REMAKING CONFRONTATION
CLAUSE AND HEARSAY
DOCTRINE UNDER THE
CHALLENGE OF CHILD
SEXUAL ABUSE PROSECUTIONS

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In this article, Professor Mosteller examines the two sets of developments in the prosecution of child sexual abuse: (1) statutory innovations in types of hearsay evidence admissible, methods of presenting testimony, and competency provisions and (2) recent major reformulation of Confrontation Clause analysis. He suggests that the current analysis which treats trustworthiness as the articulated goal of the Confrontation Clause, abandoning the procedural elements of the right of confrontation, loses the intent central to the Framers' design to protect the defendant against the introduction of evidence produced under inquisitorial techniques. Professor Mosteller proposes that the current analysis, coupled with the erosion of requirements for admission of hearsay evidence, will leave the Sixth Amendment right to confrontation a hollow formalism and allow admission of statements where meaningful cross-examination is not practically possible. He argues that the scope of the Confrontation Clause should be narrowed and that its protections within a core area should be sharply invigorated.

I. Introduction

Child sexual abuse is a major and growing problem in the United States.1 Recognizing the significance and emotional power of the problem, state legislatures have responded with an impressive array of legislative innovations that admit out-of-court statements of child victims and attempt to shield children from emotional and psychological trauma resulting from participation in judicial proceedings. These developments

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are both far-reaching and fundamental, and they have the potential to extend beyond the confines of child abuse litigation.

The frequent association of reform with children's issues is easily understood. First, we as a society care intensely about the treatment of children, and as a result, child welfare has been a paramount concern of state legislatures throughout this century. Mistreatment of children, particularly sexual abuse, is especially horrendous. All agree that action is required and perpetrators must be apprehended and punished. Second, because children obviously differ from adults, society is willing to rethink procedures and evidentiary rules. We begin almost with a presumption that the ground rules should be different. Thus, the initial inquiry is what changes to make in the process rather than whether it should be altered at all. That inquiry, in turn, quickly moves to how fundamental the modifications should be. Third, proof in child cases is often problematic. Children frequently have difficulty testifying effectively as a result of their different and somewhat limited abilities to remember, conceptualize, and communicate, and because of fear and the obstacles presented by the courtroom setting.

States have experimented with new hearsay exceptions\(^2\) that admit out-of-court statements by children and with new procedures for receiving testimony from children in court. In the area of hearsay, one approach has been to identify specific crimes—principal sexual abuse—and, regarding those crimes, to admit the hearsay statements of children below a specified age if the statements are deemed generally trustworthy. This approach authorizes the admission of a broad array of statements of a child victim of sexual abuse, limited solely by the Confrontation Clause.\(^3\)

To shield children from trauma, statutes and the case law have treated the trauma that would result from testifying as bases for finding a child unavailable to be called as a witness.\(^4\) In these situations, hearsay statements under this new exception may constitute the only evidence from the child, and the defense may be prohibited from questioning the child, who is physically available and could provide some information to the jury if cross-examined. In combination, the ability to introduce effective hearsay statements while simultaneously shielding the child creates powerful and pernicious incentives for the prosecutor. If the hearsay

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\(^2\) Rule 801(c) of the Federal Rules of Evidence provides a simple and widely used definition of hearsay: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Conceptually, hearsay is not admissible, see FED. R. EVID. 802, unless it falls within one of the many hearsay exceptions. See FED. R. EVID. 803 & 804.

\(^3\) The Sixth Amendment to the United States Constitution states, inter alia: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI. The first of these rights is called the Confrontation Clause, and the second, the Compulsory Process Clause.

\(^4\) See infra note 32.
conveys the child's story well, as it frequently will,\(^5\) the prosecution has strong motivation to develop evidence and arguments that the child cannot be called as a witness.\(^6\) Assuming these developments continue, we can expect to see fewer instances of children testifying in sexual abuse cases in the future. As a result, defendants' rights under both the Confrontation Clause and the Compulsory Process Clause will be seriously compromised.\(^7\)

A number of states have experimented with a second much more controversial hearsay exception. This exception permits the prosecution to produce ex parte videotaped statements by the child before trial and admit them as an alternative to the child's direct examination. This procedure has some potential for shielding children from trauma, but its chief purpose is to enhance the effectiveness of the state's proof.

The production at trial of ex parte videotaped testimony is a particularly ominous hearsay innovation because of recent developments in confrontation analysis that may admit hearsay statements regardless of their reliability if the prosecution simply makes the child physically available without calling her as a witness. Under this view, the Confrontation Clause is satisfied by the opportunity for the defense to call and to cross-examine the witness in front of the jury.\(^8\) In addition, other recent Confrontation Clause authority suggests that where cross-examination is attempted, the chance to cross-examine need not be very meaningful to be constitutionally sufficient.\(^9\) These developments are particularly troubling where states have legislated the automatic competency of child victims of sexual abuse, as a number have done.\(^10\) The stage is thus set to reduce confrontation to a hollow formalism and to admit statements where meaningful cross-examination is, as a practical matter, impossible.

Legislatures have authorized new methods of presenting testimony to shield children from the trauma of testifying. First, through videotaped recordings, children testify in the presence of the defendant but do so by way of a deposition taken in a less formal and more comfortable environment than the typical courtroom. Second, using either videotaped recording or live closed circuit television, children testify outside the courtroom and outside the presence of the defendant upon a specified showing that trauma would otherwise interfere with effective testimony.

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5. The hearsay is particularly powerful when presented through a videotaped statement by the child. See infra part V.B.

6. A finding of incompetency to testify produces these same advantages and incentives for the prosecution.

7. See supra note 3.


9. United States v. Owens, 484 U.S. 554, 564 (1988) (holding that the inability of the victim of an assault to remember anything about the identity of his attacker did not render his cross-examination so deficient under the Confrontation Clause as to exclude his pretrial identification).

10. See infra part II.B.2.
Adding complication, all of the above techniques can be "mixed and matched" as desired. For example, where a statute specifies that the child victim must testify for her hearsay statement to be admitted, it may permit such testimony to be received through an electronic medium and/or outside the defendant's physical presence.11

Child abuse hearsay provides a major testing ground for both hearsay rules and the Confrontation Clause. The principal issues and answers in this context apply to other areas.12 The general child sexual abuse exception imposes no explicit categorical requirements to establish trustworthiness, but rather uses an open-textured approach under which all reliable hearsay is admitted. The acceptance of such an approach in child sexual abuse prosecutions may expand to other areas of legislation. Similarly, the innovation of ex parte videotaped statements challenges the core concepts of the Confrontation Clause. If the clause imposes no restraint on such statutory innovations, the meagerness of its basic protection will be starkly established. On the other hand, if there is anything of significance remaining to the confrontation right, the answers worked out in the conflict between our intense interest in effective prosecution of child abusers and the fundamental prerequisites of confrontation may establish the analysis in other problematic areas.

Part II sets out in detail the major legislative innovations both in hearsay evidence and in the method of receiving the testimony of children, and identifies the key constitutional and evidentiary issues raised by these approaches. Part III analyzes several major elements of current Supreme Court doctrine regarding the Confrontation Clause. This analysis reveals the irrationality of the current doctrine that defines when the declarant's unavailability is a constitutional requisite and the inadequacy of the right to cross-examine effectively those declarants who are available. Part IV examines the historical roots of the Confrontation Clause and proposes new definitional lines for both the overall right and for protection of its core interests. This part concludes that the scope of the Confrontation Clause should be narrowed somewhat, and its protections within a core area sharply invigorated. Part V again examines the specific problems raised by admission of hearsay and discusses alternative methods for receiving the testimony of children in sexual abuse cases based upon doctrinal and historical analysis of the Confrontation Clause right. Part V proposes solutions in two major problem areas: first, developing techniques for accommodating the admission of videotaped record-

11. See infra note 30.
12. In fact, a type of reform appears already to have begun in that the catchall exceptions, see FED. R. EVID. 803(24) & 804(b)(5), discussed infra note 19, are operating as an escape valve that permits courts to admit problematic hearsay. See Myrna S. Raeder, Commentary: A Response to Professor Swift: The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?, 76 MINN. L. REV. 507, 514-19 (1992) (on basis of analysis of use of catchall exception, questioning whether hearsay rule is functioning as effective barrier to out-of-court statements not fitting traditional exceptions, particularly when offered by prosecution). Broad scale use of the child sexual abuse hearsay exception may accelerate the erosion of a hearsay system based on specific exceptions.
nings of early interviews with child victims and the Confrontation Clause; and second, defining a system that establishes the different levels of trauma required to restrict various elements of the confrontation right. Finally, part VI presents a summary of the major conclusions reached regarding the difficult area of child sexual abuse litigation. This analysis may help chart the path of the future treatment of confrontation and hearsay developments.

II. STATUTORY INNOVATIONS IN HEARSAY AND IN THE METHODS FOR RECEIVING EVIDENCE IN CHILD SEXUAL ABUSE CASES

A. Policy

The massive changes in rules admitting hearsay evidence in child sexual abuse cases have developed from a set of broad factual determinations and policy judgments by legislatures. First, the child's out-of-court statements are sometimes the only, and often the most important, evidence available to prove sexual abuse. Adults typically sexually molest children outside the presence of uninvolved witnesses; the perpetrators are usually relatives or others with access to the child in isolated settings; frequently physical evidence will be inconclusive or entirely unavailable; and many times the child will be unable or unwilling to testify at trial for a myriad of reasons related to age, capacity, guilt, and fear. Second, legislatures often proceed from the position that "a child's statements about sexual abuse are inherently reliable." This view is based on the beliefs that children would rarely persist in lying to authority figures about sexual activity and that most children do not have sufficient knowledge about sexual functioning to lie effectively. Third, children are believed to be harmed by the trial process. Although not universally true, in-court testimony by a child may produce emotional and psychological trauma that in some instances will be long-lasting.

The first two broad, factual determinations correspond generally to the basic hearsay concerns of necessity and trustworthiness. They have resulted in a number of innovations in the type of hearsay evidence admitted. The third has both contributed to hearsay innovation and motivated modifications in the methods for taking and presenting statements by children. Legislators have pursued these innovations with two broad purposes in mind: "to reduce trauma to the child and to facilitate successful prosecution of child molesters." In some legislation, the two

14. Id.
15. Id.
16. See Maryland v. Craig, 497 U.S. 836, 855 (1990) (citing the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court"); see also infra notes 425-28 and accompanying text.
purposes are mixed; in other legislation, one of the two appears to predominate.\(^{18}\)

**B. The Details of the New Developments in Hearsay Admissibility and Presentation of Evidence**

Focusing principally on sexual abuse cases, state legislatures have produced five major innovations regarding the testimony of children. Two of them create new exceptions to the hearsay rule and admit out-of-court statements of children that often would otherwise be inadmissible. The third innovation renders child victims of certain crimes automatically competent to testify. The final two concern the method of receiving testimony, allowing testimony through an electronic audiovisual medium either in the form of a traditional deposition taken outside the courtroom or through testimony by the child while outside the presence of both the defendant and the jury. In addition, courts, and to a lesser degree legislatures, have expanded the range of statements that may be admissible through traditional hearsay exceptions.

**1. New Hearsay Exceptions for Statements of Child Sexual Abuse Victims**

State legislatures have fashioned two major new hearsay exceptions in the child sexual abuse area. The first is a specialized form of a catchall hearsay exception;\(^{19}\) the second is an authorization for production and admission of an ex parte videotaped statement by the child victim.

a. **General Child Victim Hearsay Exception**

Responding to the basic conclusions (1) that children's statements

\(^{18}\) Some of the innovations, such as receiving testimony outside the presence of the jury and/or the defendant, are principally designed to minimize trauma. See, e.g., State v. Thomas, 425 N.W.2d 641, 646 (Wis. 1988) (statute allowing videotaped deposition outside presence of defendant "seeks to minimize the emotional strain of the child's participation in criminal proceedings by allowing the child to testify in a less threatening atmosphere"). There can be no doubt, however, that facilitating successful prosecutions is an important goal of all the statutes. See, e.g., State v. Webb, 779 P.2d 1108, 1110 (Utah 1989) (statutes admitting hearsay testimony "were enacted as part of a package that made it easier to introduce children's testimony in child sexual abuse cases and to impose harsher sentences on offenders").

\(^{19}\) Under the Federal Rule of Evidence, Rules 803(24) and 804(b)(5) are termed catchall exceptions in that they admit statements not satisfying the specific requirements of any categorical exception but exhibiting equivalent guarantees of trustworthiness.
about sexual abuse are generally trustworthy, and (2) that the circumstances of most abuse make admission of out-of-court statements necessary, approximately half the states created new exceptions to the hearsay rule for statements by children. The statutes vary in detail, but typically they admit statements of children below a certain age (from "under ten" to "under fourteen") who have been victims of specified crimes.

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Several other states have limited application exceptions involving child hearsay. The Texas statute, Tex. Crim. Proc. Code Ann. § 38.072 (West Supp. 1992), differs from the above in that it restricts admission to the first report made about the sexual offense or other assault and is treated as an expansion of the "prompt report" of rape exception. See infra note 70. Iowa's statute admits recorded statements in child sexual abuse cases if they substantially comport with the requirements of the two catchall exceptions, rules 803(24) or 804(5). IOWA CODE ANN. § 910A.14(3) (West Supp. 1993). The statute is significant only in permitting recorded statements to be received. California's child sexual abuse hearsay statute permits their use only to corroborate the defendant's confession. CAL. CIV. CODE § 1223 (West Supp. 1993). Alaska's statute is even more limited, allowing the child's statement only to be received by the grand jury. ALASKA STAT. § 12.40.110 (1990).


Florida defines the age requirement differently, using a functional approach to immaturity: "a physical, mental, emotional, or developmental age of 11 or less." Fla. Stat. Ann. § 90.803(23)(a) (West Supp. 1993). Mississippi specifies only that the child be of "tender years," Miss. R. Evid. 803(25), which means that in appropriate cases the exception might apply when the declarant is chronologically older than 14, the typical statutory limit for "tender years," but has a lower mental age.

usually sexual abuse. In a number of states, these statements may be presented to the jury through the medium of videotape as well as through more traditional methods.

The typical exception for statements by child victims of sexual abuse requires a demonstration of trustworthiness, but then defines the showing mandated in the most generic terms: "the time, content, and circumstances of the statement provide sufficient indicia of reliability." A few statutes include minor additional requirements or list very broad factors for the court to consider in determining trustworthiness. How-


26. See Kan. Stat. Ann. § 60-460(dd)(2) (Supp. 1991) ("child was not induced to make the statement falsely by use of threats or promises"); Minn. Stat. Ann. § 595.02(3)(a) (West 1988) (focusing also on "the reliability of the person to whom the statement is made").

27. See Ark. R. Evid. 804(b)(7) (list of 12 factors, including spontaneity; lack of time to fabricate; consistency, repetition, and possible recantation of statement; mental state and competency of child; use of unexpected terminology; lack of motive or bias of the child; suggestiveness of questions asked the child; and credibility of receiver of statement and potential bias of child's custodian); Ohio R. Evid. 807(A)(1) (nonexclusive list including, spontaneity, internal consistency of statement, mental state of child, child's motive or lack of motive to fabricate, child's use of age-unsual terminology, means by which statement was elicited, and lapse of time between act and statement, but not independent corroboration); Or. Rev. Stat. § 40.460(18a)(b) (Supp. 1991) (lengthy list of factors, including child's personal knowledge of event, age, and maturity; certainty that statement was made; apparent motive of child; whether child was suffering pain or distress when making statement; nature and duration of abuse; age-inappropriate facts; internal consistency of statement and age-appropriate terminology; and spontaneity of statement); Utah Code Ann. § 76-5-411 (1990) (age and maturity of child, reliability of assertion and child, nature and duration of abuse, and relationship of child to offender).

28. Although Indiana's statute, like the others, requires the proponent of the statement to establish its trustworthiness, Ind. Code Ann. § 35-37-4-6(d)(1)(B) (Burns Supp. 1992), the state supreme court found it constitutional, relying exclusively on the statute's requirement that the child be subject to physical confrontation and cross-examination. Miller v. State, 517 N.E.2d 64 (Ind. 1987). Indiana's statute, which covers both statements generally and ex parte videotaped statements, id. § 35-37-4-6 (c), more closely resembles the typical videotape statutes, which are examined in the next part, in general structure.
ever, these other formulations do little to alter the basic open-ended nature of the exception.

In addition to this generic finding of trustworthiness, the rules typically require that the child either testify or be found unavailable, both of which are affected by peculiarities of modern child testimony. The first alternative—that the child testify—may be satisfied by videotaped testimony of the child conducted with cross-examination by defense counsel but outside the physical presence of the defendant. The second alternative—that the child be unavailable—may be satisfied under a specific statutory definition that extends beyond those applicable to witnesses generally and recognizes unavailability based on trauma. For example, unavailability in Florida is shown by “a finding . . . that the


Despite the fact that most statutes follow the above described pattern, there are some notable variations. Utah’s statute requires that the child either be “available to testify” or be unavailable. Utah Code Ann. § 76-5-411(1)(a) & (b) (1990). Were it not for the fact that trustworthiness must be established independently, this variation would be constitutionally problematic. Similarly, Arkansas has two exceptions, one which requires the child to be available and subject to cross-examination, Ark. R. Evid. 803(25) (the exception covers only statements that are inconsistent with the child’s trial testimony), and the other requires the child to be unavailable. Id. 804(0)(7). Kansas presents a third variant under which the child may neither testify nor be available, but instead may be disqualified or be unavailable as a witness. Kan. Stat. Ann. § 60-460(dd)(2) (Supp. 1991). The provision was ruled constitutional in State v. Myatt, 697 P.2d 836 (Kan. 1985). Likewise in Ohio, the child’s statement is admissible only if her testimony is “not reasonably obtainable.” Ohio R. Evid. 807(A)(2). Georgia and Vermont, by contrast, require that the child must be available to testify, effectively excluding statements where the child is unavailable. Ga. Code Ann. § 24-3-16 (Michie Supp. 1992); Vt. R. Evid. 804a(a)(3).

30. Under Fla. Stat. Ann. § 92.53(1) (West Supp. 1993), when the requisites of the statute are met, the child’s testimony may be received by videotape rather than through live in-court testimony. The Florida Supreme Court held in Glendening v. State, 536 So. 2d 212 (Fla. 1988), cert. denied, 492 U.S. 907 (1989), that videotaped testimony under that provision satisfied the alternative requirement that the child testify. Id. at 216-17. Alabama makes this alternative to in-court testimony explicit in its statute, recognizing that testimony may be by videotaped deposition or by closed circuit television. Ala. Code § 15-25-32(1) (Supp. 1993).

31. Federal Rule of Evidence 804(a) lists the “traditional” bases for finding a witness unavailable as they have developed in contemporary evidence law. These include: (1) assertion of a privilege, (2) refusal to testify, (3) lack of memory, (4) inability to be present or to testify because of physical or mental illness or infirmity, and (5) physical absence. See infra note 139.

To the traditional list, Ohio adds a specific feature designed to ameliorate the tendency of children to refuse to testify or to claim lack of memory. These justifications for unavailability are only sufficient “after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.” Ohio R. Evid. 807(B)(1). Also, the court must find that delay in the hearing would not alleviate unavailability due, inter alia, to mental infirmity. Id. 807(B)(3)(b).
child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm."

Finally, most statutes provide the additional safeguard of requiring the court to find some corroborative evidence that the crime occurred when the child is unavailable. 33

b. Hearsay Exception for Ex Parte Videotaped Statement by Child

Mixing new technology and new Confrontation Clause analysis, approximately one-fifth of the states have enacted a provision admitting a prosecution-arranged videotaped interview of the child victim. 34 The interviewer questions the child outside the presence of the defendant and without contemporaneous cross-examination. Indeed, the provisions often explicitly require that the statements be made without any attor-

32. FLA. STAT. ANN. § 90.803(23)(a)(b) (West Supp. 1993). As the state supreme court noted in Glendening v. State, 536 So. 2d 212 (Fla. 1988), if the state meets its burden of showing the likelihood of severe trauma, the defendant may never have the right to cross-examine the child. Id. at 219 n.5. This situation is contrasted to that where the state establishes a risk of lesser trauma. The latter permits taking videotaped testimony outside the courtroom and outside the presence of the defendant but maintains the right to cross-examination. Id.; see also MO. ANN. STAT. § 491.075.1(2)(c) (Vernon Supp. 1993) (unavailability established when "significant emotional or psychological trauma . . . would result from testifying in the personal presence of the defendant").

33. Nevada's statute similarly recognizes unavailability based on trauma, requiring either the child be "unavailable or unable to testify." NEV. REV. STAT. ANN. § 51.385(2) (Michie 1986). Although the Colorado statute on its face makes no special provision for emotional trauma, COLO. REV. STAT. ANN. § 13-25-1291(1)(a)(II) (West Supp. 1987), the Colorado Supreme Court held that for purposes of this statute a finding that the child's emotional or psychological health would be substantially impaired if the child were forced to testify, and that the impairment would be long-standing rather than transitory, satisfied the unavailability requirement. People v. Dieffenderfer, 784 P.2d 741, 730 (Colo. 1989).

34. Alabama, like Florida, effectively covers all possibilities of availability and unavailability, and incorporates new technologies. Testimony may be live or by videotape or by closed circuit television. Unavailability may be established under traditional standards, by total failure of memory, by incompetence, which includes inability to communicate because of fear, or the substantial likelihood that the child would suffer severe emotional trauma from testifying at trial or by closed circuit television. ALA. CODE § 15-25-32(2)(a)(6) (Supp. 1993). Oregon has a similarly expansive definition of unavailability. OR. REV. STAT. § 40.460(18a)(b) (Supp. 1991).

35. The statutes require that there be corroborative evidence of the abuse, the offense, or the act. See, e.g., OHIO R. EVID. 807(A)(3) (independent proof of sexual act); WASH. REV. CODE ANN. § 9A.04.120(b)(1) (West Supp. 1993) (the act). The purpose is to reduce the risk that the defendant will be erroneously convicted based on the emotional nature of child sexual abuse charges when the child is unavailable and therefore does not testify in support of the charges. See State v. Jones, 772 P.2d 496, 499 (Wash. 1989). The statutes generally do not require corroboration of the other elements of the statement, such as the identity of the perpetrator. People v. Bowers, 801 P.2d 511, 522 (Colo. 1990). The Oregon statute requires slightly more, mandating both corroborative evidence of the sex act and "the alleged perpetrator's opportunity to participate in the conduct." OR. REV. STAT. § 40.460(18a)(b) (Supp. 1991). See infra general discussion in part VII.2.b.

34. These statutes typically require that the statement be made before "the proceeding begins." See, e.g., HAW. R. EVID. 616; see also TEX. CODE CRIM. PROC. ANN. art. 38.071, § 5(a) (West Supp. 1993) ("made before a complaint has been filed or an indictment returned"). The provisions are construed narrowly and are not equivalent to a requirement that the statements "were not taken in preparation for a legal proceeding." VT. R. EVID. 804(a)(2).
neys present. In addition, the principal version of this statute imposes no requirement that a court find the statement trustworthy before admitting it, mandating only that the child be available to testify.

These statutes typically do not require the prosecution to demonstrate that the child would suffer substantial emotional and/or psychological trauma if she testifies as a condition of admission. Thus, instead of shielding the child from trauma, these statutes have the principal effect of enhancing the effectiveness of the state's proof, because they predicate compliance with the Confrontation Clause upon the child being subject to cross-examination and therefore enduring whatever trauma may result. However, modern technology may be used to reduce trauma. Some statutes authorize cross-examination through an audiovisual link with the courtroom that eliminates face-to-face confrontation with the defendant and thereby reduces the trauma.

A key issue with these statutes is whether the child is required to testify in the state's case in spite of the language that mandates only availability or whether she must merely be available for testimony if called by the defense. The Confrontation Clause question is whether,

36. Haw. Rev. Stat. Ann. § 15:440.5 (West 1992). The Louisiana statute, for example, prohibits leading questions, prescribes that the statement be voluntary, and requires accurate recording of the statement, but it does not require a finding of reliability along the lines described in Ohio v. Roberts, 448 U.S. 56 (1980).
Utah R. Crim. P. 15.5(1)(b) requires that the child be available to testify and to be cross-examined. Under a previous version of the Utah statute, the child was required to testify. However, even then the state supreme court did not require that the child testify about the substance of the hearsay statement to satisfy either the rule or the Confrontation Clause. State v. Nelson, 725 P.2d 1353, 1355-56 (Utah 1986). However, under the facts of Nelson, the nature of the direct examination would have entitled the defense under evidentiary principles to cross-examine on the substance of the hearsay statement. Id. at 1357. The Wisconsin statute requires that if the videotaped statement is admitted, the court, upon the request of the other party, "shall order the child be produced immediately following the showing of the videotape statement to the trier of fact for cross-examination." Wis. Stat. Ann. § 908.08(5) (West 1993).

The Missouri legislature recently amended its statute, which had previously required only that the child be available to testify, to exclude the videotaped statement unless the child actually testifies.
for the majority of statutes that contain no required demonstration of reliability, the Constitution is satisfied by the availability of the child for testimony (or cross-examination) at the time the statement is admitted in evidence.

Several states have adopted an even more constitutionally controversial variant of the ex parte videotape exception. Under this version, the child’s hearsay statement may be admitted if the child is unavailable to be cross-examined either for traditional reasons or because of a determination that “the child would suffer serious emotional or mental strain if required to testify at trial.” In this situation, the court is required to determine that the statement possesses indicia of reliability. The state will have effective evidence available to prosecute the defendant through the videotaped statement even if the child is found unable to testify and can even avoid the risk to its case of cross-examination. As a result, the prosecution has substantial incentives to try to show, whether or not accurate, that trauma would be substantial. This form of the exception, therefore, has the potential to affect the integrity of the proof.

2. Statutory Treatment of Child Competency

A group of states have made changes in competency requirements to ensure that the child victim’s live testimony (often the only direct evidence of the sexual offense) will be admitted and to eliminate what was seen as an almost undefinable standard of minimal ability to testify. In

at the proceeding or the statement satisfies the requirements of the state’s general child victim hearsay exception. Mo. Ann. Stat. § 492.304.2 (Vernon Supp. 1993).


43. Such statutes have been declared constitutional in several states. See, e.g., State in Interest of R.C. Jr., 514 So. 2d 759, 763 (La. Ct. App. 1987); State v. Schaal, 806 S.W.2d 659 (Mo. 1991) (availability of child and opportunity to cross-examine satisfied Confrontation Clause), cert. denied, 112 S. Ct. 976 (1992). The courts in other states have found constitutional infirmities. See, e.g., People v. Bastien, 129 Ill. 2d 64, 541 N.E.2d 670, 133 Ill. Dec. 459 (1989); State v. Pilkey, 776 S.W.2d 943 (Tenn. 1989), cert. denied, 494 U.S. 1032 (1990). See generally infra note V.A.


Indiana’s statute operates somewhat similarly. The court must find sufficient indications of reliability in the videotaped statement and the child must be demonstrated to be unavailable because of either medical reasons, inability to understand the nature and obligation of an oath, or a substantial likelihood of emotional or mental harm. Ind. Code Ann. § 35-37-4-6(c) (West 1992). In addition, the child must either have been subjected to face-to-face cross-examination when the statement was made or must testify at a hearing outside the presence of the jury but in the presence of the defendant to determine the reliability of the statement. Id. The Indiana approach was found constitutional in Miller v. State, 517 N.E.2d 64 (Ind. 1987) (court construing the statute as intended to require physical confrontation and right to cross-examine during hearing outside of trial and finding it constitutional as construed).

47. See also infra note 399; cf. State v. Ryan, 691 P.2d 197, 203 (Wash. 1984) (expressing fear that creation of child hearsay statute will serve as disincentive for prosecutor to call child as witness).
cases involving sexual assaults and, under some statutes, child abuse or physical assault, the statutes either have eliminated the requirement that the child victim be able to take an oath48 or have more broadly declared that courts should treat the child as competent without further inquiry.49 Legislatures intended these provisions to sweep away inquiries based upon the child's ability to communicate or to understand the responsibility to tell the truth, and upon age generally.50 When the witness is an extremely young child who possesses very limited capabilities, these provisions raise questions under the Confrontation Clause regarding the adequacy of cross-examination and under the Due Process Clause concerning the fairness of admitting testimony or basing a conviction on the child's very limited testimonial capacities.

3. Modifications in the Method of Receiving Testimony from Children

In response to the concern that children are harmed by requiring testimony in the formalized setting of a courtroom and/or in the physical presence of the defendant, a majority of the states have enacted legisla-

48. Delaware, Del. Code Ann. tit. 10, § 4302 (Supp. 1992) (child not to be found incompetent because she does not understand obligation of oath; degree of understanding of obligation of oath may be considered in determining credibility); N.Y. Crim. Proc. Law § 60.20 (McKinney 1992) (child under 12 may not testify under oath unless the court is satisfied that she understands nature of oath; if child cannot understand oath because of mental disease or defect, unworn testimony may be received if witness possesses sufficient intelligence and capacity to justify its receipt).

49. Other states have made satisfying the requirements of taking an oath easier for children. See Cal. Evid. Code § 710 (West Supp. 1993) (child under 10 is not required to take oath but in court's discretion may be required only to promise to tell truth, but under § 702, is disqualified if incapable of understanding duty to tell truth); Fla. Stat. Ann. § 90.605(2) (West Supp. 1992) ("in the court's discretion, a child may testify without taking the oath if the court determines the child understands the duty to tell the truth or the duty not to lie").


In addition, Colorado and West Virginia eliminate most if not all objections to child testimony in sexual abuse cases. Colo. Rev. Stat. Ann. § 13-90-106(1)(b)(II) (Bradford Supp. 1993) (in prosecutions of sexual offense children under 10 need not satisfy general requirement that witness must be capable of receiving just impressions of facts and of relating them truly not applicable, if "child is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined"); W. Va. Code § 61-8B-11(c) (1989) ("neighbor age nor mental capacity of the victim shall preclude the victim from testifying").

tion permitting testimony from children to be received electronically under conditions designed to reduce trauma. While some procedures require only the use of simple physical screening devices to block the child's view of the defendant, most statutes allow either closed circuit television or recorded videotaped testimony, with little distinction drawn between them. The statutes establish two general mechanisms for shielding the child from trauma.

a. Videotaped Depositions of Children in the Physical Presence of the Defendant to Avoid Testimony in a Courtroom Setting

The first technique permits the creation and admission of a videotaped recording of a deposition taken outside the presence of the jury and typically in a more informal setting than the courtroom. Under this technique, the statement is taken in the fashion of an ordinary deposition. The defendant is entitled to be physically present. The prosecutor conducts direct examination and the defendant has the right to cross-examine the child, typically through defense counsel.

Most statutes limit such depositions to child victims of sexual offenses and to instances in which the court finds that the child would suffer trauma if he or she were required to testify in court. The level of trauma required varies among the states.

The most restrictive statutes require either severe emotional or psychological harm, or an apparently similarly strict standard that the victim must be medically unavailable as a result of trauma. Other statutes define a much lower level of trauma as sufficient, using terms such as suffer strain. The statute in Florida is the most innovative and explicit in this regard, permitting the use of a deposition upon a showing that the

51. See State v. Naucke, 829 S.W.2d 445, 451-54 (Mo. 1992) (rejecting the argument that videotaped testimony outside the presence of the defendant was constitutionally deficient because it delayed cross-examination while the defendant reviewed the tape of the direct examination).


53. Many of these statutes have an additional provision that permits the testimony to be received outside the physical presence of the defendant upon an additional showing that the child would suffer trauma as a result of the defendant's presence. See Miss. Code Ann. § 13-1-407(4) (Supp. 1992); see also Neb. Rev. Stat. § 29-1926(6) (1989) (child may be required to be in position to see defendant if required to preserve constitutionality of child's testimony).

54. See, e.g., Or. Rev. Stat. § 40.460(24) (1991) ("substantial likelihood, established by expert testimony, that the child will suffer severe emotional or psychological harm if required to testify in open court").

55. See, e.g., Cal. Penal Code § 1346(d) (West 1982) ("testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable" as defined for all declarants); Colo. Rev. Stat. Ann. § 18-3-413(3) (West 1986) ("victim likely to be medically unavailable" or unavailable as defined generally for all declarants).

child would suffer "at least moderate emotional or mental harm." 57

A final group of states treat trauma either as simply a factor that the court may consider in determining "good cause" for authorizing and admitting the deposition 58 or make no explicit reference to trauma at all. 59 The most significantly different from the rest are the statutes in Montana and New Mexico. In Montana, a deposition is to be taken upon the request of the victim of specified crimes and with the concurrence of the prosecutor, without any further requirement of a demonstration of trauma. 60 New Mexico's statute differs only by degree, permitting the prosecution alone to move the court for authorization of a deposition upon a showing of "good cause" and flatly authorizing the deposition's receipt in lieu of the victim's direct testimony without further requirement. 61 These statutes in effect take the position that, if the defendant is given the right of personal presence and cross-examination and the witness is placed under oath, the testimony satisfies Confrontation Clause requirements without any showing that threatened trauma necessitates the procedure. 62

b. Closed Circuit or Videotaped Testimony Outside the Physical Presence of the Defendant

The second alternative technique for receiving testimony authorizes testimony by the child with the defendant physically absent or hidden from the child's view. This technique is more often associated with closed circuit television technology, but it may employ a videotaped recording of the child's testimony. 63 Other than the removal of the defendant from the child's sight, the testimony proceeds as traditional live testimony. The child testifies under oath, with questioning by the prosecutor and cross-examination by defense counsel.

The U.S. Supreme Court examined such procedures in Coy v. Iowa 64 and approved them in Maryland v. Craig. 65 In Craig, the Court approved this technique for eliciting testimony upon a case-specific, child-

62. See State v. Scott, 850 P.2d 286, 289-91 (Mont. 1993) (no showing of necessity required before videotaped deposition of child victim may be taken and shown at trial where the requirements of Confrontation Clause in terms of "physical presence, oath, cross-examination and observation of the demeanor by the trier of fact (although by video recording)" were satisfied); see also Strickland v. State, 550 So. 2d 1054 (Ala. 1989).
63. Under the Kansas statute, the cross-examined statement of the child is recorded on videotape, and if such a cross-examined statement is taken, the child cannot be compelled to testify during the trial. Kan. Stat. Ann. § 22-3434(c) (1988). The statute does not require that the trustworthiness of the statements be established. Instead, reliability is assured by the opportunity for cross-examination. State v. Johnson, 729 P.2d 1169, 1172 (Kan. 1986), cert. denied, 481 U.S. 1071 (1987).
64. 487 U.S. 1012 (1988).
specific showing that the child would suffer more than de minimis trauma from testifying in the presence of the defendant. The showing of trauma here is differentiated both from that required to demonstrate unavailability, which may permit the admission of testimony without any opportunity for cross-examination, and the trauma that will permit admission of a deposition, which is taken with full cross-examination in the presence of the defendant.

4. Expansion of Traditional Hearsay Exceptions to Facilitate Admission of Hearsay Statements by Child Victims

Among traditional hearsay exceptions, two exceptions—excited utterances and statements for purposes of medical diagnosis or treatment—are used most innovatively with children. This article will focus principally on the exception for statements for purposes of medical diagnosis or treatment because it raises the more substantial constitutional issues. A third exception, the prompt report of sexual assault, has re-

66. Id. at 855-56.
68. Federal Rule of Evidence 803(2) creates an exception to the hearsay rule without regard to the availability of the declarant for excited utterances. The exception states: “A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” FED. R. EVID. 803(2).

With children, the time period allowed between the exciting event and the hearsay statement is often expanded dramatically under a theory that the psychological characteristics of children either cause excitement to inhibit reflective thought for a longer period of time or greatly minimize that danger. State v. Smith, 337 S.E.2d 833, 842 (N.C. 1985) (lack of capacity to fabricate and psychological factors generally causing and explaining delay in reporting permit greater delay); State v. Logue, 372 N.W.2d 151, 159 (S.D. 1985) (statements made by four-year-old boy to his mother in normal course of daily activities, “coupled with the inability we perceive of the child to fabricate an account of such a heinous sexual encounter, warrant a finding that the statements were excited utterances.”). The theory has permitted statements to be received days after the exciting event. Smith, 337 S.E.2d at 842 (two to three days); Logue, 372 N.W.2d at 159 (two to three days).

A particularly novel approach used in Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988), promises even further expansion. In Morgan, the court defined the relevant time period to be that between the declaration and the child’s first opportunity to speak with a trusted adult, rather than the time between the exciting event and the hearsay statement. Id. at 947; see also 2 MCCORMICK ON EVIDENCE § 272.1, at 224 n.8 (4th ed. 1982) (“particularly innovative, although theoretically largely unexplored, approach”); Eleanor Swift, The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?, 76 MINN. L. REV. 473, 494-95 (1992). Professor Swift described Morgan as employing three separate techniques to expand a traditional hearsay exception. First, it developed a new interpretation of categorical terms when it interpreted the relevant period of delay as the first opportunity to report. Second, it liberally applied the doctrine to the facts, permitting a delay of several hours between the first opportunity and the time of the report. Third, it used the apparent trustworthiness of the statement, even though not directly establishing excitement or recognized as a relevant independent inquiry under the rule, to support admissibility. Id.

69. This exception, which also treats the availability of the declarant as immaterial, is set out in Federal Rule of Evidence 803(4) and reads as follows:

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

FED. R. EVID. 803(4).
ceived somewhat more limited new attention.\textsuperscript{70}

The exception for statements made for medical diagnosis or treatment has expanded tremendously in child sexual abuse cases. Developments have occurred on four dimensions. First, the subject matter covered by the exception has been expanded to include statements identifying the perpetrator of the crime.\textsuperscript{71} Second, the statements may now be received by a broad array of professionals in addition to doctors, including psychologists and social workers.\textsuperscript{72} In some instances, the statements may be received by nonprofessional family members.\textsuperscript{73} Third, the state-

\textsuperscript{70} Texas enacted a statute expanding this time-worn exception. In prosecutions for sexual or assaultive offenses as specified in the statute, the provision admits statements describing the offense made by child victims under 13 years of age to the first adult other than the perpetrator of the offense. Tex. Code Crim. Proc. Ann. art. 38.072, §§1, 2(a) (West 1994). The statute also requires a finding of reliability of the statement based on time, content, and circumstances and further requires that the child testify or be available to testify. Id. §§2(b)(2) & (3). This new exception admits all the details of the incident related in the statement, details often excluded under the traditional exception. See 2 McCormick on Evidence, supra note 68, § 272.1, at 223.

Oregon likewise has specifically preserved this general exception for all complaints of sexual misconduct regardless of the age of the victim, and, in contrast to the ancient theory of the exception, id., imposes no requirement on the timing of the statement. Or. Rev. Stat. § 40.460(18a)(a) (Supp. 1991). However, unlike the exception for statements by child sexual abuse victims, id. § 40.460(18a)(b), this exception prohibits receipt of the details of the offense, limiting testimony to the fact that the complaint was made. Id. § 40.460 (18a)(a).

The practice in Massachusetts stands in contrast to the general restriction on scope of statements admitted under this traditional exception. In Commonwealth v. Lavalle, 574 N.E.2d 1000 (Mass. 1991), a case involving an adult victim, the state supreme court noted that its exception differs from the majority practice in that it permits the witness to the victim's statements to testify not only to the fact that the complaint was made but also to the details of the complaint. However, the statement is admitted not as substantive evidence but as corroboration of the complainant's in-court testimony. Id. at 1002 & n.4.

