See, e.g., Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("We have never doubted ... that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.").
3. See, e.g., 5 John Henry Wigmore, Evidence § 1395, at 150 (Chadbourn rev. 1974) (stating the defendant demands confrontation "not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination"), quoted in Davis v. Alaska, 415 U.S. 308, 316 (1974), and in Coy, 487 U.S. at 1029 (Blackmun, J., dissenting).
4. In fact, with respect to some child witnesses, the Court has held that the former right may give way, so long as the latter is preserved. See Maryland v. Craig, 497 U.S. 836, 860 (1990) (holding that state interest in preventing trauma to child witness testifying in child sexual abuse case may be sufficiently great to justify invoking special procedure in which the child testifies in room with only prosecutor and defense counsel present, while defendant, judge, and jury watch over one-way closed circuit television). But see Brady v. Indiana, 575 N.E. 2d 981 (Ind. 1991) (declining, under state constitutional provision guaranteeing the defendant the right to be brought "face to face" with the witnesses against him, to follow Craig).
5. See Davis, 415 U.S. at 320 (holding that preventing defendant from cross-examining accusing witness about prior adjudication of the witness as juvenile delinquent, when that adjudication suggested motive for the witness to fabricate accusation, was violation of defendant's confrontation right).
part, however, the boundaries of the confrontation right as applied to trial witnesses are tolerably clear.

The more pervasive perplexity arises with respect to another aspect of the Confrontation Clause. Suppose that the prosecutor offers evidence of a statement to prove the truthfulness of a proposition that the statement asserts, but the declarant herself—the person who made the statement—does not testify at trial. The accused may contend that admissibility of this statement violates his confrontation right. If the declarant were to testify live but not subject to cross-examination, he might argue, the violation would be clear, and the prosecution should not be permitted to gain an advantage by substituting hearsay evidence of the declarant’s statement for her live testimony.

Sometimes this argument will appear persuasive, and sometimes it will not. Suppose the statement accuses the defendant of a crime and the only reason the prosecution presents hearsay evidence of the statement rather than the declarant’s live testimony is that it anticipates that the declarant would be a poor witness under cross-examination. In that case, the confrontation argument seems quite strong. If, however, the statement at issue is a record of a stock exchange, recording the price of a sale and made contemporaneously with that sale, but not made in contemplation of a prosecution, the confrontation argument seems quite weak.

The issue then is this: as to what types of hearsay does the Confrontation Clause require exclusion? Vastly different theories as to this hearsay aspect of the Clause have been expressed both in judicial opinions and in academic commentary. In this essay, I will not endeavor to survey the entire field. I will,

7. For example, in Green, 399 U.S. at 172-89, Justice Harlan, concurring, took the view that the Confrontation Clause “reaches no farther than to require the prosecution to produce an[y] available witness whose declarations it seeks to use in a criminal trial.” Id. at 174. Six months later, in Dutton v. Evans, 400 U.S. 74 (1970), Justice Harlan expressed a radically different view, endorsing the following statement by Wigmore:

“The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—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 infra-judicially.”

Id. at 94-96 (1970) (Harlan, J., concurring in the judgment) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1397, at 131 (3d ed. 1940) (footnote omitted)). In Ohio v. Roberts, 448 U.S. 56, 66 (1980), the Supreme Court offered an overall approach, analyzed in detail in this article, to the question of when the Confrontation Clause demands the exclusion of a hearsay statement made by an out-of-court declarant. See infra notes 16-18 and accompanying text.

8. For Wigmore’s view, endorsed by Justice Harlan in Dutton, see supra note 7. My colleague Peter Westen has taken a view similar to that espoused by Justice Harlan in Green. See Peter Westen, The Future of Confrontation, 77 MICH. L. REV. 1185, 1187-98 (1979) (endorsing the view that a “witness against” the accused is a person who is available to give live testimony in open court, under oath, and subject to cross-examination). Other works expressing varied views of the nature of the Clause include Michael H. Graham, The Confrontation Clause, The Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 MINN. L. REV. 523, 600 (1988) (arguing that the Confrontation Clause could be interpreted as meaning that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be present and to cross-examine his accusers if they are available”); Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. REV. 557, 622 (1988)
however, criticize the current doctrine, such as it is, and propose an approach that I believe would be far more satisfactory. In many respects—but not in all—my approach is similar to those advanced by Justice Clarence Thomas,9 by the United States as *amicus curiae* in *White v. Illinois*,10 and by Professor Akhil Amar in his recent book, *The Constitution and Criminal Procedure*.11

Part I of this essay reviews the current doctrine, showing how it has been unstable and tends to conform the Confrontation Clause to the ordinary law of hearsay—particularly to the version of hearsay law expressed in the Federal Rules of Evidence. Part II introduces an alternative approach, detached from hearsay law and based instead on the idea that the Confrontation Clause gives the defendant a right to confront adverse witnesses—those who make testimonial statements—whether the testimony is given at trial or beforehand. Under this view, the confrontation right applies to a far narrower set of out-of-court statements than does hearsay doctrine, but it is not ringed with exceptions, nor is it overridden by the determination that the standard at issue is particularly reliable. One might say that the confrontation right is far less extensive, but far more intensive, than the rule against hearsay.

With this structure in mind, Part III takes a more critical look at several issues raised by current doctrine. It argues that reliability and truth-determination are poor criteria to govern application of the Confrontation Clause; that a narrow but absolute understanding of the confrontation right best comports with the language and theory of the Clause; and that, with narrow qualifications, unavail-


My approach bears a somewhat more distant relationship to that presented by Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 559 (1992). See id. at 561 (“Hearsay statements procured by agents of the prosecution or police should . . . stand on a different footing than hearsay created without governmental intrusion”). Berger’s theory is discussed further infra note 122.
ability of the declarant should not affect application of the Clause. Part IV discusses how a witness-oriented approach to confrontation should apply to statements that were not made directly to the authorities. This is one context in which I differ sharply from Justice Thomas and Professor Amar. If the confrontation right did not apply in this context, a gaping loophole would be open for an accuser to offer testimony without facing the accused.

I. THE CURRENT DOCTRINE

As I have already suggested, the Confrontation Clause expresses a fundamental right, and is very distinct in nature and consequences from ordinary hearsay doctrine. Until 1965, however, the presence of hearsay doctrine meant that it was not particularly pressing for the Supreme Court to develop a doctrine of the Confrontation Clause with respect to out-of-court statements. The Clause did not bind the states, and in federal prosecutions any out-of-court statement that might have been excluded from evidence in common law litigation via the Confrontation Clause could also be excluded by bringing it within the rule against hearsay. When the Court held the Clause applicable to the states in *Pointer v. Texas*, however, the Clause took on greater independent significance. Now some out-of-court statements became inadmissible as a matter of federal constitutional law against defendants in state prosecutions. It therefore became important for the Court to develop a theory of the Confrontation Clause. Unfortunately, however, the approach taken by the Court has tended to meld the Clause and ordinary hearsay doctrine. Indeed, whereas shortly after *Pointer* the Court tended to emphasize the extent to which the Confrontation Clause and hearsay doctrine are distinct, it has more recently emphasized the extent to which they are similar. In *Ohio v. Roberts*, the Court attempted to state "a

12. The Federal Rules of Evidence did not become effective until 1975. The common law of hearsay for the first three-quarters of this century is best reflected in—and was profoundly influenced by—Wigmore's monumental treatise on evidence. Wigmore published three editions of this treatise between 1904 and 1940. The portions dealing principally with hearsay were revised by James Chadbourne in the 1970s and are contained in volumes four through six of the revised edition.
13. 380 U.S. 400, 407-08 (1965) (holding use in state prosecution of statement from preliminary hearing at which defendant was unrepresented by counsel violates Confrontation Clause).
14. See United States v. Inadi, 475 U.S. 387, 393 n.5 (1986) (noting that the Confrontation Clause and hearsay doctrine do not overlap completely); Dutton v. Evans, 400 U.S. 74, 80-81 (1970) ("Although the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots[,] . . . this Court has never equated the two, and we decline to do so now." (footnotes omitted)); California v. Green, 399 U.S. 149, 155-56 (1970) ("While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.")
general approach” to the law of the Confrontation Clause as it applies to hearsay statements made by out-of-court declarants.17 After a brief analytical section, the Court stated the doctrine as follows:

[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate “indicia of reliability.” Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.18

In three respects that I will now discuss in turn, the Supreme Court’s subsequent treatment of this framework has tended to make confrontation doctrine resemble ordinary hearsay law.19 First is the scope of the term “witnesses” under the Confrontation Clause. The Court has insisted upon giving this term a broad meaning. Second and third, respectively, are the unavailability and reliability requirements. Both of these requirements have posed serious problems and the Court has retreated from them, especially when they are not in accord with prevailing hearsay law.20

A. THE SCOPE OF THE CLAUSE: HEARSAY DECLARANTS AS “WITNESSES”

Ohio v. Roberts makes its test generally applicable to “a hearsay declarant [who] is not present for cross-examination at trial.”21 The Court seems to have assumed out of hand—though the point had already been contested22—that hearsay declarants are per se “witnesses” within the meaning of the Confrontation Clause. Indeed, in White v. Illinois,23 the Court brushed aside a challenge to this broad sense of the term “witnesses,” saying it was “too late in the day” to embark on a different path.24

17. Id. at 65. A prior statement made by a witness who testifies in court can be hearsay and can raise Confrontation problems as well. See supra note 6 and accompanying text. The presence of the declarant as a witness at trial substantially alters the situation, however. The focus of Roberts, and my principal concern in this essay, is the declarant who does not testify at trial.

