DIAL-IN TESTIMONY

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For several hundred years, one of the great glories of the common law system of criminal justice has been the requirement that prosecution witnesses give their testimony in the presence of the accused—"face to face," in the time-honored phrase—under oath, subject to cross-examination, and, unless unfeasible, in open court. In the United States, this principle is enshrined in the Confrontation Clause of the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."1 But now a new way is developing for witnesses for the prosecution to testify: Call 911.

As we will show, it is now common practice for some prosecutors to prove a crime by offering the recording of a 911 call—that is, a telephone conversation between the alleged victim of the crime or another witness to it and an agent of an emergency assistance service. Similarly, prosecutors often offer evidence of statements made by the caller to a police officer who responded to the call. In this Article, we will describe and explain prosecutors' use and courts' tolerance of this practice. We will then use this phenomenon to explore at a broader level both what we believe are the defects in the Supreme Court's current approach to the confrontation right, as exemplified most recently in its decision in Lilly v. Virginia,2 and the possibility of re-conceptualizing the right in a way that would restore it to its proper place.

Part I of this Article describes the developing practice by which statements made in 911 calls or in follow-up conversations are often admitted at trial to prove the truth of the caller's narration of a crime allegedly committed against him or her. The statements are sometimes admitted for this purpose, we will show, even if the caller does not testify at trial and the prosecution has failed to account for his or

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1 U.S. CONST. amend. VI.
her absence—and even if the caller does testify but gives an account fundamentally inconsistent with his or her earlier one.

Part II describes one source of the new practice. Changes in the way that domestic violence is treated by the criminal justice system make a serious official response to 911 calls highly likely. There is a developing public awareness that calls to 911 reporting an alleged crime are in effect reports to law enforcement authorities. Furthermore, prosecutors are more disposed than in earlier times to pursue charges even without the cooperation of the alleged victim. This development is in part attributable to increased judicial receptivity to the victim's out-of-court statements, but it also enhances the evidentiary value of those statements. Our discussion in Parts I and II will present information from around the nation, and will also draw on the experience of one of us (McCormack) in domestic violence cases in Washtenaw County, Michigan.

We will then turn to doctrine. Part III discusses the early history of the confrontation right. It shows that the right emerges out of the basic concept, central to the common law system among others, that testimony must be given under prescribed conditions, among which are that it must be under oath and in the presence of the accused. What is now known as the excited utterance exception to the rule against hearsay at first developed in adherence to this principle, but then departed from it; that exception now provides the principal doctrinal basis for exempting from the rule against hearsay statements made in 911 calls or to officers responding to those calls. Furthermore, under the current jurisprudence of the United States Supreme Court, if a statement satisfies the hearsay rule, then the Confrontation Clause is unlikely to create any obstacle to admission.

Part IV then discusses theoretical implications. We will argue that the doctrine admitting these statements fails on its own terms, for these statements are not particularly reliable. More basically, we will argue that current confrontation doctrine, geared to improving the reliability of evidence, is fundamentally misconceived and fails to reflect the basic values underlying the Confrontation Clause. We believe that a better source of guidance lies in Justice Breyer's concurring opinion in Lilly—not surprising, perhaps, because that opinion drew heavily on an amicus brief coauthored by the other one of us (Friedman). The confrontation right, we will argue, should apply only to a limited category of out-of-court statements, but as to those it should be deemed categorical, not subject to balancing or ringed with exceptions. We will examine three different categorical approaches.
We conclude that the values and history underlying the Confrontation Clause are best reflected by a theory that focuses on whether the out-of-court statement, if admitted at trial, would amount to the functional equivalent of testimony. This approach, unlike the others, leads to the proper treatment of 911 calls.

I. THE PHENOMENON: THE DIAL-IN TRIAL

In this Part we will describe the phenomenon at the heart of this Article, the developing practice in which statements made in 911 calls or in follow-up conversations with police officers are often admitted at trial to prove the truth of the caller's narration of a crime allegedly committed against him or her. We will show that these statements are sometimes admitted even if the caller does not testify at trial and the prosecution has failed to account for his or her absence. Similarly, they are sometimes admitted if the caller does testify but, even without surprising the prosecution, gives an account fundamentally inconsistent with his or her earlier one.

In 1995, the State of Ohio successfully prosecuted one Jerry Lee for domestic violence. As noted by the trial court, "The only evidence offered by the state at trial was a tape recording of the victim's telephone call to 911 and the testimony of one of the two police officers responding to the scene." In the tape recording, the victim, Lee's wife Kathy, says that her husband stabbed her door, hit her, and tried to throw her out the door. Within five more minutes, Kathy made additional statements to one of the officers, including one that Jerry had tried to stab her. The trial court admitted all these statements, along with one of the officer's description of evidence he found at the scene—slits in the door and slashes in the bedroom mattress—indicative of a physical struggle.

Neither Kathy Lee nor the son testified, and the State made no attempt to account for their absence. The court was not troubled by

4 Id. at 607 (footnote omitted).
5 Id. at 607 n.2. Jerry Lee's angry voice is heard on the tape, saying that he no longer had a knife but that he had had one. Id.
6 Id. at 607 n.3.
7 Id.
8 Id. at 607.
this. "[P]roceed[ing] to trial without the presence of the alleged vic-
tim" in domestic violence cases was not only "[i]n keeping with the
new policy of the Hamilton County Prosecuting Attorney" but consist-
tent with the practice "[i]n many jurisdictions across the country." The
court pointed out that "[n]o rule of law requires that a battered
partner testify against a once loved one for the state to proceed on a
charge of domestic violence." That is true, of course. The fact that the prosecution need not
present the victim’s testimony is demonstrated most vividly by murder
cases, in which, by definition, the victim does not testify at trial. But
in a case like Lee, though the prosecution does not present the victim
as a live witness, it does present her allegations as to what occurred.
And the court found this approach perfectly acceptable. "Some-
times," the court said, "all that is necessary is the testimony of a re-
sponding officer and a transcript of the 911 tape." And in the
court’s view, Jerry Lee’s was such a case. The court had little difficulty
in determining that each of the offered statements fit within the hear-
say exception for excited utterances. Therefore, in light of recent Su-
preme Court doctrine (which we discuss in Part III), the defendant’s
Sixth Amendment right to "be confronted with the witnesses against
him" did not pose a problem. In effect, the police officer was the
complaining witness, and Lee’s opportunity to cross-examine him satis-
fied his confrontation right. And this was true without any need to
inquire into whether Kathy or her son were—unlike a murder vic-
tim—available to testify in court; availability, the court said, was "not
an issue." In short, the Lee court regarded this as "a textbook case of prose-
cuting the crime of domestic violence without the presence of the vic-
tim at trial." And the court surely was right in that respect. Jerry
Lee’s case is not an anomaly, but rather representative of what has be-
come a common phenomenon. Increasingly, across the country

9 Id.
10 Id. at 607-08.
11 Id. at 608.
12 Id. (footnotes omitted).
13 Id. at 608 n.5. In some states, however, the confrontation clause of the state
constitution might pose an obstacle to admission. Infra note 227.
14 657 N.E.2d at 608 n.5.
15 Id. at 608 n.8.
16 Id. at 607. There is, in fact, an Ohio “textbook” for prosecuting domestic vio-

lence cases without the complainant. RONALD B. ADRIE & ALEXANDRA M. RUDEN,
OHIO DOMESTIC VIOLENCE LAW (1999).
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prosecutors are proving their cases by using statements taken by 911 operators and police officers responding to crime scenes instead of the witnesses themselves. There is no limit to the type of crime for which prosecutors use such evidence—they have used it to prove cases of arson, felon in possession of a firearm, and murder—but they have found it to be a particularly valuable tool in domestic violence cases.

Prosecutors are proving cases in this way because it pays off. Though some defendants tried on the basis of this type of evidence have been acquitted, prosecutors have won many convictions, and when those convictions have been appealed they have almost always been upheld.

In some cases, prosecutors use this type of evidence in addition to the live testimony of the caller, essentially to bolster or corroborate that testimony. More problematic, in some cases prosecutors use the

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18 Prosecutors report roughly the same conviction rate in domestic violence cases tried with the complainant as in those tried without her. Infra note 75. Some cases of acquittals have been reported in the press. For example, Warren Moon, the Minnesota Vikings quarterback, was accused of assaulting his wife in 1995. Bruce Nichols, Moon Cleared of Assaulting Wife Last Year, DALLAS MORNING NEWS, Feb. 23, 1996, at 1A. The State of Texas proceeded with his prosecution over his wife's objections and subpoenaed her to testify. Id. She exculpated her husband in her testimony, but the prosecution asked the jury to find him guilty based on the other evidence in the case, including a 911 call placed by their son and Mrs. Moon's statements to the police who responded to that call. Id. Moon was acquitted, id.; the prosecution may have had more luck had it gone forward without Mrs. Moon's testimony.

19 Most domestic violence cases are tried as misdemeanor cases. Misdemeanor convictions are rarely appealed, and when appealed rarely reported. But as summarized below there are already a substantial number of reported cases in which prosecutors have won convictions based on statements to 911 operators and responding officers.

evidence because, though the caller testifies at trial, she does so in a way that is unhelpful to the prosecution. It "has become lamentably common in cases of domestic violence" that the complainant's testimony at trial is directly contrary to the statements she earlier made on a 911 call and to a responding officer. In such cases prosecutors have often been allowed to introduce those prior inconsistent statements—even without the need to prove that the prosecutor was surprised by the trial testimony—and have secured convictions.

1998) (holding admissible testimony of responding officers as well as a 911 tape).


22 See Gutierrez v. Municipality of Anchorage, No. A-6947, 1999 Alas. App. LEXIS 35, at *4-9 (Alaska Ct. App. June 2, 1999) (permitting prosecutor, expecting complainant to recant, to introduce a 911 tape of witness under the excited utterance exception); State v. Borrelli, 629 A.2d 1105, 1108-09 (Conn. 1993) (admitting complainant's statements to police to impeach the witness who recanted her testimony, first at the hearing on motion to dismiss and then at trial); Williams, 714 So. 2d at 463-66 (admitting statements made by the complainant to responding officers as well as a tape recorded 911 call where the witness had changed her initial description of events to the police); Impson v. State, 721 N.E.2d 1275, 1280-85 (Ind. Ct. App. 2000) (holding that the prosecutor's impeachment of the complainant with her past inconsistent statements to the responding officers was admissible as an excited utterance); State v. Johnson, No. C9-99-446, 1999 Minn. App. LEXIS 1316, at *9-12 (Minn. Ct. App. Dec. 14, 1999) (allowing testimony of responding officer, under excited utterance doctrine, where complainant changed her testimony at trial); State v. Sloat, No. 1999CA00057, 2000 Ohio App. LEXIS 387, at *7-8 (Ohio Ct. App. Feb. 7, 2000) (holding that a prosecutor need not be surprised by his witness' own testimony to invoke the excited utterance exception); State v. Smith, No. 98CA01003, 1998 Ohio App. LEXIS 6454, at *2-6 (Ohio Ct. App. Dec. 22, 1998) (permitting the testimony of the responding officer, under the excited utterance doctrine, where the complainant has recanted at least part of her original account); State v. Mineo, No. 24993-6-II, 2001 Wash. App. LEXIS 59, at *7-15 (Wash. Ct. App. Jan. 12, 2001) (deeming harmless the allowance of responding officers' testimony despite inconsistent testimony by the complainant at trial); Jennifer Liebrum, Jury Convicts Husband of Assault: Wife Testifies That He Didn't Hit Her, HOUSTON CHRON., Apr. 26, 1996, at A32 (reporting a case in which the prosecutor used complainant's statements to the responding police officer and the 911 tape of her daughter calling to report the incident to gain a conviction even though the witness testified that her husband did not hit her); Bill Miller, Officials Persist in Domestic Violence Case; D.C. Officer Is Convicted Despite Victim's Recanting, WASH. POST, Apr. 11, 1996, at B1 (reporting a case in which complainant alleged in a 911 call that her fiancé, a police officer, had beaten her, but recanted before trial and repeated recantation in testimony, yet prosecution used earlier statement to gain a conviction).

In one case tried for the defense by law students under Professor McCormack's supervision, the complainant testified that she lied to the 911 operator, and to the police officers who responded to her call, to get her husband, the defendant, out of the house. The complainant was an imperfect witness in more ways than this. She was facing her own domestic violence charges and admitted to having been very high when she called 911. The jury convicted the defendant, though the court later set aside the conviction and dismissed the complaint for unrelated reasons. Personal trial notes from Case Nos. 99-0190 & 01-0445, 14B Dist. Ct., Washtenaw County, Mich. (Sept. 2000 & Dec. 3, 2001) (on file with authors).
Increasingly, though, prosecutors are finding that there is no need to put the 911 caller on the witness stand at all in order to use her prior statements. In some cases, they have used the statements because, for one reason or another, the 911 caller is unavailable to testify at trial.  

Most strikingly, prosecutors are now often using the prior statements even though the caller may be available to testify at trial but does not do so. In such cases, the courts tend not to ask the prosecutors to account for the absence of the witness. Thus, the prosecutor

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23 See People v. Hernandez, 83 Cal. Rptr. 2d 747, 749-52 (Cal. Ct. App. 1999) (using testimony of police officer where complainant was unavailable as a witness); Kwon v. State, 517 S.E.2d 83, 84 (Ga. Ct. App. 1999) (introducing the testimony of the responding officers when complainant invoked spousal privilege to avoid testifying); Sorrow v. State, 505 S.E.2d 842, 845 (Ga. Ct. App. 1998) (allowing introduction of the complainant's hearsay statement even though she refused to testify); People v. Hendrickson, 586 N.W.2d 906, 910 (Mich. 1998) (allowing prosecution to rely on complainant's 911 call and statement to police in order to prove its case even though complainant recanted after the defendant was arrested and indicated that she would invoke Fifth Amendment privilege); State v. Edwards, 31 S.W.3d 73, 76-77 (Mo. Ct. App. 2000) (using a 911 tape to prove a case where complainant invokes her Fifth amendment privilege); State v. Archuleta, 955 S.W.2d 12, 14 (Mo. Ct. App. 1997) (obtaining a conviction based on the testimony of the responding officer when the complainant claimed that she could not remember anything about the night in question other than the police officer showing up at her door); State v. Cornell, 717 N.E.2d 361, 366 (Ohio Ct. App. 1998) (holding that the trial court did not abuse discretion in admitting testimony of statements to police officers made by complainant who was unavailable at trial); State v. Krakue, 726 A.2d 458, 460 (R.I. 1999) (presenting testimony of responding officer where complainant absented herself from the state); Tejeda v. State, 905 S.W.2d 313, 315 (Tex. Ct. App. 1995) (circumventing spousal privilege by introducing testimony of responding officer). In Cornell, the complainant was apparently unavailable to testify because she would have asserted her Fifth Amendment privilege against incrimination. 717 N.E.2d at 367-68. The State conceded "that its case rested entirely upon the admissibility of [hearsay] testimony," id. at 365, specifically, her statements to the police officer who responded to the scene. Cornell's conviction was reversed, not because the court had erred in admitting testimony of statements to police officers made by complainant who was unavailable at trial).  

is free to present the secondary evidence rather than the live testimony of the caller—because the caller would be an unhelpful witness or would be subjected to a difficult cross-examination, because she finds it distasteful to testify, or for any other reason.

Although occasionally other doctrines come into play, the so-called “excited utterance” or “spontaneous declaration” exception to the hearsay rule provides the principal basis on which courts allow this type of evidence to bypass the obstacles of the rule against hearsay and the defendant’s confrontation right. This exception is based on the idea that if the declarant is speaking while still under the stress of ex-


25 Sometimes, prosecutors invoke the hearsay exceptions for present sense impressions or for statements made for purposes of medical diagnosis or treatment in addition to the excited utterance exception. See, e.g., People v. Hendrickson, 586 N.W.2d 906, 907 (Mich. 1998) (holding that the recording of the complainant’s statement that defendant had just beaten her is admissible under the present sense impression exception); Oldman, 998 P.2d at 959 (affirming the lower court’s holding that the hearsay statements of complainant, recounted by the emergency physician, were admissible under both the excited utterance and medical diagnosis exceptions); Mary E. Asmus et al., Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships, 15 HAMLIN L. REV. 115, 139 (1991) (“The present sense impression is an often overlooked rule of evidence providing a powerful tool for the prosecutor seeking to present evidence of domestic abuse despite a victim’s unwillingness to testify regarding that abuse.”).

Where the declarant testifies in variance with her prior statements, the hearsay exception for prior inconsistent statements of a witness will not render the prior statements admissible to prove the truth of the matter asserted in most American jurisdictions. As established in FED. R. EVID. 801(d)(1)(A), that exemption applies only if the prior statement “was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.” Statements made to 911 operators and to responding police officers do not satisfy these requirements. Some jurisdictions, though, do not insist on such restrictions on the admissibility of prior inconsistent statements. See, e.g., CAL. EVID. CODE § 1235 (West 1995) (“Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.”); State v. Borrelli, 629 A.2d 1105, 1109-10 (Conn. 1993) (upholding the trial court’s admission of a prior inconsistent statement of complainant, reduced to writing and signed by her, for the truth of the matter asserted).

In addition, Oregon recently established a hearsay exception created particularly for victims of domestic violence. OR. REV. STAT. § 40.460(26) (1999). It allows a statement made within twenty-four hours, so long as it is recorded or made to a police officer or other designated officials or quasi-officials, and it has sufficient “indicia of reliability,” recantation not being sufficient in itself to lead to a conclusion of unreliability. Id.
citement caused by a startling event or condition, she presumably has not had an opportunity to concoct a false account. Particularly, but not exclusively, in the domestic violence context, courts look for testimony that the declarant was “upset,” “excited,” and “crying,” or sometimes “agitated” or “hysterical” before applying the exception. Once the victim has been described in such terms, courts have been willing to treat this exception rather generously.

Provided that the witness is still sufficiently “excited” when giving her statement, courts are often willing to admit the statement despite a considerable time lapse between the excitement-evoking event and the statement.26

Furthermore, if the witness is sufficiently upset (or excited or crying), the exception will usually apply even when her “statement” is a series of responses to inquiries posed by a professional questioner—a

26 See, e.g., Matthews, 1999 WL 286626, at *1, 4 (“hysterical” and “excited”); Dawson, 867 S.W.2d at 494 (“upset”); State v. Barnies, 680 A.2d 449, 450 (Me. 1996) (“visibly upset” and “crying”); O’Connor, 1998 Minn. App. LEXIS 1268, at *3 (“upset and crying”); State v. McGuire, No. C3-96-2310, 1997 Minn. App. LEXIS 896, at *8 (Minn. Ct. App. Aug. 12, 1997) (“visibly upset and shaken”); Harris, 1999 Ohio App. LEXIS 4585, at *9 (“very upset” and “crying”); Jorden, 730 N.E.2d at 450 (“distraught”); Smith, 1998 Ohio App. LEXIS 6454, at *1 (“crying” and “very upset”); Cornell, 717 N.E.2d at 364 (“very upset” and “crying”); Krakue, 726 A.2d at 460 (“appeared upset” and “continued to cry and shake”); Tejeda, 905 S.W.2d at 315 (“crying, screaming, shaking, and appeared nervous”); Alires, 9 P.3d at 771 (“very upset, nervous, tearful, and shaky”). But cf. W. Valley City v. Hutto, 5 P.3d 1, 6-7 (Utah Ct. App. 2000) (stating that although victim was “extremely upset,” “very agitated,” and “quite nervous” at time of interview, prosecution did not overcome “presumption that the stress had subsided with her relocation to a safe environment and the elapse of several hours”).

27 See, e.g., Camp v. State, 991 S.W.2d 611, 613 (Ark. Ct. App. 1999) (affirming that a three-hour lapse between the incident and the victim’s statements does not render them inadmissible); McGuire, 1997 Minn. App. LEXIS 896, at *8 (“Although over two hours had lapsed between the time of the incident and the police report, the fact that she was still visibly shaken supports the trial court’s determination that her out-of-court statement was admissible as an excited utterance.”); State v. Zembower, No. 96-L-184, 1998 Ohio App. LEXIS 1274, at *13 (Ohio Ct. App. Mar. 27, 1998) (applying the excited utterance exception to statements made two hours after an assault); State v. Daugherty, No. 97-CA-99, 1998 Ohio App. LEXIS 1345, at *4-7 (Ohio Ct. App. Mar. 16, 1998) (holding that statements made one and one-half hours after being seen by an emergency squad can qualify as excited utterances). But cf., e.g., Commonwealth v. DiMonte, 692 N.E.2d 45, 50-51 (Mass. 1998) (holding that the time lapse of nine to ten hours was “at an outer limit” of qualifying as a spontaneous reaction and reversing trial court’s decision to allow the evidence in this instance because circumstances indicated premeditation); State v. O’Neal, 721 N.E.2d 73, 84 (Ohio 2000) (holding that the trial court’s admission of statements made several hours after assault was harmless error); Mineo, 2001 Wash. App. LEXIS 59, at *13-15 (holding that the trial court’s admission of statements was harmless error, to the extent they concern beatings two to six days earlier, but proper to the extent they concerned beating earlier that day).
setting that suggests some opportunity for reflection—rather than her own spontaneous articulation. The typical 911 call consists largely of a series of questions by the operator and answers by the declarant, and most often the entire call is admitted.28

Finally, if the witness seems sufficiently traumatized by the event, the court may be willing to admit a statement that admittedly includes a self-interested lie—a factor that would seem to negate completely the lack of reflective capacity supposedly underlying the exception.29

The phenomenon we have described represents a dramatic change in the way criminal cases have traditionally been tried. Trying a case without the live testimony of the victim or complainant is nothing new; as we have acknowledged, that is how murder cases are necessarily tried. Instead, what is novel is that prosecutors are trying cases by relying on the out-of-court accusations of the complainant, sometimes in contravention of her live testimony and, most notably, often without presenting her live testimony, even though she may be perfectly available to testify. What is more, prosecutors routinely do so, and the courts are letting them do it.

Now we will explore reasons for this development. Part II discusses changes in the way domestic violence cases are treated. And Part III discusses developments in the doctrines of hearsay and confrontation that have made courts more receptive to dial-in testimony.