In Lavalle, the prosecution added a modern twist to this ancient doctrine, admitting not only the statements of five witnesses to whom the victim recounted the assault within a few hours of its occurrence but also a videotaped statement by the victim to the police made later the day of the assault. Id. at 1002. However, although ruling that repetition through the oral statements of the witnesses and the videotape did not constitute prejudicial error, the court expressed concern about the continued viability of the doctrine because of the "overuse or 'piling on' of evidence" that might lead the jury to misuse the evidence. Id. at 1003-04; see also Commonwealth v. Licata, 591 N.E.2d 672, 673-75 (Mass. 1992) (reaffirming admissibility of fresh complaint evidence and again cautioning against its potential to lend undue credibility to the victim's testimony).

\textsuperscript{71} Robert P. Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C. L. Rev. 257, 275-76 (1989) (courts have frequently found statements of identity, which resemble inadmissible statements of fault, admissible because of claimed relevance of identity to treatment); Swift, supra note 68, at 496-97 (cases admit identity of perpetrator when member of "same household" under theory that nature and extent of psychological problem and indicated treatment depends on identifying relationship of abuser to victim).

\textsuperscript{72} Mosteller, supra note 71, at 282-83 & nn.101, 104. A few courts have refused to allow the exception to expand to psychologists and social workers under the theory they do not provide medical treatment. State v. Zimmerman, 829 P.2d 861, 864 (Idaho 1992) (statements to psychologists inadmissible); Sharp v. Commonwealth, 849 S.W.2d 542, 546 (Ky. 1993) (no hearsay exception for statements to social workers); Leatherwood v. State, 548 So. 2d 389, 392, 398 (Miss. 1989) (statements inadmissible when made to children services specialist even though recognized by court as expert in child behavior); State v. Barone, 852 S.W.2d 216, 220 (Tenn. 1993) (statements to psychologists not admissible); see also People v. LaLone, 437 N.W.2d 611, 614 (Mich. 1989) (statement made to psychologist less reliable than statement made to physician).

\textsuperscript{73} State v. Smith, 337 S.E.2d 833, 839-40 (N.C. 1985) (statement by child to grandmother admissible under theory that children typically cannot seek medical care directly but are expected to convey information to their caretakers).
ment need not be used for treatment purposes at all. Statements developed exclusively by professionals charged with facilitating the prosecution of the case may now fit within the medical diagnosis exception.\textsuperscript{74} Fourth, courts frequently accept statements under the exception, even those relating to the identity of the perpetrator, as "firmly rooted" and therefore admissible without an examination of the reliability of the specific statement, ignoring the fact that receiving such statements under the exception constitutes a significant expansion beyond its traditional dimensions.\textsuperscript{75}

\textbf{C. Basic Challenges Posed by Legislative Innovations in Proof of Child Sexual Abuse Cases to the Current Hearsay Doctrine and to Constitutional Restrictions on Receipt of Out-of-Court Statements}

The statutes and rules described above present a tremendously rich array of innovations focused principally on proof of child sexual abuse cases. Together they raise significant challenges to the traditional treatment of hearsay under particularized exceptions. The expressed willingness of many state legislatures to admit hearsay to the limits of the Constitution will permit under a hearsay exception with no specific categorical requirements provides a discrete but potentially significant alternative to the current system of specific categorical exceptions.\textsuperscript{76}

These innovations also raise a broad range of issues regarding the scope of Confrontation Clause protection against admission of hearsay. Louisiana's statute authorizing receipt of an ex parte statement by the child victim presented through videotape\textsuperscript{77} may test whether availability of the child for testimony is sufficient to satisfy the Confrontation Clause. Utah's alternative formulation of that provision\textsuperscript{78} tests whether a showing of trustworthiness is sufficient to admit statements of physically available children who would suffer some trauma from testifying.

\textsuperscript{74} United States v. Iron Thunder, 714 F.2d 765, 772-73 (8th Cir. 1983) (fact that examination was done pursuant to standardized protocol designed principally to prepare for criminal prosecution and that no treatment was contemplated or given did not prevent statements from being received under Rule 803(4)).

\textsuperscript{75} See Dana v. Department of Corrections, 958 F.2d 237, 239 (8th Cir. 1992); United States v. George, 960 F.2d 97, 99 (9th Cir. 1992); State v. Dever, 596 N.E.2d 436, 449-50 (Ohio 1992). But see Mosteller, supra note 71, at 290. For general discussion of significance of "firmly rooted" concept, see infra text accompanying note 90.

\textsuperscript{76} The current system of hearsay exceptions depends upon a substantial list of categorical exceptions (or exclusions), which number approximately 30 under the federal rules. These specific exceptions are supplemented by two catchall exceptions, which are supposed to be used "very rarely, and only in exceptional circumstances." S. REP. NO. 1277, 93rd Cong., 2d Sess. 20 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7066. Whether the use of catchall exceptions is being so limited is open to serious question. See generally Myrna S. Raeder, The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and is Devoured, 25 LOY. L.A. L. REV. 925 (1992) (examining greatly expanded prosecutorial use of catchall exceptions).

\textsuperscript{77} LA. REV. STAT. ANN. § 15.440.5 (West 1992); see supra note 42 and accompanying text.

\textsuperscript{78} UTAH R. CRIM. P. 15.5(1)(g) & (h); see supra note 46 and accompanying text.
automatic competency provisions in Missouri and Utah\textsuperscript{79} will test whether the Confrontation Clause can be satisfied by the right to cross-examine a child who is declared competent under state law but who is almost totally bereft of the capacity to testify and/or to understand the responsibility to tell the truth. Montana's deposition statute\textsuperscript{80} tests whether recorded testimony on videotape, made under conditions permitting the child to be placed under oath and allowing both full face-to-face confrontation and unrestricted cross-examination by the defendant, is admissible without any showing of trauma. The conclusion that statements identifying the perpetrator of the abuse are per se constitutionally admissible when received under the exception for statements for medical diagnosis or treatment tests the justification for automatically recognizing significant new expansions of older exceptions as firmly rooted.\textsuperscript{81}

Even without special rules, the interplay between psychological trauma and the concept of unavailability of the child provides its own complications. When does trauma render the child unavailable in the traditional sense? When does it authorize the admission of an entirely uncross-examined statement, including a videotaped statement? When does it permit the admission of a previously cross-examined statement made outside the defendant's physical presence? Should the focus of the trauma issue relate to its impact on the ability of the child to testify fully or its impact on the long-term psychological health of the child? How should trauma in this area be distinguished from the trauma that any witness may suffer from testifying to an extremely horrible crime?

Part V examines these questions in detail after a critique of current Supreme Court confrontation analysis in part III and an inquiry into the appropriate scope of the Confrontation Clause as determined by its history and its function in part IV.

\textbf{III. CONFRONTATION: THE PRESENT STATE OF THE LAW}

Through a series of decisions over the past decade,\textsuperscript{82} the U.S. Supreme Court has put a new face on the Confrontation Clause as it applies to the admission of hearsay. The clause received little attention by the Court prior to the mid-1960s, and even then the Court did not develop a comprehensive doctrine. The decisions of the past decade thus

\textsuperscript{79} Mo. Ann. Stat. § 491.060(2) (Vernon Supp. 1993); Utah Code Ann. § 76-5-410 (1990); see supra note 49 and accompanying text.
\textsuperscript{80} Mont. Code Ann. § 46-16-216 (1993); see discussion accompanying supra notes 60-62.
\textsuperscript{81} See discussion accompanying supra note 75.
\textsuperscript{82} The principal opinions include: White v. Illinois, 112 S. Ct. 736 (1992); Idaho v. Wright, 497 U.S. 805 (1990); United States v. Owens, 484 U.S. 554 (1988); Bourjaily v. United States, 483 U.S. 171 (1987); and United States v. Inadi, 475 U.S. 387 (1986). Ohio v. Roberts, 448 U.S. 56 (1980), offers the point of departure for these new developments. Maryland v. Craig, 497 U.S. 836 (1990), and Coy v. Iowa, 487 U.S. 1012 (1988), had dramatic effects in shaping the procedure for receiving in-court testimony. However, the Court has treated the procedure for receiving testimony as largely a separate doctrinal area, and as a result, Craig and Coy have a more limited role in the analysis that follows.
constitute an original defining of the doctrine in a modern age. The question is, therefore, whether the new doctrinal system constitutes a reasonable articulation of the meaning of the clause and captures the clause's historic purpose.

Consider first the changes in, and the new articulation of, the unavailability doctrine. Under the Supreme Court's analysis, the Confrontation Clause permits the admission of certain out-of-court statements only if the declarant is shown to be unavailable to testify. Recent decisions produced two significant doctrinal developments for unavailability and suggested a third that is potentially even more significant. First, as a result of eliminating unavailability as a requirement for virtually all hearsay except prior testimony, the Court now treats the prior testimony exception in such a peculiar and disadvantaged way, so out of kilter with the logic of the Confrontation Clause, as to undermine the integrity of the Court's entire analysis. Second, the Court has subtly modified the definition of unavailability to mean either unavailability or the production by the prosecutor of the declarant at trial. Third, the Court has suggested that one method of establishing unavailability—prosecutorial production of the declarant at trial—may render irrelevant any further concern about the reliability of the hearsay statement.

A. The Curious Treatment of Prior Testimony

The development of current doctrine begins with the analysis, or perhaps more appropriately the mis-analysis, of Ohio v. Roberts. In order to introduce any hearsay evidence against a defendant, Roberts ap-

83. The unavailability doctrine is not found in the text of the Sixth Amendment right to confrontation. Rather, it has been developed by implication, by operation of historical practice, and by necessity. Mattox v. United States, 156 U.S. 237, 243-44 (1895) (admission of prior testimony and dying declarations where the declarant is deceased permitted under Confrontation Clause because these exceptions to confrontation existed at the time of the enactment of the Sixth Amendment and are justified by necessity). Unlike many doctrines created by the Supreme Court that expand rights, this implied element diminishes the protections of the apparently absolute requirement of confrontation declared in the text of the Sixth Amendment.

84. The description of the unavailability requirement given in the text at this point is purposefully simplified and therefore inaccurate. The complications in the meaning of the doctrine are developed below. See infra part III.B.

85. A few other types of statements that might be considered "close kin" to prior testimony also will be covered by the unavailability requirement. See infra note 98.

86. Under the Federal Rules of Evidence, the "former testimony" exception, which requires that the declarant must be unavailable, is defined as follows: Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

87. See discussion of the Court's general analytical system for hearsay under the Confrontation Clause discussed immediately below.

88. The questions addressed here are: What is the meaning of an unavailability requirement and what are the constitutional implications of satisfying it? See infra part III.B.

89. 448 U.S. 56 (1980).
peared to require a determination of the declarant's unavailability. Assuming that requirement was satisfied, Roberts then mandated a showing of the statement's trustworthiness. Trustworthiness could be satisfied in turn either by the statement falling within a "firmly rooted" hearsay exception or by an individualized demonstration of "indicia of reliability." 90

In United States v. Inadi, 91 the Supreme Court ruled that the apparently general unavailability 92 requirement of Roberts was overexpansive dicta. The Court noted that the unavailability requirement had been applied in its prior cases only to the admission of prior testimony. 93 Moreover, while not stating so explicitly, the Court's analysis suggested that the unavailability requirement should be imposed exclusively on hearsay offered under the prior testimony exception. 94 The Court confirmed this implication in White v. Illinois. 95 Together, Inadi and White appear to eliminate unavailability as a requirement for all specific exceptions important in criminal litigation, 96 and most statements admitted under the

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90. Id. at 65-66.
92. Roberts, 448 U.S. at 64-66.
93. Inadi, 475 U.S. at 393-94.
94. Id. at 394 (suggesting that prior testimony is simply an inferior version of present testimony and in this context better evidence is constitutionally required, which is an argument peculiarly suited to statements admitted as prior testimony). Inadi held that this logic eliminated the unavailability requirement for coconspirator statements.
96. In White, the Court ruled that statements admitted under the hearsay exceptions for spontaneous declaration and statements for medical diagnosis or treatment were admissible without a showing of unavailability. The Court gave two rationales, both of which provide a broad basis for expansion.

The first rationale is that for these two specific exceptions excitement that inhibits conscious reflection and a self-interested desire to receive proper treatment contribute to their reliability and cannot be replicated in the courtroom. Id. at 742. There would be "lost evidentiary value if the out-of-court statements were replaced with live testimony." Id. at 743.

The second argument is that statements falling within a firmly rooted hearsay exception could be received without a showing of unavailability because cross-examination is largely superfluous for such statements. This is because "a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability." Id. (citing Idaho v. Wright, 497 U.S. 805, 820-21 (1990)).

It takes no rocket scientist to understand that White eliminates the unavailability requirement for all the specific hearsay statements like those under Federal Rule 803. First, the rationale for including an exception in Rule 803 is that the statement is superior to similar statements made at trial. See Fed. R. Evid. 803 advisory committee's note ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."). The categorization thus fits the first rationale of White perfectly. Second, parts, if not all, see infra part V.E.1.b, of the 23 exceptions are firmly rooted.

Although Federal Rule 804 imposes unavailability as an evidentiary matter, unavailability is not constitutionally mandated under White's analysis. Besides prior testimony, Rule 804 contains four specific exceptions, two of which, dying declarations and statements against interest, are important in criminal litigation. The basis of trustworthiness underlying both would satisfy the first White rationale. No less an authority than the Supreme Court extolled the trustworthiness of dying declarations: "[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath." Mattix v. United States, 156 U.S. 237, 244 (1895) (citing Mattix v. United States 146 U.S. 140, 152 1892). Likewise, a
catchall exceptions, 97 except for the rare statement that, like prior testimony, is admissible only because it has satisfied an element of the testimonial process, such as the oath. 98

The Court's unique treatment of prior testimony is curious, and statement against interest must be against the financial or penal interest of the declarant at the time made, and under the analysis of White, valuable evidence would be lost without the statement. See Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. Rev. 557, 564 (1988) (logic of Inadi would admit statements against interest without showing of unavailability).

Whether statements under these two exceptions should be admitted without a showing of unavailability is not likely to arise frequently because both evidentiary rules typically require unavailability as a condition of admissibility. However, not all states follow the federal model. For example, Texas includes statements against interest within its list of exceptions where unavailability is not required, and already an appellate court has ruled such a statement admissible without a showing of unavailability. See Williams v. State, 815 S.W.2d 743, 747-48 (Tex. Ct. App. 1991), rev'd on other grounds, 829 S.W.2d 216 (Tex. Crim. App. 1992). Moreover, statutes may change as hearsay "reform" measures are advanced in the wake of relaxed Confrontation Clause constraints.

97 By giving, catchall statements admitted under a catchall exception, see supra note 19, must be treated individually, White's rationale should logically be extended to most statements so admitted. The catchall exceptions are, of course, not firmly rooted, see infra part V.E.1.a., and accordingly the need for cross-examination has not been automatically eliminated. However, under the test articulated in Roberts, they may nevertheless be received upon "a showing of particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980) (the Court used the terms particularized guarantees of trustworthiness and indicia of reliability interchangeably).

If individual indicia of reliability are found, the need for cross-examination is eliminated on the same theoretical basis that justifies receipt of statements under firmly rooted hearsay exceptions. See People v. Roy, 201 Ill. App. 3d 166, 183, 558 N.E.2d 1208, 1220, 146 Ill. Dec. 874, 886 (1990) (general child abuse hearsay exception not firmly rooted but unavailability need not be shown as long as indicia of reliability shown), appeal denied, 136 Ill. 2d 552, 567 N.E.2d 340, 153 Ill. Dec. 382 (1991), cert. denied, 112 S. Ct. 965 (1992); State v. Larson, 453 N.W.2d 42, 46-47 (Minn.) (prior to White, Minnesota Supreme Court concluded on the basis of Inadi that admission of statement under state's catchall exception without demonstration of unavailability was consistent with Confrontation Clause), cert. granted, judgment vacated, and remanded, 111 S. Ct. 29 (1990), aff'd, 472 N.W.2d 120 (Minn. 1991), cert. denied, 112 S. Ct. 965 (1992). But see Myrna S. Raeder, White v. Illinois: The Demise of Confrontation Clause Analysis for Firmly Rooted Hearsay Exception, 7 CRIM. JUST. 2, 4-5 (1993) (arguing that Supreme Court's implicit acceptance of unavailability requirement in Wright, 497 U.S. at 815, for statements within catchall exception casts some doubt on broad scale intention to eliminate unavailability).

The only question remaining is whether the statement has some independent justification or, like prior testimony, is simply a weaker form of current testimony. Precious few statements will not have independent significance. The contemporaneity of the statement to the observation and motivation at the time of the statement are among the most frequent justifications for admission of hearsay statements, and both characteristics theoretically produce statements that are superior to later in-court testimony. See, e.g., State v. Sosa, 800 P.2d 839, 842-43 (Wash. Ct. App. 1990) (unavailability not required for preparer of lab report admitted against defendant under nonfirmly rooted exception because preparer unlikely to recall details of routine report written weeks earlier).

98 The results of these cases can be summarized as follows:

Prior to Inadi and White, one prong of the Confrontation Clause appeared to require the following for all hearsay statements: Unavailability plus either (1) a firmly rooted hearsay exception or (2) a showing of indicia of reliability.

After Inadi and White, the requirements were: (1) for firmly rooted hearsay exceptions based on the theory that the circumstances of the making of the statement gave it special reliability, nothing else was required; (2) for prior testimony, (a) a showing of unavailability and (b) constitutionally adequate prior cross-examination or an opportunity to cross-examine when the testimony was initially given; (3) for other hearsay exceptions that were not firmly rooted either: (a) simply a showing of special indicia of reliability or (b) a showing of unavailability and a demonstration of special indicia of reliability. Whether new exceptions fit under (3)(a) or (3)(b) depends upon whether the statement possesses independent value absent from in-court testimony.
makes little sense, but for the obvious need to explain away past precedent that no longer fits the Court’s new preferred analytical mode. The only theoretically defensible explanation for why prior testimony should be treated in such a disadvantaged way is that the Supreme Court considers it inferior to most, indeed almost all, other types of hearsay in terms of the demands of the Confrontation Clause.

Indeed, the Supreme Court makes that claim. In Inadi, it set out its argument for inferiority, stating:

Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition . . . [for coconspirator statements], former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony . . . . When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.99

This explanation is perhaps sensible from a hearsay perspective, which the Court’s statement explicitly includes, but is entirely untenable from the perspective of the Sixth Amendment.100 Whereas hearsay analysis may favor the admission of better evidence, the Constitution is concerned with confrontation. The strain is starkly demonstrated by the explanation given in White, where the Court stated: “The preference for live testimony in the case of statements like those offered in Roberts is because of the importance of cross-examination, ‘the greatest legal engine ever invented for the discovery of truth.’ ”101

The quotation’s description of why live testimony is preferred has a place in the underlying concerns of the Confrontation Clause. However, the statement is factually ridiculous. The only type of statement involved in Roberts, as explained by Inadi and White, is prior testimony. Among all hearsay categories, only prior testimony has in fact been cross-examined. Therefore, a focus on the importance of cross-examination would admit prior testimony in preference to all other hearsay that has never been cross-examined, yet the Court reached just the opposite result.

Indeed, Wigmore, whose view of the equivalence of the Confrontation Clause, cross-examination, and the trustworthiness rationale of hearsay exceptions the Court has largely embraced,102 long argued that

100. The best explanation appears to be that, finding itself painted into a corner by precedent regarding the unavailability requirement, the Court made a valiant effort to explain how its current analysis squared with that apparently inconsistent precedent. The opinion chosen was to limit that precedent to a single class of hearsay, prior testimony. The effort, as shown below, was unsuccessful from the point of view of logic and doctrinal coherence.
prior testimony should not be considered hearsay at all precisely because such hearsay had already been cross-examined. His view was:

The hearsay rule excludes testimonial statements not subject to cross-examination. When, therefore, a statement has already been subjected to cross-examination and is hence admitted—as in the case of a deposition or testimony at a former trial—it comes in because the rule is satisfied, not because an exception to the rule is allowed. The statement may have been made before the present trial, but if it has been already subjected to proper cross-examination, it has satisfied the rule and needs no exception in its favor. 103

With prior testimony, not only has the defendant had the opportunity to cross-examine the declarant, but at that earlier point, whatever truth-inducing function a face-to-face encounter provides will also have been achieved. 104 Thus, the only value lost when comparing prior testimony to present testimony 105 is the benefit of testifying before the jury—chiefly demeanor evidence. 106

Although demeanor evidence is intuitively appealing as an aid in assessing credibility, recent social science research has demonstrated that if there are in fact consistent physical clues that reveal the sincerity or the accuracy of a speaker’s story, humans are very poor in assessing them. 107

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103. Edward J. Imwinkelried, The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require Liberalization of the Hearsay Rules, 76 MINN. L. REV. 521, 525 (1992) (Court adopted Wigmore's view that cross-examination was only requirement of confrontation and then defined right to cross-examine in functional terms of assuring reliability, which fully equated hearsay and confrontation analysis); Frank T. Read, The New Confrontation—Hearsay Dilemma, 45 S. CAL. L. REV. 1, 6-8 (1972) (outlining Wigmore's theory and its potential relationship to confrontation); see also infra note 299 and accompanying text.

104. See Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (“It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’ ’”).

105. Prior testimony also may be deficient as compared with present testimony in that the parties may not have had the interest to develop and challenge the testimony as it would be used at trial. See Brief for United States as Amicus Curiae at 12, White v. Illinois, 112 S. Ct. 736 (1992) (No. 91-6194) [hereinafter Amicus Brief for United States in White]. However, this is not an inherent or necessary defect, as illustrated when prior testimony was taken at a previous full-blown trial of the same charges.

Any problem in the adequacy of the prior cross-examination may be eliminated directly by imposition of a requirement of adequate cross-examination. The problem of lack of equivalence between the cross-examination at the two proceedings flows from the application of Supreme Court precedent that finds an opportunity of cross-examination in very different proceedings to be constitutionally adequate. See California v. Green, 399 U.S. 149, 165-66 (1970) (preliminary hearing testimony admissible). Although those precedents may be correct when the declarant is unavailable and the inferior prior testimony must out of necessity be preferred over no testimony, they need not be considered applicable when prior testimony is used as the full constitutional equivalent of present testimony.

106. As discussed below, see infra text accompanying note 134, given the possibility of preserving prior testimony on videotape in contemporary trials, even the loss of demeanor evidence is not inevitable.

Clues revealed both by body movements and facial expressions and by qualities of voice and speech add virtually nothing to determining accurately whether a person is telling the truth. By contrast, textual analysis, which is preserved by modern forms of prior testimony, is a reasonably powerful tool in reaching accurate judgments on credibility.\textsuperscript{108} Moreover, demeanor clues appear equally ineffective whether the speaker's honesty or accuracy is being assessed.\textsuperscript{109}

Given the empirical evidence regarding the ineptitude of humans in assessing demeanor evidence, basing a distinction, particularly at the constitutional level, on the difference in reliability of evidence founded on the presence or absence of demeanor approaches the nonsensical. However, modern social science's skepticism about the instrumental effectiveness of demeanor of evidence cannot change constitutional doctrine that is firmly grounded.

Three arguments potentially support treating prior testimony differently than other types of hearsay: (1) faithfulness to the constitutional text, (2) historical practice, or (3) adherence to precedent. However, none of the arguments does so successfully.

Justice Scalia is the current leading proponent of the importance of the explicit words of the constitutional provision when it comes to the Confrontation Clause. In Coy v. Iowa\textsuperscript{110} and Maryland v. Craig,\textsuperscript{111} Scalia focused on the words of the constitutional provision that give the "accused" the right "to be confronted with the witnesses against him."\textsuperscript{112} In his analysis, the text requires a face-to-face confrontation between the defendant and the witnesses. Moving from textual analysis to a functional one, Justice Scalia argues that such a physical confrontation is important because people find it more difficult to lie about a person face-to-face than "behind his back."\textsuperscript{113}

This textual and functional analysis supports a confrontation between the witness and the defendant at some point. Such analysis excludes prior testimony, however, only if the Confrontation Clause requires that the face-to-face meeting take place before the jury. The textually prescribed right is that of the defendant to confront the witness, not the jury to observe the confrontation as it takes place.\textsuperscript{114} It is true

\textsuperscript{108} Id. at 1082-88. There is some evidence that observation of facial behavior may be affirmatively harmful to evaluating credibility. Id. at 1087.

\textsuperscript{109} Id. at 1088-91 (experimental evidence in the eyewitness identification area demonstrates that subjects cannot detect error even when using both verbal content and nonverbal demeanor evidence).

\textsuperscript{110} 487 U.S. 1012 (1988).

\textsuperscript{111} 497 U.S. 836 (1990).

\textsuperscript{112} For the text of Confrontation Clause of the Sixth Amendment, see supra note 3.

\textsuperscript{113} Coy, 487 U.S. at 1019.

\textsuperscript{114} Eileen A. Scallen, Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause, 76 MINN. L. REV. 623, 638 (1992) (textual analysis of Confrontation Clause does not support right to have jury view demeanor of witness as part of right; such right may be supported as "core function" of jury trial provision); 5 WIGMORE, supra note 103, § 1395, at 154 (jury's ability to observe does not arise from confrontation of defendant and witness but from wit-
that the procedures mandated by other provisions of the Sixth Amendment, such as the right to a public trial and trial by jury,\(^{115}\) will mean that such a meeting should occur before the actual finder of fact, and in that situation, the jury may observe demeanor, including the stereotypical refusal of the lying witness to look the defendant in the eye.\(^{116}\) The text of the Confrontation Clause itself, however, does not require that result in each individual case. It does not tell us, for instance, whether on a retrial the witnesses must appear live or whether their testimony at the prior trial may be presented instead.\(^{117}\)

Thus, cross-examination in the presence of the jury enjoys some functional support in that it permits the jury’s assessment of demeanor evidence. Certainly, live testimony as opposed to trial by transcript is strongly supported by both tradition and the important symbolism of affording public justice on the basis of witnesses appearing in person to testify against the accused.\(^{118}\) However, prior testimony is no more prone to attack on any of these dimensions than is any other type of hearsay that conveys critical evidence\(^{119}\) to the jury through an out-of-court statement.\(^{120}\)

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\(^{115}\) Professor Jonakait has argued that the rights under the Sixth Amendment should not be read in isolation. However, he views the rights of notice, counsel, confrontation, and compulsory process, which guarantee an adversary process, as somewhat separate from the rights to a jury trial that is public and speedy before a local and impartial jury, which more generally guarantee fairness and constrain government overreaching. Jonakait, supra note 96, at 581-84; see also Randolph N. Jonakait, Foreword: Notes for a Consistent and Meaningful Sixth Amendment, 82 J. CRIM. L. & CRIMINOLOGY 713, 734-36 (1992).

\(^{116}\) Coy, 487 U.S. at 1019.

\(^{117}\) The quality of the reproduction of the actual words of the witness at the prior trial was a major concern at the time of the early precedents that mandated unavailability before prior testimony could be received. Often no transcripts were available, and the evidence was offered through the unaided memory of an observer. See infra notes 138, 257 and accompanying text. Although the cases do not explicitly treat this as a matter of constitutional concern, the lack of an exact record of what was said supplements the concern about loss of demeanor evidence in generating a preference for live testimony over prior testimony. Indeed, modern social science research would suggest that precision in what was said would be far more important than demeanor evidence in permitting the jury to assess accurately the credibility of the witness. See Wellborn, supra note 107, at 1088.

\(^{118}\) Cf. Lee v. Illinois, 476 U.S. 530, 540 (1986) (confrontation contributes to perception of fairness as well as to its reality). Professor Park argues that the requirement that the testimony be produced live in front of the jury rather than through prepared documents serves the function of controlling governmental power in criminal prosecutions. It helps to individualize the determination of guilt, increases the independence of the jury as decision maker, and reduces the power and the abuse of government data gathering. Roger Park, A Subject Matter Approach to Hearsay Reform, 86 MICH. L. REV. 51, 102-03 (1987).

\(^{119}\) Prior testimony in the case of a retrial would have the capacity to totally supplant live testimony and would therefore have the potential for more extensive impact. However, prior testimony need not be that extensive and may involve the testimony of a single witness. Moreover, other types of hearsay besides prior testimony may play just as critical a role, as where the full accusation of child sexual abuse is presented through hearsay statements of the child reported by medical personnel or recorded on videotape.

\(^{120}\) The argument that prior testimony is poorer evidence than present testimony in terms of the hearsay concerns is tenable but not always correct. Prior testimony will always be closer in time
Historical practice under the predominant Supreme Court view also has nothing to say on the point of treating prior testimony as uniquely different from other hearsay.\textsuperscript{121} Part IV will discuss more fully the major role of proceedings such as Sir Walter Raleigh's treason trial in the development of the Sixth Amendment confrontation right.\textsuperscript{122} Suffice it to say that prior testimony was not at issue in Raleigh's case. The statements of Lord Cobham confessing his own guilt and damning Raleigh, upon which Raleigh's conviction was largely based, were not made previously in Raleigh's presence, nor were they cross-examined earlier. Indeed, the types of testimonial evidence presented in the state trials of the late sixteenth and early seventeenth centuries consisted of confessions, affidavits, and depositions\textsuperscript{123} whose critical deficiency was that they were produced ex parte. In the main, the state procured such testimony by interrogation before magistrates whose task was to question the accused and others prior to trial for the purpose of developing evidence to be used in later proceedings.\textsuperscript{124}

Whether those who believed the state trials of that era violated fun-
damental rights of Englishmen would have felt similarly about the use of prior cross-examined testimony is impossible to say. Because defendants were denied counsel in such trials and lawyers may be critical in ascribing importance to a right to cross-examine, it is difficult even to imagine the response of contemporaries of Raleigh or how their response might have differed from that of the Framers of the Sixth Amendment for whom cross-examination had likely taken on greater importance. Clearly, however, the Framers were not motivated by the evils of the use of prior cross-examined testimony in the political trials of that era. In addition, the historic evils that compelled the Framers to include the clause do not establish the special treatment of prior testimony.

The third argument that might support a different treatment of prior testimony is precedent. The first U.S. Supreme Court case to discuss extensively the Confrontation Clause was Mattox v. United States, which approved receipt of the prior testimony of witnesses who had died by the time of the retrial and were therefore unavailable. The Court did not dismiss the Confrontation Clause issue as wholly inapplicable to previously cross-examined testimony. Instead, it recognized that one of the purposes of the Confrontation Clause was to give the defendant an opportunity for in-person cross-examination in front of the jury so that the jurors might assess the witness’s demeanor. Mattox thus stands as precedent for the proposition that the Confrontation Clause bestows the right to place the witness under cross-examination before the jury. Given the long-standing status of that precedent, it should not be abandoned quickly.

However, to the extent that Mattox is recognized as precedent that supports the constitutional right to cross-examine in front of the jury, it is simultaneously difficult to cabin Mattox as purely a case about the requirement of unavailability for prior testimony. Mattox construed the Confrontation Clause as assuring citizens’ rights as they existed at the time of the framing, but limited those rights according to the exceptions then recognized.

probably never was, present . . . ." (quoting 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW ENGLAND 221 (London, MacMillan 1883)).

125. Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 MINN. L. REV. 557, 572-73 (1992) (noting that before lawyers were allowed to assist defendants at trial, right to cross-examine was not recognized as basic element of ensuring accurate proof); see infra note 250.

126. See infra notes 247-52 and accompanying text.

127. 156 U.S. 237 (1895).

128. Id. at 242-43.

129. Precedent may be considered even more sacred after Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2808-16 (1992) (relying upon the importance of stare decisis in adhering to Roe v. Wade). However, the increased reverence for stare decisis may not be uniformly applicable and may prove more powerful outside the criminal area, where a conflict in national will does not demand protection of institutional legitimacy. See Payne v. Tennessee, 111 S. Ct. 2597, 2611 (1991) (reversing two recent precedents in death penalty area).

130. 156 U.S. at 243-44.
Nothing in *Mattox* suggests an inferior place for prior testimony with regard to the Confrontation Clause. First, if any priority can be discerned, it is that, along with dying declarations, prior testimony occupied an exalted position. Courts had recognized both hearsay exceptions prior to the framing of the Sixth Amendment. Both exceptions possessed special reasons for admission that justified receipt based on prior satisfaction of the right to cross-examine in the case of prior testimony and particular reliability for dying declarations under the value system and the beliefs of the day. Second, *Mattox* suggests that courts would dispense with the right of cross-examination only in very limited situations. The opinion recognized only one type of unavailability, the death of the declarant, and even then it eliminated confrontation as a requirement because special protections existed. The implication of the case is that other out-of-court statements should be treated less well under the Confrontation Clause rather than better.

Given new technology, any distinction between prior testimony and present testimony with regard to reliability for constitutional purposes must assuredly disappear. Take, for example, the prior testimony of a witness given at a previous trial and recorded on videotape. In that situation, the prior testimony was given under oath; it was subject to contemporaneous cross-examination when given; and the present jury has an audiovisual record of the witness to permit an evaluation of demeanor. Understanding how such evidence violates the hearsay rule is hard, and indeed, a number of state courts have reached the conclusion that such evidence is not hearsay at all.

Assuming the witness initially testified in the presence of the defend-

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131. Professor Berger argues that the two exceptions to confrontation recognized by the Court in *Mattox* were both very special cases involving more than just necessity. Receiving dying declarations "is explicable on a waiver notion;" because that exception then applied only to homicide prosecutions in which the defendant was charged with murdering the declarant, thereby causing the unavailability, and prior testimony "requires confrontation at the time the declarant makes a statement." Berger, *supra* note 125, at 591.

At the time of the framing, it appears that no other exceptions applied in criminal cases. See Amicus Brief for United States in *White*, *supra* note 105, at 24 n.14 (describing other exceptions that existed at that date, but all authorities referenced are civil cases); see also *infra* notes 259-33 and accompanying text.

132. The perceived importance of the oath is discussed in part V, *see infra* note 242 and accompanying text. The greater religiosity of the population supported the view that a declarant would be unlikely to disavow the truth he uttered, and that a witness who did so would be viewed as untrustworthy by his fellow citizens. The oath therefore afforded the confirming guarantee arguably on par with the oath, which for similar reasons was also viewed as critical to the admission of hearsay in the early 18th century.

133. Professor Berger argues that *Mattox* reasonably may be read as approving admission of hearsay only where confrontation concerns had been directly addressed. In the case of dying declarations, her argument is that it was not that such statements fit an established hearsay exception that justified their admission but that the defendant had killed the witness and therefore waived or forfeited his Confrontation Clause objection. See Berger, *supra* note 125, at 590-91.

134. *State v. Jarzok*, 529 A.2d 1245, 1253 (Conn. 1987) (videotaped testimony viewed as functional equivalent of in-court testimony); *Commonwealth v. Willis*, 716 S.W.2d 224, 228 (Ky. 1986) (same); *State v. Thomas*, 425 N.W.2d 641, 645 (Wis. 1988) (same), *aff'd on rehearing*, 442 N.W.2d 10 (Wis.), *cert. denied*, 493 U.S. 867 (1989); *see also* Spigarolo v. Meachum, 934 F.2d 19, 24 (2d Cir. 1991) (no difference between live electronically transmitted testimony and videotaped testimony);
ant, it is equally difficult to see how receiving such testimony would violate the Confrontation Clause under current Supreme Court analysis. From a trustworthiness or reliability perspective, which is a touchstone for admissibility under current Supreme Court analysis, the best argument that can be made challenges only the adequacy of matters such as camera angle and film quality in capturing demeanor evidence. Although valid, treating such concerns as constitutionally significant is unthinkable given the Supreme Court's ready acceptance of the other impediments to reliability. Moreover, as discussed above, if we do not know whether jurors can use demeanor evidence effectively in any form, an argument finding constitutional error based on some comparative diminishment of the quality of demeanor (whether the camera focused on the hands while the witness spoke or whether the witness looked at the questioner, the jury, or the defendant) hardly suffices to constitute a constitutional impediment.

B. The Meaning of Unavailability Under the Confrontation Clause

As an evidentiary concept within the hearsay rule, unavailability means roughly what the word would appear to suggest. Although modern evidentiary rules do not restrict unavailability to physical absence, they do require that the declarant's testimony be unobtainable at trial.

United States v. Binder, 769 F.2d 595, 600 (9th Cir. 1985) ([videotape] serves as the functional equivalent of a live witness.

135. See infra part IV.B. Trustworthiness is assured by the fact that the hearsay has already been cross-examined. Perhaps this argument is technically incorrect. As Professor Jonakait has argued, see Jonakait, supra note 96, at 587 n.94, cross-examination does not in fact guarantee trustworthiness because the evidence may remain untrustworthy even after full cross-examination. Instead, cross-examination gives the jury the information necessary to assess its weight, id., which like trustworthiness makes the hearsay admissible. Although technically inaccurate, this article will treat cross-examination as guaranteeing trustworthiness because of its simplicity of expression.


137. See, e.g., United States v. Owens, 484 U.S. 554, 558-59 (1988) (declarant's total lack of memory regarding underlying events covered by statement did not render cross-examination insufficient for Confrontation Clause); Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (ineffectiveness of counsel at prior proceeding does not per se render prior testimony inadmissible).

138. As discussed in part IV, one of the historical reasons that prior testimony was not freely received related directly to a "best evidence" concern different from the current Court's desire to admit "better evidence." Prior testimony before the days of court reporters relied upon the memory of the witness reporting the testimony, and the difficulty of conveying nuance in the testimony, particularly cross-examination, likely played an important role in limiting its admissibility. See infra note 257 and accompanying text. The use of videotape almost entirely eliminates such concerns. Aside from changes in strategy or the discovery of new information upon which earlier cross-examination could not be based, the principal reason that prior testimony conveyed by videotape should not be freely received is explained by other elements of the Sixth Amendment, in particular the right to a public trial. See supra note 115 and accompanying text.

139. Under Federal Rule of Evidence 804(a)(1), unavailability may be shown by successful as-
As defined in recent cases, however, constitutional unavailability does not require unavailability at all. While the prosecution may in fact meet the requirement by showing the declarant's unavailability, it may also meet the requirement by producing the declarant at trial. The Supreme Court has not definitively established what it means by the alternative of producing the declarant at trial—whether it entails only making the declarant available to be called as a witness as desired by the defense or whether it requires the prosecution to call the declarant to the stand as a witness. However, in the process of rejecting any unavailability requirement for coconspirator statements, the Court in Inadi indicated that, between two suggested formulations, requiring the prosecution to call the declarant "may be even less defensible."