18. Id. at 66.

19. The argument in this Part is broadly in agreement with that made by Jonakeit, supra note 8, that the Supreme Court has treated the confrontation right as “essentially a minor adjunct to evidence law,” id. at 558, in which “the accused must look to hearsay doctrine to see if he has a confrontation right,” id. at 572.

20. Jonakeit, id. at 571-72 & n.50, discusses another respect in which the Court has conformed confrontation law to ordinary hearsay doctrine: If an out-of-court statement is not offered to prove the truth of what it asserts and so is not hearsay under the most common definition, as expressed in Fed. R. Evid. 801(c), then the Court concludes that it does not raise Confrontation Clause concerns. See Tennessee v. Street, 471 U.S. 409, 413, 414 (1985).


22. See supra note 7 (discussing the changing views of Justice Harlan on this point, his later view adopting that of Wigmore).


24. Id. at 353.
I will question the wisdom of that choice later in this essay, arguing instead for a narrower reading of the term “witnesses” that includes only declarants who make statements with testimonial intent. I will argue that the failure to adopt a limited sense of the term “witnesses” has tended to make the confrontation right broader than it should be, and that, at least partially as a consequence, the right is too dilute—that is, too weak—in situations in which it should apply.

B. THE UNAVAILABILITY REQUIREMENT

The idea behind Roberts’s unavailability requirement was that, if the declarant is available to testify as a witness at trial, the prosecution should produce her rather than relying on her out-of-court statement. If the declarant is unavailable, the possibility of producing the witness does not exist, and so the benefits of admitting the prior statement are more apparent. The general unavailability rule articulated by Roberts was too stringent, however, and soon broke down. Consider the hypothetical mentioned above of a prosecution’s attempt to prove the price of a stock at a given time by contemporaneous records of the stock exchange. It would be silly to require the prosecution, as a precondition to admitting the records, to demonstrate the unavailability of their maker. Indeed, even if the maker in this scenario appeared to be available, it would probably be wasteful to require the prosecution to produce her.

Not surprisingly, the Court has cut back drastically on the unequivocal application of the unavailability requirement. In United States v. Inadi, the Court considered a Confrontation Clause challenge to the admissibility of out-of-court statements of a nontestifying coconspirator, absent a showing by the prosecution that the declarant was unavailable to testify. Reversing the court of appeals, the Court countenanced the trial court’s admission of the testimony. It refused to impose an unavailability requirement in this context, instead holding that “Roberts simply reaffirmed a longstanding rule... that applies unavailability analysis to prior testimony.” Any thoughts that Inadi’s rejection of an unavailability requirement might be confined to the type of declaration there at issue, the statement of a coconspirator, were dispelled by

25. See infra Part II. Professor Amar also questions the Court’s choice. See AMAR, supra note 11, at 94 (suggesting that the Court “heed the word witness and its ordinary, everyday meaning”). The White Court’s unwillingness to consider such a limitation was based on its view that “[s]uch a narrow reading of the Confrontation Clause... would virtually eliminate its role in restricting the admission of hearsay testimony.” White, 502 U.S. at 352. That is definitely not so of the variant of the limitation that I propose here. In fact, under my theory the Confrontation Clause would require exclusion of hearsay in some situations in which Chief Justice Rehnquist, author of the White majority opinion, favors admissibility. Note the discussion below of Lee v. Illinois, 476 U.S. 530, 543 (1986), in which Justice Rehnquist voted against application of the Confrontation Clause. See infra text accompanying notes 39-46.

27. Id. at 388.
28. Id. at 400.
29. Id. at 394.
**White v. Illinois.** In *White*, the statements at issue were a four-year-old girl’s accusations that the defendant sexually abused her. The Court repeated much of the analysis of *Inadi* in refusing to impose an unavailability requirement on the girl’s statements, which purportedly fit within the hearsay exceptions for excited utterances and statements made for purposes of medical diagnosis or treatment.

Thus, the Supreme Court’s decision to impose an unavailability requirement in the confrontation context has closely paralleled the imposition of an unavailability requirement by the hearsay rules of the Federal Rules of Evidence. *Roberts*, while purporting to announce a general unavailability requirement, applied it in the case of prior testimony—a setting in which the Federal Rules of Evidence also require unavailability for admissibility of the prior statement.

*Inadi* and *White* proclaimed that the unavailability requirement is limited to prior testimony and refused to apply the requirement to statements of a co-conspirator, to excited utterances, or to statements made for purposes of medical diagnosis or treatment—statements that, under the Federal Rules, fit within exemptions to the rule against hearsay without any need for showing unavailability. The emerging pattern is not hard to spot: follow the Federal Rules. Notwithstanding *Inadi* and *White*, it would not be surprising were the Court to hold—if a proper case arose—that the Confrontation Clause’s unavailability requirement is not strictly limited to prior testimony. It likely applies to statements offered under any of the other hearsay exceptions—most prominently declarations against interest—for which the Federal Rules of Evidence require unavailability.

**C. THE RELIABILITY REQUIREMENT**

*Roberts* declares that a statement can satisfy the reliability requirement in either of two ways. First, the statement may fall within a “firmly rooted”

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31. Id. at 349-50.
32. Id. at 353-57. Note that in *Idaho v. Wright*, 497 U.S. 805, 815-16 (1990), the Court reserved the question of whether the unavailability requirement applied to the declarations there at issue. As in *White*, those statements were accusations of sexual abuse made by a child. Id. at 809.
33. See FED. R. EVID. 804(b)(1).
34. See id. 801(d)(2)(E); id. 803(2); id. 803(4).
35. Id. 804(b)(3).
36. The Court might achieve this result by purporting to apply *Roberts’s* reliability requirement rather than by openly re-expanding the unavailability requirement. That is, the Court might hold that, given the prevailing doctrine governing such an exception, and particularly the requirements of the exception as stated in the Federal Rules of Evidence, if the variant of the exception invoked by a state prosecutor did not require unavailability it would not be “firmly rooted.” Even if a state court purported to require the declarant’s unavailability as a precondition to admissibility of the statement, the Supreme Court and, in a habeas case, the lower federal courts as well could impose their own view of unavailability. Suppose, for example, that the state court, while purporting to require unavailability, rules that a declarant is unavailable because the prosecution has been unable to find her. The Supreme Court might nevertheless rule that as a matter of constitutional law the declarant is not unavailable because the prosecution had made inadequate attempts to locate her.
hearsay exception. Second, the statement may be supported by "a showing of particularized guarantees of trustworthiness." Like the unavailability requirement, the reliability requirement yields problematic results if applied according to its terms. In one case, the Court responded to this tension by evading the apparent dictates of Roberts; more recently, its response has been to conform the reliability test to hearsay doctrine and to adhere to the test in that form.

1. "Firmly Rooted" Exceptions

The first aspect of the reliability requirement provides that "reliability can be inferred without more" if the statement "falls within a firmly rooted hearsay exception." This per se aspect of the reliability requirement, providing that qualification under a "firmly rooted" hearsay exception automatically satisfies the requirement, was bound to create problems; some statements that fit within such exceptions are nevertheless of the type that the Confrontation Clause should exclude.

Lee v. Illinois presented this dilemma. There, one Thomas confessed to having committed murder with Lee. At trial, Thomas was at least arguably unavailable to be a witness, because he was a codefendant and was relying on his right not to testify. And, given the nature of the confession—under which Thomas accepted a full share of blame for a particularly gruesome and senseless pair of murders—it at least arguably fell within the firmly rooted hearsay exception for declarations against interest. The per se aspect of the Roberts reliability requirement therefore should have at least called for consideration of whether the statement did fit within that exception. But a bare majority of the Court, per Justice Brennan, refused to approach the case in that way, saying in a footnote:

We reject respondent's categorization of the hearsay involved in this case as a simple "declaration against penal interest." That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant.

38. Id. Though Roberts was tentative about this second means, the Court was more definite about it in Lee v. Illinois, 476 U.S. 530, 543 (1986) ("even if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness' "); accord Idaho v. Wright, 497 U.S. 805, 816-17 (1990).
40. Id. at 533-36.
41. Id. at 536. The four dissenters concluded that Thomas was unavailable for confrontation purposes. Id. at 549-50 (Blackmun, J., dissenting). This conclusion is not obviously correct. As the dissenters recognized, if the prosecution had been eager to have Thomas's testimony, it had some plausible options, such as trying him first. Id. at 550.
42. See Fed. R. Evid. 804 (b)(3).
43. Lee, 476 U.S. at 544 n.5.
Failing to find sufficient "particularized guarantees of trustworthiness"—a point hotly contested by the four dissenters— the majority held that the Confrontation Clause rendered the statement inadmissible.

Lee is particularly interesting because it reflects unwillingness on the part of the majority to accept the full implications of the per se aspects of the Roberts reliability requirement, as well as implicit recognition that, even if a statement by an unavailable declarant fits within a firmly rooted hearsay exception, its admission may violate the confrontation right.