II. THE CHANGING ENVIRONMENT OF DOMESTIC VIOLENCE

Many of the cases that have used dial-in testimony—statements made in 911 calls and to responding officers—have involved charges

28 Courts have held consistently that this question-and-answer format poses no threat to a successful excited utterance foundation and have admitted testimony over specific objections on this issue. See State v. Hernandez, 987 P.2d 1156, 1159 (N.M. Ct. App. 1999) (affirming the trial court’s finding that complainant’s answers to police questions fell within the excited utterance exception to the hearsay rule); State v. Wallace, 524 N.E.2d 466, 472 (Ohio 1988) (holding “that the admission of a declaration as an excited utterance is not precluded by questioning”).

29 In People v. Simpson, 656 N.Y.S.2d 765 (App. Div. 1997), the complainant called 911 to report a robbery and sexual assault. Id. at 766. At trial, she testified that she lied to the 911 operator in reporting that the defendant had a gun, so that the police would respond to her call quickly. Id. at 767. The 911 tape was nevertheless admitted as an excited utterance, and the conviction was upheld over the dissent of two justices. Id. at 765-66. We find application of the exception to this case rather remarkable. We regard the admissibility of the tape as less troublesome than it otherwise would be because the complainant did testify, apparently in accordance with most of her assertions on the tape, and the prosecutor did not rely on the tape to prove the assertion, regarding the gun, that the complainant later repudiated.
of domestic violence. This Part will demonstrate how changes in the way that the criminal justice system handles domestic violence charges have increased the incentives and opportunities for the use of such statements. It will also show that such statements are usually testimonial in nature, in that the caller knows she is not simply asking for help but providing information for the use of the criminal justice system.

Over the last decade, legislatures, courts, law enforcement authorities, and the public have shown an increased awareness of the extent and seriousness of domestic violence. Efforts to curb this terrible problem have intensified at the national, state, and local levels. As Section A of this Part discusses, these efforts have led the police to respond far more actively to complaints of domestic violence. A complaint of domestic violence made in a 911 call is now almost certain to result in a police officer making a prompt investigative visit, and usually an arrest.\(^{30}\) Furthermore, prosecutors are now far more likely to pursue the matter, even without the cooperation of the caller.\(^{31}\) The results are that a call to 911 is likely to lead to a criminal trial (absent a guilty plea), and that at trial the prosecutor will seek to use the caller's initial statements as evidence, often without the caller testifying in court.\(^{32}\) Moreover, in part because of increased awareness of the nature of domestic violence, courts have become more receptive to such evidence.

In Section B, we focus on the caller. We argue that a caller to 911 knows that, directly or indirectly, he or she (for there are now many male callers alongside the greater number of female callers) is providing information to the police that will almost certainly lead to a significant official response, including the strong possibility of prosecution. The caller also probably knows that there is a good chance statements he or she makes during the 911 call, or to the responding officer, will be used in prosecution. The result is that 911 callers are effectively allowed to testify without exposing themselves to the oath or to cross-examination. Not surprisingly, some callers abuse the opportunity.

\(^{30}\) *Infra* text accompanying notes 81-86.

\(^{31}\) *Infra* text accompanying notes 35-51.

\(^{32}\) *Infra* text accompanying notes 63-75.
A. Public and Official Responses

1. Increased Awareness and Effort

In recent years, the public, legislatures, law enforcement authorities, and the courts have gained a greater awareness of the extent and seriousness of domestic violence. While domestic violence once was regarded as largely a private matter, that is no longer true. Society has increasingly recognized that domestic violence is a common, rather than an occasional, occurrence; that it often has devastating and even fatal consequences; that recidivism among those who commit domestic violence is very high; that even though acts of domestic violence may appear to be of relatively slight significance when taken in isolation, they often indicate a likelihood that the aggressor will commit far worse acts in the future; and that for a variety of reasons, a victim of domestic violence often will withdraw her accusation and decline to testify against her victimizer or otherwise support prosecution, even though her initial accusation is true.

This increased awareness has triggered considerably greater intensity in governmental efforts to curb and punish domestic violence. For example, many states have increased the remedies for domestic violence by expanding the availability and the scope of personal protection orders and expanding the penalties for abusers.\textsuperscript{33} They also have intensified greatly their efforts in investigating and prosecuting domestic violence. Even Congress has become involved, primarily by providing funds to assist efforts by state and local governments\textsuperscript{34}—

\textsuperscript{33} See, for example,\textsuperscript{34} MICH. COMP. LAWS ANN. § 600.2950 (West 2000), the personal protection order (PPO) statute, which was amended for the first time since 1983 in 1994 and has been amended every year since then. Petitioners can, and regularly do, receive PPOs ex parte. See § 600.2950(12) (stating the requirements for issuing an ex parte PPO); E-mail from Anne N. Schroth, Clinical Assistant Professor, University of Michigan Law School, to Bridget McCormack, Clinical Assistant Professor of Law, University of Michigan Law School (Jan. 28, 2002) (on file with authors) ("Most PPOs are granted on an ex parte basis."). In addition to prohibiting the restrained individual from entering the petitioner's home, place of employment, or place of education, PPOs can order that the restrained individual refrain from carrying a gun. § 600.2950(1)(e). A violation of a PPO can subject the restrained individual to charges of criminal contempt, punishable by as many as ninety-three days in jail. § 600.2950(11)(a)(i).

which, as in the case of most crime, carry most of the burden.

2. Police Practices

In 1984, Tracey Thurman sued the city of Torrington, Connecticut, for its egregious failure to take seriously her calls to authorities complaining about domestic violence committed against her. After a jury awarded her $2.3 million, the State of Connecticut dramatically strengthened its law enforcement response to domestic violence. As a general matter, a police officer may not arrest a person for a misdemeanor without a warrant unless the offense is committed in the officer’s presence. Connecticut made an exception to this rule for cases involving domestic violence.
in which the police respond to a call concerning violence committed between family members.\(^39\) Other municipalities and some states followed.

Today every state except North Carolina permits warrantless arrests in domestic violence cases. Twenty states provide discretionary arrest authority to police,\(^40\) seven instruct police that an arrest is the preferred action,\(^41\) and twenty-two states and the District of Columbia require the police to make an arrest upon responding to a domestic violence complaint if the officer has probable cause to believe that a domestic assault has occurred.\(^42\) In states that do not require arrest by

\(^{39}\) CONN. GEN. STAT. ANN. § 46b-38b(a) (West Supp. 2001).

\(^{40}\) ALA. CODE § 15-10-3(a) (Supp. 2000); DEL. CODE ANN. tit. 11, § 1904(b)(1) (2001); GA. CODE ANN. § 17-4-20(a) (1997); HAW. REV. STAT. § 709-906(2) (Supp. 2000); IDAHO CODE § 19-603(6) (Michie 1997); 725 ILL. COMP. STAT. ANN. 5/107-2 (West 1992); KY. REV. STAT. ANN. § 431.005(2) (Michie 1999); MD. CODE ANN., CRIM. PROC. § 2-204 (2001); MINN. STAT. ANN. § 629.341(1) (West Supp. 2002); MO. ANN. STAT. § 455.085.1 (West 1997); NEB. REV. STAT. § 29-404.02(5) (1995); N.H. REV. STAT. ANN. § 173-B:9(1)(a) (2001); id. § 594:10(a) (Supp. 2001); N.M. STAT. ANN. § 31-1-7-A (Michie 2000); N.C. GEN. STAT. § 15a-401(b)(2)(a), (d) (1999); OKLA. STAT. ANN. tit. 22, § 40.3.B (West Supp. 2002); 18 PA. CONS. STAT. ANN. § 2711(a) (West Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 14.03(a) (4) (Vernon Supp. 2002); VT. R. CRIM. PROC. 3(a) (Supp. 2001); W. VA. CODE ANN. § 48-27-1001(b) (Michie 2001); WYO. STAT. ANN. §§ 7-20-102(a), 35-21-107(b)(iv) (Michie 2001).


\(^{42}\) ALASKA STAT. § 18.65.530(a) (Michie 2000); ARIZ. REV. STAT. ANN. § 13-3601(B) (West 2001); CAL. PENAL CODE § 836(c)(1) (West Supp. 2002); COLO. REV. STAT. ANN. § 18-6-803.6(1) (West 2001); CONN. GEN. STAT. ANN. § 46b-38b(a) (West Supp. 2001); D.C. CODE ANN. § 16-1031(a) (2001); IOWA CODE ANN. § 236.12(3) (West 2000); KAN. STAT. ANN. § 22-2401(c)(2)(c) (2000); LA. REV. STAT. ANN. § 46:2140(1)-(2) (West 1999); ME. REV. STAT. ANN. tit. 19-A, § 4012(6)(D) (West 1998); MISS. CODE ANN. § 99-37-3 (Supp. 2001); NEV. REV. STAT. ANN. § 171.137(1) (Michie 2001); N.J. STAT. ANN. § 2C:25-21(a) (West 2001); N.Y. CRIM. PROC. LAWS § 140.10(4) (McKinney Supp. 2001-2002); OHIO REV. CODE ANN. § 2935.032(A)(1)(a) (Anderson 1999); OR. REV. STAT. § 133.055(2)(a) (Supp. 1998); R.I. GEN. LAWS § 12-29-3(c)(1) (2000); S.C. CODE ANN. § 16-25-70(B) (Law Co-op. 2001); S.D. CODIFIED LAWS § 23A-3-2.1 (Michie 1998); UTAH CODE ANN. § 77-36-2.2(2)(a) (1999); VA. CODE ANN. § 19.2-81.3(B) (Michie 2000); WASH. REV. CODE ANN. § 10.31.100(2) (West Supp. 2002); WIS. STAT. ANN. § 968.075(2)(a) (West 1998). Missouri requires arrest after the second complaint within twelve hours, if the officer finds probable cause to believe the same person has again committed a violation. MO. ANN. STAT. § 455.085(1) (West Supp. 2002).

Many states adopted mandatory arrest statutes because of the concern that police were not appropriately using discretionary authority. See Developments in the Law—Legal Responses to Domestic Violence, 106 HARV. L. REV. 1498, 1537-38 (1993) (*By reducing police discretion, mandatory arrest schemes ensure that officers will not trivialize domestic violence or make decisions about arrest on a discriminatory or otherwise illegiti-
law, municipal ordinances or police department policies often fill the gap, mandating in prescribed circumstances that the responding officer make an arrest. Although there are criticisms of the mandatory arrest system, the trend toward this method of dealing with domestic violence has not slowed.

Most pro-arrest statutes require or encourage the police to arrest the "primary aggressor" in a domestic dispute. "Primary aggressor" is generally defined as the most significant, rather than the first, aggressor. Aggressive arrest policies in domestic violence cases have resulted in a dramatic increase in arrests of both of men and women, with local increases running as high as 431% over a decade in one large California county. This increase is not a response to increased mate basis.

See, e.g., CITY OF ANN ARBOR CODE § 9:68 ("A Police Officer shall arrest a person when the Officer has reasonable cause to believe that person has, within the previous 24 hours, assaulted a spouse, former spouse or other person residing or having resided in the same household . . . .").

See Linda G. Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 HARV. L. REV. 550, 557-70 (1999) (arguing that mandatory state interventions leave battered women less safe from violence by robbing them of the opportunity to emotionally persevere and giving rise to increased violence against some women, especially African-American women); Donna M. Welch, Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?, 43 DEPAUL L. REV. 1133 (1994) (analyzing research on the efficacy of mandatory arrest laws in reducing recidivism and finding that they have little deterrent value and, for some segments of the population, lead to increased violence).

See generally Mills, supra note 44, at 558-60 (explaining the reasons behind the popularity of mandatory arrest policies).

For examples of "primary aggressor" statutes, see CAL. PENAL CODE § 836 (West Supp. 2002); FLA. STAT. ANN. § 741.29(4)(b) (West Supp. 2002); MICH. COMP. LAWS ANN. § 776.22 (West 2000); N.Y. CRIM. PROC. LAW §140.10(4)(c) (McKinney Supp. 2001-2002).

ALASKA STAT. § 18.65.530(b) (Michie 2000); MO. ANN. STAT. § 455.085(3) (West Supp. 2002); N.Y. CRIM. PROC. LAW § 140.10(4)(c) (McKinney Supp. 2001-2002).

See David Doege, Slowing Cycle of Domestic Violence; Courts, Prosecutors Try New Ways to Aid Abusers, VICTIMS, MILWAUKEE J. SENTINEL, May 7, 2001, at A1 (reporting a ninety-one percent increase in arrests immediately following the passage of a mandatory arrest law in 1989); John Johnson, A New Side to Domestic Violence, L.A. TIMES, Apr. 27, 1996, at A1 (citing the fact that "[i]n last year in Los Angeles, a record 14.3% of domestic abuse arrests were of women, more than double the rate five years earlier"); Kerry McCray, Raised Efforts Lower Domestic Abuse, MODESTO BEE (Cal.), May 21, 2000, at B1 (reporting a 137% increase in domestic violence arrests from 1988 to 1998 in one California county); Susan Spencer-Wendel, Domestic Violence Efforts Doubled, PALM BEACH POST, Oct. 3, 2000, at 1B (reporting a consistent increase in domestic violence arrests and predicting a fifteen-percent annual increase based on prior increases).

incidence of domestic violence; on the contrary, according to the Department of Justice the actual incidence of non-lethal intimate partner violence against women decreased between 1993 and 1998, and the level of such violence against men has remained stable. While the increase in arrests of men was what was expected and intended by advocates—for there is general agreement that most domestic violence is committed by men against their female partners—increased arrests of women were not expected.

Because arrest followed by short-term incarceration has been found to be the most effective deterrent against subsequent domestic violence, pro-arrest policies are sometimes accompanied (as the mayor of Miami recently learned) by laws effectively requiring overnight lock-up of the suspected offender.

Police practices have changed in other ways as well. Many jurisdictions require police to advise the complainant about the services available to her, and officers often do this even absent legal compulsion.

Furthermore, many states have required increased record keeping...
in domestic violence cases.\textsuperscript{56} Such requirements tend to give the officer greater incentive to make an arrest; given that police officers are required to complete a detailed report on whether they make an arrest or not, they are less likely to leave the scene without arresting someone.\textsuperscript{57} Increased record-keeping requirements also can be an evidence-gathering tool. Police are required to take a statement from the complainant, and they are taught that these statements may be used to prove the case, especially if the officer can lay the foundation for the excited utterance exception.\textsuperscript{58} Thus, since 1993, Florida prosecutors have been training police officers to prepare a case so that, if necessary, it can be tried without the victim's testimony.\textsuperscript{59} Duluth, Minnesota, has made the police reporting task easier by creating a form that “provides a list of emotional states that officers can check off to describe the victim’s demeanor at the time the statements were made,” including “crying,” “hysterical,” and “sobbing.”\textsuperscript{60} Given such preparation, police officers have begun to see it as their role to supply evidence in "victimless"\textsuperscript{61} prosecutions.\textsuperscript{62}

\textsuperscript{56} Most states require police to complete domestic violence incident reports when they respond to a domestic violence complaint, whether or not an arrest is made. The Michigan reporting statute requires the police to include the names of the persons involved, contact information for those people, whether there is a restraining order in effect, the name of the person who called law enforcement, names and contact information of other witnesses, the relationship between the parties, a narrative of the incident, details of the assault, a description of injuries and property damage, and a description of previous domestic violence between the parties. MICH. COMP. LAWS ANN. § 764.15c(2). This report must be retained by the law enforcement agency and a copy sent to the prosecutor within forty-eight hours. § 764.15c(3). For other states’ requirements for peace officers investigating reports of domestic violence, see FLA. STAT. ANN. § 741.29(2) (West 2002); OHIO REV. CODE ANN. § 2935.032(D) (Anderson 1999); LA. REV. STAT. ANN. § 46-2141 (West 1999).

\textsuperscript{57} See Developments, supra note 42, at 1553 (“By requiring a report even if no arrest is made, reporting statutes encourage the officer to consider carefully whether he should take the batterer into custody.” (citations omitted)).

\textsuperscript{58} Asmus et al., supra note 25, at 152; see Angela Corsilles, Note, No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?, 63 FORDHAM L. REV. 853, 862 n.65 (1994) (referencing the Domestic Violence Prosecution Plan of the City Attorney’s Office for Duluth, Minnesota, which provides for coordination “with Duluth police to develop methods for gathering and preserving evidence such as statements of victims and perpetrators at or near the time of the incident”).

\textsuperscript{59} Alison Frankel, Domestic Disaster, AM. L. W., June 1996, at 54, 63.

\textsuperscript{60} Kristin Littel et al., Assessing Justice System Response to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses (Feb. 1998), available at http://www.vaw.umn.edu/Promise/pplaw.htm.

\textsuperscript{61} Domestic violence, of course, is not a victimless crime. The term “victimless prosecution” has sometimes been used in this context to refer to a prosecution in which the victim does not testify. See, e.g., Cory Adams, Deterring Domestic Violence: Pros-
3. Prosecution Practices

Prosecutors have responded to their increased domestic violence caseload with aggressive new tactics for getting convictions. Special prosecution units to handle domestic violence cases, some supported by federal grant money, are now common.65

One aggressive prosecution strategy now supported by federal grant money is a "mandatory prosecution" or "no drop" policy.66 These policies vary from place to place, sometimes encompassing a strict refusal to plea bargain in any domestic violence case.67 At their heart, though, is a determination that the prosecutor will pursue the case even over the complainant's objections. A prosecutor might adopt such a policy for a variety of reasons—in part because of recog-
nition that domestic violence is a matter of public, not merely private significance; because of a paternalistic realization that the complainant may face greater danger than she realizes from recurrent violence; or because of a practical judgment that, if the victim of a domestic violence crime lacks any control over the case, there will be one less factor that might lead to violence by the abuser, and the victim will be safer. The policies are highly controversial, both because they may deprive the complainant of choice in a matter that could fundamentally affect her and because their effectiveness is in doubt.

We take no position here on the merits of this debate. But clearly one of the consequences of such policies is that prosecutors must sometimes proceed even though the complainant is recalcitrant. In some cases, she does not want to testify at all. Occasionally, prosecutors have used legal sanctions to compel a reluctant complainant to testify. Thus, in one well-known case in 1983, an Anchorage, Alaska, woman named Maudie Wall filed an abuse complaint against her husband but later changed her mind about testifying. To compel her testimony, she was arrested and held in jail overnight.

Sometimes when the reluctant complainant does testify, she does

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66 See Casey G. Gwinn & Anne O'Dell, Stopping the Violence: The Role of the Police Officer and the Prosecutor, 20 W. ST. U. L. REV. 297, 310 (1993) (finding that "abusers would become more violent and aggressive toward the victim when they learned that she controlled the outcome of the criminal prosecution").

67 Some argue that mandatory prosecution is a creative and effective solution to the problems associated with domestic violence prosecution. Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 HARV. L. REV. 1849 (1996); Donna Wills, Domestic Violence: The Case for Aggressive Prosecution, 7 UCLA WOMEN'S L.J. 173 (1997). But that view is not unanimously held among advocates. See Mills, supra note 44, at 589-96 (arguing that mandatory arrest and prosecution polices abuse women in ways that parallel the abuse they receive from their batterers—by reinforcing batterer judgements of them and by silencing them further by limiting their options—and suggesting that mandatory policies reflect patriarchal influence); Martha Minow, Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice, 32 NEW ENG. L. REV. 967, 977 (1998) ("[N]o-drop policies deprive or constrict the victim's choices and refuse deference to her own assessment... "); Christine O'Connor, Note, Domestic Violence No-Contact Orders and the Autonomy Rights of Victims, 40 B.C. L. REV. 937, 961-62 (1999) (critiquing mandatory policies for silencing victims).

68 For a summary of the research conducted so far about the effects of mandatory prosecution strategies on reducing domestic violence, see Robert C. Davis et al., The Deterrent Effect of Prosecuting Domestic Violence Misdemeanors, 44 CRIME & DELINQ. 434, 441 (1998). Mixed support exists for the view that mandatory prosecution strategies reduce domestic violence. Mills, supra note 44, at 561 n.51.

69 Hanna, supra note 67, at 1866.

70 Id. In Duluth, complaining witnesses were forced to testify against their will as early as 1991. See Asmus et al., supra note 25, at 155-36 (discussing the use of subpoenas in domestic abuse protection).
so inconsistently with the statements she made in her 911 call or to the responding officer. In response, the prosecutor may offer those statements into evidence, asking the fact-finder to credit those statements over the complainant’s in-court testimony. 71

Often, however, prosecutors do not bother with an unwilling or recanting complainant. Rather, they simply go forward without her, 72 and instead of her live testimony, submit as evidence of the incident the statements carefully taken from her by the 911 operator and the police. 73 In some cases, the prosecutor’s decision to pursue a “victimless” prosecution is based on a well-founded belief that the defendant’s misconduct has inhibited the complainant from testifying. 74 But often the prosecutor evidently concludes that it is easier to go forward with unsworn, untested statements provided on the 911 tapes than to expose a witness to the risks of testifying at trial. 75

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71 Supra note 22 and accompanying text.
72 As of 1995, thirty to forty percent of jurisdictions were proceeding in domestic violence cases without complainants. Mark Hansen, New Strategy in Battering Cases, 81 A.B.A. J. 14, 14 (1995). In some jurisdictions, San Diego among them, prosecutors were doing so in a majority of their cases. Id.; supra notes 23-24 and accompanying text. In Washtenaw County, approximately half of the domestic violence cases are prosecuted without the complaining witness. Interview with Blaine Longsworth, supra note 63.
73 The San Diego Police Department’s Domestic Violence Manual instructs officers that “[s]ince victims are often uncooperative, everything possible is done to develop a solid case that does not depend on participation by the victim.” CITY OF SAN DIEGO POLICE DEPARTMENT, DOMESTIC VIOLENCE POLICING IN SAN DIEGO, available at http://www.bsz-bw.de/depot/media/5600000/5736000/5736112/dvmanual.html (last visited Mar. 19, 2002). The Duluth prosecution plan in domestic violence cases directs the city attorney’s office to work with the police to gather statements from victims and other witnesses. Corsilles, supra note 58, at 862 n.65. This is also true in Washtenaw County, where police and prosecutors (and judges) are trained about victimless prosecution by local advocates. Meeting notes from Domestic Violence Judicial Oversight Grant Project Team, Washtenaw County, Mich., at 2 (Dec. 17, 1999) (on file with authors).
74 In such a case, the accused should often be held to have forfeited his confrontation right and hearsay objection. See infra Part IV (arguing that accused should be deemed to have forfeited objection to admissibility of prior statement based on his inability to cross-examine declarant if his misconduct prevented declarant from testifying at trial). There is, however, a suspicion that any recanting witness is doing so because she is afraid of the defendant. The rush to that conclusion, absent any showing of its applicability in a particular case, is unjustified and sits uneasily, at best, alongside the defendant’s right to be presumed innocent.
75 In San Diego, “[t]he . . . track record for winning domestic assault cases has been so good, prosecutors now prefer that the victim not testify.” Jane Armstrong et al., Hitting Back in San Diego, TORONTO STAR, Mar. 16, 1996, at C1; see also Gwinn & O’Dell, supra note 66, at 304 (indicating that San Diego was already prosecuting sixty percent of its cases without the in-court testimony of the victims and nevertheless had
4. Judicial Endorsement

Of course, prosecutors cannot introduce prior statements made by complainants unless the courts let them do so, but in recent years the courts have been very accommodating. We will discuss later the doctrinal rubric under which they have done so. For now, we only note that their receptivity to the evidence fits in well with the changed environment of domestic violence cases.