The above constitutional definition of unavailability is supposedly derived from California v. Green, but in that situation, unavailability did not mean merely making the declarant available to be called by the defense. In Green, the prosecution in fact called the declarant, a young man named Porter, to the stand and sought to elicit from him the facts of a drug delivery allegedly made by the defendant Green. Porter, in the words of the state supreme court, proved "markedly evasive and uncooperative on the stand." Unable to secure the testimony from the witness, the prosecution then impeached him with his prior inconsistent testimony given at a preliminary hearing. Under a state evidence rule, such prior inconsistent statements were substantively admissible, whether or not the rule was constitutional. The Supreme Court reasoned as follows:

As in the case where the witness is physically unproducible, the State here has made every effort to introduce its evidence through
the live testimony of the witness; . . . . Whether Porter then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination, or simply refused to answer, nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case against Green.\textsuperscript{145}

The Supreme Court has not since \textit{Green} faced a situation where a court required the prosecution to prove unavailability when the declarant was in fact physically available. In \textit{Roberts}, the declarant was physically absent, and the Court concluded that the prosecution, although unsuccessful, had made sufficient efforts to locate her.\textsuperscript{146} In \textit{Inadi} and \textit{White}, where the Court suggested that the prosecution could satisfy unavailability merely by producing the declarant, the declarant was neither produced nor unavailable because the Court viewed the issue as constitutionally irrelevant.\textsuperscript{147} The Supreme Court thus has never \textit{held} that the prosecution can establish unavailability merely by producing the witness at trial.\textsuperscript{148}

Critically, if the Confrontation Clause has the purpose of requiring better evidence, which the Court in \textit{Inadi} asserted was the purpose of the unavailability rule,\textsuperscript{149} simply making the declarant available cannot be sufficient. If all the prosecution must do is to produce the declarant, it need not attempt to elicit the better evidence (the witness's live testimony) before it admits the inferior evidence (the prior testimony). The prosecution is prevented from admitting the prior testimony but only because the evidentiary rule requires actual unavailability. Under the Court's new formulation of constitutional unavailability, it is the hearsay

\textsuperscript{145} \textit{Green}, 399 U.S. at 167-68. Because the preliminary hearing testimony was given under oath and respondent was given "every opportunity to cross-examine," \textit{id.} at 165, the Court observed that the statement would have been admissible had Porter been unavailable, \textit{id.} at 165-66, a position that it reaffirmed in \textit{Ohio v. Roberts}, 448 U.S. 56, 68-69 & n.10 (1980). The Court found no justification for reaching a different result where the state placed Porter on the stand under oath, attempted to elicit the testimony from him, and tendered him for cross-examination. \textit{Green}, 399 U.S. at 166-68.

This ruling means that for prior testimony, where there is a preference for the presence of the declarant, the prior testimony will be admissible if adequately cross-examined even if the witness is available. See James B. Haddad, \textit{The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?}, 81 J. CRIM. L. & CRIMINOLOGY 77, 81 (1990) (preferential rule for availability takes two forms: (1) excluding evidence of out-of-court declaration where declarant is available and (2) admission of hearsay where declarant is available if prosecution produces declarant and makes him or her available for cross-examination by defense).

The hearsay would be clearly admissible if the witness, like Porter, is produced at trial, sworn in as a witness, and tendered for cross-examination. \textit{Green}, 399 U.S. at 167. The unanswered question is whether that much is required.

\textsuperscript{146} \textit{Roberts}, 448 U.S. at 75-77.


\textsuperscript{148} \textit{See infra} part D.2.

\textsuperscript{149} \textit{Inadi}, 475 U.S. at 394 ("When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.").
rule's requirement of unavailability that forces the production of better evidence, not the Confrontation Clause.

Not only would the new definition of unavailability fail to satisfy the purpose ascribed to the confrontation right by the Court, but such a definition does not fit precedent. Mattox, which the Court decided only under the Confrontation Clause, not a hearsay rule, assumed real unavailability through death before prior testimony could be introduced. Thus, if true to the theory developed by the Court, the prosecution must call the declarant and attempt to elicit testimony on direct examination to establish unavailability when that is required by the Constitution.

Before going further, considering whether the definition has any significance is worthwhile. Given the current state of the law, the definition is irrelevant for most hearsay. As discussed above,\(^{150}\) there rarely will be an occasion to worry about the definition because unavailability must be constitutionally established only for prior testimony, and the requirements of the prior testimony exception to the hearsay rule demand actual unavailability. Under the rules of evidence, the declarant must be unavailable or the testimony is inadmissible, and in virtually every other situation, the government need not show unavailability.

Conversely, because the alternative meaning—making the declarant available at trial—is unlikely to matter given the current hearsay definitions, one may also wonder why it was ever stated in the alternative. One answer is that in developing a constitutional unavailability rule that could apply to all hearsay, the Court in Roberts created a definition broader than needed if applied only to prior testimony. A more interesting alternative explanation, which is developed later,\(^{151}\) is that the definition is a trojan horse for use in service of a different cause—the admission of hearsay without any demonstration of its trustworthiness based upon nothing beyond the production of the declarant at trial.

C. Preliminary Conclusions

A number of conclusions flow from the above discussion. First, the doctrine that constitutionally requires a showing of unavailability only for prior testimony is insupportable. That this result flows from current doctrine itself demonstrates that the Court must have misidentified the correct basis for distinguishing between classes of hearsay statements under the Confrontation Clause. Second, given the new technology of videotape, requiring unavailability cannot be supported even as to prior testimony when that prior testimony was produced explicitly as a substitute for trial testimony. Assuming that the declarant testified under circumstances where the issues were appropriately framed and where adequate opportunity to prepare had been allowed,\(^{152}\) as exist when the

\(^{150}\) See supra notes 94-98 and accompanying text.

\(^{151}\) See infra part D.2.

\(^{152}\) At some point the framing of the issues and the adequacy of opportunity to prepare be-
testimony comes from either a prior trial on the merits or from a deposition taken for trial purposes, the allowance for cross-examination, physical confrontation, and preservation of substantial, if not perfect, demeanor evidence eliminates all substantial concerns protected by the Confrontation Clause. Third, the meaning of unavailability when applied to a witness who is in fact available to testify remains unclear. For the Confrontation Clause to perform the function given to it by the Court, the prosecution should be required to attempt to elicit the statement from the witness as part of its proof in order to satisfy the unavailability requirement. A major point that should be clear from an analysis of the unavailability requirement and the peculiar treatment of prior testimony is that the Supreme Court's current Confrontation Clause analysis in this area has no logical cogency.

D. The Satisfaction of Confrontation Through Subsequent Cross-Examination of Hearsay Declarant

Whether the Confrontation Clause is, as Wigmore argued, little more than a guarantee of cross-examination or its equivalent, generally no confrontation problem exists if the witness is cross-examined before the jury. In the typical situation, the Confrontation Clause is

153. Actual physical confrontation may not have taken place when the prior testimony was produced because of some shielding of the witness from the defendant, but the same can occur at trial under Maryland v. Craig, 497 U.S. 836 (1990). Whether the defendant has a right of physical confrontation is determined under Craig independently of whether the testimony is live or presented through videotape.

154. Even more clearly, the doctrine produces results that do not square with the concerns of the Framers of the Sixth Amendment right to confrontation, which are examined in some depth in part IV infra. We cannot be sure that the Framers would have at all been concerned about the procedure in Sir Walter Raleigh’s case if Lord Cobham’s statement against Raleigh had been produced in a modern preliminary hearing under oath, in public, and with direct testimony and cross-examination. Whether they would have demanded more is uncertain. There is reason to believe they would have objected to a procedure under which the state could make out its case by introducing a written statement by Cobham, which was developed ex parte, even if he was then available to be cross-examined, but they may have accepted that procedure as minimally sufficient. Finally, we can be virtually certain that the Framers would have objected to admission of such a statement by an available but uncalled Lord Cobham, even if that statement had indicia of reliability. See White v. Illinois, 112 S. Ct. 736, 746-47 (1992) (Thomas, J., concurring in judgment). In terms of unavailability analysis, however, the final position is exactly the point we have apparently reached. Thus, the doctrinal articulations by the Supreme Court appear clearly wrong.

5 Wigmore, supra note 103, § 1397, at 158; see also Dutton v. Evans, 400 U.S. 74, 94-95 (1970) (Harlan, J., concurring in result) (adopting Wigmore’s position).
clearly satisfied when the witness testifies on direct examination for the government and is subject to full and unrestricted cross-examination by defense counsel. The witness meets the cross-examination element of the constitutional right, and the witness will have testified under oath and the jury will have observed the witness's demeanor. Courts have held these same protections to also satisfy the Confrontation Clause with regard to the witness's prior statement where the declarant is subject to cross-examination on that prior statement.\textsuperscript{156}

The resolutions of two issues relating to prior statements remain somewhat uncertain, although the Supreme Court appears to have implicitly resolved them or suggested a result favorable to prosecutorial interest. These issues are: First, with regard to prior statements, how effective must subsequent cross-examination be to satisfy the Constitution? Second, is there in fact a right to have cross-examination following the prosecutor's direct examination of the witness, or is production of the declarant by the prosecution with an opportunity for the defense to call and question the witness all that the Constitution requires?

1. The Test of the Adequacy of Subsequent Cross-Examination

\textit{California v. Green,}\textsuperscript{157} discussed earlier with regard to the meaning of unavailability for an available declarant, is the seminal case regarding subsequent cross-examination as a method of satisfying the Confrontation Clause. In \textit{Green}, Porter had implicated Green as his drug supplier not only in his preliminary hearing testimony,\textsuperscript{158} but also in a statement made to a police officer four days after arrest while still in the custody of juvenile authorities. After unsuccessfully attempting to have Porter repeat that accusation against Green, the prosecution introduced Porter's statement to the police officer through that officer's testimony. A state evidence rule that treated as substantive evidence prior inconsistent statements of a witness who is given an opportunity to explain or deny the statement at some point during the trial permitted this prior statement.\textsuperscript{159}

The California Supreme Court ruled that receipt of the prior statement violated the Constitution because the right to cross-examine at the trial did not satisfy the Confrontation Clause,\textsuperscript{160} but the U.S. Supreme Court rejected that position. The Court began by noting that the core value that the Confrontation Clause was designed to prevent—trial by ex parte affidavits or depositions without the opportunity of the defendant


\textsuperscript{157} 399 U.S. 149 (1970).

\textsuperscript{158} See supra part B. The Court ruled the preliminary hearing testimony admissible under the Confrontation Clause because Green's defense attorney had an opportunity to cross-examine Porter at this hearing. \textit{Green}, 399 U.S. at 165-66.

\textsuperscript{159} 399 U.S. at 150 n.1; see CAL. EVID. CODE §§ 770, 1235 (1966).

\textsuperscript{160} 399 U.S. at 153.
to challenge the accusers before the jury—was not offended by the procedure "as long as the declarant is testifying as a witness and subject to full and effective cross-examination."  

The Court buttressed this historical argument regarding the core value served by the Confrontation Clause with a second argument that contemporaneous cross-examination is not of crucial significance to the interests of the defense when the witness has abandoned his or her prior testimony, which must be the case if now inconsistent, and the defendant is assured of full and effective cross-examination. Because the witness has changed stories to one incompatible with the prosecution's preferred version, the danger that the story would "'harden and become unyielding to the blows of truth' " over time is not present. Furthermore, although the Court noted that the task of the cross-examiner differs from that presented by the typical witness because the witness's story at trial is not hostile, it concluded that the examiner was likely to be aided by the willingness of the witness to adopt available explanations for the story's alteration. The majority's critical characterization was that although not perfect, the subsequent cross-examination "will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."

Having decided the broader theoretical issues, the Court identified one area of uncertainty. Although admitting making the statement to the police officer, Porter claimed at trial that he could not remember the events to which it related because "he was at the time on 'acid' (LSD)" and was unable to distinguish fact from fantasy. Because that statement had not been the subject of prior cross-examination, the Court recognized the possibility that the witness's apparent lapse of memory rendered cross-examination ineffective for purposes of the Confrontation Clause. It remanded the case to the California courts to determine this issue.

Justice Harlan wrote a concurring opinion that was much more

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161. Id. at 156-57. Justice Harlan described this as "trials by anonymous accusers, and absentee witnesses." Id. at 179 (Harlan, J., concurring).
162. Id. at 158.
163. Id. at 159.
164. Id. at 159 (quoting State v. Saporen, 285 N.W. 898, 901 (Minn. 1939)).
165. Id. at 160.
166. Id. at 161. In dissent, Justice Brennan would require that the witness be willing and able to testify about the operative events before he would find that a subsequent cross-examination could be effective in challenging the message of the prior statement. Id. at 192 n.5 (Brennan, J., dissenting). Brennan argued that a decision by the jury that the witness is lying when claiming to have forgotten does not provide a satisfactory basis to determine the prior statement's accuracy, which can be assayed only by probing the basis for the witness's statement. Id. at 193.
167. Id. at 152.
168. Id. at 168-69 & n.18.
169. On remand, the California Supreme Court held that the purpose of the Confrontation Clause had been satisfied. People v. Green, 479 P.2d 998 (Cal. 1971). It relied upon the fact that Green's counsel had an opportunity to test Porter's memory concerning the prior statement but declined to take advantage of the opportunity. Id. at 1003-04.
sweeping in scope than the majority regarding the meaning of the Confrontation Clause. Then, only a few months later he abandoned this alternative vision of the Confrontation Clause. A portion of his analysis, however, became the basis on which the Court subsequently broadened the significance of Green and reoriented that decision away from a focus on the effectiveness of cross-examination to one relying on the mere presence of the declarant on the stand at a subsequent trial.

Harlan's broad vision was that the Confrontation Clause "reaches no farther than to require the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial." Applying that principle to Porter's statements, he found no objection based on the Confrontation Clause to its receipt because the prosecution had "produced . . . [him], and made him available for trial confrontation."

Given his simple and absolute view of the nature of the Sixth Amendment requirement, Justice Harlan found no significance in the relative ineffectiveness of cross-examination:

The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory. The witness is, in my view, available. To the extent that the witness is, in a practical sense, unavailable for cross-examination on the relevant facts . . . confrontation is nonetheless satisfied.

In his judgment, concerns about unreliability are outside the Confrontation Clause and are properly considered under due process.

Almost two decades later in United States v. Owens, the Supreme Court faced the question of the adequacy of cross-examination that the majority had avoided in Green. In Owens, the government offered testi-

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170. Dutton v. Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring) ("Nor am I now content with the position I took in concurrence in California v. Green . . . that the Confrontation Clause was designed to establish a preferential rule, requiring the prosecutor . . . to produce available witnesses.").

171. Green, 399 U.S. at 174 (Harlan, J., concurring).

172. Id. at 188.

173. Id. at 188-89. Justice Harlan's view relied heavily on a distinction between the Sixth Amendment right and the Due Process Clause in two different ways. First, he acknowledged that his view of the scope of the Sixth Amendment might be wrong as a matter of Sixth Amendment analysis but would nevertheless be correct in applying that right to the states under the Due Process Clause of the Fourteenth Amendment. Id. at 174. Harlan did not accept the full incorporation theory, and his opinion reflected a combined analysis of the particular clause within the Bill of Rights and the proper application of that right when applied to the states through the Fourteenth Amendment. Second, where a particular cross-examination was practically impossible or where the nature of the hearsay raised questions of whether the conviction was obtained through reliable and trustworthy evidence, he believed the issue should be decided as a matter of due process, not confrontation, analysis. Id. at 184-87 & n.20.

174. Id. at 186 n.20.

mony by John Foster that he had identified the defendant Owens as his attacker in an interview with an FBI agent approximately one month after the assault. Foster’s memory had been severely impaired as a result of head injuries suffered during the attack. Although he could remember identifying Owens, he could neither remember if Owens was his attacker nor if anyone might have suggested Owens’s guilt before the identification.176

The Supreme Court majority found no Confrontation Clause violation. In reaching its decision, it adopted Harlan’s view in Green quoted above.177 In what could be considered limiting rationale, the Court observed that the Confrontation Clause guarantees “an opportunity for effective cross-examination,” 178 which is not denied when the witness testifies to a current belief but is unable to remember the basis for that belief.179 That opportunity is provided if the defendant has the chance to bring out matters going to bias, opportunity and ability to observe, and qualities of memory, 180 which provide realistic “weapons” to attack the witness’s statement. 181 In discussing the requirement under the evidence rule that the witness must be “subject to cross-examination,”182 the Court observed that this requirement is satisfied when the witness “is placed on the stand, under oath, and responds willingly to questions.”183 The Court contrasted this situation with restrictions on the scope of cross-examination by the trial court or assertions of the privilege by the witness, which can render the opportunity to cross-examine deficient for both evidentiary and constitutional purposes.184

The Court also identified a major problem with any other construction of either the evidence rule or the requirements of the Confrontation Clause: a witness should not be able to avoid the introduction of a prior

176. Id. at 556.
177. The Court did not, however, adopt the broader view of the requirement of the Confrontation Clause that the prosecution must call all available witnesses.
180. Id. at 559.
181. Id. at 560.
183. Owens, 484 U.S. at 561.
184. Id. at 561-62. Refusal of the trial judge to permit any cross-examination about the prior statement clearly violates the requirements of Green and Owens. United States v. Vargas, 933 F.2d 701, 705-06 (9th Cir. 1991); State v. Barker, 797 P.2d 452, 455 (Utah Ct. App. 1990). Cases where a witness takes the Fifth Amendment during testimony and thereby forecloses further examination give guidance by analogy to the types of judicial restrictions that would deny effective cross-examination. United States v. Berrio-Londono, 946 F.2d 158, 160-61 (1st Cir. 1991) (testimony is properly stricken if inquiry cut off by invocation of privilege is closely related to commission of crime or material issue, but not if it concerned collateral matters or cumulative material concerning credibility), cert. denied, 112 S. Ct. 1223 (1992); Bagby v. Kuhlman, 932 F.2d 131, 135 (2d Cir.) (if invocation of privilege concerns collateral matter or does not deprive defendant of meaningful opportunity to test witness’s direct testimony, then no violation of right to confront witness), cert. denied, 112 S. Ct. 341 (1991).
inconsistent statement simply by asserting a lack of memory of the facts underlying that statement. 185 Justice Brennan addressed this concern in dissent, suggesting that, unlike in Owens, an apparently bogus assertion of memory loss or a partial memory would provide a basis for juror evaluation of the prior statement. 186 He protested that because of the nature of the declarant’s injuries in Owens nothing about his inability to remember at the time of trial shed light on the quality of his memory at the time of the identification. 187 The dissent concluded that the majority’s position reduced the Confrontation Clause where the declarant is present to a “hollow formalism” 188 that is satisfied by “nothing more than a defendant’s right to question live witnesses, no matter how futile that questioning might be.” 189

The dissent’s extreme claim provides a useful point of departure for examining the implications of the majority opinion. The majority made three statements to support its holding. First, it reiterated the position of Justice Harlan, which can be translated into an absolutist position that where a declarant is present there are no Sixth Amendment consequences and all questions of trustworthiness are handled under the Due Process Clause. 190 Second, the Court suggested a limitation to this principle. It noted that under the circumstances of the case, the defense had “weapons” available to impugn the witness’s prior statement. 191 Third, in the context of interpreting the term subject to cross-examination under the rules of evidence, it observed that a witness is ordinarily so considered when he or she “responds willingly to questions.” 192 Interference by the trial court or assertion of a privilege, but not memory loss, would render the cross-examination insufficient. 193 The case leaves unclear what, if

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185. Owens, 484 U.S. at 563.
186. Id. at 570-71 (Brennan, J., dissenting); cf. Nelson v. O’Neil, 402 U.S. 622, 627-29 (1971) (witness’s denial that he made prior statement harmful to defendant and rejection of its substance as false satisfied Confrontation Clause).
187. Owens, 484 U.S. at 570.
188. Id. at 572.
189. Id. at 567.
190. Id. at 558-59. This result would appear to be congenial to that preferred by Justices Thomas and Scalia in another context. See White v. Illinois, 112 S. Ct. 736, 744-48 (1992) (Thomas, J., concurring in judgment) (reliability more properly a due process concern; Confrontation Clause chiefly concerned with proof by ex parte affidavits, depositions, and confessions and should be limited to formalized testimonial materials).
191. Owens, 484 U.S. at 560.
192. Id. at 561.
193. Id. at 561-62. The Court’s recognition in Owens that assertion of a privilege rendered cross-examination inadequate was developed in Douglas v. Alabama, 380 U.S. 415 (1965), one of the earliest cases applying the Confrontation Clause to the states under the Fourteenth Amendment. In Douglas, the prosecutor read before the jury an allegedly coparticipant’s statement that implicated Douglas under the guise of refreshing the witness’s recollection. In response to each question about the statement, the witness asserted his privilege against self-incrimination, id. at 416, and the Court held that the Confrontation Clause was violated where cross-examination was made impossible by such assertion. Id. at 419-20.
194. Much of the Douglas Court’s treatment of the requisite of effective cross-examination is no longer accepted law. For example, the conclusion that the witness could not effectively be examined on his statement unless he admitted making the statement has been rejected. Nelson v. O’Neil, 402
anything, is required to satisfy the Confrontation Clause beyond the declarant taking the stand and neither being shielded from cross-examination by judicial intervention nor asserting a privilege. 194

Under ordinary circumstances and using traditional analysis, the failure of an adult witness to answer because of demonstrated mental or physical infirmities, such as senility, does not violate the Confrontation Clause. 195 Similarly, where an adult claims to have complete memory loss regarding the statement or denies making a prior statement, there is no constitutional violation. 196 Part V examines whether the treatment of these issues should change fundamentally when children are involved. I contend that they should. Also, courts have not considered the issues to be different where the prior statement is one produced by the government in an ex parte fashion. 197 Part IV examines this issue as well and again argues that the outcome should be fundamentally altered when such statements are involved. Finally, when the two factors are combined—when ex parte statements are offered without a truly adequate opportunity to cross-examine—the statements should be excluded.

2. Availability for Cross-Examination: The Equivalent to Green’s Requirement of Subsequent Cross-Examination?

Going one step further, a court may not require the prosecutor to put

194. See also Delaware v. Fensterer, 474 U.S. 15 (1983) (per curiam) (admission of opinion from expert witness who cannot recall basis of his opinion does not violate Confrontation Clause).

195. Cf. Frank v. Brookhart, 877 F.2d 671, 676-77 (8th Cir. 1989) (fact that witness was suffering from schizophrenia at time of testimony did not violate confrontation right given information available to jury to evaluate credibility), cert. denied, 493 U.S. 1027 (1990); Vasquez v. Lockhart, 867 F.2d 1056, 1058-59 (8th Cir. 1988) (80-year-old witness’s unresponsiveness on cross-examination presented no constitutional violation), cert. denied, 490 U.S. 1100 (1989). Indeed, failure of an adult to remember even his prior identification without explanation other than his being emotionally upset does not violate Confrontation Clause. Bullock v. State, 543 A.2d 858, 860 (Md. Ct. Spec. App.) (victim did not testify to any identification on direct or cross-examination), cert. denied, 548 A.2d 128 (Md. 1988).


197. See Lee v. Illinois, 476 U.S. 530 (1986) (although statement of codefendant implicating defendant was rejected on Confrontation Clause grounds, analysis not fundamentally different because it was produced ex parte by governmental interrogation); discussion infra note 315.
the declarant on the stand at all to satisfy the Confrontation Clause as to any prior statement regardless of its trustworthiness. Heretofore Green has been viewed as creating two prongs for confrontation analysis. 198 One prong housed prior statements when the witness is either unavailable or physically available but is not called by the prosecutor and therefore not subject to adequate cross-examination; for both types of statements trustworthiness had to be independently demonstrated. On the other prong were statements where the defendant's subsequent cross-examination of the declarant about the statement at trial established trustworthiness. Owens fit, albeit somewhat uncomfortably, on this second prong. 199

Part B above questioned whether the Court might be suggesting that one method of satisfying the unavailability requirement—prosecutorial production of the witness at trial 200—satisfies the Confrontation Clause regardless of the trustworthiness of the prior hearsay statement. Stated differently, the issue is whether a distinction does exist between (1) the prosecution simply making the witness physically available to be called by the defense, and (2) affording the defense an opportunity for subsequent cross-examination regarding the prior statement.

In both Green and Owens, the prosecution called the declarant and defense conducted cross-examination of a sort. 201 In those cases and in others, however, the Supreme Court has articulated the position that "the Confrontation Clause guarantees only an opportunity for effective cross-examination." 202 Does that statement mean that when the prosecution satisfies the constitutional requirement of "unavailability" by producing the declarant at trial, it has also done all it must to meet the requirement in Green and Owens unless the defendant calls the declarant

198. See Mosteller, supra note 71, at 286-87 (Confrontation Clause presents obstacle to admitting hearsay only when child does not testify in state's case and is thereafter made available for cross-examination). But see Inwinkelried, supra note 102, at 529-31 (apparently drawing no distinction for confrontation purposes between prosecution producing declarant at trial or calling witness to stand); but cf. Michael H. Graham, The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 MINN. L. REV. 523, 593-94 (1988) (similarly recognizing no distinction but assuming that when prosecution is required to produce witness it must call witness).

199. At the subsequent trial, the declarant would be under oath and his or her demeanor could be observed. See California v. Green, 399 U.S. 149, 158 (1970).

200. This alternative is derived from Green, where the declarant was physically available. In White, the Court stated that the "unavailability" rule requires "either a showing of the declarant's unavailability or production at trial of the declarant." White v. Illinois, 112 S. Ct. 736, 742 n.6 (1990). Similarly, in Inadi, the Court indicated that the unavailability rule might require either a showing of unavailability or require the prosecution either "to call the declarant as a witness or... to ensure that the declarant is available for testimony if needed." United States v. Inadi, 475 U.S. 387, 398 n.10 (1986). The Court, however, found the proposal to require the prosecution to call each declarant problematic. Id.

201. After Owens, we know that the cross-examination in Green was itself sufficient to render Porter's statement to the police officer admissible under the Confrontation Clause.

and either judicial interference or the declarant's assertion of a privilege thwarts efforts to cross-examine the declarant?

If the answer to this inquiry is affirmative, then it changes the above set of rules. Confrontation analysis contains two prongs but they are differently formulated. On one prong is the witness who is truly unavailable whose statements must be shown to be trustworthy. The other contains statements where the witness is produced, and on this prong, the prosecution need never demonstrate trustworthiness. It merely produces the declarant at trial and forces the defendant to call the declarant in his or her case.

The key question is what the Green-Owens line of cases requires. Beginning with the situation where the prosecution calls the declarant, lower courts have concluded that the declarant is not required to testify concerning the prior statement or the details covered by it. Testimony on direct examination that subjects the declarant to cross-examination about the prior statement is sufficient. Indeed, several lower courts have concluded that the presence of the witness available to be cross-examined satisfies this line of authority.

203. The consequences are particularly significant because some common hearsay exceptions used in child sexual abuse prosecutions rely exclusively upon the availability of the declarant to satisfy the Confrontation Clause. See infra part V.A.

204. The new chart of confrontation analysis after Inadi, White, and Owens would look like the following: (1) if the witness is produced by the prosecution, any hearsay statement, including prior testimony and ex parte produced statement, is admissible as far as the Confrontation Clause is concerned; (2) when the witness is not produced, (a) firmly rooted hearsay exceptions are automatically admissible; (b) prior testimony is admissible if the witness is (i) constitutionally unavailable and (ii) the defendant had a constitutionally adequate opportunity to cross-examine the witness; (c) for other hearsay exceptions that were not firmly rooted either: (i) simply a showing of special indicia of reliability or (ii) a showing of unavailability and a demonstration of special indicia of reliability, depending upon whether the exception possesses independent value absent from in-court testimony. For a very different chart of confrontation analysis, see supra note 98.

205. United States v. Gibson, 29 M.J. 379, 382 (C.M.A.) (Confrontation Clause satisfied because child testified in the case and was available to be cross-examined about pretrial statements), cert. denied, 496 U.S. 907 (1990); People v. Rushing, 192 Ill. App. 3d 444, 449, 548 N.E.2d 788, 792, 139 Ill. Dec. 403, 407 (1989) (child's in-court testimony need not replicate the content of the out-of-court statement), appeal denied, 131 Ill. 2d 565, 553 N.E.2d 400, 142 Ill. Dec. 886 (1990); State v. Nelson, 725 P.2d 1353, 1356-57 (Utah 1986) (Green imposes no requirement that the direct examination cover any particular subject matter and no issue regarding right to cross-examine presented because direct examination, while not covering the details of the statement, opened the door under domestic evidence law for cross-examination concerning those details).

206. United States v. Cree, 778 F.2d 474, 478 (8th Cir. 1985) (defendant waived Confrontation Clause objection when he did not call to stand child who was present at trial; right of confrontation does not mandate that prosecution call available witness whose cross-examination may be favorable to defense); United States v. Quick, 26 M.J. 460, 462 (C.M.A. 1988) (availability of child to be cross-examined and offer of government to call witness to permit cross-examination if required satisfied confrontation right regarding four-year-old's prior statement of sexual abuse by defendant); Wetz v. State, 561 So. 2d 1190, 1192 (Fla. Dist. Ct. App. 1990) (codefendant's midtrial guilty plea eliminated Fifth Amendment privilege and her availability to be called as witness eliminated confrontation issues regarding her prior statement); State v. Schaal, 806 S.W.2d 559, 663 (Mo. 1991) (en banc) (presence of child, who was not called as witness, satisfied Confrontation Clause regarding prior testimony under Green because all that is required is opportunity for effective cross-examination), cert. denied, 112 S. Ct. 976 (1992); see also supra notes 177-84 and accompanying text. Other courts have not been so accepting of this result. See infra discussion in notes 335-45 and accompanying text.
The U.S. Supreme Court has yet to say definitively what the Constitution requires in this area. However, its recent approach appears most consistent with not requiring the prosecution to call the declarant as a prerequisite for the prior statement’s admission. The analysis of Inadi, although dealing directly with other issues, suggests that the Court will follow such an approach.

As discussed earlier, the Court in Inadi ruled that an unavailability requirement was not a constitutional prerequisite to admission of coconspirator statements. It offered several justifications for the ruling, one of which was the superiority of the out-of-court statement to that obtainable through in-court testimony. A second major justification provides what may be critical insight on whether the Court would consider mere presence of the witness equivalent to opportunity to cross-examine.

The majority in Inadi argued that requiring the government to establish unavailability would likely add little to the “‘truth-determining process’ over and above what would be produced without such a rule.” The Court cited as justification for this second proposition the fact that the defendant has the right to produce witnesses under the Compulsory Process Clause and may cross-examine them, either pursuant to the provisions of Federal Rule of Evidence 806 that authorizes examination “on the statement as if under cross-examination” or upon the traditional finding that the witness is hostile. Moreover, the Court indicated that if the choice were between a rule that required the government to produce hearsay declarants or to call the declarant as a witness, the latter would likely be less defensible.

Finally, the Court paid no heed to the arguments by Justice Marshall in dissent that, at a practical level, the rights to confrontation and compulsory process are not the same at all. He argued that the confrontation right imposes on the prosecution the risk of calling the declarant to the stand. Requiring the defendant to call the witness imposes significant tactical costs, among which are that any attack must await the

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207. See supra notes 91-94 and accompanying text.
209. Id. at 396 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).
210. Id. at 397 & n.8; Fed. R. Evid. 806.
211. Inadi, 475 U.S. at 398 n.10.
212. In view of all the disadvantages that attend a defendant’s decision to call a co-conspirator declarant as a witness, the majority’s reliance on the defendant’s right to compulsory process to justify a decision to deprive him of a critical aspect of his Confrontation Clause right cannot be supported. The two are simply not equivalent.
213. This part of Justice Marshall’s argument does not necessarily follow from his position that unavailability should be a requirement of admission of coconspirator statements. Justice Marshall was arguing that the unavailability requirement means that the government was required to produce, to call to the stand, and to seek to elicit the content of the statement from the declarant. Because under the majority’s view the government’s obligation would run only to producing the declarant, even if the majority had agreed to impose an unavailability requirement, it would not have met any of the specific objections raised by Justice Marshall.
defense case, potentially a very long delay during which the charges go unrebuttered. Moreover, the defense runs the risk of emphasizing the hearsay by almost necessarily repeating it to set up any cross-examination.214

Assuredly, Inadi does not answer the present question because the case involved a different issue. Inadi held that given a coconspirator statement that possesses significant independent evidentiary significance, there is no confrontation right. Any difference between the right to cross-examine under the Compulsory Process Clause and that provided when the prosecution called the witness was not constitutionally significant.215 Accordingly, the Court did not state that the right of cross-examination under the Compulsory Process Clause would itself be sufficient to satisfy the confrontation right had it existed. Nevertheless, it went a long way toward recognizing the two opportunities to cross-examine as equivalent. The Court's analysis suggests that the Confrontation Clause and the Compulsory Process Clause should be collapsed into one undifferentiated right, a proposition that conflicts directly with the obvious meaning of the Sixth Amendment's text.216 If production of the

214. Inadi, 475 U.S. at 409-10 (Marshall, J., dissenting). Justice Marshall made several additional arguments, one of which is entirely inapposite to the current discussion, but the other has an analogy in child cases. The totally inapposite argument is that the prosecution should have the duty of identifying and finding the coconspirator declarants. Id. at 408-09. Having the declarants available certainly satisfies that concern. A second argument is that by calling the declarant regarding the alleged coconspirator statement, the defense runs the risk of suggesting that indeed a conspiracy exists. Id. at 409. In the child witness case, the risks are that the defendant will alienate the jury by forcing the generally sympathetic child to testify or, as a more concrete variant of the same problem, will highlight his treatment as one not worthy of the presumption of innocence by being permitted to cross-examine the child only if separated from the child.

The Minnesota Supreme Court has adopted as a state rule of evidence a proposition similar to that advanced by Justice Marshall. In State v. Larson, 453 N.W.2d 42, 47 (Minn.), cert. granted, judgment vacated, and remanded, 111 S. Ct. 29 (1990), it accepted "a modified version" of the approach suggested in Peter Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 HARV. L. REV. 567, 617-18 (1978). The court concluded that a defendant who wants to cross-examine an available child witness should not be compelled to call the child if he or she preferred that the state do so. As a result, it decided that for "future cases of this kind the state must, when expressly requested by the defendant to do so, call in its case-in-chief an available witness whose hearsay statements are being admitted against the defendant." Larson, 453 N.W.2d at 47; see also State v. Larson, 472 N.W.2d 120, 123 n.1 (Minn. 1991) (reviewing rationale for its prospective rule), cert. denied, 112 S. Ct. 965 (1992).

215. Viewed with the benefit of Bourjaily v. United States, 483 U.S. 171 (1987), in which the Court subsequently found the coconspirator exclusion to be firmly rooted, and White, where it concluded that cross-examination was superfluous for statements admitted under firmly rooted hearsay exceptions because of their trustworthiness, the Court was not necessarily deciding that the opportunity to cross-examine using the Compulsory Process Clause was equivalent to the right under the Confrontation Clause. This is because the right to cross-examine had already been functionally satisfied.

216. See Edward J. Imwinkelried, The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants, 30 HASTINGS L.J. 621, 645-46 (1979) (merging the Confrontation Clause and the Compulsory Process Clause, rights with apparently independent force, would violate standard rules of textual analysis); Westen, supra note 214, at 577-79, 616-18 (arguing that Confrontation Clause, where applicable, requires prosecution to call witness and seek to elicit evidence from his lips, as opposed to requiring defendant to call witness; indeed Confrontation Clause and Compulsory Process Clause are distinguished on basis of which party has burden of producing, in sense of calling, witness).
witness by the prosecution is all that is required and the defense already has an effective mechanism for producing witnesses under the Compulsory Process Clause, confrontation only adds, if anything, a constitutional basis to the right to ask questions in a traditional cross-examination form (leading questions) and perhaps a constitutional right to impeach the defendant's own witness.\footnote{217}

The validity of the Court's approach will be tested in the child abuse area as new techniques for presenting evidence magnify the impact of the evidence and the need for confrontation. These techniques permit, for example, the introduction of a videotaped statement by the child without any cross-examination, the child thereafter being made available to the defense for cross-examination. Although the use of hearsay rather than live testimony may be self-policing in many situations because of the loss of effectiveness for the prosecution, the use of videotape does not have this negative feature for the prosecution. Indeed, a videotaped interview, rather than live testimony, may provide the most effective method of establishing the prosecution's case,\footnote{218} and the burdens on the defense to

\footnote{217. One aspect of the opinions, such as \textit{Green} and \textit{Inadzi}, is unmistakable. The majority was singularly unimpressed by any arguments about the practical differences, particularly in the absence of empirical evidence, in the effectiveness of the two procedures. See \textit{California v. Green}, 399 U.S. 149, 161 n.13 (1970) (rejecting the contention that trial lawyers would find immediate cross-examination critical as without empirical foundation).

Although new empirical data has not become available that would dramatically demonstrate the ineffectiveness of delayed cross-examination or the impact of shifting to the defendant the responsibility of initiating the cross-examination since the time of the opinions in \textit{Green}, \textit{Inadzi}, and \textit{Owens}, one important addition to the trial practice literature field does support the significance of this difference. See \textit{Robert J. Klomoff \\& Paul L. Colby, Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials} (1990). \textit{Sponsorship Strategy} has quickly won an impressive place in the literature, with extravagant claims for its pathbreaking analysis of trial strategy by the Deputy Attorney General, \textit{id} at xiii (foreword), and no less than two reviews in the \textit{Yale Law Journal}. \textit{Floyd Abrams, Trial Tactics: Sponsorship Costs of the Adversary System, 101 Yale L.J. 1159 (1992); Michael J. Saks, Flying Blind in the Courtroom: Trying Cases Without Knowing What Works or Why, 101 Yale L.J. 1177 (1992).

The book's central principle is that the jury evaluates each piece of evidence by reference to the party introducing it, assuming that evidence is the best the party could produce on the point. \textit{Klomoff \\& Colby, supra}, at 26-29. A party is thus generally held responsible for the strengths and weaknesses of the witnesses it calls. Unfavorable evidence introduced by a party is treated as a concession and counted much more heavily against it than the same evidence when offered by the opponent. \textit{id} at 37. A distinction, although not a total one, is drawn with cross-examination where the examiner is not viewed as sponsoring the witness, because she did not call the witness and does not concede the importance of the witness's testimony. \textit{id} at 231-32. These arguments strongly support the importance of the distinction between the defendant being permitted to cross-examine the child when called by the prosecution for direct examination and requiring the defendant to call the child in his case.

Unfortunately, it is doubtful that any practical argument or reliance on nonempirical writings in the field of trial practice techniques will cause the Supreme Court to reach a different constitutional conclusion. Similar authorities were rudely dismissed by Justice White's opinion in \textit{Green}, 399 U.S. at 161 n.13.

\footnote{218. See Josephine A. Bulkeley, \textit{Recent Supreme Court Decisions Ease Child Abuse Prosecutions: Use of Closed-Circuit Television and Children's Statements of Abuse Under the Confrontation Clause}, 16 \textit{Nova L. Rev.} 687, 698-99 (1992) (where prosecutor has excellent testimony from adults regarding what child told them, where child is not credible or sympathetic, and where good defense counsel can be expected to impeach regarding child's youth, prosecutor may prefer not to have child testify;}

secure adequate cross-examination are substantial. Part V addresses these issues in detail.

Part IV analyzes the arguments regarding the proper scope of the Confrontation Clause as it relates to hearsay evidence. It explores the often stated position that there is a core purpose of the Confrontation Clause—the protection of the defendant from a trial by ex parte affidavits and depositions. It examines the support for a core concept, its dimensions, and the different results that should obtain for Confrontation Clause analysis, including the requirement of adequate opportunity for cross-examination when statements falling within that core are offered against the defendant. Part V addresses these issues again in the specific context of child abuse hearsay.

IV. The Proper Scope of the Confrontation Clause

A. The History of the Confrontation Clause and Its Critical Elements

Because of the brevity and generality of the words of the Confrontation Clause,²¹⁹ certainty of its application to the admissibility of hearsay when offered by the prosecution in modern criminal trials could not be reasonably expected.²²⁰ Although we have gained some important insights through the accretion of scholarship,²²¹ it remains true that a definitive history has not yet been written²²² and one probably cannot be

²¹⁹ In this regard, the Confrontation Clause does not differ from the other elements of the Sixth Amendment, see Kenneth W. Graham, Jr., The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 CRIM. L. BULL. 99, 103 (1973) ("The Sixth Amendment merely describes a concept; it does not prescribe a set of rules.").

