Lilly v. Virginia: The Confrontation Clause and Hearsay - "Oh What a Tangled Web We Weave …"

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LILLY V. VIRGINIA:
THE CONFRONTATION CLAUSE AND HEARSAY—
“OH WHAT A TANGLED WEB WE WEAVE . . . .”*

When Caesar reigned King at Rome,
Saint Paul was sent to hear his Doom,
But Roman Law in a criminal Case,
Must have the Accuser Face to Face,
Or Caesar gives a flat Denial—
But here’s a Law made now of late;
Which destines Men to awful Fate
And Hangs and Damns without a Trial,
Which made me view all Nature through
To Find a Law where Men were ti’d,
By Legal Act which doth exact
Men’s Lives before they’re Try’d

Then down I took the sacred Book
And turn’d the Pages o’er
But could not find one of this kind
By God or Man before

INTRODUCTION

The Confrontation Clause has a very long and colorful history.2 The Sixth Amendment of the United States Constitution contains the

* “Oh what a tangled web we weave, When first we practise to deceive!” SIR WALTER SCOTT, MARMION, Stanza 17 (1808).
1. JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776) 446-47 & n.300 (1944) (discussing the The Proceeding of the Convention of the Representatives of the New Hampshire Settlers attacking a version of the English riot act passed by the New York legislature in 1774). The pamphlet ended with the poem, and stated:
May it be considered that the legislative authority of the Province of New York had no Constitutional right or power to make such Laws and consequently that they are Null and Void from the Nature and Energy of the English Constitution therefore as they merit no place among the laws of the Realm of Great Britain . . . .
Id. at 446.
2. For a historical background on how the Confrontation Clause developed and materialized in the Sixth Amendment of the Constitution, see Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 RUTGERS L.J. 77 (1995). Professor Jonakait’s article focused on the right of confrontation as a grant of adversary power to the accused, and on an alternative history of the Confrontation Clause and its placement in the Sixth Amendment of the United States Constitution. Id. at 81. Professor Jonakait argued that the origins of the Confrontation Clause were murky, but consistent with the historical record. It is likely that the English abuse of the colonists was not the motivating reason behind the Clause. Id. at 80-82, 108-19.
indoctrination of the federal Confrontation Clause in America, which provides in part that a defendant in a criminal action has the right "to be confronted with the witnesses against him." As seen through case history, the Supreme Court has found a defendant's right to confront his accusers applicable to the states through the Fourteenth Amendment. The Court in *Pointer v. Texas* found that throughout the years, both state and federal courts had emphasized cross-examination as a necessity if the accused was to enjoy the right to a fair trial.

The Supreme Court's development of the Confrontation Clause began in earnest in 1895, with its decision in *Mattox v. United States*. Since that time, exceptions to the Confrontation Clause have virtu-

Furthermore, Professor Jonakait stated that the Supreme Court's premise, in *Dutton v. Evans*, that the Clause has an ultimate goal of truth determination, was faulty: "Accurate trials [were] not the driving force behind the Confrontation Clause and related provisions. The driving force was to have trials in which the government's power was more constrained and the accused had more opportunity to act in his own self-interest." *Id.* at 82, 168. See also *Coy v. Iowa*, 487 U.S. 1012. 1015-16 (1988), *Dutton v. Evans*, 400 U.S. 74 (1970) (acknowledging the derivation of the Confrontation Clause).

3. The full text of the Sixth Amendment provides:

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

U.S. CONST. amend. VI.

4. *See Pointer v. Texas*, 380 U.S. 400, 403 (1965) (finding that the right of the accused to confront witnesses against him is a fundamental right, similar to the right to counsel and guarantee against self-incrimination, and likewise is made obligatory on the states by the Fourteenth Amendment).

5. *Id.*

6. *Id*. at 404. The Court listed its past decisions that guarded the Confrontation Clause from deterioration. *Id*. at 404-05. See also *Kirby v. United States*, 174 U.S. 47, 55-56 (1899) (referring to the right of confrontation as so essential to the guarantee of life and liberty that the Constitution of the United States and the constitutions of most states have protected it from legislative and judicial intervention); *Alford v. United States*, 282 U.S. 687, 692 (1931) (stating that cross-examination is "one of the safeguards essential to a fair trial"); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (finding that the Court has been "zealous to protect these rights [confrontation and cross-examination] from erosion").

7. 156 U.S. 237 (1895). The Court found that a transcribed copy of the reporter's stenographic notes of two key prosecution witnesses' testimony, who were both examined and cross-examined in a former trial but subsequently died, could be admitted into evidence against the defendant. *Id*. at 240, 250.

8. The Court noted in *Mattox* that "general rules of law of this kind, however beneficent in their operation and valuable [sic] to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Id*. at 243. The Court found that provisions of the Bill of Rights are inherently subject to exceptions that are "intended to be respected." *Id*. The Court stated that one such exception previously recognized is dying declarations that "from time immemorial . . . have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility." *Id*. at 243-44. See generally John G. Douglass,
ally entwined procedural rights with hearsay exceptions, which are presently embodied in rules of evidence. The beginning of the intimate relationship between hearsay and confrontation can be traced to the Supreme Court’s decision in *Ohio v. Roberts*, which articulated a test that became the starting point for confrontation-hearsay analysis. This opinion announced that an unavailable declarant’s statement is admissible “only if it bears adequate ‘indicia of reliability.’” Furthermore, the Supreme Court held that an inference of reliability could be made when the evidence “falls within a firmly rooted hearsay exception” or when there was a “showing of particularized guarantees of trustworthiness.” With the enunciation of this test by the Supreme Court, the Confrontation Clause, a constitutional procedural right, was transformed into a rule of evidence.

Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay, 67 Geo. Wash. L. Rev. 191, 201 (1999) (stating that the Court’s dictum in *Mattox* “signaled the basic shift that would dominate Confrontation Clause analysis a century later”). Professor Douglass noted that the Court bypassed an opportunity to articulate a right to impeach hearsay testimony as the defendant in *Mattox* proposed. *Id.* at 201 n.45. Douglas asserted that the failure of the Court to address this issue defined a pattern that it has never broken. *Id.* Consequently, the Court’s opinions since *Mattox* regarding the Confrontation Clause have focused on the admissibility of prosecution evidence or hearsay statements. *Id.* To support his hypothesis Douglass cited: *White v. Illinois*, 502 U.S. 346 (1992); *Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56 (1980); and *Pointer v. Texas*, 380 U.S. 400 (1965).

9. The Supreme Court defined hearsay as “testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.” *Lee v. Illinois*, 476 U.S. 530, 543 n.4 (1986). In the Federal Rules of Evidence, hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” *Fed. R. Evid.* 801(c).

10. See generally Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 607 (1992) (suggesting the analysis of statements admissible under a hearsay exception to determine if they conform to the Confrontation Clause). *See also* Douglass, *supra* note 8, at 196-97 (demonstrating how the Court continued to allow the law of evidence and the Confrontation Clause to merge and contending that the defendant’s confrontation right “is not to exclude the declarant’s unreliable testimony,” but to impeach the declarant).

11. *448 U.S. 56 (1980).*

12. Douglass, *supra* note 8, at 203-06. Professor Douglass found that the Court completed its transformation of confrontation to hearsay. Douglass stated that the “general approach” the Court defined in *Roberts* turned reliability into a surrogate for cross-examination. *Id.* at 206. He further contended that “[t]he Confrontation Clause is simply an exclusionary rule for unreliable hearsay, and the law of evidence largely defines the rule.” *Id.*


15. See Douglass, *supra* note 8, at 205-06. Professor Douglass found that since the *Roberts* decision “[r]eliability has become the surrogate for cross-examination.” *Id.* at 206.
In 1999 the Supreme Court visited the confrontation-hearsay dichotomy in *Lilly v. Virginia*, a decision that would further confuse and ameliorate future confrontation analysis. In *Lilly*, authorities arrested Mark Lilly, his brother Benjamin Lee Lilly, and Gary Wayne Barker after a two-day crime spree, which included the abduction and murder of Alex DeFilippis. Upon being interrogated separately from the others, Mark Lilly insisted that while he participated in various crimes during the spree, he was not the one who shot DeFilippis. 

Mark Lilly further stated that his brother, Ben Lilly, was the one who murdered DeFilippis. At Ben Lilly’s trial, the state called Mark Lilly as a witness, but he refused to testify and invoked his Fifth Amendment privilege against self-incrimination. Nonetheless, the Commonwealth of Virginia entered the statements of Mark Lilly into evidence as declarations of a witness against Mark’s penal interest, and the court held that Mark Lilly’s statements were admissible.

Subsequently, the jury convicted Ben Lilly of various charges, including capital murder, and recommended the death penalty as mandated by the court. Ben Lilly appealed his conviction and asserted that the declarations of Mark Lilly were inadmissible because they were not against Mark’s penal interest, and further, the admission violated his right to confrontation as articulated in the Sixth Amendment.

The Confrontation Clause’s salvation lies in redefining its parameters and remaining a procedural right as other Sixth Amendment rights remain intact. Although the text of the Confrontation Clause

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17. Id. at 120.
18. Id.
19. Id. at 120-21.
20. Id. at 121.
21. To be a statement against penal interest, “the statement must be such ‘that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true,’ in view of the statement’s adversity to declarant’s interest.” JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE 344 (Practitioner Treatise Series, 4th ed. 1992).
23. Id. at 122.
24. Id. at 123.
25. See generally Douglass, supra note 8, at 272 (proposing a broader notion of confrontation to include an affirmative right to confront hearsay). Professor Douglass stated:
   
   If creative and vigorous exercise of the right to confront hearsay can equip the jury with adequate information for it to make a fair assessment of the out-of-court statement, then the “hammer” of exclusion is unnecessary. The tool of confrontation, the one written into the Sixth Amendment, will do the job.

Id. See also Akhil Reed Amar, Sixth Amendment First Principles, 84 Geo. L.J. 641 (1996). In his third article of a trilogy, Professor Amar discussed the Sixth Amendment and in particular the Confrontation Clause:
is clear in what it advocates, the Supreme Court's jurisprudence "is surprisingly muddled in logic and exposition." If left unfettered, the dilution of the Confrontation Clause will effectively excise it from the Sixth Amendment. As a result, it is up to the Court to provide a means of analysis that is both consistent and sound.

This Comment will analyze the history and development of the Confrontation Clause culminating in its disjointed application by the Supreme Court in *Lilly v. Virginia*. Part II will trace the history of the Confrontation Clause and its growth in American criminal and constitutional jurisprudence. In addition, Part II will explore the development of the hearsay doctrine and how it has become intimately connected to the right of confrontation. Part III will discuss, in full, the subject opinion of this Comment, notably *Lilly v. Virginia*. Part IV will analyze two different categorical approaches suggested by commentators, and endorsed by civil right groups such as the American Civil Liberties Union (ACLU), to correct imbalances in confrontation analysis. Furthermore, Part IV will discuss the ACLU's categorical approach, which was advocated in their amicus brief in *Lilly* and the subject of Justice Stephen Breyer's concurring opinion, as the most sensible means for attacking the inequities that have transformed the Confrontation Clause from a procedural right to a rule of evidence. Part IV will argue that the ACLU's categorical view is the most plausible approach for the law to follow in order to establish precedent that courts will be able to apply without forming additional diluted decisions, such as those that have confused courts in the past, or rendered the Confrontation Clause subordinate to hearsay excep-

The Sixth Amendment is the heartland of constitutional criminal procedure, yet the legal community lacks a good map of its basic contours, a good sense of its underlying ecosystem, a good plan for its careful cultivation. Amidst all the Amendment's tightly configured clauses, scholars, lawyers, and judges have often lost their way. The result, at times, has been bad constitutional law and bad criminal procedure.

Id. at 641.


27. See generally Berger, supra note 10, at 588 (finding the right to confrontation interwoven with the evolution of other protections and, combined, these guarantees were aimed at more then just accurate fact-finding). See also Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 558 (1988) (examining the Confrontation Clause and concluding that its interpretation is fundamentally different from other guarantees in the Bill of Rights).

28. See infra notes 36-69 and accompanying text.

29. See infra notes 70-142 and accompanying text.

30. See infra notes 143-178 and accompanying text.

31. See infra notes 179-242 and accompanying text.

32. See infra notes 243-248 and accompanying text.
tions. In conclusion, Part V will discuss the ACLU’s approach, its impact on future litigation and how its application will not disturb precedent established by the Supreme Court. Moreover, Part V will suggest that Justice Stephen Breyer’s opinion in *Lilly* opened the door to future Confrontation Clause analysis centering on the utilization of a categorical approach.

II. History of the Confrontation Clause and Hearsay

Notwithstanding its questionable beginning, the controversy surrounding the Confrontation Clause’s origin is not a recent phenomenon. The Confrontation Clause can be traced throughout its early history to its development and present application.

A. The Early History

The writings of the Hebrews, in the King James Bible, constitutes one of the earliest known appearances of the right to confrontation. History reveals that not only did the Hebrews endorse confrontation, but that the Romans also required a similar approach to confrontation rights. However, in England the right to confrontation was recognized with prestige, and for centuries the English practiced a form of confrontation that required an open and face-to-face system, described as an “altercation.” Prior to England’s consistent use of confrontation in its legal arena, various judges and commentators praised the English system over its continental counterpart. The English sys-

33. See *infra* notes 249-320 and accompanying text.
34. See *infra* notes 321-350 and accompanying text.
35. See *infra* note 351 and accompanying text.
36. See *supra* note 2 and accompanying text. The Supreme Court has discussed the origins of the Confrontation Clause, and its guarantee of a face-to-face encounter, along with the strong feelings, both in history and modern times, that people convey about the right. *Coy*, 487 U.S. at 1017. The Court relied on remarks by President Dwight D. Eisenhower to convey this sentiment. *Id.* President Eisenhower stated that in his hometown of Abilene, Kansas, if an individual failed to confront a man and chose instead to talk behind his back, he would suffer a public outrage. *Id.* at 1017-18. He analogized that in the entire United States it is the same principle, and people must have the opportunity to meet their accusers face-to-face, because the accuser “cannot hide behind the shadow.” *Id.* at 1018.
37. The Hebrews required that the accused have the right to hear testimony from the witnesses in the offender’s presence. *Deut.* 19:15-18.
38. See *Coy*, 487 U.S. at 1015-16. The Book of Acts quotes the Roman Governor Festus as proclaiming: “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.” *Acts* 25:16.
tem utilized the common law trial, as opposed to the continental system which relied on witness testimony in the form of written questions taken out of the presence of the offender.  

Nonetheless, the English did not always follow such a virtuous road to confrontation. For example, there were a variety of courts in England, including the Court of the Star Chamber, which followed the continental system, rather than the English common law system. The Court of the Star Chamber welcomed volunteer witnesses, however, the party in opposition could not question them, in order to discredit them, because it was believed that this would discourage witnesses from coming forward. Typically, the Court of the Star Chamber employed torture to extort confessions or information from the accused. However, the use of these tactics by courts employing Continental law led to political controversy over the system’s tactics and eventually caused its abolishment in the seventeenth century.

The battle for confrontation rights was clearly fought in England during the treason cases of the Tudor and Stuart eras, specifically that of Sir Walter Raleigh. The trial of Sir Walter Raleigh commenced in 1603 for his alleged crimes of conspiring to overthrow the King of

40. Id. at 1023 & n.68. Professor Friedman mentioned several authorities that discuss Athenian procedure as well as European civil procedure that took written testimony out of court. Id. at n.68. This practice led to fixed testimony that was simply brought in to the trial and confirmed by the witness. Id.

41. See infra notes 42-56 and accompanying text.

42. See 5 William S. Holdsworth, A History Of English Law 170-75 (2d ed. 1937). Holdsworth listed various ways that common law and continental law were melded into the procedure of the Court of Star Chamber. Id. at 184. Holdsworth noted that the “extraordinary” measures that the Court of Star Chamber employed, which included torture and questioning witnesses separately, made it different from common law and as such, the object of much criticism. Id. at 184-86. Holdsworth further stated that:

[1]In the ordinary procedure of the court of Star Chamber we can see the influence both of the common law and of the continental ideas. In the manner of pleading, in the open hearing, in the liberty of defence, in the permission to employ counsel at all stages of the proceedings, we see the influence of the common law. In the obligation of the defendant to answer, and to submit to interrogatories on oath, in the secrecy of the examination of both defendant and witnesses, and in the manner of hearing the case on this written evidence we can see continental influences. But the ordinary procedure was not the only procedure which the court used. For extraordinary cases extraordinary methods of procedure must be employed; and it is in these extraordinary cases that the analogy with continental methods becomes closer.

Id. at 184.

43. Id. at 182.

44. Id. at 184.

45. See Friedman, supra note 39, at 1024. Professor Friedman discussed other equity courts, which employed the same tactics as the Star Chamber, such as relying on testimony taken out of the presence of the accused, that survived, albeit without criminal jurisdiction. Id.