Lee represents one response to the tension created by the per se aspect of Roberts's reliability standard. If the case were decided today, however, I believe the contemporary Court would be more likely to act in accordance with the far different attitude reflected in Justice O'Connor's opinion for the Court, unanimous on this issue, in White v. Illinois. There, the Court noted that the exception for excited utterances has a long history and broad acceptance. As to the exception for statements made for medical diagnosis or treatment, however, the Court could say only that it "is similarly recognized in Federal Rule of Evidence 803(4), and is equally widely accepted among the States." Indeed, the latter exception is of much more recent vintage, and to a large extent it was created by—rather than merely recognized in—Rule 803(4). Only by

44. Id. at 551-57 (Blackmun, J., dissenting).
45. Id. at 543-46.
46. Lee is also interesting, in my view, because the majority utterly failed to recognize the grounds that made its result so compelling. See text following note 91 or Part IIIA infra. Taken on its own terms, Lee reflects recognition that a statement fitting within a firmly rooted hearsay exception may not be reliable. That point is valid, though I do not believe that Thomas's statement, which strikes me as quite reliable, illustrates it. More broadly, I am arguing in this essay that reliability is an inappropriate criterion under the confrontation right.
47. Justice Thomas, joined by Justice Scalia, joined in the Court's opinion except for its discussion of the meaning of the phrase "witnesses against." White v. Illinois, 502 U.S. 346, 358-366 (1996). All other Justices concurred fully in the Court's opinion. This unanimity with respect to the per se aspect is one reason I believe White is a better guide to the contemporary Court's attitude than is Lee. Other considerations are that White is more recent and that Justice O'Connor, along with Justice Stevens, is one of the two members of the Lee majority still on the Court. Perhaps the most significant consideration, though, is that, as I argue throughout this Part, the conformance of the per se aspect to the Federal Rules of Evidence is part of a broader tendency toward such conformance in applying all aspects of the Roberts framework. Indeed, this tendency makes it an interesting question whether Lee itself would be decided the same way today.
48. Id. at 355 n.8.
49. Id.
50. It is instructive to examine the first edition of McCormick's handbook, which appears to have been the principal source relied on by the drafters of Rule 803(4). CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE (1st ed. 1954). Before the Federal Rules were promulgated, "[s]tatements of a presently existing condition made by a patient to a doctor consulted for treatment" were "universally admitted as evidence of the facts stated." Id. § 266, at 563 (emphasis added). According to McCormick, "some courts" had extended the scope of the exception to include statements of the patient as to past symptoms "when made to a doctor for treatment." Id. McCormick further argued for admissibility of statements made "by the patient to the doctor for treatment which describe the general character of the cause or external source of the condition to be treated, so far as this description is pertinent to the purpose of treatment," but he acknowledged that "[t]he greater number of courts" had declined to adopt this principle. Id. § 266, at 564. Further, it appears that the majority of courts—with McCor-
virtue of the expansive language of that Rule, language that Illinois had adopted, could the crucial statements be brought within that "firmly rooted" exception, thereby satisfying Roberts's reliability requirement. A near synonym for "firmly rooted," it seems, is "in the Federal Rules of Evidence."

Of course, the presence of a provision in the Federal Rules as they were originally promulgated does in itself indicate widespread acceptance, even if not a long pedigree; the Rules have been more or less closely adopted in about forty states. But we might well pause at a doctrine that in effect conforms a constitutional right, a part of the Bill of Rights, to the contours designed—in a process not bearing the remotest resemblance to the amendment procedure established by Article V of the Constitution—by a committee of drafters of evidentiary rules for the federal courts.

2. "Particularized Guarantees of Trustworthiness"

Even if a statement does not fall within a "firmly rooted" exception, it may yet satisfy the reliability test of Roberts if it is supported by "particularized guarantees of trustworthiness." Once again we see the Confrontation Clause being conformed to ordinary hearsay doctrine. The language is strikingly similar to the key phrase of the residual hearsay exception as expressed in

mick's support—held the hearsay exception inapplicable to descriptions even of present symptoms made to a doctor employed only for purposes of testimony (though most courts allowed the doctor to include the statement in describing the basis of his medical conclusions). Id. § 267, at 565-66. In at least three crucial respects, then, Rule 803(4) expanded on the prior law. First, it applies to past as well as present descriptions. FED. R. EVID. 803(4). Second, it applies to statements made for purposes of diagnosis—including litigation-demanded diagnosis—as well as those made for treatment. Id. Third, in language closely tracking McCormick's, it applies to descriptions not only of symptoms but also of "the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Id.


52. The statements described acts of sexual molestation and identified the accused as the perpetrator. White, 502 U.S. at 349-50. Thus, they went beyond a description of symptoms, to a description of the causes. Indeed, the identification of the accused seems to go beyond a description of the "inception or general character of the cause or external source" of the injury. Some courts have allowed statements of this sort on the theory that identification of the perpetrator is necessary for treatment for sexually transmitted diseases—a controversial theory when the declarant is a young child who cannot be expected to understand the medical significance of the perpetrator's identity. See Tome v. United States, 61 F.3d 1446, 1450 (10th Cir. 1995) (holding over dissent that trial court did not err in permitting doctor to testify as to victim's statement to her identifying perpetrator of sexual abuse), on remand from 513 U.S. 150 (1995).

53. In Idaho v. Wright, 497 U.S. 805, 817-18 (1990), the Court refused to treat a state's residual exception, identical to former Federal Rule of Evidence 803(24) (now new Rule 807), as "firmly rooted." But as the Court noted, the residual exception is a beast of a different nature from other hearsay exceptions. It is meant to accommodate ad hoc instances of statements that appear to warrant admissibility, and so "almost by definition" does not address recurrent situations with a long tradition supporting admissibility. See id. at 817.

Federal Rule 807—"equivalent circumstantial guarantees of trustworthiness." And that residual exception, like this aspect of the Roberts reliability test, was created to ensure that hearsay warranting admissibility would not be excluded merely because it failed to fit one of the "firmly rooted" hearsay exemptions enumerated in the Rules.

In Idaho v. Wright, the Supreme Court held that this aspect of the Roberts reliability test could be satisfied only by "circumstances . . . that surround the making of the statement and that render the declarant particularly worthy of belief," and not by corroborating evidence. Justice O'Connor declared that "[t]his conclusion derives from the rationale for permitting exceptions to the general rule against hearsay . . . ." The mode of analysis is remarkable. Why, we might wonder, should the shape of doctrine under the Confrontation Clause be determined by the rationales of hearsay doctrine, unless the Clause is seen as essentially nothing more than a constitutionalization of prevailing hearsay doctrine?

Wright's refusal to allow corroborating evidence into the inquiry does serve a purpose, however. Under the contrary rule, the Confrontation Clause issue would largely come down to the question of whether the court believes, on the basis of all the evidence, that the statement is very probably true. And often this would translate into: "does the court believe the defendant is guilty?" There is no logical inconsistency in requiring the court to decide as a threshold matter for admissibility purposes a question identical to one the factfinder must determine on the merits of the case. But an argument that the court has examined all the evidence and determined that the defendant is guilty, and therefore he has no confrontation right, is at the least extremely unattractive. Moreover, the inquiry would be intensely dependent on the facts of particular cases, which would mean that the Clause would provide very little protection unless appellate courts were willing and able to delve deeply into the facts of each case.

Nevertheless, Justice Kennedy was surely correct in saying for himself and three other Wright dissidents: "[i]t is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence." The problem, I believe, is

57. Id. at 819, 823.
58. Id. at 819.
59. But see California v. Green, 399 U.S. 149, 155 (1970) (refusing to view the Confrontation Clause as "nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law").
60. See Bourjaily v. United States, 483 U.S. 171, 181 (1987) (making admissibility of coconspirator statements, even in a prosecution for conspiracy, dependent on the judge's threshold determination that the declarant and the accused were coconspirators).
61. Wright, 497 U.S. at 828 (Kennedy, J., dissenting).
the Court's articulation of the confrontation right in terms of the reliability of the statement, a matter to which I will return in Part III. The reliability determination threatens to become a shadow of the trial on the merits—a battle over the ultimate factual issues at stake in the prosecution, based on all the evidence presented at trial. To prevent this from happening, the court must crop the inquiry. One way is to exclude from it information that might substantially help prove the accuracy of the particular statement not because it tells us anything about the making of the statement but only because it points in the same direction as the statement.

I have argued that in three respects—the scope it accords to the term “witnesses”; the significance it accords to the unavailability of the declarant; and the importance it places on, and the way in which it purports to assess, the reliability of the declarant—the Supreme Court has tended to conform the Confrontation Clause to prevailing hearsay doctrine. This approach devalues the Confrontation Clause, treating it as a constitutionalization of an amorphous and mystifying evidentiary doctrine, the continuing value of which is widely questioned. We may well wonder whether the Roberts framework, as initially presented by the Court and as subsequently developed by it, fails to capture some enduring value reflected by the Clause. I believe the answer is affirmative and, in Part II, I will show why—developing a basic structure for the confrontation right that is far different from the one that prevails under current law.

II. “THE WITNESSES AGAINST HIM”

The Confrontation Clause does not speak of the rule against hearsay or of its exceptions, or of unavailability, reliability, or truth-determination. It says simply that the accused shall have a right “to be confronted with the Witnesses against him.”

The origins of the Clause are famously obscure. If we look back far enough, however, a reasonably clear picture emerges, one in which the Clause’s applications to testimony at trial and to out-of-court statements appear not as separate rules but as parts of an integral whole. I am currently engaged in a project with Michael Macnair, an English legal historian, in which we are attempting to trace the origins of hearsay law and of the confrontation right. I will glean briefly from that project in the following pages.

We are used to the idea that witnesses testify under oath in an open proceeding in the presence of the accused, “face-to-face.” This was the practice of the

62. U.S. Const. amend. VI.
ancient Hebrews and Romans, and for centuries it has been the English way. It was described in especially vivid terms by Thomas Smith in the sixteenth century as an "altercation." But this is not the only way in which testimony might be given in a judicial proceeding. Smith presented his account of English law as contrasting with the system that then prevailed in Continental Europe. There, testimony was taken under oath but out of the presence of the parties. Often it was taken in front of a notary rather than at the tribunal itself, and was later presented to the tribunal in written form.