²²⁰ At a slightly more macrolevel, the Confrontation Clause is subject to a number of plausible interpretations. One author set out some of these as follows:

The confrontation clause could be read to prohibit the use of any hearsay evidence at a criminal trial, to limit the range of permissible legislative or judicially-created hearsay exceptions, to guarantee the accused a right to cross-examine all witnesses, to describe the procedures the state must follow in presenting proof, or merely to mandate the presence of a defendant at his trial.

Gutman, supra note 102, at 332.


²²² Graham, supra note 219, at 104.
fashioned. 223

Enough of the historical materials surrounding the drafting and the ratification debates survives that we can be relatively confident that no precise meaning was ascribed to the Confrontation Clause in either process. 224 Indeed, the clause received only limited attention. 225 What we can expect from a historical analysis is to identify the common-law foundation upon which the clause was built and the historical conflicts that produced the right. 226

Two major types of sources are found in the historical material that provide help in ascertaining the relationship between the Confrontation Clause and the modern hearsay concept. The first is the then-existing law regarding the admission of hearsay against criminal defendants. An obvious source for the Confrontation Clause is the hearsay rule of the day. The Confrontation Clause closely tracked the hearsay rule of that era. The second source is trial by ex parte affidavit or deposition (the perceived historical evil that helped generate the clause).

I. The Major Components of the Late Eighteenth Century Hearsay Rule

The hearsay rule of the late eighteenth century was stated with a different emphasis than our modern evidentiary rule, which focuses on reliability and necessity. It had a decidedly procedural flavor. A leading

223. Read, supra note 102, at 6 ("exact intent of the framers [regarding meaning of Confrontation Clause] is probably undiscernible"). From the point of view of the precise meaning of the language understood by those members of Congress who voted to submit the Sixth Amendment to the states and the state legislators who voted to approve it, we certainly cannot ascribe a specific meaning. See PHILIP BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 10-11 (1982). In the context of statutory analysis, Justice Scalia has argued that such an enterprise is misguided because existing materials on contemporary debates usually cannot tell us the specific meaning that "any more than a handful of the Members of Congress who enacted [Rule 609] were aware...." Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in judgment). Historical materials regarding the meaning of the legislative text in his judgment can generally tell us no more than that a particular version was specifically understood by a larger minority that some other version. Id.

In addition, the historical argument also focuses on the "controversies, the attitudes, and decisions of the period" for clues about likely intended meaning. BOBBIT, supra, at 7. Those materials are somewhat more available, but they usually provide little precise direction.

224. Larkin, supra note 221, at 67 ("The precise source of this use of the word 'confront' is obscure. . . .").

225. The clause was debated for only five minutes before adoption by Congress. Gutman, supra note 102, at 332. 226. In ascertaining the meaning of the Confrontation Clause, Professor Jonakait has cautioned against placing too much reliance upon either the English common law, which I, like other authors, chiefly consult because few American sources have been discovered and analyzed, or the English experience with ex parte depositions and affidavits used in political trials. Jonakait, supra note 115, at 741-42. He notes that, for example, Americans viewed criminal violations as offenses against the state as opposed to the English view that treated most as private matters between individuals and treated others as political prosecutions. Id. I find these suggestions intriguing although I do not find evidence to undercut my basic uses of English authorities. Where appropriate I speculate on the potential significance of America's different experience on the shape of the confrontation right. See infra note 289 and accompanying text.
handbook on evidence written by Irish Barrister Leonard MacNally a decade after the Sixth Amendment's ratification described the hearsay concept as follows:

No evidence can be received against a prisoner but in his presence: and therefore it is agreed, that what a stranger has been heard to say, is in strictness no manner of evidence, either for or against the prisoner . . . . The reasons assigned as to grounds of this rule are, because such evidence is not upon oath; and also because the party, who would be affected by such evidence, had no opportunity of cross examination . . . .

MacNally recognized as hearsay exceptions admissions by the prisoner, dying declarations by a deceased declarant and prior statements to support or impeach the witness's present testimony, but not testimony given at the trial of another defendant. For civil cases, other treatises of the same period recognized business records and reputation regarding family relationships and land boundaries as admissible hearsay.

The British view of the hearsay principle as stated by MacNally and Thomas Peake, an English Barrister who wrote a similar treatise one year earlier, apparently tracked the American view as well. An early American evidence treatise published in 1810 and written by Zephaniah Swift, a justice of the Connecticut Supreme Court, borrowed liberally from these sources and was fully consistent with them.


229. Id. at 361.

230. Id. at 381-83.

231. Id. at 378-81.

232. Id. at 390-91. Whether prior testimony was ever admissible in a criminal case even when the declarant was dead was more in doubt than one might imagine. Thomas Peake, Compendium of the Law of Evidence 61 (Frederick-Town, John P. Thompson, 3d ed. 1809) [hereinafter Peake (3d ed.)] (declaring that former testimony was admissible on retrial in civil cases of a deceased declarant but not in criminal cases). This statement did not appear in the first edition of Peake's work. See Thomas Peake, Compendium of the Law of Evidence 39-40 (Garland Pub. 1979) (1801). Wigmore considered Peake's position a flat misstatement of the law. See 5 Wigmore, supra note 103, § 1398, at 186. An American author, Zephaniah Swift, writing a few years after Peake, appeared to consider such testimony admissible generally, although whether his statement was intended to apply to criminal cases is not entirely free from doubt. Zephaniah Swift, A Digest of the Law of Evidence in Civil and Criminal Cases 125 (Hartford, Oliver D. Cooke 1810).

233. Peake (3d ed.), supra note 232, at 7-10 (justifying receipt of reputation evidence regarding pedigree on basis that no better evidence is possible and describing business records); Swift, supra note 232, at 121-24 (reputation and other hearsay as to pedigree).

234. After describing admissible pedigree evidence in civil cases, Swift stated:

In criminal cases, it is a very important principle, that no evidence shall be received against a prisoner but in his presence: and that hearsay evidence is not admissible, for it is not on oath,
However, stating that there was a hearsay rule that the Confrontation Clause largely embodied falsely simplifies the historical situation. Although English courts had recognized hearsay evidence as a problem for decades, general enforcement of a prohibition on receiving hearsay in typical criminal trials had only recently been accomplished at the time of the framing of the Sixth Amendment. The rationale and the scope of the rule was evolving at the same time the concept of the trial as an adversarial enterprise and evidence law in general matured. Thus, the seemingly heretical conclusion that the Confrontation Clause embod-

and the party to be affected by it, has no opportunity of cross-examination: but to this rule there is a very important exception [for dying declarations]. Swift, supra note 232, at 124. This description of the hearsay rule appears to be a close paraphrasing of the MacNally treatise, although it excluded only evidence offered against the accused.

The remainder of the discussion is similar to Peake's work. Swift describes the dying declaration exception in detail. Id. at 124-25. He then briefly states an exception for prior testimony where the witness has died, which apparently is meant to apply in criminal cases, and closes with the statement that in England a deposition taken before a committing magistrate under oath may be received after the witness's death. Id. at 125-26.

Swift does not mention the Confrontation Clause of the state or federal constitutions in his treatment of hearsay. Probably the reason for this omission is that Connecticut's bill of rights was not enacted until 1818. Powell v. Alabama, 287 U.S. 45, 62 (1932). Swift's treatment of hearsay in terms much like we would describe the Confrontation Clause is therefore unaffected by formal constitutional provisions, and it is further evidence of the similarity of the two concepts.

235. See Landsman, Contentious Spirit, supra note 221, at 564-72 (finding from examination of London's Old Bailey criminal court during the 18th century that hearsay was relatively freely admitted in early part of century, that by 1730s rudimentary rule was sporadically applied, that restrictions grew more substantial in middle part of century, and that by end of century more sophisticated rule was being applied to broadening range of cases); see also J.M. Beattie, Crime and the Courts in England 1660-1800 364-65 (1986) (tracing development of hearsay rule from still allowing admission but with greater sensitivity to its dangers in second quarter of 18th century, to status of being largely inadmissible by end of century); Langbein, supra note 221, at 301-02 (noting the acceptance of hearsay in Old Bailey criminal trials in the 1730s, although when hearsay was received trial judges sometimes commented negatively on its value).

The recency of the general acceptance that evidence should be excluded when offered without confrontation explains why the concept had not been written into early colonial bills of rights. Professor Berger, by contrast, argues that omission from early colonial documents is explained by the lack of perceived relevance of the English experience until the rise of new inquisitorial threats in the colonies themselves associated with British enforcement of customs laws. Berger, supra note 125, at 578-79.

236. Professors Langbein and Landsman have cataloged an interrelated set of changes that occurred in ordinary criminal trials conducted during the 18th century in England. The development of the prohibition on hearsay in their view was only an element of this mosaic and is difficult to separate from other changes, such as the growing role of lawyers in the process. Landsman, Contentious Spirit, supra note 221, at 591-602; Langbein, supra note 221, at 306; see also Beattie, supra note 221, at 226-36 (describing growing role of lawyers in criminal cases during second half of 18th century in cross-examining witnesses and objecting to evidence that increased courts' sensitivity to evidentiary problems and hastened development of evidentiary rules).

237. In fact, this assertion is hardly heretical at all. Justice Joseph Story described the Sixth Amendment as related to some of its enumerated rights, including the Confrontation Clause, as follows: "The other article [Sixth Amendment], in declaring that the accused shall enjoy the right to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crime." 3 Joseph Story, Commentaries on the Constitution of the United States 662 (Carolina Academic Press 1987) (1833); see also Lilly, supra note 221, at 213-14 (proposing as hypothesis that Confrontation Clause gave constitutional status to contemporary common-law understanding that most hearsay statements of available declarants were excluded). Wigmure put a very different gloss on the consistency between common-law practices and the Confrontation Clause. He argued that the clause guaranteed only the right to cross-examine
ied the major elements of the contemporaneous hearsay rule has only limited utility in determining the meaning of the clause. This is because the hearsay "rule" was an imprecise, porous, and still changing concept.

During the eighteenth century, the understanding of evidence law was developing on a number of levels. Part of the change can be seen by looking at the world of evidence as it was seen by Lord Geoffrey Gilbert, who died in 1726, and comparing it with evidence theory at the end of the eighteenth century. Gilbert's treatise, which was first published in 1754 and therefore was available to the Framers, builds a system around the best evidence rule. Formal written documents were preferred to live evidence. The oath also played a key role in Gilbert's system, giving special status to statements produced under an oath. The absence of an oath not only rendered oral hearsay evidence not the best evidence, but no evidence at all.

Cross-examination had a place in Gilbert's system, but not the central place it was to assume later, as demonstrated by his receptivity to evidence given under oath but not subject to cross-examination. The primacy of written evidence and the relative unimportance of cross-examination produced for Gilbert a preference for written depositions, which were taken without cross-examination, over prior testimony, which before transcription depended upon the accuracy of the memory of witnesses to the testimony. A further example of the secondary

when evidence is presented "infrajudicially" and said nothing about the type of hearsay statements that may be received. 5 Wigmore, supra note 103, § 1397, at 159.

238. In this analysis, I am deeply indebted to the insightful work of Professor Landsman in sensitively and carefully analyzing the writings of the major evidence writers of the period. See Landsman, From Gilbert to Bentham, supra note 221.


240. Twining, supra note 227, at 34.

241. For the Testimony of an honest Man, however fortified with the Solemnity of an Oath, is yet liable to the Imperfections of Memory, and as the Remembrances of things fail and go off, Men are apt to entertain Opinions in their stead, and therefore the Argument turns the other way, in most Cases; For the Contracts reduced to Writing, are the most sedate and deliberate Acts of the Mind, and are more advantageously secured from all Corruption by the Forms and Solemnities of the Law, than they possibly could be been if retained in Memory only . . . . Gilbert, supra note 239, at 5.

242. Id. at 107 (although person who heard statement is under oath, out-of-court declarant was not).

243. Lack of ability to cross-examine justified the refusal to accept affidavits, id. at 44, and depositions, id. at 47, not made by parties and judgments not involving the parties. Id. at 23.

244. Statements of witnesses who were examined under oath before a coroner were admissible. Id. at 99.

245. But though the Depositions do fall short of Examinations viva voce, yet they see superior to what a Witness said at a former Trial, for what is reduced to Writing, but an Officer sworn to that purpose, from the very Mouth of the Witness, is of more Credit than what a Stander-by retains in Memory, of the same Oath; for the Images of Things decay in the Memory by the perpetual Change of Appearances, but what is reduced to Writing continues constantly the same, so that we cannot be certain on verbal Attestation but that some Circumstances of the Fact may be lost in the Recollection.

Id. at 45-46.

Gilbert preferred "present Examination viva voce" to depositions "for the Examiners and Commissioners in such Cases, do often dress up secret Examinations, and set a quite different Air upon
place of cross-examination is found in the practice during the eighteenth century of admitting the statement of a witness who testified under oath in the presence of the defendant but without cross-examination. 246

By the early nineteenth century (and presumably by the late eighteenth century), the focus had shifted, and cross-examination had assumed a position of much greater importance. In the writing of authors such as MacNally and Peake, although the best evidence concept and the oath remained important, 247 cross-examination was viewed as much more central to the testing of evidence. Peake stated:

The Law never gives credit to the bare assertion of any one, however high his rank or pure his morals; but always requires the sanction of an oath: It further requires his personal attendance in Court, that he may be examined and cross examined by the different parties . . .; for the relation of one who has no other knowledge of the subject than the information he has received from others, is not a relation upon oath; and moreover the party against whom such evidence should be permitted would be precluded from his benefit of cross examination. 248

This greater emphasis on cross-examination is entirely understandable because its importance in the trial process had grown during the eighteenth century. 249 That growth in England was no doubt associated with the recognition of the right of the accused to have lawyers assist at trial 250 and a general expansion in adversarial techniques. 251 In the colo-

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246. Peake (3d ed.), supra note 232, at 40-41 (describing examinations by committing magistrates conducted in presence of accused as admissible upon death of witness, with no mention of cross-examination at all); 5 Wigmore, supra note 103, § 1374, at 59 (discussing admissibility of evidence received at coroner’s inquest during 1700s, where defendant was present but had no right to cross-examine).

247. Peake (3d ed.), supra note 232, at 6-7 (best evidence), 7-8 (oath). Peake uses the concept of best evidence to justify the receipt of some hearsay. Reputation of pedigree, for example, is admitted because the matter is “in its very nature incapable of positive and direct proof.” Id. at 8. Similarly, depositions are not to be admitted when the witness is available, but when the witness is dead or cannot be found, they are admitted in civil cases as the next best evidence available. “even though a private examination does not give that satisfaction to the mind, which a public one before a judge and jury does.” Id. at 38-40.

248. Id. at 7-8.

249. 1 Stephen, supra note 124, at 82 (in discussing the trials prior to 1678, Stephen notes that prisoner had no counsel, and although permitted to cross-examine, cross-examination technique was poorly understood); id. at 403 (bemoaning lack of skill displayed by prisoners in cross-examining).

250. Langbein, supra note 221, at 306 (speculating that development of law of evidence coincided with growing importance of lawyers in process, which made it much more difficult for judges to exercise direct control over juries); see also 1 Stephen, supra note 124, at 424 (characterizing as “[t]he most remarkable change introduced into the practice of the courts” relaxation of old rule which deprived prisoners of right to counsel in felony cases, which occurred in middle of 18th century); 5 Wigmore, supra note 103, § 1364, at 27 (noting that existence of right to cross-examine made indispensable use of trained counsel to conduct questioning, and that recognition of right to counsel resulted in development of art of interrogation and various rules of evidence most applicable to cross-examination).

Professor Beattie similarly describes a fundamental change in the conception of trials that resulted from the occasional presence of lawyers, who were permitted to cross-examine witnesses, in
nies, the right of the defendant to employ lawyers in criminal litigation was clearly recognized much earlier than in England. Before the Bill of Rights was drafted, twelve of the thirteen colonies recognized the right to counsel contrary to the then official English practice. 252

One point that should be crystal clear from this discussion is that the meaning of a rule prohibiting admission of hearsay and the understanding of trial procedures were not static, and thus the potential meaning of the Confrontation Clause was evolving at the time of the framing. Enactment of the Sixth Amendment occurred just as evidence law was rapidly developing. 253 Hearsay exclusion was still in part based on best evidence principles, but that focus was receding and an emphasis on cross-examination was ascending. The oath had not disappeared as an important requirement, nor would it, but the fact that a statement had been obtained under oath was viewed as less important in justifying admission than in an earlier time. The defendant's presence had previously been seen as itself an important and sometimes sufficient procedural protection, but it was losing ground to the centrality of cross-examination.

Given the current Supreme Court's emphasis on receiving the "better evidence" in Inadi 254 and White, 255 consider again that the best evidence concern during this earlier age was a substantially different one. The quality of the transmission of the evidence was a major concern during this earlier period. Gilbert preferred documentary evidence to prior testimony, even though the former may have had the benefit of cross-examination, due to the difficulty of preserving the accuracy of the lat-

the middle and late 18th century. Previously, judges might or might not have carefully examined the weakness of evidence, but when defense lawyers were present there was a searching examination of the prosecution's evidence. Beattie, supra note 221, at 232-36. Indeed, the effectiveness of some counsel's cross-examination was a matter of substantial notoriety that likely worked hand in hand with growing popular interest in protection of criminal rights. Id. at 236-50. These popular developments go hand in hand with the development of the hearsay rule and may well have crossed the Atlantic to influence the development of the Confrontation Clause.

251. Over the course of the 18th century in English trial courts, Professor Landsman tracks the decline of judicial activism in the inquisitorial mode, the growth of party responsibility for production of proof, and the creation of rules of evidence, chiefly, the hearsay rule, to regulate the presentation of proof. Landsman, Controversial Spirit, supra note 221, at 513-72. These developments in his judgment combined to transform trials into adversarial enterprises. Id. at 513; see also Landsman, From Gilbert to Bentham, supra note 221, at 1151, 1185-86.

252. Powell v. Alabama, 287 U.S. 45, 61-65 (1932). In contrast to denial of the right to counsel in England, "to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold here." Holden v. Hardy, 169 U.S. 366, 386 (1898). Although the right to full representation in ordinary criminal prosecutions was not officially granted in England until 1836, counsel began participating in occasional felony trials in the first half of the 18th century. See Beattie, supra note 221, at 225-27.

253. Of the period that began in 1790, Wigmore stated: "[t]he full spring-tide of the [evidence] system had now arrived." Wigmore, supra note 227, at 695. Professor Twining identifies the late 18th and early 19th centuries as the period when "the modern system" of evidence was largely created. Twining, supra note 227, at 34.


In fact, this best evidence concern about the accuracy of prior testimony remained a major reason for preferring live testimony to prior testimony well into the nineteenth century. The American cases that struggled with the confrontation issues pertaining to the admission of prior testimony frequently struggled even more vigorously with the second question of whether the prior testimony could be admitted if, or because, it did not reflect the exact words of the witness.\textsuperscript{257} Thus, today's Supreme Court is absolutely correct that a best evidence concern animated the Confrontation Clause analysis. However, the best evidence concern was very different, and its focus was not on assuring that hearsay statements with independent evidentiary significance be admitted regardless of the declarant's unavailability.

One important fact to consider is where in the developmental path the Framers saw the right. Were they describing what the right had meant at some point in the historical past, what they understood it to mean at the date of promulgation, or what they believed it should mean as it developed further? Unfortunately, one cannot be certain which vision of the right the Framers and ratifiers believed they were capturing; indeed, we cannot be sure they even recognized that massive changes had occurred.\textsuperscript{258} It is likely, however, that because they were acting in the midst of a century in which the adversary system was expanding on many fronts\textsuperscript{259} the Framers were looking forward to a doctrine with the

\textsuperscript{256} See supra note 245 and accompanying text.

\textsuperscript{257} See, e.g., United States v. Macomb, 26 F. Cas. 1132, 1135-37 (C.C.D. Ill. 1851) (examining conflicting authorities on whether prior testimony must be given in exact words and concluding that when necessity requires receipt of such secondary evidence that exact words not be required because to do so would be to effectively reject such alternative proof); Commonwealth v. Richards, 18 Mass (1 Pick) 434, 439 (Mass. 1936) (prior testimony admissible in principle because cross-examined but evidence was excluded because witness is required to give "full proof of all that the deceased witness swore to" and could not do so); Summons v. State, 5 Ohio St. 325, 345-53 (Ohio 1856) (determining after extended discussion that this secondary evidence, being best which could be obtained under circumstances, could be received even if not given in exact words of witness).

\textsuperscript{258} Stephen explained why reformers were often neither explicit nor accurate about whether they were changing or continuing past practices. There persisted an idealized view of "the 'good old laws of England'"—a belief in a golden age of law sometime in the indefinite past. I Stephen, supra note 124, at 359. The Court in Mattox engaged in this same idealization of historical past in recognizing the Constitution "as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta." Mattox v. United States, 156 U.S. 237, 243 (1895). Thus, even if the framers believed they were simply writing into the Constitution the inherent rights of Englishmen to be confronted by the witnesses against them, what they were likely doing was enacting a reality that either never existed or had only recently been achieved.

\textsuperscript{259} While not telling us the content of the confrontation right, the rhetoric of founding-era Americans demonstrates that they held this right to be part of a generally libertarian regime of criminal justice—a system that was self-consciously humane and progressive. Sometimes they spoke of various rights specifically and sometimes they referred more generally to the overall right of jury trial and the protections of the common law.

Security against ex post facto laws, the trial by jury, and the benefits of the writ of habeas corpus, are but a part of those inestimable rights the people of the United States are entitled to, even in judicial proceedings, by the course of the common law. . . . Perhaps it would be better to enumerate the particular essential rights the people are entitled to in these proceedings . . . . In this case, the people may proceed to declare that every person shall be entitled to have a right to
right of cross-examination preeminent rather than backward to a time when personal presence and best evidence concepts dominated.

The dangers of pegging the concept to an inappropriate historical period can be illustrated by contrasting Wigmore's view of the importance of physical confrontation with that of Justice Scalia. Wigmore believed that the principal purpose of confrontation was to ensure cross-examination and that physical confrontation was a secondary and easily dispensable feature of the right. He acknowledged that in "earlier and more emotional periods, this confrontation was supposed . . . to be able to unstring the nerves of a false witness," citing an account from a seventeenth century case as an example of the thinking of that misguided time.

He found another example of this earlier conception in Shakespeare's Richard the Second: "Then call them to our presence; face to face, And frowning brow to brow, ourselves will hear The accuser and the accused freely speak." By contrast, Justice Scalia in Coy quoted the same Shakespeare passage as reflecting the true root meaning of confrontation and treated Wigmore's general view as a statement of the latter's thesis rather than a reflection of historical fact.

If Justice Scalia were referring to the meaning of confrontation at the time of Sir Walter Raleigh's trial in 1603, he would no doubt have been correct—physical confrontation was the central focus. However, by the time of the adoption of the Sixth Amendment, Scalia's view of the centrality of physical confrontation was no longer shared by the law-

produce all proofs that may be favourable to him, and to meet the witnesses against him face to face . . . . Letter XVI of "The Federal Farmer", in 2 Herbert J. Storing, The Complete Anti-Federalist 28.2 (1991).

Similarly, in attacking the Alien and Sedition Acts of 1798, the Kentucky Resolutions, which were drafted by Jefferson, viewed the Acts as a violation of the Sixth Amendment because it "authorize[d] the president to remove a person out of the United States who is under the protection of the law, on his own suspicion, without jury, without public trial without confrontation of witnesses against him . . . ." Kentucky Resolutions of 1798, reprinted in Jefferson Powell, Languages of Power: A Sourcebook of Early American Constitutional History 131-32 (1991). The Resolutions objected to the Acts on the more general grounds that they made the President "the accuser, counsel, judge, and jury, whose suspicions may be the evidence, his order the sentence, his officer the executioner, and his breast the sole record of the transaction . . . ." Id. at 132. In this view, the Confrontation Clause was part of an overall system of constitutional rules that prevented executive branch tyranny. The system was clearly designed to limit government and to banish forever the historical memories of royal oppression.

The more difficult and imponderable issue is how these lofty political atmospherics about the role of the Confrontation Clause in protecting basic liberties should affect the dimensions of the right in ordinary criminal cases. One cannot gain much guidance here, other than to note that the right was not seen as minor, unimportant, or secondary in protecting against governmental oppression.

260. 5 Wigmore, supra note 103, §§ 1395-1396, at 153-54.
261. 195. § 1395, at 153 n.2 (emphasis added).
262. 18 Id.
264. In White, Scalia joined Justice Thomas's concurring opinion that focuses on the period of political trials in the late 17th and early 18th centuries as the critical period of development for the Confrontation Clause. White v. Illinois, 112 S. Ct. 736, 745 (1992).
265. Justice Scalia's argument in Coy that the origin of the word confrontation—its etymology—means that face-to-face meeting is required, Coy, 487 U.S. at 1016, provides some support for
yers of the age, and there is no firm proof that the Framers chose the word confrontation to protect preeminently the value of a physical face-to-face meeting. Thus, Scalia is not justified in his certainty about the requirement of physical confrontation. On the other hand, Wigmore's view of the easy dispensability of physical confrontation has no more historical support. Although cross-examination was the emerging, central concern of the hearsay rule; no practices had developed admitting evidence where cross-examination was allowed but physical presence denied, and no clear proof exists that the Framers had abandoned the earlier concern with a face-to-face meeting.

Clearly Wigmore was willing and eager to engage in anachronistic analysis. Introduction of dying declarations provides an exceptional example of his effort and its ultimate success in altering the historical view. In Mattox, decided in 1896, the Supreme Court cited the long-standing English and American practice of admitting dying declarations as proof that the Confrontation Clause was adopted with exceptions recognized at the time of its promulgation.266 The Mattox Court reasoned that while dying declarations generally violated the requirement that the statement should be made in the defendant’s presence, and while they are always made without any opportunity for examination or cross-examination, the threat of impending doom enforced "as strict an adherence to the truth as would the obligation of an oath."267

Three years later in his seminal discussion contained in the revision of the Greenleaf treatise, Wigmore described his overall theory for the admission of hearsay. Under that system, the court admitted hearsay where necessary and if the “particular class of declarations offered...some circumstantial guarantee of trustworthiness which shall—in some degree, at least—supply the tests of oath and cross-examination.”268 Wigmore thus had recast the impetus to truthfulness in the dying declaration from its earlier focus on the oath to his new search for a guarantee of trustworthiness that would stand as a substitute for cross-examination. The historical record is clear then, that hearsay exceptions were not considered a substitute for cross-examination at the time of the promulgation of the Confrontation Clause. Courts recognized only a handful of exceptions, each with a specialized history that could not be easily generalized. If we were to take our cue from the exceptions in effect at the

267. Id. at 244 (emphasis added). The Mattox Court, while acknowledging that equivalence to the oath was the historical basis for the exception, itself recast the issue. Sources more contemporaneous with the framing of the Confrontation Clause, such as MacNally, supra note 228, at 381 and Swift, supra note 232, at 124, noted as the only contemporary concern the fact that the defendant was not present at the time the dying declaration was made. They omitted reference to the absence of cross-examination, although it had likely become a concern by the time of the framing of the amendment.
time of the framing, the result would be a very restrictive one regarding the admission of hearsay in criminal cases. In general, if a statement was considered hearsay, it was inadmissible except in a very limited number of exceptions and where the declarant was unavailable, with death generally the only form of unavailability recognized.269

Thus, at the time Congress ratified the Sixth Amendment, the hearsay/Confrontation Clause analysis was quite protective of the criminal defendant. Not insignificantly, if hearsay and the Confrontation Clause applied, the statement was excluded except under very narrow circumstances. In most areas of criminal procedure, modern formulations of constitutional rights protect defendants far more than established practices at the time of the framing. Confrontation Clause jurisprudence is a clear exception. The clause as it exists today provides extremely weak protection in comparison to that of the earlier, critical time of the framing. Indeed, the difference is so stark as to suggest strongly that current analysis has strayed from the reasonable meaning of the clause.

2. The Scope of the Confrontation Clause

Unfortunately, even if the Framers intended to exclude the same statements under the hearsay rule of the day and the Confrontation Clause, we have no clear indication of the application of the Confrontation Clause to hearsay offered by the prosecution in modern criminal trials. The hearsay rule of the late eighteenth century was far from fully formed, and courts had not vigorously enforced it for long in ordinary trials. Moreover, at that time criminal trials were generally simple affairs, involving little exotic hearsay.270

Thus, to say that the Framers probably understood the Confrontation Clause and the hearsay rule to have the same effect tells us something about how the clause should apply to our more sophisticated hearsay rule but does not tell us that the Framers would have viewed the Confrontation Clause as presumptively excluding all modern hearsay.271 Moreover, numerous prudential reasons exist for not constitutionalizing

269. Lilly, supra note 221, at 212; see also Berger, supra note 125, at 591 (noting the narrowness of the exceptions to confrontation recognized by Mattox).

270. Professor Langbein describes criminal litigation in Old Bailey in the early 18th century as involving quick trials with one or two material witnesses, who may have caught the culprit in the act. Langbein, supra note 221, at 280-81. The observation that hearsay was not as important in the simple prosecutions of the era should not be understood to mean that receiving hearsay was not occasionally critical to the case or that admitting it would not have been useful. See Landsman, Contentious Spirit, supra note 221, at 566 (noting that frequently even in simple criminal trials of 18th century England, hearsay often used because no other source of proof readily available).

271. It is often argued that the words chosen for the Confrontation Clause do not suggest their intention was to exclude all hearsay. See Dutton v. Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring in result) ("The language is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay . . . ."). But see Bourjaily v. United States, 483 U.S. 171, 182 (1987) ("literal interpretation of the Confrontation Clause could bar the use of any out-of-court statement when the declarant is unavailable"); Scallen, supra note 114, at 624 n.3 (arguing that plain meaning of clause covers hearsay).
the entire hearsay rule, if that result can be achieved without intellectual dishonesty and without direct conflict with the historical evidence.272 Accordingly, commentators have attempted to develop a definition for the Confrontation Clause that does not make it applicable to all out-of-court statements.273 These commentators typically have focused upon the meaning of the phrase “witnesses against him” in the Confrontation Clause.274

An examination of the historical materials provides two clues to the meaning of that phrase. The first is the alternative wording of the confrontation right used in the state constitutions enacted shortly before the Sixth Amendment was drafted, particularly the Virginia Declaration of Rights which served as the primary model for the Sixth Amendment.275 The alternatives differed in two chief ways. First, instead of “to be confronted with,” some used the phrase “to meet . . . face to face,”276 lan-

272. These reasons include the stultifying of evidentiary development and either the exclusion of too much evidence, thereby excessively hindering prosecutions, or the watering down of constitutional rights because their enforcement is too costly.

273. Efforts have been made in this regard by Margaret Berger, Richard Friedman, Kenneth Graham, Michael Graham, Randolph Jonakait, Laird Kirkpatrick, Toni Massaro, and Peter Westen. Berger, supra note 125, at 561-62 (focusing, if not restricting, Confrontation Clause attention on statements procured by agents of prosecution absent procedures to protect against abuse of governmental power in generating statement); Richard D. Friedman, Improving the Procedure for Resolving Hearsay Issues, 13 CARDOZO L. REV. 883, 885 n.9 (1991) (Confrontation Clause should exclude statements made in anticipation that they might be used in investigation or prosecution of crime unless defendant was responsible for declarant’s absence); Graham, supra note 219, at 129 (“witness against” covers only statements by “principal witness” for prosecution who must be confronted absent waiver or excuse); Graham, supra note 198, at 593-95 (Confrontation Clause requires prosecution to produce available declarants whose statements were accusatory when made); Jonakait, supra note 96, at 592, 596-97 (upon introducing hearsay against defendant, prosecution has burden to establish that cross-examination is inconsequential from defendant’s perspective); Laird C. Kirkpatrick, Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement, 70 MINN. L. REV. 665, 682 (1986) (requirement of unavailability depends upon statement’s importance, reliability, and susceptibility to testing through cross-examination or through other means); Massaro, supra note 120, at 870-71 (language suggests intended to cover declarants who make “focused accusations against the accused”); Peter Westen, The Future of Confrontation, 77 MICH. L. REV. 1185, 1206-07 (1979) (clause applies to declarant who is available whose statement prosecution introduces, and whose prosecution can reasonably anticipate defense would wish to cross-examine). The effort was joined by Justice Thomas in White. See infra text accompanying note 281.

274. See White v. Illinois, 112 S. Ct. 736, 747 (1992) (Thomas, J., concurring in judgment). The reasons for the inquiry have varied. Professor Kenneth Graham saw the task that the Court was attempting as one of preserving the core of the Confrontation Clause as a restriction on evidentiary practices without stifling hearsay reform, a goal he appeared to approve. Graham, supra note 219, at 127. By contrast, Professors Berger and Jonakait hope to expand confrontation rights and to correct a Confrontation Clause analysis that has diminished its protections. Berger, supra note 125, at 564; Jonakait, supra note 96, at 558. On the other hand, Thomas’s effort appears to be to limit the scope of the Confrontation Clause, but it may also give that right greater power within that more limited scope.


276. In the Massachusetts and New Hampshire Constitutions, the defendant is given the right “to meet the witnesses against him face to face.” SOURCES OF OUR LIBERTIES 376, 384 (Richard L. Perry & John C. Cooper eds., 1959) [hereinafter SOURCES].

The Supreme Court of New Hampshire may somewhat overstate its claim that “[t]he language of the New Hampshire Constitution in this regard is the more precise of the two, in that it explicitly provides what the Federal Constitution has been interpreted to mean.” State v. Peters, 387 A.2d
guage that we recognize describes an aspect of the right.

Second, and relevant to the present inquiry, the Virginia Declaration of Rights used the phrase “accusers and witnesses” instead of “witnesses against him.” A plausible interpretation of this alternative language is that it intended to permit the defendant to confront both all those who in fact testified (witnesses) and also those who had made accusations against the defendant upon which the prosecution depended (accusers). The words of the Sixth Amendment may be seen as covering both groups by the words “witnesses against him,” although limiting the


277. Section 8, Virginia Bill of Rights. Sources, supra note 276, at 312. Putting the phrase in context, Section 8 began “That in all capital or criminal prosecutions a man hath a right to demand the cause and the nature of his accusation, to be confronted with the accusers and witnesses . . . .” The Virginia Bill of Rights was drafted in large part by George Mason, Heller, supra note 275, at 23, and in turn served as the basis for the Sixth Amendment. Id. at 34. This same phrasing was used to describe the right in both Pennsylvania and New York in complaints against adoption of the Constitution without a Bill of Rights. 2 Bernard Schwartz, The Bill of Rights: A Documentary History 665, 913 (1971). Delaware in its Declaration of Rights of 1776 likewise guaranteed the right “to be confronted with the accusers or witnesses.” Sources, supra note 276, at 339. North Carolina in its constitution of 1776 used the term “accusers and witnesses” but phrased the right to be “to confront the accusers and witnesses with other testimony.” Id. at 355. Similarly, in the debate in the Massachusetts ratifying convention held on January 30, 1788, objection was made to the Constitution without a Bill of Rights on the basis that “[t]he mode of trial is altogether indeterminate; . . . whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantages of cross examination, we are not yet told.” 2 Schwartz, supra, at 690.

The proposed amendments to the Constitution that James Madison introduced in the First Congress would have guaranteed the right “to be confronted with his accusers, and the witnesses against him.” Id. at 423. The reference to accusers was perhaps dropped from the final version because, with the addition of the term against him, it was seen as redundant. By contrast to these formulations contemporary with the framing of the Sixth Amendment, the Georgia Constitution of 1877 granted a differently phrased and clearly more limited right: “shall be confronted with the witnesses testifying against him.” 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies (Francis N. Thorpe ed., 1909).

There is certainly no indication that the historical evil of proof of charges by statements from absent accusers had been abandoned by the Framers. The most reasonable interpretation is that protection against that danger was believed to be accomplished through the phrase witnesses against.

278. The term accuser has several historical meanings that are both broader and narrower than that suggested above. Professor Leonard Levy describes an accuser in the traditional English criminal system as “a witness who instigated the prosecution, and his direct and open participation in the case was indispensable.” Leonard W. Levy, Origins of the Fifth Amendment 29 (1986). The accuser under this definition would be the instigator of the charges. In Green, Justice Harlan observed that the “Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses.” California v. Green, 399 U.S. 149, 179 (1970) (Harlan, J., concurring). Harlan’s accuser is both secret and anonymous. The anonymous accuser presented a problem whether or not his statement was used as evidence against the defendant. For example, John Lilburne’s objection to being put under oath to answer charges was in part based on his objection to an accusation by absent and anonymous accusers. Levy, supra, at 271-73. The objection went in part to the adequacy of the basis of the charge, not the nature of formal proof at trial. Stephen treats the accusers and witnesses as the same. He describes the demand of the defendant, after proof by depositions or confessions had been read, “to have his ‘accusers,’ i.e. the witnesses against him, brought before him face to face . . . .” 1 Stephen, supra note 124, at 326.
scope of accusers only to those whose accusations are in fact offered against the defendant at trial. Under this construction, all witnesses who testify are subject to the clause. However, not all declarants whose out-of-court statements are offered against the defendant would be considered "witnesses against him [or her]," with that status limited to statements that were accusations, meaning accusatory at the time made.279

The suggestion that the Framers might have intended the Confrontation Clause to cover only statements that were accusatory when made has some plausibility as a restriction on the application of the clause to hearsay. The next question is whether it goes far enough in restricting the application of constitutional principles to hearsay used in criminal cases. Would the Framers have understood the term witnesses against him to include out-of-court oral accusations offered through the testimony of others, or would the term in ordinary usage have been further limited?

Two possible further limitations have recently been suggested. First, the Solicitor General suggested in White that the clause should be applicable only to "those individuals who actually provide in-court testimony or the functional equivalent—i.e., affidavits, depositions, prior testimony or other statements (such as confessions) that are made with a view to legal proceedings."280 Second, as Justice Thomas proposed in White, the clause should include "extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."281

We have evidence that the legal community at the time of the framing understood that at least a witness who made an accusation against the defendant was the equivalent of a witness against him.282 For exam-

279. Professor Michael Graham developed this same limitation, largely for practical reasons of not unduly restricting the receipt of reliable hearsay while not conflicting with the core meaning of the clause. Graham, supra note 198, at 593. The statement would be judged according to whether it was accusatory when made. Id. Professor Massaro would similarly limit the clause to "focused accusations" based on textual interpretation of the Confrontation Clause. Massaro, supra note 120, at 870-71.

280. Amicus Brief for United States in White, supra note 105, at 18-19. Unlike Justice Thomas's suggestion, see White v. Illinois, 112 S. Ct. 736, 747 (1992) (Thomas, J., concurring in judgment), the United States did not propose to limit the clause to formalized statements. Indeed, it suggested that the oral statements of the child victim in Idaho v. Wright, 497 U.S. 805 (1990), fell under its definition because they were made after the declarant had been taken into custody and were secured as evidence for a criminal prosecution. Amicus Brief for United States in White, supra note 105, at 28 n.18.