England, altering religion and procuring enemies to invade the kingdom.\textsuperscript{47} The prosecution rested a majority of its case on interrogatories and statements that others heard the principle witness, Sir Lord Cobham, say to officers of the Crown.\textsuperscript{48} Sir Walter Raleigh objected to the use and admission of these statements at his trial and demanded that he meet his accuser face-to-face.\textsuperscript{49} However, the only witness brought before him was a pilot who related a conversation that he had with a fellow Englishman in Portugal.\textsuperscript{50} The pilot testified that the Englishman told him that Raleigh and Cobham were going to cut the King’s throat.\textsuperscript{51}

Sir Walter Raleigh was not alone in his objection, as it was not uncommon for witnesses to escape testifying at trial during treason cases.\textsuperscript{52} The ability of witnesses to escape testifying in person ended once defendants accused of treason became more aggressive in demanding that their accusers be brought before them.\textsuperscript{53}

No one seems to have been able to write about the right [of confrontation] without repeating the claim that the evils of the Raleigh trial led in some way to the Sixth Amendment . . . . My research gives me no reason to suppose that this custom represents anything other than a convenient but highly romantic myth, and I adhere to it for this reason.

\textit{Id.} at 100 n.4.

\textsuperscript{47} \textit{Id.} at 100 (noting that these charges would eventually cost Sir Walter Raleigh his head).

\textit{See also} Berger, \textit{supra} note 10, at 571 n.58 (citing \textit{2 COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783} 1, 16-17 (T.B. Howell ed., London, T.C. Hansard 1816)).

\textsuperscript{48} \textit{See also} Berger, \textit{supra} note 10, at 571 (finding that “the prosecution relied almost exclusively on witnesses testifying to statements that Cobham had made to officers of the Crown when they examined him and on answers to interrogatories that Cobham had subscribed”).

\textsuperscript{49} \textit{See also} Graham, \textit{supra} note 46, at 100. Professor Graham wrote that Raleigh, though not a lawyer or permitted counsel, eloquently demanded confrontation. \textit{Id.} Raleigh stated: “The proof of the Common Law is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face, and I have done.” \textit{Id.} However, Officers of the Crown obtained the document with Lord Cobham’s confession that was used to support Raleigh’s conviction. This document was virtually the only piece of evidence used against Raleigh at trial; although Raleigh was later able to show that Cobham had recanted. \textit{Id.}

\textsuperscript{50} Graham, \textit{supra} note 46, at 100-01.

\textsuperscript{51} \textit{Id.} at 101. Even though this was a clear case of hearsay, that concept was not developed until much later. \textit{Id.} Raleigh, much ahead of his time, asked the court to look at the weight and not the admissibility of the witnesses account. \textit{Id.} He stated: “This is the saying of some wild Jesuit or beggarly priest; but what proof is it against me?” \textit{Id.} There was a consensus among Raleigh’s contemporaries that while none of the evidence proved that Raleigh was guilty, nonetheless, the court still convicted him. \textit{Id.}

\textsuperscript{52} \textit{See Berger, supra} note 10, at 571 & n.60 (citing \textit{MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY; AND OF OTHER CROWN CASES} 234 (Michael Dodson ed., 3d ed. 1792)).

\textsuperscript{53} This position was supported by statutes passed by Parliament. \textit{See} Friedman, \textit{supra} note 39, at 1024 & n.72 (citing Seymour’s Case, 1 How. St. Tr. 483, 492 (1549) (demanding an open trial and “accusers be brought face-to-face”)); Duke of Somerset’s Trial, 1 How. St. Tr. 515, 517,
Another major figure in the fight for democracy, and one of the most vocal advocates for civil liberties in England during the seventeenth century, was John Lilburne. Lilburne fought over forty years for the proposition that "the poorest he that is in England" was endowed at birth with rights and privileges which his government, whatever form it took, was powerless to invade." Sir Walter Raleigh and John Lilburne are only two men who fought for the civil rights of many. Their efforts finally paid off when the long battle for the right to confrontation was won, and there was no doubt that an offender's rights included the right to meet his accusers face-to-face.

B. American History of the Confrontation Clause

Through a somewhat obscure process, the right of confrontation found its way into American jurisprudence. It was clear in England...
that the right to confrontation constituted a way for citizens to diminish inquisitorial control by the Crown. Consequently, the colonists brought this mentality with them when settling the American colonies. In fact, it was not long after the establishment of the colonies that Massachusetts enacted a statute that stated “in all capital cases all witnesses shall be present wheresoever they dwell.” There is doubt as to whether the colonists relied on the events of the seventeenth century, such as Sir Walter Raleigh's trial, to form the basis of their confrontation rights. However, it is clear that the lawyers from England brought with them the knowledge of the procedural modifications in trials enacted in England after the Glorious Revolution of 1688.

M. Beaney, The Right To Counsel In American Courts 9 (1955). See also Berger, supra note 10, at 567-86 (finding that the colonists certainly knew of the historical developments in England regarding criminal procedure); Douglass, supra note 8, at 234-40 (finding that the Framers were aware of a history of struggle to resist inquisitorial procedures); Cathleen J. Cinella, Note, Compromising the Sixth Amendment Right To Confrontation—United States v. Gigante, 32 Suffolk U. L. Rev. 135, 141-143 (1998) (finding that although the drafters of the Constitution did not explicitly provide for “face-to-face” confrontation, early Supreme Court decisions found it inherent in the right to confrontation); But see California v. Green, 399 U.S. 149, 174-75 (1970) (Harlan, J., concurring) (finding that “[t]he Confrontation Clause of the Sixth Amendment is not one that we may assume the Framers understood as the embodiment of settled usage at common law”).

58. See Berger, supra note 10, at 577 (finding that the abolition of the Star Chamber, the strengthening of the role of the jury, and newly passed legislation after the Glorious Revolution confirmed that confrontation emerged as part of a procedural package).


60. See, e.g., Graham, supra note 46, at 104 n.23 (finding that the Sixth Amendment was probably a reaction to the vice-admiralty courts and not the fate of Raleigh or the abuses of the Star Chamber); Murl A. Larkin, The Right of Confrontation: What Next? 1 Tex. Tech. L. Rev. 67, 70 (1969). Professor Larkin found that the Leveller pamphlets, which advocated the levelling of all ranks and the establishment of a more democratic government, printed in the mid-seventeenth century in England, were the most influential in the colonies. Id. at 70. However, several viewpoints exist suggesting that Sir Walter Raleigh's trial led directly to the Confrontation Clause of the Sixth Amendment. See White, 502 U.S. at 360-61 (1992) (Thomas, J., concurring) (finding that the Supreme Court had, in the past, based the common law origins of the right to confrontation on abuses, such as Sir Walter Raleigh's trial, in England during the sixteenth and seventeenth centuries); Francis H. Heller, The Sixth Amendment To The Constitution Of The United States 104-05 (1951) (granting the accused the right to be confronted with witnesses against him "was a common law right which had gained recognition as a result of the abuses in the trial of Sir Walter Raleigh"); Robert P. Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 717 (1993) (discussing crucial role of Raleigh's treason trial in development of Sixth Amendment confrontation rights).

61. See Berger, supra note 10, at 580. Professor Berger discussed the Glorious Revolution and the American colonists' optimism toward obtaining liberty through the granting of rights to members of the community. Id. After the Glorious Revolution, which was a struggle to strengthen the rights of citizens resulting in the ousting of the Stuarts in England, many lawyers came to the American colonies and presented new reforms to the criminal justice system; for the
Furthermore, by 1719, publications in the colonies that described trials, such as Sir Walter Raleigh's trial, affirmed that the colonists were aware of the Crown's attempt to oppress civil liberties in England. The colonists felt their own brand of oppression when, in the 1760s, Parliament imposed upon them intolerable laws such as the Stamp Act of 1765.

The colonists' battle with Parliament and the Crown, in addition to the inquisitorial battle fought in England concerning the right to confrontation, influenced the Framers of the Bill of Rights. However, the American approach to the right of confrontation did not solely draw on English law, as there were other influences that helped to shape the rules of criminal procedure. In addition, the colonists

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63. See Berger, supra note 10, at 579. The Stamp Act was an inquisitorial measure by England to control the American colonists. Id. at 579. Professor Berger stated:

In 1765 the Stamp Act enlarged the jurisdiction of the vice-admiralty courts, allowing them to sit without juries and to examine the witnesses in chambers upon interrogatories. Shortly thereafter Parliament resolved that all colonial traitors would be tried in England—thereby depriving them of a jury from the vicinage, the ability to call witnesses on their behalf, and virtually ensuring that the Crown's evidence would be in the form of depositions. Viewed against the backdrop of increasing knowledge about English criminal procedure and the gains of the Glorious Revolution, this reversion to inquisitorial procedures may have struck the colonists as a step backwards. Id. Professor Berger also discussed the highly publicized trial of John Hancock in 1768, who had been sued in Admiralty by the advocate general for the alleged smuggling of wine. Id. at 579 n. 94. John Adams represented him and wrote extensively about the controversial and much hated civil law interrogatories. Id.
64. See Berger, supra note 10, at 579-80. Professor Berger stated:

To the colonists, the evolution of the common law in the period from Magna Carta to the Glorious Revolution recorded the successful struggle to strengthen the rights of citizens vis-à-vis the Crown. It provided the colonists, and hence the framers, with an explanation of how England had ultimately arrived at a "constitution" capable of preserving liberty by securing rights to different members of the community. Id. at 580.
65. For an interesting view on how major trials in America shaped criminal procedure jurisprudence, see Jonakait, supra note 2, at 124-64. Professor Jonakait, in an attempt to support his proposition that the Confrontation Clause constitutionalized procedures already used in the states, discussed several different occurrences that he believed shaped the colonists' view of criminal procedure. Id. at 112, 124. Some of these events included the Salem Witch Trials, the Boston Massacre Trials, the New York Slave Revolt Trials of 1741, and the Trial of Levi Weeks. Id. at 126-64. Professor Jonakait found that the Salem Witch Trials expressed the "dangers in a system where the accused could do little to affect the factual developments that occurred at trial." Id. at 135-36. Critics of the Salem Witch Trials found that a fair trial required an advocate for the defense who could conduct meaningful cross-examination. Id. at 136. The Boston Massacre Trials moved Massachusetts toward a true adversarial system that included representation by an attorney for the accused, a right to present a defense through cross-examination, and the right to present witnesses. Id. The New York Slave Revolt Trials of 1741 were examples of trials
often relied on Sir William Blackstone’s *Commentaries on the Laws of England*, with the intent of including its contents in their rules of criminal procedure.66

Blackstone discussed the advantages of the English system requiring oral testimony in open court by stating the following:

This open examination of witnesses *viva voce*, 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 before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial . . . . In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it.67

66. See Berger, supra note 10, at 581-82 (citing LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102 (2d ed. 1985)). Friedman recounted that in colonial history, a lawyer’s library was full of books on English law and not American law, however:

When Blackstone’s *Commentaries* were published (1765-69), Americans were his most avid customers. At last there was an up-to-date shortcut to the basic themes of English law. An American edition was printed in 1771-72, on a subscription basis, for sixteen dollars a set; 840 American subscribers ordered 1,557 sets—an astounding response. *Id.* at 581 n.102.

67. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *373-74* (emphasis in original).
Blackstone discussed the role of confrontation as it related to the role of the jury, which he and the Framers of the Bill of Rights believed was the principle safeguard of the people's liberties. Eight different colonies eventually adopted the idea of a Confrontation Clause into bills declaring their state's rights and eventually, the Confrontation Clause became one of the procedural rights protected by the Sixth Amendment of the United States Constitution.

C. How Hearsay Fits Into the Web of the Confrontation Clause

During the early evolution of the Confrontation Clause, reliability of the witnesses' statements was not tied to the procedural right of confrontation. In fact, it was unheard of that an accused would lose his right to confront his accuser simply because the evidence was reliable. The idea that the reliability of a witness' statement could excuse an accused's right to confrontation is important since, in Ohio v. Roberts, it was a factor in deciding whether an unavailable declarant's statement was admissible. Deciding whether an accused has the right to confront his accuser, by using the subjective test of whether a witness' statement is reliable, brought rebuke from Justice Antonin Scalia who commented that, "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation." Justice Scalia's reasoning mirrors what commentators such as Blackstone contemplated when writing about confrontation analysis.

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68. See Berger, supra note 10, at 583-84 (finding that Blackstone's Commentaries "demonstrate no concern with the law of evidence even though this area of the law was in the midst of change").

69. See id. at 584-85. Professor Berger noted that although there is very little legislative history that exists concerning the eight colonies' inclusion of a Confrontation Clause, the anti-federalist debate, which protested the lack of a federal Bill of Rights, indicated that the right to confrontation, along with other procedural rights, was viewed as a whole with the right to trial by jury as a necessary safeguard against government abuse. Id.

70. For an extended discussion of the term "reliability" see Richard D. Friedman, Confrontation and the Definition of Chutzpa, 31 Isr. L. Rev. 506, 511-13 (1997). Professor Friedman contends that reliability is an inappropriate standard for measuring the confrontation right. Id. at 512. Furthermore, reliability "does not respond to the underlying concerns that make the confrontation right fundamental." Id.


72. Id.


75. See BLACKSTONE, supra note 67, at *373.
1. John Henry Wigmore

A tremendous influence on the Supreme Court's jurisprudence concerning confrontation analysis and rules of hearsay was John H. Wigmore. According to one commentator, Wigmore brought forth the concept that evidence that meets a hearsay exception also passes Confrontation Clause muster because a hearsay exception guarantees that cross-examination is not needed, and the right of confrontation is identical with the right to cross-examination. Consequently the admission of evidence that satisfies a hearsay exception does not impair the Confrontation Clause's truth-seeking mission, which Wigmore assumed was the only function of the Confrontation Clause.

Wigmore claimed that the hearsay rule was well established by the early 1700s, however, there is skepticism surrounding this theory. Today, many commentators believe that the hearsay rule was not fully developed until the late 1700s. Further supporting this belief is the fact that not until 1794, over one hundred years after the introduction of the right to confrontation in America, the general and abstract

76. 5 John H. Wigmore, Evidence in Trials at Common Law (Chadbourn rev. ed. 1974) [hereinafter Wigmore]. The Federal Rules of Evidence were not enacted until 1975; however:

The common law of hearsay for the first three-quarters of this century is best reflected in—and was profoundly influenced by—Wigmore's monumental treatise on evidence. Wigmore published three editions of this treatise between 1904 and 1940. The portions dealing principally with hearsay were revised by James Chadbourn in the 1970s and are contained in volumes four through six of the revised edition.

Friedman, supra note 39, at 1014 n.12.

77. Berger, supra note 10, at 592; see also Wigmore, supra note 76, §1395 at 150. Wigmore found that the process of confrontation has two purposes, the main and essential purpose was to secure for the opponent the opportunity of cross-examination. Id. The secondary and dispensable purpose was that the judge and jury have the opportunity to watch the witness’ demeanor while testifying. Id. at 153.

78. Wigmore, supra note 76, §1395 at 150; see also John H. Langbein, The Criminal Trial Before the Lawyers, 45 U. Chi. L. Rev. 263 (1978). Professor Langbein posited that, even as late as the 1730s, judges knew that there was something wrong with hearsay, but could not decide between exclusion or admissibility with diminished credit. Id. at 302; see also Stephan Landsman, The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 Cornell L. Rev. 497 (1990). Professor Landsman wrote:

During the course of the 1700's, judges came to recognize the dangers of hearsay. The problem was met by the eventual development of a rather strict rule of exclusion. That rule became ever more formal, and both counsel and the court were increasingly likely to insist on its enforcement. The hearsay rule generally worked to compel the production of live testimony. In this way it increased the opportunities for contentious examination. It also served as a tool that counsel might manipulate in pursuing a client’s interests, . . . . [T]he growth of the hearsay rule came in three stages. In the earliest years of the century there was little concern about the use of out-of-court words. By the 1730s, the rudiments of the hearsay rule were established and at least sporadically applied. By the closing decades of the century a more sophisticated rule had been developed and was being applied in a constantly broadening range of cases.