Consider as illustrations two domestic violence cases tried by Ypsilanti Township in Washtenaw County on February 7, 2000. In the first, the defendant was charged with domestic violence and his wife was allegedly the victim. Just before giving his opening statement, the prosecutor called out the name of the defendant’s wife to see if she had shown up. She was there, but maintained that her husband had not assaulted her. The prosecutor decided not to call her to the stand. Instead, he played a 911 tape on which a woman identifying herself as the defendant’s mother—who also did not testify at trial—claimed that the defendant assaulted his wife. Next the prosecutor called the sheriff who arrested the defendant. He testified that when he arrived at the scene, he interviewed the defendant’s mother, who said that she lied to 911 to get the police to come get her son. The defendant was angry and yelling, but he did not strike his wife, the mother told the sheriff. The sheriff next spoke to the defendant’s wife, who confirmed that her husband had not hit her. Based on that evidence, the prosecutor asked the court to find the defendant guilty of domestic violence. The court acquitted the defendant. Personal trial notes from Case No. 99-1053, 14B Dist. Ct., Washtenaw County, Mich. (Feb. 7, 2000) (on file with authors).

In the second case, tried for the defense by law students under Professor McCormack’s supervision, the 102-pound defendant allegedly hit her 250-pound husband. Although the complainant was in court ready to testify, the prosecutor preferred to go forward without calling him to the stand and instead to play the tape of his call to 911. In that call, the complainant claimed that his wife was going crazy and that he had “bruises all over [his] ass.” The prosecutor also presented the arresting officer, who testified that the complainant told him that the defendant had hit him in the face. As a result of defense counsel’s successful confrontation argument, the prosecutor was forced to call the complainant to the stand. The complainant admitted that he called 911 and lied to “mess with” his wife. The court acquitted the defendant. Personal trial notes from Case No. 99-0906, 14B Dist. Ct., Washtenaw County, Mich. (Feb. 7, 2000) (on file with authors).

76 Palm Beach County, Florida, State Attorney Barry Krischer credited the O.J. Simpson case with the change in judicial consciousness. Frankel, supra note 59, at 63-64.
to be current on domestic violence trends. At the same time, the increased public consciousness about domestic violence has put judges under considerable pressure: If a judge shows leniency to the wrong domestic violence defendant, it can be career ending. Courts are increasingly receptive to expert testimony explaining victim absence or recantations in domestic violence prosecutions. It is not surprising that some judges openly advocate greater receptivity to complainants' hearsay statements to ease the way for "victimless" prosecution.

77 In many states judges have taken an active role in grant-planning teams and other efforts to reform domestic violence prosecutions. See Gersten, supra note 61 (offering a judge's account of the growing use of hearsay exceptions in proving domestic violence cases where the victim is unwilling to cooperate); Cindy S. Lederman & Neena M. Malik, Family Violence: A Report on the State of the Research, FLA. B.J., Dec. 1999, at 58 (arguing that judges should keep current on family violence research to inform decision making in domestic violence cases). Judge Lederman was one of the architects of Florida's domestic violence courts. In Washtenaw County, all of the judges who preside over criminal cases are involved in the community response domestic violence grant team, which meets regularly to oversee the projects the grant money funds. In addition, judges attend training sessions sponsored annually by domestic violence advocates. As one Washtenaw County judge, John Collins, said at a recent meeting about the domestic violence grant, "We are told, and we believe, that every time a defendant gets arrested for domestic violence it is, on average, the seventh time he has assaulted her. As judges, we don't have the luxury of thinking about the six times that came before." Personal notes from Domestic Violence Grant Training/Planning Meeting, Washtenaw County, Mich. (Feb. 8, 2000) (on file with authors).

78 Judge Lorin Duckman, who sat in New York City Criminal Court, became a target of public outcry when a criminal defendant, whom he had released on bail after allegedly assaultig his girlfriend, killed her. Mayor Rudolph Giuliani and Governor George Pataki called for his removal, and Pataki filed a complaint with the Commission on Judicial Conduct. John Sullivan, Report Says Judge in Domestic-Violence Cases Abused Power, N.Y. TIMES, Sept. 9, 1997, at B1. Similarly, Maryland Governor Parris N. Glendening and some state legislators urged the state Commission on Judicial Disabilities to "take appropriate action" against Baltimore County Judge Thomas J. Bollinger, Sr., after he agreed to erase the conviction of a man who had beaten his wife. David Montgomery, Judge Erases Conviction, Draws Outcry; Man's Record Cleared of Domestic Violence, WASH. POST, Feb. 8, 1997, at C1.

79 See Adam Nossiter, When Battered Women Recant: New Witness for the Prosecution, N.Y. TIMES, June 9, 1996, § 4, at 4 (highlighting New York courts' willingness to allow "experts on battered women to contradict a reluctant witness"); Rogers, supra note 61, at 69 (1998) ("Between 1991 and 1997 . . . appellate courts in at least thirteen more jurisdictions ruled on the admissibility of expert testimony to explain a battering victim's puzzling behavior at or before trial. All of those jurisdictions, except Ohio, approved of prosecutorial use of expert testimony.").

80 See Renee Esfandiary & Krista Newkirk, Interview with the Honorable John E. Klock of the Alexandria Circuit Court Defending Mandatory Arrest, 3 WM. & MARY J. WOMEN & L. 241, 241 (1997) (explaining why Judge Klock supports Virginia's "victimless" prosecution policy); Gersten, supra note 61, at 65-66 (outlining recent state courts' endorsement of the use of hearsay exceptions in proving domestic violence cases where the victim is unwilling to cooperate). Michigan's Domestic Violence Benchbook directs judges
B. The Participants' Awareness

Increased law-enforcement responses to domestic violence have been accompanied by greater awareness on the part of those who are involved in the violence—whether as victim or as perpetrator—about those responses and about domestic violence itself. Part of that
to consider all of the evidentiary possibilities in "victimless" prosecutions, because "some criminal trials on charges involving allegations of domestic violence may be similar to murder trials in that the victim will not appear as a witness." See MARY M. LOVIK, DOMESTIC VIOLENCE BENCHBOOK 5-1 to 5-21 (1998) (comprising part of a section entitled Evidentiary Issues Where the Complaining Witness Cannot Participate Effectively at Trial).

For a rather extreme example of judicial receptivity to a complainant's hearsay statement, see State v. O'Connor, No. C1-98-575, 1998 Minn. App. LEXIS 1268, at *2-5 (Minn. Ct. App. Nov. 24, 1998). The complainant did not appear at trial, and the prosecutor attempted to introduce her statements through the responding police officer by claiming they constituted a business record, id. at *2-3, and thus fell within an exception to the rule against hearsay, MINN. R. EVID. 803(6). Defense counsel objected, and the court suggested that the prosecutor try the excited utterance exception, 1998 Minn. App. LEXIS 1268, at *2-3. When the prosecutor hesitated because the statement had been taken "some time later after the incident took place," the court responded that what was important was whether the victim was "upset and crying." Id. at *3. The prosecutor still hesitated, telling the court that the statement was taken "about some 20 minutes later." Id. Perhaps frustrated by the lack of prosecutorial assistance, the court then took over the examination of the officer and led him through the excited utterance foundation:

THE COURT: Did the person say anything as to how she got injured when she was upset and crying when you saw her?
THE WITNESS: Yes.
THE COURT: What did she say?
THE WITNESS: She said she was assaulted by her husband.
THE COURT: She was upset and crying at that time?
THE WITNESS: Yes.

[DEFENSE COUNSEL]: Objection, Your Honor, that is not in the report.
THE COURT: Well, that is not—you can cross examine on that, but tell me—you have testified that when you were at the scene she was upset and crying, her left eye was puffy to the temple area?
THE WITNESS: Yes.
THE COURT: Did you talk to her then?
THE WITNESS: I talked to her shortly before I took the statement.

[DEFENSE COUNSEL]: Then, your honor—
THE COURT: Well, when she was upset and crying, at that point did she say something to you?
THE WITNESS: Yes, she said she was hit by her husband.
THE COURT: Describe her demeanor at the time she said that?
THE WITNESS: She was upset and crying.

Id. at *3-5. The appellate court held that the trial court "exceeded its prerogative to interrogate witnesses by suggesting an exception to the hearsay rule that the prosecutor had not only failed to consider but also deemed inapplicable," but it upheld O'Connor's conviction on the ground that the error was harmless. Id. at *7-8.
awareness, we believe, is an understanding that statements made in 911 calls or in follow-up interviews are likely to lead to arrest and prosecution and to be used against the alleged abuser at trial.

Domestic violence cases are grist for the daily mill of the popular media. Local media give close attention to local cases, and dramatizations of cases, real or fictional, are presented on national television and in the movies. The O.J. Simpson criminal case, probably the most observed trial of the twentieth century, focused public attention for an extended period on domestic violence and responses to it. Millions of Americans heard a tape recording of a 911 call by Nicole Brown Simpson being introduced into evidence against Mr. Simpson.

Recognizing that domestic violence is terribly underreported, governments and social service agencies have made concerted efforts to foster awareness of the problem and of the responses to it. Indeed, President Clinton issued a proclamation in October 1996 designating that month as National Domestic Violence Awareness Month. Frequent advertisements in a wide variety of media remind us that domestic violence is a crime and encourage victims to report it. In the stalls of a women's room at a movie house in Ann Arbor, Michigan, for example, one finds posters, pamphlets, and small cards announcing the different phone lines, including 911, that victims of domestic violence can call to get a response. This information is repeated on

81 The San Diego domestic violence prosecution and police units “launched an on-going campaign to work with the media to change the way every one in San Diego thinks about domestic violence cases” to accompany changes in police and prosecution strategy. Gwinn & O’Dell, supra note 66, at 303-04. A search conducted on NewsLibrary <www.newslibrary.com> revealed that in 1999 the Boston Globe ran at least 269 articles containing the term “domestic violence.” A similar search of the Detroit Free Press database <www.freep.com/newslibrary> showed that during the same year the Detroit Free Press ran at least eighty-three articles containing the term “domestic violence.” These searches, of course, do not include articles that covered incidents of actual or alleged domestic violence but did not use the term “domestic violence.”

82 See, e.g., SLEEPING WITH THE ENEMY (Twentieth Century Fox 1991) (relaying the story of a woman who fakes her own death in an attempt to escape her abusive husband); THE BURNING BED (NBC television broadcast, Oct. 8, 1984) (telling the tale, based on a true story, of a woman who, after years of abuse, douses her husband in gasoline and sets him on fire while he sleeps).


84 The national “There’s No Excuse for Domestic Violence” public education campaign, launched in 1994, and run by the Family Violence Prevention Fund, won nearly $100 million in media support in its first five years. The campaign’s public service announcements aired on all the major networks and print versions ran in many major newspapers and other outlets. Family Violence Prevention Fund, Public Education Program Overview, at http://endabuse.org/programs/publiceducation (last visited Mar. 19, 2002).
the big screen before the show starts, between movie trivia and ads for local businesses. The same messages are presented on the sides of local buses and on posters in all courthouses and county buildings, as well as in some commercial and other buildings.

Because the principal aim of these efforts is to encourage victims of domestic violence to report it, one of their major themes is that reporting will not be futile. Victims are reminded that their complaints will be taken seriously and that protective and punitive action to assist them will follow issuance of the complaint. Thus, five pages of a pamphlet distributed statewide by the Michigan Women's Commission describe the dangers and risks of domestic violence and the responses the law can and will make when it occurs. Victims of domestic violence are encouraged to call the police because the police can help in a number of ways—including using the report they are required to complete to prove the case in court.

Mandatory law enforcement strategies—mandatory arrest and lock-up laws and “no drop” prosecution policies—also are a significant part of the picture; these policies also have received wide, and favorable, media exposure. If these strategies are to have their intended deterrent effect, law enforcement officials need to make sure that both potential victims and potential abusers know about them.

85 These observations were made at the Quality 16 Theater, Jackson Road, Ann Arbor, and the State Theater, State Street, Ann Arbor.

86 AIMEE ARGEL, MICHIGAN WOMEN’S COMMISSION, DOMESTIC VIOLENCE: WHAT SOME WOMEN LIVE WITH IS A CRIME 14 (n.d.) (on file with authors).

87 Churchill, supra note 65.

88 The “There’s No Excuse” campaign directed public service announcements (PSAs) at victims, assailants, and friends and neighbors of both. One aimed at friends of abusers depicts a woman whose face has been beaten, and then in large print the legend proclaims, “IT’S HARD TO CONFRONT A FRIEND WHO ABUSES HIS WIFE. BUT NOT NEARLY AS HARD AS BEING HIS WIFE.” Family Violence Prevention Fund, Men’s Intervention, at http://endabuse.org/programs/publiceducation/images/ads/n-11504-c.jpg. Underneath, the text of the advertisement reads:

So you know your friend is an abuser. Do you ignore it or bring it up? Ignoring it is easy. Bringing it up is awkward. You could lose a friend. But maybe bringing it up is the only way to really be a friend. Telling him you know, telling him it’s wrong, telling him it’s a punishable crime, could be doing him a big favor. Maybe he needs someone to talk to. Maybe he needs someone to say, “No, it’s not OK.” But more important than his feelings, his wife’s well-being, her very life may be in your hands. We can give you some information that may help. Call us at 1-800-END ABUSE.

Id. To view other PSAs used in the campaign, see Family Violence Prevention Fund, Public Education Program Public Service Announcements, at http://endabuse.org/programs/display.php?DocID=7.
There has been a substantial increase in calls to 911 reporting domestic violence since mandatory law enforcement strategies took hold across the country. People know now that if they call 911 and report domestic violence there will probably be an arrest and prosecution. Indeed, "under mandatory arrest laws, a battered woman's call to the police is tantamount to a request for arrest."

This awareness is reinforced by the fact that many of those who are involved in incidents of domestic violence have been involved before, and even if they have not it is likely that they know someone who has been. Whether their prior experience was as suspect or as complainant, potential callers are not naive about the system. They are almost sure to know that when a police officer responds to a domestic violence complaint the officer will likely feel compelled to leave the scene with someone in custody.

Furthermore, "repeat players" are likely to understand another phenomenon: The person first to call and complain is most likely to

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89 See Marion Wanless, Note, Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?, 1996 U. ILL. L. REV. 533, 550 (citing New Jersey, Iowa, and Wisconsin as examples of states witnessing an increase in reports of domestic violence in response to their mandatory arrest policies). There is evidence, however, that not every segment of the population avails itself of the service equally. In one New York study, African-American participants expressed the view that reporting batterers to the police was a breach of loyalty. INSTITUTE ON VIOLENCE, INC., VIOLENCE IN THE LIVES OF AFRICAN-AMERICAN WOMEN: A FOCUS GROUP STUDY 18-19 (Beth E. Ritchie ed., 1996). Mistrust of 911 services by African Americans has been reflected in popular culture. See PUBLIC ENEMY, 911 Is a Joke, on FEAR OF A BLACK PLANET (CBS Records 1990) ("Now I dialed 911 a long time ago/Don't you see how late they're reactin'/They only come and they come when they wanna."). Studies finding that mandatory arrest policies lead to greater violence against African-American women, see supra note 44 (citing such analyses by Linda G. Mills and Donna M. Welch), may suggest that the mistrust is well-founded.

90 Developments, supra note 42, at 1538.


92 Though domestic violence occurs frequently in all aspects of the population, it is particularly common in certain subpopulations. See JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 29-26 (1999) (discussing the correlation between poverty and violence); Donna Coker, Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color, 33 U.C. DAVIS L. REV. 1009, 1036-37 (2000) (discussing studies that have shown overrepresentation of domestic violence to be correlated with race and socio-economic status).
get to stay home, while the other person is the one charged and taken in custody. We know of no formal research establishing this proposition, but it has held true in every case handled by Professor McCormack and other lawyers who have shared their experiences with us. It also helps explain a phenomenon noted above, that increasing numbers of women have been arrested for domestic violence. To some extent, this phenomenon probably reflects the underlying reality that men are sometimes the victims of domestic violence and, until recently, had failed to report it. But we believe that, to a greater extent, it reflects merely a race to the phone by abusers who have been through the system and who know that they will be in a much better position if they are the first to call; batterers, skilled at controlling their victims, are also likely to manipulate the law enforcement and evidence gathering system to which 911 is the threshold.

The behavioral patterns suggested by our incentive analysis of 911 have played out, at least anecdotally. In more than one case handled by Professor McCormack’s office, the complainant reported having won a race to dial 911 and being the first to report the incident that led to the defendant’s arrest. In one case, the fight for the phone became the primary issue. Having been through the mandatory prosecution system already, as a defendant, the husband understood the problems he would face if his wife was the first to report their physical altercation. As she reached for the phone, he ripped it out of the wall. Once he had successfully insulated himself from her allegations, he went outside with his cell phone and placed his own call to 911, claiming that she had assaulted him. As he expected, his allega-

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93 Supra notes 49-51 and accompanying text.
94 Even O.J. Simpson may have learned the advantage of getting to the phone first. On one occasion, Simpson placed a call to 911, alerting the operator that he was concerned about his girlfriend’s safety. Sue Anne Pressley, O.J. Simpson, from One Hot Spot to Another; He’s Traded Calif. for Fla., but Can’t Dodge Scandal, WASH. POST, Aug. 31, 2000, at C1. Several months later, an employee of a hotel in which the couple was a guest, concerned by a loud altercation, called 911. Id. The police report of the incident listed Simpson as the victim. Id.
95 See generally DONALD G. DUTTON & SUSAN K. GOLANT, THE BATTERER: A PSYCHOLOGICAL PROFILE 29-33 (1995) (discussing how some batterers abuse their victims emotionally by dominating and isolating them); NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 76-79 (1998) (discussing how batterers use mind control to manipulate their victims); PTACEK, supra note 92, at 74-91 (discussing the tactics of men who batter and finding that batterers use violence to control their victims).
97 According to his neighbor, after calling 911 from his cell phone he laughed and
tion was treated seriously; his wife was charged with assault, though the prosecutor eventually dismissed the charges.  

In another series of local cases, a divorced couple had four domestic violence charges between them; each party had been charged twice. Each time one was arrested, there was a claim that there had been a race to the phone with competing allegations. And each time, the prosecutor used the winner's phone call to secure yet another conviction. There was a running threat between the parties to call and falsely report more domestic violence.

Similar cases have arisen in California. Some men have injured themselves superficially and then called the police and had their partners arrested. One Sacramento man scratched a scab on his ear to make it bleed, and then called the police and had his wife arrested. A Los Angeles man born with a pronounced bump on his head had his wife arrested three times before the police realized that he was manipulating the mandatory system to his advantage.

These attempts at manipulation do not always succeed to the point of securing a trial and conviction of the other person. We do

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98 The prosecutor did so after learning how manipulative the "victim" was. He had two convictions for child abuse and a history of abusing and controlling his wife and ex-wife. But the prosecutor could have proved the case against the wife with his 911 call and follow-up statements to the police, and the jury might never have known any of his history. 


100 Id.

101 Johnson, supra note 49. Another Northern California man hit himself in the head with a brick and then reported to police that his wife assaulted him. As neighbors saw the police arresting the wife, they spoke up and the additional facts came out. 

102 Id. A California administrator of counseling groups for male batterers reports that some abusers freely admit using the system to get revenge. 

103 Sometimes, police and prosecutors get to the bottom of a false report to 911 or police before a complaint is brought. See Keller v. State, 431 S.E.2d 411, 411-12 (Ga. Ct. App. 1993) (describing how the police quickly assessed that the defendant had falsely reported that the man with whom she lived had robbed her home); Chris Tisch, *Man Arrested in Phony Complaint*, ST. PETERSBURG TIMES, Dec. 29, 2000, at 3 (telling the story of a man who, in an effort to remove his girlfriend's seventy-two-year-old mother from his home, called 911 and reported that she had attacked him with a steak knife).
not contend that most 911 callers manipulate the system; on the contrary, we believe that most do not. Rather, our principal point is that most 911 callers know what they are doing. They know that by making the call they are practically ensuring that the other person will be arrested, and that a criminal prosecution will probably follow. We also believe that in most cases they understand that the prosecutor may attempt to use the statements they make to the 911 operator or to the police officer who follows up on the call. In short, these 911 callers realize they are creating evidence for the prosecution as they call.1

Even if such knowledge is not as widespread as we believe it is, it will be soon, assuming present trends continue. As more courts admit statements made by 911 callers, the message illustrated by the Simpson case will become only more deeply ingrained in the consciousness of the public, and especially of those who are involved in domestic violence: If you call 911, your statements will make their way to court—whether you do or not.