281. White, 112 S. Ct. at 747.

282. There is some evidence that lawyers of that era would not have found an equivalence between all hearsay declarants whose testimony was offered by the prosecution and the constitutional phrase "witnesses against him." Cf. Graham, supra note 219, at 130 (arguing that there is an older tradition no longer congenial to Anglo-American law that would treat out-of-court utterances as a form of circumstantial evidence having less value than in-court statements and contending that the Framers of the Sixth Amendment likely drew a distinction between sworn written documents and less formal extrajudicial utterances, which were viewed as an inferior form of evidence). However, although documentary evidence was clearly given greater importance, the fact that statements were
ple, in *King v. Brasier*,283 an ordinary criminal case decided in England a decade before the drafting of the Confrontation Clause, the defendant was charged with rape of a seven-year-old child and convicted on the testimony of the child's mother and another individual who related the accusations made to them by the child immediately after she returned home following the assault. The child was not sworn or produced as a witness at trial. The conviction was found invalid because of the determination that "no testimony whatever can be legally received except on oath,"284 a determination that unmistakably rested on the conclusion that the child was effectively a witness against the defendant despite her oral statement being offered through other witnesses.285 This procedural infirmity was not forgiven even though the statement would likely have been admitted under modern analysis as an excited utterance.286 Thus, the general limitation on the Confrontation Clause proposed by Justice Thomas, which he claims has a basis in both the history and the text,287 has neither. The Solicitor General's proposal is also too strict because historical practice did not depend on whether the statement was made with a view toward legal proceedings.

The treatment of dying declarations also supports rejection of these proposals. Both in terms of the contemporary understanding of the hear-

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284. Id. at 202. Note the focus on the absence of an oath rather than cross-examination.
285. This recognition of the equivalence between the accusations received directly from a child in court or indirectly through one who testifies to her hearsay statements was not new. Lord Hale, who wrote more than 100 years earlier, had the same insight. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 634-35 (Professional Books Limited 1971) (1736). Hale writes that in a rape case involving a child under 12 the court should receive the child's unsworn testimony [b]ecause if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself, than to receive it at second-hand from those that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered . . . .

See also Langbein, supra note 221, at 294 n.87. At the time Hale wrote, however, because of the uniformed nature of the hearsay rule, the hearsay from the witnesses hearing the child's statement would have been received. Id.
286. For discussion of the excited utterance exception in modern practice, see supra note 68. See also White v. Illinois, 112 S. Ct. 736, 742-43 (1992) (receiving spontaneous declaration as firmly rooted hearsay exception without requirement of unavailability).

287. White, 112 S. Ct. at 747 (Thomas, J., concurring in judgment). The textual argument upon which Thomas appears to rely is not sound. Thomas quotes Scalia's argument in Craig that the word witness as used in the Confrontation Clause had the definition of "one who gives testimony" or who "testifies," i.e., "[i]n judicial proceedings, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." Id. at 745 (Thomas, J., concurring in judgment) (quoting Maryland v. Craig, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting)) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). This argument seems to provide the basis to require formalized testimonial documents. However, as Professor Dripps has observed, essentially the same term witness against is used in the Fifth Amendment, and could have meant there only out-of-court statements by the defendant because the defendant at the time of the framing was incompetent to testify. Donald A. Dripps, The Confrontation Clause and the Sexual Abuse of Children, TRIAL, May 1991, at 11, 13.
say rule and in Mattlex., the Supreme Court’s first Confrontation Clause case, the Court gave no significance to whether the statement was written or oral or made to family members, bystanders, or law officers. Similarly, the Court drew no distinction between dying declarations and prior testimony on these bases.

Limiting the clause to apply to those making accusations can be supported by the text and does not appear inconsistent with history. Moreover, it finds strong support in policy. The failure to impose such a restriction likely has been a major reason that the Confrontation Clause currently provides such weak protection against the admission of hearsay. Applied to all hearsay, Confrontation Clause protections had to be minimal and flexible, or the impact on criminal litigation would have been entirely too substantial and costly. The Supreme Court watered down the right as its coverage expanded, because of that expansion.

Restricting the right more narrowly than accusatory statements, however, would conflict with the general breadth of the other Sixth Amendment guarantees, which provide a broad set of rights applicable to criminal prosecutions.288 Also, differences between the organization of American and English law support including all accusatory statements. Although the American justice system was never as formally inquisitorial as that of England, our criminal justice system from the beginning did have a greater degree of state involvement in mine-run criminal cases, which in England were more private affairs. The Sixth Amendment, through its explicit application to “all criminal prosecutions,” and its focus on the admission rather than the creation of the evidence, appears aimed at broadly constraining that much more general governmental presence in American criminal litigation.289

3. The Anti-Inquisitorial Purpose of the Confrontation Clause

Another aspect of the history that motivated the Confrontation Clause is in many respects quite clear. The confrontation right repre-

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288. One admitted problem with the suggested definition of the clause is that it will pose some difficulties in application. See White, 112 S. Ct. at 736 (Thomas, J., concurring in judgment) (noting potential difficulties with Solicitor General’s approach). The fact that a standard entails some difficulties in application should not constitute a basis to adopt a clearer but erroneous standard as long as those difficulties are not insuperable. However, the fact that a statement is contained in a formalized documentary form may certainly be used as one of the indicators that would place a burden upon the government to demonstrate admissibility. Cf. Jonakait, supra note 96, at 590 (prosecution should bear burden of proof on likely jury misvaluation when uncross-examined statements are offered).

289. Randolph N. Jonakait, Commentary: A Response to Professor Berger—The Right to Confrontation: Not a Mere Restraint on Government, 76 MINN. L. REV. 615, 619-21 (1992) (noting this difference in orientation of criminal prosecutions and arguing that an exclusive focus on inquisitorial abuses arising from English political trials, such as secret generation of evidence, is inappropriate when determining purpose of American Confrontation Clause, which was likely product of unique experience); see supra note 226; cf. Stephen J. Schulhofer, Reconsidering Miranda, 54 U. CHI. L. REV. 435, 437-38 (1987) (compulsion under Fifth Amendment was historically defined to mean formal legal compulsion because the only form of pretrial interrogation in England was done by magistrates, function that has been assumed in America by police).
resents a rejection of the abuses of the state trials of the late sixteenth and early seventeenth centuries in England that borrowed their procedures from the inquisitorial system. These trials involved proof of charges in political prosecutions by the use of ex parte affidavits and depositions and denied the defendant the opportunity to receive the accusation in person, to question those who had been interrogated privately and had provided incriminating accounts, and to call witnesses.

Whether associated with the legendary treason trial of Sir Walter Raleigh conducted in 1603 or with more immediate events in the colonists' lives when the vice admiralty courts employed inquisitorial methods to enforce customs laws, such as the Stamp Act, substantial evidence exists that the Confrontation Clause was meant as a ringing rejection of the inquisitorial model. Not only were those inquisitorial abuses historical antecedents of the amendment, but their characteristics help define what the Confrontation Clause is designed to prohibit. The promulgation of the Confrontation Clause was part of the effort to establish an adversarial system. The elements of the inquisitorial system represented by proof of charges through ex parte statements are the antithesis of the meaning of the Confrontation Clause, which was clearly not just a rule preventing the admission of some hearsay.

290. See, e.g., California v. Green, 399 U.S. 149, 157 n.10 (1970) (citing Heller, supra note 275, at 104). Professor Kenneth Graham states that his research gave him "no reason to conclude that this custom represents anything other than a convenient but highly romantic myth ... ." Graham, supra note 219, at 100 n.4. Professor Larkin rejects a major role for the Raleigh trial because colonial records during the 200 years between this trial in 1603 and the framing of the Sixth Amendment demonstrated little interest in the right. Larkin, supra note 221, at 70.

291. Larkin, supra note 221, at 71-73; Lilly, supra note 221, at 210-12; Politt, supra note 221, at 395-98. Professor Berger accepts the influence of experiences during both periods. Berger, supra note 125, at 568-86.

292. See Berger, supra note 125, at 560-86 (arguing Confrontation Clause is part of group of procedural rights surrounding jury trial designed to restrain government, and in particular to retain its creation of evidence through private interviews); Jonakait, supra note 96, at 581-96 (arguing that Confrontation Clause was intended along with other rights in Sixth Amendment to guarantee right to defense under adversary system, with confrontation right intended to guarantee right to cross-examine evidence in order that jury will have necessary information to evaluate it).

293. The procedural aspect of the confrontation right is supported by the work of Professors Berger, supra note 125, Jonakait, supra note 96, and Kirst. Roger W. Kirst, The Procedural Dimension of Confrontation Doctrine, 66 Neb. L. Rev. 485 (1987). It is also consistent at least to some degree with the concurring opinion of Justice Thomas in White. The evidence supporting their basic argument for a core concept appears virtually undeniable.

While Professor Jonakait focuses on the clause's purpose to guarantee cross-examination so that the jury can properly evaluate the evidence, Jonakait, supra note 96, at 586-88, Professor Berger argues for a somewhat different procedural purpose. She contends that the clause is primarily intended as a restraint on use of government power in the creation of evidence through private interviews. Berger, supra note 125, at 560-62. She argues that statements produced under such techniques can be admitted only if the declarant is subjected to cross-examination and/or if proof, such as tape recordings, is produced by the government documenting its evidence producing activities. Id. at 607-12.

The position taken in this article is somewhat consistent with both approaches. However, unlike Professor Berger, I cannot find any substitute for adequate cross-examination when such evidence is offered. Professor Jonakait's approach potentially differs from mine in that he suggests that the principal concern of the Confrontation Clause is not to check the prosecutorial adversary but rather to take power from judges, who had previously controlled the development of facts at trial.
Proof of the state’s case through ex parte accusations is antithetical to the adversary system in three regards. First, the manner in which the accusation is created is suspect—often secret and always one-sided. Second, the presentation of the state’s case through such documents rather than by oral presentation of the witness is inconsistent with face-to-face accusation. The historical record indicates that the drafters were not inclined to permit trial by dossier.\(^{294}\) Third, the procedure denies the ac-

\[^{294}\] See Graham, supra note 219, at 135. There appears to be no clear historical example of the presentation of the state’s case by ex parte affidavit or deposition followed by a right to cross-examine. However, in some instances during one period, affidavits were produced and then the declarant was asked in the presence of the defendant to affirm them. 5 Wigmore, supra note 103, § 1364, at 22-24. This practice was apparently viewed as offensive, but whether the practice was opposed because the declarant only affirmed the statement rather than testifying to it or because no right of cross-examination was granted is unclear.

If the Framers of the Confrontation Clause were concerned about political prosecutions, such as that of Raleigh, they were concerned about proof of the government’s case by ex parte affidavit and deposition. However, it is not at all clear that they were concerned exclusively with the right to cross-examine.

If Raleigh’s trial is the gauge, the exchange between Raleigh and the Court may give some guidance:

Lord Cecil. . . . Let me ask you this, If my lord Cobham will say you were the only instigator of him to proceed in the Treasons, dare you put yourself on this?

Raleigh. If he will speak it before God and the king, that ever I knew of Arabella’s matter, or the Money out of Spain, or of the surprising Treason, I put myself on it, God’s will and the king’s be done with me.

2 T.B. Howell, State Trials 24 (London, T.C. Hansard 1816). Raleigh is here not demanding a right to cross-examine Lord Cobham but is contending that Cobham would not accuse Raleigh to his face. See Wellborn, supra note 107, at 1093.

Justice Scalia’s quotation from Shakespeare is to the same effect: “’Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak.’” Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (quoting Richard II, Act 1, sc. 1). The demand is to have the accusation made face to face. See also Dowdell v. United States, 221 U.S. 325, 330 (1911), quoted in Coy, 487 U.S. at 1017 (“to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination.”) (emphasis added).

The language of the Confrontation Clause itself suggests that the Framers intended that the direct testimony be produced in court. It states that the “accused shall enjoy the right . . . to be confronted with the witnesses against him.” (emphasis added). To be “confronted with” certainly suggests that the evidence will be presented before the defendant. The alternative formulation “to confront” would be the more logical if the only guarantee were the right to cross-examine. See Michael H. Graham, Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions, 40 U. Miami L. Rev. 19, 65 (1985); see also Graham, supra note 198, at 582.

We certainly have no evidence that the Framers of the Sixth Amendment would have approved a procedure whereby the state produced its proof by ex parte statement with the defendant’s only right to call the declarant for cross-examination if he chooses to do so. On the other hand, nothing in this history or in precedent necessarily restricts the state from using prior statements to impeach, MacNally, supra note 228, at 378-81, and to corroborate, 5 Wigmore, supra note 103, § 1364, at 19-20 (use of prior consistent statements to corroborate testimony derived from early limitations on direct use of hearsay and survived until the end of 1700s). Similarly, my suggested interpretation of the Confrontation Clause, would not render invalid modern formulation of hearsay rules that admit prior statements as substantive evidence once the declarant has testified. See Fed. R. Evid. 801(d)(1).
cused the right to cross-examine the witnesses—to test their conscience about the accusation.

We have evidence that all three concepts were recognized as important differences between the idealized common-law system and the inquisitorial devil at the time of the framing and enactment of the Confrontation Clause. Blackstone, who was widely read by the Framers, noted each of those three failings of the inquisitorial model.295

Although each of these failings contributes to a lack of trustworthiness for the proof, the right articulated in the Sixth Amendment generally, and the confrontation right specifically, are not designed to make trustworthiness the defining principle.296 Rather, the central principle is that the Framers chose an adversarial system for criminal justice modeled on the revered English common-law tradition and, in doing so, rejected an inquisitorial one. Assuredly, the Framers made that choice in part because they believed the truth would be best found through such a system. However, the decision also involved a more fundamental decision about the relationship of the individual to the state, and a desire to restrain the power of the state. Specifically, there is no reason to believe that an inquisitorial procedure would have been regarded as satisfactory under this constitutional scheme even if that particular procedure promised to produce a more accurate result.

However, even though opposition to the worst elements of the inquisitorial system motivated acceptance of the Confrontation Clause, no affirmative evidence exists that the Framers intended the clause to limit its reach only to the specific inquisitorial procedures. The best guide—the actual words of the Sixth Amendment's Confrontation Clause—do not carry such a message. Nevertheless, there is strong reason to believe that the Framers intended the confrontation right to prevent such procedures in particular.

Accordingly, history and the text support the proposition that the Confrontation Clause applies to all accusatory hearsay. History suggests it applies with particular strength to statements and/or procedures resembling those involved in the trial of Sir Walter Raleigh. However, the critical offending characteristics are not immediately obvious because inquisitorial statements exhibit a number of elements. These include: the evidence was produced for testimonial purposes; it was documentary; it was produced by the state; it was prepared ex parte; it substituted for the live testimony of the declarant; and it was accusatory when made.

The immediate question is which of these factors are required for a statement to fall within a constitutionally significant core. No clear an-


swer is apparent. Of the factors listed above, the one that has the least support is that the statement be in writing. Although written accusations, such as affidavits and depositions, were perhaps given special weight, ascribing definitional effect to this formalism—the creation of explicitly testimonial materials—is not justified by the slight additional value given to written accusations.297 Clearly the general design of the clause requires no governmental involvement other than the fact that the state offers the statement. However, governmental involvement in some fashion in the creation of the statement is necessary to render the statement inquisitorial in nature. When the other factors are present (the statement was made as a potential substitute for the testimony of the declarant, it was produced ex parte, the declarant does not testify, and it was accusatory when made), the critical dangers are all present.

B. The Abandonment of the Anti-Inquisitorial Roots of the Confrontation Clause

The Supreme Court presently does not single out the type of hearsay evidence used in Sir Walter Raleigh's prosecution for particularly vigorous scrutiny. Instead, it has articulated a single system, albeit one with various prongs, that operates uniformly across the hearsay spectrum. This system is centered upon an analysis of the characteristics of the statement indicating trustworthiness. Obviously, this article argues that such a system is wrongly based, although not as errant as many commentators contend.

How the Court came to this position can be briefly sketched. Dean Wigmore had a dominant role in equating the Confrontation Clause with the guarantee of cross-examination.298 Using another element of Wigmore's analysis, the Court equated the protections of the Confrontation Clause and those of the hearsay rule, because the articulated theory of the modern hearsay rule is that it, like the Confrontation Clause, is designed to require cross-examination and its exceptions admit statements that provide a substitute for cross-examination.299

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297. Thus, Justice Thomas's position in White that the Confrontation Clause would apply only to formalized testimonial materials, White v. Illinois, 112 S. Ct. 736, 747 (1990), is not successful as a definition. However, he does identify what must be considered the most dangerous form of hearsay from a constitutional perspective. Significantly, this "central core" concept of the Confrontation Clause is found in ex parte videotaped statements admitted in child sexual abuse cases.

298. Wigmore further argued that the type of hearsay that could be received was not governed at all by the Confrontation Clause but rather by domestic evidence rules. 5 Wigmore, supra note 103, § 1397, at 159.

299. Id. § 1397, at 158-62; see also Imwinkelried, supra note 102, at 525 (Supreme Court first recognized that cross-examination is primary purpose of confrontation, then defined right functionally to assure accuracy of fact-finding, and finally concluded that prosecution can substitute showing of accuracy or reliability of hearsay for right to cross-examine); Massaro, supra note 120, at 868 n.22 (Wigmore considered the hearsay rule and confrontation guarantee coextensive because both protect the value of cross-examination). Wigmore did not support equating confrontation with trustworthiness, see Shaviro, supra note 296, at 360, but that has been the result of the Court's use of his analysis.

Wigmore's influence has been admirably described by others. In strongly criticizing the impact
Wigmore's view succeeded for a number of reasons. First, it was plausibly consistent with early precedent.\textsuperscript{300} In its first extended treatment of the Confrontation Clause in \textit{Mattox}, the Court recognized that the clause was not intended to change the existing law but rather to give the protections recognized at the time of the ratification the force of constitutional sanction. It proceeded to recognize two exceptions to the Confrontation Clause—the receipt of prior testimony and dying declarations—as consistent with such intent. Although the Court did not use the term \textit{hearsay} in the opinion, these were common-law hearsay exceptions, and the language of the opinion in describing the justification for receipt of dying declarations when slightly modified (as by Wigmore) resonated perfectly with the developing theory for the admissibility of hearsay exceptions.\textsuperscript{301}

Second, Wigmore's system gave the Confrontation Clause flexibility to grow as our view of hearsay matured and admissibility of hearsay was liberalized. Although \textit{Mattox} contained no statement that later adopted hearsay exceptions would also stand as exceptions to the Confrontation Clause, Wigmore, not implausibly, adopted such a view.\textsuperscript{302} Unless the

\textsuperscript{300} Of course, one cannot determine whether Wigmore wrote only a history of the hearsay rule, not the Confrontation Clause “since his dogmatic and completely undocumented assertion as to the meaning of ‘confrontation’ makes a separate history unnecessary.” Graham, supra note 219, at 118. Furthermore, Professor Graham interprets Wigmore's theory of confrontation as biased by his desire to promote hearsay reform and his opposition to the development of separate rules for criminal evidence, both of which were facilitated by defining confrontation as simply a guarantee of cross-examination. \textit{Id.} at 104 & n.24; Larkin, supra note 221, at 69 (foundations for Wigmore's conclusions that Confrontation Clause required only cross-examination “far from convincing”). See generally Gutman, supra note 102, at 327-43 (describing general influence of Wigmore's evidence scholarship and views upon development of confrontation right).

\textsuperscript{301} The sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight as if made under oath, there is equal if not greater reason for admitting testimony of his statements which were made under oath.

Mattox v. United States, 156 U.S. 237, 244 (1895). Wigmore shifted the emphasis from the oath to cross-examination and trustworthiness. See \textit{infra} discussion accompanying note 268.

As Professor Berger argues, there is a confrontation rationale available to explain the receipt of dying declarations based on waiver because the defendant was required to have killed the declarant under the definition of dying declarations generally in effect at the time of \textit{Mattox}. Berger, supra note 125, at 591. However, as the above quotation demonstrates, the Court explained the receipt of the evidence in terms conducive to interpretation as trustworthiness and necessity, the formula that was soon to be applied to the receipt of hearsay generally.

Professor Kenneth Graham argues that such an equivalence between cross-examination and the trustworthiness rationale of hearsay is fallacious for two reasons. First, the rationale for trustworthiness is a patent fiction untested empirically and likely to be ineffective. Second, because this theoretical structure was not developed at the time of the framing of the Sixth Amendment, the drafters could not have contemplated the existence of a hearsay exception as substituting for cross-examination. Graham, supra note 219, at 136.

\textsuperscript{302} 5 Wigmore, supra note 103, \S 1397, at 158 (“The rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein.”).
Confrontation Clause was to be a straitjacket, preventing development of the law of evidence and substantially impeding the efficient prosecution of criminal cases in a more complicated age, then something along the lines of Wigmore's suggestion was necessary. When the Supreme Court extended the Confrontation Clause to the states in 1965, the concerns of flexibility and efficiency became compelling.

Third, the system proposed by Wigmore serves reasonably well in the mine-run case from a functional perspective. The equivalence of the Confrontation Clause with the right to cross-examine and with the hearsay rule generates a focus on the trustworthiness of the statement, hardly an implausible concern of any constitutional system designed to protect defendants. The inquisitorial aspects of the procedure used against Raleigh threatened production of unreliable evidence. Untrustworthiness was potentially engendered through the power of the state to coerce and manipulate the statement at its creation, the absence of a face-to-face meeting that eliminates the psychological pressure constraining the making of a false accusation, and the lack of cross-examination that removes any ability to challenge and test the statement. Thus, a focus on trustworthiness helps meet functional concerns of the Confrontation Clause.

Indeed, outside the core of the Confrontation Clause, the concept of trustworthiness provides an imperfect but tolerable accommodation between the interests of practicality and the concerns of the Confrontation Clause. Particularly given the accumulation of precedent supporting this mode of analysis, it is reasonable to preserve something of that structure.

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303. This argument begs an important question. It is clearly possible that the Confrontation Clause was intended to be a straitjacket with respect to the admission of certain types of hearsay such as ex parte produced prosecutorial statements.


305. A focus on trustworthiness is particularly important if efficiency is considered critical. When dealing with statements, such as business records, that were likely not even contemplated as a problem by the Framers, or excited utterances, which may in some instances come closer to issues contemplated by the Framers, the inherent trustworthiness of the statement because of the circumstances under which the statement is produced both satisfies prosecutorial desire for easy admission of hearsay evidence, which the modern Supreme Court exploited, and provides a plausible basis on which to permit admission. In what he characterized as the "federalist approach," Professor Read demonstrates how the Confrontation Clause was accommodated to the states' interest in preserving their evidentiary rules through the balancing possible under the "indicia of reliability" test first articulated in Dutton v. Evans, 400 U.S. 74, 89 (1970). Read, supra note 102, at 41.

306. See, e.g., Berger, supra note 125, at 605 (majority opinion in Wright, although couched in terms of reliability and trustworthiness, has impact of restraining prosecutor from shaping evidence in ex parte interview).

307. Although most recent confrontation decisions have favored the prosecution, Idaho v. Wright, 497 U.S. 805, 826 (1990), restricted the admission of hearsay. It has come under criticism. See Ronald J. Allen, Foreword—Evidence, Inference, Rules and Judgment in Constitutional Adjudication: The Intriguing Case of Walton v. Arizona, 81 S. Ct. Rev. 727, 753-55 (1991) (questioning whether reliability of a statement can or should be evaluated exclusively upon its internal characteristics). And, its life span has been questioned. Imwinkelried, supra note 102, at 528-29 (suggesting uncertain future given that two of the five votes were cast by Justices Brennan and Marshall).

In Wright, the Court limited the type of evidence that could be considered in making the trust-
worthiness determination. It concluded that "other evidence at trial that corroborates the truth of the statement" could not be considered. 497 U.S. at 819. Instead "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." Id.

Justice O'Connor, writing for the majority, found this limitation in the theory of hearsay exceptions as stated by Wigmore. According to his theory, when the circumstances surrounding the making of the statement guarantee that it is free of inaccuracy and untrustworthiness, cross-examination is unnecessary to expose those infirmities. As a consequence, the statement may be admitted as an exception to the hearsay rule. Id. at 819-20 (quoting 5 Wigmore, supra note 103, § 1420, at 251).

O'Connor argued that precedent under the Confrontation Clause had established a similar role for the finding that a hearsay exception either is firmly rooted or has "particularized guarantees of trustworthiness." Once this finding is made, the statements are "so trustworthy that adversarial testing would add little to their reliability." Wright, 497 U.S. at 821.

O'Connor noted a general danger of the alternative approach and a more particularized one. The general danger is that otherwise presumptively unreliable statements could be admitted by "bootstrapping on the trustworthiness of other evidence at trial," thereby permitting introduction of evidence where cross-examination of the hearsay would hardly be of marginal value. Id. at 823. She cited the example of a statement made under duress, which may be true, but the circumstances of the statement are such that the declarant is particularly likely to have not told the truth and his or her state of mind should be probed. Id. at 822. The specific danger is that corroboration, if permitted, was likely to be misused to permit partial verification, demonstating only "selective reliability." In the context of child abuse, verification of the general fact of abuse may leave unverified the key issue of the identity of the abuser. Id. at 824.

Justice Kennedy dissented sharply. His main point was that eliminating corroboration from the determination of reliability is illogical: "It is a matter of common sense for most people that one of the best ways to determine whether someone says is trustworthy is to see if it is corroborated by other evidence." Id. at 828 (Kennedy, J., dissenting). He also argued that the result reached by the Court was not supported by prior precedent, which he contended relied explicitly or implicitly on an examination of external corroboration, id. at 831-32, and that the majority's distinction between factors demonstrating the "inherent trustworthiness" of the statement and external corroboration of its truth was unworkable. Id. at 833-34.

Whether Wright will be reversed depends upon which mode of Confrontation Clause analysis the Court follows in the future. Under the view that the Confrontation Clause is chiefly designed to advance "the accuracy of the truth-determining process in criminal trials," Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion), the opinion is likely doomed. Corroborated evidence is generally accurate evidence and should therefore be admissible. That was the message of Justice Kennedy's dissent although not its language.

However, intellectual consistency may save Wright. Justice O'Connor appropriately cited Wigmore's view of the rationale for hearsay exceptions as the basis for rejecting extrinsic corroboration. Wigmore's argument that confrontation means no more and no less than cross-examination, combined with a second argument derived from his work that statements admitted under established hearsay exceptions functionally satisfy the Confrontation Clause because the rationale for their existence eliminates any need for cross-examination, is the centerpiece of the dominant contemporary Confrontation Clause analysis. See supra notes 298-99 and accompanying text. Having used Wigmore's system as a justification largely to eviscerate confrontation applied to admitting hearsay statements, it would be wholly disingenuous to abandon that view when the system imposes costs. See also Berger, supra note 125, at 604-05 (arguing that, although rationale questionable, Wright performs important function of preventing prosecution from bootstrapping statements obtained through inquisitorial questioning into admissibility).

Justice O'Connor's position in Wright also receives substantial support from White. If an unavailability requirement is not imposed for hearsay statements meeting a firmly rooted hearsay exception, it is because cross-examination is deemed superfluous under Wigmore's rationale. White v. Illinois, 112 S. Ct. 736, 743 (1992) ("as we have also noted, a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability") (citing Wright, 497 U.S. at 220-21)). Thus, either corroboration cannot be used to establish trustworthiness, or the rationale of White cannot be extended to statements under nonfirmly rooted hearsay exceptions. In other words, unless unavailability is a requirement for admission of the particular hearsay, external corroboration should be excluded. If external corroboration is used, cross-examination is not even conceptually superfluous, a linchpin of the White analysis.

There are legitimate concerns about whether the majority in Wright articulated a workable
Some Justices\textsuperscript{308} and commentators\textsuperscript{309} have suggested that trustworthiness need not be abandoned as a concern but that it logically has a place only under due process analysis. Due process, however, is not effective when applied to individual pieces of evidence unless the item alone is tremendously powerful.\textsuperscript{310} Therefore, due process does not provide a vehicle for determining at the time of admission whether individual hearsay statements should be received. By contrast, use of trustworthiness analysis under the Confrontation Clause permits a trial court to make such individual determinations, a practice that the Confrontation Clause by its terms appears to contemplate.

The Supreme Court's system of analysis lost its integrity when it transformed trustworthiness from an instrumental concern to the articulated goal of the Confrontation Clause and abandoned a procedural perspective. This transformation was fully realized in the Court's decision in \textit{Inadi}. There the Court stated that "[t]he admission of co-conspirators' declarations into evidence thus actually furthers the 'Confrontation Clause's very mission' which is to 'advance the accuracy of the truth-determining process in criminal trials.'"\textsuperscript{311} In the words of Professor Massaro, this analysis, which also suggests that excluding trustworthy statements offered against the criminal defendant would violate his confrontation rights, "sounds wrong, because it is wrong."\textsuperscript{312} Furthermore, according to the Court in \textit{Inadi}, the defendant's right to compulsory process could satisfy any interest in physically confronting or cross-examining the declarant;\textsuperscript{313} the Court eliminated any procedural aspect of the Confrontation Clause on the ground that it adds little to the truth-determining process.\textsuperscript{314}

The history of the Confrontation Clause tells us that the procedural aspect to the right is a central element when applied to certain types of statements. The clause is designed to protect the defendant against the introduction of evidence produced under inquisitorial techniques. The procedural protections are the requirement that the declarant testify in an adversarial setting and the right to cross-examine. Espousing a proce-

distinction. See Allen, supra, at 754 (noting that two of the four factors identified by the Court as demonstrating inherent trustworthiness—lack of motive to falsify and use of age-inappropriate terminology—require reliance on external evidence). These are not trivial concerns, but they do not challenge the soundness of the conceptual judgment made in \textit{Wright}.

\textsuperscript{308} White, 112 S. Ct. at 747 (Thomas, J., concurring in judgment); California v. Green, 399 U.S. 149, 186 n.20 (1970) (Harlan, J., concurring).

\textsuperscript{309} Westen, supra note 214, at 599-600.

\textsuperscript{310} See Green, 399 U.S. at 186 n.20 (Harlan, J., concurring) (due process analysis would mean that conviction should be reversed if critical issues at trial were supported only by testimony found to be unreliable).


\textsuperscript{312} Massaro, supra note 120, at 887; see also Jonakait, supra note 96, at 581 (under Court's present analysis, defendant does not need confrontation right because defendant and prosecutor are on same side both seeking most accurate truth-determining process).

\textsuperscript{313} Inadi, 475 U.S. at 396-400.

\textsuperscript{314} \textit{id.} at 396.
dual focus of this type is not equivalent to adopting a functional approach to confrontation, and it is not satisfied by a showing of trustworthiness. Thus, Justice Thomas in *White* was correct when he stated: "Nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of ex parte affidavits found to be reliable."\(^{315}\)

C. The Requirements of Confrontation

As one should anticipate, the above analysis answers only a few confrontation questions directly, but it provides some general indicators that may be applied more broadly. What I have suggested is that a more exacting test should be applied to a core group of statements—those that exhibit the dangers of inquisitorial methods. In making this argument, I recognize full well that establishing a two-tiered system for the Confrontation Clause is not likely to be embraced by the current Supreme Court, and the text provides no basis for such a system. However, eliminating all confrontation protection except for statements within the core is not justified. As developed above, historically examined, the Confrontation Clause should apply to all statements that were accusatory when made, and in the area outside the core, the existing system based on trustworthiness may continue to operate.

However, if a two-tier system is not accepted, applying the Confrontation Clause with some real vigor only to its core\(^{316}\) would be preferable.

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315. *White v. Illinois*, 112 S. Ct. 736, 747 (1992) (Scalia, J. concurring in judgment); *see also* Park, *supra* note 118, at 94-104 (different treatment of hearsay in criminal cases may be justified by our suspicion of evidence created by police and our desire to control governmental power).

Justice Thomas could be correct either because there is an area—a core type of statements—where reliability analysis does not operate and a categorical restriction is imposed, or because inquisitorial methods for producing evidence so negate reliability that other indicia of trustworthiness would likely never provide an adequate counterbalance. This article contends the treatment should be categorical rather than factually determined.

Although not wholly consistent with recent precedent, some transformation of the Confrontation Clause to recognize a core interest is still possible within the Court's framework of analysis. *Lee v. Illinois*, 476 U.S. 530 (1986), provides both the basis for a new beginning and the most difficult impediment to the new system. In *Lee*, the question was the admissibility of a confession by a nontestifying codefendant implicating both himself and Lee, and because the statement of her codefendant Thomas was written, *id.* at 532-33, it should fall within Justice Thomas's definition. *See White*, 112 S. Ct. at 747 (Thomas, J., concurring in judgment).

The confession was ruled inadmissible. However, the Court stated even in this context that "[t]he right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee*, 476 U.S. at 540. On the other hand, the majority recognized that statements of codefendants "have traditionally been viewed with special suspicion" and that such accusations "under circumstances in which the declarant stands to gain by implicating another . . . is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Id.* at 541. However, this language does not clearly distinguish statements by codefendants from other statements not falling within a firmly rooted hearsay exception, which Roberts viewed as "presumptively unreliable and inadmissible" absent a showing of particularized guarantees of trustworthiness. *Id.* at 543 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). A special treatment of confessions by codefendants can therefore be supported from the *Lee* opinion, but the fairest reading of this opinion is that the Court would not require unique treatment.

316. If only the core were to be protected, one would be more conservative in specifying which
to the present state of affairs where a watered down right is applied uniformly to all hearsay statements offered against the defendant. The result is to provide inadequate protection where the dangers are extreme—when the statements exhibit the evils that provoked the Framers to add the right of confrontation to the Constitution. 317

First, under the theory I propose, the fact that a statement is made under inquisitorial methods acts as a trigger, and special requirements must be met before the court will receive the statement. At an extreme, a procedural prohibition is directly imposed on the prosecution: it may not prove its entire case through statements, documents, or videotape produced in an ex parte manner by government agents. Trial by dossier is not consistent with the requirement of confrontation, which governs more than just the right to cross-examine. 318

Second, the clause expresses a preference for receiving testimony through the witness’s presence on the stand for direct examination. Accusations must be made in an adversarial setting.

The proper definition of unavailability flows from concerns related to the requirement of live testimony by witnesses, and consequently, the prosecution does not establish unavailability simply by making the declarant available. For a declarant who is physically available and apparently able to testify, unavailability requires that the prosecution attempt but fail to elicit the testimony from the witness. Even the Supreme Court’s recently described constitutional preference for the better evidence, 319 presupposes an effort to receive the testimony from the witness.

characteristics were essential to making a statement inquisitorial. See supra text accompanying note 297.

Although Justice Thomas defined a core concept in White, he did not specify what protections would be afforded to statements within the core. One might anticipate that the protections would be minimal, such as requiring that the declarant be produced, which is certainly not all the confrontation right should entail, as developed in the text that immediately follows and in part V.

317. See Kiri, supra note 293, at 486 (abandonment of procedure perspective and exclusive reliance on trustworthiness analysis opens the door for revival of trial by affidavit). By contrast, the court in United States v. Flores, 985 F.2d 770, 777, 780-83 (5th Cir. 1993), took protection of the “core values of the Confrontation Clause” into account in finding unconstitutional admission of grand jury testimony by a codefendant as a statement against penal interest.

318. See Jonakait, supra note 96, at 619-20 (arguing that allowing prosecution to produce its case through hearsay and forcing defendant to call declarant for cross-examination alters accepted timing of cross-examination in our adversary system that is inconsistent with part of Confrontation Clause’s guarantee); Westen, supra note 214, at 577-79, 615-22 (arguing that Confrontation Clause imposes rule of preference that, where defendant might reasonably expect to want to cross-examine, prosecution must call and examine its witnesses in order to facilitate defense examination while incriminating evidence still fresh and not yet frozen in jury’s mind). In State v. Larson, 453 N.W.2d 42 (Minn.), cert. granted, judgment vacated, and remanded, 498 U.S. 801 (1990), the Minnesota Supreme Court adopted “a modified version” of Professor Westen’s approach, deciding that for “future cases of this kind the state must, when expressly requested by the defendant to do so, call in its case-in-chief an available witness whose hearsay statements are being admitted against the defendant.” Id. at 47; see also State v. Larson, 472 N.W.2d 120, 124 n.1 (Minn.), cert. denied, 112 S. Ct. 965 (1991) (reiterating position on remand).

319. United States v. Inadi, 475 U.S. 387, 394 (1986) (“When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.”).
on the stand not only with regard to cross-examination but also direct examination. The correct requirement is not derived from a best evidence principle at all, however, but from opposition to inquisitorial methods: not a preference for the best evidence but a preference to have the accusation delivered face-to-face.

Third, when a prior statement produced ex parte by government agents is offered from an available declarant under the principle that subsequent cross-examination justifies admissibility, the definition of what constitutes an adequate opportunity to cross-examine should be rigorously enforced. Deviations from full cross-examination should not be accepted when the state has chosen to use an inquisitorial method to produce an accusatory statement. Availability for cross-examination should mean that the defendant has both an opportunity to ask questions and a right to have them answered. Refusal of a witness to answer should not provide a basis for admission, such as a child becoming unresponsive on cross-examination to questions about the key elements of his accusation against the defendant.

For such statements, the testimony should be excluded in all but the most extraordinary situations if the declarant is unavailable to be cross-examined. The fact that a statement was produced by the government in an ex parte manner is not just a single circumstance suggesting unreliability. Necessity through unavailability is not alone a sufficient basis for admission. Necessity combined with some traditional indicia of reliability may be sufficient to admit ordinary hearsay evidence, but only cross-examination should permit admission of statements within the core.

320. This principle does not prevent use of statements to impeach or to corroborate. See supra note 294.

321. The common forms of hearsay covered by this rule would be statements inculpating the defendant made by codefendants in custody, statements made before the grand jury, and formalized statements—particularly videotaped statements—made by children to all those charged with duties to investigate abuse. See Berger, supra note 125, at 596-612 (setting out such categories).

Professor Berger would also include statements made by coconspirators when the receiver of the statement is a government informer. Id. at 596-600. She bases special treatment of such statements upon the possibility that the agent framed questions so as to encourage certain replies. Berger, supra note 122, at 596. Special treatment may rely on concerns for the accuracy of the hearer's rendition of the statement. Cf. Park, supra note 118, at 56-58 (arguing that dangers related to accuracy of hearer's rendition of statement provides largely ignored historical justification for excluding hearsay).

322. Professors Jonakait and Westen develop an analysis that would excuse cross-examination in certain circumstances. See Jonakait, supra note 96, at 596-97 (unconfronted statements may be received when, according to defendant's perspective, statement can be accurately evaluated by jury without further cross-examination); Westen, supra note 214, at 617-18 (eliminating prosecution's obligation to produce declarants when "the defendant could not reasonably be expected to wish to examine the declarant in person"). The exceptions developed under their systems, however, would not be met by any statements within what I have defined to be the core concern of confrontation.

Professor Berger argues that establishing some procedural protections that diminish the dangers posed by inquisitorial methods of evidence development might satisfy Confrontation Clause concerns if combined with a determination that the statement was reliable. Berger, supra note 125, at 612. Unless the procedural protection is so substantial so that the statement no longer poses the dangers inherent in inquisitorial statements, which will rarely be the case, I contend that cross-examination remains the only constitutionally satisfactory protection.
V. CONFRONTATION CLAUSE AND EVIDENTIARY ANALYSIS OF MODERN CHILD SEXUAL ABUSE HEARSAY INNOVATIONS

A. Application of Constitutional Doctrines to Admission of Ex Parte Videotaped Statements of Child Victims

The most interesting and troubling response to hearsay issues in child sexual abuse prosecutions has been legislation authorizing receipt of ex parte videotaped interviews of the child victim. These statutes represent very stark challenges to the Confrontation Clause. Nonetheless, state courts are split on their constitutionality. Some have found such statutes valid against all objections. Others have ruled the statutes unconstitutional, relying on both the Confrontation and the Due Process Clauses.

These statutes and the state courts’ responses to them provide an excellent testing ground for confrontation analysis. Although the decisions striking down the statutes reflect a basic sense that the new exception denies fundamental constitutional rights, whether their reasoning is defensible under the Supreme Court’s current analysis is unclear. If these statutes are constitutional, we have powerful proof that the Confrontation Clause is not much more than a valueless “form of words.”323 If they are unconstitutional, the reasons why they fall short should help reveal the irreducible minimum of the confrontation right.