Id. at 572.
rules of evidence, including the rule of hearsay, were addressed in England’s House of Commons.\(^7\)

In the course of his studies, Wigmore found an interrelationship between cross-examination and confrontation. In addition, Wigmore believed that when hearsay was sufficiently reliable, it excused the declarant from testifying.\(^8\) Wigmore further contended that confrontation concerned truth-seeking and did not operate independently of the hearsay rule in a case regarding out of court statements.\(^8\) Examining Wigmore’s theories, and comparing them to the Supreme Court’s concern about reliability, it is likely that Wigmore significantly influenced the Supreme Court’s present day view of confrontation as an evidentiary doctrine.\(^8\)

\(^7\) John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1188 (1996). Professor Langbein quoted Edmund Burke as remarking to the House of Commons that “the law of evidence . . . [was] 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.” *Id.; see also Lilly*, 527 U.S. at 140 (Breyer, J., concurring) (“[T]he Confrontation Clause itself has ancient origins that predate the hearsay rule . . . .”); Salinger v. United States, 272 U.S. 542, 548 (1926) (stating that the right of confrontation was a common-law right having recognized exceptions and did not originate with the provision in the Sixth Amendment). Justice Breyer, in *Lilly*, listed a variety of sources indicating the right of confrontation’s ancient roots and stated: “The right of an accused to meet his accusers face-to-face is mentioned in, among other things, the Bible, Shakespeare, and 16th and 17th century British statutes, cases and treatises.” *Lilly*, 527 U.S. at 140-41. Justice Breyer’s list included: *The Bible, Acts* 25:16; *William Shakespeare, Richard II*, act I, sc. 1; *William Shakespeare, Henry VIII*, act II, sc. 1; 30 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE & PROCEDURE* §6342, at 227 (1997) (quoting statutes enacted under King Edward VI in 1552 and Queen Elizabeth I in 1558); cf. Case of Thomas Tong, Kelyng J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) (finding that out-of-court confession may be used against the confessor, but not against co-conspirators); *Sir Matthew Hale, History of the Common Law of England* 163-164 (C. Gray ed. 1971); 3 *William Blackstone, Commentaries* *\(^3\)* 373. *See also supra* notes 2, 36-38 and accompanying text.

\(^8\) Berger, *supra* note 10, at 572. Wigmore insisted that:

There never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names . . . . It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution . . . . Moreover, this right of cross-examination thus secured was not a right devoid of exceptions.

*Wigmore, supra* note 76, at 158-59 (emphasis in original).

\(^8\) See Berger, *supra* note 10, at 572.

\(^8\) *See id.* at 592. Professor Berger noted that Wigmore’s effect on the teaching of evidence and acceptance of his theory by both commentators and courts has been widely chronicled. *Id.* at 592 n.143 (citing Graham, *supra* note 46, at 104; Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 327-43 (1981); Larkin, *supra* note 60, at 68-70); *see also supra* notes 71-75 and accompanying text.
However, the rule of hearsay provides that statements which cannot be tested, should not be used to prove the truth of that statement. Thus, contrary to Wigmore, the hearsay doctrine differs in multiple ways from the Confrontation Clause. First, the evidentiary rule of hearsay is concerned with the admissibility of evidence; while confrontation, a constitutional right, concerns itself with the process by which the accused may confront the declarant of an out of court statement. Second, the hearsay rule is fraught with exceptions while the Confrontation Clause, as expressly written in the Sixth Amendment, is not subject to such exceptions. However, although these doctrines seem to appear different on the surface, the desire of the courts to connect the two has infiltrated a myriad of cases that continue to cause confusion among the lower courts.

83. See Fed. R. Evid. 801(c).

84. See Friedman, supra note 39, at 1014-15. Professor Friedman listed several cases that demonstrate the Court's attempt to distinguish between hearsay and confrontation, they included: United States v. Inadi, 475 U.S. 387. 393 n.5 (1986) (noting that hearsay and confrontation do not completely overlap); Dutton, 400 U.S. at 80-81 (stating that the Court has never equated the Confrontation Clause and the hearsay rule and therefore refused to do so in this opinion). In California v. Green the Court noted that “while it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.” 399 U.S. at 155-56. Professor Friedman listed Bourjaily v. United States, 483 U.S. 171, 182-82 (1987), White, 502 U.S. at 353, and Roberts, 448 U.S. at 65-66 as recent cases where the Court melded hearsay and confrontation. See Friedman, supra note 39, at 1014 n.15.

85. See Douglass, supra note 8, at 199. Professor Douglas wrote: "The temptation to merge the two has always been great. After all, they both address the same evil: trial by absent, untested witnesses. As Justice Harlan once commented, it is “not unnatural” to assume that they both should employ the same method—exclusion of unreliable hearsay—to combat a common enemy. The Court has not been able to avoid that temptation. This “exclusionary thinking” under the Confrontation Clause began in the Court’s first hearsay/confrontation cases.

Id. at 199. Professor Douglass expanded on Justice Harlan’s concurrence in Dutton v. Evans. Douglass, supra note 8, at 199 n.31. Professor Douglass noted that the concurrence by Justice Harlan was the first time a member of the Supreme Court argued that courts should not apply the Confrontation Clause as a rule excluding hearsay. Id. at 199.

86. Id. at 199.

87. See Bourjaily, 483 U.S. at 182-83. The Court discussed the statements of the co-conspirators and found that the coconspirator exception to the hearsay rule was firmly rooted in criminal jurisprudence starting with the case of United States v. Gooding, 25 U.S. (12 Wheat) 460 (1827). Id. at 183. Therefore, the Court believed there was no need for an independent investigation of the reliability of the statement, and thus, no need for a separate challenge to the out-of-court statement by the co-conspirator based on the Confrontation Clause. Id. For the Court’s “general approach” to confrontation analysis see supra notes 12-15 and accompanying text.
2. Mattox v. United States

In 1895, the Supreme Court decided *Mattox v. United States*, and looked for the first time at the Confrontation Clause as it pertained to challenges against the admissibility of hearsay. The defendant in *Mattox* was convicted of murder by the United States District Court of Kansas. The defendant subsequently appealed the decision directly to the United States Supreme Court, which reversed and remanded for a new trial. The second trial ended in a hung jury, which resulted in a third trial where the jury found Mattox guilty and condemned him to death. Prior to the third trial, Thomas Whitman and George Thornton, two of the state's witnesses, had died; yet the court admitted into evidence the dead witnesses' testimony which had been recorded by a stenographer at the two previous trials. The defendant objected to this admission, citing the Confrontation Clause as a clear procedural right, which dictated that the admissibility of prior testimony was unconstitutional.

The Supreme Court never mentioned hearsay, but rather, extensively discussed the Confrontation Clause and its historical primary objective “to prevent depositions or *ex parte* affidavits . . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . .” The Supreme Court disagreed with Mattox and found that “general rules of law of this kind [confrontation], however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.” The Court further found that multiple provisions of the Constitution are subject to respected pre-

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88. 156 U.S. 237 (1895).
89. Id. at 242-45.
90. Id. at 251. The first trial ended with a conviction for Mattox in the 1891 September term. Id.
91. Id. Mattox was tried for the third time in the 1893 December term, and he, for the second time, presented a writ of error to the United States Supreme Court. Id.
92. Id.
93. Id.
94. *Mattox*, 156 U.S. at 242; see also Brief for Petitioner at 13. The ACLU's brief stated: It is noteworthy that the word hearsay appears neither in *Mattox v. United States*, the first of several cases to note that the “primary object” of the Clause was to prevent the use of testimony taken ex parte, nor in *Pointer v. Texas*, which held that the Clause expresses a fundamental right applicable against the states. As its language plainly indicates, the Clause was not an attempt to constitutionalize the nascent law of hearsay. Rather, it plainly expressed the fundamental principle that if a person acts as a witness against an accused, the accused must have the opportunity to confront that person. Id.
existing exceptions and do not interfere with the spirit of the law. The Court recited one exception as the admission of dying declarations:

They [dying declarations] are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination, nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted, not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice.

Although the Court found that Mattox's rights had not been infringed since the defendant had adequate opportunity to cross-examine the witnesses in the previous trial, the Court had carved out an exception to the Confrontation Clause and virtually equated that exception to dying declarations. Therefore, the Court went beyond the narrow holding that prior cross-examination satisfied the procedural right found in the Confrontation Clause and implicitly connected that procedural right to a rule of evidence. The Court drew an analogy between prior testimony given under oath and subject to cross-examination, and dying declarations, which are not subject to cross-examination, because the Court believed that dying declarations were as "reliable" as cross-examination given under oath.

An opposing view is that if hearsay and the right to confrontation are superimposed to mean the same thing, "[a]dmissibility of hearsay would become an all-or-nothing issue" because procedural rights protected by the Confrontation Clause would not apply to cases such as dying declarations, constituting an "exception" to the right of confrontation. It is this tension between hearsay and the right to confrontation that would dominate the Court's confrontation-hearsay analysis in future cases.

For the better part of a century, the Court did not confront the "reliability" theme of Mattox. Instead, the Court strictly applied the

96. Id. at 243-44.
97. Id. at 200-01. See also FED. R. EVID. 804(b)(2) (stating that "[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death" is not excluded by the hearsay rule).
98. See Douglass, supra note 8, at 201.
99. See Douglass, supra note 8, at 201.
100. Id.
101. Id.
102. Id.
103. Id. at 202.
"procedural rights" of the Mattox holding to the cases brought before it.\textsuperscript{104} For example, in 1970, the Supreme Court decided Dutton v. Evans.\textsuperscript{105} In Dutton, the state successfully convicted the defendant, Alex Evans, of murder partially based on an informant's testimony that concerned statements made by Evans' accomplice, Venson Williams.\textsuperscript{106} Williams never testified, nor was he subject to cross-examination.\textsuperscript{107} In deciding Dutton, Justice Potter Stewart conceded that, in the past, the Court had recognized that hearsay rules and the Confrontation Clause protect similar values, but on more than one occasion, the Court has found a violation of the Confrontation Clause even though a lower court admitted the statements under a recognized hearsay exception.\textsuperscript{108} Justice Stewart analyzed the informant's statement and found that it was both spontaneous and against his penal interest.\textsuperscript{109} Subsequently, Justice Stewart found that these two elements, when specifically advanced by an informant, were "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."\textsuperscript{110} The Court used Dutton v. Evans as a basis for a Confrontation Clause decision, which based the admissibility of hearsay on the "reliability" of the hearsay statement and not the procedural right of confrontation.\textsuperscript{111}


In Ohio v. Roberts,\textsuperscript{112} the United States Supreme Court came full circle to its decision in Mattox and refined the theme of allowing hearsay exceptions to trump the right of confrontation.\textsuperscript{113} The Court acknowledged that historical evidence, regarding the procedural usage of the right to confrontation, left little doubt as to the intent of the Confrontation Clause and whether it was to exclude hearsay.\textsuperscript{114} In addition, the Court noticed a preference for face-to-face confrontation

\footnotesize{104. Id. See e.g., Mancusi, 408 U.S. 204; Green, 399 U.S. 149; Pointer, 380 U.S. 400.}
\footnotesize{105. See Douglass supra note 8, at 202 (recognizing Dutton as the only case in the 1960s or 1970s in which the Court's opinion did not deal with hearsay testimony from judicial proceedings).}
\footnotesize{106. Dutton, 400 U.S. at 77-78.}
\footnotesize{107. Id. at 78.}
\footnotesize{108. Id. at 81-82.}
\footnotesize{109. Id. at 89.}
\footnotesize{110. Id.}
\footnotesize{111. Douglass, supra note 8, at 203 n.55.}
\footnotesize{112. 448 U.S. 56 (1980).}
\footnotesize{113. In Roberts, the Court articulated a test that would dominate Confrontation Clause analysis. Roberts, 448 U.S. at 66; Douglass, supra note 8, at 205.}
\footnotesize{114. Roberts, 448 U.S. at 63.}
at trial. The Court stated that "a primary interest secured by [the
Confrontation Clause] is the right of cross-examination" and further
articulated a "general approach" to Confrontation Clause analysis.\footnote{115}

The Court found that when analyzing a confrontation problem, two
distinct elements should be considered in deciding whether to restrict
admissible hearsay.\footnote{116} The first element dictated a finding that a rule
of necessity was essential to conform to the Framers' preference for
face-to-face accusation.\footnote{117} This rule of necessity dictated that the
prosecution either produce or show the unavailability of the declarant
whose statement it wished to introduce into evidence.\footnote{118} The second
element required proof, or an examination, of whether the declarant
was unavailable.\footnote{119} If the declarant was proven to be unavailable by
the prosecution, then his prior testimony must, to be entered into evi-
dence, have sufficient "indicia of reliability."\footnote{120} The Court ended its
analysis by concluding that "reliability can be inferred without more
in a case where the evidence falls within a firmly rooted hearsay ex-
ception. In other cases, the evidence must be excluded, at least absent
a showing of particularized guarantees of trustworthiness."\footnote{121}

Thus, to have admissible hearsay and avoid a confrontation prob-
lem the declarant must be unavailable, and the evidence must have
sufficient "indicia of reliability."\footnote{122} To have sufficient "indicia of reli-
ability," the evidence must fall within a firmly rooted hearsay excep-
tion, or absent that, the evidence must show particularized guarantees
of trustworthiness. Thus, the right to cross-examination became an
"indicia of reliability" that made hearsay admissible, rather then the
primary objective of the Confrontation Clause.\footnote{123} Inevitably, the
Court used this two-pronged "general approach" in determining the

\footnote{115. Id. at 63, 65 (citing Douglas v. Alabama, 380 U.S. 415, 418 (1965)).
116. Id. at 65.
117. Id.
118. Id.
119. Id. at 66.
120. Roberts, 448 U.S. at 66.
121. Id. The Court identified a number of commentators who had recently written on the
reconciliation of confrontation and hearsay. Id. at 66 n.9. The Court found that there was not a
single commentary suggesting that the Court had misidentified the basic interests of the accused,
nor was there any commentary that had shown their analysis was out of line with the intention of
the Framers. Id. Based on the fact that the Court was not apprised of any logical alternative to
their line of jurisprudence, they rejected the notion that they should, in effect, alter prior deci-
sions by adopting an alternative proposal. Id. The Court determined that their "middle of the
road" approach was both successful and appropriate. Id.
122. Id.
123. See Douglass, supra note 8, at 204-05.}
admissibility of hearsay statements, and therefore, the procedural
right of confrontation became a rule of evidence.124

Although the Supreme Court found that the use of its two-pronged
"general approach" was a "middle-of-the-road" adaptation of hearsay
and confrontation, the Court virtually abandoned the "rule of neces-
sity" prong of the analysis used in United States v. Inadi.125 In Inadi,
the Court ruled that the admissibility of a co-conspirator's statements
did not depend on the availability of the declarant.126 Moreover, the
Court refused to apply an "unavailability requirement," which was
similar to the Court's decision to not apply the "unavailability require-
ment" in White v. Illinois.127

In White, the defendant was convicted of aggravated criminal sexual
assault, residential burglary, and unlawful restraint.128 On appeal, the
Supreme Court held that the prosecution was not required to produce
the four year-old victim at trial and, furthermore, that they did not
have to prove that the child was unavailable in order for her testimony
to be admitted into evidence.129 The Court determined that the girl's
statements properly fell within the hearsay exceptions for excited ut-
erances and statements made for purposes of medical diagnosis or
treatment.130

While the Court in Roberts proclaimed a "general unavailability"
requirement, it only applied the requirement to prior testimony.131

124. See Douglass, supra note 8, at 206. See e.g., White, 502 U.S. at 355-56 (finding spontane-
ous declarations and statements made for purposes of medical treatment are made in contexts
that provide substantial guarantees of their trustworthiness). The Court noted that "[t]here can
be no doubt that the two exceptions we consider in this case are "firmly rooted." Id. at 356 n.8.
It found that the exception for spontaneous declarations was at least two centuries old, recog-
nized by the Federal Rules of Evidence, and accepted by nearly four-fifths of the states. Id.
Similarly, the Court found that the exception for statements made for purposes of medical treat-
ment was recognized in the Federal Rules of Evidence and equally accepted by the States. Id.
See also Bourjaily, 483 U.S. at 183 (finding that co-conspirators statements are "firmly rooted"
hearsay exceptions and "steeped in our jurisprudence"). See also Puleio v. Vose, 830 F.2d 1197,
1205 (1st Cir. 1987) (stating that "since Roberts was announced, federal appellate courts have
marched in near-perfect unison to the Roberts tune"). Cf. Inadi, 475 U.S. at 392-94 (finding
"unavailability" only necessary under the "general approach" when the analysis includes prior
testimony).

125. Inadi, 475 U.S. at 387.

126. Id. at 399-400.

127. White, 502 U.S. at 354-55. The Supreme Court found that "an unavailability rule would
. . . do little to improve the accuracy of factfinding, [and] it is likely to impose substantial addi-
tional burdens on the factfinding process." Id. at 355. See also Douglass, supra note 8, at 206-07.

128. White, 502 U.S. at 349.

129. Id. at 349-51. See also Friedman, supra note 39, at 1016-17 (finding that the general
unavailability rule articulated in Roberts was too stringent thus, causing it to eventually break
down).


131. Id.
Yet, in *Inadi* and *White*, the Court held that while the “unavailability requirement” applied in the case of prior testimony, it was not applicable to statements of co-conspirators, excited utterances, or statements made for purposes of medical treatment. This limitation was the beginning of the deterioration of the “general approach to confrontation analysis.”

Distinguishable from *White* and *Inadi*, the United States Supreme Court faced a problem with the second prong of the “general approach,” or the “firmly rooted” hearsay exception, in *Lee v. Illinois*. In *Lee*, an accomplice incriminated not only himself, but also the defendant, for the crime of murder when he was interrogated by the police. The accomplice was theoretically unavailable as a witness at the defendant’s trial because he asserted his Fifth Amendment right against self-incrimination. It could be argued that since the accomplice accepted part of the blame for the murders, his confession fell within the firmly rooted hearsay exception for declarations against penal interest. However, a majority of the Court analyzed the accomplice’s admission and “reject[ed] respondent’s categorization of the hearsay involved in this case as a simple ‘declaration against penal interest.’ That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant.”