Over the course of centuries, English writers praised the openness of the English system. That is not to say, however, that the norm of having the

64. Under scriptural law, multiple witnesses were necessary for a criminal conviction. Deuteronomy 17:6, 19:15-18 (King James). The Essenes, the people of the Dead Sea Scrolls, allowed a capital conviction on proof by three witnesses to separate episodes of the same crime. To ensure against witness unavailability, the testimony of witnesses would be taken after each episode, in the offender's presence; on the third episode the verdict would be complete. See Lawrence H. Schiffman, The Law of Testimony, in Sectarian Law in the Dead Sea Scrolls: Courts, Testimony, and the Penal Code 73 (1983). This may be the first known instance of a deposition taken to preserve testimony.

65. See, e.g., Acts 25:16 (King James), which quotes the Roman governor Festus as declaring: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him." Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988), quotes this passage.


68. R.C. van Caenegem, History of European Civil Procedure, in 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 15, 44, 53 (Mauro Cappalletti ed., 1972). In later Athenian procedure as well, testimony was usually taken out of the presence of the tribunal and then presented to it in writing. The witness usually confirmed the written testimony in person at the trial, but the testimony was essentially fixed. ROBERT J. BONNER, EVIDENCE IN ATHENIAN COURTS 47-48 (1905); A.R.W. HARRISON, THE LAW OF ATHENS: PROCEDURE 139 (1971); STEPHEN C. TODD, THE SHAPE OF ATHENIAN LAW 128-29 (1993); Stephen C. Todd, The Purpose of Evidence in Athenian Courts, in NOMOS: ESSAYS IN ATHENIAN LAW, POLITICS AND SOCIETY 19, 29 n.15 (Paul Cartledge et al. eds., 1990).

69. For example, in the Case of the Union of the Realms, 72 Eng. Rep. 908, 913 (K.B. 1604), Lord Chief Justice Popham, arguing the superiority of English over Scots law, particularly emphasized the preferability of live testimony over previously taken depositions:

For the Testimonies, being viva voce before the Judges in open face of the world, he said was much to be preferred before written depositions by private examiners or Commissioners. First, for that the Judge and Jurors discern often by the countenance of a Witness whether he come prepared, and by his readiness and slackness, whether he be ill affected or well affected, and by short questions may draw out circumstances to approve or discredit his testimony, and one witness may contest with another where they are viva voce. All which are taken away by written depositions in a corner.

More than a century later, Sollon Emlyn wrote:

The excellency ... of our laws I take chiefly to consist in that part of them, which regards criminal prosecutions. ... In other countries ... the witnesses are examined in private, and in the prisoner's absence; with us they are produced face to face and deliver their evidence in open court, the prisoner himself being present, and at liberty to cross-examine them.

Sollon Emlyn, Preface to A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS, at iii-iv (2d ed. 1730). Professor Amar cites a later passage, from Blackstone, along the same lines. AMAR, supra note 11, at 130 (citing 3 WILLIAM
witness testify before the accused at trial was always maintained in England. Some courts in England, such as the Court of the Star Chamber, adhered to the procedures of the Continent rather than to those of the common law. But precisely for this reason, these courts were politically controversial, and most of them were abolished in the seventeenth century; the equity courts survived, but without criminal jurisdiction. Moreover, the common law courts were not above using equity procedures when it turned out that a witness was unavailable to testify at trial. Before the middle of the seventeenth century, the common law courts developed a sophisticated body of doctrine governing when it was acceptable to use at trial equity depositions taken of witnesses no longer available. And, perhaps most importantly for our purposes, in politically charged trials in the Tudor and early Stuart eras, especially trials for the crime of treason, the authorities did not always bring the accusing witnesses to the trial. But, beginning even before the middle of the sixteenth century, we find repeated demands by treason defendants that their accusers be brought “face-to-face,” and also repeated statutory support for this position. By the middle of the seventeenth century, this position, and the accused’s right to examine the witnesses, had prevailed.

BLACKSTONE, COMMENTARIES 373 (1765)). Other important statements describing, and praising, the openness and confrontational nature of the English system in contrast to Continental systems include MATTHEW HALE, HISTORY OF THE COMMON LAW 163-64 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1739); SMITH, supra note 66, at 99, 114-15.

70. E.g., Anon., 78 Eng. Rep. 192 (K.B. 1623) (misdated in 5 WIGMORE, supra note 3, § 1364, at 23 n.47) (allowing deposition to be read to jury when taken in connection with a case between same parties and witness cannot be found); The King and the Lord Hunsdon v. Countess Dowager of Arundel & The Lord William Howard, 80 Eng. Rep. 258, 261 (K.B. 1616) (allowing reading of witness depositions by court only if court in which depositions were taken is held competent); see also Michael Richard Trench Macnair, The Law of Proof in Early Modern Equity 192-95 (1991) (unpublished D.Phil. dissertation, Oxford University) (Bodleian Law Library, Oxford) (describing Elizabethan and later practices allowing for introduction of depositions when witnesses have died or otherwise become unavailable).

71. The most notorious example is that of Walter Raleigh. See, e.g., Kenneth W. Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 CRIM. L. BULL. 99, 100 n.4 (1972) (noting that the oft-repeated contention “that the evils of the Raleigh trial led in some way to the Sixth Amendment” may not be “anything other than a convenient but highly romantic myth,” and “adher[ing] to it for this reason”).

72. See, e.g., Seymour’s Case, 1 How. St. Tr. 483, 492 (1549) (defendant demanded that he receive open trial and that his “accusers be brought face to face”); Duke of Somerset’s Trial, 1 How. St. Tr. 515, 517, 520 (1551) (defendant had accusations against him “openly declared” and asked that witness be brought “face to face” with him); R. v. Rice ap Griffith, Lloyd and Hughes (K.B. 1531), in 93 PUBLICATIONS OF THE SELDEN SOCIETY, 1 THE REPORTS OF SIR JOHN SPELMAN 47, 48 (J.H. Baker ed., 1976) (the witness James ap Powel (an accomplice) “allowa toutz lour actz facie ad faciem” (admitted all their acts face to face)).

73. Treason statutes requiring that accusers or accusing witnesses be brought “face to face” with the defendant included 1 Eliz. ch. 1, § 21 (1558) (requiring that witnesses be brought face to face with defendant before defendant is arraigned or indicted); 1 Eliz., ch. 5, § 10 (1558) (requiring that witnesses be face to face with defendant, unless defendant confesses the crime); 13 Eliz., ch. 1, § 9 (1571) (same); and 13 Car. 2, ch. 1, § 5 (1661) (same).

74. By the time of John Lilburne’s trial in 1649, there seemed to be no doubt that the witnesses would testify live in front of Lilburne; “hear what the witnesses say first,” said the presiding judge in
This history, I believe, reveals the essential idea of the Confrontation Clause: *If the prosecution wishes to present the testimony of a witness, the testimony must be taken before the accused, subject to oath and the accused's right to cross-examination.* And testimony, it must be emphasized, is not limited to statements made by witnesses at trial. Just what out-of-court statements should be deemed to be "testimony"—or, put another way, just what declarants of out-of-court statements should be deemed to be "witnesses"—for purposes of the Confrontation Clause is a difficult issue, to which I will return in Part IV. But in light of what I have said thus far, testimony must include not only testimony given under oath at trial, but also (at the very least) the type of statements Justice Thomas identified in his concurring opinion in *White v. Illinois*—"formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." 75 Such statements are made to the authorities who will use them in investigating and prosecuting a crime, and they are usually made with the full understanding that they will be so used. And if the practice of the adjudicative system is that such statements are admissible at trial, then to that extent the system has provided a mechanism by which witnesses, without actually appearing at trial, can create testimony for use there. In that circumstance, such statements, although made out-of-court, are testimonial in every

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postponing one of Lilburne's arguments. 4 How. St. Tr. at 1329. When the witnesses did testify, Lilburne was allowed to pose questions for them, but only through the court: "[Y]ou must make your question to us, and require us to ask him the question: and then if your question be fair, it shall not be denied you." *Id.* at 1335; *see also id.* at 1334. Lilburne purported to accept this restriction, though sometimes, perhaps impulsively, he failed to comply with it. *Id.* at 1335; *see also id.* at 1334. And, though the court was quite restrictive, he did get answers to some of his questions. *Id.* at 1333, 1340.


By the time of John Mordant's trial just nine years later, there does not seem to have been any doubt that the defendant could question the witnesses, which Mordant did. Mordant's Trial, 5 How. St. Tr. 907, 919-21 (1658). Indeed, at one point the presiding judge solicitously inquired whether Mordant wished to ask a witness any questions, a practice that apparently soon became routine. *Id.* at 922; *see, e.g.*, Earl of Pembroke's Trial, 6 How. St. Tr. 1309, 1326-37 *passim* (1678) (allowing defendant on trial for murder to ask which doctors examined victim's body); Colledge's Trial, 8 How. St. Tr. 549, 599, 603, 606 (1681) (allowing defendant on trial for treason to ask witness about incriminating conversation witness had had with defendant regarding meetings with conspirators, and about other evidence introduced at trial); Grahme's Trial, 12 How. St. Tr. 645, 779 (1691) (allowing defendant on trial for treason to ask witness how incriminating papers arrived in witness's possession); *cf.* Lord Delamere's Case, 11 How. St. Tr. 509, 548-55, 566-67 (1686) (allowing defendant to question some witnesses directly, but requiring that he propound questions through the court for lead witness, and for character witnesses as to the lead witness).