I. Conflicting Results in State Courts

In State v. Schaal,324 the Missouri Supreme Court upheld a statute that was very far-reaching in its impact. First, it imposed no general requirement of a finding of reliability of the statement.325 Second, it allowed admission if “[t]he child is available to testify.”326 Third, it afforded the defendant neither an automatic nor an immediate right to cross-examine, stating that “either party may call the child to testify and the opposing party may cross-examine the child.”327

The court ruled the statute constitutional even under a very problematic fact pattern. The videotape, which recorded an interview be-

323. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (referring to meaninglessness of Fourth Amendment right without remedy of excluding evidence obtained through its violation).
324. 806 S.W.2d 659 (Mo. 1991), cert. denied, 112 S. Ct. 976 (1992).
325. It did require accuracy of the recording, Mo. Ann. Stat. § 492.304(1)(3) (Vernon Supp. 1993), and prohibited questions “calculated to lead the child to make a particular statement or to act in a particular way.” § 492.304(1)(4).
326. Id. § 492.1(8). Although the supreme court found this provision constitutional, Schaal, 806 S.W.2d at 663, the Missouri legislature recently amended the statute to eliminate this provision. This new version of the statute excludes the videotaped statement unless the child actually testifies at trial or the statement satisfies the requirement of the state’s general child victim hearsay exception. L. 1992 S.B. No. 638 A (see Mo. Ann. Stat. § 492.304.2 (Vernon Supp. 1993)). Statutes in other states, see e.g., La. Rev. Stat. Ann. § 15:440.5 (West 1992), continue to admit statements based on the child’s mere availability to testify.
tween a seven-year-old child victim and a psychologist, was not the first effort to tape a conversation. The psychologist had attempted another interview several days earlier, but "that effort ended without a usable tape being made, as [the child] . . . was uncomfortable discussing these topics before a camera." 328 The first tape was destroyed when the second session was recorded over it. 329 At trial the prosecution played the tape for the jury as part of its case-in-chief. Although the child was available to testify, neither the state nor the defendant called her to the stand.

The state supreme court considered Green sufficient to answer all Confrontation Clause issues. It found no constitutionally significant distinction between affording the defendant an opportunity to examine and requiring the state to call the child. 330 Similarly, it considered of no great moment the fact that the hearsay statements admissible under the statute were consistent with the state's position whereas those in Green were explicitly inconsistent. 331

The court also dismissed a due process argument that the statute placed the defendant at a marked disadvantage by requiring him to call the declarant, which the defendant argued would engender juror hostility, and by not guaranteeing him the right to cross-examine. 332 The court gave the first of these arguments short shrift, suggesting that such difficulty was inherent in confronting a child witness and simply a vexing matter of strategy. With regard to the right to cross-examine, the court viewed the common-law right to cross-examine upon a demonstration of hostility to be adequate protection. 333 The decision in Schaal thus gives broad approval to receipt of ex parte videotapes, and although not painting with such broad strokes, several other states have concurred. 334

On the other side of the ledger, two state supreme courts have ruled

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328. Schaal, 806 S.W.2d at 661.
329. Id.
330. Id. at 663. The court cited Kentucky v. Stincer, 482 U.S. 730, 739 (1987) for the proposition that the opportunity to cross-examine was all that the Constitution requires.
331. Schaal, 806 S.W.2d at 663.
332. At least the second of these two arguments might fairly be treated as a Confrontation Clause challenge, because the right to cross-examine is generally assumed as the mode of confrontation assured by the Constitution. See United States v. Inadi, 475 U.S. 387 (1986); Ohio v. Roberts, 448 U.S. 56 (1980). However, the Court has never squarely held that the mode of confrontation must necessarily be by way of cross-examination rather than direct.
333. Schaal, 806 S.W.2d at 664.

Louisiana's intermediate appellate courts have ruled constitutional its ex parte videotaping statute, LA. REV. STAT. ANN. § 15:440.5 (West 1992). See e.g., State in Interest of R.C. Jr., 514 So. 2d 759 (La. Ct. App. 1987); State v. Feazell, 486 So. 2d 327 (La. Ct. App. 1986). Although the statute requires only that the child must be "available to testify," § 15:440.5(B), the Louisiana courts have not decided whether availability alone is constitutionally sufficient because the prosecution apparently follows a practice of calling the child as a witness. R.C., 514 So. 2d at 760; Feazell, 486 So. 2d at 331. However, in State v. Gray, 533 So. 2d 1242, 1249 (La. Ct. App. 1988), the court suggested
ex parte videotape statutes unconstitutional. The Illinois Supreme Court in *People v. Bastien*, and the Tennessee Supreme Court in *State v. Pilkey*, largely following *Bastien*, found their statutes unconstitutional on Confrontation Clause grounds. In *Bastien*, the court examined a statute that required the child to be available to testify and guaranteed the defendant the opportunity to cross-examine the child at trial. The court held that the lack of provision for cross-examination at the time of the out-of-court statement made the statute unconstitutional.

The *Bastien* court concluded that *Green* did not support the statute’s constitutionality because *Green* dealt with admission of statements inconsistent with trial testimony. Because a witness making an inconsistent statement has necessarily changed stories, delay had not allowed the original version to “harden and become unyielding to the blows” of cross-examination. However, when the statement has not changed, that danger remains and “unnecessarily and impermissibly infringes on an accused’s right of confrontation.”

*Bastien* advanced two further arguments against constitutionality. First, because the child must be available to testify, necessity does not support the admission of the testimony, and the videotape is little more than a “weaker version” of live testimony that is not constitutionally preferred. Second, the court feared that upholding the statute would

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that requiring the defendant to call the child as an adverse witness during his case in order to exercise his confrontation rights appeared unconstitutional.

In *State v. Tarantino*, 458 N.W.2d 582 (Wis. Ct. App. 1990), the Wisconsin Court of Appeals approved its statute, which has the same requirement of a finding of “indicia of reliability” as does the Kansas statute. Wis. STAT. ANN. § 908.08(3)(d) (West Supp. 1991). Its allowance for cross-examination is explicit and immediate, specifying that if the party admitting the videotape does not call the child, the trial judge, “upon request by any other party, shall order that the child be produced immediately following the showing of the videotape statement to the trier of fact for cross-examination.” *Id.* § 908.08(5). Moreover, on the facts of *Tarantino*, not only was the child in fact cross-examined at the trial, but because the videotape involved happened to have been produced at a preliminary hearing, there had been contemporaneous cross-examination by the defendant, which was shown to the jury. 458 N.W.2d at 584-85. The court in *Tarantino* also examined whether requiring the defendant to request the calling of the child for cross-examination violated due process. It rather easily dismissed the argument on the basis that there was no need for the jury to be informed that the defendant caused the child to be called because the actual calling is to be done by the court. *Id.* at 588-89. That response answers the issue because any anger flowing from the conduct of the cross-examination, rather than the calling of the child, would not be a consequence of the admission of the videotape. See also *Briggs v. State*, 789 S.W.2d 918, 922 (Tex. Crim. App. 1990) (finding Texas’s statute constitutional as applied because the prosecution called the child as a witness in its case-in-chief).

337. The case came to the state supreme court on the basis of the trial court’s ruling that the statute was unconstitutional, which prevented the prosecution from admitting the videotape at trial. *Bastien*, 129 Ill. 2d at 67, 541 N.E.2d at 671, 133 Ill. Dec. at 460. As a result, the particular facts of the case and the opportunity for cross-examination were not developed.
340. *Id.* at 77-78, 541 N.E.2d at 676, 133 Ill. Dec. at 464-65.
341. *Id.* In support of this point, the court quoted the “better evidence” distinction developed
open the flood gates to videotape recordings of key prosecution witnesses. Indeed, the state conceded at oral argument that the statute's rationale would also apply to other types of witnesses, and the court found the danger of expansion very threatening.342

The Texas Court of Criminal Appeals in Long v. State343 accepted the due process argument rejected in Schaal, holding the defendant could not be required to choose between giving up his right to cross-examine and calling the child with the potential of incurring the wrath of the jury.344 Courts have also objected to the use of videotape on the basis

in Inadi between prior testimony and coconspirator statements for this proposition. United States v. Inadi, 475 U.S. 387, 394 (1986).

Similarly, in Pilkey, the Tennessee Supreme Court, while recognizing that the requirements of the Confrontation Clause, like contemporaneous cross-examination, can be required to give way where necessary, found no basis in necessity for using the procedure authorized by the statute. First, there was no required finding that courtroom testimony would result in trauma for the child. Second, the statute permitted the child to be called as a witness, so that a policy of shielding the child from trauma would only be partially accomplished. State v. Pilkey, 776 S.W.2d 937, 949-51 (Tenn. 1989).

The Texas Court of Criminal Appeals in Long v. State, 742 S.W.2d 302, 316-18 (Tex. Crim. App. 1987) (en banc), cert. denied, 485 U.S. 993 (1988), also made this general argument. It noted that under the circumstances of the case the prosecutor's actions in calling the child demonstrated that the state's only interest was in effectively prosecuting the defendant, not in protecting the child. Id. at 318. Subsequent cases from the Texas Court of Appeals have muted that message, however.

In Briggs v. State, 789 S.W.2d 918 (Tex. Crim. App. 1990) (en banc), for example, the court found the statute's ineffectiveness in achieving its goal of protecting children no basis for invalidating the statute. Id. at 922 & n.4.

342. Bastien, 129 Ill. 3d at 79, 541 N.E.2d at 677, 133 Ill. Dec. at 466. The Oklahoma Court of Criminal Appeals likewise held its statute unconstitutional in Burke v. State, 820 P.2d 1344 (Okla. Crim. App. 1991), cert. denied, 112 S. Ct. 2940 (1992). The precise basis of the ruling is unclear, however. The court was most concerned about "manufactured hearsay," id. at 1346, that gave the state an unfair advantage in presenting its principal witness through a carefully prepared and effective videotape and presented the child's testimony twice if the witness also testified at trial. Id. at 1348. The court found particular fault in a provision that allows admission of such evidence where the child is ruled unavailable and the court finds "sufficient indicia of reliability." OKLA. STAT. ANN. tit. 22, § 752 nn. 1 & 9 (West 1992). The court concluded that indicia of reliability could be satisfied only by the opportunity for cross-examination. Burke, 820 P.2d at 1347-48. This position appears to track the mistaken interpretation of the Texas Court of Criminal Appeals in Long that Green relied in all instances on the fact that the prior statements had been cross-examined. Long, 742 S.W.2d at 318-19. See infra note 344.


344. Id. at 321; cf. Sosebee v. State, 357 S.E.2d 562, 563 (Ga. 1987) (to avoid potential constitutional difficulties, court interpreted general child hearsay statute, which was ambiguous as to who had duty to call available child witness, to require court to call witness at request of either party, to inform jury that it was court that called witness, and to permit both parties to cross-examine). But cf. Briggs v. State, 789 S.W.2d 918, 922 (Tex. Crim. App. 1990) (recognizing possibility of denial of due process, but finding no violation on facts of case because state called child as witness in its case-in-chief). In Pilkey, though not squarely ruling on the issue because of uncertainty regarding the meaning of its provision, the court was concerned about the sufficiency of procedures that required only that the child be available and did not explicitly guarantee a right of the defendant to cross-examine. Pilkey, 776 S.W.2d at 948-49.

Long rested its decision that the Texas statute was unconstitutional on a Confrontation Clause argument, at least one element of which appears plainly wrong. The court interpreted Green as basing the admissibility of the prior statements in all instances on the fact that they were subject to contemporaneous cross-examination at a preliminary hearing. Long, 742 S.W.2d at 318-19. That analysis ignores a separate holding of Green that subsequent cross-examination of an inconsistent statement itself satisfies the Confrontation Clause. See supra part III.D.1.
that it improperly bolsters the witness's testimony, sometimes suggesting a constitutional basis for that objection.345

2. The Fundamental Issues Presented by These Statutes

When examining such ex parte statements, the Confrontation Clause might impose five types of requirements: (1) the defendant must have the right to cross-examination at the time the out-of-court statement is made; (2) the state must present the live testimony in the presence of the defendant and the jury; (3) the witness must testify on direct examination in an adversarial setting; (4) the defendant must have the opportunity to full cross-examination, not limited by refusals to testify or claims of failure of memory; and (5) the defendant must have the right to cross-examination in a traditional form contemporaneous with the introduction of the statement at trial.

Schaal either explicitly or implicitly rejects each of those protections, and the revealing point is that it did not clearly misapply any recent Supreme Court precedent in doing so. Moreover, the arguments made in Bastien against the statute are not obviously sufficient. For example, the U.S. Supreme Court found nothing critical about the distinction between consistent and inconsistent statements in its Owens decision where the out-of-court statement was consistent with the prosecution's position and not contradicted by the declarant's limited in-court testimony.346

The inability of current doctrine to resolve adequately the fundamental challenge these new statutes pose to the Confrontation Clause, combined with the inconsistent results reached in Schaal and Bastien, graphically demonstrate the need for reevaluation of the Supreme Court's approach. From a historical perspective, little should be clearer than that statutes admitting ex parte statements violate the clause.347 The analogy to Sir Walter Raleigh's case is powerful. Other than the greater impact of videotaped evidence as compared to written depositions, which should exacerbate this constitutional infirmity, the only distinction between receiving the deposition of Lord Cobham in Raleigh's case and videotaped statements of children is the modern statutes' requirement of the child's availability. Upholding the modern statutes on

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345. Long, 742 S.W.2d at 322 (due process violated where statute permitted state to introduce both victim's live testimony and videotape of same events). Burke, 820 P.2d at 1348 (following Long with respect to impropriety of bolstering; unclear whether disapproval is on constitutional grounds, although appears that court finds vice of bolstering testimony either alone or in combination with other infirmities of statute to be violation of defendant's Sixth Amendment right).

346. Owens to be sure involved a prior identification and not a prior consistent statement per se. However, the witness's testimony at trial, insofar as it went, was entirely consistent with the prosecution's position at trial. The witness remembered making an identification of the defendant but no longer remembered seeing his assailant at the time of the attack. United States v. Owens, 484 U.S. 554, 556 (1988).

347. See Graham, supra note 198, at 582 (statutes such as these present type of abuses—trial by ex parte affidavit—that produced Sixth Amendment).
the basis of that distinction would effectively read the Sixth Amendment
to guarantee only compulsory process and read the Confrontation Clause
completely out of the Constitution, at least as it means the right to cross-
examination.

Assuming that the procedure authorized by a statute like that in
Schaal is fundamentally inconsistent with the rights guaranteed by the
Confrontation Clause, the task is to identify both the feature that raises a
fundamental constitutional challenge and the minimum protections re-
quired by the Confrontation Clause. I posit that the feature that invokes
special treatment is the authorization of ex parte production of evidence
by the government. When this inquisitorial method is used, courts must
provide offsetting Confrontation Clause protections before admitting the
evidence. First, cross-examination that is effective, traditional in form,
and contemporaneous with the introduction of the statement is required.
Second, although the right to cross-examine is of preeminent importance,
the confrontation right also requires the witness to give direct testimony
regarding the subject matter of the statement in an adversarial setting. 348

One might argue that the lack of a mandatory finding of trustwor-
thiness is also a critical defect in the statutes. Under current Supreme
Court analysis that deficit certainly necessitates an opportunity for cross-
examination. However, I contend that, even if the Court mandates a
finding of trustworthiness, it must also afford the opportunity for cross-
examination. A finding of trustworthiness should not be sufficient to au-
thorize admission of hearsay without cross-examination where the gov-
ernment ex parte produced the statement for evidentiary purposes.

A possible alternative position is that such ex parte statements
should be per se inadmissible. Although that may be an attractive initial
position, the confrontation guarantee is a right to challenge the evidence,
not a right to automatic exclusion of ex parte statements. Instead, assur-
ing testing in our chosen adversarial method is the key.

3. Adequate and Effective Cross-Examination Given Developmental
and Other Limitations of Child-Witnesses

An earlier part analyzed the general requirements regarding the ade-
quacy of subsequent cross-examination. 349 Although the issues do not
appear to change fundamentally but only to become somewhat more dif-
cult when the witness is a child, I contend that when child witnesses are
involved the meaning of an adequate opportunity for cross-examination
must change. 350

348. My argument is that for such inquisitorial statements, the Confrontation Clause requires
satisfaction of items (3) through (5). See supra text following note 345. The Confrontation Clause
requires neither that cross-examination be contemporaneous with the making of the out-of-court
statement nor that testimony be in the physical presence of the defendant and jury, assuming there is
some justification, such as trauma, for dispensing with physical presence.
349. See supra part III.D.1.
350. The resolution of the adequacy of cross-examination issue is particularly important because
When young children testify at trial, they are often unable or unwilling to recount the events underlying the criminal charges. They may in fact not remember what happened. They may only marginally understand the meaning of an oath. They will usually exhibit nervousness and often more substantial physical manifestations of trauma. All of these factors may be the simple result of youth, forgetfulness, and unfamiliarity with the trial setting; confabulation or misinterpretation; the product of fear of defendants who committed heinous crimes against them; or the telltale consequences of lying, usually the result of manipulation by an interested adult.351

The child's demeanor and other signals provided during testimony can be exceedingly difficult for a jury to judge accurately in determining which of the above explanations is correct. Unlike even an atypical cross-examination of an adult, such as those that occur when an adult accomplice refuses to acknowledge the accuracy of a statement incriminating to the defendant,352 the young, apparently frightened child's testimony does not provide the jury with "a satisfactory basis for evaluating the truth of the prior statement."353 Given the highly plausible explana-

when the child is subject to what is considered constitutionally adequate cross-examination no inquiry into the trustworthiness of the hearsay statement is conducted. No showing of indicia of reliability is required whether the statement is admissible as a new and novel exception designed to receive child sexual abuse hearsay or a statute admitting ex parte videotaped statements. See United States v. Spotted War Bonnet, 933 F.2d 1471, 1473-74 (8th Cir. 1991) (case remanded for trustwor-thiness analysis under Idaho v. Wright, 497 U.S. 805 (1990), resolved without such inquiry because children testified and were subject to cross-examination), cert. denied, 112 S. Ct. 1187 (1992); Tucker v. State, 564 A.2d 1110, 1123-24 (Del. 1989) (where child victim available for cross-examination, out-of-court statements admissible without showing of indicia of reliability).


The type of problem encountered depends somewhat on the age and developmental state of the child. See generally Nancy W. Perry & Lawrence S. Wrightsman, The Child Witness 55-96 (1991) (outlining developmental stages of child with regard to traits required of witnesses). Even though some age distinctions regarding credibility are beginning to emerge, see infra note 355, how confrontation rights might vary depending upon age has not been examined, and I have not developed any principled distinction, although it is possible that with further analysis deviations from uniform treatment would be shown to be appropriate. However, the number of factors that bear upon a particular child's responses are so numerous and significant that using age alone for differing categorical treatment of children is unlikely to prove appropriate. See Gail S. Goodman & Beth M. Schwartz-Kenney, Why Knowing a Child's Age Is Not Enough: Influences of Cognitive, Social, and Emotional Factors on Children's Testimony, in CHILDREN AS WITNESSES, supra note 136, at 15-31.

352. United States v. Owens, 484 U.S. 554, 570-71 (1988) (Brennan, J., dissenting) (when witness who asserts memory loss does so under circumstances that suggest bias or ulterior motive, ability to cross-examine considered constitutionally effective given witness's apparent self-interest); cf. Nelson v. O'Neill, 402 U.S. 622, 627-29 (1971) (witness's denial that he made statement incriminating to defendant and his repudiation of its substance satisfied confrontation right). See supra notes 177-84 and accompanying text.

353. California v. Green, 399 U.S. 149, 161 (1970). Similarly, in Owens the Court concluded that the defense has realistic weapons to impugn the witness's statement when memory loss is asserted, including the value to the defense of the very fact that the witness has a defective memory. Owens, 484 U.S. at 559-60.
tions for refusals to testify by a child that are consistent with the truth of the out-of-court statements and therefore the guilt of the defendant, such refusals and/or claimed failures of memory provide no alternative to adequate cross-examination. This is because signs of distress generally enhance the child’s credibility. Thus, as a class, child witnesses’ refusals to testify or claims of forgetfulness are inadequate bases for evaluating the credibility of the witness. Adding fundamentally to the significance of any inadequacy in cross-examination is the fact that the testimony at trial may be far inferior in appearance and quality to testimony received through hearsay statements, particularly those presented by videotape.

In addition to excluding statements where the child directly or indirectly refuses to testify, I contend that ex parte statements should not be admissible unless the cross-examination is effective. Given current precedents, this is an extremely difficult position to establish.

The courts, while occasionally recognizing the sensitivity of the issues, have not been very attentive either to the differences between the appropriate treatment of children and adults or particularly sensitive when hearsay of an especially questionable nature is involved. Under general application of Green and Owens, courts have ruled that the child is not required to testify concerning the prior statement or its details. The Confrontation Clause is held satisfied if the child testifies on direct examination so as to be subject to cross-examination on the prior statement. Also, courts have consistently ruled that the child’s refusal or inability to answer questions about particular subjects does not offend the


355. The impact on credibility of gaps in the child’s testimony is ambiguous according to the empirical research. When the gap appears reflective of distress or fear, credibility may be enhanced. See supra note 354. However, particularly with young children who are presumed incapable of conscious fabrication, credibility may still be harmed by the lack of detail, which casts doubt on the accuracy of the child’s testimony. Gail S. Goodman et al., Determinants of the Child Victim’s Perceived Credibility, in Perspectives on Children’s Testimony 12, 18 (S.J. Ceci et al. eds., 1989). In general, the credibility of children may be divided into two different fields depending upon whether cognitive ability or honesty is most important. When the issue is accuracy of memory, as it often is with eyewitness testimony, a child’s youth and lack of cognitive abilities harm credibility. By contrast, when the principle issue is honesty, as it most frequently is in child sexual abuse cases, youth and lack of cognitive abilities enhance credibility because children are not viewed sufficiently sophisticated to lie. Perry & Wrightsman, supra note 351, at 31-36.

356. In United States v. Spotted War Bonnet, 933 F.2d 1471 (8th Cir. 1991), cert. denied, 112 S. Ct. 1187 (1992), the court assumed that physical presence and simply putting the child on the stand would not be sufficient if her mental maturity is such that she is too young to be cross-examined at all or too young and too frightened to be subjected to a thorough direct and cross-examination. Id. at 1474.

357. United States v. Gibson, 29 M.J. 379, 382 (C.M.A. 1990) (Confrontation Clause satisfied because child testified in the case and was available to be cross-examined about pretrial statements); State v. Nelson, 725 P.2d 1353, 1356-57 (Utah 1986) (Green imposes no requirement that direct examination cover any particular subject matter and no issue regarding right to cross-examine presented because direct examination, though not covering details of statement, triggered right to cross-examine under domestic evidence law).
confrontation right.358 The courts have not been as concerned about selective testimonial coverage of the critical facts359 as they have been about selective corroboration.360 In particular, reluctance to testify may be sufficient in ordinary situations to satisfy confrontation concerns,361 but reluctance should be met with insistence that the child respond to questions, and when statements at the core of the Confrontation Clause are involved, reluctance to testify should result in exclusion.

These difficulties in cross-examining young children who approach incompetency resulting from their normal developmental limitations may be easily dismissed as not denying the opportunity for effective cross-examination in the mine-run situation,362 but a different result should obtain when the statements are developed through modern forms of inquisitorial procedures. In the latter situation, either the cross-examination must in fact be adequate, or the state should lose the advantage of admitting the specially prepared videotaped statement of the child. Likewise, selective availability for cross-examination should result in inadmissibility when the government seeks to change the accepted rules and to introduce its principal evidence through videotaped statements and when that selectivity relates to key issues.

4. A Potential Solution to the Confrontation Issue

Two states, Indiana and Texas, have enacted statutes similar in many ways to the Missouri statute but which provide an essentially different form of protection that points the way toward meeting the irreducible minimum requirements of confrontation.363 The statutory structure

358. Spotted War Bonnet, 933 F.2d at 1474-75 (youth and imperfect memory made cross-examination of children, one of whom was six years old, difficult but not appreciably more so than in Owens); Tucker v. State, 564 A.2d 1110, 1123-24 (Del. 1989) (Sixth Amendment satisfied in spite of children’s unwillingness or inability to respond fully regarding hearsay statements, particularly those regarding sexual penetration); cf Commonwealth v. Amirault, 535 A.2d 193, 202 (Mass. 1988) (lapse of memory on cross-examination not equivalent to refusal to answer questions and did not deny right to effective confrontation of direct testimony); State v. Bishop, 816 P.2d 738, 743 (Wash. Ct. App. 1991) (refusal or inability of nine-year-old child to answer question about penetration, which was covered by pretrial statements, did not render cross-examination ineffective for confrontation purposes).


361. State v. Hester, 801 S.W.2d 695, 697 (Mo. 1991) (reluctance to testify not equivalent to being unavailable to be cross-examined and such reluctance does not automatically constitute denial of right to cross-examination). Ohio R. EVID. 807(B)(1) requires that an effort must be made by a trusted person, in the court’s presence, to persuade the child to testify before a refusal to testify or a claim of memory failure will be accepted as rendering the child unavailable.

362. State v. Carlson, 812 P.2d 536, 538, 541 & n.7 (Wash. Ct. App. 1991) (competency issue regarding child who was three and one-half at time of sexual abuse, which made cross-examination difficult, neither grounds for constitutional concern nor basis for new trial).

has received substantial attention in Indiana, and the current statute reflects the extended analysis of the court regarding the demands of the Confrontation Clause.

In *Miller v. State*, the Indiana Supreme Court ruled a judicially revamped statute constitutional. The Indiana statute differs substantially from Missouri's with respect to the right to cross-examine. Instead of requiring only that the child be available, the Indiana statute specifies that either the child testify at trial or be found unavailable, albeit a very specialized and constitutionally sensitive form of unavailability.

The *Miller* court began by examining the statute's legislative history, finding the purpose of the statute was both "to reduce trauma to the child and to facilitate successful prosecution of child molesters." It concluded, however, that the legislature intended for the defendant to have a right to cross-examine the child at some point: "the legislature did not intend to restrict the defendant's right of cross-examination but only to require that it occur in an atmosphere less traumatizing to the child victim." The court ruled that the Confrontation Clause is satisfied if the child either testifies at trial and is subject to cross-examination or is available for cross-examination at the hearing on unavailability. In a subsequent decision, the court added an important further requirement: the defendant is entitled to "have that cross-examination relayed to the trier of fact in the same manner as the statement."

The Indiana system thus requires testimony in an adversarial setting when the child is able and guarantees cross-examination when the child

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364. Miller, 517 N.E.2d at 69.
365. The Indiana Supreme Court subsequently determined that its state constitution, in contrast to the Sixth Amendment as interpreted by *Craig*, requires literal face-to-face confrontation. Brady v. State, 575 N.E.2d 981, 988 (Ind. 1991).
367. *Id. at 71-72*. The court required an opportunity to cross-examine at some point under the Indiana Constitution, *id. at 73*, which specifies "face to face" confrontation. *Id. at 71*. See supra note 367. In the *Miller* case itself, the court ruled that the statement was improperly admitted because the trial court denied the defendant the opportunity to cross-examine the child. 517 N.E.2d at 73. The state legislature subsequently amended its statute to incorporate the requirements of the *Miller* decision into the statutory structure. *Ind. Code Ann.* § 35-37-4-6 (West Supp. 1993) (1990 amendments).
is not. When the child is not required to testify at trial because traumatized or incompetent, the statute still requires cross-examination and recognizes that such cross-examination should be conveyed to the jury in a fashion that treats it as if it was secured in the same fashion as direct examination. Although not fully adequate because it does not require direct testimony in an adversarial setting, the Indiana system provides several useful advances.

Texas's newly revamped statutory structure resembles Indiana's. In trials of sexual or physical assault on a child, either the defense or the prosecution can move before formal charges are filed to have the child's statement recorded on videotape. An "expert in the handling, treatment, and investigation of child abuse cases," who must be called at trial by the state and subject to cross-examination by the defense must conduct the interview without any attorney present. The initial interview is admissible, however, only if the court admits a similar videotaped cross-examination conducted by defense counsel after the filing of an information or indictment. Counsel presents the initial interview and the cross-examination to the jury in sequence. Thus, Texas's system like Indiana's, requires cross-examination of the child under protective circumstances and conveys the result of that cross-examination to the jury contemporaneously and in the same manner and medium as the direct examination.

The Texas system advances the search for an effective method of preserving and presenting the child's version of events without denying the defendant his or her right to confrontation. Like Indiana's sys-

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The Texas statute is similar to Uniform Rule of Evidence 807. It employs many of the basic concepts of the Pigot Committee proposal in England regarding the taking and presenting of children's testimony in serious offenses involving sex and violence. See J.R. Spencer, Reforming the Law on Children's Evidence in England: The Pigot Committee and After, in CHILDREN AS WITNESSES, supra note 136, at 122-24, 126-28 (describing proposal and largely negative legislative response to it).


373. Id. § 5(a)(9) & (b). The statute appears to have a glaring, although correctable flaw under Craig. It specifies that the defendant is to be placed where the child cannot hear or see him without any predicate finding that the child would otherwise be traumatized. Id. § 5(c).

374. Id. § 5(b).

375. Children generally are more susceptible to forgetting details when there is a substantial delay between an event and the request to recall it, and accordingly the need to capture quickly the child's firsthand account is important. Davies & Westcott, supra note 136, at 212. Children predictably will remember the criminal conduct reasonably well but may not remember surrounding detail as well, see Avery, supra note 351, at 123. They also do not tend to fill in memory gaps with plausible interstitial detail that makes an incomplete memory appear complete, as adults do. Id. at 120. The loss of this detail over time can erroneously impair credibility. See supra note 355. Accordingly, preserving the initial interviews of the child on videotape can play an important role. However, there are some inherent conflicts between the type of questioning format that is needed for therapeutic purposes, to aid in assessing the merits of the case, and for evidentiary use, see Davies & Westcott, supra note 136, at 222-23, that at least diminish the evidentiary utility of these early recordings.
tem, it has one important but remedial defect. Although the initial videotaped statement may be an important evidentiary tool, its admission does not in any way justify ignoring the Confrontation Clause's requirement that the witness make the accusation in an adversarial setting. Because of the potential for children to forget important details or to change their statement, receipt of the initial videotaped statement is justifiable even if the direct testimony of the child is also admitted. However, the defendant should have the right to insist that the child testify to his or her present version of the events without the influence of the inquisitorial setting prior to cross-examination by the defense. Although this procedure does require the child to tell the story more than once, he or she must do so only once in an adversarial setting, thus reducing the potentially harmful effects of multiple testimony.  

5. Summary

For evidence which is produced ex parte and presented on videotape to be admissible, an effective method of testing the statements under our chosen adversarial system must be assured. Fortunately, the doctrines and the methodology exist. Counsel can conduct additional direct examination and initial cross-examination in an adversarial setting and preserve them on videotape. As developed in the next part, the child can testify in the presence of the defendant in a comfortable setting without having to show substantial trauma or outside the presence of the defendant if the state can make a somewhat more substantial showing of trauma.

If these procedures are followed and an adequate cross-examination is possible, then the court should admit the statement. If not, the court should exclude the evidence. Although the price of exclusion is high when cross-examination is deficient, it is a cost properly attributable to the Framers of the Sixth Amendment. The prosecution should not enjoy the benefits of using inquisitorial procedures without providing adequate adversarial testing. However, if the state can accommodate new procedures to those of the normal adversarial system, then admission of evidence is constitutionally permissible.

376. See Paula E. Hill & Samuel M. Hill, Note, Videotaping Children's Testimony: An Empirical View, 85 Mich. L. Rev. 809, 822-23 (1987) (arguing that procedures that provide two opportunities to cross-examine and intimidate child, even if one is somewhat sheltered, are more damaging to child than merely requiring child to testify at trial). If the child is screened from the defendant, testimony can be expected to produce less trauma. See Goodman et al., supra note 354, at 121 (after testimony, children who testified in defendant's presence felt better about experience than they expected, having improved feelings about testifying, about judge, and even about defense counsel, but not about testifying in front of defendant).


378. See infra notes 437-58 and accompanying text.

379. See infra notes 408-18 and accompanying text.
B. Videotaped Statements Under the General Child Sexual Abuse Exception and Other Exceptions That Require Demonstration of Trustworthiness

Ex parte videotaped statements regarding child abuse are not exclusively admitted under statutes like that in Missouri. Courts may allow ex parte videotaped statements under three other types of statutes. First, courts may allow videotaped statements under traditional exceptions, most frequently through the exception for statements made for the purpose of medical diagnosis or treatment. Second, they may allow admissions of statements through the general child sexual abuse hearsay exception. Third, a statute similar to the Missouri model may require an additional showing of trustworthiness and as a consequence of that requirement, permit admission when the child is unavailable.

The admission of videotaped statements made for the purpose of medical diagnosis or treatment in the category of ex parte statements may be improper when the videotape is made for the express purpose of manufacturing evidence. This exception is well established, with independent evidentiary integrity. However, the use of videotape marks a different sort of use for the exception. Indeed, although not limited to statements recorded on videotape, the use of this medium to record hearsay highlights a critical feature that demands special treatment—the use of a hearsay exception in a purposeful effort to manufacture evidence.

This difference is most obvious in cases where videotape is not used for therapeutic or diagnostic purposes, and thus the videotaped statements are not the by-product of substantive medical activity. Here the exception is being used as a mechanism to produce evidence for trial.

In other instances, videotape records are made as part of the ordinary course of activity and may be used for therapeutic as well as investigative and prosecutorial purposes. However, recordings made in this context should not be treated qualitatively differently from those made

380. The Oregon Court of Appeals has admitted videotaped statements under its exception for statements for the purpose of medical diagnosis or treatment. See State v. Barkley, 817 P.2d 1328, 1329-30 (Or. Ct. App. 1991); State v. Verley, 809 P.2d 723, 724 (Or. Ct. App. 1991). There is little reason to assume that the court would treat the issue of videotaped statements differently under the general child sexual abuse exception.

381. UTAH R. CRIM. P. 15.5(1)(g) & (h). Wisconsin's statute also requires a finding of indicia of reliability but requires the immediate right to cross-examine. WIS. STAT. ANN. § 908.08(5) (West 1993).

382. See Norm Abrams, Preliminary Notes on a Guided Judicial Discretion Approach to the Admissibility of Hearsay (Aug. 5, 1992) (unpublished paper presented to The Conference on Reform of Evidence 11). Abrams argues that one of the principles that can be used to guide judicial discretion [regarding the admission of hearsay] is that if a statement is made in the course of some kind of event or course of conduct, it is unlikely to be calculated and to be insincerely made because the declarant is likely to be caught up in the ongoing event or course of conduct.

383. See Kee MacFarlane, Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases, 40 U. MIAMI L. REV. 135, 136-46 (1985) (outlining uses of videotaped interviews to
exclusively for prosecutorial purposes. First, the purposes frequently are intermingled. Second, given mandatory reporting requirements imposed principally upon doctors and medical personnel, the medical interview as a matter of law takes on a prosecutorial function. Third, given the recognized medical concern with factors such as the identity of the perpetrator, the role of the doctor is frequently indistinguishable from that of the police. Finally, many interviews are conducted by trauma teams that are both emotionally and functionally part of the prosecutorial team. Examination of these factors should bring most, if not all, of these statements within the effective definition of ex parte governmental statements.

The general sexual abuse exception is the newest area of expansion for videotaped statements. Typically, child abuse hearsay exceptions do not explicitly authorize admission of videotape. However, the statutes in two states, Iowa and Minnesota, do so. In addition, courts in Florida, Georgia, Missouri, and South Dakota have admitted videoreduce trauma from repeated interviews, assist in providing on-going treatment, prevent retractions, and aid in judicial proceedings).

384. See Mosteller, supra note 1, at 212-13 (doctors and medical personnel were first targets of mandatory child abuse reporting laws and doctor-patient privilege is uniformly voided by these laws).

385. See supra note 71 and accompanying text.

386. Cf. Mary C. Hutton, Child Sexual Abuse Cases: Reestablishing the Balance Within the Adversary System, 20 J. L. REFORM 490, 528-30 (1987) (noting difficulty of investigator both being supportive and also neutrally investigating offense, and observing that need to maintain supportive relationship may influence needed neutrality).

387. For example, in White the Solicitor General acknowledged that the physician who questioned the child in Wright was functionally an official interrogator. Amicus Brief for United States in White, supra note 105, at 28 n.18; see also Rolader v. State, 413 S.E.2d 752, 755-56, 758 (Ga. Ct. App. 1991) (court recognizes that two videotapes were made by "persons acting in a law enforcement capacity," one interview conducted by police investigator accompanied by "court advocate" from "Victim Witness Program" and other by social worker employed by private, nonprofit organization which assists police in their investigations of child abuse and helps prepare children for their testimony in court).

388. IOWA CODE ANN. § 910A.14(3) (West Supp. 1992) ("recorded statements" of child describing sexual contact not otherwise admissible may be admitted if they substantially comport with requirements of general catchall exceptions).

389. MINN. STAT. ANN. § 395.02(3) (West 1988) ("For purpose of this subdivision, an out-of-court statement includes video, audio, or other recorded statements."). See State v. Oshund, 469 N.W.2d 489, 492-94 (Minn. Ct. App. 1991) (videotaped statements made to county social workers admitted; child found incompetent to testify).

390. FLA. STAT. ANN. § 90.030(23) (West Supp. 1993); see Clay v. State, 580 So. 2d 843, 844 (Fla. Dist. Ct. App. 1991) (videotaped statement of child made by case coordinator of child protection team admitted; child did not testify because incompetent); see also Fardo v. State, 596 So. 2d 665 (Fla. 1992) (reversing Kopko v. State, 577 So. 2d 956, 962 (Fla. Dist. Ct. App. 1991)), which had excluded videotaped statement on grounds that it was improper vehicle for admitting prior consistent statement where child testifies consistently with prior statement).