Therefore, the Court held that the accomplice’s statement was inadmissible under the Confrontation Clause, and made it clear that the per se reliability analysis was not absolute. Hence, the Court main-

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132. See Friedman, supra note 39, at 1016-17 (stating that the emerging pattern from cases such as *White* and *Inadi* has been to follow the Federal Rules of Evidence). See also Douglass, supra note 8, at 207 (finding that “[a]fter *Inadi* and *White*, the Confrontation Clause ‘rule of necessity’ has no real impact on the admission of hearsay”).

133. See supra note 132.


135. *Id.* at 533-36.

136. *Id.* at 539.

137. The Federal Rules of Evidence provides an exception to the hearsay rule if the declarant is unavailable as a witness and if:

[a] statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID. 804(b)(3).


139. *Id.* at 543-46. The majority also found that the statements were not sufficient under the “particularized guarantees of trustworthiness” prong. *Id.* at 543-44. This was a point with which
tained that if a statement by an unavailable declarant fits within a firmly rooted hearsay exception, it still has the potential to violate the right of confrontation.\textsuperscript{140} Despite this tension in the per se aspect of the reliability requirement, the Court has continued to find that a statement is reliable if it falls into a firmly rooted hearsay exception, and uses the definitions in the Federal Rules of Evidence as a guide to what hearsay exceptions are “firmly rooted.”\textsuperscript{141} As a result of this tension, the Court may have rendered the “reliability” prong of the test ultimately useless.\textsuperscript{142}

III. Subject Opinion: \textit{Lilly v. Virginia}

In \textit{Lilly v. Virginia}, the United States Supreme Court was once again faced with the right to confrontation and its application. Although the Court ultimately found that the defendant’s right to confrontation had been violated, the Court did not agree as to how the Confrontation Clause should be applied when dealing with the admission of an “against penal interest” declaration. Moreover, the Court seemed to solidify the fact that while a case with facts similar to \textit{Lilly} may be more easy to resolve as a confrontation violation, there remains numerous unanswered questions as to how the analysis on confrontation jurisprudence might be navigated. \textit{Lilly} illustrates the need for a united approach to confrontation analysis.

A. Lower Court Decisions

In \textit{Lilly}, the Circuit Court of Montgomery County found Benjamin Lee Lilly guilty of robbery, abduction, carjacking, possession of a firearm by a felon, and four charges of illegal use of a firearm. As a result of the court’s ruling, Ben Lilly received two consecutive life sentences

the dissent did not agree. \textit{Id.} at 551-57 (Blackmun, J., dissenting). \textit{See also} Friedman, \textit{supra} note 39, at 1019-20. Professor Friedman noted:

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

\textit{Id.} at 1019.

140. \textit{See} Friedman, \textit{supra} note 39, at 1018-19.

141. \textit{Id.} Furthermore, the Court has not stopped at using the Federal Rules of Evidence, but has expanded the “firmly rooted” hearsay exception to include almost any hearsay exceptions. \textit{Id.}

142. \textit{See generally} Douglass, \textit{supra} note 8, at 206-10 (commenting on how the Court’s application of its “general approach” has diminished it to the point of extinction). \textit{See also} Friedman, \textit{supra} note 39, at 1019-20 (finding that “[a] near synonym for ‘firmly rooted,’ it seems, is ‘in the Federal Rules of Evidence’”).
plus twenty-seven years.\textsuperscript{143} The court also imposed a sentence of death for capital murder, as recommended by the jury.\textsuperscript{144} The Supreme Court of Virginia upheld Ben Lilly’s conviction and sentences based on his brother’s statements to the police, finding that the statements fell within the firmly rooted exception to the hearsay rule as statements made by an unavailable witness against his penal interest.\textsuperscript{145} Lilly appealed to the United States Supreme Court, who granted certiorari.\textsuperscript{146}

\textbf{B. United States Supreme Court Decision}

On March 29, 1999, Ben Lilly argued that the statements elicited by the police from his brother were not against Mark’s penal interest because they shifted the blame onto himself and another accomplice, thus, the admission of these out of court statements violated the Sixth Amendment’s Confrontation Clause.\textsuperscript{147} In reaching its decision, the Court turned to the issue of the Confrontation Clause. Although the Court was divided on how the right to confrontation should be applied, all nine justices concurred in their judgments and found that Lilly’s right to confrontation had been violated.\textsuperscript{148} Thereafter, the United States Supreme Court reversed the Supreme Court of Virginia’s decision and remanded the case for the Virginia courts to de-


\textsuperscript{144} Lilly, 499 S.E.2d at 528.

\textsuperscript{145} Id. at 533-35.


\textsuperscript{147} Id. at 122-23.

\textsuperscript{148} Id. at 119. The plurality opinion, written by Justice Stevens, was joined by Justices Souter, Ginsburg, and Breyer. Id. at 120-49. Justices Scalia and Thomas concurred in part and concurred in judgment with the opinion, while Chief Justice William Rehnquist, joined by Justice Sandra Day O’Connor and Kennedy, concurred in judgment with the opinion. Id. at 133-34. With the Court’s divergent mode of analysis and lack of a strong plurality opinion, state courts considering the issue today will likely find it difficult to apply consistent legal reasoning to issues regarding the right to confrontation. Id. at 133-34 & n.4. Justice Stevens noted that several states, such as Arkansas, Indiana, Maine, Nevada, New Jersey, North Dakota, and Vermont, provide statutorily that their against penal interest hearsay exceptions do not allow the admission of a co-defendant’s statement that inculpates both himself and the accused. Id. at n.4. Several other states, such as Delaware, Louisiana, Maryland, Minnesota, Texas and West Virginia, have adopted Federal Rule of Evidence 804(b)(3). Id. See supra note 137 (defining the hearsay exceptions for statements made against pecuniary or proprietary interest). Still other states, such as Alabama, Georgia, and Missouri, have no statutory exception for “against penal interest.” Id. However, Chief Justice Rehnquist noted that several United States Courts of Appeals have admitted confessions that were made by co-defendants while in custody, which equally inculpated the co-defendant and the accused. Id. at 146 n.2. (Rehnquist, C.J., concurring).
cide whether the Sixth Amendment error was "harmless beyond a reasonable doubt."\(^1\)

1. The Plurality Opinion

Justice Stevens, in his plurality opinion, emphasized the continued validity of the "general approach" test in *Roberts*, to determine whether a hearsay exception satisfies the Confrontation Clause.\(^5\) Justice Stevens commented that

the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) 'the evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability.\(^5\)

Furthermore, Justice Stevens defined a "firmly rooted" hearsay exception as one that in light of "longstanding judicial and legislative experience, rests on such [a] solid foundation that admission of virtually any evidence within it comports with the 'substance of the constitutional protection.'"\(^5\) Justice Stevens supplied the example of spontaneous declarations as a firmly rooted exception; since the states accepted spontaneous declarations as exceptions, they were over two centuries old, and considered credible.\(^5\) Moreover, Justice Stevens equated hearsay exceptions to the procedure of cross-examination and stated that "established practice, in short, must confirm that statements falling within a category of hearsay inherently ‘carr[y] special guarantees of credibility’ essentially equivalent to, or greater than, those produced by the Constitution’s preference for cross-examined trial testimony."\(^5\)

Justice Stevens defined three categories of statements given against one's penal interest that qualify as a "firmly rooted" hearsay exceptions.\(^5\) The first category included "voluntary admissions against the

\(^{149}\) *Id.* at 140. The Court cited *Chapman v. California*, for the "harmless beyond a reasonable doubt" standard. 386 U.S. 18, 24 (1967)

\(^{150}\) *Lilly*, 527 U.S. at 124-25. Justice Stevens noted that the statements taken from Lilly's brother were obviously obtained for the purpose of using them as evidence in a later trial. *Id.* at 125. He analogized this to the presentation of ex parte affidavits in early English proceedings, which the right to confrontation was thought to ameliorate. *Id.*

\(^{151}\) *Id.* at 124-25.

\(^{152}\) *Id.* at 126 (quoting Wright, 497 U.S. at 817; Roberts, 448 U.S. at 66; Mattox, 156 U.S. at 244).

\(^{153}\) *Id.*

\(^{154}\) *Lilly*, 527 U.S. at 126.

\(^{155}\) *Id.* at 127. Justice Stevens stated that the first category, voluntary admissions by the declarant, is routinely offered into evidence and found to be admissible by courts. *Id.* He emphasized the importance of separating the first category from the third, in which the prosecution
declarant,” the second category included “exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense,” and the third category included “evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant.” Justice Stevens found the third category to be of “recent vintage” and not a “firmly rooted” hearsay exception in Confrontation Clause analysis because accomplices typically have an interest in betraying their co-defendants. Justice Stevens found, more importantly, that the third category of statements against penal interest was inherently unreliable and functioned similarly to the ancient ex parte affidavit system used by the English courts. Thus, offers evidence by the declarant against an alleged accomplice, in determining the admissibility against penal interest. *Id.* See generally Bruton v. United States, 391 U.S. 123 (1968) (finding that a confession against penal interest did not warrant its use against the defendant). Justice Stevens reviewed the history behind exculpatory evidence offered by a defendant against a declarant by citing the Donnelly rule, which barred the admission of other person’s confessions that exculpated the accused. *Lilly*, 527 U.S. at 129. See also Donnelly v. United States, 228 U.S. 243, 272-77 (1913) (finding “declarations of this character” incompetent to establish any specific fact and excludable under hearsay rules). Justice Stevens explained that the Donnelly rule became the subject of much criticism:

The only practical consequences of this unreasoning limitation are shocking to the sense of justice; for, in its commonest application, it requires, in a criminal trial, the rejection of a confession, however well authenticated, of a person deceased or insane or fled from the jurisdiction (and therefore quite unavailable) who has avowed himself to be the true culprit . . . . It is therefore not too late to retrace our steps, and to discard this barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the true culprit now beyond the reach of justice. *Lilly*, 527 U.S. at 129-30 (quoting 5 WIGMORE ON EVIDENCE §1477, pp.289-90 (3d ed. 1940)). In 1973, the Court found Wigmore’s view to be more rational and held that criminal defendants have the right to introduce evidence of third parties’ declarations against penal interest when there is considerable assurance of reliability. *Id.* at 130 (quoting Chambers v. Mississippi, 410 U.S. 284, 300 (1973)).

156. *Lilly*, 527 U.S. at 127.

157. *Id.* at 130-31.

158. *Id.* See Williamson v. United States, 512 U.S. 594, 599-601 (1994) (using Federal Rules of Evidence 804(b)(3), rather than the Confrontation Clause, to hold that an accomplice’s statement against penal interest was not admissible against the defendant); *Lee*, 476 U.S. at 541 (finding accomplices’ confessions that incriminate defendants presumptively unreliable); *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting) (finding that such statements “have traditionally been viewed with special suspicion”); *Bruton*, 391 U.S. at 136 (finding such statements are “inevitably suspect”); *Douglas*, 380 U.S. at 419 (finding admission of non-testifying accomplice confession that inculpated the defendant denied the defendant the right to cross-examination); *Crawford v. United States*, 212 U.S. 183, 204 (1909) (stating that a confession which inculpates an accomplice with a defendant “ought to be received with suspicion, and with the very greatest care and caution”). But see *Dutton*, 400 U.S. at 86-89 (finding co-conspirator statement against penal interest admissible). Chief Justice Rehnquist addressed *Dutton* in his separate opinion in *Lilly*. 527 U.S. at 144. Chief Justice Rehnquist found that since *Dutton* involved an accomplice’s statement to a fellow prisoner, it is distinguishable from the other cases involving custodial confessions. *Id.* at 147. *Dutton* involved a jailhouse confession to a fellow inmate,
Justice Stevens vigorously upheld the Court's prior decisions, which involved accomplice confessions and their inherent unreliability, and suggested that precedent supported Lilly's holding.\footnote{159}

Justice Steven's plurality opinion further held that "accomplice's confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."\footnote{160} Moreover, as stated by prior Supreme Court decisions, if hearsay evidence is used to convict a defendant, it must be inherently reliable and cannot "bootstrap" onto other evidence at trial that corroborates the accomplice's statements.\footnote{161}

2. **Chief Justice Rehnquist's Concurrence**

Chief Justice Rehnquist disagreed substantially with Justice Steven's broad plurality opinion, and argued that the plurality addressed the wrong question when it devoted much of its attention toward assessing whether a declaration against penal interest is a "firmly rooted exception" to the hearsay rule.\footnote{162} Justice Rehnquist found that "Mark Lilly's statements inculpating his brother in the murder of DeFilippis [were] not in the least against Mark's penal interest."\footnote{163} He further found that "[i]t therefore does not raise the question whether the Confrontation Clause permits the admission of a genuinely self-inculpatory statement that also inculpates a co-defendant, and our precedent does not compel the broad holding suggested by the plurality today."\footnote{164}

Moreover, Justice Rehnquist noted that several federal courts have found that the declaration against penal interest, which can equally incriminate the declarant and the defendant, is sufficiently reliable to admit into evidence.\footnote{165} He found Mark Lilly's confession incriminat-

\footnote{159. See supra note 149 and accompanying text.}
\footnote{160. Lilly, 527 U.S. at 134.}
\footnote{161. Id. at 136-38. Justice Stevens relied on Wright for the proposition that corroborating evidence cannot be used to support the reliability of a hearsay statement. Id. In Wright, the Idaho criminal trial judge admitted a hearsay statement by a child, under Idaho's recognized hearsay rule, which was supported by corroborating evidence. Wright, 497 U.S. at 805. The Court refused to allow the hearsay statement to be admissible because the statement must be inherently reliable, not found reliable based on other testimony at trial. Id. at 822.}
\footnote{162. Lilly, 527 U.S. at 144-45 (Rehnquist, C.J., concurring).}
\footnote{163. Id. at 146.}
\footnote{164. Id.}
\footnote{165. Chief Justice Rehnquist found that two different types of statements were protected in various federal courts: (1) statements that truly incriminate the declarant that are made while in
ing his brother, which was a statement made as part of a custodial confession and clearly not a declaration against penal interest, typical of the statements the Court has viewed with "special suspicion" in the past.\(^\text{166}\) Justice Rehnquist would not extend the holding any farther than to say that the custodial confession falls under the line of cases that have found these types of confessions inadmissible.\(^\text{167}\) In Justice Rehnquist’s view,

[the plurality’s blanket ban on the government’s use of accomplice statements that incriminate a defendant thus sweeps beyond the facts of this case and our precedent, ignoring both the exculpatory nature of Mark’s confession and the circumstances in which it was given. Unlike the plurality, I would limit our holding here to the case at hand, and decide only that Mark Lilly’s custodial confession laying sole responsibility on petitioner cannot satisfy a firmly rooted hearsay exception.\(^\text{168}\)]

Justice Rehnquist further found that it was difficult to apply any standard in Lilly because the lower courts had found that Mark Lilly’s confession was firmly rooted. Therefore, the lower courts had not inquired into whether the statement bore “particularized guarantees of trustworthiness.”\(^\text{169}\) Since the second prong of the Roberts test was not reached in the lower courts, Justice Rehnquist felt that the plurality was deciding an issue that had never been passed on in the lower courts.\(^\text{170}\) Furthermore, Justice Rehnquist found the plurality’s conclusion, holding that appellate courts must independently review a lower court’s finding that a hearsay statement bears particularized guarantees of trustworthiness, particularly worrisome. In view of the fact that a trial judge is in a much better position to decide the fact

\(^{166}\) Lilly, 527 U.S. at 146-47 & nn.2-3 (citing United States v. Keltner, 147 F.3d 662, 670 (8th Cir. 1998) (finding that a “statement ‘clearly subjected’ declarant to criminal liability for ‘activity in which [he] participated and was planning to participate with... both defendants’’”); Earnest v. Dorsey, 87 F.3d 1123, 1134 (10th Cir. 1996) (finding that the “entire statement inculpated both [defendant] and [declarant] equally” and “neither [attempted] to shift blame to his co-conspirators nor to curry favor from the police or prosecutor”); United States v. York, 933 F.2d 1343, 1362-64 (7th Cir. 1991) (stating that “federal declaration against penal interest exception firmly rooted in case involving accomplice’s statements made to two associates”); United States v. Seeley, 892 F.2d 1, 2 (1st Cir. 1989) (holding “exception firmly rooted in case involving statements made to declarant’s girlfriend and stepfather”); United States v. Katsougrakis, 715 F.2d 769, 776 (2d Cir. 1983) (holding “no violation in admitting accomplice’s statements to a friend”)).

\(^{167}\) Lilly, 527 U.S. at 146. See also supra note 158 (Chief Justice Rehnquist’s discussion of Dutton).

\(^{168}\) Lilly, 527 U.S. at 147. See supra note 149 and accompanying text.

\(^{169}\) Id. at 148-48.