John Fenwick was convicted in 1696 by Parliament on a bill of attainder in part on the basis of an examination taken under oath but out of his presence by a justice of the peace. Not only was that case hotly contested, it was argued on the basis that attainder was different from ordinary legal processes; even the prosecution conceded that in an ordinary court an out-of-court examination could not be presented so long as the witness could be produced. Sir John Fenwick's Trial, 13 How. St. Tr. at 593. 75. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concursing in the judgment). Similarly, Professor Amar speaks of "videotapes, transcripts, depositions, and affidavits when prepared for court use and introduced as testimony." *Amar, supra* note 11, at 129. There may be a slight difference in nuance between the standard used by Justice Thomas and that used by Professor Amar, *see infra* note 121, but they are essentially the same.
meaningful sense of the word; indeed they lie at the core of the concern underlying the Confrontation Clause. Such a statement can be offered against the accused only if he has had an adequate opportunity to examine the witness under oath.\(^76\)

This view of the Confrontation Clause integrates the Clause’s applications both to testimony given in court and to statements made beforehand. The Clause provides that testimony against the accused, whether given before or during trial, is not admissible unless it is given subject to oath and the accused’s ability to examine the witness, face-to-face. The key question with respect to a pretrial statement, under this view, is whether it is testimonial. If it is, the confrontation right applies; if it is not, the right does not apply (although other evidentiary or constitutional rules might nevertheless call for the statement’s exclusion). Thus, under this theory the confrontation right applies only to a subset of hearsay declarants, those who are deemed to have made testimonial statements and so have acted as witnesses. And note that nothing in this theory requires a court, in determining whether the right applies, to decide whether the statement is reliable, or whether it fits within a recognized hearsay exception, or (subject to limited qualifications that I will soon explain) whether the witness is unavailable. In Part III, I will elaborate on these points, and compare in these respects the theory I am advocating with the prevailing doctrine.

III. COMPARING APPROACHES

In Part I, I discussed three respects in which current Confrontation Clause doctrine, as applied to hearsay statements by out-of-court declarants, tends to conform to prevailing hearsay doctrine: the broad scope accorded to the term “witnesses,” the qualified unavailability requirement, and the reliability requirement, including the per se satisfaction of that requirement by statements falling within a firmly rooted hearsay exception. In this Part, I will address the same aspects of confrontation theory, although in altered order, and compare the view of the confrontation right that I have outlined in Part II to the doctrine as implemented by the Supreme Court and, to a lesser extent, to some other views. Part IIIA argues that the Court has engaged in the wrong inquiry by making reliability the basic criterion for deciding whether the confrontation right ap-

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76. Often, the accused's opportunity to examine the witness occurs some time after the statement was made, typically at trial. I have discussed the important issue of the circumstances in which such a delayed opportunity should be considered adequate in Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket. See Friedman, supra note 6, at 297.

If the testimonial statement is made before trial, subject to an adequate opportunity to confront the witness (typically at a deposition), and the witness is unavailable to testify at trial, then the Confrontation Clause is not violated by introduction at trial of the prior statement. If the witness is available to testify at trial, then our system prefers to have her live testimony taken in front of the factfinder and perhaps supplemented by the prior testimony, rather than relying on the prior testimony alone, even though the prior testimony was subject to confrontation. I express no opinion on the questions whether this preference should be established as a matter of constitutional law, and if it should whether it should be as a matter of the Confrontation Clause or as a more flexible matter of due process.
plies. Part IIIb contends that the scope of the right should extend only to testimonial statements, but that as to such statements it should be absolute, not riddled by exceptions, subject only to the qualification that the right can be forfeited by the accused's misconduct. Part IIIc argues that, subject to the same qualification and perhaps two others that, while not rejecting outright, I do not endorse, the availability or unavailability of the witness should be irrelevant in deciding whether the confrontation right applies.

A. RELIABILITY AND TRUTH-DETERMINATION

The Supreme Court has said that “the ‘Confrontation Clause’s very mission' ... is to ‘advance the accuracy of the truth-determining process in criminal trials.'” 77 In Lee v. Illinois, 78 the Court acknowledged that the Clause advances “symbolic goals” by “contribut[ing] ... to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.” 79 But even in Lee, the Court said that confrontation is “primarily a functional right that promotes reliability in criminal trials.” 80

Thus, as Part Ic has shown, the Court has consistently made reliability the keynote of its jurisprudence dealing with the application of the Confrontation Clause to hearsay. When the Court has excluded statements under the Clause, it has purported to do so on the grounds that they are unreliable. 81 Correspondingly, assuming that no unavailability requirement applies to the out-of-court statement at issue, or that the requirement has been satisfied, a Confrontation Clause challenge to admissibility may be overcome by demonstrating that the statement at issue is sufficiently reliable. 82

Elsewhere, I have argued that reliability of hearsay evidence is a poor criterion to determine whether admissibility of the evidence will advance the truth-determination process. 83 Reliability is notoriously difficult to determine. It puts the cart before the horse, essentially asking whether the assertion made by

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78. 476 U.S. 530 (1986).
79. Id. at 540.
80. Id.
82. Justice Thomas appears to agree. As noted above, Justice Thomas joined in most of the Court's opinion in White—including its holding that the statements there at issue fit within firmly rooted hearsay exceptions and therefore satisfied the reliability requirement. White v. Illinois, 502 U.S. 346, 366 (1992) (Thomas, J., concurring). Professor Amar does not address this issue explicitly. But he criticizes the Court, and particularly Roberts, for treating the Clause as a "balance" in which some hearsay is permitted on grounds of practicality, rather than as a "bright-line rule." See AMAR, supra note 11, at 126. Accordingly, there does not appear to be any room in Professor Amar’s scheme for admitting, on grounds of reliability, evidence that would otherwise be precluded by the Confrontation Clause.
the statement is true as a precondition to admissibility.\textsuperscript{84} Perhaps most important, evidence that is not particularly reliable can be very helpful to the truth-determination process.\textsuperscript{85} Indeed, the paradigm of acceptable evidence—live testimony given under oath and subject to cross-examination—is not particularly reliable; if it were, conflicting testimony would not be such a common aspect of trials.

These are all arguments suggesting that reliability of a hearsay statement is a poor criterion to determine whether admissibility of a hearsay statement will assist the truth determination process. Plainly, these arguments apply just as forcefully if the confrontation right, as well as ordinary hearsay law, is at stake. In applying the confrontation right, moreover, I believe an additional, broader consideration comes into play: Truth-determination is itself a poor criterion for determining applicability of the confrontation right. That is, whether or not admissibility of the challenged statement would assist truth-determination should not be determinative of whether admissibility violates the confrontation right.

If a witness delivers live testimony at trial, the court does not excuse the witness from cross-examination on the ground that the evidence is so reliable that cross-examination is unnecessary to assist the determination of truth.\textsuperscript{86} The result should be no different when the testimonial statement is made out-of-court. Though the Confrontation Clause may be, as both Professor Amar and the Court contend, closely related to our desire that litigated facts be determined accurately, that does not mean that the Clause should be applied on a case-by-case basis with an eye to what will assist accurate factfinding in the particular case. The Clause expresses a right that has a life of its own: Giving the accused the right to confront the witnesses against him is a fundamental part of the way we do judicial business.\textsuperscript{87} As Part II's brief historical overview has shown, this right has deep roots. We should adhere to it even if in the particular case it does not help accurate factfinding—just as we adhere to the rights of counsel and trial by jury without having to ask whether to do so in the particular case will do more good than harm.

If, apart from reliability considerations, a given statement would fit within the

\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} The situation in which the witness becomes unavailable, as by death, through no fault of either party after giving direct testimony but before cross has been substantially completed, is discussed below. See infra notes 112-13 and accompanying text.
\textsuperscript{87} Such a view might be justified under a sophisticated form of utilitarianism, a "two-level" or "indirect" utilitarianism, recognizing that social utility may be best advanced in some circumstances "by setting up principles about rights, and inculcating habits of absolute respect for them," even though doing so forces us to give up some opportunities for actions that, the cost of denigrating the principle aside, would achieve further utility. JEREMY WALDRON, THE LAW 102 (1990). Or it may also be justified under a conception that views rights as those interests of special importance that must be kept on a different "level[] of moral calculation" from interests that are part of the "ordinary social calculus." Id. at 105.
Confrontation Clause, I think it is most unsatisfactory to say to the accused, in effect:

Yes, we understand that you have not had an opportunity to cross-examine this person who has made a testimonial statement against you. Do not trouble yourself. The law in its wisdom deems the statement to be so reliable that cross-examination would have done you little good.\(^8\)

If such a reliability test were applied rigorously—admitting a statement only if the courts were extremely confident that it was so clearly reliable that cross-examination would have done no good—very little evidence would satisfy it. But some courts, at least, are more inclined to treat the test as a generous doorway for prosecution evidence.\(^8\) And, because any serious attempt to determine the reliability of a statement must take into account many circumstances of the particular statement and its context, a reliability test is immune to effective appellate monitoring.

Note that the argument I am making—that reliability is not the proper criterion for judging whether admissibility of a statement would violate the Confrontation Clause—is a double-edged sword. On the one hand, if the statement is not testimonial, so that the declarant should not be deemed to have been acting as a witness in making it, the Clause should not bar its admissibility, even if the statement does not seem reliable.\(^9\) On the other hand, if the statement is testimonial, so that the declarant was acting as a witness in making it, then the Clause should bar its admission unless it was made or reaffirmed in the manner appropriate for testimony, subject to oath and cross-examination.\(^9\)

This analysis helps justify the result in Lee. The problem with Thomas's statement was not the one the majority identified, that the statement was unreliable; given its highly self-inculpatory content, the statement actually seems quite reliable. Rather, the problem was that, given that circumstances in which it was made, the statement amounted to testimony against Lee, offered without oath or cross-examination.