C. Summary

We are eager to avoid misunderstanding. Domestic violence, as we have said, is a blight on society, and we applaud the increased ef-

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wife was the first to dial 911, but the husband grabbed the phone and replaced the receiver before she could make her report. The 911 operator called back a moment later, and the husband answered the phone and reported that his wife had scratched and kicked him. When the responding officer arrived, the "victim" told the same story he had told 911, and the officer—who had been called out to this family's home on more than one prior occasion—arrested the wife. Personal case notes from Case No. 00-10138, 14A-1 Dist. Ct., Washtenaw County, Mich. (May 16, 2001) (on file with authors). But when interviewed by the student attorney representing his wife, the husband admitted that he had been drunk, had pushed his wife into a wall, and had grabbed the phone when she tried to make a 911 report. *Id.* Only then did the prosecutor, who had been prepared to try the wife without the husband's live testimony, arrange for the wife to take a police-administered lie detector test. She passed it, and the prosecutor dismissed the charge against her. *Id.*

104 The same problem can occur with reports directly to police. In another case handled by law students supervised by Professor McCormack, the complainant, after an argument with his girlfriend in his truck, instead of going to a phone to call 911, drove directly to the police station and reported that his girlfriend had scratched him, punched him and threatened him with a screwdriver. Personal case notes from Case No. 00-2366, 15th Dist. Ct., Washtenaw County, Mich. (Dec. 31, 2000) (on file with authors). The prosecutor issued a complaint based on his allegation, without ever interviewing the girlfriend. *Id.* Had an officer done so, he or she would have seen the extensive bruising the girlfriend suffered as a result of the "argument." *Id.* She had no prior experience with the criminal justice system up to that moment and was afraid to report her boyfriend’s escalating abuse. *Id.* He, on the other hand, had a great deal of experience with the system, *id.*, which may explain why he reported her first.
forts to combat it, and to encourage victims to report it. We take no position on the complex question of the merits of mandatory law enforcement strategies. Our basic point is simply this: The web of developments that we have discussed—increased public concern and political attention to the problem, aggressive strategies by police and prosecutors, a receptive attitude by courts, and understanding by participants—means that statements made in calls to 911 or in follow-up interviews with police are likely to result in arrest and prosecution. Additionally, those conversations are likely to be deemed admissible at trial, and many callers are aware of this. So long as courts remain receptive to this evidence, callers effectively will be able to dial in their testimony, without having to appear at trial, take an oath, or subject themselves to cross-examination.

III. THE DOCTRINAL FRAMEWORK

In this Part, we discuss the development and status of the doctrinal framework in which courts consider the admissibility of statements made in 911 calls and follow-up conversations. Though doctrinal analysis cannot provide complete answers, we believe it can shed significant light on two questions: Why have courts traditionally not been receptive to prosecutors' use of these statements? And why have courts recently changed their attitudes toward such use?

Section A of this Part shows that the confrontation right developed before and apart from the rule against hearsay. The confrontation right, like the oath,\(^{105}\) is one of the fundamental conditions governing the giving of testimony. If a person is going to testify against an accused, she should offer the testimony under oath, in the presence of the accused and subject to cross-examination.

In Section B, we turn to hearsay law, with a focus on the "spontaneous exclamation" or "excited utterance" exception, which principally underlies the admission of statements made in 911 calls and follow-up conversations. We will show that this exception emerged out of the traditional res gestae doctrine, which originally was sensitive to the testimonial nature of narrative statements describing an event that predictably would lead to litigation. Thus, nineteenth-century courts resisted the admission of statements that were narrative in nature or that had been made after the close of the events they described. American courts eventually abandoned these restraints under the in-

\(^{105}\) See generally Helen Silving, The Oath: I, 68 Yale L.J. 1329 (1959) (providing an account of the evolution of the judicial oath in different legal systems).
The influence of John Henry Wigmore in the first half of the twentieth century and of the Federal Rules of Evidence in the second half. The exception is now well established; no longer can it be characterized as a limitation on the definition of hearsay, applicable only to statements offered for what might be considered a nonhearsay purpose. Nor is it confined to genuinely spontaneous exclamations, made without any opportunity for reflection. Instead, it has been stretched to reach many statements that, while purportedly made while the declarant was still affected by a stressful event, were made with ample opportunity for reflection and with the anticipation that the statement would be used in investigating or prosecuting crime. Furthermore, while the issue may have been in doubt before, a pronouncement by Wigmore, and its adoption by the Federal Rules, established for most American courts that the exception is applicable even if the declarant is available to be a witness.

Even if hearsay law does not prevent the admission of a statement, the Confrontation Clause might. The Supreme Court, however, has never articulated well the bounds of the confrontation right, and Section C of this Part shows that, over the last two decades, the Court has tended to merge the confrontation right and hearsay law. As a result, if a statement fits within the hearsay exception for excited utterances, the Confrontation Clause will not, under current law, pose an obstacle to its admission.

As a result of these developments, what is now referred to as the “excited utterance” exception has been used to allow prosecutorial use of statements that are testimonial in nature, but were not made under the conditions required for testimony—and current Confrontation Clause jurisprudence offers no resistance to the practice.

A. Historical Development of the Confrontation Right

Most adjudicative systems rely on the testimony of witnesses for fact-finding, rather than on irrational methods like the ordeal or trial

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106 This Section draws on a portion of the amicus brief submitted by the American Civil Liberties Union in Lilly v. Virginia, 527 U.S. 116 (1999). Professor Friedman and Professor Margaret Berger were the principal authors of the brief. See Brief of Amici Curiae American Civil Liberties Union et al., Lilly v. Virginia, 527 U.S. 116 (1999) (No. 98-5881) (articulating the belief that the Confrontation Clause has too often been treated as little more than a constitutional analog of the hearsay rules, thus undervaluing its significance in the constitutional scheme), available at LEXIS 1998 U.S. Briefs 5881, at *1.
by battle. If a system is to rely on testimony, then it must determine the conditions under which acceptable testimony can be given. Since ancient times, most western systems have required that testimony be given under oath, or some similar affirmation. The oath not only provides solemnity and a reminder of the witness’s obligation to tell the truth, but it assures that if the witness testifies falsely she exposes herself to considerable risk. In older days, many witnesses believed that if they swore falsely they risked eternal damnation. While few witnesses have that fear today, false testimony still exposes them to prosecution for perjury or cognate crimes.

Another fundamental condition for testimony is that it be given in front of the adverse party. The right of an accused to confront the witnesses against him has received its fullest development within the Anglo-American tradition, but it has also been a critical feature of other judicial systems. The ancient Hebrews required accusing witnesses to give their testimony in front of the accused, as did the Romans. The Book of Acts quotes the Roman Governor Festus as saying: “It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.”

When medieval Continental systems began to rely on the testimony of witnesses, they allowed the parties to examine the witnesses,

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107 For an explanation of the ordeal, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 5 (3d ed. 1990):

Ordeals involved an appeal to God to reveal the truth in human disputes . . . . In [ordeal by fire], a piece of iron was put into a fire and then in the party’s hand; the hand was bound, and inspected a few days later; if the burn had festered, God was taken to have decided against the party. The ordeal of cold water required the party to be trussed and lowered into a pond; if he sank, the water was deemed to have ‘received him’ with God’s blessing, and so he was quickly fished out.

For an explanation of trial by battle, see THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 105 (1929), explaining that in criminal cases battle “lay when a private person brought a criminal charge against another. It was deadly; if the defeated defendant was not already slain in the battle he was immediately hanged on the gallows which stood ready.”

108 See Silving, supra note 105, at 1329-30 (discussing the historical evolution of the judicial oath in various legal systems and showing that it has remained an atavistic survival of an ancient ritual).


but on written questions. These systems took the testimony behind closed doors, for fear that witnesses would be coached or intimidated. By contrast, the open and confrontational way in which testimony was taken—an "altercation" between accuser and accused, in a celebrated sixteenth-century description by Sir Thomas Smith—was the most critical characteristic of the common law trial. Beginning in the fifteenth century, and continuing for centuries afterwards, numerous English judges and commentators praised the open and confrontational nature of the English trial in contrast to its Continental counterpart. For example, Sir Matthew Hale lauded the "open Course of Evidence to the Jury in the Presence of the Judges, Jury, Parties and Council" in English criminal procedure. Among other advantages, this procedure allowed "Opportunity for all Persons concern'd" to question the witness and "Opportunity of confronting the adverse Witnesses." In a passage closely following Hale, Blackstone articulated many of the same advantages, including "the confronting of adverse witnesses" of "the English[] way of giving testimony, or tenus."

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111 R.C. Van Caenegem, History of European Civil Procedure, in 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 2:58, at 77 (Mauro Cappelletti ed., 1973) (discussing how witnesses' statements were "taken privately by the judge and his clerk, though sometimes interrogators might be handed in with statements of the points on which the procator wished the witness to be examined").


113 Around 1470, even before the roles of witnesses and juries were clearly distinguished, Sir John Fortescue praised the openness of the English system in contrast to that of the civil law. JOHN FORTESCUE, ON THE LAWS AND GOVERNANCE OF ENGLAND 38-40 (Shelley Lockwood ed., Cambridge Univ. Press 1997) (c. 1471).


115 Id. at 164.

116 3 WILLIAM BLACKSTONE, COMMENTARIES *973-74. Or tenus means "by word of mouth" or "orally." BLACK'S LAW DICTIONARY 1126 (7th ed. 1999). Hale and Blackstone spoke of "confronting" one witness against another. Similarly, in 1730, Sollom Emlyn emphasized the "Excellency" of English criminal procedure in his monumental collection of state trials: "In other Countries, the Witnesses are examin'd in private, and in the Prisoner's Absence; with us, they are produced face to face, and deliver their Evidence in open Court, the Prisoner himself being present, and at liberty to cross-examine them..." A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANORS, at iii-iv (Sollom Emlyn ed., London, T. Wright 1776). Additionally, Lord Chief Justice Popham, arguing for the superiority of English over Scots law, contended that "the Testimonies, being viva voce before the judges in open face of the world... was much to be preferred [over] written depositions by private examiners or Commissioners." Le Case del Union, del Realm, D'Escose, ove Angleterre, 72 Eng. Rep. 908, 913 (K.B. 1604).
Thus, by 1696, in the celebrated case of *Rex v. Paine*, it was clearly established that, even if a witness had died, his statement made to a justice of the peace could not be admitted against a misdemeanor defendant because the defendant was not present when the examination was taken and so "could not cross-examine" the deponent.

To be sure, the norm of confrontation was not always respected. Thus, a set of courts in England, including the equity courts, followed the Continental system rather than the common law, relying largely on testimony taken out of court and out of the presence of the parties. These courts appeared to be arms of an unlimited royal power, and so many of them—notably the Court of Star Chamber—did not survive the political and social upheavals of the seventeenth century.

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118 90 Eng. Rep. at 1062; see also 91 Eng. Rep. at 1387 ("An information taken before a justice cannot be read in evidence after the death of the party who gave it on a prosecution for a misdemeanor.").
119 For example, *Paine* itself distinguished felony cases. Since the mid-sixteenth century, justices of the peace had been required by statute to examine felony witnesses, and these examinations were admissible at trial, even though the witness had not been cross-examined, if the witness was then unavailable and the examination was taken under oath. JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 27-29 (1974). This anomalously lenient treatment—which was probably one of the abuses at which the Confrontation Clause was aimed—was controversial by the early seventeenth century. See *The King v. Westbeer*, 168 Eng. Rep. 108, 109 (K.B. 1739) (overruling, after much argument, objection to admissibility of deposition taken pursuant to statute and without cross-examination of witness who had since died, but ruling that deposition would not be taken as conclusive "unless it were strongly corroborated by other testimony"). It was eliminated by statute in the nineteenth century. Sir John Jervis’ Act, 1848, 11 & 12 Vict., c. 42, § 17 (Eng.) (allowing use of deposition of unavailable witness at trial for any indictable offense if the deposition was taken under certain conditions, including oath, the presence of the accused, and the opportunity of the accused to question the witness).
120 See, e.g., WILLIAM HUDSON, A TREATISE ON THE COURT OF STAR-CHAMBER (1621) ("Parties and witnesses may not hear the several examinations of every witness."). reprinted in COLLECTANEA JURIDICA 204 (Francis Hargrave ed., Fred B. Rothman & Co. 1980). The equity courts did, however, carefully preserve the ability of the parties to examine adverse witnesses, albeit on written questions. Cf. Rushworth v. Countess de Pembroke & Currier, 145 Eng. Rep. 553 (Ex. D. 1668) (recognizing the right of parties to examine adverse witnesses by means of depositions or interrogatories, but denying such right to a non-party to the suit at hand). For this reason, the law courts were willing to accept depositions as a substitute for trial testimony when the witness was unavailable to testify at trial and the party against whom the deposition was offered, or a privy, had the opportunity to examine the witness at the deposition. See, e.g., Howard v. Tremain, 87 Eng. Rep. 314, 89 Eng. Rep. 641, 90 Eng. Rep. 757, 91 Eng. Rep. 243 (K.B. 1692-1693) (deciding that depositions taken de bene esse are good evidence at law, where the witness dies before defendant’s answer).
121 THE STUART CONSTITUTION 104-06 (J.P. Kenyon ed., Cambridge Univ. Press 2d
And sometimes in the common law courts, especially in politically charged cases, the Crown, eager to use the criminal law as a means of controlling its adversaries, used testimony taken out of the presence of the accused. Thus, it is in the treason cases of Tudor and Stuart England that one finds the battle for the confrontation right most clearly fought.

As early as 1521, treason defendants, often using the term "face to face," demanded that witnesses be brought before them. Sometimes these demands were heeded, and sometimes they were not, but what is most notable is that they found recurrent support in acts of Parliament, which repeatedly required that accusing witnesses be brought "face to face" with the defendant. By the middle of the seventeenth century, the battle was won, and courts routinely required that treason witnesses testify before the accused and be subjected to questioning by him.

Well into that century, prosecutorial authorities often tried to use...
confessions made by alleged accomplices of the accused even if the confessions were not made according to the usual norms of testimony (under oath and before the accused). The case of Sir Walter Raleigh is the most notorious, but far from the only one. In these cases, the theory for admissibility of the confession was that self-accusation was "as strong as if upon oath." But the judges soon realized the iniquity of allowing an exception to the usual norms of testimony simply because the accomplice accused himself as well as another. In 1662, the judges of the King's Bench ruled unanimously and definitively in Tong's Case that, though a pretrial confession was "evidence against the party himself who made the confession" and, if adequately proved, could indeed support conviction of that person without witnesses to the treason itself, the confession "cannot be made use of as evidence against any others whom on his examination he confessed to be in the treason." Thus, the judges stated in clear terms a fundamental principle that, as we shall see, the Supreme Court's modern Confrontation Clause jurisprudence has occluded to a substantial degree.

The confrontation right naturally found its way to America. Thus, a Massachusetts statute of 1647 provided that "in all capital cases all witnesses shall be present wheresoever they dwell." But the

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127 In 1631, the judges concluded that, at the trial of a peer before the House of Lords, "[c]ertain Examinations [clearly confessions from the context] having been taken by the lords without an oath ... could not be used until they were repeated upon oath." Lord Audley's Case (1631), in 3 HOWELL'S STATE TRIALS 401, 402.

128 Case of Thomas Tong, 84 Eng. Rep. 1061, 1062 (K.B. 1662); see also Lilly v. Virginia, 527 U.S. 116, 141 (1999) (Breyer, J., concurring) (citing Tong's Case for the principle that an "out-of-court confession may be used against the confessor, but not against his co-conspirators").


130 This importation was no doubt aided, especially toward the end of the seventeenth century, by the arrival of a substantial number of lawyers who "had received their training at the Inns of Court in London and brought with them, applied, and enforced the procedural modifications enacted in England after the Revolution of 1688." FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 20 (1951); see also BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30-31 (1967) (discussing the influence of England's legal commentators on colonial American political thought).

131 THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE
Americans did not simply draw on English law. American criminal procedure developed in a distinctive way. The right to counsel in felony trials developed far more quickly in America than in England, and with it rose an adversarial spirit that made the opportunity for confrontation of adverse witnesses especially crucial. In addition, the right became especially relevant to American concerns when in the 1760s Parliament began to regulate the colonists through inquisitorial means like the Stamp Act, which provided for the examination of witnesses upon interrogatories. In the Revolutionary period, the right to confrontation was frequently expressed, especially in the early state constitutions. Some used the time-honored “face to face” phrase; others, following Hale and Blackstone, adopted language strikingly similar to that later used in the Sixth Amendment’s Confrontation Clause. It is clear that the Framers were aware not only of the American history of the confrontation right, but also of the abuses in the sixteenth- and seventeenth-century treason trials and of the de-

INHABITANTS OF THE MASSACHUSETTS 54 (Thomas G. Barnes ed., 1975) (1648) (emphasis omitted). The same statute provided that in other cases the testimony of a witness may be taken by a magistrate or a commissioner, but that if the witness lived within ten miles of the court and was not disabled, this pretrial statement “shall not be received, or made use of in the Court, except the witness be also present to be farther examined about it.” Id. (emphasis omitted).

132 See Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77, 112-16 (1995) (arguing that before the Sixth Amendment, several states adopted confrontation rights, as well as other procedural protections, as a result of the adversarial nature of American trials).


134 E.g., MASS. CONST. of 1780, pt. 1, art. XII, reprinted in SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 376 (Richard L. Perry ed., 1952) [hereinafter SOURCES OF OUR LIBERTIES] (outlining the right of the accused “to meet the witnesses against him face to face”); N.H. CONST. of 1784, pt. 1, art. XV, reprinted in SOURCES OF OUR LIBERTIES, supra, at 384 (same).

135 See, e.g., MD. CONST. of 1776, § XIX, reprinted in SOURCES OF OUR LIBERTIES, supra note 134, at 348 (providing that “in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him”); N.C. CONST. of 1776, § VII, reprinted in SOURCES OF OUR LIBERTIES, supra note 134, at 355 (“[E]very man has a right . . . to confront the accusers and witnesses with other testimony.”); PA. CONST. of 1776, § IX, reprinted in SOURCES OF OUR LIBERTIES, supra note 134, at 330 (“[A] man hath a right . . . to be confronted with the accusers and witnesses.”); VA. CONST. of 1776, § 8, reprinted in SOURCES OF OUR LIBERTIES, supra note 134, at 312 (“[A] man hath a right . . . to be confronted with the accusers and witnesses.”); VT. CONST. of 1777, ch. 1, § 10, reprinted in SOURCES OF OUR LIBERTIES, supra note 134, at 366 (“[A] man hath a right . . . to be confronted with the witnesses.”).
fendants' demands for meeting their accusers "face to face."136

Note that in this account of the background of the Confrontation Clause, we have not mentioned reliability. To be sure, one of the advantages perceived by those who lauded the common law system of open confrontation of witnesses was its contribution to truth-determination.137 But neither in the statutes, caselaw, nor commentary was there a suggestion that, if the courts determined that a particular item or type of testimony was reliable, then the accused lost his right of confrontation. On the contrary, the confrontation principle was a categorical rule, a basic matter of the procedures by which testimony was taken.

Similarly, the law against hearsay has not played a role in this account. Hearsay doctrine, like evidentiary law more generally,138 was not well developed even at the time the clause was adopted, much less during the previous centuries.139 The tendency to meld the confronta-

136 The Framers had access to the reports of the state treason trials first published in 1719, Symposium, Historical Development of the American Lawyer's Library, 61 LAW LIBR. J. 440, 444 (1968). They also had access to standard treatises, such as Gilbert's and Hale's, which relied heavily on the state trials, and they read and revered Blackstone. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102 (2d ed. 1985) (discussing colonial legal literature).

137 Hale, for example, argued that cross-examination "beats and boults out the Truth much better" than privately taken examinations with "limited . . . Interrogatories in Writing." HALE, supra note 114, at 164. Similarly, Blackstone contended, "[t]his open examination of witnesses visà vis, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing," in the manner of the civil law. 3 WILLIAM BLACKSTONE, COMMENTARIES *373.

138 As late as 1794, "Edmund Burke remarked in the House of Commons that the rules of 'the law of evidence . . . [were] very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half hour, and repeat them in five minutes.'" John H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Sources, 96 COLUM. L. REV. 1168, 1188 (1996) (quoting 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 165 n.3 (1938)); see also, e.g., Stephan Landsman, The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 CORNELL L. REV. 497, 498 n.4 (1990) (paraphrasing Burke to the same effect). Burke was overstating the point, of course; there was an identifiable law of evidence well before this time. But, at least until relatively late in the eighteenth century, much of the law of evidence was a matter of general principles and did not result in the exclusion of evidence with the degree of consistency now associated with it. Richard D. Friedman, Anchors and Flotsam: Is Evidence Law "Adrift"?, 107 YALE L.J. 1921, 1944 n.113 (1998).

139 See T.P. Gallanis, The Rise of Modern Evidence Law, 84 IOWA L. REV. 499, 531 (1999) (claiming that the rule against hearsay "was applied inconsistently, if at all, in the middle of the eighteenth century but . . . this approach had changed measurably by the early 1820s"); id. at 533 ("If the treatises are to be believed, the rule against hearsay began to mature into its modern form during the late eighteenth century.");
tion right and hearsay, as we shall show, is a latter-day development. As this historical account and the language of the Confrontation Clause indicate, the clause was not an attempt to constitutionalize the nascent law of hearsay. Rather, it plainly expressed the basic procedural principle that if a person acts as a witness against an accused, the accused must have an opportunity to confront that person. Confrontation, like the oath, is one of the fundamental conditions under which testimony must be given.

B. Development of the Modern “Excited Utterance” Exception

The confrontation principle discussed above, though powerful, is relatively narrow: It does not apply to all out-of-court statements, but only to those that constitute the giving of testimony. Beginning late in the seventeenth century, however, courts and scholars—nonlegal as well as legal—manifested significant concern over the epistemological difficulty created generally whenever one person reports what another has said. In the terminology of that day, as in today’s lay understanding, this is the problem of hearsay.