\(^{170}\) Id. at 148.
specific issue of trustworthiness, appellate review of every case would result in a waste of judicial resources.  

3. Justices Scalia, Thomas, and Breyer's Concurring Opinions

Justices Scalia and Thomas both wrote concurring opinions, which focused on the Framers' original intent behind the Confrontation Clause and its inclusion in the Sixth Amendment. The Justices bypassed the assumed intent behind the Confrontation Clause, to curb an inquisitorial government that used affidavits of hearsay declarants as an option for face-to-face confrontation, and noted their preference for a narrow approach to the Confrontation Clause. Justices Scalia and Thomas contended that the implication of the Confrontation Clause was by "extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions." This approach is similar to, though not as broad as, the testimonial view of confrontation analysis.

On the other hand, Justice Breyer concurred separately in the judgment and pointed out that not addressing the confrontation-hearsay interrelationship in Lilly did not mean that that interrelationship was a moot point with the Court. Justice Breyer recognized that since the Court did not reach the confrontation-hearsay matter in Lilly, it would "leave it open for another day." Thus, Justice Breyer left the door open for future confrontation-hearsay analysis and the possibility of the Court severing the connection between the right of confrontation and the hearsay rule.

171. Id.

172. Id. at 143-44. For a detailed discussion of Justice Scalia's approach to the Confrontation Clause, see Cornelius M. Murphy, Justice Scalia and the Confrontation Clause: A Case Study In Originalist Adjudication of Individual Rights, 34 AM. CRIM. L. REV. 1243 (1997).

173. Lilly, 527 U.S. at 143. See supra notes 39-56 and accompanying text. See also Murphy, supra note 172 and accompanying text.

174. Lilly, 527 U.S. at 143 (quoting White, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment)). Professor Friedman employed a similar approach to Justice Thomas' opinion in White, which was propounded by Professor Amar in his recent book, The Constitution and Criminal Procedure, infra note 180. See Friedman supra note 39 and accompanying text.

175. See infra notes 191-220 and accompanying text, which gives an explanation of Professor Friedman's testimonial analysis.

176. Lilly, 527 U.S. at 142-43.

177. Id. Justice Breyer's concurring opinion focused on the amicus brief written by the ACLU and how it addressed the Court's past effort to tie the Confrontation Clause directly to the hearsay rule. Id. at 140-41. See infra notes 184-189 and accompanying text.

178. Lilly, 527 U.S. at 140-43.
IV. Analysis: The Confrontation Clause

The history of the Confrontation Clause and the evidence rules governing hearsay succeeds in explaining how these two doctrines evolved, but fails to answer the question of what the future holds for the tension between procedural rule of confrontation and hearsay rules of evidence. Suggestions abound on how the Court should interpret the Confrontation Clause and how it should apply to defendants. Unfortunately, the lack of consistent legal precedent does not aid courts in discerning the expectations of a confrontation analysis. While this area of law is ripe for commentary, an attempt has been made to address two theories of confrontation analysis.

One such approach, the testimonial view, is similar to that of Justice Clarence Thomas. The testimonial view of confrontation analysis centers on witnesses that make testimonial statements, whether at trial or beforehand. The testimonial view contends that the Confrontation Clause applies to a more narrow set of statements than hearsay and thus “is far less extensive, but far more intensive, than the rule against hearsay.”

A second view suggests a slightly different approach, which centers on prosecutorial involvement in the declarant’s statement. The prosecutorial restraint model, consistent with Sixth Amendment jurisprudence, specifically takes into account the historical reasoning behind the Bill of Rights and attempts to restore control of the central government through the Confrontation Clause.

In its amicus curae brief for Lilly v. Virginia, the ACLU advocated acceptance of a categorical approach to confrontation analysis by promoting both the testimonial view and the prosecutorial restraint model. The ACLU concluded that since both analyses focused on when confrontation is necessary and not the requirements that are necessary to have successful confrontation, such as having the witness and defendant in the same room, either categorical approach would serve as a viable alternative to current confrontation analysis.
The ACLU viewed the Supreme Court as implicitly accepting the testimonial view and the prosecutorial restraint model in their past decisions, although not consciously articulating such ideas. For several reasons, the ACLU's categorical approach is the most plausible approach to Supreme Court jurisprudence regarding the Confrontation Clause. First, a categorical approach incorporates ideas such as originalism and the historical reasoning behind the Bill of Rights and, in particular, the Sixth Amendment. Second, a categorical approach establishes a bright line test for future confrontation analysis. Third, a categorical approach comports with Supreme Court precedent involving the right to confrontation. Finally, this approach releases the tension involved in the Supreme Court's confrontation-hearsay analysis that began in Roberts.

The Supreme Court's position on the Confrontation Clause is debatable. Lower courts need consistency and bright line rules in order to make sure that they are correctly applying Supreme Court precedent to confrontation cases. The Lilly opinion may be a further dilution of the Confrontation Clause, or a narrowing of the hearsay doctrine. Nonetheless, it is imperative that courts and members of the legal profession are able to understand the Confrontation Clause and its procedural rules.

The ACLU advances both the testimonial view and the prosecutorial restraint method as the most plausible approach for confrontation analysis. The testimonial view approaches confrontation analysis by asking whether a declarant was acting as a witness, while the prosecutorial restraint method approaches confrontation analysis by asking whether the historical objectives underpinning the Confrontation Clause have been followed by prosecutors and other government officials. These categorical approaches address confrontation analysis with a bright line test consisting of rules that are easy for lower courts to follow and apply. However, though these two approaches are not without weaknesses, it can be argued that the weaknesses of these two approaches far outweigh the confusion and tension used by the Supreme Court when applying the "reliability" method as adopted in Roberts.
A. The Testimonial Approach

The testimonial approach to confrontation analysis raises the key question of whether, in making the statement at issue, the declarant was acting as a witness within the meaning of the Confrontation Clause. Likewise, one must question whether a person who makes a statement to police, such as the description of a bank robber, or a battered women who tells a social worker that her husband beat her, is acting as a witness within the meaning of the Confrontation Clause. To answer these questions it has been suggested that, in order for statements to be included at trial, the breadth of the testimony must include not only testimony given under oath, but also testimony given in the form of statements such as “formalized testimonial materials,” which include affidavits, depositions, prior testimony, and confessions. Thus, the testimonial approach is applicable to statements recited at trial as well as those made beforehand.

It has been argued that the Court has engaged in the wrong inquiry, since the Roberts decision, by using reliability as a criterion for whether a defendant’s right to confrontation applies to a specific situation. "[T]he Confrontation Clause does not speak of the rule against hearsay or of its exceptions, or of unavailability, reliability, or truth-determination. It says simply that the accused shall have a right ‘to be confronted with the Witnesses against him.’" Furthermore, it can be argued that reliability is a difficult standard to determine and is immune to appellate review, since “any serious attempt to determine the reliability of a statement must take into account many circumstances of the particular statement and its context.” These arguments support the adoption of a rule that does away with “reliability” as a criterion and instead advances a more uniform bright line test of confrontation analysis.

It has also been suggested that truth-determination is a poor criterion for deciding whether the Confrontation Clause applies to a situat-
The right to confrontation is a fundamental right with deep roots implicating the same values that are attributed to other rights such as the right to counsel and the right to trial by jury. Therefore, the Confrontation Clause should be adhered to “even if in the particular case it does not help accurate fact-finding—just as we adhere to the rights of counsel and trial by jury without having to ask whether to do so in the particular case will do more good than harm.”

As alluded to earlier, it is important under the testimonial view to ascertain whether statements made before trial are in fact testimonial. In making this inquiry, if the statement given before trial was not considered testimonial, there would likely be a reduction in the number of possible hearsay declarants, thus, the Confrontation Clause will not be implicated. Furthermore, the right to confrontation should be considered absolute, with no exceptions, when applied to testimonial statements. Making this right absolute would equate the right to confrontation with the right to trial or the right to counsel.

In making the right to confrontation absolute, as applied to testimonial statements, the Confrontation Clause should be adhered to “even if in the particular case it does not help accurate fact-finding—just as we adhere to the rights of counsel and trial by jury without having to ask whether to do so in the particular case will do more good than harm.”

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196. Id. at 1028. See also Friedman, supra note 39, at 1012 n.8. Professor Friedman lists numerous opinions on the nature of the Confrontation Clause including: Michael H. Graham, The Confrontation Clause, The Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 MINN. L. REV. 523, 600 (1988) (“arguing that the Confrontation Clause could be interpreted as meaning that ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be present and to cross-examine his accusers if they are available’”); Jonakait, supra note 27, at 622 (“contending that ‘[t]he confrontation clause gives the accused the right to exclude all out-of-court statements when the declarant is not produced except when the prosecutor establishes the lack of a reasonable probability that the accused’s cross-examination of the declarant would have led the jury to weigh the evidence more favorably to the accused’”); Charles R. Nesson & Yochai Benkler, Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause, 81 VA. L. REV. 149, 173 (1995) (“proposing ‘an interpretation of the Confrontation Clause that will limit the use of hearsay evidence to situations in which (1) the judge has made an independent foundational finding that the hearsay is competent and (2) the hearsay is independently corroborated’”); Eileen A. Scallen, Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause, 76 MINN. L. REV. 623, 626-27 & n.14 (1992) (“contending that the Confrontation Clause should be interpreted in light of three dimensions: an evidentiary dimension that ‘addresses the concern that the reliability of a statement offered as evidence be tested by cross-examination,’ a procedural dimension that ‘addresses the concern that a hearsay statement may be the product of misconduct by the prosecution or its agents,’ and a societal dimension that ‘embodies communal values by granting criminal defendants the affirmative right to face their accusers’””). Id. See also Murphy, supra note 172, at 1266 (concluding that Justice Scalia’s originalist approach “is not only more analytically sound than the approaches advocated by other members of the Court, but also affords criminal defendants greater confrontation rights across the board”). Id.

197. Id. See supra note 2 and accompanying text.

198. See Friedman, supra note 39, at 1028.

199. Id.

200. Id.

201. Id. at 1030.
nial statements, a bright line rule would emerge in order to gauge the protection and application of one’s right to confrontation. 202

Furthermore, under the testimonial approach, the availability of the witness becomes an irrelevant concern in deciding whether confrontation should apply, a key prong in the Roberts “reliability” analysis. 203 The unavailability of a witness is inconsequential if the defendant had ample opportunity to examine the witness under oath before the trial. 204 Contrary to the Court’s general rule in Roberts, which “seemed to imply . . . that, to use the hearsay or an out-of-court declarant, the prosecution must show the unavailability of the declarant as well as the reliability of the statement,” the testimonial approach simply assesses whether the statement was testimonial. 205 Thus, if the statement was testimonial, then the right of confrontation applies regardless of whether the declarant is available. 206

There are two extreme exceptions to the proposition of disregarding the availability of the witness in determining the right of confron-

202. See id. Professor Friedman does not think that balancing tests are the answer in confrontation jurisprudence, although “[a]bsolute rights may not be much in fashion in this “age of balancing.” Id. See generally T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943 (1987). Professor Aleinikoff delivers a thoughtful article on the pitfalls of balancing constitutional rights in a justice system:

The balancers have gained the high ground, at this point, by adverse possession. Balancing has attained legitimacy through the reputation of its early advocates and the passage of time. Moreover, if constitutional interpretation is ultimately a reflection of larger, deeper trends in social consciousness, we may now simply be deaf to the criticisms of balancing. It is deeply engrained in us to see the law as a forum for competing interests and moral and legal choice as turning on an evaluation of the strength of those interests.

Here, then, is the ultimate irony of balancing. Balancing was a liberating methodology at the outset. It took blinders off judges’ eyes and let them openly take into account the connections between constitutional law and the real world. Preaching a pragmatic, realistic approach to constitutional law, it promised doctrine arrived at objectively and grounded in the facts of the society to which it applied. But balancing, whatever its merits as a way out of formalism, has itself become rigid and formulaic. It gives answers, but it fails to persuade.

Id. at 1004.

203. Friedman, supra note 39, at 1032. The availability of a witness is always a concern in confrontation analysis because this determines whether a hearsay exception will be used to excuse the right to confrontation. Id. However, Professor Friedman noted that other doctrines, besides unavailability of a witness, may apply, such as hearsay law, and exclude the statement on the grounds that it is more prejudicial than probative. Id. at 1032 n.101.

204. Id. at 1032-33.

205. Id. at 1034. See Green, 399 U.S. at 172-89 (Harlan, J., concurring). Justice Harlan stated that the Confrontation Clause “reaches no farther than to require the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial.” Id. at 174 (emphasis in original).

206. Friedman, supra note 39, at 1034.
First, if the accused causes the unavailability of the declarant, then he forfeits his right to confrontation; however, if the prosecution causes the unavailability of the declarant, then the right of confrontation prevails. For the cases in which the declarant is unavailable, through no fault of the defendant or the prosecutor, the court presumably would not allow the testimony into evidence.

Another exception applies to the accused in the case of compulsory process, where intimidation causes the declarant, most likely a child declarant, not to testify at trial. If a court believes that intimidation of the declarant is the motivation behind the accused’s invocation of the Confrontation Clause, then a court can admit the prior statement and let the accused, instead of the prosecution, call the declarant to the stand to help overcome the confrontation issue. The Court previously placed great emphasis on the accused’s right to compulsion and used it to reject the accused’s confrontation claims.

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207. See id.

208. Id. at 1034-35. Professor Friedman contended that his conclusion is fortified by the fact that in most cases, the prosecution can protect itself quite easily against the later unavailability of the witness . . . [since in his view] the Confrontation Clause’s reach is limited to testimonial statements, and such statements are rarely made long before investigation and prosecution have begun. Thus, the prosecutor can usually arrange for the witness to be deposed while she is still available, giving due notice to the accused.

209. Id. at 1035. Professor Friedman advocated a result similar to when the witness dies prior to cross-examination. In that case, the statement does not make it into evidence. In his view, neither should a statement made by an out-of-court witness. Id.

210. See Friedman, supra note 39, at 1036-38. Professor Friedman argued that since the text of the Confrontation Clause is in the passive voice, the accused only needs to demand his right. Id. at 1036-37. If this premise is true, then a requirement to actively invoke compulsory process to “obtain” the presence of a witness imposes an improper burden on the defendant. Id.

211. Id. at 1036-37. Professor Friedman was adamant in declaring compulsory process as a trap for the accused by explaining that: even when the compulsory process will secure the attendance of the witness, so that the accused could put her on the stand, this is far less satisfactory for the accused than the opportunity to cross-examine. When a witness finishes testifying for the prosecution, defense counsel usually finds it worthwhile to rise and ask at least a few questions, exploring the possibility of impeaching the witness and, if the witness seems nearly invulnerable, sitting down promptly in order to play down her testimony. But if an out-of-court statement is introduced as part of the prosecution’s case, it is far riskier and costlier for the defense counsel, in the middle of his own case, to put the declarant on the stand, invite her to repeat the damaging account, this time live in front of the jury, then try to shake her—and if he comes up empty-handed, try to explain to the jury why he bothered with the whole exercise. Small wonder defense counsel hardly ever tries.

Id. But see Richard D. Friedman, Improving the Procedure for Resolving Hearsay Issues, 13 Cardozo L. Rev. 883, 892-904 (1991) (suggesting a procedural change that would support a fundamental reform of hearsay law and improve defendants ability to cross-examine witnesses).

212. Friedman, supra note 39, at 1036-37 & n.115 (citing White, 502 U.S. at 355; Inadi, 475 U.S. at 397-98 & n.7).
Finally, the testimonial view’s use of the word “witnesses” is consistent with Justice Thomas’ conclusion that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” However, the testimonial approach goes one step further, considering statements made by the declarant with the understanding that they will be used in litigation as testimonial. Such statements would include those made to legal authorities or intermediaries with the intent that they will be used at trial, even though they were not made under oath. Declarants would be unable to take advantage of the accused’s confrontation rights by making statements to a private party with the intent that they will reach the factfinder but with no intent of being available to testify, therefore, the less formalized statements would, in effect, protect the accused. Furthermore, statements made by the declarant, who understands that the statements will not play a part in litigation, are not considered testimonial and thus, do not implicate the Confrontation Clause.

Therefore, the term “witnesses” should not be limited to statements made directly to authorities or made in formalized statements. The testimonial approach to the Confrontation Clause eliminates witnesses testifying “in informal ways that avoid confrontation . . .”

This structure . . . reflects a fundamental premise of our judicial system—that the prosecution cannot present as evidence against a criminal defendant a statement made with the intention that it be used unless the accused has had an opportunity to examine the witness. It sets up a bright-line rule, but one that, when sensitively applied, leads to sensible results. Moreover, it confines the confrontation right to its proper realm, those who make testimonial statements and so act as witnesses. Thus, it is clearly distinct from the vast morass of hearsay law.

Accordingly, it is clear that the declarant who told police about the description of the bank robber and the battered housewife who told her social worker about her husband beating her, would be considered witnesses for confrontation purposes. Nonetheless, the battered wife

213. *Id.* at 1038; *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment).
215. See *id.* at 1039-42.
216. *Id.* at 1042.
217. *Id.* at 1039.
218. *Id.* at 1043.
219. *Id.*
would have to know that her statements were going to be used in future litigation against her husband for them to be considered testimonial.