392. MO. ANN. STAT. § 491.075 (Vernon Supp. 1993); see State v. Robinson, 782 S.W.2d 694, 696-97 (Mo. Ct. App. 1989) (videotaped statement made to nurse at hospital's sexual abuse manage-
taped statements under their general child sexual abuse statutes, and other states will likely follow suit.\textsuperscript{394} Courts in several states now regularly admit early interviews by child abuse specialists under the general child abuse hearsay exception.\textsuperscript{395}

As a consequence of historical accident, most of the general child abuse hearsay exceptions require the child either to testify or to be unavailable.\textsuperscript{396} They do not present the option of simply making the child available to be cross-examined as does the typical ex parte videotape statute. Introduction at trial of the videotape when the child does not testify presents a very serious constitutional challenge. This may occur either if the child is found incompetent\textsuperscript{397} or too traumatized to testify, or in the minority of states where the child must only be available, if the defense decides not to call the child because of feared juror hostility.\textsuperscript{398}

Indeed, the availability of videotaped evidence of statements admis-

\begin{quote}
\textsuperscript{394} The Mississippi Supreme Court in Hall v. State, 611 So. 2d 915, 922-22 (Miss. 1992), indicated that its new "tender years" exception, Miss. R. Evid. 803(25), would in the future support admission of an interview tape between a child victim and social worker. Oregon permits admission of videotape under the traditional exception for statements of medical diagnosis or treatment, which suggests that videotaped statements would likewise be admissible under other exceptions. See supra note 380. Also, in State v. Lamb, 798 P.2d 506, 509 (Kan. Ct. App. 1990), the state court of appeals appeared to assume that videotaped statements could be admitted under the general child abuse exception, KAN. STAT. ANN. § 60-460(dd) (Supp. 1991).
\end{quote}

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\textsuperscript{395} For example, the intermediate courts in Georgia have examined numerous cases involving videotaped statements of early interviews with children. See supra note 391. The Minnesota courts have handled a similarly large number of cases, although most of them are officially unreported. See supra note 389.
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\textsuperscript{396} The reason for this historical accident is that the Washington statute, upon which most other statutes were modeled, adopted such requirements apparently because of the then current analysis of the Confrontation Clause. See Note, supra note 17, at 811-12 (of seven statutes enacted by 1985, all but one were modeled on Washington statute, and their design demonstrated both appreciation of Roberts's requirements regarding trustworthiness and desire to discourage constitutional challenges when they exceeded its requirements by mandating showing of trustworthiness even if child testified).
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\textsuperscript{398} Cf. State v. Larson, 453 N.W.2d 42, 47 (Minn.) (requiring upon defendant's request that prosecution call child in its case-in-chief when child's extrajudicial statement will be used against defendant), cert. granted, judgment vacated, and remanded, 111 S. Ct. 29 (1990); State v. Larson, 472 N.W.2d 120, 124 n.1 (Minn. 1991) (further explaining requirement); see also supra notes 343-44 and accompanying text for discussion of the arguable due process violation resulting from forcing the defense to call the child.
\end{quote}

Four states, Georgia, Mississippi, Utah, and Vermont, have general child abuse hearsay statutes that require only that the child be available to testify rather than actually testify. See supra note 29. Georgia has eliminated at least part of the problem by construing its statute to require the court to call the child if either party wishes to cross-examine. Sosebee v. State, 357 S.E.2d 562, 563 (Ga. 1987).
sible under the general child abuse hearsay exception can, and almost certainly will, perniciously increase the chances that child witnesses will never testify. 399 Through a videotaped interview of the child, the prosecution can develop a very effective case without calling the child as a witness, and the prosecution thereby gains the additional advantage of denying the defense an opportunity to challenge directly the child’s testimony. This alternative method of producing the testimony increases the incentives for the prosecutor to argue, or interested family members or advocates to insist, that the child is unavailable because he is either incompetent to testify or traumatized by its prospect. 400 Thus, the availability of videotaped statements has the potential to reduce the likelihood that children will testify, and that potential is itself a powerful policy justification for either never allowing videotaped statements to be admitted under the general exception or insisting that videotape can be received only when the child testifies at trial.

When the child does not testify, the major distinction between the ex parte videotaped statute and videotaped statements under the general child abuse hearsay exception is that the latter requires a finding of trustworthiness. Without that requirement, admission of videotape under the general exception threatens the interests protected by the Confrontation Clause almost as seriously as the more obviously problematic ex parte videotape statutes. 401 However, establishing trustworthiness does not eliminate the constitutional infirmity.

A showing of trustworthiness cannot compensate for the lack of cross-examination where inquisitorial statements are involved. Again, Sir Walter Raleigh’s case demonstrates this fact. In Raleigh’s case, had the statement of Lord Cobham manifested elements of trustworthiness as defined by the current Supreme Court, admission of the ex parte deposition would still have been antithetical to the procedural protections demanded by the Framers. Where such evidence is involved, only the right to confrontation—meaning at least cross-examination—can be sufficient.

399. See Bulkley, supra note 218, at 700 (expressing hope that after White prosecutors will not routinely decide not to call child witnesses); cf. Raeder, supra note 76, at 947-49 (arguing that expansion of use of catchall exceptions threatens to reduce place of live testimony in criminal trials and thereby undo policy and political judgments about nature of criminal trials; Eleanor Swift, Abolishing the Hearsay Rule, 75 Cal. L. Rev. 495, 512 (1987) (requiring production of witnesses controls tactical advantage taking by prosecutors, although this and other value choices that result from preference for face-to-face accusation are not recognized as critical by current Supreme Court).

400. The experience in Israel, where a government employee acts as the interrogator of, and advocate for, the child, shows how protective the advocate may become if testimony is not required. The interrogator/advocate has a right to decide that the child cannot withstand personal appearance and is empowered in those circumstances to recount the substance of the child’s testimony. In 1990, the child was allowed to testify in only 7.7% of the cases. Eliahu Haron, Children’s Evidence in Sexual Offenses (Aug. 6, 1992) (unpublished paper presented to The Conference on Reform of Evidence 5).

401. Similar issues arise when videotape is used under an expanded version of more traditional hearsay exceptions, such as statements for the purpose of medical diagnosis or treatment. See State v. Barkley, 817 P.2d 1328, 1329-30 (Or. Ct. App. 1991); State v. Verley, 809 P.2d 723, 724 (Or. 1991).
The same applies to purposeful efforts to produce modern testimonial equivalents through videotaped statements under the general child abuse hearsay exception.

When the child testifies in court, the power of the videotape medium creates issues regarding the evidentiary, but not the constitutional, propriety of receiving the evidence. Although the commands of the Confrontation Clause are satisfied when the child testifies and is subject to cross-examination, the potential for the videotape to be extremely persuasive evidence and the difficulty of effectively cross-examining the child in court justify regulating the production of videotaped statements.

Indeed, some courts reject the admission of videotaped statements under their general child sexual abuse exception for related reasons. In Arkansas and Colorado, for example, the state supreme courts ruled videotaped statements inadmissible under the child hearsay provision. In both states, the courts concluded that, given explicit provisions regulating videotaped statements in separate deposition statutes, the legislature did not intend to admit videotape through the general child sexual abuse hearsay exception, which made no mention of videotape use. First, due to the greater persuasive power of a videotaped interview of a child victim and its potential to distort the testimony and enhance credibility, the court concluded that strict safeguards as set out under a specialized statute were legislatively required. Second, the court found that use of videotape permits improper bolstering of testimony through the double presentation of the child's testimony—once when the child testifies live at trial and a second time when her consistent videotape statement is introduced.


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403. Cogburn, 732 S.W.2d at 809; Newbrough, 803 P.2d at 161 (citing Hochheiser v. Superior Court, 208 Cal. Rptr. 273, 278-79 (Cal. Ct. App. 1984)).


405. Cogburn, 732 S.W.2d at 809 ("the state was in effect permitted to offer the direct testimony of the victim twice"). With respect to the concern with improper bolstering, see State v. Seever, 733 S.W.2d 438, 441 (Mo. 1987) (total repetition of witness's statement through hearsay statement under ex parte video statute violated traditional restriction on improper enhancement and rehabilitation of unimpeached witness); Burke v. State, 820 P.2d 1344, 1348 (Okla. Crim. App. 1991), cert. denied, 112 S. Ct. 2940 (1992) (following Texas appellate case Long v. State, with respect to propriety of bolstering; unclear whether disapproval was on constitutional grounds, although appears that court found vice of bolstering testimony either alone or in combination with other infirmities of statute violated Sixth Amendment); Long v. State, 741 S.W.2d 302, 322 (Tex. Crim. App. 1987) (en banc) (due process violated where statute permitted state to introduce both victim's live testimony and videotape of same events), cert. denied, 485 U.S. 993 (1988).

The Florida Supreme Court recognized the validity of the concern about excessive weighing
Protocols should be established as matters of legislative policy, although requiring them on a constitutional basis is realistically foreclosed by the Court's rejection of them in *Idaho v. Wright*.

Protocols can be important in ensuring that the evidence is produced only under circumstances justifying the substantial reliance that the jury will place upon it. They also can provide a record on which the value of the statement can be properly judged, either by establishing a basis for defense cross-examination or by allowing direct jury evaluation.

C. The Relationship Between Trauma and the Rights to Confront, to Compel the Presence of Child Hearsay Declarants, and to Cross-Examine

Trauma produced by judicial proceedings can harm a child's mental health and/or diminish her ability to testify. However, trauma should not be viewed as a monolithic phenomenon. It can vary in strength, duration, and character. Similarly, a finding that a child will be traumatized by judicial proceedings can have differing consequences for the defendant's rights. Such a finding may deny the defendant the opportunity to face the child, or it may mean that the defendant may not question her at all—rights of a substantially different character. My thesis is that the type and degree of trauma required to warrant shielding the

through repetition. However, it refused to embrace a categorical rule of exclusion. Instead, it was content to rely upon general authorization to exclude evidence that is found to be more prejudicial than probative. *Pardo v. State*, 596 So. 2d 665, 667-68 (1992) (reversing Kopko v. State, 577 So. 2d 956, 962-63 (Fla. Dist. Ct. App. 1991), which had excluded hearsay contained in videotape as improperly repetitive). *Courts have also been concerned with jury replaying of a videotape during deliberations. State v. Kraushaar, 470 N.W.2d 509, 513-16 (Minn. 1991) (would have been better practice to have replayed videotape in courtroom, but error considered harmless); Martin v. State, 747 P.2d 316, 319-20 (Okla. Crim. App. 1987) (videotaped testimony should not have been provided to jury for its viewing during deliberations).*

406. 497 U.S. 805, 812-13, 818 (1990) (Supreme Court rejected on the basis that the Constitution imposes no "fixed set of procedural prerequisites" state court's reliance on lack of procedural safeguards for creation of the hearsay).

407. The protocol might include a number of factors: (1) leading questions should be controlled, see *State v. Wright*, 775 P.2d 1224 (Idaho 1989), *aff'd on other grounds*, 497 U.S. 805 (1990); (2) all conversations between the interviewer and the child must be recorded, *id.; cf. Berger, supra* note 125, at 612 (arguing that statements other than videotaped statements should not be admissible unless contemporaneous recording of them had been made); (3) additional conversations between the child and the witness beyond those presented must not only be recorded but such recordings must be preserved, *but see State v. Schaal*, 806 S.W.2d 659, 661 (Mo. 1991) (permitting admission of videotaped interview despite fact that earlier interview effort had been erased); (4) and the videotape should be required to record the interview with a high degree of accuracy, capturing the reactions of all persons present at the time the interview is conducted, see *Commonwealth v. Bergstrom*, 524 N.E.2d 366 (Mass. 1988), discussed in *infra* note 460. Professor Montoya argues that if the prosecution is to be allowed to introduce a videotaped statement from the child, all conversations between the child and investigators leading up to that tape must be videotaped and preserved once abuse is suspected because it is in these conversations that charges may be manufactured or enhanced through suggestion. *Montoya, supra* note 363, at 973-77.

As part of the reform proposal in England, an official Code of Practice designed to obtain the most reliable information at the videotaping of an initial interview was proposed. *See Spencer, supra* note 371, at 122. The English experience should be examined.
child should increase in relation to the severity of the impact on the defendant's rights.

I. The Right to Face-to-Face Confrontation

In Maryland v. Craig, the Supreme Court considered one aspect of trauma under the Confrontation Clause—the circumstances under which a child could be examined outside the physical presence of the defendant. The Court found no constitutional impediment to the Maryland procedure that eliminated face-to-face confrontation but retained the other elements of the confrontation right. The Court justified the limitation on the defendant's rights based on the states' traditionally strong interest in protecting the child and the growing body of scientific literature documenting the psychological trauma suffered by victims of child abuse who testify in court.

The Court ruled that face-to-face confrontation could be eliminated upon a case-specific, child-specific finding that the use of one-way closed circuit television was necessary to protect the child's welfare. It required a finding that the child would be traumatized by the presence of the defendant, not by the courtroom generally, and that the emotional distress suffered by the child be "more than de minimis, i.e., more than 'mere nervousness or excitement or some reluctance to testify . . .'. " The type of trauma that justified elimination of face-to-face confrontation was "trauma [that] would impair the child's ability to communicate."

Prior to Craig, some state courts had characterized the trauma determination in such cases as a species of unavailability. Under this view, the trial court was required to find that the child's testimony would otherwise be unavailable before the child's testimony could be taken outside the defendant's presence. Although the Supreme Court has

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408. 497 U.S. 836 (1990). The Court in Craig was revisiting an issue first addressed in Coy v. Iowa, 487 U.S. 1012 (1988), where the Court struck down a rigid statutory structure that shielded the child from viewing the defendant without requiring a case-specific finding of necessity. Id. at 1025 (O'Connor, J., concurring).

409. First, the child was competent and testified under oath; second, the defendant retained the right for contemporaneous cross-examination through counsel; and third, the judge, jury, and defendant were able to view the demeanor and body of the witness through a video monitor. Craig, 497 U.S. at 851.

410. Id. at 855.

411. Id. at 856.

412. Id. (quoting Wildermuth v. State, 530 A.2d 275, 584 (Md. 1987)).

413. Id. at 857. The Maryland statutory standard that the Court found constitutional was "serious emotional distress such that the child cannot reasonably communicate." Md. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(2) (Supp. 1991). The Court rejected the state court's requirement that such a determination demanded observation by the trial judge of the child's behavior in the defendant's presence and could not be made on the basis of expert testimony alone. Craig, 497 U.S. at 860. It also rejected the imposition of an obligation to explore less restrictive alternatives before authorizing one-way closed circuit television upon the specified showing. Id.

414. One court articulated the necessary determination to be that the "child witness would be so traumatized by face-to-face confrontation as to be prevented from reasonably communicating." State v. Vincent, 768 P.2d 150, 164 (Ariz. 1989); see also Wildermuth v. State, 530 A.2d 275, 285-86 (Md. 1987). The reasoning of these courts was that the closed circuit television procedure, which in
rejected the unavailability characterization,\textsuperscript{415} conceptualizing physical separation or other limitations on traditional confrontation rights as forms of unavailability is useful in highlighting that the different forms of "unavailability" have varying impacts on the defendant's rights.

Requiring only the demonstration of a relatively low level of trauma made sense to the majority in \textit{Craig} because it concluded that hearsay was not being introduced under the Maryland procedures. Instead, the Court considered the televised testimony as "functionally equivalent to that accorded live, in-person testimony,"\textsuperscript{416} with "assurances of reliability and adversariness [that] are far greater than those required for admission of hearsay testimony under the Confrontation Clause."\textsuperscript{417} Given that cross-examination was still permitted, the Court reasoned that face-to-face confrontation could be eliminated when the child's ability to communicate would otherwise be impaired.

To justify this result, the majority made a policy judgment favoring effective testimony and child protection over the right of face-to-face confrontation, both with regard to the recognized status of confrontation as a textually protected element of the constitutional right and with respect to the function of confrontation to "'confound and undo the false accuser.'"\textsuperscript{418} This was a relatively easy judgment given the Court's recent determination that the principal function of the Confrontation Clause is to produce "better evidence." The Court's theory is that eliminating face-to-face confrontation shields the child, and by reducing trauma, the jury receives better evidence.

\section{The Rights of Confrontation and Cross-Examination}

The \textit{Craig} Court was not required to choose between viewing the Confrontation Clause as guaranteeing better evidence or viewing it as a procedural right guaranteeing, inter alia, cross-examination. The choice was unnecessary because in \textit{Craig} the defendant retained the right of cross-examination. But what would the Court's position be if the right to cross-examine rather than merely the defendant's physical presence were eliminated because of trauma? The question thus becomes, if the child's ability to communicate is diminished in some way, when, if ever, may the right to cross-examination be denied?

Under the Court's current "better evidence" analysis, if the child's ability to relate the facts is diminished at trial as compared to at the time

\footnote{\textsuperscript{415} See White v. Illinois, 112 S. Ct. 736, 743-44 (1992) (no requirement of necessity imposed by \textit{Coy} and \textit{Craig} for admission of closed circuit television transmission of child's testimony, which concerns only issues regarding in-court procedures for eliciting testimony, not issues of admission of out-of-court statements).}

\footnote{\textsuperscript{416} \textit{Craig}, 497 U.S. at 851.}

\footnote{\textsuperscript{417} \textit{Id.}}

\footnote{\textsuperscript{418} \textit{Id.} at 866-67 (Scalia, J., dissenting) (quoting \textit{Coy} v. Iowa, 487 U.S. 1012, 1020 (1988)).}
of the out-of-court statement, then the evidence that the Confrontation Clause supposedly prefers is the out-of-court statement. This argument also means that out-of-court statements should be admitted in preference to cross-examined testimony if the prospect of cross-examination will impair the child’s ability to communicate.

By contrast, if the confrontation right is a procedural right, the fact that cross-examination would impair the child’s ability to communicate does not necessarily mean cross-examination should be eliminated. Some cross-examination is better than none; cross-examination of a child with reduced communicative ability is unquestionably superior to the denial of cross-examination entirely. Only trauma that threatens severe harm to the child or eliminates, rather than inhibits, the child’s ability to testify could justify dispensing with that right.\(^{419}\)

If cross-examination is allowed, nothing in the Confrontation Clause prohibits introducing both the out-of-court statement and the in-court version if for some reason the in-court version proves inferior.\(^ {420}\) The choice is thus not between the better evidence and cross-examination; both can be received.\(^ {421}\) Properly viewed, trauma that produces an impediment to testifying, like that existing in Craig, can never be sufficient to eliminate the cross-examination right.\(^ {422}\)

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\(^{419}\) In dealing with the related issue of the admissibility of statements under evidence rules requiring unavailability, state courts have imposed two types of trauma requirements, sometimes strictly following the commands of their statute and in other instances imposing a significant new gloss. One standard requires a finding of “unavailability” that requires “a particularized finding that the child’s emotional or psychological health would be substantially impaired if she were forced to testify and that such impairment will be long standing rather than transitory in nature.” People v. Diefenderfer, 784 P.2d 741, 750 (Colo. 1989) (imposing this requirement with regard to requirement of unavailability under child hearsay exception); see also Thomas v. People, 803 P.2d 144, 148-49 (Colo. 1990) (imposing this requirement for state’s videotaped deposition statute, with additional requirement that testifying in defendant’s presence must be cause of trauma). For a similar standard, see Perez v. State, 536 So. 2d 206, 207 n.1 (Fla. 1988), cert. denied, 492 U.S. 923 (1989) (statute defines unavailability as severe mental or emotional harm if child required to testify); People v. Cintron, 551 N.E.2d 561, 571 (N.Y. 1990) (same).

Other courts have described the effect of the trauma differently. They have required that the trauma be “so great [that] the child cannot reasonably communicate.” State v. Chisholm, 777 P.2d 753, 759 (Kan. 1989) (describing showing of trauma required for unavailability under general child hearsay statute that requires either child be unavailable or testify); see also People v. Rocha, 191 Ill. App. 3d 529, 539, 547 N.E.2d 1335, 1341-42, 138 Ill. Dec. 714, 720-21 (2d Dist. 1989) (unavailability is established when child is “unable to testify because of fear, inability to communicate in the courtroom setting, or incompetence”), appeal denied, 131 Ill. 2d 565, 553 N.E.2d 400, 142 Ill. Dec. 886 (1990).

\(^{420}\) There are no historical or theoretical arguments against receiving inconsistent statements whether offered for impeachment, see supra note 294, or substantively where the declarant has testified and been subject to adequate cross-examination, see supra notes 160-62 and accompanying text.

\(^{421}\) On the other hand, if because of threatened trauma the child is ruled unavailable, then cross-examination is rendered impossible, and the jury receives only the out-of-court version.

\(^ {422}\) Trauma that eliminates the child’s ability to testify fits the traditional unavailability mold. State v. Jarzbeak, 529 A.2d 1245, 1255-56 (Conn. 1987), cert. denied, 484 U.S. 1061 (1988) (impact on trustworthiness of child’s testimony as result of defendant’s presence must be primary focus, not injury that victim may suffer as result of testifying). If the child cannot testify, her testimony is not available.

In the typical adult case, if a witness refuses to testify, he or she is unavailable but will be ordered to testify and threatened with contempt before being found to be unavailable. See e.g.,
Where the child could testify but would suffer trauma, the child is not automatically unavailable. The question is one of weighing harms—trauma to the child versus the loss of the defendant’s right to cross-examine.\(^{423}\) Where courts strike the balance between confrontation rights and trauma turns upon a policy judgment similar to that made in \textit{Craig}, which led to the elimination of face-to-face confrontation.\(^{424}\) Where the threatened trauma is substantial, the risk will likely be judged more important than the damage to the defendant’s rights or to the accuracy of the fact-finding process. However, although evidence exists that trauma from testifying is sometimes immediate and severe\(^ {425}\) and may be somewhat long-lasting,\(^ {426}\) some empirical research shows that testifying is not necessarily damaging to children.\(^ {427}\) Indeed, the existence of trauma may result more from the manner in which the child is treated than from the fact that he testifies.\(^ {428}\)

\(^{423}\) The Confrontation Clause could be held to require that the child must suffer all but the most severe psychological trauma if the child remains able to communicate. However, we would not require a witness to endure great physical pain in order to guarantee cross-examination. We would not require greater harm when psychological trauma is involved. See \textit{Warren v. United States}, 436 A.2d 821, 829-30 (D.C. 1981) (evidence of high likelihood of temporary, and possibility of permanent, psychological injury justified unavailability finding of adult rape victim).

\(^{424}\) One could argue, as Justice Scalia did in \textit{Craig}, that balancing is not appropriate between social interests and constitutional commands. Rather the “correct” constitutional result is loss of the child’s testimony if he is not subject to cross-examination where the defendant has not secured his absence. \textit{Cf.} \textit{Graham}, supra note 198, at 593-95 (prosecution required to produce declarant if available and if statement was accusatory when made). However, this view is unrealistic given the analysis of the present Supreme Court.

\(^{425}\) See, e.g., \textit{People v. Newbrough}, 803 P.2d 155, 159 n.6 (Colo. 1989) (upon being informed by her mother she would have to see perpetrator and tell about abuse, child immediately began projectile vomiting and crying).

\(^{426}\) \textit{Goodman et al.}, supra note 354, at 51, 62, 114 (study showing that children who testified in court evidence significantly greater distress seven months after testimony than those who did not testify; by the time the case was resolved, testifiers still showed less improvement than non-testifiers but the effect was considerably weaker, and the mental health of most children who testified was similar to that of children who did not testify).

\(^{427}\) Desmond K. Runyan et al., \textit{Impact of Legal Intervention on Sexually Abused Children}, 113 J. PEDIATRICS 647, 652 (1988) (at least in juvenile court proceedings, expected harm of testimony to mental health of child was not found and indeed some support was observed for proposition that opportunity to testify may exert protective effect on child victim); \textit{see also} Gail D. Cecchetini-Whaley, \textit{Note, Children as Witnesses after Maryland v. Craig}, 65 S. CAL. L. REV. 1993, 2016-18 (1992) (arguing that empirical data does not show face-to-face confrontation is necessarily traumatic to child).

\(^{428}\) Nancy M.P. King et al., \textit{Going to Court: The Experience of Child Victims of Intr familial Sexual Abuse}, 13 J. HEALTH POL. POL‘Y & L. 705, 717 (1988) (through observations of juvenile and criminal proceedings, researchers observed stressful conditions on children and noted that such stress could be reduced by simple reforms concerning way children are treated, not necessarily requiring elimination of live testimony); \textit{see also Brief for American Psychological Association as Ami-
Whatever the required type of trauma that must be shown, the degree of trauma required where the right to cross-examine will be denied should be more substantial than in a situation such as that found in Craig. Less impact upon testimony resulting from trauma should be required to eliminate face-to-face confrontation than to admit hearsay without any cross-examination at all. 429 When particularly questionable types of hearsay like that authorized by ex parte videotape statutes are involved, cross-examination should be an absolute prerequisite to admissibility.

After White, the defendant rarely has a right to cross-examine under the Confrontation Clause when traditional hearsay exceptions are involved. However, when videotaped statements are admitted either under the general child sexual abuse hearsay exception 430 or under extensions of traditional exceptions, such as statements for medical diagnosis or treatment, 431 the right to cross-examine should be a prerequisite to admission. Such powerful and explicitly testimonial statements implicate the core interest of the Confrontation Clause almost regardless of the exception.

3. The Rights of Compulsory Process and Cross-Examination

A somewhat different set of issues arises when a defendant wishes to call and cross-examine a child who may suffer some trauma from testifying. What should be the requisite showing of trauma to block such an examination?

Here the state has a legitimate policy interest in protecting the child from victimization by the trial procedures themselves. Repeated requirements to testify are to be avoided, 432 and certainly to be avoided is the specter of a guilty defendant purposefully intimidating his victim through judicial proceedings or rendering testimony inadmissible by demanding cross-examination that the child is unwilling or unable to endure.

Indeed, one may have difficulty imagining a defendant who would

429. Glendenning v. State, 536 So. 2d 212, 219 n.5 (Fla. 1988) (demonstration that testimony in open court will cause moderate emotional harm permits videotaping of testimony with cross-examination but with defendant behind screen; demonstration of severe emotional harm from testimony permits admission of hearsay statement, and defense may have no opportunity to cross-examine), cert. denied, 492 U.S. 907 (1989); State v. Chisholm, 777 P.2d 733, 758-59 (Kan. 1989) (introducing videotaped testimony where defendant had right to cross-examination but was not permitted to be personally present requires lesser impact on ability to testify than does satisfaction of unavailability requirement that permits introduction of hearsay).

430. See supra notes 388-95 and accompanying text.

431. See supra note 380 and accompanying text.

432. Amicus Brief for APA in Craig, supra note 428, at 12 (noting that having to testify multiple times is one of strongest predictors of distress).
genuinely want to cross-examine a child as opposed to demanding the right to cross-examination as a ploy to force exclusion of evidence. However, given the broad range of hearsay statements that are now admissible under expansive child hearsay exceptions, including videotaped statements, it is easier to understand the defendant’s desire to cross-examine. Videotaped versions of the child’s testimony may be so effective that cross-examination is the only hope of convincing the jury that the allegations are untrue.

Moreover, the Supreme Court in Inadi justified the elimination of the unavailability requirement for most hearsay because defendants desirous of challenging the statement directly could secure the benefits of cross-examination through the Compulsory Process Clause and evidentiary rules. After Inadi, denying the right to cross-examine cannot be justified unless the child is in fact unavailable under a constitutional standard.

The decision to deny cross-examination when demanded by the defendant under the Compulsory Process Clause should be carefully scrutinized and the showing of trauma required should be both specialized and extreme. Trauma that would merely impair the effectiveness of the child’s testimony should never constitute grounds for denying cross-examination.433 Such a showing of trauma may properly limit the method of cross-examination to one not involving personal confrontation, but it should never eliminate the right. When trauma entirely destroys the child’s ability to testify, the child is obviously unavailable, but the court should determine that only after an attempt to cross-examine, not on the basis of prior assumptions.

Trauma that significantly threatens the long-term psychological or emotional well-being of the child is theoretically sufficient. Fortunately, modern technology can avoid such dire consequences in many cases. The defendant should have the right to show that cross-examination conducted outside his or her presence would not threaten long-term injury. Either when cross-examination is guaranteed by the Confrontation Clause or when the defendant must resort to the Compulsory Process Clause, the accused should have the option of demanding cross-examination by electronic means as an alternative to denial of the right to cross-examine.434

Use of alternative methods of cross-examination both promises to protect the defendant and poses a threat to other confrontation rights.

433. In a much earlier age, Lord Hale recognized the essential illogic of receiving a child’s testimony through hearsay but refusing to receive her testimony directly because she was incapable of taking the oath. See supra note 285.

434. As with the other suggestions made in this article, whether the U.S. Supreme Court chooses to adopt such a requirement should not bar state supreme courts from adopting what they consider appropriate protections either as a matter of state constitutional law or evidentiary principles. An example of the latter is found in Minnesota’s requirement that when relying on hearsay from an available child, the state must upon the defense’s request call the child in its case-in-chief. See supra notes 214 & 318.
The government may not be able to show that the child will be so traumatized as to be unavailable in the traditional sense, and it may be unwilling to call the child to testify. If the prosecution still wishes to have the child’s videotaped statements admitted, for example, it may follow the option outlined above and move to have cross-examination conducted outside the defendant’s presence and conveyed to the jury by electronic means. Indeed, legislatures and courts have already combined innovations, admitting new types of hearsay statements with cross-examination conducted in just this fashion.435

The minimal constitutional protection that this article sets out may be welcomed by the prosecution as a broadly available method of increasing the effectiveness of its evidence. One can easily imagine that in a few years children will rarely testify live before the jury in sexual abuse cases. The prosecution will instead present a videotape of an earlier conversation between the child and a member of the child abuse detection team followed by another tape of his or her direct and cross-examination in a somewhat less threatening but adversarial setting.436

4. Depositions in Child Sexual Abuse Cases

As an alternative to excluding the defendant during the child’s testimony, as authorized by Craig, the child may testify in the defendant’s presence but in a more comfortable and less threatening setting than the courtroom. This is another of the mechanisms used to reduce the child’s trauma in some states, and its broader utility should be explored.

The only significant constitutional issue regarding the admissibility of deposition evidence is the level of trauma required. As discussed in part II,437 current statutes require varying levels of trauma. The most restrictive statutes require either severe emotional or psychological harm or an apparently similarly strict standard that the victim be medically unavailable as a result of trauma.438 Others define a much lower level of trauma as sufficient—that the child would “suffer strain”439 or “at least
moderate emotional or mental harm." A final group of states either treat trauma as simply a factor to be considered in determining "good cause" for authorizing and admitting the deposition or make no direct reference to trauma.

Although the case law analyzing the question is somewhat limited, basic principles indicate that a minimal showing should be constitutionally sufficient. In child sexual abuse prosecutions, Montana's statute permits admission of videotaped testimony of a victim who is under sixteen years old upon the request of the victim and with the concurrence of the prosecutor. The statute requires that the defendant and his attorney must be allowed to be present when the videotape is made. It specifies that if offered in evidence, the videotaped testimony must be received and the victim need not be physically present.

In State v. Scott, the Montana Supreme Court ruled that the statute did not violate the defendant's confrontation rights. The defendant was entitled under the statute to be present and to confront the victim. The court concluded that the defendant had been afforded the basic protections of the Confrontation Clause: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact (although by video recording)."

Similarly, Alabama's statute permits videotaped depositions of victims or witnesses who are under the age of sixteen. The deposition may be ordered upon a determination of "good cause shown," considering the age and maturity of the child, the nature of the offense, the nature of the testimony anticipated, and the possible effect that live testimony may have on the victim or witness. It is then admissible in lieu of direct testimony "unless the court determines that its introduction . . . will unfairly prejudice the defendant."

In Strickland v. State, the Alabama Supreme Court broadly held the statute constitutional. The deposition had been ordered pretrial upon the prosecution's ex parte motion. When admission was challenged at trial, the court admitted the deposition without receiving any evidence

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444. Id. § 46-16-216(3). Although the statute does not explicitly guarantee the right to cross-examine, that right is presumably covered by the provison that the videotape proceedings are governed by the procedural and evidentiary rules applicable to criminal trials. Id. § 14-16-216(2).
445. Id. § 46-16-216(1). The statute does not explicitly prohibit other testimony by the child, but presumably it would not be received if cumulative.
446. 850 P.2d 286 (Mont. 1993).
447. Id. at 291.
449. 550 So. 2d 1054 (Ala. 1989).
that the child could not withstand the experience of testifying in court.\textsuperscript{450} The court found no problem either with the procedures used\textsuperscript{451} or in the sufficiency of the showing of trauma that would result from in-court testimony.\textsuperscript{452} It reasoned that the statute satisfied the Confrontation Clause by providing the defendant "the right physically to face those who testify against him, and the right to conduct cross-examination."\textsuperscript{453} Because no screen or other device that might shield the child's view of the defendant was used, the court dismissed the concerns articulated in \textit{Coy}.\textsuperscript{454}

Wisconsin's course, although not yet as clearly marked, appears similar to that in Montana and Alabama. However, Wisconsin's statute\textsuperscript{455} admits the testimony as a clear substitute for any appearance by the child,\textsuperscript{456} thereby reducing the potential traumatic impact on the child of being required to testify on multiple occasions.\textsuperscript{457}

\begin{itemize}
\item \textsuperscript{450} \textit{Id.} at 1056.
\item \textsuperscript{451} "The process that was due the appellant was the opportunity to dispute the use of the videotape and the right to cross-examine the child. The trial court provided the appellant an opportunity to do both." \textit{Id.} at 1057.
\item \textsuperscript{452} The court made absolutely no comment on the nature of the showing required by the statute or the ways in which it may have been met by the facts.
\item \textsuperscript{453} 550 So. 2d at 1057 (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987)).
\item \textsuperscript{454} \textit{Id.} at 1056-57. In addition to a Wisconsin appellate court decision, which is discussed below, the supreme courts of Arkansas and New Hampshire have agreed that no substantial confrontation issue is presented. McGuire v. State, 706 S.W.2d 360, 362 (Ark. 1986) (unlike statutes which have raised substantial constitutional difficulties because defendant not present for face-to-face confrontation, this statute does not violate Confrontation Clause); State v. Peters, 587 A.2d 587, 590 (N.H. 1991) (state's "videotape procedure . . . does not raise a substantial confrontation clause problem since it involves testimony in the presence of the defendant").
\item \textsuperscript{455} The statute, which is much more complex than the Alabama statute, permits any party to move for the taking of the deposition of a child witness below the age of 16 in any criminal case. \textsc{Wis. Stat. Ann.} \S 967.04(7)(a) (West Supp. 1992). As written, the statute makes granting the motion automatic for witnesses under 12, and it requires a finding that the "interests of justice" warrant the action for children 12 to 15 years of age. However, State v. Thomas, 425 N.W.2d 641 (Wis. 1988), and State v. Thomas, 442 N.W.2d 10 (1989) (\textit{Thomas II}), effectively rewrote the statute to require an exercise of discretion based on standards that indicate a special need to protect the child. \textit{Thomas II}, 442 N.W.2d at 19-20.
\item In determining the interests of justice, the statute provides a nonexclusive list of factors, which include: the child's age, level of development, and reaction to previous interviews about the incident, and whether the child manifests symptoms associated with post-traumatic stress disorder or other mental disorders. \textsc{Wis. Stat. Ann.} \S 967.04(7)(b)(1), (6), (8) (West Supp. 1992).
\item The most interesting element of the Wisconsin statute requires the court to consider whether taking a videotaped deposition would either reduce the mental or emotional strain of testifying, or whether the deposition could be used to reduce the number of times the child will be required to testify. \textit{Id.} \S 967.04(7)(b)(10).
\item It prohibits the child being called as a witness if her videotaped deposition has been admitted unless the court finds that the interests of fairness so require for reasons unknown and undiscoverable at the time the deposition was taken. \textsc{Wis. Stat. Ann.} \S 967.04(10) (West Supp. 1992). New Hampshire has a similar provision in its statute, which states the standard for requiring further testimony more generically: "Unless otherwise ordered by the court for good cause shown, no victim or witness whose testimony is taken pursuant to this section shall be required to testify at trial." \textsc{N.H. Rev. Stat. Ann.} \S 517:13a(III) (Supp. 1992).
\item See supra notes 379 & 435.
\item Although Wisconsin's supreme court has not yet interpreted the requirements of the statute, its court of appeals upheld admission of videotaped deposition testimony without "a specific finding that shows a high need to override the guarantee of face-to-face encounter in open court." State v.
Properly analyzed, the showing required to introduce depositions need be no more exacting than a requirement of a due process rational relationship test. Introducing a videotaped deposition raises concerns similar to those for admitting prior testimony. It implicates Confrontation Clause interests as well as the issues of trial by jury and public trial. For that reason, courts cannot approve wholesale admission of videotaped testimony without some demonstration that it serves a rational purpose, but once that showing is made, no valid confrontation claim remains.

Massachusetts courts have focused on an additional concern—assuring the quality of the videotape recording by which the deposition is presented. Not only must the videotape's picture and sound quality be accurate, but it must convey accurately the interactions between the witness and all those present. If courts move toward treating videotaped depositions as the equivalent of in-court testimony, concern for representational quality should be made part of statutory requisites for admissibility, although exacting requirements are not constitutionally mandated.

5. Summary

As a result of threatened trauma to the child, the prosecution may

Wachsmuth, 480 N.W.2d 842, 847 (Wis. Ct. App. 1992). Like the Strickland court, it concluded that the Confrontation Clause had not been violated because the defendant confronted his accuser face-to-face and was able to fully cross-examine and because the jury was able to observe the demeanor of the witness on videotape. Id. The appellate court also relied upon the state supreme court's conclusion in State v. Thomas, 442 N.W.2d 10, 18-19 (Wis. 1989), that videotaped testimony is the "functional equivalent to live in-court testimony."


459. The Massachusetts decisions should not be used, however, as a gauge of federal confrontation rights. This is because the state supreme court, going beyond the standards subsequently set in Craig, ruled videotaped or electronically transmitted testimony taken outside the physical presence of the defendant violates its state constitutional requirement of "face to face" confrontation. Bergstrom, 524 N.E.2d at 373-75.

460. In Bergstrom, the court stated:

Absent compelling circumstances, a jury ought to be able to view the interaction between a witness and others who are present. The subtle nuances of eye contact, expressions, and gestures between a witness and others in the room are for the jury to evaluate. Hearing the disembodied, off-screen voices of the judge and the attorneys is not ordinarily an adequate substitute for witnessing personal interactions. Especially where child witnesses are involved, and great leeway for leading questions is allowed, jurors must be able to choose their own focus in looking for any direct or indirect influences on a child's testimony.


Courts in other states have not imposed such exacting requirements with respect to videotape quality. See Casselman v. State, 582 N.E.2d 432, 438 (Ind. Ct. App. 1991) (test is whether the recording quality is so poor as to lead the fact finder to speculate regarding its contents).

461. Only in the most extreme case could poor videotape quality ever violate the confrontation right. However, an adequate alternative for child testimony should not depend alone upon the commands of the Constitution; it requires the development of protocols.
attempt to alter the procedure for receiving or admitting testimony in three ways. It may seek to block cross-examination entirely; it may permit cross-examination but require that the defendant to be out of the child's view, with the testimony conveyed to the jury by an electronic medium; or it may allow traditional cross-examination in the presence of the defendant but receive that testimony outside the jury's presence and present it to them through videotape.

The required showing of trauma should be the greatest in the first instance where cross-examination is denied, requiring that the trauma either eliminate entirely the child's ability to communicate or threaten severe and long-lasting harm. A lesser showing of trauma is appropriate where the defendant is excluded but afforded the right to cross-examine through his or her lawyer. Because cross-examination is maintained, the Court could easily shift to a concern that I contend should be secondary—securing the "better evidence." Accordingly, trauma that diminishes the ability of the child to communicate can be sufficient to justify taking testimony outside the presence of the defendant. In the third situation where the state uses videotaped depositions, the only deviation from the Confrontation Clause's ideal is that the child's testimony is videotaped outside the jury's physical presence, which preserves the detail and demeanor of the witness's testimony. The important tradition of public trials and live testimony should mean that courts should not accept videotaped testimony without some justification but that a very minimal showing should be sufficient.

The analytical system that this article proposes requires different levels and different types of trauma dependent upon the differential impact of the procedures on elements of the defendant's confrontation right. In addition, when alternative procedures (such as conducting proceedings outside the courtroom or out of the presence of the defendant) would impinge less on the defendant's rights, the opportunity for cross-examination should not be eliminated if those alternative procedures would allow for cross-examination while reducing trauma to tolerable levels.

D. Competency

In Wright, the Supreme Court assumed that a child was unavailable within the meaning of the Confrontation Clause upon a finding by the trial court that she was incompetent because she was incapable of communicating with the jury. It declined to hold, however, that the child's prior statements were inadmissible because statements of incom-

462. See also Myers, supra note 377, at 246 (various video testimony alternatives should be arrayed along continuum according to elements of effective confrontation satisfied, with constitutional difficulties increasing as elements are infringed).

petent declarants are per se unreliable. The Court correctly observed that the inability to relate information at trial is not inconsistent with the ability to receive and relate information accurately and truthfully at the time the child made the out-of-court statement.