In the early eighteenth century, the principle that “a mere Hear-

id. at 536 (stating that “[u]ntil the 1780s, the courts rarely discussed the hearsay rule,” and “hearsay controversies in criminal cases were almost non-existunt before then,” but there was a burst of activity in that decade). See generally Stephan Landsman, From Gilbert to Bentham: The Reconceptualization of Evidence Theory, 36 WAYNE L. REV. 1149, 1151 (1990) (tracing the expanding influence of the adversary idea through works of famous evidence theorists); John H. Langbein, The Criminal Trial Before the Lawyers, 45 U. CHI. L. REV. 263, 300-02 (1978) (illustrating the lack of clarity regarding the hearsay rule in early trials).

Indeed, Justice Story faulted the drafters of the Sixth Amendment for failing to incorporate the law of evidence into the Sixth Amendment even while showing “undue solicitude” for procedural protections. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 662 (Fred B. Rothman & Co. 1991) (1833).

Interestingly, until near the end of the eighteenth century, lack of the oath appears to have been a greater concern with respect to out-of-court statements than was absence of the opportunity to cross-examine. Gallanis, supra note 139, at 533.

In both the terminology of the day and today’s lay understanding of the term, the problem of hearsay occurs whenever one person reports what another person said. See Friedman, supra note 138, at 1944-45 (discussing the “preference for firsthand observation” in the late-seventeenth and early-eighteenth centuries). For example, in a nonlegal, religious publication written around 1670, Sir Matthew Hale argued: “[T]hat which is reported by many Eye-witnesses hath greater motives of credibility than that which is reported by few; ... and finally, that which is reported by credible persons of their own view, than that which they receive by hear-say from those that report upon their own view.” MATTHEW HALE, THE PRIMITIVE ORIGINATION OF MANKIND, CONSIDERED AND EXAMINED ACCORDING TO THE LIGHT OF NATURE 129 (1677).
say is no Evidence" was commonplace, but this rule—which was understood to refer only to the oral statements that the witness "heard another say"—was not carefully worked out or consistently applied through the exclusion of evidence. By the end of the century, however, an exclusionary rule had gelled. Soon it gained all the breadth and even more of the modern rule, which defines hearsay as an out-of-court statement offered to prove the truth of a matter asserted in

\[143\] GILBERT, supra note 129, at 107.

\[144\] See id. ("The Attestation of the Witness must be to what he knows, and not to that only which he hath heard, for a mere Hearsay is no Evidence . . . ."); 2 HAWKINS, supra note 129, ch. 46, § 14, at 431 ("It seems agreed, That what a Stranger has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other Side hath no Opportunity of a cross Examination . . . ."); WILLIAM NELSON, THE LAW OF EVIDENCE 278 (2d ed. 1735) ("A Witness shall not give Evidence of what he has heard another say."); see also id. at 277 ("Hearsay, or a Report of what another Man said, is no Evidence against a Prisoner.").

In the early years of the nineteenth century, the category of hearsay expanded to cover writings. In his discussion of hearsay, Thomas Peake contended that certain written memoranda made in the ordinary course of business are admissible as "not within the exception as to hearsay evidence." THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 10 (1801). Peake was using the word "exception" in the same sense that we would today use the term "objection." The statement, therefore, is that these memoranda are not excluded by the hearsay rule; apparently implicit in this argument is the inchoate idea that other writings would be. In 1815 S.M. Phillipps made the principle clear: The exclusionary rule "is applicable to statements in writing, no less than to words spoken," with the only difference being that there is greater facility of proof in the case of written statements. 1 S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 173 (1st Am. ed. 1816). (The first London edition of Phillipps' influential treatise was published in 1814 but is not readily available today. Gallanis, supra note 139, at 532 n.247.) Phillipps' analysis did not gain instant universality. The seventh edition of Francis Buller's treatise, in a passage not present in earlier editions, follows Peake's treatment virtually to the point of plagiarism. FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 294b n.d (Richard Whalley Bridgman ed., 7th ed. 1817). Jeremy Bentham treats written evidence as distinct from hearsay but claims that the same rules apply to both. 3 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 447-48 (1827).

Soon, the hearsay rule also expanded to include the long-established rules governing when depositions of a witness, see supra note 120 (summarizing seventeenth-century cases on the admissibility of written depositions), taken under oath before trial, could be introduced in lieu of trial testimony. See PHILLIPPS, supra, at 177-78 (discussing the celebrated Berkeley Peereage Case, 11 Eng. Rep. 333 (H.L. 1858-61)).

In 1838, the famous case of Wright v. Tatham, 47 Rev. Rep. 136 (H.L. 1838), extended the reach of the rule against hearsay to conduct that apparently reflected an actor's belief in a proposition and was offered to prove the truth of that proposition, even though the actor did not assert the proposition. This conception goes beyond the modern American definition of hearsay, which is limited to conduct that is intended as an assertion of the proposition that the conduct is offered to prove.
the statement, and renders the statement presumptively inadmissible for that purpose.

The scope of the hearsay rule, therefore, extended beyond out-of-court statements that might be considered testimonial. However, such statements lay at the core of the rule, and the rule was supported on the basis that it preserved the conditions that should govern the giving of testimony. Thus, S.M. Phillipps, in one of the most important evidence treatises of the nineteenth century, explained that "the reason of the rule is, because evidence ought to be given under the sanction of an oath, and that the person, who is to be affected by the evidence, may have an opportunity of interrogating the witness."

Because the rule had become so broad, it could no longer be applied without qualification or exception. Indeed, even before 1800, several recognizable hearsay exceptions had developed to a considerable extent. But these exceptions were, at least for the most part, consistent with the principle that testimonial statements should be given under oath and in the presence of the adverse party. With respect to most of the exceptions, this consistency was attributable to the fact that the exceptions principally concerned statements made ante litem, before the dispute giving rise to the litigation. Drawing on recent cases, Phillipps distinguished between "the natural effusions of a party, who must know the truth, and who speaks upon an occasion, "

146 FED. R. EVID. 801(c).
147 FED. R. EVID. 802.
148 PHILLIPPS, supra note 145, at 173.
149 According to T.P. Gallanis: [T]he treatises indicate that most of the modern exceptions to the rule against hearsay were in place by the end of the eighteenth century, even if their contours in particular cases required clarification. These exceptions were: legitimacy, family relationships, pedigree, prescription, custom, general reputation, prior consistent and inconsistent statements, and dying declarations.
Gallanis, supra note 139, at 533 (footnotes omitted). Gallanis' list might be extended to include former testimony and personal admissions.
150 This is true of the first six exceptions listed by Gallanis—statements concerning legitimacy, family relationships, pedigree, prescription, custom, and general reputation. Id. With respect to prior consistent or inconsistent statements of a witness (to the extent that these were actually admitted), at least the witness had to testify under ordinary conditions at trial. We believe that the dying declaration exception was at base a groping effort toward recognition of the doctrine under which a defendant may forfeit her confrontation right if her misconduct causes the unavailability of the witness. With respect to former testimony, the conditions of oath and adverse examination were sedulously protected. Supra note 120. With respect to personal admissions, the idea of confrontation does not apply, and there is little if any need for oath because the statement is offered against the person who made it.
when his mind stands in an even position, without any temptation to exceed or fall short of the truth," and statements made "for the express purpose of being given in evidence."

Shortly after 1800, commentators began articulating the doctrine to which some attached the label "res gesta" or "res gestae"—literally, "things done." In its origin, this principle was not clearly an exception to the rule against hearsay. Rather, it was an expression of a basic limitation on the scope of the exclusionary rule. Thus, Sir William Evans explained the concept, though without using the term:

What is called hearsay, may be properly divided under two principal heads: 1st, Those in which it is a mere narrative of an event: 2d, Those in which it is the actual occurrence of a fact, which fact may be materially connected with the general conclusion intended to be drawn upon the subject of the enquiry. . . . [T]he distinction between the cases, in which the immediate action of speech furnishes a material indication with respect to the object of inquiry, and those in which it is a mere act of narration, will in most cases furnish the proper principle for ascertaining whether the evidence of its occurrence is or is not properly admissible.

Though Phillipps said that hearsay "is often admitted in evidence, as part of the res gesta," he explained the res gesta concept in terms that clearly distinguish it from hearsay under the modern definition. According to Phillipps, the meaning of res gesta seems to be, that where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence, for the purpose of showing its true character.

The same point was made about a decade later in another important treatise, written by Thomas Starkie, who explained res gestae this way:

If the declaration or entry has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in

152 Id. (citing Lord Chancellor Thurlow in the Berkeley Peerage Case, 11 Eng. Rep. 333 (H.L. 1858-1861)).
153 Gallanis, supra note 139, at 533.
154 See BLACK'S LAW DICTIONARY, supra note 116, at 1310 (defining res gestae as "[t]he events at issue, or other events contemporaneous with them").
156 PHILLIPS, supra note 145, at 201.
157 Id. at 201-02.
dispute, and depending for its effect entirely on the credit of the person who makes it, it is not admissible in evidence; but if, on the contrary, any importance can be attached to it as a circumstance which is part of the transaction itself, and deriving a degree of credit from its connection with the circumstances, independently of any credit to be attached to the speaker or writer, then the declaration or entry is admissible in evidence.\textsuperscript{158}

The basic idea of res gestae, then, was that if an utterance was part of the event at issue rather than a report about it, it should not be excluded under the hearsay rule. Thus, courts sometimes stated the test for admissibility in terms that today sound almost amusingly metaphysical: "Were the facts talking through the party or was the party talking about the facts?"\textsuperscript{159} When the courts in the nineteenth and early twentieth centuries spoke in operational terms, however, they were often very restrictive, in accordance with the principles set out by the early commentators.

First, courts were rigorous in limiting the principle to statements that were made while the events at issue were occurring, or immediately thereafter. Some cases purported to preclude admissibility if the event was already closed. For example, in the well-known—and much criticized—case of \textit{Regna v. Bedingfield},\textsuperscript{160} the victim, whose throat had been cut by the defendant no more than a minute or two earlier, exclaimed, "See what Harry has done!"\textsuperscript{161} and died ten minutes later.\textsuperscript{162} The court ruled the statement inadmissible.\textsuperscript{163} "Anything . . . uttered by the deceased at the time the act was being done would be admissi-

\textsuperscript{158} THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE, AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS, at pt. I, § 28, at 47 (1st Am. ed. 1826).
\textsuperscript{159} Upton v. Commonwealth, 2 S.E.2d 337, 339 (Va. 1939) (citation omitted). Also, see City of Wynnewood v. Cox, which stated: "\textit{Res gestae}," as said by Mr. Wharton, in his work on Criminal Evidence (section 262), "are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the trans-

\textsuperscript{160} 14 Cox Crim. Cas. 341 (Crown Ct. 1879).
\textsuperscript{161} Id. at 345 n.6; see also James B. Thayer, \textit{Bedingfield's Case: Declarations as a Part of the Res Gesta}, 14 AM. L. REV. 817, 826 (1880) (rendering the statement as "See what Bedingfield has done to me").
\textsuperscript{162} The court ruled that the statement was not admissible as a dying declaration because there was no evidence that the victim knew she was dying. 14 Cox Crim. Cas. at 343-44.
\textsuperscript{163} Id. at 342.
ble," ruled Lord Chief Justice Cockburn. Thus, if the utterance was, "Don't, Harry!" it would not have been excluded as hearsay. "But here it was something stated by her after it was all over, whatever it was, and after the act was completed." Other courts, even though not quite so restrictive, usually confined admissibility to those cases in which the statement was made a very brief time after the events being described. Courts and commentators described the requirement in various ways. Many spoke of a requirement of contemporaneity. A typical expression of the rule was that the statement must be "in a general sense, contemporaneous with the main occurrence; although,

164 Id.
165 Id.
166 Id. at 342-43; see also Elder v. Arkansas, 65 S.W. 938, 939 (Ark. 1901) ("[M]ere narrations of a past event, or the declarations of a witness concerning [the] event, giving his relations to it and his knowledge or opinion of it, made after the event is complete, and having no immediate connection with it, are not admissible as evidence to prove such event."); Chicago W. Div. Ry. Co. v. Becker, 21 N.E. 524, 525 (Ill. 1889) (declaring that "according to all the authorities" a statement is inadmissible if "it is... merely a history or a part of a history of a completed past affair"); Waldele v. N.Y. Cent. & Hudson River R.R. Co., 95 N.Y. 274, 278 (1884) (rejecting evidence of statements as "giving an account of a transaction not partly past, but wholly past and completed"). Also, in Williams v. Southern Pacific Co., the court stated:

Expressions of persons who are actors, made during the occurrence, may generally, but not always, be proved. If spontaneous and caused by the event, they may nearly always be shown. But if afterwards, no matter how shortly afterwards, there is an attempt to explain what has happened, or to account for it, or to defend one's self, or the like, it is incompetent and inadmissible as res gestae.

65 P. 1100, 1102 (Cal. 1901). Compare this to People v. Del Vermo, in which the court declared:

Strictly speaking, the spontaneous declaration [admitted in another case, and made twenty seconds after the injury] did not really form part of the res gestae, as being itself a verbal act contemporaneous with the principal occurrence; for the exclamation was uttered after the act of stabbing had been wholly completed and after the assailant had fled, although it is true that the time which had elapsed was very short.

85 N.E. 690, 695 (N.Y. 1908).

167 This was the position of James Bradley Thayer:

There can seldom be a perfect coincidence of time, but the... rule calls for a declaration which is made either while the matter in question is actually going on, or immediately before or after it.... [T]he nearness in time should be such that the declaration may in a fair sense be said to be a part of the res gestae, i.e. a part of the transaction of which it purports to give an account.

James B. Thayer, Bedingfield's Case—Declarations as a Part of the Res Gestae, 15 AM. L. REV. 71, 84 (1881); see also id. at 86 ("[I]t is the closeness of the declaration to the fact in point of time, coupled with its own import, that gives it its legally recognized quality as proof."). The Thayer view, emphasizing contemporaneity and not stress, eventually was reflected in the hearsay exception for statements of present sense impressions, now expressed in FED. R. EVID. 803(1). Infra note 193.
in case of a sudden accident or attack, the declaration would not be inadmissible merely because the blow or collision immediately preceded it." In another formulation, the statement had to be "an integral part of the transaction, occurring dum fervet opus—'[w]hile the work glows,' or "in the heat of action." Whatever the time element, courts insisted that the rule applied only if the statement "bears no evidence of reflection or deliberation."

Second, the courts frequently said that the statement must not be "a narrative of a past occurrence." Such narrations, they pointed

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168 Heckle v. S. Pac. Co., 56 P. 56, 57 (Cal. 1899); see also, e.g., Becker, 21 N.E. at 525 (excluding statements made by decedent after a forty-foot walk from the place of injury on the grounds that "[t]he declarations were not a part of the res gestae; "[t]hey were not made at the time of the accident;" and "[t]hey were not concurrent with the injury, nor uttered contemporaneously with it, so as to be regarded as a part of the principal transaction," but rather "[t]hey were made after the injury was received"); Commonwealth v. Hackett, 84 Mass. 136, 139 (1861) (holding that a statement by the victim twenty seconds after a fatal stabbing could be admitted, as "an exclamation or statement, contemporaneous with the main transaction, forming a natural and material part of it"); Mo., Okla. & Gulf Ry. Co. v. Adams, 153 P. 200, 202 (Okla. 1915) ("[T]he statement must be substantially contemporaneous with the transaction, made on the spur of the moment, and induced by the happening of the events concerning which the statement is made . . . .").


170 BLACK'S LAw DICTIONARY 501 (6th ed. 1990). The operating principle appears to have been that the question begged by one Latin phrase could be begged again by another. This, of course, is essentially the same principle applied by many tourists: If the locals don't understand you, talk louder.

171 Wash.-Va. Ry. Co. v. Deahl, 100 S.E. 840, 842 (Va. 1919). In perhaps the first case to articulate a rationale for admissibility of spontaneous utterances, the court "allowed, that what the [alleged victim of an assault and battery] said immediately upon the hurt received, and before that she had time to devise or contrive anything for her own advantage, might be given in evidence." Thompson v. Trevanion, 90 Eng. Rep. 179, 179 (K.B. 1693).

172 Upton v. Commonwealth, 2 S.E.2d 337, 339 (Va. 1934) ("As stated in Corpus Juris, the true test is this: . . . Was the statement made dum fervet opus or was it a narrative of a past occurrence?"); see also, e.g., Largin v. State, 104 So. 556, 558 (Ala. Ct. App. 1925) (noting that statements must have been "instinctive from the occurrences to which they relate rather than the retrospective narration of a past fact"); Williams v. S. Pac. Co., 65 P. 1100, 1102 (Cal. 1901) ("A narrative, even if given during the occurrence, is inadmissible."); Heckle, 56 P. at 57 ([I]f it be a mere narrative of past events, it then is clearly within the category of inadmissible hearsay, and must, beyond doubt, be excluded."); Becker, 21 N.E. at 525 (holding inadmissible declarations that "were made after the injury was received, and were merely narrative of what had taken place"); Waldele v. N.Y. Cent. & Hudson River R.R. Co., 95 N.Y. 274, 278 (1884) (rejecting evidence of statements deemed to be "purely narrative"); Prickett v. Sulzberger & Sons Co., 157 P. 356, 360 (Okla. 1916) ("[R]est gestae statements] exhibit the mind's impression of immediate events, and are not narrative of past happenings . . . ." (quoting JOHN JAY MCKELVEY, HANDBOOK ON THE LAW OF EVIDENCE § 198a (1st ed. 1897))); Adams, 153 P. at 202 (asserting that "the rule is universal that, to be admissible as part
out, depended for their probative value "upon the accuracy and reliability" of the out-of-court declarant, as well as on the veracity of the witness who reported the statement in court. Thus, there was no way that "the truth of the declarations could be tested" by "cross examination of the witness testifying, or by the examination of other witnesses." On the other hand, if the statements were deemed to be "so nearly contemporaneous with [the occurrence] as to characterize it, or throw any light upon it" then they would be considered part of the res gestae, or in one formulation "a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part," as opposed to "merely a history or a part of a history of a completed past affair."

As might be expected, the application of these standards was problematic, not merely because they called for judgments of degree but because they drew evanescent or even incoherent distinctions. We suspect that, though the courts generally spoke in terms of the accuracy of the statements, another consideration tended to motivate them. The more time had passed between the event and the statement, and the more the statement was a narrative of past occurrences, the more likely the statement was made with the anticipation that making it would provide information to be used later in adjudication. Put another way, the more the statements looked like a reflective narration of past events, the more they resembled testimony, though not given under the usual conditions prescribed for testimony. As one leading case posed the problem:

[Statements not under oath] are frequently made under such circumstances as entitle them to very great, and frequently to implicit confidence; and yet they do not answer the requirements of the law—that a party prosecuted shall be confronted with the witnesses, shall have an opportunity of cross-examination, and that the evidence against him shall be given under the test and sanction of a solemn oath. Declarations of the res gestae" the utterance must not be "a narrative or statement of what has occurred"); City of Wynnewood v. Cox, 122 P. 538, 533 (Okla. 1912) ("Res gestae,'... are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events." (citation omitted)).

173 Waldele, 95 N.Y. at 278.
174 Id.
175 Becker, 21 N.E. at 525.
176 As discussed previously, such distinctions include those between parts of an uncompleted transaction on the one hand and a completed transaction and a separate statement about it on the other, or between narrative about an event and a statement explaining the event.
tions which are received as part of the res gesta are to some extent a departure from or an exception to the general rule; and when they are so far separated from the act which they are alleged to characterize that they are not part of that act or interwoven into it by the surrounding circumstances so as to receive credit from it and from the surrounding circumstances, they are no better than any other unsworn statements made under any other circumstances. They then depend entirely upon the credit of the person making them and of the persons who testify to them, and hence are of no more value as evidence in a legal proceeding than the unsworn declarations of a person under any other circumstances.\(^ {177}\)

By the time Wigmore published the first edition of his treatise in 1904, courts were beginning to display a more receptive attitude toward spontaneous exclamations. Wigmore greatly fostered the development. Some spontaneous statements, he pointed out, were admissible notwithstanding the hearsay rule because they were not offered for a hearsay purpose. But others were hearsay and were nevertheless admissible under an exception to the hearsay rule that he contended had been discernible in the cases for a generation.\(^ {178}\)

Wigmore not only acknowledged but embraced the narrative nature of such statements: "Such statements are genuine instances of using a hearsay assertion testimonially; i.e. we believe that Doe shot the pistol, or that the bell was rung, because the declarant so asserts,—which is essentially the feature of all human testimony."\(^ {179}\) Wigmore put less emphasis on timing than did many of the cases, and more on external shock. The exception, he said, was

based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled

\(^{177}\) Waldele, 95 N.Y. at 287.

\(^{178}\) See 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1745, 1746 (1904) (explaining that the courts consistently admit a class of statements to which the hearsay rule applies, creating a distinct exception to the rule).

\(^{179}\) Id. § 1746. In his digest of Dismukes v. State, 3 So. 671 ( Ala. 1887), Wigmore quoted the court's assertion that the statement in question "'being uttered so near the scene of the transaction, and being apparently spontaneous in its nature, ... was free from all suspicion of device, premeditation, or afterthought,'" 3 WIGMORE, supra note 178, § 1747 case notes (quoting Dismukes, 3 So. at 673), but he excised the court's conclusion that the statement "cannot be regarded in any respect as merely narrative of a past transaction," Dismukes, 3 So. at 673.
domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him . . . .