B. The Prosecutorial-Restraint Method

Most commentators agree that the Supreme Court’s emphasis on the Confrontation Clause as a promoter of accurate fact-finding is erroneous. The Court’s approach to confrontation analysis ignores the historical underpinnings of the right to confrontation and the background against which the Framers drafted the Confrontation Clause. Arguably, the Court utilized an evidentiary approach, which ultimately ignored the Confrontation Clause’s role in restraining the government’s willful use of power, which included keeping government agents under control, and “ensuring the ability of ordinary citizens to participate in this process.” Moreover, cross-examination of government agents regarding statements made to them does not alleviate the problem of faulty protection for the accused because statements elicited by the government are of a special nature, and the Confrontation Clause should focus on the Bill of Right’s concern over exercising control over the government.

Prosecutions for child sexual abuse and drug offenses are the two types of cases that require the most aggressive type of prosecutorial restraint. As a result of severe prosecutorial pressure from the public in these cases, and the strong incentive to succumb to political pressures, it is believed that the Confrontation Clause “should be

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221. See Berger, supra note 10, at 559. Professor Berger explained:

This insistence that the sole function of the Confrontation Clause is to promote more accurate fact-finding ignores the historical background against which the Clause was drafted and overlooks the context in which it was placed. The majority of the Court has forgotten, at least on a conscious level, that the Confrontation Clause is a provision in the Sixth Amendment, that the Sixth Amendment is a part of the Bill of Rights, and that the Bill of Rights is part of the Constitution of the United States.

Id. at 559. See also Friedman supra note 39, at 1013-14 (stating that his article will attempt to prove that “reliability and truth-determination are poor criteria to govern application of the Confrontation Clause”).

222. See Berger, supra note 10, at 559.

223. Id. at 560.

224. Id. at 561, 563.

225. Id. at 564. Professor Berger found that recent child sexual abuse cases have prompted commentary in which the prosecution was likened to the “over-zealously encountered in the Salem Witch trials.” Id. at 564. Observers of these recent cases claimed that “[p]rosecutors or their agents cajoled, coaxed, and threatened children during interviews, often with special techniques that possess a high potential for improper suggestion. Furthermore, the prosecution’s experts often have publicly funded jobs and rely on studies financed by government research grants. Thus they are dependent on the epidemic’s continuance.” Id. at 564-65.
interpreted to restrain prosecutors from using suggestive, manipula-
tive questioning techniques.”226 To make the Confrontation Clause a
more meaningful right there is a need for prophylactic measures, espe-
cially when child sexual abuse and drug offenses are involved in the
confrontation analysis.227

The prosecutorial restraint model was extracted from history under-
lying the right of confrontation and its accompanying caselaw.228 It is
important to recognize that the inclusion of the Confrontation Clause
in the Bill of Rights occurred due to the Framers’ knowledge of the
unchecked power that government could have over its people. If the
Framers “did not perceive a connection between the notion of con-
frontation and the reduction of the inquisitorial powers of the Crown,
then confrontation looks more like Wigmore’s purely evidentiary doc-
trine than a procedure that also aspires to prevent government from
leaning on witnesses and concealing the process from the jury.”229
Furthermore, a relationship exists between the right of confrontation
and the role of the jury because of its role in providing protection to
people’s rights.230

[T]wo hundred years ago when the Bill of Rights was enacted, the
right to confrontation was viewed in conjunction with other proce-
dural rights surrounding trial by jury. Confrontation was part of an
arsenal designed not only to ensure accurate results in criminal tri-
als, but also to restrain the government in criminal trials from acting
in a covert, repugnant manner that would be concealed from the
people.231

The prosecutorial restraint method is premised on the fact that con-
frontation emerged as a bundle of rights aimed at curbing prosecutorial power and mandated that the Supreme Court respect
the values behind the right to confrontation, as it does other procedu-
ral rights, in order to accurately determine how confrontation should
function.232 In two separate lines of cases, the Supreme Court recog-
nized the need for special rules when prosecutors are in a position to

226. Id. at 565-66.
227. Id. at 566.
228. See Berger, supra note 10, at 567-604.
229. Id. at 578-586.
230. Id. at 583-84.
231. Id. at 586.
232. Id. at 586 & nn.17, 114 (citing Norman J. Singer, Sutherland Statutory Construc-
tion § 46.05 103 (C. Dallas Sands ed., 5th ed., 1992) (finding that a statute is passed as a whole
and has one general purpose or intent); Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (quoting
United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1850) (stating that “[i]n ex-
pounding a statute, we must not be guided by a single sentence or member of a sentence, but
look to the provisions of the whole law, and to its object and policy’’))).
mold trial court proceedings. However inconsistent, the Court did not require counsel to be present when the prosecution obtained statements from witnesses prior to trial, but rather, assumed that the details of the prosecution's questioning would eventually come out at trial. However, starting with Roberts, the Court ruled that confrontation at trial can be excused under certain situations, namely when a declarant's statement has certain indicia of reliability, such that it satisfies a firmly rooted hearsay exception, or when the statement has particularized guarantees of trustworthiness. The inconsistency produced when the right to counsel depends on whether one is the accused or the witness segregates the right to confrontation from other procedural rights.

The Supreme Court's sensitivity to inquisitorial questioning is clear by its analysis in three different types of cases, specifically cases where there was no hearsay exception, cases that involved the production of the declarant who made a prior statement, and cases where introduction of testimony was through a hearsay exception rather than by a declarant. In the latter two scenarios, it can be argued that the Court does not restrain prosecutors as adequately as it should because the less a jury is informed about prosecutorial misconduct, the less the jury is able to acquit in extreme cases of misconduct.

Under the prosecutorial restraint approach, a determination must be made concerning statements according to a hearsay exception elic-

233. See Berger, supra note 10, at 586-89. Here Professor Berger extrapolated from two lines of cases the Supreme Court's realization that, since the prosecutor is in a position to abuse the proceedings of the trial, special safeguards are needed. Id. at 586. In the line of cases beginning with Massiah v. United States, the Court excluded reliable evidence if it was obtained through inquisitorial practices, that denied the accused procedural rights granted in the Sixth Amendment. 377 U.S. 201, 206 (1964). See Berger, supra note 10, at 587. The Court found the right to counsel absolute, even if it interferes with ascertaining the truth. Id. In the line of cases beginning with United States v. Wade, the Supreme Court wanted to make sure that there was a procedure in place to assure that the jury determined the accused's fate and not the police. 388 U.S. 218, 242 (1967). See Berger, supra note 10, at 587.

234. Id. at 588. See supra note 233 and accompanying text.

235. See Berger, supra note 10 at 588.

236. Id.

237. Id. at 593-605. For cases in which there was no hearsay exception see Douglas, 380 U.S. at 416-17 and Pointer, 380 U.S. at 401. A case in which a declarant, who was produced for trial, made a prior statement that was not subject to confrontation is Owens, 484 U.S. at 556. Finally, for cases where testimony was introduced under a hearsay exception see Bourjaily, 483 U.S. at 175, and Lee, 476 U.S. at 531.

238. Id. at 599-601. Professor Berger found that although jury nullification is not an accepted practice, it plays an important role in trials and in stopping the prosecution from melding evidence against the accused. Id. at 599 (citing Katherine Bishop, Diverse Group Wants to Follow Natural Law, N.Y. Times, Sept. 26, 1991, at B16 (discussing how a movement to encourage jury nullification has grown)).
ited by the prosecution, thus testing whether the statements are within the gambit of the Confrontation Clause.\(^{239}\) Placing emphasis on the circumstances surrounding the statement is an appropriate approach to confrontation jurisprudence, rather than the formalistic view which limited the Confrontation Clause to particular statements “contained in formalized testimonial materials.”\(^{240}\)

Lastly, the vigorous application of the Confrontation Clause, rather than its curtailment, recognizes the objectives behind the Bill of Rights:\(^{241}\)

Diminution of the right to confrontation is inconsistent with the aims of the Bill of Rights. The failure to hold statements elicited by the prosecution to a higher standard of admissibility defeats the objective of protecting the individual against the power of the government and interferes with the jury’s historical function of guarding our civil liberties.\(^{242}\)

C. The ACLU’s Adoption of a Categorical Approach

Analytically, the categorical approach adopted by the ACLU differs from the Supreme Court’s approach, yet it is consistent with virtually all of the results reached by the Court.\(^{243}\) However, both the testimonial view and the prosecutorial restraint method focus primarily on

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\(^{239}\) See Berger, supra note 10, at 607. Professor Berger looked at five separate categories under her model. The categories were (1) former testimony; (2) declarant produced; (3) co-conspirators statements; (4) declarations against interest; and (5) the residual hearsay exception. Id. at 607-12. Under the former testimony category, the rules promulgated by the Supreme Court fit under the prosecutorial restraint model. Id. at 607. Under the declarant produced category, if the declarant testifies at trial about his out-of-court statements, he has satisfied the Confrontation Clause. If, however, the declarant is particularly vulnerable, then the prosecution is required to produce a tape of the interview or a transcript from a hearing. Id. at 608-09. Under the co-conspirators statements category, statements elicited by an informant or a government agent are presumptively excluded unless the declarant testifies or the government produces a recording. Id. Custodial declarations against penal interest are per se excluded, and if it is a non-custodial interview the court must examine the circumstances leading to the statement. Id. at 609. The residual hearsay exception covers both statements made to the grand jury and a child’s statements. Id. at 610-12. If the statements are made to a grand jury, the testimony must be excluded unless the accused caused the witness’ unavailability at trial or the witness died before trial. Id. Finally, concerning children’s statements, Professor Berger took a strong stand in suggesting that unless there is production of the questions, the testimony should not be presented at trial, even if the statement is reliable or the child is produced. Id. at 611-12.

\(^{240}\) Id. at 563-64; White, 502 U.S. at 358-66. This approach was advocated by Justice Thomas in White v. Illinois. Id.

\(^{241}\) See Berger, supra note 10, at 564. Professor Berger utilized similar reasoning as Professor Friedman in the sense that she felt reliability led to “illusory constitutional protection.” Id. However, her approach differed from Professor Friedman’s in that her key question was whether the government participated in making the declarant a witness against the defendant. See Brief for Petitioner, supra note 71, at 23.

\(^{242}\) See Berger, supra note 10, at 613.

\(^{243}\) See Brief for Petitioner, supra note 71, at 25.
whether confrontation is in fact necessary.\textsuperscript{244} As offered, in \textit{Lilly}, a
categorical analysis introduces a bright line test to confrontation
cases.\textsuperscript{245} The categorical approach is based on the Confrontation
Clause’s original intent to protect categorical procedural rights, such
as the right to counsel. Further, placement of the right to confronta-
tion in the Sixth Amendment fortifies this conclusion, similar to the
argument put forth by the prosecutorial restraint model.\textsuperscript{246}

Considering the Sixth Amendment in its entirety, it is clear that
there is a bundle of procedural rights that “have more then the right
to accurate fact-finding at their core;” however, the stripping of proce-
dural objectives to further rules of evidence only occurs in the applica-
tion of the Confrontation Clause.\textsuperscript{247} For example, the use of the
general approach in \textit{Ohio v. Roberts} not only rid the Confrontation
Clause of absolute procedural rights, but also thwarted confrontation
analysis, providing courts with virtually unreviewable discretion in de-
termining reliability and trustworthiness on an individual case basis.\textsuperscript{248}

The use of either one of the categorical approaches leads to virtu-
ally the same results reached by the Supreme Court without the need
to entangle confrontation with hearsay. Moreover, the application of
either the categorical approach to \textit{Lilly} results in a favorable outcome,
consistent with the Supreme Court’s judgment, but without the use of
several modes of analysis in order to reach the same result.

1. \textbf{The Attributes of a Categorical Approach on Confrontation
Analysis}

The ACLU, in its amicus curae brief in \textit{Lilly}, stated that the exact fit
the Supreme Court found between the hearsay rule and the Confron-
tation Clause, when the statement satisfied a “firmly rooted” hearsay

\textsuperscript{244} \textit{Id.} at 25 & n.41.

\textsuperscript{245} \textit{Id.} at 20.

\textsuperscript{246} \textit{Id.} at 14. See \textit{supra} notes 221-242 and accompanying text.

\textsuperscript{247} See Brief for Petitioner, \textit{supra} note 71, at 14. The ACLU compared the right of confronta-
tion to the right of counsel and the right to a jury trial. It posited that the right to counsel is
found to be fundamental even if it disrupts the factfinding process. \textit{Id.} Furthermore, the right to
trial by jury is also found to be fundamental even if a judge may be more knowledgeable and
capable of unraveling complicated testimony. \textit{Id.}

\textsuperscript{248} See Douglass, \textit{supra} note 8 and accompanying text. \textit{See also} Brief for Petitioner, \textit{supra}
note 71, at 15-16, 19. The ACLU noted that in Europe, under the European Convention on
Human Rights, the right to confrontation is recognized as a procedural right, and since the doc-
trine of common law tradition is not encumbered by the hearsay doctrine, there are no hearsay
rules under civil law, therefore Europeans hand down unhindered and articulated decisions re-
garding the right to confrontation. \textit{Id.} at 15-16. Thus, the ACLU concluded that the Confronta-
tion Clause, in the United States as well as Europe, should guarantee a categorical procedural
right superior to the law of hearsay. \textit{Id.} at 20.
exception, gave lower courts a tremendous amount of leeway to admit hearsay statements against a criminal defendant. In advocating a categorical approach, the ACLU found that the "firmly rooted" test had not been clearly applied in past Supreme Court cases. For instance, in White v. Illinois, the United States Supreme Court affirmed the Circuit Court of Vermilion County and Appellate Court of Illinois' decision to admit statements made by a four year-old in the course of receiving medical care, which implicated the defendant as her sexual abuser. The Court justified the admission of the statements, made during medical diagnosis and treatment, by commenting that such "firmly rooted" statements were recognized in the Federal Rules of Evidence and were "widely accepted among the states."

On the other hand, in Lee v. Illinois, the United States Supreme Court rejected the Appellate Court of Illinois' admission of a statement against penal interest, stating "[t]hat concept [declaration against penal interest] defines too large a class for meaningful Confrontation Clause analysis." The hearsay exception was not allowed even though the Federal Rules of Evidence, along with various states, had expanded the hearsay exception to include declarations against penal interest. When viewed together, it is clear that White and Lee are not reconcilable.

In White, the Court found both spontaneous declarations and statements made for purposes of medical diagnosis or treatment inherently reliable because they were codified in the Federal Rules of Evidence and widely accepted by the states. In so doing, the Court saw the need for confrontation to be dispensable. In contrast, the Court in

249. Brief for Petitioner, supra note 71, at 16-17 (citing Inadi, 475 U.S. at 387; White, 502 U.S. at 357 (finding that a "firmly rooted" hearsay exception is so trustworthy that confrontation and cross-examination would add little to its reliability)).
250. Id.
251. See id. at 17.
252. White, 502 U.S. at 348-49.
253. Id. at 355, 356 & n.8. However, it is relevant that the enactment of the Federal Rules of Evidence was not until 1975, and prior to that time, the hearsay exception that allowed evidence to be admitted, in White, was not yet an exception included as generally admissible even if the statement was relevant to diagnosis or treatment. See Brief for Petitioner, supra note 71, at 17.
255. Id. at 544 & n.5.
256. See Brief for Petitioner, supra note 71, at 17-18. See also supra note 165 and accompanying text.
257. See Brief for Petitioner, supra note 71, at 18.
259. See Brief for Petitioner, supra note 71, at 18. The ACLU found that "the need for confrontation disappears—even if the exception was extended by the Rules themselves beyond prior law and even if the particular application is poorly grounded in the rationale of the exception." Id.
Lee found that an inherently untrustworthy statement, such as a statement against penal interest, could not automatically be "firmly rooted," even though that type of statement was codified in the Federal Rules of Evidence and widely accepted as a hearsay exception by the states.\(^\text{260}\) Thus, in Lee, the Court saw confrontation as an indispensable right.\(^\text{261}\) The ultimate problem, illustrated by the inconsistent court decisions in White and Lee, is that courts lack guidance on how to approach confrontation analysis. For example, if a statement falls under the Federal Rules of Evidence as a "firmly rooted" hearsay exception, and is generally accepted by the states then a court, must question whether there is a confrontation problem or whether the right to confrontation is not an issue because of prevailing hearsay exceptions. Looking at White and Lee side by side, the courts may never know.