\(^8\) See Wright, 497 U.S. at 820-21 (declaring that cross-examination would be of "marginal use" with respect to statements falling within firmly rooted hearsay exceptions).

\(^9\) See, e.g., Taylor v. Commonwealth, 821 S.W.2d 72, 74-76 (Ky. 1990), cert. denied, 502 U.S. 1121 (1992); State v. Earnest, 744 P.2d 539, 539-40 (N.M. 1987), cert. denied, 484 U.S. 924 (1987). In both of these cases, notwithstanding Lee, the court upheld on grounds of reliability the admission of confessions of murder coconspirators who at defendants' trials asserted the privilege against self-incrimination.

\(^9\) If the statement seems so unlikely to be true as to have little probative value, perhaps it should be excluded on those grounds. See Fed. R. Evid. 403. And perhaps in extreme cases an accused should have a due process right to the exclusion of such evidence offered against him, on the grounds that, given its slight probative value, if it has any impact on factfinding that impact is likely to be deleterious. But such a doctrine should not often come into play.

\(^9\) I address the situation in which the witness reaffirms at trial a prior statement in Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket. See Friedman, supra note 6, at 309.
B. SCOPE AND EXCEPTIONS

Closely related to the matter of reliability is the architecture of the Confrontation Clause. Under the prevailing doctrine, the scope of the Clause is very broad, as broad as the rule against hearsay. That is, the declarant of any out-of-court statement offered to prove the truth of what it asserts is treated as a “witness” for purposes of confrontation. But the confrontation right is riddled with exceptions, purportedly based on the attempt to sift out reliable evidence from the presumptive exclusionary bar. Given the vast scope that the Court attributes to the Clause, limitations of this sort are inevitable. Otherwise, the Clause would have intolerably restrictive consequences, barring all prosecution hearsay.

Justice Thomas takes a narrower view of the scope of the Clause. Like Professor Amar and myself, he does not equate the word “witnesses” in the Clause with all hearsay declarants, but rather limits it to those who make statements that might in some sense be deemed testimonial.\textsuperscript{92} Justice Thomas does not correspond for this narrow reach, however, by enhancing the intensity of the right—that is, by giving it stronger consequences when it does apply. Like the Court, it appears, he would reject confrontation-based challenges when the statement at issue falls within a “firmly rooted” hearsay exception or is otherwise shown to be reliable.\textsuperscript{93}

By contrast, although I take a relatively narrow view of the Clause’s scope, I would treat the right that it creates as absolute, just as we treat as absolute the rights to counsel and jury trial and, for that matter, the right to cross-examine witnesses testifying at trial. I therefore do not believe that the vitality of the confrontation right should be in any way dependent upon whether a statement falls within a “firmly rooted” hearsay exception. Absolute rights may not be much in fashion in this “age of balancing.”\textsuperscript{94} But I agree with Professor Amar that the Confrontation Clause should be viewed as creating a bright-line rule, not merely a presumptive rule subject to defeasance by proof that the importance of the evidence to the factfinding process outweighs the value of the confrontation right.\textsuperscript{95}


\textsuperscript{93} The Government, in its amicus brief in \textit{White}, also argued for this narrower view of the scope of the Confrontation Clause. The Government first argued the position adopted by the Court, that the statements at issue fit within firmly rooted hearsay exceptions. Brief for the United States, \textit{supra} note 10, at 10-15. Justice Thomas “join[ed] the Court’s opinion except for its discussion of the narrow reading of [the phrase ‘witnesses against’] proposed by the United States.” \textit{White}, 502 U.S. at 366. Perhaps both the Government and Justice Thomas can be understood to have been arguing in the alternative—that is, they would prefer a reinterpretation of the Clause, with a narrow scope and no exceptions, and failing to gain adoption of the principle they regarded the statements at issue as falling within “firmly rooted” hearsay exceptions. But they gave no indication that this was their view, and the structure of the Government’s brief, at least, suggests otherwise.


\textsuperscript{95} Amar, \textit{supra} note 11, at 126 (noting text of Confrontation Clause does not contain a balancing test).
The language of the Clause, as well as its theory, suggests a strong, absolute right—not simply some interest that should be weighed against others. Balancing tests are not very good protectors of rights, because a judge disposed to rule against the right will generally have an easy enough time finding ample weight on the other side of the balance. And balancing tests are highly case-specific in application, making it difficult to yield consistent results, and demanding great expenditure of appellate resources if power is not to be effectively ceded to trial judges.

Admittedly, a bright-line rule will not avoid arbitrary and manipulative application unless it reflects a principle that seems sound and commands respect. But I believe that the principle that an accused has a right to confront those who make testimonial statements against him is such a principle.96

Having said all this, I must also state one qualification (which I do not regard as an exception): If the accused's own wrongful conduct is responsible for his inability to confront the witness, then he should be deemed to have forfeited the confrontation right with respect to her statements. He might do this by obstructing the trial, or whatever other forum is provided for the confrontation, to such an extent as to warrant his physical exclusion from that forum.97 He might also do it by preventing the witness from testifying at any such forum, as by intimidating or killing her. This forfeiture principle, which I have elaborated upon elsewhere,98 has long had substantial recognition in case law,99 and has also been recognized in the new Federal Rule of Evidence 804(b)(6).100

In short, the scope of the confrontation right should be limited to those who act as witnesses by making testimonial statements, but within that scope it should be treated as a precious right, one of the basic cornerstones of our system. It is subject to forfeiture by the accused's misconduct, but in other respects it should be treated as absolute.


99. See, e.g., United States v. Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982) (allowing witness's grand jury testimony to be admitted at trial where defendant had knowledge of plot to kill witness and failed to give warning), cert. denied, 467 U.S. 1204 (1984); Reynolds v. United States, 98 U.S. 145, 159 (1878) (allowing testimony given at previous trial to be admitted after defendant's conduct resulted in declarant's unavailability); Harrison's Trial, 12 How. St. Tr. 833, 851-52 (1692) (admitting previous statement of witness whom defendant allegedly caused to be unavailable at trial).

100. The new Rule, which became effective on December 1, 1997, states an exception to the rule against hearsay for a statement that was made out of court by a declarant deemed unavailable to testify at trial and that is "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Fed. R. Evid. 804(b)(6).
C. UNAVAILABILITY

Unavailability is a complex factor in the jurisprudence of the Confrontation Clause. On the one hand, if the declarant is unavailable, the prosecution can argue that excluding the out-of-court statement will not lead to the production of live testimony. On the other hand, if the declarant is available, the prosecution might argue that if the defendant insists on examining her, he can call her as a witness. Under the approach I have presented here, however, unavailability should generally have no impact on the application of the Confrontation Clause. With narrow qualifications, which I will discuss in this section, I believe the governing principles should be quite simple. If the statement is not a testimonial one, then the declarant should not be deemed to have been acting as a witness in making it, and so the Clause should not apply—whether the declarant is available or not. Other doctrines might exclude the statement, but the Confrontation Clause should not. If, by contrast, the statement is testimonial, so that the declarant was acting as a witness in making it, then the Clause should apply, and exclude the statement, unless the accused had an adequate opportunity to examine the witness—whether the declarant is available at trial or not.

In subsection c1, I will address the question of whether, for the prosecution to introduce a hearsay statement by an out-of-court declarant consistently with the Confrontation Clause, the unavailability of the declarant should generally be necessary, as Roberts seemed to provide. This analysis will, I believe, shed some light on the Supreme Court’s recent treatment of unavailability. In subsection c2, I will discuss the question of whether the witness’s unavailability should be sufficient to remove the proscription of the Clause. And in subsection c3, I will consider the significance of the accused’s ability to produce the declarant as a witness.

1. Unavailability as Necessary to Satisfy the Confrontation Clause?

Under the theory of the Confrontation Clause that I have presented here, the Clause does not apply to all hearsay statements by out-of-court declarants that are offered by the prosecution, but only to the narrow subset of such statements that qualify as testimonial. Hence, the Clause cannot impose a general requirement of unavailability of the declarant as a precondition to admissibility of such hearsay.

Now consider testimonial statements, the type of statements that should fall within the ambit of the Clause. Under the theory presented here, the Clause should preclude admission of such a statement unless the accused has had an adequate opportunity to examine the witness under oath. It may be that the

101. The statement might, for example, be excluded by ordinary hearsay law, or on the grounds that it is more prejudicial than probative.
102. See, e.g., Pointer v. Texas, 380 U.S. 400, 407 (1965) (holding Confrontation Clause violated by admission of testimonial statement that was not taken subject to adequate opportunity for cross-examination).
accused did have such an opportunity before the trial—if, for example, the statement was testimony given at a deposition or at a prior trial. 103 If the accused did in fact have such an opportunity, and the witness is unavailable at trial, it seems clear that the Clause should not, and does not, pose any obstacle to admission of the prior statement. 104

But now suppose that the accused had an adequate opportunity to examine the witness before the trial, and the witness is available to testify at trial. Our system has a general preference that the witness testify live. 105 Whether that preference should be imposed constitutionally, and if so, whether that preference should be imposed under the Confrontation Clause rather than under the more flexible standards of due process, are difficult and complex questions on which I wish to offer no opinion. 106 I believe, however, that a plausible argument supports the proposition that the prior opportunity to examine the witness satisfies the Clause: The accused has had the opportunity to “be confronted with” the witness when the witness gave the testimony, and it is not clear that the Clause requires that the confrontation be repeated at trial if that is possible.