This supposed psychological phenomenon—though unsupported by any scientific finding—struck Wigmore as so powerful that it satisfied the two basic criteria he set out for an exception to the hearsay rule: trustworthiness and necessity. Because the declaration was likely to be "the unreflecting and sincere expression of [the declarant's] actual impressions and belief," it had sufficient trustworthiness to "exempt[] it from the ordinary test of cross-examination on the stand." Also "[t]he extrajudicial assertion being better than is likely to be obtained from the same person upon the stand, a necessity or expediency arises for resorting to it." Wigmore acknowledged that this last point was "rarely noted" by courts, a phenomenon he believed "may be ascribed to the influence of the Verbal Act doctrine," which "usually obviated argument" as to whether the proponent had to show "a specific necessity" for resorting to the statement. In other words, when a court admits a spontaneous statement for a nonhearsay purpose—as part of the events being proved rather than as a report of those events—the hearsay rule does not apply and it generally does not weigh against admissibility that the declarant could be, but has not been, made a witness in court. Glibly, Wigmore simply extended the principle to the hearsay exception that he discerned. With essentially no support in the caselaw, especially in the context of prosecution evidence, he pronounced "a proposition never disputed"—that "the death, absence, or other unavailability of the

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180 3 WIGMORE, supra note 178, § 1747.
181 Id. § 1749.
182 Id. § 1748.
183 Id.
184 He cited two criminal cases discussing the asserted superiority of the spontaneous statement. Id. § 1748 n.1. In one, the declarant was dead, a result of the murder being tried. See State v. Wagner, 61 Me. 178, 194-95 (1873) ("The outcries of a person deceased during the perpetration of the assault which results in death, . . . are competent evidence upon the trial of a party charged with the murder of such person . . . ."). Thus, the forfeiture principle, discussed infra note 285 and accompanying text, may have justified admission of the statement even without relying on the exception. In the other case, the declarant was a witness, and the accused did not object to admission of the prior statement. Jordan v. Commonwealth, 25 Va. (1 Gratt.) 943, 944-45 (1874).
declarant need never be shown under this Exception.\textsuperscript{185}

To Wigmore, the key to the exception was that "[t]here must be some shock, startling enough to produce [the] nervous excitement and render the utterance spontaneous and unreflecting."\textsuperscript{186} Though in his view there was "no definite and fixed limit of time" to the exception, "[t]he utterance must have been before there has been time to contrive and misrepresent, i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance."\textsuperscript{187} Further, the statement had to "relate to the circumstances of the occurrence preceding it"—a requirement that Wigmore had some difficulty justifying but that he thought provided some extra assurance of trustworthiness and necessity.\textsuperscript{188}

Wigmore's analysis was dubious in several respects. Later commentators have challenged his supposition that a statement made while the declarant's reflective faculties are dominated by a stress-inducing event is more likely to be accurate than the run-of-the-mill narrative statement.\textsuperscript{189} The premise that the reflective powers are "in abeyance" for more than an instant is questionable. In many situations, the ability to recognize one's self-interest and articulate a statement that supports it does not take much time at all. Further, whatever its impact on the sincerity of the declarant, extreme stress is likely to distort her perception, memory, and communicative ability.\textsuperscript{190}

Moreover, Wigmore's cavalier treatment of the unavailability question is also subject to question. Even if he were right that an out-of-court statement made under stress is "better than is likely to be obtained from the same person upon the stand,"\textsuperscript{191} it does not follow that the statement should be admissible without a showing that the declarant is unavailable to be a witness. Presumably, better evidence than the statement alone is the statement taken together with the declarant's

\textsuperscript{185} 3 WIGMORE, supra note 178, § 1748.

\textsuperscript{186} Id. § 1750(a).

\textsuperscript{187} Id. § 1750(b).

\textsuperscript{188} Id. § 1750(c).


\textsuperscript{190} Cf. State v. Harris, No. 5-99-14, 1999 WL 797159, at *4 (Ohio Ct. App. Sept. 30, 1999) (reporting a police officer's testimony that a declarant "was so incoherent because she was so agitated[,] crying, upset, yelling, that I couldn't, I really couldn't get a lot of information out of her").

\textsuperscript{191} 3 WIGMORE, supra note 178, § 1748.
testimony, given under oath and cross-examination—which Wigmore himself famously characterized as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." The threat of exclusion of the evidence if the declarant is available but not produced is a means of ensuring that the proponent will in fact produce the declarant. Arguably, therefore, the hearsay exception should not apply if the declarant is available but not produced by the proponent.

Nevertheless, Wigmore’s analysis had a large influence on American courts and on other commentators in the twentieth century. According to the notable evidence scholar Edmund Morgan,

but few cases prior to 1880 gave weight directly to the element of spontaneity, and fewer still to the fact that spontaneity was insured by the startling nature of the event.... [I]t is only since the publication of Dean Wigmore’s work that this exception to the hearsay rule has gained wide recognition.

Although the exception was “by no means universally accepted,” many American courts followed the framework set out by Wigmore and exempted from the hearsay rule those statements made a short time after, under the influence of, and relating to, a stressful event. Following Wigmore’s suggestion, they sometimes admitted such statements even without inquiring whether the declarant was available to testify at trial. Over time, the courts applied the exception even

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192 WIGMORE, supra note 178, § 1367.
193 See, e.g., People v. Poland, 174 N.E.2d 804, 807 (Ill. 1961) (citing Wigmore to explain the “spontaneous declarations” exception to the hearsay rule); Zechariah Chafee, Jr., The Progress of the Law, 1919-1922: Evidence. II, 35 HARV. L. REV. 428, 447 (1922) (“Wigmore’s view... does not require contemporaneousness with an event.”), quoted in Showalter v. W. Pac. R.R. Co., 106 P.2d 895, 899-900 (Cal. 1940). In the end, however, Wigmore’s analysis did not occupy the entire field formerly designated by the term res gestae. Some courts treated simultaneity, as well as stress, as a basis for relieving a statement from the hearsay rule. See, e.g., Houston Oxygen Co. v. Davis, 161 S.W.2d 474, 477 (Tex. 1942) (stating that, in an automobile accident case, "present sense-impressions[... have such exceptional reliability as to warrant their inclusion within the hearsay exception for spontaneous declarations"). The Federal Rules of Evidence now include a hearsay exception for statements of present sense impression, FED. R. EVID. 803(1), alongside the exception for excited utterances, FED. R. EVID. 803(2).

195 Id.
196 E.g., Wheeler v. United States, 211 F.2d 19 (N.C. Cir. 1953); N.Y., Chi. & St. Louis R.R. Co. v. Kovatch, 166 N.E. 682, 684 (Ohio 1929). English courts appear to be willing to apply the exception only if the declarant is unavailable, and only if the time between the event and the statement is very brief. COLIN TAPPER, CROSS AND TAPPER ON EVIDENCE 547-48 (9th ed. 1999).
more leniently than Wigmore’s formulation suggested they should. Wigmore had demanded that the statement be "spontaneous and unreflecting," made "before there has been time to contrive and misrepresent, i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance." But courts began to invoke the exception in cases in which, though the declarant may well still have been affected substantially by the stressful event, one could not say reasonably that nervous excitement was still dominant, or that the declarant had little opportunity to reflect on her statement before making it. This development may have been attributable in large part to a growing general disaffection with the hearsay rule, especially in civil cases, and the disinclination of courts to craft a different set of evidentiary rules for civil and criminal cases. In any event, it is clearly reflected in the two main precursors to the Federal Rules of Evidence: the original Uniform Rules of Evidence of 1953 and the California Evidence Code of 1966. Neither of these speaks of the dominance of nervous excitement or the abeyance of reflective

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197 3 Wigmore, supra note 178, § 1750(a).
198 Id. § 1750(b).
199 E.g., Guthrie v. United States, 207 F.2d 19, 22-23 (D.C. Cir. 1953) (holding that an accusatory statement to the police by an incoherent adult complainant at least eleven hours after an assault and several days before death was admissible as a spontaneous utterance); Soto v. Territory, 94 P. 1104, 1105 (Ariz. 1908) (admitting a four-year-old boy’s statement made an hour and a half after an assault because, where a young victim’s age would “render it improbable that his utterance was deliberate and its effect premeditated in any degree,” the utterance need not be “so nearly contemporaneous with the event which gave rise to it as in the case of an older person, whose reflective powers are not presumed to be so easily affected or keep [sic] in abeyance”); State v. Novak, 132 N.W. 26, 27 (Iowa 1911) (holding admissible as a spontaneous statement the declaration of a seventy-one-year-old woman (who testified at trial) after running half a mile from her home, where the assault occurred, to her nephew’s house).
200 See, e.g., Jack B. Weinstein, Probative Force of Hearsay, 46 Iowa L. Rev. 331, 331, 347 (1961) (contending that prevailing hearsay rules “exclude evidence that has a higher probative force than evidence they admit,” and that, at least in civil cases, the rule against hearsay should be converted “from a rule of exclusion to one of discretion”).
201 See Unif. R. Evid. 63(4)(b) (1953) (excepting from the hearsay rule a statement made “while the declarant was under the stress of a nervous excitement” caused by his or her perception of “the event or condition which the statement narrates, describes or explains”).
202 Cal. Evid. Code § 1240 (West 1966) provides: “Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.”
powers. Instead, they merely demand that the statement have been made while the declarant was "under the stress" of the exciting event. And the Federal Rules of Evidence, effective in 1975, followed suit. The "excited utterance" exception of Rule 803(2) provides that, without regard to the availability of the declarant, the rule against hearsay does not exclude "[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."

Like its precursors, Rule 803(2) applies whether or not the declarant is available; the drafters appear to have followed the lead of Wigmore in this respect without much consideration. Codifications based on the Federal Rules now have been adopted in more than forty states, and all but one of these codifications include rules identical (or, in the case of Florida, virtually and substantively identical) to Rule 803(2). The remaining codification, that of New Jersey, also has a very similar rule; like its prior codification, which was adapted from the original Uniform Rules, it still insists that the statement have been made "without opportunity to deliberate or fabricate." The courts, however, appear not to have made much of the difference.

Outside as well as within the context on which this Article focuses—statements made in 911 calls and follow-up conversations—the courts have continued to apply the exception with increasing leniency, often tolerating great time lapses between the stressful event and the statement. It appears, however, that, until relatively recently, the

203 FED. R. EVID. 803(2).
204 The English rule is to the contrary. See TAPPER, supra note 196, at 548 (observing that under English law "the doctrine can be used when the prosecution has taken all reasonable steps to secure the attendance of a witness").
206 N.J. STAT. ANN. § 803(c) (2) (West 1994).
207 See, e.g., Truchan v. Sayreville Bar & Rest., Inc., 731 A.2d 1218, 1222 (N.J. 1999) ("Even where the time interval between the event and the statement is long enough to permit reflective thought, the statement is not necessarily excluded if the proponent can establish that the statement was nevertheless made under the stress of the event without reflective thought.").
208 See 2 JOSEPH ET AL., supra note 205, ch. 58, at 36 ("Statements made after lapses of one to two and one-half hours, five hours to seven or eight hours or more are admissible, if the proof establishes the appropriate excitement."); see also, e.g., United States v. Rosetta, No. 97-2023, 1997 U.S. App. LEXIS 28862, at *5 (10th Cir. Oct. 20, 1997) (admitting a statement made by a complainant approximately nine hours after an attack as an excited utterance); United States v. Farley, 992 F.2d 1122, 1126 (10th
exception was rarely if ever used to allow the prosecution to prove its case by introducing a statement, describing a crime and made to law enforcement authorities or their agents, by a declarant who is available to testify at trial but whom the prosecution has not called. The

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We base this assertion on a survey of virtually all the cases cited in 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1750 (James H. Chadbourn ed., rev. 4th ed. 1976), conducted for us by Hannah Weiss of the Harvard Law School Class of 2003. It appears that in most of the cases in which a narrative statement was admitted under the exception against a criminal defendant the declarant was either unavailable or present and testifying. In many of these cases, the declarant was the victim of a homicide, the crime being charged. See, e.g., Littlejohn v. State, 219 A.2d 155 (Del. 1966) (holding admissible a statement by the deceased ten minutes after a fatal attack); Washington v. State, 98 So. 605 (Fla. 1924) (holding admissible the statement “Randolph shot me,” made by the deceased two minutes after a shooting); cf. People v. House, 217 N.E.2d 566 (Ill. App. Ct. 1966) (holding admissible the statement by a victim of robbery, since deceased, to the police); State v. Crawley, 410 P.2d 1012 (Or. 1966) (holding admissible a statement to a police officer by a victim of theft, since deceased, shortly after discovering the theft). In some cases, the court did admit a statement by a declarant who, so far as appears, was available to testify but did not actually do so. But in these cases the statement was almost always made to an acquaintance of the declarant rather than to those who might be considered representatives of law enforcement. See, e.g., People v. Poland, 174 N.E.2d 804 (Ill. 1961) (admitting a statement to a neighbor that the declarant’s son-in-law had just shot his wife, the declarant’s daughter); State v. Stafford, 23 N.W.2d 832 (Iowa 1946) (admitting a statement by the victim to her neighboring sister and brother-in-law that her husband had tried to kill her); cf. Curran v. State, 122 A.2d 126 (Del. 1956) (stating in dictum that a statement, not actually presented to the jury, by an unknown caller to the police that a rape was being committed appears to have been admissible as a spontaneous declaration). The courts tended to be receptive to testimony by parents of statements made to them by their young children, even though (or because?) the children may have been incompetent to testify at trial. See, e.g., Soto v. Territory, 94 P. 1104 (Ariz. 1908) (admitting the statement of a four-year-old child to his mother alleging sexual abuse); State v. Hutchison, 353 P.2d 1047 (Or. 1960) (admitting the statement of a five-year-old child made to his parents). Similarly, the courts seem to have been receptive to testimony of statements made by the defendant’s spouse, who would have been incompetent to testify against him. See, e.g., State v. Breyer, 232 P. 560 (Idaho 1925) (holding admissible a statement to the sheriff by the defendant’s wife, who would not...
reason is not easy to discern; nothing in the articulation of the exception would appear to preclude its use in this way. But we suspect that courts and prosecutors had a residual sense that such a use of the exception would violate the defendant’s right to confront the witnesses against him. As we will now show, the Confrontation Clause jurisprudence of the Supreme Court has—at least for now—removed that obstacle to dial-in testimony.

C. The Confrontation Right Subsumed by Hearsay Law

Section B has shown that developments in the hearsay exception for excited utterances have opened the door to prosecutors’ use of statements made even a considerable time after the events they describe and with the anticipation that they would be used as evidence, and even if the declarant is available at the time of trial. But if hearsay law does not block admissibility of such statements, does the Confrontation Clause?

In early cases, most notably Mattox v. United States, the Supreme Court took the view—which squares well with the historical account we have given in Section A—that the “primary object” of the Clause was to prevent the use of testimony taken ex parte. The word “hear-say” is not even mentioned in Mattox, or in most of the other early confrontation cases. It also is not used in Pointer v. Texas, the 1965 case in which the Supreme Court held the Clause applicable against the states. In the years shortly after Pointer, the Court tended to emphasize the degree to which the Confrontation Clause and the law of hearsay are distinct.
More recently, however, the Court has tended to emphasize the degree to which they are similar. The Court took a significant step toward melding the law of confrontation and of hearsay in 1980 when, in *Ohio v. Roberts*, it offered "a general approach" to the law of confrontation as it applies to hearsay statements made by out-of-court declarants:

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

The *Roberts* standard thus treated the reach of the Confrontation Clause, with respect to statements by out-of-court declarants, as co-extensive with that of hearsay law. That is, if a speaker is "a hearsay declarant" who "is not present for cross-examination at trial," then the prosecutor faces a Confrontation Clause problem. To solve that problem, *Roberts* appears to prescribe, the prosecutor must satisfy both an unavailability requirement and a reliability requirement—and the reliability requirement can be satisfied by bringing the statement within a "firmly rooted" hearsay exception. The reliability require-
ment therefore poses no greater obstacle to the admissibility of prosecution evidence than does ordinary hearsay law.

At first, it appeared that the unavailability requirement would provide such an obstacle, but the Court soon largely eviscerated that requirement. The guiding principle seems to be to follow the Federal Rules of Evidence, which now provide the dominant framework for American evidentiary law. If the statement fits within one of the enumerated exemptions to the hearsay rule that, as expressed in the Federal Rules, do not make unavailability of the declarant a requirement for admissibility, then the Court will not impose an unavailability requirement under the Confrontation Clause.

Like Pointer and Mattox, Roberts involved prior testimony given in a formal proceeding. The prosecution offered the statements under the hearsay exception for former testimony, now expressed in Federal Rule of Evidence 804(b)(1), which applies only if the declarant is unavailable. And so the Roberts Court articulated the unavailability requirement. In other settings in which unavailability would be a requisite for admissibility under the Federal Rules, the Court has held out the possibility that the Confrontation Clause requires unavailability as a constitutional matter.

In United States v. Inadi, however, a majority of the Court held that Roberts established an unavailability requirement only for prior testimony, and not for all out-of-court statements. The Inadi Court refused to apply the unavailability requirement to statements that fit within the hearsay exemption for statements of a conspirator. That

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218 Mattox, 156 U.S. at 240, involved testimony given at a prior trial, and Pointer, 380 U.S. at 401, and Roberts, 448 U.S. at 59-60, involved testimony given at preliminary hearings.

219 In Lee v. Illinois, 476 U.S. 530, 544 n.5 (1986), the prosecution argued that the statement was against penal interest. The Court noted that it did not need to reach the question of unavailability, because it held the statement inadmissible on grounds of unreliability. Id. at 539. In Lilly v. Virginia, the prosecution also alleged that the statement was one against penal interest, and the plurality assumed explicitly that, to the extent unavailability of the declarant was required for admissibility, the condition was satisfied. 527 U.S. 116, 122, 124 n.1 (1999). The exception for statements against interest is established for federal courts in Fed. R. Evid. 804(b)(3), which applies only if the declarant is unavailable. Also, in Wright, 497 U.S. at 816, the Court made a point of saying that it would “assume without deciding that, to the extent the unavailability requirement applies in this case, the [declarant] was an unavailable witness.” There, the State argued that the statement fit within the residual exception to the hearsay rule, but the Court properly refused to regard this open-ended exception as a firmly rooted one for purposes of Confrontation Clause analysis. Id.


221 Id. at 394-96.
IV. REVAMPING CONFRONTATION THEORY

To us, the willingness of courts to allow prosecutors to prove their cases through dial-in testimony, without even demonstrating why the caller has not been brought to court as a witness, demonstrates that something has gone very wrong with the jurisprudence of the confrontation right; a proper conception of the right would not tolerate the practice. We expect that some readers will agree—but not all. In this Part, we show how the Supreme Court’s conception of the confrontation right is flawed, and argue that the Court should adopt a radically different approach, intolerant of dial-in testimony.

In effect, we argue from both ends. Regarding tolerance of dial-in testimony as plainly suspect, we use the phenomenon to support our argument that confrontation jurisprudence should be revamped. At the same time, we develop what we believe, on principle, is a better approach to the confrontation right, and we show that it leads to an attitude suspicious of dial-in testimony.

In Section A, we contend that the Court has erred in tying the confrontation right to hearsay law and in making its applicability depend on whether the particular statement at issue, or a category of statements into which that one might fit, is deemed reliable. This approach gives the right too broad a scope and then denigrates it by dilution. Under this conception, the confrontation right is treated as a generalized protection against unreliable evidence—a role for which it is not needed, and which, as illustrated by dial-in testimony, it does not perform well. At the same time, this conception fails to recognize the confrontation right as an expression of one of the basic procedures of our criminal justice system. Thus, as illustrated by the recent case of Lilly v. Virginia, this conception makes easy cases hard; instead of treating the Confrontation Clause as a ringing endorsement of a principle that commands widespread respect, the courts must treat it as a complex, amorphous, and technical expression of principles that are baffling even to lawyers.

In Section B, we argue that a better approach, more consistent with the language and history of the Clause and with an intuitive sense for what the confrontation right is all about, can be articulated independently of hearsay law. Under this approach, the Clause does not apply to hearsay in general, but only to statements that are deemed testimonial. As to those, however, it creates a categorical rule: The statement should not be admitted against the accused unless he has had an adequate opportunity to cross-examine the declarant under oath. To this rule, we would admit only one qualification: If the declarant is unavailable
exemption, as expressed in the Federal Rules, does not require the declarant to be unavailable for the exemption to be applicable. And in 1992, in *White v. Illinois*, the Court held that the unavailability requirement did not apply to statements that fit within Illinois' hearsay exception for statements made for purposes of medical treatment or—most importantly for purposes of this Article—within its exception for "spontaneous declarations." Illinois did not then have an evidentiary codification based on the Federal Rules, but its statutory medical statement exception was very similar to the exception provided by Federal Rule of Evidence 803(4). And it articulated its common law "spontaneous declaration" exception in terms identical to the "excited utterance" exception of Federal Rule of Evidence 803(2). And those exceptions, too, apply even if the declarant is available.

At the same time, the *White* Court held that the "excited utterance" exception, as well as the medical statement exception, is "firmly rooted" for purposes of Confrontation Clause analysis. Thus, the way is clear: If a statement is deemed to be within the "excited utterance" exception, then under the Supreme Court's interpretation the Confrontation Clause poses no obstacle to its admission, even if the declarant is available to be a witness but is not called by the prosecution. As we have shown, prosecutors soon began in earnest to take advantage of this opportunity.

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222 *Fed. R. Evid. 801(d)(2)(E).*
224 725 ILL. COMP. STAT. ANN. 5/115-13 (West 1992) provided that, in certain prosecutions, statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.
225 See *People v. White*, 555 N.E.2d 1241, 1246 (Ill. App. Ct. 1990) ("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 is admissible as a hearsay exception.").
227 A state constitution's confrontation clause may still pose an obstacle to admission, however. See, e.g., *State v. Ortiz*, 845 P.2d 547, 556 (Haw. 1993) ("Although excited utterances have certain guarantees of reliability, we also recognize that the right to confront an accuser should not be abandoned simply because the alleged incriminating statement was made spontaneously."); *State v. Lopez*, 926 P.2d 784, 788-89 (N.M. Ct. App. 1996) ("We are not persuaded that the *White* decision gives sufficient importance to the values sought to be protected by the confrontation clause.").
to testify at trial because of misconduct of the accused, then the accused should be deemed to have forfeited the right. We will show how this approach can be applied in the case of statements made in 911 and follow-up conversations.

In Section C we will compare our approach to others with which it bears some resemblance. Subtle differences can have important consequences in this context, and we will show how this is true with dial-in testimony.