In addition, the ACLU argued that the "particularized guarantees of trustworthiness" portion of the Robert's test was inadequate to sufficiently protect a defendant.\(^\text{262}\) According to the ACLU, nothing in the holding of Lee precluded a court from using its discretion in admitting an out of court statement if it found that the statement had "particularized guarantees of trustworthiness."\(^\text{263}\) Thus, the ACLU argued that courts would effectively retain "enormous, virtually unreviewable, discretion in determining trustworthiness on a case-by-case basis."\(^\text{264}\)

The Lilly case demonstrates the subjective nature of the trustworthy inquiry.\(^\text{265}\) Mark Lilly's confession, which incriminated himself to
some degree, could not circumvent the right to confrontation because
there were factors that may have led him to falsely accuse his brother
of the crime. The ACLU argued that it was not fair to deprive a
defendant of the right to face his accusers simply because of a judge’s
preconceived notion of human behavior, such as the notion that
brothers would not falsely incriminate each other. The ACLU con-
tended that “hearsay exceptions may hinge on such cliches, but a def-
fendant should have the right to challenge his accuser in the
courtroom when the out-of-court statement falls within the perimeter
of core values on which the Sixth Amendment right of confrontation
rests.” The ACLU found that neither the “firmly rooted” test, nor
the “particularized guarantees of trustworthiness” test protected the
defendant or guaranteed the ancient right of confronting an accuser
“face to face,” as protected by the Sixth Amendment.

The testimonial view and the prosecutorial restraint method are the
two categorical approaches that the ACLU advocated as best repre-
senting the true nature and function of the Confrontation Clause. The
use of the categorical approach is tantamount to applying a bright
line rule to confrontation analysis. If the accused does not have the
opportunity to confront the witness, the issue of whether the witness is
unavailable, as proscribed in the testimonial view, is not a concern and
the statement is not admissible.

There are a few exceptions to the categorical approach. If the ac-
cused caused the unavailability of the witness, the confrontation right
is forfeited. Additionally, if the witness dies prior to testifying, the

266. Id. at 19.
267. Id. The ACLU noted that corroborating evidence would not help authenticate the state-
ment because the trial court’s discretion would be unlimited, corroborating evidence is itself
highly unreliable and the Confrontation Clause analysis would turn into the question of whether
the judge thinks the defendant is guilty. Id. at 20 & n.35. See also Idaho v. Wright, 497 U.S. 805,
822 (1990) (rejecting the idea that “evidence corroborating the truth of a hearsay statement may
properly support a finding that the statement bears ‘particularized guarantees of
trustworthiness’”).
268. Brief for Petitioner, supra note 71, at 19-20.
269. Id. at 20.
270. Id. at 20-25.
271. See Brief for Petitioner, supra note 71, at 21.
272. Id. at 21 & n.36.
273. Id. at 21. See, e.g., Friedman, supra note 39, at 1035 (finding that, in a very narrow qualifi-
cation, confrontation rights may depend on whomever causes the unavailability of a declarant); United States v. Mastrangelo, 693 F.2d 269, 272-74 (2d Cir. 1982) (allowing grand jury testimony
admitted at trial because accused had knowledge of plan to kill witness and did not warn). Federal
Rule of Evidence 804(b)(5) is an exception to the rule against hearsay when the accused
causd the unavailability of the witness or “has engaged or acquiesced in wrongdoing that was
intended to, and did, procure the unavailability of the declarant as a witness.” Fed. R. Evid.
804(b)(5).
prosecution could argue that there was no way of anticipating that the witness would die suddenly or naturally, and thus provide the accused the ability to confront the witness beforehand.\textsuperscript{274} However, this exception would only arise under the testimonial approach, a person is considered a witness under the Confrontation Clause only if their statement was testimonial in nature.\textsuperscript{275} It is necessary to include as testimonial those statements that are made to authorities informally, that is without a formal oath or without containment in “formalized testimonial materials,” but with knowledge that they will be used at trial.\textsuperscript{276} This would protect the integrity of the Confrontation Clause, as well as the accused, because authorities attempting to elicit statements out of the reach of the Confrontation Clause, through the use of informal means would be stymied by use of statements at trial that were elicited even though the witness was not under oath.\textsuperscript{277}

Under the prosecutorial restraint method, the only bar to the admissibility of a statement is whether it was made to a government agent.\textsuperscript{278} However, if the unavailability of a witness occurs through the fault of the prosecutor, or falls under a claim of privilege, as in the Lilly case, the state should bear the risk of the declarant becoming unavailable.\textsuperscript{279} The presumption is that the prosecution can take

\begin{itemize}
  \item \textsuperscript{274} See Brief for Petitioner, supra note 71, at 28 & n.47. The ACLU argued that “the prosecution rather than the accused should bear the risk that the declarant will later become unavailable. The prosecution could presumably have protected itself and preserved the defendant’s confrontation right by taking the declarant’s deposition, except perhaps in those cases where the death unexpectedly occurs.” \textit{Id}.
  \item \textsuperscript{275} See Friedman, supra note 39, at 1039 (finding that whether or not a witness’ statement is testimonial depends largely on the procedural rules utilized in the legal system because those rules will determine how the statement is used).
  \item \textsuperscript{276} See Berger, supra note 10, at 607 (stating that “[u]nder a prosecutorial restraint model, statements elicited by the prosecution and admissible pursuant to hearsay exceptions would have to be reanalyzed to determine conformity with the Confrontation Clause”).
  \item \textsuperscript{277} See Brief for Petitioner, supra note 71, at 28 & n.47. The ACLU commented that in a case where there is an asserted claim of privilege “all the cards are in the state’s hands. It could try the witness first; it could strike a plea bargain; it could grant use immunity. If the state refuses to play any of those cards, it—not the accused—should pay the price of that refusal.” \textit{Id}. \textit{See also} Friedman, supra note 39, at 1032 (finding that unavailability is “a complex factor in the jurisprudence of the Confrontation Clause”).
  \item \textsuperscript{278} See Brief for Petitioner, supra note 71, at 28.
  \item \textsuperscript{279} See Friedman, supra note 39, at 1032-33 & n.102 (citing \textit{Pointer}, 380 U.S. at 407 (finding that the right of confrontation was violated where a testimonial statement was admitted without giving the accused adequate opportunity to cross-examine)). However, Professor Friedman found that there might be tactical reasons that a prior opportunity to cross-examine does not yield an adequate opportunity to cross-examine as the Confrontation Clause anticipates. \textit{Id}. at 1033 n.103-04 (citing \textit{Green}, 399 U.S. at 164-66 (holding that a preliminary hearing provided an ample opportunity for accused to examine the witness); Barber v. Page, 390 U.S. 719, 722 (1968) (noting that in circumstances where defendant has cross-examined a declarant at a prior judicial proceeding the requirement of confrontation was satisfied)).
\end{itemize}
steps, such as depositions, to preserve the defendant’s rights. If the witness becomes unavailable, and the accused had the opportunity to examine the witness under oath before trial, but did not take advantage of this opportunity, this should not preclude admission of the statement into evidence.

It then follows that statements made by a witness who testified at a grand jury proceeding should not be admissible unless the defendant was allowed to confront the witness.

In Lilly, Mark Lilly’s statements clearly came under the testimonial view. Authorities elicited his statements for the purpose of using them at trial, and they were testimonial in nature. Thus, he was a witness as defined by the Confrontation Clause. Hence, if there was no right to confrontation between the accused, Ben Lilly, and his brother then the statements were inadmissible. The ACLU argued that Mark Lilly’s statement was similarly inadmissible under the prosecutorial restraint model. As mentioned earlier, the key question under this model turned on whether the government participated in soliciting the statement from the declarant, and if so, then the Confrontation Clause demands that the defendant have the right to confront his accuser.

280. See Brief for Petitioner, supra note 71, at 22. The ACLU noted that this would “eliminate the current practice of subjecting grand jury statements to a ‘particularized guarantees of trustworthiness’ analysis when they are offered under a residual hearsay exception.” Id. at 22 & n.37 (citing United States v. Gomez-Lemos, 939 F.2d 326, 332-33 (6th Cir. 1991) (quoting Wright, 497 U.S. at 816)).

281. Brief for Petitioner, supra note 71, at 22-23. See Friedman, supra note 39, at 1038-43. Professor Friedman suggests a hypothetical to dramatize the effect of not including less-formalized statements as fodder for confrontation rights:

A woman tells a counselor at a private shelter that she has been raped. The counselor says:

Please make a statement for us. We will videotape it and send the tape to the prosecutor. I anticipate that the prosecutor’s office will use it at trial as the cornerstone of its case against your assailant. The prosecutor won’t have to call you as a witness, because that’s just not necessary any more . . . . The accused might call you—but only if he dares, and only if you’re then available. Which, so far as the law is concerned, you needn’t be. Oh, and by the way, since you’re not speaking under oath, don’t worry about the prosecutor going after you for perjury.

Id. at 1041.

282. See Brief for Petitioner, supra note 71, at 22-23.

283. Id. at 23.

284. Id.

285. Id.


287. See Berger, supra note 10 and accompanying text.
Under this approach, confrontation protects the defendant against statements that the government might elicit through its enormous power to coerce or induce. If confrontation is not required, the government has the huge advantage of choosing whether to offer the contents of the statement through the testimony of the often discreditable declarant, or through the testimony of a presumptively upright person involved in law enforcement.288

The ACLU noted that there was no requirement under this approach to exempt all other hearsay from Confrontation Clause analysis, as this approach was “responsive to the Bill of Rights’ concern with restraining the might of the government; other objectives of the Bill of Rights and the Sixth Amendment support restrictions on hearsay even though the government played no role in its creation.”289 In Lilly, if Mark Lilly’s interrogation and ultimate confession to police was admitted into evidence without Mark having to appear under oath in open court, it is clear that under a prosecutorial restraint model that the admission was a violation of Ben Lilly’s right to confrontation.290

These two approaches, endorsed by the ACLU, do have limitations.291 However, given the amorphous nature of the Confrontation Clause as it stands today, and its relegation to simply another hearsay exception, the categorical approach provides a more objective method to analyze the rights of the accused under the Confrontation Clause.

2. Possible Weaknesses in Adopting a Categorical Approach

The first problem with a categorical approach stems from the fact that both the testimonial view and prosecutorial restraint method eschew a reliability standard. The absence of a reliability factor to determine the admissibility of a statement under the Confrontation Clause is a “double-edged sword.”292

On the one hand, if the statement is not testimonial, so that the declarant should not be deemed to have been acting as a witness in

288. See Brief for Petitioner, supra note 71, at 24.
289. See Berger, supra note 10, at 563. Professor Berger found that Justice Thomas would endorse, through his analysis, the exemption of other hearsay. Id. Professor Berger contended that her article focused on the circumstances in which the statement was obtained and did not “draw distinctions based on the form in which the statement was memorialized.” Id. at 564. She noted that Justice Thomas stated, in White v. Illinois, that applying the Confrontation Clause to statements made in the anticipation of legal proceedings, similar to the approach of Professor Friedman, would “entangle the courts in a multitude of difficulties.” Id. at 563-64 n.30 (citing White, 502 U.S. at 364 (Thomas, J. concurring)).
290. See Brief for Petitioner, supra note 71, at 24.
291. See infra notes 292-320 and accompanying text.
292. See Friedman, supra note 39, at 1029 (positing that a reliability standard “is immune to effective appellate monitoring”).
making it, the Clause should not bar its admissibility, even if the statement does not seem reliable. On the other hand, if the statement is testimonial, so that the declarant was acting as a witness in making it, then the Clause should bar its admission unless it was made or reaffirmed in the manner appropriate for testimony, subject to oath and cross-examination.293

While the absence of a reliability factor as a criterion for analysis under the Confrontation Clause may be a “double-edged” sword, reliability itself is very difficult to determine.294 “[E]vidence that is not particularly reliable can be very helpful to the truth determination process . . . the paradigm of acceptable evidence—live testimony given under oath and subject to cross-examination—is not particularly reliable; if it were, conflicting testimony would not be such a common aspect of trials.”295

Another potential problem, concerning the testimonial approach, is the subjective mindset of witnesses deemed to have made a testimonial statement.296 The extension of the word “witnesses” to include those statements made informally, but with the knowledge that the statements are to be used as testimony, requires difficult factual determinations.297 Most cases involve difficult factual determinations, which are “a familiar, and tolerable, problem in protecting a fundamental right.”298 In fact, it has been ascertained that almost all rules of law require difficult determinations and for the most part cases involving the Confrontation Clause would not involve a question of testimo-

293. Id. Professor Friedman felt that this analysis helped justify the outcome in Lee v. Illinois. Id. The problem, according to Professor Friedman, was not that the statement in that case was unreliable, in fact, it was probably very reliable considering its self-inculpatory content. Id. The problem was that the statement was not made under oath or during cross-examination and was tantamount to testimony against Lee. Id. Professor Friedman addressed the issue of a statement so unlikely to be true that it has little probative value. Id. at 1029 n.90. He felt that such a statement should be excluded under Federal Rules of Evidence 403. Id. He also directed the reader to another article he authored, Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket, 1995 SUI. CR. REV. 277, 309, which addressed the situation concerning a witness reaffirming at trial a prior statement. Id. at 1029 n.91.


295. Friedman, supra note 39, at 1028.

296. For an answer to Professor Friedman’s extension of the word “witnesses,” see Akhil Reed Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 GEO. L.J. 1045. 1050 (1998).

297. See Friedman, supra note 39, at 1042. Professor Friedman acknowledged that his extension of the word “witnesses” is beyond what Justice Thomas and Professor Amar would include under confrontation analysis. Id. See supra note 289 and accompanying text.

298. Friedman, supra note 39, at 1043.
A broader definition of the term "witnesses" ensures that witnesses will not avoid confrontation by testifying informally. A problem with choosing only one approach is that certain statements may avoid Confrontation Clause analysis, while others may fall directly in its path. For instance, a statement elicited by an undercover government agent, and admitted as testimony, unbeknownst to the declarant, would fall within the prosecutorial restraint model and require the right of confrontation. However, the same statement may not fall within the ambit of the Confrontation Clause under the testimonial view because the statement was not made with the intent that it be used in a forthcoming trial or against the accused. Nonetheless, since the government elicited the response by deliberately concealing their identity, and used the statement in the investigation or trial, it is conceivable that the declarant was acting as a witness. Otherwise, the government could utilize trickery to elicit statements from declarants, such as deliberately concealing their identity in order to avoid reproducing the declarant at a trial. With the use of trickery, the government is able to circumvent the Confrontation Clause, thus denying the accused his fundamental right to confront the witnesses against him.

The cases concerning children and the right to confrontation also involve sensitive issues. In applying the two approaches, different methods have been adopted in order to manage the special circum-

299. See Friedman, supra note 39, at 1042-43. Professor Friedman interjected a few rules of thumb when trying to ascertain whether a statement is testimonial:

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.

Id.

300. Friedman, supra note 39, at 1043.
301. See Brief for Petitioner, supra note 71, at 24 & n.40.
302. Id.
303. See Friedman, supra note 39, at 1039. Professor Friedman would find that since the declarant did not know that her statement was elicited to be used at trial, the declarant did not have the requisite intent for the statement to be considered testimonial. Id.
304. See Brief for Petitioner, supra note 71, at 24 & n.40. The ACLU did not reach the problem of whether the statement was testimonial, since Mark Lilly's statement was clearly not in this category. Id. However, since the prosecution deliberately elicited the response from Mark, for use in an investigation or trial, the statement was clearly testimonial.
305. Id. at 26 & n.44.
stances surrounding children and their testimony.\textsuperscript{306} For example, the prosecutorial restraint method covers statements that are elicited from children where a government agent participated in the coercion.\textsuperscript{307} This approach cautions that there are several factors that require an extraordinary safeguard when dealing with out of court statements by a child. These factors include: "The vulnerability of the witness, the high potential for the witness's absence at trial, and the pressures on the prosecutor to get a conviction . . . ."\textsuperscript{308} Furthermore, this approach advocates having a contemporaneous recording at the time a child's statement is being taken by a prosecutor, and moreover, not having the testimony admitted into evidence unless the recording is available.\textsuperscript{309} With this safeguard in place, the jury is assured of hearing the child's testimony and not a paraphrased rendition.\textsuperscript{310}

Even if the government subsequently produces the child as a witness, the jury may find it extremely difficult to ascertain whether the initial questioning of the child tainted her perception and memory. When the child is so young that it is unlikely that he or she will qualify as a witness, the interviewer knows that the statement elicited will most probably constitute the chief evidence against the accused.\textsuperscript{311}