The distinction between incompetency at the time of trial, either because of the inability to relate information adequately in the trial setting or the inability to take an oath, and incompetency to make an out-of-court statement is well recognized. For example, courts have viewed an exciting event, which eliminates the likelihood of conscious fabrication at the time of the statement, as justifying admission of a hearsay statement even when the declarant could not have taken an oath at trial.

Until recently, a determination of incompetency denied the prosecution the ability to use the child as a witness but was likely to be helpful for constitutional purposes in that the finding satisfied the unavailability requirement assumed necessary after Roberts. After Inadi and White, the constitutional significance of such a determination has been virtually eliminated. The child's hearsay statement is now admissible regardless of the decision on competency and, in turn, on availability. As far as hearsay admissibility is concerned, the government is now indifferent whether the witness is considered competent or incompetent, available or unavailable.

Inadi and White are thus likely to reduce substantially the role of live testimony in child abuse trials. In the past, practical trial considerations countered the evidentiary advantages to the prosecution of an

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464. Id. at 824.
465. Id. at 824-25. Instead, the Court considered the inability to communicate with the jury at the time of trial potentially relevant to determining whether the earlier hearsay statement bore particularized guarantees of trustworthiness. Id. at 825; see State v. Lanam, 459 N.W.2d 656, 659 (Minn. 1990), cert. denied, 111 S. Ct. 693 (1991) (statements of child found incompetent to testify and therefore unavailable admitted as bearing sufficient indicia of reliability).
467. 2 McCormick on Evidence, supra note 68, § 272, at 221-22 (while firsthand knowledge is required, other elements of competency not required); cf. People v. Cherry, 88 Ill. App. 3d 1048, 1052, 411 N.E.2d 61, 65, 44 Ill. Dec. 135, 139 (1980) (statement of almost five-year-old child ruled admissible in spite of trial court's determination that she was incompetent to testify because she could not recollect and narrate in satisfactory manner, court stating that "[t]he reliability, and therefore admissibility, of a spontaneous declaration comes not from the reliability of the declarant, but from the circumstances under which the statement is made.").

All such issues are not so easily dismissed. If a child does not understand what it is to tell the truth or to tell the difference between fact and fantasy, it is unclear how excitement, which can conceptually only interfere with conscious fabrication, guarantees reliability to that which is unconsciously flawed.
468. The evidence may be admissible whether or not the child is unavailable, and if the child is found unavailable because of trauma, the evidence will be admissible while denying the defendant the opportunity to cross-examine the child.
469. See supra note 399 and accompanying text.
unavailability finding. Prosecutors argued for competency to avoid having to rely on unpersuasive hearsay statements. Those practical considerations are changing as more effective forms of hearsay become available, particularly videotaped statements. Presently, in many situations, a finding of incompetency deprives the prosecution of little persuasive power. Moreover, a finding of incompetency is strategically advantageous in that it denies the defense the ability to test the out-of-court statements through cross-examination. As a result, the prosecution's incentives to secure the live testimony of the child have been greatly weakened. 470

Some protections remain, however, if a defendant has the right under the Compulsory Process Clause to call a witness ruled incompetent. The Court in Inadi and White argued that a defendant could secure the advantages of cross-examination by calling a hearsay declarant and subjecting him to cross-examination. Is that right eliminated when the child is ruled incompetent to testify?

An issue of another sort arises as a consequence of statutory reforms in a number of states that have all but eliminated the competency issue for children victimized by sexual abuse. 471 As part of the package of changes designed to facilitate prosecution of such cases, Utah declared children below the age of ten who are victims of sexual abuse to be competent as witnesses without further judicial determination. 472 Statutes of this type make challenging the competency of a child sexual abuse victim practically impossible. 473

Under Green and Owens, the presence of the declarant for cross-

470. Having a child determined to be incompetent may still have unfavorable consequences for the prosecution in terms of the admissibility of evidence. The Supreme Court ruled in Owens that a witness without a memory of the relevant events, who was unavailable for certain evidentiary purposes under the hearsay rules, was sufficiently available for cross-examination regarding a prior statement to satisfy the Confrontation Clause under Green. Is it possible that a child who is unavailable because incompetent would be sufficiently available to satisfy Green? I argue in the negative, see supra notes 349-62 and accompanying text, but courts may hold otherwise.

471. Even before the statutes' total elimination of the competency issues, the procedure for placing a child under oath or affirmation or its equivalent was already very flexible. See, e.g., Spigarolo v. Meachum, 934 F.2d 19, 24 (2d Cir. 1991) (child's affirmative responses to trial judge's questions whether she was going to tell the truth sufficient "oath" for Confrontation Clause purposes to admit videotaped testimony); State v. Pilkey, 776 S.W.2d 943, 952 (Tenn. 1989) (common law requires no particular ritual or form, and court must simply be satisfied that child understands duty to testify truthfully).


473. State v. Webb, 779 P.2d 1108, 1110, 1114 n.7 (Utah 1989) (child who was 18 months old at time of offense statutorily competent to trial court erred in finding unavailability because of incompetency); see also State v. Williams, 729 S.W.2d 197, 199 (Mo. 1987) (en banc) (provision removes need for judicial determination of competency for youthful victim of specified offenses), cert. denied, 484 U.S. 929 (1987).
examination eliminates the need to determine the trustworthiness of the prior statement. Can that Confrontation Clause doctrine and the new legislation regarding competency be combined with the result that no Confrontation Clause challenge is possible when an extremely young child is made available for cross-examination?474 If so, the effect is to reduce confrontation to a hollow right, with due process the only remaining protection.

The answers to these two basic issues—(1) whether states can deny any right to cross-examine a child declared incompetent to testify but whose out-of-court statements are admissible, and (2) whether the availability of such a child is automatically sufficient to satisfy the Confrontation Clause—are potentially related. The elimination of competency in child sexual abuse cases in some states has revealed the weakness of the policy interest supporting statutes that enforce competency requirements to the defendant's disadvantage. When competency determinations provide no effective protection against the admission of evidence from such witnesses because their out-of-court statements are admissible but prohibits testing of that evidence under either the Confrontation or Compulsory Process Clauses, the state's interest is insufficient to sustain a competency rule.475

When, on the other hand, the state has declared children competent, that determination cannot automatically eliminate all Confrontation Clause objections to receipt of the child's out-of-court statements. Ruling that presence on the stand of a child declared competent, but entirely unable to communicate, satisfies the right to cross-examine under Green would have the effect of equating unavailability with the right to cross-examine. The theory of Green will not permit such an equation.

474. It appears that the Supreme Court of Missouri would answer this question affirmatively. See Williams, 729 S.W.2d at 202 (ruled where no hearsay was involved that confrontation right merely prevented improper restrictions on types of questions asked by defendant).
475. Cf. Washington v. Texas, 388 U.S. 14 (1967) (statute rendering codefendants incompetent to testify on behalf of defendant ruled unconstitutional under Compulsory Process Clause as arbitrary restriction because codefendant could be called by the prosecution); Boykins v. Wainwright, 737 F.2d 1539, 1543-45 (11th Cir. 1984) (federal court found invalid on due process and compulsory process grounds state court evidentiary ruling that excluded defense expert testimony regarding defendant's prior history of mental illness because ruling denied fundamental rights and was not supported by compelling state interest); Braswell v. Wainwright, 463 F.2d 1148, 1149-50, 1154 (5th Cir. 1972) (state procedural rule sequestering witnesses, under which testimony of key defense witness who violated rule without defendant's knowledge was excluded, ruled invalid because it conflicted with defendant's compulsory process right); State v. Sorenson, 449 N.W.2d 280, 287 (Wis. Ct. App. 1989) (trial court's refusal to permit defendant to subpoena child victim whose hearsay statement was admitted against him violated Compulsory Process). But see Washington, 388 U.S. at 23 n.21 (decision does not deal with nonarbitrary state rules that disqualify persons who, because of infancy, are incapable of testifying).

Although the same state does not simultaneously take inconsistent positions with regard to competency for children, as Texas did regarding testimony by codefendants in Washington, separate states treat competency differently based at least in part on what will assist the prosecution to prove its case. Where the state wants to place the child on the stand, it can declare all children competent. Where it chooses to rely on out-of-court statements, it can retain the competency requirement and deny the defendant the right to cross-examine the child. This inconsistent treatment supported only by an interest in effective prosecution should not withstand constitutional scrutiny.
When inquisitorial statements are at issue, as with videotaped statements, the defendant has a right to effective cross-examination.\textsuperscript{476} Courts must enforce a constitutionally based minimum standard for the intellectual abilities and moral understanding of the child before cross-examination can be judged adequate to satisfy the Confrontation Clause.\textsuperscript{477}

E. Admissibility of Statements Under Particularized Showing of Reliability

States have addressed the perceived need to admit hearsay more freely in child sexual abuse cases in two ways. They have created general child sexual abuse hearsay exceptions, and they have expanded older exceptions. Hearsay statements are admissible under the Confrontation Clause as interpreted by \textit{Roberts} and \textit{White} in either of two situations. First, the statements may fall within a firmly rooted hearsay exception. If so, trustworthiness is established without more,\textsuperscript{478} and unavailability need not be shown.\textsuperscript{479} Second, if the statement does not fall within such an exception, particularized guarantees of trustworthiness must be demonstrated.\textsuperscript{480} In this second situation, an additional question arises: Because the exception is not firmly rooted, does the Confrontation Clause require unavailability?

1. The "Firmly Rooted" Requirement

a. General Child Sexual Abuse Hearsay Exception

Because a large number of states have enacted a new general exception for child victim hearsay, is this exception firmly rooted in our jurisprudence? The Supreme Court has defined "firmly rooted" exceptions to be those with which we have "longstanding judicial and legislative expe-

\textsuperscript{476} See supra discussion accompanying notes 321, 355-62. Even when noninquisitorial types of hearsay statements are offered, the weakness of the state's interest in preventing cross-examination as a consequence of its competency rules cannot support the denial of cross-examination under either the Confrontation or the Compulsory Process Clauses. In cases involving such statements, however, the defendant has no enhanced right for effective cross-examination. A trustworthiness guarantee is sufficient.

\textsuperscript{477} Such were assumed by the Court in United States v. Spotted War Bonnet, 933 F.2d 1471, 1474 (8th Cir. 1991), \textit{cert. denied}, 112 S. Ct. 1187 (1992), but it is not clear that the court's assumption would be supported by the Supreme Court.

Another view is that incompetency presents no Confrontation Clause issues if the child is permitted to be cross-examined and can be cross-examined meaningfully, even if not perfectly. If indeed the child is as competent in terms of intellectual abilities to answer cross-examination questions as she was to make the initial statement, the Confrontation Clause has been satisfied. However, leaving the inquiry entirely to the Due Process Clause ignores the separate protection provided by the confrontation right regarding the admission of each witness's testimony. See supra note 310 and accompanying text.


\textsuperscript{480} \textit{Roberts}, 448 U.S. at 66.
rience." The new statutes fall outside the firmly rooted category for two reasons. First, even if specific in definition, their newness itself means that the exceptions are not firmly rooted. For example, the plurality opinion in *Coy v. Iowa* concluded that the Iowa statute "could hardly be viewed as firmly rooted" because it was passed in 1985, only three years before the Supreme Court's opinion. Nevertheless, the widespread enactment of child sexual abuse hearsay statutes should speed the accumulation of experience with these statutes. There is a second objection, however. Exceptions that are broadly cast and open textured, such as the typical child sexual abuse hearsay statute, which requires only that "the time, content, and circumstances of the statement provide sufficient indicia of reliability," lack the capacity to become firmly rooted precisely because of their generic character. These exceptions "accommodate[] ad hoc instances" in which statements do not fall within the bounds of any specific exception and "almost by definition . . . do not share the same tradition of reliability" as specific firmly rooted exceptions. The inconsistency between the generic quality of these exceptions and the specificity inherent in the rationale of firmly rooted exceptions presents an insuperable obstacle to treatment of the general child sexual abuse exception as firmly rooted. This difficulty will not be eliminated with time and even with substantial experience: there is no there there.

b. Expansions of Well-Established Exceptions

Exceptions that represent expansions of traditional exceptions raise a discrete but very important issue: when traditional exceptions are expanded, as was done with some exceptions when the Federal Rules of Evidence were adopted, does the entire exception become firmly rooted?

481. Idaho v. Wright, 497 U.S. 805, 817 (1990). It is the long-standing acceptance of the exception that establishes it as firmly rooted rather than the particular reliability of the exception. Mosteller, *supra* note 71, at 288-89; *Bourjaily*, 483 U.S. at 183-84 & 188-89 (Blackmun, J., dissenting) (because coconspirator exception to hearsay rule has been long accepted, it is received without independent inquiry into reliability, this despite fact that rationale of exception depends upon agency theory and not upon belief that such statements possess any particular guarantee of trustworthiness).
483. Id. at 1021.
486. There is a possibility that a unique factor involved in the hearsay statements of child sexual abuse victims can be identified that could be considered discrete enough to accord the overall exception firmly rooted status. Cf. *Jason A. Levine, Note, The Confrontation Clause and Hearsay Statements by Child Victims of Sexual Abuse: White v. Illinois, 112 S. Ct. 736 (1992), 15 Harv. J. L. & Pub. Pol'y 1040, 1047 (1992)* (arguing that Court in *White* should have recognized statement of child sexual abuse to have evidentiary value beyond that of typical spontaneous declaration). However, I contend there is no unique feature for child hearsay but rather a shifting combination of features that constitutes no definable exception. The exception cannot be based on the theory that children do not lie about such events because that proposition is far too debatable.
487. A related issue is whether a newly enacted exception in a given state can be accepted
Until recently, statements against penal interest that incriminated another were considered outside any hearsay exception. Influenced by the Federal Rules of Evidence, the exception for statements against interest has been expanding in scope, and many courts now receive statements incriminatory of others under this exception. However, in Lee v. Illinois, the Supreme Court found that a confession by the declarant containing accusatory statements about another was not firmly rooted and accordingly required a particularized showing of reliability. It rejected the state's argument that the statement was simply a “declaration against penal interest,” concluding that the concept defined “too large a class for meaningful Confrontation Clause analysis.

A similar issue arises with statements for the purpose of medical diagnosis or treatment, particularly when the statements identify a specific individual as the perpetrator or when they are made to a witness who has duties to develop evidence. These statements are often admissible under an expansion of the exception that admits statements made only for the purpose of the expert reaching an opinion, whereas the exception was traditionally limited to statements made by the patient with immediately as firmly rooted if modeled on an established exception in another jurisdiction. An example of a newly enacted exception that immediately would be accepted as firmly rooted is the prompt complaint of sexual offense exception. See State v. Campbell, 705 P.2d 694, 704-05 (Or. 1985) (exception that has since been repealed held to be "an ancient and firmly rooted hearsay exception"). Texas has enacted such an exception, but it expanded the traditional exception so substantially that treatment as a firmly rooted exception would be very questionable. See Tex. Code Crim. Proc. Ann. art. 38.072, §§ 1 & 2 (West Supp. 1994), discussed in supra note 70.

488. 2 McCormick on Evidence, supra note 68, § 318, at 342-43 & n.12, § 319, at 344-45 (liberal interpretation of phrase “tended to subject” declarant to criminal liability and similarly liberal treatment of contextual or related statements are largely responsible for new admissibility of statements that incriminate another).

489. See, e.g., United States v. Garris, 616 F.2d 626, 630 (2d Cir.) (statement of defendant's sister recounting defendant's admission regarding bank robbery admissible as statement against interest of sister because it implicated her as accessory after the fact in robbery), cert. denied, 447 U.S. 926 (1980); United States v. Alvarez, 584 F.2d 694, 699-700 (5th Cir. 1978) (statement implicating third party as supplier of heroin ruled admissible as against declarant's interest because statement indicated his inside knowledge of crime).


491. Id. at 546; see also State v. Cook, 610 A.2d 800, 804-05 (N.H. 1992) (requiring showing of particularized indicia of reliability for statements against interest incriminating both declarant and another rather than treating it as established simply by fact that exception is firmly rooted as advocated by dissenting justice).

492. Lee, 476 U.S. at 544 n.5. The danger is greatest when the statement is taken by a person known to be a police agent, for there the incentives on the part of the speaker to curry favor are substantial. However, even when the statement is made to an individual not known by the speaker to be a police agent, the danger may exist that the agent will manipulate the conversation to produce a certain answer. See Berger, supra note 125, at 597-99.

493. See Mosteller, supra note 71, at 290 (arguing that expansion of hearsay exception for statements made not for medical treatment but to physician who was expected only to testify is likewise not firmly rooted); State v. Larson, 472 N.W.2d 120, 126 (Minn. 1991) (statements to doctor were within the core of the long-standing "medical treatment" exception, and accordingly particularized guarantees of trustworthiness need not be shown); cf. Shaviro, supra note 296, at 363 (Supreme Court's simultaneous broadening of existing hearsay exceptions and reliance on their ancient roots is historically suspect).
a selfish interest in treatment. Because the expert has a professional interest in the child’s treatment and placement that may depend upon the identity of the perpetrator, the statement of identity is considered admissible regardless of whether the child perceives that her or his self-interest in treatment is implicated by the statement.

The courts that have examined the firmly rooted question have almost uniformly rejected varying treatment for different types of statements under the exception. Some courts treat the exception as if it required that the patient in each case have the purpose of seeking medical treatment and then freely find that purpose. Others have been more direct, baldly declaring that all statements within the exception are firmly rooted. These latter cases treat as inconsequential the significant expansion of this firmly rooted exception.

The determination of whether such statements are firmly rooted highlights the poverty of the Supreme Court’s current analysis. Determining when a hearsay exception carries with it a guarantee of trustworthiness such that cross-examination is superfluous surely requires more than simply counting jurisdictions that have adopted an exception. The Constitution cannot be amended by such crude expediency, and nothing in the history of the Confrontation Clause suggests that counting states adopting a certain view was considered an acceptable method of eliminating Confrontation Clause protections.

Although the length of time an exception has been in place or the number of jurisdictions adopting it makes for an easily applied rule, a different type of analysis that focuses on the need for cross-examination is appropriate. The consequences of finding a class of statements to be

494. See Mosteller, supra note 71, at 260-64.
495. See supra note 71.
496. See, e.g., United States v. Renville, 779 F.2d 430, 437-38 (8th Cir. 1985) (combining two rationale for exception and treating statement of identity as if it satisfied self-interested treatment rationale as well). See generally Mosteller, supra note 71, at 275-77. In White, Chief Justice Rehnquist appeared to finesse the issue by terming the exception the “medical examination” exception, which he viewed as resting on the rational that “the declarant knows that a false statement may cause misdiagnosis or mistreatment.” White v. Illinois, 112 S. Ct. 736, 739-43 (1992).
498. See also Raeder, supra note 97, at 54-55 (noting the apparently broad brush treatment as firmly rooted of all statements falling within the exception for statements for medical diagnosis or treatment as firmly rooted in spite of legitimate questions regarding the propriety of admitting statements of identity under that category).
499. Wright illustrates the unreasonable impact of the state evidence law on the constitutional determination. The Court excluded statements in Wright made to a pediatrician with extensive experience in child abuse cases, Idaho v. Wright, 497 U.S. 805, 809 (1990), which were admitted under the state’s residual hearsay exception, id. at 811, because the circumstances of the statements did not demonstrate their trustworthiness. Id. at 826-27. Those statements concerned the nature of the assault and the identity of the perpetrator. Had Idaho simply admitted the statements under its exception for statements made for medical diagnosis or treatment, the statements would have been automatically admissible under the analysis used by many courts that, because the state evidence rule has the same label as a well-established exception, statements falling within it are automatically admissible.
firmly rooted is extremely significant. It means more than that the state need not call the child; instead the evidence is automatically trustworthy and is admissible even if the child cannot be called by the defendant because of trauma or incompetency.

In its modern form, whether presented through videotape or otherwise, the exception for medical diagnosis or treatment is used as a way to manufacture and present evidence against the defendant. This is particularly true given the broad categories of experts who may qualify, many of whom are part of child abuse trauma teams heavily invested in enforcement of sexual abuse laws. When the content of the statement concerns fault or identity, the challenges to the values protected by the Confrontation Clause are too great to ignore. The important issues should not be avoided by simply declaring that the entire exception under the Federal Rules model is firmly rooted.

2. The Individualized Determination of Trustworthiness and Corroboration in Child Sexual Abuse Cases

a. The Impact of Wright

Wright excludes external proof corroborating the truth of the statement as a method of demonstrating trustworthiness for the Confrontation Clause. Although Wright is theoretically very significant for cases involving child victims, it has somewhat more modest practical importance.

Wright has enormous potential significance because the general child sexual abuse hearsay exceptions occupy the full field left open by the Constitution. Courts typically admit hearsay statements by a child of a certain age who either testifies or is unavailable upon a showing that "the time, content, and circumstances of the statement provide sufficient indicia of reliability." Thus, Wright’s elimination of the use of corroboration by external evidence demonstrating the truth of the statement imposes an important theoretical limitation on what would otherwise be the tremendous breadth of such statutes.

Indeed, Wright is dispositive in some instances, excluding critical hearsay. For example, corroboration of a child's statement of sexual abuse through evidence of a sexually transmitted disease will no longer be permitted. Also, statements made under very suggestive circum-

500. See supra note 307.
501. Although many statutes also require corroboration of the statement when the child is unavailable, this requirement is generally easily satisfied. See infra notes 516-28 and accompanying text. Also, some statutes prescribe additional requirements, see supra notes 26-27. See supra notes 21-33 and accompanying text.
503. State v. Matsamas, 808 P.2d 1048, 1055 (Utah 1991) (on remand, trial court instructed not to rely on presence of vaginal infection in four-year-old child that doctor indicated was almost inva-
stances are excluded, such as those in *Wright* itself where the questioner used "blatantly leading questions" with a child of only two and one-half. 504

Nevertheless, the range of evidence available for establishing "particularized guarantees of trustworthiness" remains enormous. For example, in another *Wright* case, *State v. Wright*, 505 a state court found sufficient indicia of reliability in a statement made by a child to a police officer without any reliance on external corroboration. It cited the following factors:

[1] The statement was made within two hours of the crime, reducing the chance of memory lapse, fabrication, and contamination from interaction with interested persons.

[2] The environment of the interview was not threatening and instead took place in a special interview room designed to be comfortable and calming.

[3] No one but the victim and the police detective were present during the interview and thus no direct pressure on the victim by others was possible during that interview.

[4] The statement was not the product of coercion or leading questions.

[5] An examination of the contents of the statement, while showing some minor inconsistencies, does not indicate unreliability. 506

In the typical child sexual abuse case, similar factors will be present. 507 Absent reformation of confrontation analysis, *Wright* will principally impact other types of statements, such as statements made before a grand jury by a witness under pressure to cooperate with authorities or statements made by a suspect in police custody implicating both the speaker and another in the crime. These other exceptions are important to prosecutions, previously admissible upon corroboration by external

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504. Idaho v. Wright, 497 U.S. 805, 808, 813, 826 (1990); see also, e.g., Rolader v. State, 413 S.E.2d 752, 757-58 (Ga. Ct. App. 1991) (videotaped statements obtained by persons acting in law enforcement capacity and taken after numerous interviews with child found invalid under Wright).

505. 751 S.W.2d 48 (Mo. 1988) (en banc).

506. Id. at 52.

507. See Berger, supra note 125, at 606. Berger notes that indicia of reliability are easy to come by and argues that "Wright reads like a handbook instructing prosecutors how to offer a child's hearsay statement with requisite 'particularized guarantees of trustworthiness.'" Id.; see also Dutton v. Evans, 400 U.S. 74, 100 (1970) (Marshall, J., dissenting). She then lists the four factors in Wright. Professor Berger's prediction was accurate. When Ohio approved a new general child hearsay exception, it tracked these four factors to establish "reasonable likelihood of trustworthiness." Ohio R. Evid. 807(A)(1).

Wright's impact should not be excessively minimized, however. For example, in Rolader v. State, 413 S.E.2d 752, 758-59 (Ga. Ct. App. 1991), the court excluded a statement because it determined the circumstances surrounding the making of the statement did not establish reliability. The court emphasized that both interviews were conducted by adults interested in gathering evidence against the defendant, one of whom was a police investigator. Id. at 758.
facts, and frequently inadmissible under Wright’s analysis.\textsuperscript{508}

A major problem with Wright is that it is not demanding enough in some circumstances. When statements are produced through the ex parte efforts of government agents in the inquisitorial tradition, a finding of trustworthiness should be insufficient to satisfy the demands of the Confrontation Clause. Only if the declarant is actually cross-examined or if cross-examination was inconsequential from the defendant’s perspective\textsuperscript{509} should the test be satisfied.

b. The Place for Corroboration Under Current Analysis

After Wright, corroboration of the statement’s accuracy is not part of the Confrontation Clause analysis, but it does have a place in determining whether an error was constitutionally harmless.\textsuperscript{510} Moreover, corroboration may continue to play a role in child abuse prosecutions as a nonconstitutional protector of the defendant.

Washington’s general child sexual abuse exception, on which many others were modeled, requires that when the child does not testify\textsuperscript{511} “corroborative evidence of the act” must be demonstrated.\textsuperscript{512} In that limited context, the provision is designed to protect against convictions based on the highly emotional impact of the crime of child sexual abuse but resting on insufficient evidence.\textsuperscript{513} Even in such circumstances, however, only the criminal act must be corroborated, not the full details of the statement.\textsuperscript{514}

\textsuperscript{508} 2 McCormick on Evidence, supra note 68, § 324, at 364 & n.14; see also United States v. Flores, 985 F.2d 770 (9th Cir. 1993) (inability to consider corroborating evidence important in finding admission of inculpatory statement by codefendant to grand jury violated Confrontation Clause).

\textsuperscript{509} Jonakait, supra note 96, at 596-97.


\textsuperscript{511} If the child testifies, corroboration is not required even if her in-court testimony fails to repeat all the details of the out-of-court statement. People v. Rushing, 192 Ill. App. 3d 444, 449, 548 N.E.2d 788, 792, 139 Ill. Dec. 403, 407 (4th Dist. 1989), appeal denied, 131 Ill. 2d 565, 553 N.E.2d 400, 142 Ill. Dec. 886 (1990).

\textsuperscript{512} Wash. Rev. Code § 9A.44.120(2)(b) (1989); see also Fla. Stat. Ann. § 90.803(a)(2)(b) (West Supp. 1992) (requiring corroboration of the abuse or offense); Wright, 497 U.S. at 829 n.2 (Kennedy, J., dissenting) (listing statutes that incorporate a requirement of corroboration, generally following the model of the Washington statute). See supra note 33.

\textsuperscript{513} State v. Jones, 772 P.2d 496, 499 (Wash. 1989) (“By permitting into evidence only those hearsay allegations that can be substantiated by other evidence, the corroboration requirement reduces this risk.”); see also People v. Bowers, 801 P.2d 511, 524-25 (Colo. 1990) (corroboration requirement that the event took place added to statute to allay the fears of the conviction of an innocent person based on child’s imagination); Beck v. State, 544 N.E.2d 204, 211 (Ind. Ct. App. 1989) (“The requirement of corroborative evidence was intended to act as a safeguard due to fears about the reliability of a young child.”); Note, supra note 17, at 820 (“Because the state’s case will typically rest largely on the child’s hearsay statement, a general requirement of corroboration is a necessary safeguard against wrongful conviction.”).

Given the elimination of the constitutional significance of corroboration in *Wright* and the apparent preeminence of the legislative policy of fostering effective prosecution, questioning whether this additional requirement will remain in the statutes has some basis. However, the corroboration requirement appears to have a relatively firm status as a limited protector against convictions resting entirely on hearsay statements by an absent declarant.

Courts have found a wide variety of evidence sufficient to corroborate the criminal act and to permit admission of the statement. The fact that such evidence need not be admissible to be corroborative further expands the range. Moreover, courts often relax the "standard of proof" for corroboration: the corroborative evidence "must be enough to induce a person of ordinary prudence and caution conscientiously to entertain a reasonable belief that the sexual abuse that is the subject of the child's hearsay statement occurred." Indeed, because of the secretive character of most offenses and because of the nonviolent nature of many of them, courts have recognized the necessity of accepting highly indirect forms of corroboration.

The strongest and most clearly acceptable forms of corroboration recognized by courts are: eyewitness testimony from another witness, a confession by the defendant, or medical or scientific evidence of abuse.

late court in Oklahoma has held that not only must the act be corroborated but the identity of the defendant as the actor must be corroborated as well. Matter of A.S., 790 P.2d 539, 542 (Okla. Ct. App. 1989). However, the Oklahoma statute appears to provide no basis for such a requirement. OKLA. STAT. ANN. tit. 12, § 2803.1(A)(b) (West Supp. 1992) (requiring "corroborative evidence of the act").

515. *Cf.* State v. Renly, 827 P.2d 1345, 1351 n.7 (Or. Ct. App. 1992) (explaining how in response to *Wright*, state legislature eliminated corroboration from list of reliability factors and reduced rigor of one of its statutory requirements, which previously had mandated extrinsic evidence that defendant participated in conduct, to require only that defendant be shown to have had an opportunity to participate).

516. For example, Mississippi included a corroboration provision in its rule enacted in 1991 with full knowledge that *Wright* made external corroboration irrelevant to finding indicia of reliability. *See* MISS. R. EVID. 803(25) cmt.

517. In the analysis that follows, I do not attempt to develop which types of corroboration should be sufficient and which should not. My failure to attempt these distinctions in not based on a belief that all currently approved types of corroboration are appropriate. For example, not all childhood nightmares or expert opinions should be sufficient. Rather, I attempt no distinctions because the overall inquiry is so devoid of standards to be of little general value, *see infra* text accompanying notes 352-33, and thus these more difficult secondary distinctions do not justify the careful examination required.

518. Corroboration is categorized as a preliminary fact to be decided by the court without restraint by the rules of evidence. *State v. Jones*, 772 P.2d 496, 498-99 (Wash. 1989); *see also* FED. R. EVID. 104(a) ("In making its determination [the court] is not bound by the rules of evidence except those with respect to privileges.").


520. "The statute's essential purposes should not be defeated by a stubborn insistence on corroboration that is impossible to obtain." *Joner*, 772 P.2d at 500.

521. *State v. Swan*, 790 P.2d 610, 615 (Wash. 1990), *cert. denied*, 111 S. Ct. 752 (1991). In *Bowers*, the Colorado Supreme Court provided the following statement of corroborative evidence: testimony from an eyewitness, other than the unavailable child-victim, whose statement is offered into evidence, that the offense occurred; statements of other children who were present
Other more indirect forms of corroboration include the victim's precious knowledge of sexual activity, sexually oriented play or activity, and nightmares, expert opinion that the child experienced post-traumatic stress consistent with sexual abuse or other expert testimony regarding psychological reactions, "cross-corroboration" by the hearsay statements of other co-victims, and evidence that the defendant has committed other similar acts.

The one type of evidence inadequate to corroborate the criminal act is another hearsay statement by the same unavailable declarant. The theory is that the corroboration requirement was meant to call for evidence independent of the statement, and self-corroboration by the hearsay declarant would deny the requirement meaningful content. An area of dispute between the cases is whether conduct of the child while giving the statement, such as sexually oriented play with dolls, can con-
stitute corroboration. The judgment turns on the often highly technical determination of whether conduct is considered assertive, and therefore constitutes hearsay, or nonassertive and outside the hearsay category.\footnote{\textit{Compare Bowers}, 801 P.2d at 523-27 (rejecting both play with anatomically correct dolls and precocious sexual knowledge as basis for corroboration because first is directly assertive and second requires an inference from assertive content of child's statement) with \textit{Swan}, 790 P.2d at 622 (play with anatomically correct dolls considered nonassertive and proper corroboration) and \textit{Jones}, 772 P.2d at 500-01 (precocious sexual knowledge considered nonassertive aspect of child's statement and therefore properly used to corroborate statement).}

Although the concept is very broad and malleable, requiring corroboration does prove decisive in some instances.\footnote{\textit{Bowers}, 801 P.2d at 524-25 (conviction reversed where only child's actions and statements, which court considered to be assertive, corroborated hearsay statement); \textit{Beck}, 544 N.E.2d at 211 (conviction reversed where only corroborating was other hearsay statements of child); \textit{Reny}, 827 P.2d at 1351-52 (conviction reversed where only corroborative evidence was other admissible hearsay by child).} Nevertheless, corroboration as defined by the general child sexual abuse statutes provides weak protection. The case law certainly supports Justice O'Connor's concern in \textit{Wright} that a corroboration requirement would be selectively applied and provide little real guarantee of the reliability of the critical elements of accusatory hearsay.\footnote{\textit{Idaho v. Wright}, 497 U.S. 805, 824 (1990).} Only the criminal act, not the critical details of the statement, such as the identity of the perpetrator, must be corroborated in most jurisdictions. Corroboration is no substitute for reliability, and it is certainly not a substitute for cross-examination. Theoretically, the corroboration concept provides useful protection against conviction based on sensational charges but insubstantial evidence. Given the haphazard impact of corroboration, which is applicable only to aspects of the child's statements and may be satisfied by very attenuated forms of proof, the requirement is hardly worth its costs.

3. \textit{Whether Unavailability Exists as a Requirement}

Under the logic of recent confrontation decisions, whether a showing of unavailability is required for statements admitted under new non-traditional hearsay exceptions should not depend upon whether the exception is firmly rooted but on whether the theory of the exception establishes an independent basis for trustworthiness that is not replicated by in-court testimony. For example, a statement that owes its trustworthiness to the declarant's motivation to tell the truth at the time the statement was made, such as self-interest, or a statement that relies on the contemporaneity of the declaration in relation to the event described should not require a showing of unavailability under the theory of \textit{Inadi} and \textit{White}.\footnote{\textit{See supra} discussion in notes 94-98 and accompanying text.}

The only real impediment to eliminating the unavailability requirement for these new exceptions,\footnote{But see assumption by Justice Blackmun in his dissent in \textit{Lee} that unavailability is required for statements against interest because custodial confessions are more like prior judicial testimony} as an earlier version of the Arkansas
child sexual abuse exception did,\footnote{The exception treated such hearsay as a standard Rule 803 exception as to which the availability or unavailability of the declarant was irrelevant. See Smart v. State, 761 S.W.2d 915 (Ark. 1988) (examining one implication of the absence of an unavailability requirement).} is recognition of a new dimension in Confrontation Clause analysis. Under this new analysis, a presumption against admissibility applies to statements whose admission would threaten the core values of the Confrontation Clause. The presumption would not apply to all statements admissible under a statute structured like the Arkansas rule, but only to statements created under inquisitorial means, particularly those in trial-type form. To avoid manipulation that would eliminate this special scrutiny, the court must exercise care in the determining whether such statements are created for prosecutorial purposes.\footnote{See Rolader v. State, 413 S.E.2d 752, 753-56, 758 (Ga. Ct. App. 1991), discussed supra note 387.} For example, the fact that the statements may also be useful for a purpose beyond prosecutions, as where child protection workers have the initial duty to take civil protective actions, should not affect the characterization of the interview as serving a prosecutorial function.\footnote{Under my argument, State v. Duffy, 605 A.2d 533, 534-35 (Vt. 1992), takes the wrong approach. In Duffy, the court was determining whether to exclude hearsay offered in a criminal case against the defendant under a statute that excludes statements “taken in preparation of a legal proceeding.” Vt. R. Evid. 804(a)(2). It found the statute’s limitation inapplicable because the child protection caseworker had dual functions. The existence of a second function does not, however, eliminate the danger that the statute was obviously designed to prevent—the creation of inquisitorial evidence.} This limitation is important because otherwise a trustworthiness determination eliminates the right to cross-examine under the Confrontation Clause even for new forms of questionable hearsay.

VI. CONCLUSION

I have argued that the admission of statements that were accusatory and testimonial at the time made and produced by the government ex parte against the defendant should trigger enhanced protection under the Confrontation Clause. Videotaped statements by child victims in sexual abuse cases present the archetypal example of such statements. For those statements to be admissible, courts must require the declarant to testify in an adversarial setting and to submit to effective cross-examination. The cross-examination must also be presented to the jury in the same medium as the prior statement. Refusal to testify or a claim of lack of memory cannot suffice. Such responses do not provide a basis for evaluation of children’s credibility. On the other hand, if these important protections are provided, then videotaped statements may in fact be constitutionally received.

I contend that videotaped statements offered under the new general child hearsay exception and the traditional exception for statements for medical diagnosis or treatment present the same dangers as statutes ex-
plicitly authorizing ex parte videotaped statements create. Under all these exceptions, admitting videotaped statements creates an enormous incentive for the prosecutor to shield the child from adversary testing by a finding of unavailability. The remedy is to require significant adversarial protections as a precondition to receiving videotaped statements that may substitute for the live testimony of the most critical witness. With regard to the medical diagnosis or treatment exception, given the modern expansion of the exception to make statements of fault and identity admissible as relevant to the expert's concern, such statements are in many cases functionally indistinguishable from investigative efforts by the police. A finding of trustworthiness under these exceptions can never be a substitute for adversarial testing.

When threatened trauma resulting from the prospect of the child testifying at trial is raised as an objection to the child's availability, the inquiry should be multifaceted. The level and type of trauma required should vary according to the impact of such a finding on the defendant's rights. Progressively greater trauma is required as a finding of "unavailability" dispenses in turn with (1) testimony in the presence of the jury, (2) testimony in the presence of the defendant, and (3) the right of cross-examination. Trauma that only impairs the effectiveness of the testimony cannot justify eliminating the right to cross-examine. This analysis applies whether the right to cross-examine is guaranteed by the Confrontation Clause or the Compulsory Process Clause.

We must examine competency issues anew given the prospect of entirely eliminating live testimony and cross-examination of the child in favor of ex parte videotaped statements. Incompetency cannot justify eliminating the right to cross-examine when the court will admit that same declarant's testimony by hearsay statement, particularly a videotaped statement. Conversely, a statutorily mandated declaration that all children are competent cannot automatically satisfy the Confrontation Clause under the argument that the child is available to be cross-examined. The Constitution does not permit reduction of the confrontation right to such a hollow formalism.

I also have argued that the new exceptions developed to cover child hearsay cannot be treated as "firmly rooted" within the meaning of current Supreme Court analysis. The same is true for major expansions of traditional exceptions, such as the receipt of statements of identity when made to a broad range of medical and quasi-medical personnel under the theory that the information is important to the rendering of an expert opinion, not the self-perceived treatment interest of the patient. The nonsensical nature of the analysis that would lead to a contrary result—that additions to federal hearsay rules if adopted by a suitable number of states alters the constitutional right to confrontation—demonstrates both that we cannot permit the individual result and that the general analysis that would permit such a result is flawed. Whether an extension of a traditional exception is treated as firmly rooted must turn on whether it
poses challenges to confrontation concerns beyond those accepted traditionally under hearsay exceptions. The extension of the medical diagnosis or treatment exception to the issue of identity poses major additional threats of the type that the Framers designed the Confrontation Clause to control.

The challenges to the Confrontation Clause and to evidence doctrine posed by new developments in child hearsay are enormous. These challenges vigorously test those principles and have forced us to examine alternative solutions. The failures of existing doctrinal analysis in this area have helped illuminate its flaws and can help point the way to proper solutions in the area of child sexual abuse litigation that we can apply in other areas as well.