This analysis casts an interesting light on the current doctrine. As discussed in Part I, White indicates that the Confrontation Clause does not impose an unavailability requirement on hearsay statements that are not prior testimony. Under the theory I have advanced, this result makes sense, almost fortuitously, because under this theory, if the prior statement is not testimonial—however that term may be defined—then the Confrontation Clause should not apply at all. At the same time, there is some irony in imposing an unavailability requirement on prior testimony alone. The principal way by which prior testimony is likely to satisfy the current doctrine’s reliability requirement—and so

103. I do not mean to suggest that all prior opportunities should be deemed adequate; it may be, for example, that the earlier opportunity was inadequate because it occurred before the issues were sufficiently gelled, or in a proceeding at which counsel was insufficiently prepared, or at which tactical considerations weighed against conducting a rigorous examination. Cf. California v. Green, 399 U.S. 149, 164-66 (1970) (holding sufficient an opportunity to examine the declarant at a preliminary hearing).

104. E.g., id. at 165-66 (upholding admission of prior testimony where witness was deemed to be unavailable and defendant was deemed to have had an adequate opportunity for cross-examination). In Barber v. Page, 390 U.S. 719, 722 (1968), the Supreme Court noted that “traditionally there has been an exception to the confrontation requirement when a witness is unavailable and has given testimony at previously judicial proceedings against the same defendant which was subject to cross-examination by that defendant.” Rather than speaking about an exception to the confrontation requirement, the Court might have said that in these circumstances, the requirement is satisfied.

105. Live testimony is not incompatible with introduction of the prior statement; in some circumstances, indeed, the optimal result is live testimony supplemented by the prior statement.

106. Cf. Barber v. Page, 390 U.S. at 725 (“The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.”); Fed. R. Evid. 804(b)(1) advisory committee’s note (recognizing argument that “former testimony is the strongest hearsay” and so should be admissible even if the witness is available, but concluding that “opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. . . . In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available.”).
make it important whether the unavailability requirement is met—is to satisfy the criteria of the very firmly rooted hearsay exception designed especially for admitting some prior testimony. Unlike any of the other exceptions governing hearsay by out-of-court declarants, this exception requires that the accused must have had an earlier opportunity to examine the declarant under oath. Indeed, that earlier opportunity is the basis for this exception, and arguably it should be sufficient in itself to satisfy the Confrontation Clause, even if the declarant is available at trial.

2. Unavailability as Sufficient to Satisfy the Confrontation Clause?

Roberts seemed to imply a general rule that, to use the hearsay of an out-of-court declarant, the prosecution must show the unavailability of the declarant as well as the reliability of the statement. At least two notable scholars have advocated a position once taken by the second Justice Harlan—that unavailability is sufficient in itself to satisfy the Confrontation Clause. In other words, they would hold the confrontation right applicable only if the declarant is available to testify. I disagree. If the prior statement is testimonial, then the confrontation right applies, whether the declarant is available or not.

Nothing in the text of the Confrontation Clause suggests that it is applicable only to available witnesses; the Clause speaks of "the witnesses," not "the

108. See Fed. R. Evid. 401 advisory committee's note ("Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact.").
109. As discussed above, this was the view of Justice Harlan in June 1970, expressed in his concurrence in Green, 399 U.S. at 172-89; see supra note 7. It is also the view of Peter Westen and Michael Graham. See supra note 8.

I do not believe Professor Amar means to advocate an unavailability requirement, but in his 1996 article he suggested that the prosecution ought to be able to "can" a witness's affidavit for use at trial if the witness is then unavailable. Amar, supra note 11, at 695. I believe this was a slip, because an affidavit is not taken subject to cross-examination. Thus, in his recent book, Amar speaks instead of the government's ability, before trial, to subpoena a dying witness to "can" the witness's deposition "with the defendant looking on, and able to cross-examine." AMAR, supra note 11, at 130. The change is important, because a deposition stands on a different footing from an affidavit. The accused presumably had an adequate opportunity to confront the witness at the deposition. If the accused had such an opportunity, then the only reason, or at least the principal reason, to exclude the deposition at trial is a preference for the live testimony, a factor that drops out of the analysis if the witness is no longer available.

Professor Amar still says the defendant should be able to "oblige witnesses to [make] ... pretrial depositions and affidavits, 'canning' testimony to be later introduced in court in situations where the witness might not be available at the time of trial." Id. Just how a defendant is to oblige a witness to sign an affidavit is unclear to me. It is one thing to compel a witness to answer a question, even in writing; but an affidavit is not a response to questions. Putting that aside, if Amar means to suggest that the defendant, but not the prosecution, ought to be able to compel a person to make an out-of-court sworn statement, without examination by the other party, and later introduce that statement at trial if the declarant is unable to testify, then I wonder whether this is consistent with his view that the Compulsory Process Clause merely gives the defendant subpoena parity with the prosecution. Id. at 133-34. Perhaps Amar means to suggest that parties have equal power to compel pretrial testimony from a witness but only the defendant has a right to require exclusion of the testimony if it was not taken subject to cross-examination. Or perhaps Amar's residual reference to affidavits is merely a slip, as I believe the other one was, and in this context he meant only to refer to depositions.
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available witnesses." And I do not believe any reasons of constitutional policy call for such a limitation, either.

At the outset, it is important to bear in mind the qualification to the confrontation right that I have stated: If the accused’s own wrongful conduct is responsible for the witness’s unavailability to testify subject to confrontation, then he should be deemed to have forfeited the confrontation right with respect to her testimonial statements. At the other extreme, if the unavailability of the declarant is attributable to the prosecution, then it seems obvious that the confrontation right should survive.

Now consider the cases in the middle, in which the unavailability of the declarant cannot be attributed to the fault of either party. Why should the accused, rather than the prosecution, bear the burden of the witness’s unavailability? The witness has, by hypothesis, made a testimonial statement, and has become unavailable through no fault of the accused before the accused has had an opportunity to exercise his right of confrontation. If the witness testified at trial on direct examination but died before cross-examination, without fault of the accused, the court presumably would not allow the testimony to support a verdict. I do not believe any different result is appropriate when the witness makes the testimonial statement out-of-court instead of at trial.

My conclusion is fortified by the fact that in most cases, the prosecution can protect itself quite easily against the later unavailability of the witness. Recall that, under the theory I am proposing, the Confrontation Clause’s reach is limited to testimonial statements, and such statements are rarely made long before investigation and prosecution have begun. Thus, the prosecutor can

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110. See supra text accompanying notes 97-100.
111. See Federal Rules of Evidence 804(a), which provides that if a declarant’s unavailability to testify as a witness at trial is “due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying,” then the declarant is not deemed unavailable for purposes of Rule 804, and therefore the declarant’s statement will not be admitted under Rule 804’s exceptions to the hearsay rule.
112. It seems to be rather clear that, when a witness who has testified against an accused refuses altogether to answer the accused’s questions on cross-examination, the confrontation right demands exclusion of the testimony, at least if the testimony was significant. See Commonwealth v. Kirouac, 542 N.E.2d 270, 273 & n.5 (Mass. 1989) (holding defendant unjustly denied meaningful cross-examination when six year-old accuser declined to answer all relevant questions); 1 MCCORMICK ON EVIDENCE § 19, at 79 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK].

The same result should be required, without reference to the reliability of the testimony, if the witness, after testifying for the prosecution but before the accused has had an adequate opportunity for cross, dies or becomes permanently disabled through no fault of the accused. See Kirouac, 542 N.E.2d at 273 n.5 (collecting authorities); MCCORMICK, supra, § 19, at 80 (contending in general that direct testimony of witness who dies before cross should stand “except for the testimony of the state’s witnesses in criminal cases” with respect to whom “exclusion may well be required”); cf. WIGMORE, supra note 3, § 1390(1), at 134-36 (“[p]rinciple requires in strictness nothing less” than exclusion, but discretion should be exercised where absence of cross-examination is shown not to be “a material loss”; no distinction drawn between prosecution witnesses and other witnesses).
113. Indeed, under the views of Justice Thomas and Professor Amar, a testimonial statement is by definition made in the presence of the authorities, so they would have to be aware of it when it is made. In Part IV, I will advocate a somewhat broader definition of testimonial statements.
usually arrange for the witness to be deposed while she is still available, giving
due notice to the accused. If the witness later becomes unavailable, there
should usually be no constitutional obstacle to use of the deposition transcript,
because the accused had an adequate opportunity to confront the witness. If the
accused did not avail himself of that opportunity, that is his problem. Arguably,
though less clearly, it should suffice for the prosecution to give the accused
notice, while the witness is still available, that it intends to use the out-of-court
statement if the witness becomes unavailable and that the accused may take her
deposition now, should he wish to be sure of an opportunity to confront her.

3. An "Available to the Accused" Exemption?

Ironically, as the last paragraph suggests, a plausible argument could be made
that those who have argued for an unavailability exemption from the Confronta-
tion Clause have gotten it almost precisely backwards, and that there ought to
be instead an "available to the accused" exemption. That is, if the accused,
aided by his Compulsory Process right, can force the declarant to testify subject
to cross-examination, then presentation of the declarant's hearsay statement as
part of the prosecution's case, without the declarant becoming a witness at that
time, does not mean that the accused will not have had the opportunity to
examine her. This argument finds some support in decisions of the Supreme
Court; the Court has placed great weight on this opportunity of compulsion in
rejecting defendants' confrontation claims. Though the argument may have
some force, it presents several difficulties.