The testimonial view, on the other hand, considers other factors with regard to children.\textsuperscript{312} For example, under the testimonial view, a very young child would not be considered a witness for Confrontation Clause purposes because of her limited understanding.\textsuperscript{313} Moreover, a child could be susceptible to intimidation, which may lead to a forfeiture of the confrontation right by the accused under the testimonial view.\textsuperscript{314} However, this view espouses that a child witness, if at all possible, be put on the stand if the child's statement is one to which the right of confrontation should apply, so that the right is not defeated by an invocation of a hearsay exception that admits the evidence into court.\textsuperscript{315} In supporting this view, one commentator wrote,

\begin{itemize}
  \item \textsuperscript{306} Id. at 26.
  \item \textsuperscript{307} See Berger, supra note 10, at 611-12 (finding that manipulation of a child declarant would not be a problem for an over-aggressive interviewer).
  \item \textsuperscript{308} Id. at 612.
  \item \textsuperscript{309} Id.
  \item \textsuperscript{310} Id.
  \item \textsuperscript{311} Id. at 611.
  \item \textsuperscript{312} See Friedman, supra note 70 at 531-535 (advocating an approach, concerning child declarants, that would not require developing more exceptions to the rule against hearsay).
  \item \textsuperscript{313} Brief for Petitioner, supra note 71, at 26 & n.44.
  \item \textsuperscript{314} Id.
  \item \textsuperscript{315} See Friedman, supra note 70, at 532. Professor Friedman listed several factors that weigh in favor of having a child declarant testify: (1) child declarants are no more susceptible to trauma and fear in the courtroom as adults; (2) available evidence suggests that testifying does not have
\end{itemize}
I find disturbing an approach that says to the accused, in effect, “Well, perhaps you have a fundamental right at stake here, but someone else would be hurt if we allowed you to invoke it against the state and yet insisted on prosecuting you [sic]. Perhaps it is too late in this “age of balancing” to argue against such willingness to balance away the rights of an accused against the state. But I prefer viewing the accused’s fundamental rights, at least at their core, as truly fundamental and not subject to being balanced away.\footnote{1.183}

Finally, in evaluating the testimonial approach, there has been some concern about prior testimony adequately meeting the confrontation requirement, effectively preventing the witness from testifying again at trial, regardless of availability.\footnote{316} According to a testimonial view, this type of situation calls for fact specific exception.\footnote{317}

In examining some of the differences and idiosyncrasies between the categorical approaches, it is important to note that neither the testimonial view, nor the prosecutorial restraint method, answers every problem or solves every fact pattern neatly.\footnote{318} In some cases, a difference in outcome is inevitable. The importance of the categorical approach, as advocated by the ACLU, is the creation of a bright line rule that is readily discernable to lower courts.\footnote{319} Furthermore, this approach eliminates the amorphous and subjective nature of the general approach enunciated by the Court in White, and followed by the Court in Lilly. Therefore, if the categorical approach were used in place of the Court’s “reliability” analysis, the Confrontation Clause would stand independent of the Rules of Evidence and the hearsay doctrine. Furthermore, adoption of one of the categorical approaches would not change the outcome of prior decisions of the Supreme

\footnote{316. \textit{Id.} at 533 (citations omitted).}
\footnote{317. \textit{See Friedman, supra} note 39, at 1033 (noting that “our system has a general preference that the witness testify live”).}
\footnote{318. Friedman, \textit{supra} note 39, at 1032-33. In fact, Professor Friedman addressed this concern in his article. He found: that a plausible argument supports the proposition that the prior opportunity to examine the witness satisfies the Clause: The accused has had the opportunity to “be confronted with” the witness when the witness gave the testimony, and it is not clear that the Clause requires that the confrontation be repeated at trial if that is possible. \textit{Id.} at 1033.}
\footnote{319. \textit{See Douglass, supra} note 8, at 195 & n.15 (reciting a list commentators and their different approaches to confrontation).}
\footnote{320. \textit{See Friedman, supra} note 39, at 1042-43 (finding that “if a statement fell within the Clause, the protection would, in a meaningful sense, be absolute”).}
Court, but rather, it would provide a stable and easy rule of law for the lower courts to follow.

V. THE EFFECT OF A CATEGORICAL APPROACH ON PAST JURISPRUDENCE AND FUTURE COURT CASES

The ACLU’s categorical view of the Confrontation Clause is consistent with most of the Supreme Court’s past decisions.321 The ACLU has commented that “although the Court has not consciously articulated our approach, its decisions have reflected the force of that approach.”322 Moreover, the ACLU has not suggested that all difficult decisions could be easily decided under the categorical approach, but rather, many of the cases the Court has grappled with in the past would become more straightforward.323 Further, future cases decided under a categorical approach would not stray from the results reached by the Court in past cases, yet the analysis would differ significantly; a result lower courts might eagerly embrace.

The ACLU examined a number of cases to establish the premise that past Supreme Court case decisions do not differ significantly under a categorical approach.324 First, the ACLU looked at Pointer v. Texas,325 Douglas v. Alabama,326 and Lee v. Illinois.327 The ACLU ascertained that in these three cases there were two common elements.328 First, the declarant knowingly made a statement to government agents concerning a criminal investigation.329 Second, the accused did not have an opportunity to confront the declarant.330

321. See Brief for Petitioner, supra note 71, at 25.
322. Id.
323. Id. at 25. The ACLU, in its brief, did not address all the possible problems that might arise under the testimonial view or the prosecutorial restraint method. However, problems may arise because the ACLU’s approach focuses on when confrontation is necessary, not what is required for confrontation. Id. at 25 & n.41. Problems that arise when a witness has a faulty memory, as in United States v. Owens, or whether the accused and the witness must always be in the same room for adequate confrontation protection, as in Maryland v. Craig and Coy v. Iowa, were not addressed in the ACLU’s brief. Id. These types of situations are unique and must first follow the guidelines in either approach and then possibly take into account the specific facts of each case; considering each case based on its facts is hardly a departure from routine jurisprudence for the Supreme Court. While not all answers may be clear what is clear, is that under the approach advocated by the ACLU, the Supreme Court would eliminate a multitude of problems and lower court confusion over the correct analysis.
324. Id. at 25-30.
325. 380 U.S. 400 (1965). Note that in Pointer v. Texas, the Supreme Court made applicable to the States the confrontation right through the Fourteenth Amendment. Id. at 407-08.
328. See Brief for Petitioner, supra note 71, at 25.
329. Id.
330. Id. at 25-26.
Under these facts, both the prosecutorial restraint model and the testimonial view would find that the declarant was a witness within the meaning of the Confrontation Clause, and under either categorical approaches, there would be a violation of the accused’s right to confrontation. More importantly, in Douglas and Lee, the accomplice made a statement to police that the accused was not able to adequately confront, a scenario similar to Lilly. Further, under a categorical approach, Lilly would be decided in the same manner as Douglas and Lee, thus, since the statement was made to a government official and the accused did not have ample opportunity to confront the witness, the right of confrontation was violated. This type of analysis narrows the debate on how the right to confrontation should be applied, and gives a bright line test that is easy to apply and straightforward.

The ACLU contrasted the Pointer-Douglas-Lee line of cases with Dutton v. Evans and United States v. Inadi. In these cases, the declaration was not issued in a judicial proceeding or to a government agent concerning a criminal investigation. Thus, the ACLU concluded that the statements were not within the realm of the Confrontation Clause, as defined by the testimonial view or the prosecutorial restraint model. In other words, although the statements at issue fell under other rules of evidence, the statements were not subjected to confrontation analysis because they did not fit under that analytical framework. In Lilly, the extrajudicial statements made by Mark Lilly were spoken to a law enforcement officer in the course of an interrogation. Those statements, therefore, do not fall under either Dutton or Inadi because they are subject to confrontation analysis.

331. Id. at 26. In both Douglas and Lee, the alleged accomplice made a statement that the accused did not have an adequate opportunity to confront. Id. at 25. This is the same scenario in Lilly v. Virginia.
334. See Brief for Petitioner, supra note 71, at 26.
335. The ACLU summarized these two cases as follows:
In Dutton, the statement was made by one prisoner to another. In Inadi, the statements were made by one member of a conspiracy to another, without any inducement by agents of the prosecution; they were not testifying but carrying on the ordinary business of the conspiracy. Thus, in neither of these cases were the declarants acting as witnesses when they made the statements in issue.
Id. at 26. Note, however, that even though confrontation may not be implicated, other hearsay exceptions may come into play. This section of the Comment will focus on how a categorical approach would not change the Court’s past decisions, thus other hearsay exceptions are not addressed.
In still other cases, such as *Mattox v. United States* and *California v. Green*, the accused had an opportunity to interview the witness before trial. Using either categorical approach, the unavailability of the witness, despite good faith efforts, does not preclude use of the earlier testimony due to the prior opportunity to interview the witness. Since the prosecution made a good faith effort to secure the attendance of a witness at trial, and the defendant had an adequate opportunity to cross-examine the witness, the right to confrontation was not violated. In *Lilly*, the accused, Ben Lilly, had no opportunity to cross-examine his brother concerning the statements made to the police. At trial Mark Lilly had refused to testify, asserting his Fifth Amendment right, yet the lower courts allowed the statements in against his brother citing the "firmly rooted” against penal interest hearsay exception. Under either categorical approach, the lower courts would not have let the statements into evidence because the analysis would immediately have found a violation of the Confrontation Clause when Ben Lilly did not have the opportunity to cross-examine his brother concerning the statements elicited by the police.

In addition, the ACLU noted that if the Supreme Court had used a categorical approach in *Williamson v. United States*, the analysis would have led directly to a violation of the Confrontation Clause. In *Williamson*, the accomplice confessed to police while implicating the accused in the crimes. The Court held that Federal Rule of Evidence 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is

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337. 399 U.S. 149 (1970). In *Green*, the accused cross-examined the witness at a preliminary hearing, but at trial the witness was uncooperative. *Id.* at 151-153.
338. See Brief for Petitioner, supra note 71, at 27-28.
339. *Id.* at 28.
340. See Friedman, supra note 39, at 1032-34 (discussing prior statements made at preliminary hearing or trial as sufficient to satisfy Confrontation Clause); see also Barber v. Page, 390 U.S. 719, 724-25 (1968) (finding that a witness is not "unavailable," "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial;" in addition, the Court found that the defendant did not waive his right of confrontation by not cross-examining the declarant at a preliminary hearing); *Mancusi*, 408 U.S. at 216 (holding that there was adequate opportunity to cross-examine the declarant at a prior trial and that the state's efforts to procure a declarant that was living in a foreign country were satisfactory). The ACLU found that these holdings were consistent with their categorical approach: "If the witness was unavailable at trial despite good faith efforts, the Confrontation Clause should not preclude use of the earlier testimony." Brief for Petitioner, supra note 71, at 27-28.
343. See Brief for Petitioner, supra note 71, at 29.
generally self-inculpatory.” While the Court found a violation of
the right to confrontation, the same result would be reached using a
categorical approach, albeit without the use of the rules of evidence
on hearsay. The witness made a confession to the police, thus, the
statement, under either the testimonial view or the prosecutorial re-
straint method, falls under the umbrella of confrontation analysis.
Therefore, the statement would have to be excluded, unless the ac-
cused had the right to confront his accuser. As a result, the use of a
categorical approach is more straightforward and does not involve the
hearsay rules in its determination. Moreover, the Court, in William-
son, narrowly construed the hearsay exception for declarations against
penal interest, causing the ACLU to state that “Williamson is thus a
good indication that the melding of the Confrontation Clause and of
hearsay doctrine tends not only to denigrate the constitutional protec-
tion, but also to make hearsay law unduly rigid.”

Nonetheless, the Court in its decision in Lilly turned to the general
approach articulated in Ohio v. Roberts. In Lilly, there was a clear
violation of Ben Lilly’s right to confrontation because statements
made by an accomplice to a government official, which the accused
had no opportunity to cross-examine, were admitted into evidence.
While the Court decided there was a violation of Ben Lilly’s right to
confrontation, because the accomplice’s confession was not suffi-
ciently reliable in order to be admitted without the opportunity for
cross-examination, the Court missed the opportunity to create a bright
line test to resolve the confrontation problem.

The question remains whether the Lilly opinion is a further dilution
of the Confrontation Clause or a narrowing of the hearsay doctrine.
The answer lies in the opinion itself. All nine Justices concurred in the
judgment; however, there were four separate opinions on how to ap-
proach the confrontation analysis. This is indicative of the convo-
luted status that still belies the Confrontation Clause, and the
difficulty lower courts will continue to have in deciding what hearsay
rule may trump the procedural right to confrontation. Therefore,
while taking a case to the Supreme Court may be one avenue to re-
solve differences in appellate court opinions concerning a right em-
bodyed in the United States Constitution, the Lilly case did nothing to

345. Id. at 600-01.
346. Id. The ACLU suggested that the holding in Williamson was far more restrictive then
prior authorities contended. See Brief for Petitioner, supra note 71, at 29. (citing 2 McCormick
On Evidence 344-45 (4th ed. 1992)).
347. Lilly, 527 U.S. at 124-25.
348. See supra notes 143-145 and accompanying text.
349. See supra notes 148-150 and accompanying text.
resolve the confrontation-hearsay tension. The Supreme Court’s plurality opinion and ultimate decision on the method to tackle a Confrontation Clause question is far from solidified. Furthermore, five members of the Court rejected the plurality’s definition of a declaration against penal interest.\(^{350}\)

The right of confrontation must be recognized as a fundamental part of a defendant’s right to due process, just as the right to counsel and the right to a trial by jury are considered part of the due process rights. The impact of changing the analysis toward a categorical approach would result in more symmetry in the otherwise asymmetrical interpretation of the Confrontation Clause. In other words, the guesswork courts currently use would disappear in Confrontation Clause analysis. Cases could be decided with the same set of rules, predictably and consistently, a benefit for both courts and legal practitioners alike. Further, the Court would not have to delve into \textit{stare decisis} by changing their analysis, allowing future cases to be decided with consistency. Simply put, the impact of such a change would necessarily keep courts on the same page without having to define amorphous terms such as “reliability” and “trustworthiness.”

When looking at the Court’s cyclical banter about an exception to the hearsay rule being “trustworthy” or “reliable,” based on the number of years it has been around, it seems ludicrous to base the right to confrontation, on such a subjective category. The categorical approach advocated in this Comment eliminates guess-work from the analysis process. However, the Supreme Court may not have permanently put Confrontation Clause analysis to rest since Justice Breyer, in \textit{Lilly}, acknowledged that the approach advocated by the ACLU was not lost on deaf ears, thus keeping the door open for a revision of confrontation analysis that utilizes a categorical approach.\(^{351}\)

\section*{VI. Conclusion}

This Comment is but one road concerning confrontation-hearsay analysis that the Supreme Court could travel down. It is important, however, that the road less traveled be taken. Ultimately, the Supreme Court needs to write an opinion that is authoritative on the

\footnotesize{\textit{350.} See supra note 151 and accompanying text. See also Daniel J. Capra, \textit{Out-Of-Court Statements and the Confrontation Clause}, N.Y.L.J., July 9, 1999, at 3, 4 (stating that the analysis in \textit{Williamson v. United States} is more authoritative on the subject of declarations against penal interest then the plurality opinion in \textit{Lilly}).}

\footnotesize{\textit{351.} \textit{Lilly}, 527 U.S. 142-43 (Breyer, J., concurring). Justice Breyer stated “I write separately to point out that the fact [that] we do not reevaluate the link [between confrontation and hearsay] in this case does not end the matter. It may leave the question open for another day.” \textit{Id}.}
right to confrontation, only then will the application of the Confrontation Clause in courts across the country become consistent. In addition, the constitutional right of confrontation, along with the defendants it protects, will no longer suffer the consequences of being judged a rule of evidence instead of a procedural right.

The right of confrontation is both procedural and fundamental. The foregoing analysis provided alternative means by which the Court can evaluate cases without turning confrontation into a rule of evidence. It is important that the Sixth Amendment retain its original purpose, to give the accused the right to confront "the witnesses against him." Otherwise, adequate protection will not be within the accused's reach, lower courts will continue to be flummoxed by Supreme Court decisions on the issue, and effective appellate review will be impossible because of amorphous decisions by the Court. A categorical approach would provide a rule that is easy to follow and does not use subjective criteria such as "reliability" and "guarantees of trustworthiness." Furthermore, the categorical approach will return the Confrontation Clause to its original meaning and historical roots in the Bill of Rights:

The Court will, we believe, continue to make decisions that reflect the demands of the confrontation right, because that right is such a fundamental, and intuitively appealing, aspect of civilized jurisprudence. But, if it continues to use hearsay law as the vehicle for those decisions, it will be unable to articulate either a robust understanding of the constitutional right or a sensible, truth-oriented, doctrine of hearsay.

Finally, a categorical approach to the Confrontation Clause is not only logical, but more importantly, necessary to save the right to con-

352. See supra note 3 and accompanying text.
353. See Brief for Petitioner, supra note 71, at 29-30. In concluding their amicus brief, the ACLU stated:

The Court could reach the proper result in this case without revisiting its approach to the Confrontation Clause. But to do so would just be to put one more patch on a tattered garment. It would leave lower courts perplexed on how to apply the Clause, because there would still be no constant guide to the Court's decisions. It would continue to make effective appellate review impractical, because decisions would still depend so heavily on analysis of the evidence in the particular case. It would require continuing reliance on hearsay doctrine to do the work that should be performed by the Confrontation Clause—to the detriment of both. It would mean that the Court's stated grounds of decision lack persuasive power. And it would miss out on the great principle underlying the Clause, one integral to the Sixth Amendment and with roots both [sic] deep and broad: When the government prosecutes an accused, the accused has a categorical right to confront "the witnesses against him."

Id.

354. Id. at 29.
frontation and untangle the web of confrontation-hearsay analysis that is currently plaguing the courts.

Natalie Kijurna