A. Flaws of the Current Doctrine

1. Language and Structure

To a textualist, the language of the Sixth Amendment controls the meaning of the confrontation right. Even if we accord no prescriptive force to the constitutional text, moreover, it is an important articulation of the right. That articulation, and the context in which it is set out, may contain significant indications of how the right should be construed.

The Sixth Amendment reads in full as follows:

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

Note at the outset that the Amendment does not read like a balancing doctrine. On the contrary, it provides rights to apply "[i]n all criminal prosecutions." That language has not been construed as broadly as it might be; the Supreme Court has, for example, held with considerable historical support that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provisions." Moreover, in some cases, the exact bounds of the rights are limited by the open-textured words used to describe them—how slow can a trial be and still qualify as speedy? And the rights are subject

228 U.S. CONST. amend. VI.

229 Duncan v. Louisiana, 391 U.S. 145, 159 (1968); see also, e.g., Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (holding that the Federal Constitution is not violated if a state trial court fails to appoint counsel in a case in which the accused is not actually punished with imprisonment).

230 Pretty slow. See Barker v. Wingo, 407 U.S. 514, 556 (1972) (holding that succes-
to waiver or forfeiture. But within their bounds, the rights are categorical. That is, they are stated and applied without qualification. Thus, the Amendment does not say, nor has it been construed to provide, that the accused shall enjoy the right to be tried by a jury unless the facts are so complicated that a jury likely would not understand them or be able to render an accurate verdict, or that he shall enjoy the right "to have the Assistance of Counsel for his defence" unless his guilt is so clear that such assistance probably would do little good, or in the circumstances of the case it actually would obstruct the search for truth. Even in an "age of balancing," there are some absolutes.

Now focus on the Confrontation Clause itself. In simple and straightforward terms, it provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Like the other clauses in the Amendment, it seems to establish a procedural right of the accused, in this case a right that takes effect if a person acts as a witness against him. And, like the other rights established by the Amendment, this one appears to be categorical. This is seen most easily with respect to what now appears to be the paradigm for application of the Clause, the witness who testifies at trial. The Clause does not speak about the reliability of the witness's testimony—it does not say that the accused shall enjoy the right to be confronted with the witnesses against him unless their
testimony is so reliable that the right is of little value. ("Thank you, Ms. Witness, for that helpful testimony. You are excused; there is no need for the accused to cross-examine you.") Nor does the Clause suggest that if a witness testifies before trial, without the accused having the right to confront her, but later becomes unavailable through no fault of the accused, then the prosecution may use the pre-trial testimony and the confrontation right does not apply. Of course, there is ambiguity in the term "witnesses," which we shall explore. But it is important to bear in mind that "witnesses" is the key term used in the Clause. The Clause does not speak about hearsay declarants—it does not say the accused shall enjoy the right to be confronted with the declarants of any hearsay offered against him.

Taking the text of the Confrontation Clause and of the whole Sixth Amendment seriously, then, it appears that the Clause sets forth a simple categorical rule that an accused has a right—subject to waiver or forfeiture—to confront the witnesses against him, whoever they may be. And that, we will argue, is indeed the proper way to view the Clause. But now compare to this view the confrontation doctrine currently applied by the Supreme Court.

First, rather than viewing the Clause as setting forth a procedural right, the current doctrine focuses on the Clause as a rule of evidence. The difference, though not airtight (for the procedure is enforced in part through exclusion of evidence that violates it), is significant. As suggested above, categorical procedural rights are common in our system. It is not strange for us to conclude, when presented with a procedural alternative that is tempting in a particular case, that we just do not do things that way. Rules of evidence, by contrast, tend away from absolutism because they involve an assessment of whether the evidence will help or hurt in determining truth, and that assessment almost inevitably involves attention to the details of the particular case.

Second, as a related matter, there is no serious attempt under current doctrine to come to grips with the term "witnesses." The Roberts Court did not view the term as a significant limitation on the scope of the Clause. The Court implicitly assumed that any hearsay declarant is a witness within the meaning of the Clause, for it spoke of a potential Confrontation issue arising whenever "a hearsay declarant is not

236 Another example, in addition to those discussed above, supra notes 229-34 and accompanying text, is that no matter how truthful it seems a witness will be, she must testify under oath or affirmation. See FED. R. EVID. 603 (applying the requirement to "every witness").
present for cross-examination at trial."\textsuperscript{237} How did hearsay get into this picture, one might ask? Rather than attempt to define the word "witnesses"—not an easy matter, as we shall see—the Court simply borrowed a concept that seemed related. But note how broad this makes the reach of the Confrontation Clause. Any person who makes an assertion that is later offered to prove the truth of the assertion is a hearsay declarant, even if in doing so she was just going about her daily business with no anticipation of litigation. The clerk who makes a routine entry in a business record or the conspirator who conducts a mundane conversation with her colleagues may turn out to be a hearsay declarant, depending on the use that a litigant later attempts to make of the statement at trial.

Third, given that the current doctrine applies the right over such a broad region, inevitably it dilutes the right. A system that excluded all hearsay would be untenable.\textsuperscript{238} Thus, the Court has had to develop a mechanism for limiting the right. Given that the Court has equated the scope of the right to the scope of hearsay law, it is not surprising that the principal mechanism that the Court has chosen has been the prime criterion that Wigmore articulated for the admissibility of hearsay: reliability, or trustworthiness. Thus, the confrontation right, instead of being defined sturdily within defensible boundaries, has become an amorphous right against the admission of untrustworthy evidence. And that, as we will now argue, is an inappropriate standard.

2. The Inappropriateness of the Trustworthiness Standard

The Supreme Court has said that the "underlying purpose" of the Confrontation Clause is "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence."\textsuperscript{239} Because cross-examination is considered, in the famous words of Wigmore, the "'greatest legal engine ever invented for the discovery of truth,'"\textsuperscript{240} an out-of-court statement ordinarily will be pre-

\textsuperscript{237} Ohio v. Roberts, 448 U.S. 56, 66 (1980).
\textsuperscript{238} Cf. id. at 63 ("If one were to read [the Confrontation Clause] literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." (citation omitted)).
\textsuperscript{239} Id. at 65.
\textsuperscript{240} California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940)); see also Roberts, 448 U.S. at 63 n.6 (quoting Green,
sumptively inadmissible against an accused to prove the truth of what it asserts unless he has had an adequate opportunity to examine the declarant of the statement. But because the Court regards the Clause as evincing "a practical concern for the accuracy of the truth-determining process in criminal trials,"241 it has concluded that in some settings other assurances that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement" will satisfy the Clause.242 In particular, a statement may be admitted without violating the Clause if the Court deems the statement to be "so trustworthy that cross-examination of the declarant would be of marginal utility."243 The Court has failed to recognize, however, that if this standard were truly the measure of trustworthiness, very little evidence would satisfy it.

In justifying the admissibility of statements fitting within the "dying declaration" exception to the hearsay rule, for example, in recent years the Court has quoted approvingly the old wisdom that "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 oath,"244 and that "no person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips."245 One must really have faith in the old-time religion to make these perceptions the basis of Confrontation Clause jurisprudence.

Let us perform a simple thought experiment. Victim, having identified Defendant as the person who fatally wounded him, promptly meets his Maker. But as it happens, the Maker is willing to cooperate to allow Victim to testify by remote hookup—there are no technological limitations in this thought experiment—and respond to cross-examination by Defendant’s counsel. How likely is it that Defendant’s counsel would say, “No thanks,” thinking to herself, “I couldn’t do anything with him. He made the statement when he knew the gates of heaven were about to open, so it’s obviously reliable beyond any genuine doubt”? Not at all likely. This is the prime witness in a murder case. Even if she thinks that Victim’s sincerity is beyond doubt, counsel will take the opportunity to explore such matters

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242 Green, 399 U.S. at 161.
244 Mattox v. United States, 156 U.S. 237, 244, quoted in Wright, 497 U.S. at 820.
245 Wright, 497 U.S. at 820 (quoting Regina v. Osman, 15 Cox Crim. Cas. 1, 3 (N. Wales Cir. 1881)).
as reasons to believe that Victim did not have a good chance to observe his assailant, or that in fact his accusation was a conclusion based on questionable inferences that he did not disclose. Beyond that, counsel may want to explore whether Victim has minimized his role in provoking the attack, or whether he had a grudge against Defendant. Thus, it strikes us as nearly laughable to say that Victim’s statement is so trustworthy that we can comfortably conclude that cross-examination of Victim essentially would be worthless.

Similarly, the Court has said that “[t]he basis for the ‘excited utterance’ exception... is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous.” Superfluous?! Consider the statements we have discussed in this Article, made to 911 operators or to responding officers. Sometimes, we have shown, there are substantial reasons to doubt the truthfulness of such statements. Could one really say with a straight face that as a general matter defense counsel could get no benefit from cross-examining the declarants? Certainly when a caller does testify, defense counsel do not as a rule conclude that the statement is so clearly reliable that cross-examination would obviously be worthless, and so decline even to try.

Thus, if trustworthiness means “so clearly truthful that the opportunity to cross-examine the declarant would offer the accused little benefit and can be safely discarded,” then the category of trustworthy statements is far narrower than current doctrine, incorporating the common hearsay exceptions, indicates. Indeed, the category of statements meeting this rigorous criterion may be very small, and there is no apparent way in which the courts can reliably discern which statements do meet it.

Consider, then, an alternative definition of trustworthiness—“so probably truthful that the truth-determining process is better off with the statement admitted, even though the declarant has not been cross-examined, than without any statement on the subject from the declarant.” But such a standard would provide slight resistance to the admission of hearsay. There is no psychological evidence or other persuasive reason to believe that jurors tend to overvalue hearsay evidence so much that the truth-determining process is improved by

260 Id.
shutting their eyes and ears to the evidence rather than exposing them to it and allowing them to assess its deficiencies.\(^{247}\) In addition, such a standard is static, not taking into account the impact that an exclusionary rule has in encouraging a prosecutor to present the declarant as a live witness, if doing so is feasible—that is, if the declarant is available. So another alternative definition of trustworthiness might be "so probably truthful that it is not worthwhile to induce the prosecution to produce the declarant as a live witness." But this third definition fares no better than the other two. If the declarant is unavailable, it is congruent with the second definition, because the prosecutor cannot feasibly produce the declarant—hence virtually any hearsay would be admissible. If the declarant is available, this standard would seem to call for a balance of the difficulties in producing her against the additional difficulties for truth-determination created if she is not produced. Application of such a grand, overall balance would be erratic and unpredictable, which may account in part for the Supreme Court's reluctance to attempt it.\(^{248}\)

Indeed, whatever standard of trustworthiness might be used, its application is bound to be difficult. A good assessment of the probability that a given statement is accurate depends on an assessment of all the facts in the case. To the extent that the standard of trustworthiness attempts to take all of those facts into account,\(^{249}\) the confrontation right becomes essentially a case-by-case assessment of how likely it is that the declarant was speaking accurately—which is often effectively an assessment by the court of how likely it appears that the defendant is guilty. To the extent that the trustworthiness standard attempts to make determinations more uniform by cropping certain types of information out of the inquiry\(^{250}\) or acting on generaliza-
tions, it can aspire only to rough accuracy.

The fundamental problem is that, instead of grappling with the question of what the confrontation right means, the Court assumes that the right presumptively applies across a broad domain and then attempts to use a trustworthiness standard to determine the circumstances in which the right may be safely disregarded. Thus, it seems unlikely that the Court would say that the accused's right to be confronted with "the witnesses against him" means that he has a right to be confronted with "the declarant of any hearsay statement that is not trustworthy." Trustworthiness is a tool used by the Court to pick up the slack left by its failure to articulate the meaning of the right.

Justice Scalia was far closer to the mark in saying that "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence." But even this statement, with a proper emphasis on procedure, overemphasizes the reliability of evidence. That a witness has been cross-examined does not make her statement reliable: Witnesses often speak falsely, and much of what a trial is about is the attempt to determine when they are doing so. Moreover, that a statement is not reliable does not mean that it cannot contribute to accurate fact-finding. An accurate factual finding may, and often does, depend on an accumulation of evidence, no single piece of which points infallibly to the finding. To apply a common phrase, "a brick is not a wall,

3. Making Easy Cases Hard

Because the current approach does not proceed from a clear sense of what the confrontation right means, it makes easy cases hard. Consider, for example, Lilly v. Virginia. In that case, three men went
on a crime spree during which one of them shot another young man
to death.\textsuperscript{255} One of the three, Mark Lilly, made statements to the po-
lice admitting to various crimes and identifying his brother Benjamin
as the triggerman.\textsuperscript{256} Mark asserted the privilege against self-
incrimination at Benjamin’s trial and so was deemed unavailable to
testify.\textsuperscript{257} Accordingly, the prosecution offered his prior statements
into evidence.\textsuperscript{258} Over the defendant’s objection, the statements were
admitted. Benjamin was convicted and the Virginia Supreme Court
affirmed.\textsuperscript{259}

Recall that in \textit{Tong’s Case} in 1662, the judges of King’s Bench es-
tablished that a confession could be offered only against the person
who made it, not against another person who did not have a chance to
cross-examine him.\textsuperscript{260} Under traditional principles, therefore, it ap-
ppears that this ought to have been an easy case.\textsuperscript{261} And Justice Scalia
saw the case that way. In a one-paragraph opinion, he said that use of
Mark Lilly’s statement without making him available for cross-
examination constituted “a paradigmatic Confrontation Clause viola-
tion.”\textsuperscript{262}

Most of the Court, however, operated under the \textit{Roberts} rubric,
and that made \textit{Lilly} a rather difficult case, yielding a five-to-four deci-
sion and six separate opinions. First, the Justices had to compare the
statements at issue to the hearsay exception for statements against in-
terest. This inquiry posed two questions: Within what bounds, if any,
should the given exception be considered “firmly rooted”? Do the
particular statements at issue fit within those bounds? Justice Stevens,
for the plurality, focused on the first question and dissected the ex-
ception, concluding that “accomplices’ confessions that inculpate a
criminal defendant are not within a firmly rooted exception to the

\textsuperscript{255} \textit{Lilly}, 527 U.S. at 120.
\textsuperscript{256} \textit{Id.} at 120-21.
\textsuperscript{257} \textit{Id.} at 121.
\textsuperscript{258} \textit{Id.}
\textsuperscript{259} \textit{Id.} at 122.
\textsuperscript{260} \textit{Supra} note 128 and accompanying text.
\textsuperscript{261} We put aside the possibility—because it is not one that the courts addressed—
that Mark asserted the privilege because of persuasion or inducement by Benjamin or
someone acting in his interests.

\textsuperscript{262} \textit{Lilly}, 527 U.S. at 143 (Scalia, J., concurring in part and concurring in the
judgment).
hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence. Chief Justice Rehnquist, for himself and two other justices, declined to make such a categorical pronouncement but concluded that Mark's statements against his penal interest were so far removed in time and place from the statements inculpating Benjamin in the shooting that the latter could not be considered within the exception for Confrontation Clause purposes. That was not the end of the matter, however. The statements still might satisfy the reliability requirement of Roberts if they showed sufficient "particularized guarantees of trustworthiness." After what he recognized to be a "fact-intensive" inquiry—one that the Chief Justice thought was premature—Justice Stevens concluded that they did not. The inquiry was confined, however, because in accordance with the Court's decision in Idaho v. Wright, the Court was willing to examine only indicia of reliability that established the "inherent trustworthiness" of the statements; the Court was precluded from relying on corroborative evidence, a basis that frequently offers strong guarantees of trustworthiness.

Should Lilly have been so difficult? Justice Scalia's brief opinion suggests not; indeed, its brevity suggests that both Justice Stevens and Chief Justice Rehnquist overlooked a basic principle that should have made the case easy. Justice Scalia did not attempt to articulate such a principle, however. Ironically, Justice Stevens' opinion, while adhering to the reliability-based orientation of the Court's confrontation analysis and refusing to speak in categorical terms, did point in the general direction of such a principle:

It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old ex parte affidavit practice—that is, when the government is involved in the statements' production, and when the

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263 Id. at 134 (plurality opinion).
264 Id. at 145 (Rehnquist, C.J., concurring in the judgment).
265 Id. at 135 (plurality opinion).
266 Id. (plurality opinion).
267 Id. at 148 (Rehnquist, C.J., concurring in the judgment).
268 Id. at 137 (plurality opinion).
270 Lilly, 527 U.S. at 137-38 (plurality opinion) (citing Wright, 497 U.S. at 822). But cf. Wright, 497 U.S. at 828 (Kennedy, J., dissenting) ("It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence.").
Justice Breyer, while joining the plurality opinion, wrote separately to suggest that the law of the Confrontation Clause might be improved by breaking its link to hearsay law and by recognizing that the Clause was meant principally to protect "[t]he right of an accused to meet his accusers face-to-face" rather than the trustworthiness of evidence.\(^7\)\(^\text{272}\) We agree, and in the next Section we will discuss how the Confrontation Clause might be reconceptualized, and how doing so would help solve the problem of dial-in testimony.

B. A Reconceptualized Confrontation Right: Protecting the Conditions for Testimony

It is tempting to think that a witness is one who testifies at trial, or at formal pre-trial proceedings, and that the Confrontation Clause is a protection primarily drawn to govern the procedure for taking testimony from such persons, with some peripheral (and necessarily uncertain) application to out-of-court declarants.\(^27\)\(^\text{3}\) But we think the history that we have summarized in Part III shows that the core idea behind the Clause is to ensure that those who provide testimony against the accused do so openly, under oath, in the presence of the accused, subject to examination by the accused, and, if reasonably possible, at trial.\(^27\)\(^\text{4}\) And the language of the Clause points in the same

\(^{271}\) Lilly, 527 U.S. at 137 (plurality opinion).

\(^{272}\) Id. at 140 (Breyer, J., concurring); see id. at 142 (Breyer, J., concurring) ("[W]hy should we, like Walter Raleigh’s prosecutor, deny a plea to ‘let my Accuser come face to face,’ with words (now related to the penal interest exception) such as, ‘The law presumes, a man will not accuse himself to accuse another?’" (citation omitted)).

\(^{273}\) See Akhil Reed Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 GEO. L.J. 1045, 1046, 1048-49 (1998) (stating that "the word ‘witnesses’ in the Confrontation Clause means in-court ‘witnesses’ who testify rather than out-of-court . . . eyewitnesses who do not,” but concluding that the Clause should cover "government-prepared affidavits and depositions" and "[p]olice station confessions and statements").

\(^{274}\) We elide here questions of the type posed by Maryland v. Craig, 497 U.S. 836 (1990), whether the presence requirement can be satisfied in some circumstances, even though the accused and the witness are in separate rooms, by a video connection. In Craig, a bare majority of the Supreme Court held in the affirmative with respect to those child witnesses who, case-specific findings indicate, would be traumatized by having to testify with the accused in the same room. Id. at 860; see also infra text accompanying note 286 (summarizing the Craig Court’s holding).

\(^{275}\) If the witness is unavailable to testify at trial, testimony previously taken under oath and subject to cross-examination may suffice. See, e.g., Ohio v. Roberts, 448 U.S.
direction. An accused has a right to "be confronted with" the witnesses against him, meaning that they must be drawn together—presumably at trial, presumably "face to face"—for the giving of testimony. The Confrontation Clause certainly is concerned with what happens when a prosecution witness testifies at trial. But its first concern is to make sure that the witness does testify, if at all, at trial or in another forum where the confrontation right can be preserved.

Put another way, a person is not a witness for purposes of the Confrontation Clause because she is testifying at trial or some other formal proceeding. Rather, she is a witness because she has made a testimonial statement and therefore she must give testimony under prescribed procedures, among which are that she must be subject to examination by the accused; if she does not, the statement may not be used against the accused.

Of course, this approach requires us to have a sense of what constitutes a testimonial statement. Crafting a precise definition is not a simple matter, but we believe the history and policy of the Clause yield tolerable clarity: The Clause is meant to prevent a prosecution from being based on testimony given behind closed doors, not under oath or subject to examination by the accused. Imagine, then, that there were no confrontation right. If a person made a statement with the anticipation that it would be used in prosecuting the accused, and the statement were so used, then the person should be deemed to be testifying against the accused. That the statement was made informally, perhaps privately and without oath or adverse examination, would not undercut this conclusion. Rather, this hypothetical system without a confrontation right would tolerate such informal testimony. Now, clearly such methods of testimony are just what the Confrontation Clause is meant to prevent. So we might say that if a person makes a statement in circumstances under which—but for the confrontation right—she would understand that the statement would likely be used as evidence against the accused, the person is acting as a witness against the accused, making a testimonial statement. But application of that standard may be overly complex, both because of the conditional ("but for" the confrontation right) and because it focuses on the subjective state of mind of the declarant. A standard somewhat easier to apply, but yielding similar results, would be: If a statement is

56, 73 (1980) (holding that admission at trial of testimony given at preliminary hearing by a witness deemed unavailable at trial did not violate Confrontation Clause); cf. FED. R. EVID. 804(b)(1) (providing hearsay exception for former testimony given by witnesses now unavailable).
made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime, then the statement should be deemed testimonial. Various rules of thumb can assist in application of this standard.\(^{276}\)

If a statement is testimonial, then the declarant is a witness for purposes of the Confrontation Clause, and the statement must not be offered against the accused unless the conditions for testimony have been satisfied—among which are that the witness must have made or confirmed the statement under oath and that the accused must have had an adequate opportunity to cross-examine her. This is a categorical rule, subject to but one qualification: If the inability of the witness to testify under these procedures is attributable to wrongdoing by the accused, then the accused may be deemed to have forfeited the confrontation right.\(^{277}\)

Let us see how this standard would apply in two recurrent types of cases. First, consider accomplice confessions, as in Lilly. Mark Lilly's statements to the police were certainly testimonial. A murder had been committed, and Mark knew that the police were investigating it.\(^{278}\) Furthermore, his statement identified his brother as the triggerman.\(^{279}\) Clearly, a reasonable person in Mark's position would know that he was providing information to the police that would aid investigation and prosecution of the crime. Accordingly, the statement was testimonial, and it should not have been admitted against Benjamin Lilly unless Mark confirmed it under oath and subject to cross-examination. The case was every bit as easy as Justice Scalia's brief

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\(^{276}\) As one of the authors has previously suggested: A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.