First, the text of the Confrontation Clause is in the passive voice. The accused
has a right "to be confronted with the witnesses against him." Arguably, this
suggests that to secure confrontation, the accused need do no more than demand
it. If so, a requirement that to achieve confrontation the accused must act

114. Even if the witness appears to be dying, a deposition is possible. For cases in which the
confrontation requirement was taken very seriously in the context of the deposition of a dying witness,
see Rex v. Charles Smith, 171 Eng. Rep. 357, 357-60 (1817) (entire deposition of deceased admitted,
despite defendant's late arrival when taken, only because text read back and affirmed by declarant upon
defendant's arrival and defendant given opportunity to cross-examine); Rex v. Forbes, 171 Eng. Rep.
354, 354 (1814) (portion of deceased's deposition made prior to arrival of defendant inadmissible
because defendant unable to observe manner and demeanor of declarant during testimony).

115. White v. Illinois, 502 U.S. 346, 355 (1992) (reasoning declarant can be subpoenaed by
prosecution or defense regardless of whether, given availability of declarant, Confrontation Clause
requires production of declarant); United States v. Inadi, 475 U.S. 387, 397-98 & n.7 (1986) (reasoning
co-conspirators whose out-of-court statements were admissible regardless of availability to testify
in-court could nevertheless be subpoenaed by the defense). At least in a limited context, Professor Amar
appears to agree. AMAR, supra note 11, at 131. See infra note 127.

116. I have contended, outside the confrontation context and subject to proper procedures, that if the
party opponent is not substantially less able than the proponent to call as a witness the declarant of a
hearsay statement, this factor weighs heavily in favor of admitting the hearsay. See Richard D.
Friedman, Toward a Partial Economic, Game-Theoretic Analysis of Hearsay, 76 MINN. L. REV. 723,

117. I would think Professor Amar might regard this problem as quite serious indeed, because in
various contexts he has emphasized the importance of taking the constitutional text—including single
words—seriously. See AMAR, supra note 11, at 127.
affirmatively, by invoking compulsory process to "obtain" the presence of the witness, imposes an improper burden on him.

Second, this argument would render the Confrontation Clause virtually superfluous, because that Clause would only be, in effect, the flip side of the Compulsory Process Clause. It would tell criminal defendants, "if the prosecution chooses to use the prior statement of a witness rather than presenting her at trial, but you want to confront her, you may use your compulsory process right to do so."

Third, even when compulsory process will secure the attendance of the witness, so that the accused could put her on the stand, this is far less satisfactory for the accused than the opportunity to cross-examine. When a witness finishes testifying for the prosecution, defense counsel usually finds it worthwhile to rise and ask at least a few questions, exploring the possibility of impeaching the witness and, if the witness seems nearly invulnerable, sitting down promptly in order to play down her testimony. But if an out-of-court statement is introduced as part of the prosecution's case, it is far riskier and costlier for defense counsel, in the middle of his own case, to put the declarant on the stand, invite her to repeat the damaging account, this time live in front of the jury, then try to shake her—and if he comes up empty-handed, try to explain to the jury why he bothered with the whole exercise.118 Small wonder defense counsel hardly ever tries.119

Finally, the full implications of the argument are rather startling. The prosecution could present as part of its case-in-chief an affidavit or videotaped statement that it had taken from a witness, and perhaps even drafted for her, and in response to the Confrontation Clause objection it could point out, "If the accused wants to examine her, he may call her as part of his case." Such a procedure is not unthinkable. It is perhaps most easily envisioned in the case of child witnesses, where we may suspect that cross-examination is so likely to be fruitless that the invocation of the confrontation right is little more than an

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118. Another potential difficulty is that ordinarily a party is not allowed to ask leading questions of his own witness. As Amar points out, however, this should not be a problem, because the witness would presumably be deemed hostile. See Amar, supra note 11, at 131 n.192. This rule may have constitutional force. Id.

119. I have proposed a procedural change that would minimize this difficulty, but as of yet (one can always hope) it is not the law. Richard D. Friedman, Improving the Procedure for Resolving Hearsay Issues, 13 Cardozo L. Rev. 883, 892-904 (1991). Under this procedure, if the proponent of sufficiently probative hearsay gave sufficient notice, the hearsay would generally be admissible unless the opponent produced the declarant, ready and able to testify, by a given time. If the opponent did that, the proponent would have to present the declarant as a live witness as part of its case or forgo use of the hearsay. More recently, I have questioned whether this procedure should be applied universally. But if the Confrontation Clause were interpreted to allow the prosecutor to escape a challenge under the Clause by saying, "If the accused wants to examine the declarant, let him produce her," then I think this procedure definitely ought to be followed.
attempt to intimidate the child into not testifying. This procedure would be such a dramatic change from the way we conduct criminal trials that the prospect ought to give us pause.

In short, we must treat with great care any suggestion that the accused’s compulsory process right relieves the confrontation problem when the prosecution offers a testimonial statement made by a witness whom the accused has not had an opportunity to confront.

In this Part, I have argued that the unavailability of the witness should generally be irrelevant in determining whether the Confrontation Clause demands the exclusion of an out-of-court statement. The only qualification of this rule that I would draw with certainty is that if the unavailability of the witness was procured through wrongdoing of the accused, then the accused should be deemed to have forfeited the confrontation right. Two other qualifications are possible. First, if the prior statement is testimonial and the accused had an adequate opportunity before the trial to examine the witness under oath, then arguably unavailability should be decisive, the Confrontation Clause allowing the prior statement if the witness is unavailable at trial but not otherwise. This qualification comports with current doctrine. The second possible qualification arises if the court believes, given an extremely unlikely prospect of cross-examination being fruitful, that the accused’s invocation of the confrontation right is probably based on the anticipation that the witness would be too intimidated to testify at trial to the full detail of an earlier testimonial statement. Arguably, in such a case, if the witness is available to testify at trial the court should call the accused’s bluff, admitting the prior statement and leaving it to the accused to call the witness to the stand, if he really hopes that confrontation will be helpful. Such a procedure strikes me as plausible, at least when the witness is a child, though I have grave qualms about it.

IV. TESTIMONIAL STATEMENTS NOT MADE TO THE AUTHORITIES

So far, my arguments have been consistent with Justice Thomas’s view that “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.”

Professor Amar appears to agree with this sense of what it means to act as a witness for purposes of the Confrontation Clause, although he may differ slightly with Justice Thomas over the meaning of the term “formalized.”

I would take the definition of “witnesses” only slightly further—but the extension is a crucial one.


121. Professor Amar believes that Justice Thomas and Justice Scalia (who joined Justice Thomas’s opinion) “have properly drawn” the distinction “between general out-of-court declarations . . . and governmentally prepared depositions.” Amar, supra note 11, at 131 & n.194. Justice Thomas, unlike Professor Amar, puts emphasis on formalization of the statement; Professor Amar, unlike Justice Thomas, puts emphasis on governmental preparation. But they may mean much the same thing—open
The question of whether a statement made by a person out-of-court should be considered testimonial—or put another way, whether the person should be considered a witness in making the statement—is not exogenous to the legal system’s procedural rules. Rather, the question depends crucially on those rules because to a large extent it depends on the use that the system makes of the statement. If the declarant correctly understands at the time she makes the statement that it will play no role in any litigation, then the statement cannot readily be considered testimonial. If, by contrast, the declarant correctly understands that her statement will be presented at trial, than the statement does appear testimonial. Thus, as suggested above, the definition of “witnesses” must extend to persons who make out-of-court statements under the formalities prescribed by the system for the making of statements later to be presented to the factfinder.

Now suppose a system in which statements made out-of-court—including out-of-court statements not made under prescribed formalities—may be freely presented to the factfinder and the factfinder is placed under no greater restrictions in considering such statements than it would be in considering testimony given by the declarant as a live witness in court. Suppose further that a declarant, either unwilling or unable to testify at trial, makes a statement—perhaps orally, perhaps in writing, perhaps to legal authorities, perhaps to someone else entrusted to relay the statement—with the anticipation that, in all likelihood, the statement will be presented to the factfinder at trial. It seems to me that such a person is a witness as fully as an out-of-court deponent in the ancient Athenian or the medieval Continental—or indeed the modern American—system. True, the state as prosecutor may not have participated in the preparation or recording of the particular statement. But the adjudicative system has given broad leeway to the declarant to testify in an informal manner.122

governmental involvement in the preparation or taking of the statement. Both Justice Thomas and Professor Amar, it seems, would treat as falling within the Confrontation Clause a detailed accusatory statement made by a declarant to the police in the police station, even if the declarant did not swear to the statement or even sign it and even if the initiative was all on the part of the declarant. Professor Amar’s term “governmentally prepared depositions” has a mildly archaic ring to it. In most modern jurisdictions, a deposition is not the same thing as an affidavit. Rather, a deposition is an examination of a witness before trial. Thus, while an affidavit, a sworn statement, may be prepared by the government, nobody really prepares a deposition—for the questioner presumably has not drafted the witness’s answers. Professor Amar, in expressing agreement with Justice Thomas, says that Thomas “accept[ed] the views propounded by the United States” as amicus curiae in White v. Illinois. Id. That is true in substantial measure. Indeed, Justice Thomas said that the test he adopted was “along the lines suggested by the United States,” White, 502 U.S. at 365. But Justice Thomas also explicitly criticized the Government’s articulation of its test, and his articulation, emphasizing “formalized” statements and not extending to all statements made “in contemplation of legal proceedings,” seems significantly more restrictive. See infra note 125.

122. Note that Berger, supra note 11, makes prosecutorial involvement the touchstone of her Confrontation Clause analysis. This essay, by contrast, makes the touchstone the question of whether the statement was testimonial. There is a close, but not perfect, fit between the two concepts. As discussed in this Part, some statements are testimonial even though governmental agents had no involvement in their presentation. Also, some statements procured by governmental agents are not

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