\(^{277}\) For a discussion of the bounds of this forfeiture principle, taking the view that it applies even when the crime being charged is the act that allegedly rendered the witness unable to testify, see Richard D. Friedman, *Confrontation and the Definition of Chutza*, 31 Isr. L. Rev. 506 (1997).

\(^{278}\) 527 U.S. at 121.

\(^{279}\) Id.
concurrence made it appear. This was indeed "a paradigmatic Confrontation Clause violation"—without reference to whether the statement was reliable or not.

Now consider statements made in 911 calls and to responding police officers. A reasonable person knows she is speaking to officialdom—either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities. The caller's statements may therefore serve either or both of two primary objectives—to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation, and to provide information to aid investigation and possible prosecution related to that situation. In occasional cases, the first objective may dominate—the statement is little more than a cry for help—and such statements may be considered nontestimonial, at least to the extent that they are not offered to prove the truth of what they assert. But as our discussion in Part I has shown, these statements are often more detailed, providing significant information that the police do not need for immediate intervention but that may be useful to the criminal justice system. A reasonable person in the position of the declarant would realize that such information would likely be used in a criminal investigation or prosecution. Accordingly, such a statement should be considered testimonial, and the confrontation right should apply to it.

Interestingly, the standard that this approach suggests is quite similar to that of the excited utterance exception as it originally emerged, and as we have described it above in Part III, but without the metaphysical distinctions that the nineteenth century courts sometimes invoked. The more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial.

Thus, if any significant time has passed since the events it describes, the statement is probably testimonial. When, as is often the case, the 911 call consists largely of a series of questions by the opera-

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280 Id. at 143 (Scalia, J., concurring in part and concurring in the judgment).
281 Interestingly, the new Oregon hearsay exception for statements by victims of domestic violence seems drafted almost purposefully to facilitate admission of statements that are testimonial in nature. The exception applies to a victim's description of an incident of domestic violence, made within twenty-four hours after the incident, if it has "sufficient indicia of reliability" and it was "recorded, either electronically or in writing, or was made to a peace officer . . . , corrections officer, youth corrections officer, parole and probation officer, emergency medical technician or firefighter." Or. Rev. Stat. § 40.460(26) (1999).
tor, and responses by the caller, concerning not only the current incident but the history of the relationship, the caller's statements should be considered testimonial. When O.J. Simpson called 911 to report an assault by his girlfriend, his call was testimonial, not a plea for urgent protection.

Often, of course, a 911 call is such a plea. Even in this type of situation, a court should closely scrutinize the call. To the extent the call itself is part of the incident being tried, the fact of the call presumably should be admitted so the prosecution can present a coherent story about the incident. But even in that situation, the need to present a coherent story does not necessarily justify admitting the contents of the call. And even if the circumstances do warrant allowing the prosecution to prove the contents of the call, those contents generally should not be admitted to prove the truth of what they assert.

If the contents of the call are probative on some ground other than to prove the truth of the caller's report of what has happened, then admissibility should be limited to such other ground. To the extent that the contents of the call are significant only as the caller's report of what has happened, such a report usually should be considered testimonial.

If the out-of-court statement is testimonial, then the declarant should be deemed to be a witness for Confrontation Clause purposes, and so the prosecution may not use the statement against the accused to prove the truth of its contents unless the accused has had an adequate opportunity to confront the witness. The impact of this principle is limited in some circumstances by the qualification that if the accused's wrongdoing has as a practical matter prevented the witness from testifying subject to confrontation, then the accused should be deemed to have forfeited the confrontation right. Thus, for example, if the court determines as a threshold matter that the accused probably murdered the witness or intimidated her from testifying at trial, then he presumably should not be allowed to invoke his confrontation right to exclude proof of her out-of-court statement. Such a finding

282 See supra note 94 (describing the call in greater detail).
283 For example, it may be that the defendant's voice is heard on the tape of the 911 call, or that the prosecution's account is that the defendant's resentment at the making of the 911 call led him to renewed and intensified violence.
284 So, for example, if the prosecution wants to prove that the 911 tape recorded the defendant making damaging statements in response to accusations made by the complainant, those accusations would presumably be admissible—but only as the predicate for the accused's statements.
285 The criteria for applying the forfeiture doctrine are further explored in Fried-
of forfeiture may be appropriate in a substantial number of domestic violence cases.

C. Possible Objections

Our approach calls for a narrow but rigorous confrontation right, qualified only by the possibility that the accused may have forfeited the right by wrongdoing that prevented the confrontation. Against this approach, we anticipate three types of objections. We will respond briefly in turn to all three.

First, there may be an objection in principle. We have shown the long-standing support in the Anglo-American legal system for according the accused the right to insist that testimony against him be given under appropriate conditions. But attachment to some of those conditions may be loosening. Few commentators would be willing to ascribe the significance to the oath that was commonplace several hundred years ago. And to some, the idea that a complaining witness must give her testimony face to face with the accused may seem unacceptable, a reflection of male hegemony that fails to take into account the burden that such confrontation imposes on victims. Thus, in *Maryland v. Craig* the Supreme Court allowed child witnesses to testify in some circumstances outside the immediate presence of the accused. One might expect that soon there will be significant pressure to expand this possibility to adult victims of sexual violence.

We need not enter into a debate over these points. Even if it were appropriate to dispose with the oath and the requirement that testimony be given face to face with the accused, that would not suggest that our system should dispose of all the traditional requirements for testimony—in particular, cross-examination. No reasonable observer can seriously contend that an acceptable means for a witness to give testimony is by an informal statement, lacking the oath, face-to-face confrontation with the accused, and cross-examination on behalf of the accused. Yet the developing system of dial-in testimony allows precisely that.

Second, there may be objection to the consequences of our approach. Our approach would make it more difficult for prosecutors to secure convictions, especially in domestic violence cases. But that difficulty is not in itself an argument against our approach. It would also be easier to secure convictions if we did away with the right to
counsel, or the guilt-beyond-a-reasonable-doubt standard, or all re-
straints on prosecution evidence. Our approach does not lead to in-
tolerable results. Indeed, our approach is no more unfavorable for
the prosecution than the law that until recently prevailed; under our
construction, the Confrontation Clause requires no more than that a
witness testify under the ordinary, traditional conditions necessary for
testimony. If the witness is available to testify at trial, the prosecution
should present her testimony rather than relying on a testimonial
statement she made previously. The risk that she will become unavail-
able through nobody's fault should be borne by the prosecution—
which bears the burden of proof and wishes to rely on her
testimony—rather than by the defendant, who has the right to
confront her. Only if she is unavailable through the fault of the
accused is there a compelling case for the prosecution to present the
prior statement, and in that case the forfeiture doctrine should
support admissibility.

Finally, an objection based on administrability is possible. Our ap-
proach depends on factual determinations to be made by the trial
court: Was the statement made under circumstances leading to the
conclusion that it should be deemed testimonial? If so, did the ac-
cused forfeit the right to confront the witness by wrongdoing that pre-
vented her from testifying? Sometimes, these determinations will be
difficult to make. But that is true of any system. The current system,
for example, depends on determinations of whether a hearsay excep-
tion is applicable, and that often depends on findings on such matters
as the declarant's state of excitement or anticipation of imminent
death—findings that not only can be remarkably difficult to make but
that bear at best an attenuated relationship to any question that
should determine admissibility. In addition, the current system, like ours, sometimes makes questions of forfei-
ture significant. See FED. R. EVID. 804(b)(6) (excluding from the hearsay rule, if the
declarant is unavailable as a witness, any "statement offered against a party that has en-
gaged or acquiesced in wrongdoing that was intended to, and did, procure the un-
availability of the declarant as a witness").
D. Related Theories

The theory that we have presented here is close in some respects to theories that have been presented by Justice Thomas and by Professors Akhil Amar and Margaret Berger, but it also differs in critical respects. In Justice Thomas's view, "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Professor Amar takes a very similar view, though he puts somewhat less emphasis on formalization and more on the governmental role in preparation of the statement. According to him, "the Clause encompasses only those 'witnesses' who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like." Similarly, Professor Berger makes government participation in the preparation of the statement the hallmark of her analysis. We will contend here that, if a statement is testimonial in the sense we have described, it should be covered by the Confrontation Clause, whether or not it is formalized and whether or not the government participated in making it.

The trouble with making formalization a prerequisite to coverage by the Confrontation Clause is that it gets matters almost precisely

\[\text{\textsuperscript{288}}\text{White v. Illinois, 502 U.S. 346, 365 (Thomas, J., concurring in part and concurring in the judgment); see also Lilly v. Virginia, 527 U.S. 116, 143 (1999) (Thomas, J., concurring in part and concurring in the judgment) (reiterating his view that the Confrontation Clause should only be implicated by extrajudicial statements if such statements are contained in extrajudicial materials, but clarifying that he does not believe the Clause imposes "a 'blanket ban on the government's use of accomplice statements that incriminate a defendant" (citation omitted)).}\]

\[\text{\textsuperscript{289}}\text{Amar, supra note 273, at 1045.}\]

\[\text{\textsuperscript{290}}\text{See Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 MINN. L. REV. 557, 561 (1992) ("Hearsay statements procured by agents of the prosecution or police should therefore stand on a different footing than hearsay created without government intrusion."). Like Amar and ourselves, Berger would make the proscription of the Clause a categorical, brightline rule. See Brief of Amici Curiae American Civil Liberties Union et al., Lilly v. Virginia, 527 U.S. 116 (1999) (No. 98-5881) (arguing that “[w]ithin its proper realm, . . . the Confrontation Clause states a simple and categorical rule, which is central to the Anglo-American conception of justice: the accused has a right to confront all adverse witnesses”), available at LEXIS 1998 U.S. Briefs 5881, at *2. By contrast, it appears from Justice Thomas' opinion in White that he would hold that, even if a statement fits within the scope of the Confrontation Clause, it is exempted from the proscription of the Clause if it also fits a "firmly-rooted" hearsay exception. See White, 502 U.S. at 358-66 (Thomas, J. concurring in part and concurring in judgment) (concurring in the Court's opinion—which applied the doctrine exempting from the Clause statements fitting within a "firmly rooted" exception—except for its discussion rejecting a proposed narrow reading of the term "witness against").}\]
backwards. Formalities such as the oath are not necessary to render a statement testimonial. Rather, they are necessary, but not sufficient, to render testimony acceptable. Imagine a judicial system that advertised to the public as follows:

If you want to make a criminal accusation against a person, make the statement however you wish and present it to us in a way that we can pass it on to the fact-finder. If you want, you can make it in person to the fact-finder, but you don’t have to. You can make it on audio or video tape, you can make it in writing (no need for a signature), you can make it by telephone (we’ve set up a special number, 911, for just that purpose), or you can make it to any person you want, with the request that he or she pass it on to us. And you don’t have to take an oath. In fact, if you want to do the whole thing anonymously, that’s OK, too.291 We can use the statement at trial however you make it.

Given such a receptive attitude, a person who made a statement for the police describing a crime, perhaps by calling 911, would be testifying in any meaningful sense of the term: The person is making a statement with the understanding that, in accordance with the usual procedures of the criminal justice system, it will probably be used as proof against the accused in a criminal trial. The lack of formality would not make the statement less testimonial. Instead, the lack of formal requirements would make this system for the creation of testimony appalling.

Indeed, if formality were necessary to bring a statement within the Confrontation Clause, perverse incentives would arise. The government, or others interested in the creation of prosecution evidence, would have an incentive to encourage the making of statements—such as 911 calls—lacking formalities such as the oath, because the avoidance of such formalities would ensure that the statement would not be covered by the Confrontation Clause.

A rule that the Confrontation Clause does not cover a statement unless the statement is formalized breaks down most obviously with respect to confessions. It is obvious that accomplice confessions—such as those in the Raleigh, Tong, and Lilly cases, among many others—must be covered by the Confrontation Clause; it is practically a commonplace that the Raleigh case was one of the principal targets at which the Clause was aimed. Only by simple fiat did Justice Thomas bring confessions within the ambit of the Clause as he would define it;

291 But see Smith v. Illinois, 390 U.S. 129, 131-32 (1968) (holding that the right to confront a prosecution witness includes the right to ask the witness’s name and address).
that is, he declared that confessions were among the "formalized testimonial materials" covered by the Clause. But why is a confession a formal statement? As in Lilly, it can be made quite informally. This may be why Amar admits to some difficulty in fitting confessions into his theory. He regards out-of-court confessions as a hard case, a conclusion that does not square well with the clear evidence that, as Justice Scalia has said, accomplice confessions are a "paradigmatic" concern underlying the Confrontation Clause.

In the end, Amar brings "[p]olice station confessions and statements" within his theory of the Confrontation Clause, presumably within the rather vague "and the like" safety valve of his standard. His inclusion of the mysterious "and the like" among the statements covered by the theory seems to reflect recognition that if an accomplice confession fits within the Clause there is presumably no reason why an equally accusatory statement, made under similar circumstances but not inculpating the declarant along with the accused, should not also be covered by the Clause.

Amar's principal reason for bringing declarations made in the police station within the Clause is that they "are prepared by the government for in-court use and are then used in court." There is no doubt that, in modern criminal procedure, the government is usually involved in the taking or preparation of a testimonial statement by a witness for the prosecution. After all, the paradigm for acceptable testimony is live testimony of the witness at trial in response to questions from the prosecution and then cross-examination by the accused. And the prospect of the government taking or preparing testimony without affording the accused confrontation rights may be particularly disturbing. But this does not mean that government involvement is necessary to render a statement testimonial.

Indeed, such a theory is profoundly ahistorical. Even as late as the eighteenth century, most prosecutions were private lawsuits, and yet

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292 Amar, supra note 273, at 1048-49. Amar acknowledges that "[p]olice station confessions and statements... are often made without oath," but argues that "they typically have other formal indicia of testimony—response to precise questions, purportedly precise rendition or transcription or taping, signature, and the like." Id. at 1049.


294 Amar, supra note 273, at 1049.

295 As the distinguished historian J.M. Beattie has written:
Until the state assumed the management of crime in the nineteenth century and professional police forces took over the pursuit and apprehension of sus-
the norm of the "altercation" between accuser and accused, described by Thomas Smith in the sixteenth century, was established long before. The right of the accused to confront his accusers does not lose force in a system in which an accuser rather than the State is the adverse party. Recall the insistence of the Roman governor Festus that the accused have an opportunity to confront his accusers face to face.

Even in a system of governmental prosecutions, government involvement in the preparation of a statement cannot reasonably be regarded as a prerequisite for the statement to fall within the coverage of the Confrontation Clause. Suppose that, entirely unbidden, Accuser walks into the police station and delivers a handwritten statement—printed on a transparency, no less, so that it is ready for presentation to a jury—accusing Defendant of a crime, and then saunters off. We do not believe that one can seriously contend that the Confrontation Clause has nothing to say about the use of this statement in

pects, the gathering of evidence, and the preparation of cases... these matters were left largely to the private initiative of the victim. If he wanted to bring an offender to justice in the eighteenth century, the victim himself (or his agent) had to take on the burden and the expense of the prosecution, not only bringing the offense to the attention of the authorities but also preparing himself unaided for the trial, assembling witnesses, and taking the lead in laying out the evidence in court. Only in rare cases did the law officers of the crown or local constables actively prosecute offenses against property or the person. It was becoming more common in the eighteenth century for prosecutors to hire counsel to take the lead in court, but this did not alter the fundamental point that virtually all prosecutions in cases involving personal violence or the loss of property were still initiated and carried forward by the enterprise and at the expense of the victim.

J.M. Beattie, Crime and the Courts in England, 1660-1800, at 35-36 (1986); see also, e.g., Langbein, supra note 119, at 39 ("In the sixteenth century ordinary crime was locally, and in the main privately, prosecuted... Typically [the magistrate operating under bail and commitment statutes passed in Queen Mary's reign] could limit himself to binding over aggrieved citizens to prosecute in their own causes."); Jonakait, supra note 132, at 97-99 (describing the medieval English worldview of crime as a matter of private vengeance by those wronged).

296 See supra note 112 and accompanying text (noting the open and confrontational manner in which testimony was taken in the English system).

297 See supra note 110 and accompanying text (recounting a statement by Festus in the Book of Acts). But see Amar, supra note 273, at 1048 ("The Sixth Amendment is triggered when Carl [the defendant in a hypothetical posed by Amar] is 'accused' by the state, not by Abner [the person who has made an accusatory statement]."). Of course, Amar is right that the Sixth Amendment is not triggered until an accusation is tried; the Confrontation Clause does not give a person a right to confront one who has accused him of a crime if no charges are brought. But if a charge is tried, the accused has a right to confront the accusing witnesses, whatever the identity of the prosecuting party may be.
a prosecution of Defendant because government agents were not involved in its production (or, for that matter, because it is not "formalized").

Perhaps a fallback argument would be that for the statement to be considered witnessing, it is necessary not that the government have been involved in the preparation of the statement, but that the declarant have been speaking directly to or through government agents. That does not help us very much, however. Suppose Accuser, rather than writing out the accusation by hand, dictates it to Scribe, with clear and explicit instructions to take the statement to the police for possible use in a prosecution of Defendant. If the criminal justice system in fact allows a statement produced in this manner to be used against Defendant, then wasn’t Accuser testifying long distance, through Scribe? And now suppose that, although Accuser did not give such instructions to Scribe, Scribe conducts a regular course of operations in which she transmits such accusatory statements to the police, and people in the position of Accuser understand that this is what she does. If the system allows the use of evidence produced in this way, then it still seems clear that Accuser is testifying through Scribe.

And that, of course, is in substance often what happens with 911 calls. In some areas, the 911 system is operated by a governmental agency, and in others it is operated by the regional telephone company or some other private organization. But it would be absurd for these mechanics of operation—which the caller is unlikely to know—to determine the Confrontation Clause standing of the statement. The significant fact is that a 911 caller knows that, even if she is not connected to the police, her message will be transmitted to the police.

Perhaps one contending that the critical fact is governmental in-

298 One article explains:
Far from a nationwide standard, no single agency either controls or coordinates America’s 911 system. In some areas, regional telephone companies own the 911 answering centers and operate them under contract to local governments. Other 911 systems, while operated by governments, are actually “owned” by different entities in different jurisdictions. Sometimes the fire department operates 911, while in the next town down the road, it’s the police, or sheriff’s department, or a private provider.


299 Similarly, we think it would be odd if a 911 call were deemed outside the scope of the Confrontation Clause because the operator was not an agent of the state, and yet a statement made by the same declarant to the police officer responding to the 911 call were deemed covered by the Clause.
volvement would respond that, even if a private organization owns and operates the 911 system, it does so under contract with governmental agencies, and so the 911 operators should be considered governmental agents for purposes of the Confrontation Clause. This argument relies heavily on but stretches the concept of agency. We doubt that a private 911 operator would indeed be considered a government agent rather than an independent contractor, but the whole question seems irrelevant to the applicability of the Confrontation Clause.

Moreover, a government-agent theory would not be able to handle all similar cases. Suppose a rape counselor, with no ties to the government at all, advises her clients, "Make your accusatory statements to me, and I will pass them on to the authorities, who will then be able to use them in prosecuting your assailant. There will be no need for you to come to court or to take an oath."\textsuperscript{300} Amar's only response to this argument is that "the Constitution is mainly addressed to state action."\textsuperscript{301} That is true, but irrelevant. Even assuming the Confrontation Clause requires state action, the criterion is easily satisfied. The Clause is not violated when the counselor takes the statement, or even when she passes it on to the authorities, but only when a court operated by the state admits it into evidence in support of a prosecution of the accused.

It certainly tends to be easier to recognize the testimonial character of a statement when the statement is made directly to, or with the participation of, government officials. In such a case, it is often clear that a reasonable person in the position of the declarant would realize that she is creating testimony for use in a prosecution; there are no doubtful links in the chain of transmission. But such statements do not exhaust the universe of statements that pose the problem to which the Confrontation Clause was addressed. That problem arises in full force if a person testifies through intermediaries, never taking an oath or confirming her statement face to face with the accused. How intermediaries may be characterized—whether they be deemed agents of the state, of the witness, of both, or of neither—does not matter. The critical question is whether a reasonable person in the position of the declarant would recognize a likelihood that the statement would be passed on to the authorities and then used to assist a criminal prosecution. If a realistic assessment of the situation yields an affirma-

\textsuperscript{300} For a somewhat more elaborate version of this hypothetical, see Friedman, \textit{supra} note 276, at 1041.

\textsuperscript{301} Amar, \textit{supra} note 279, at 1048.
tive answer, then the statement should be deemed testimonial, and the declarant should be treated as a witness for purposes of the Confrontation Clause.

Ultimately, although our approach and approaches like that of Amar yield similar results in most cases, they proceed from very different points. Amar tries to develop an understanding of the word “witnesses” by beginning at the core meaning of the term in common modern parlance and then extending it somewhat outwards. We believe the best way of approaching the Confrontation Clause is to construe it to ensure the result at which it was aimed, that prosecution testimony be given in formal proceedings, subject to the oath and confrontation by the accused. If a statement is testimonial in function but fails to meet those criteria, those failures do not mean that the statement falls outside the reach of the Confrontation Clause because the statement does not fit the core meaning of testimony. On the contrary, those failures mean that the statement is presumptively unacceptable under the Clause because otherwise our system would countenance testimony given in an intolerable way.

CONCLUSION

We believe that the problem of dial-in testimony represents a crucial turning point for our criminal justice system. The Supreme Court may decide that statements made in 911 calls and to responding officers may be used in place of in-court testimony. But if it does, it will forswear one of the foundational pillars of the common law system, the principle that accusatory witnesses testify under oath and subject to cross-examination, face to face with the accused. On the other hand, the Court may refuse to accept such statements as a proper
method for a witness to present her account to an adjudicative fact-finder. We believe the Court should take the latter course. The reasons for doing so will become clearer if the Court abandons the current jurisprudence of the Confrontation Clause, which makes the Clause depend on the vagaries of hearsay law. Instead, the Court should treat the Clause as capable of standing on its own, stating a fundamental principle of how acceptable testimony shall be given.