

## Dial-In Testimony

by Richard D. Friedman\* and Bridget McCormack\*\*

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

As we will show, it is now common practice for some prosecutors to prove a crime by offering the recording of a 911 call – that is, a telephone conversation between the alleged victim of the crime and an emergency assistance service. Similarly, prosecutors often offer evidence of statements made by the caller to a police officer who responded to the call. In this article, we will describe and explain prosecutors’ use and courts’ tolerance of this practice. We will then use this phenomenon to explore at a broader level what we believe are the defects in the Supreme Court’s current approach to the confrontation right, as exemplified most recently in its decision in *Lilly v. Virginia*,<sup>1</sup> and the possibility of re-conceptualizing the right in a way that would restore it to its rightful place.

Part I of this article describes the developing practice in which statements made in 911 calls or in follow-up conversations are often admitted at trial to prove the truth of the caller’s narration of a crime allegedly committed against him or her. The statements are sometimes admitted for this purpose, we will show, even if the caller does not testify at trial and the prosecution has failed to account for his or her absence – and even if the caller does testify but, without surprising the prosecution, gives an account fundamentally inconsistent with his or her earlier one.

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

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<sup>1</sup> 527 U.S. 116 (1999).

experience of one of us (McCormack) in domestic violence cases in Washtenaw County, Michigan.

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

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

## **I. The Phenomenon: The Dial-In Trial**

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

In 1995, the State of Ohio successfully prosecuted Jerry Lee for domestic violence. As noted by the trial court, "The only evidence offered by the state at trial was a tape recording of the victim's telephone call to 911 and the testimony of one of the two police officers responding to the scene."<sup>2</sup> In the tape recording, the victim, Lee's wife Kathy, says that her husband stabbed

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<sup>2</sup> State v. Lee, 73 Ohio Misc.2d 9, 657 N.E.2d 604, 607 (Hamilton Co. Munic. Ct. 1995).

her door, hit her and tried to throw her out the door.<sup>3</sup> When police officers arrived at the scene, two minutes after receiving a dispatch, the couple's 18-year-old son told them, "I think my father is killing my mother." Within five more minutes, Kathy made additional statements to one of the officers, including one that Jerry had tried to stab her. The trial court admitted all these statements, along with one of the officer's description of evidence he found at the scene – including slits in the door and slashes in the bedroom mattress – indicative of a physical struggle.

Neither Kathy Lee nor the son testified, and the state made no attempt to account for their absence. The court was not troubled by this. “[P]roceed[ing] to trial without the presence of the alleged victim” in domestic violence cases was not only “[i]n keeping with the new policy of the Hamilton County Prosecuting Attorney” but consistent with the practice “[i]n many jurisdictions across the country.”<sup>4</sup> The court pointed out that “[n]o rule of law requires that a battered partner testify against a once loved one for the state to proceed on a charge of domestic violence.”<sup>5</sup>

That is true, of course. That the prosecution need not present the testimony of the victim is demonstrated most vividly by murder cases, in which by definition the victim does not testify at trial.<sup>6</sup> But in a case like *Lee*, though the prosecution does not present the victim as a live witness, it does present her allegations as to what occurred. And the court found this approach perfectly acceptable. “Sometimes,” the court said, “all that is necessary is the testimony of a responding officer and a transcript of the 911 tape.”<sup>7</sup> And in the court's view Jerry Lee's was such a case. The court had little difficulty in determining that each of the offered statements fit within the hearsay exception for excited utterances. Therefore, in light of recent Supreme Court doctrine (which we discuss in Part III), the defendant's sixth amendment right to “be confronted with the witnesses against him” did not pose a problem.<sup>8</sup> In effect, the police officer was the complaining witness, and Lee's opportunity to cross-examine him satisfied his confrontation right.<sup>9</sup> And this was true without any need to inquire into whether Kathy or her son were – unlike a murder victim

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<sup>3</sup> Jerry Lee's angry voice is heard on the tape, saying that he no longer had a knife but that he had had one.

<sup>4</sup> 657 N.E.2d at 606-07.

<sup>5</sup> *Id.* at 607-08.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 608.

<sup>8</sup> *Id.* at 608 n.5. In some states, the confrontation clause of the state constitution might pose an obstacle to admission, however. See note 188 *infra*.

<sup>9</sup> *Id.*

– available to testify in court; availability, the court said, was “not an issue.”<sup>10</sup>

In short, the *Lee* court regarded this as “a textbook case of prosecuting the crime of domestic violence without the presence of the victim at trial.”<sup>11</sup> And the court was surely right in that respect. Jerry Lee’s case is not an anomaly, but rather representative of what has become a common phenomenon. Increasingly, across the country prosecutors are proving their cases – especially domestic violence cases but sometimes other cases as well<sup>12</sup> – by using statements taken by 911 operators and police officers responding to crime scenes to prove crimes instead of the witnesses themselves.

Prosecutors are proving cases in this way because it pays off. Though some defendants tried on the basis of this type of evidence have been acquitted,<sup>13</sup> prosecutors have won many convictions, and when those convictions have been appealed they have almost always been upheld.<sup>14</sup>

In some cases, prosecutors use this type of evidence in addition to the live testimony of the witness, essentially to bolster or corroborate that testimony.<sup>15</sup> More problematic, in some

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<sup>10</sup> *Id.* at 608 n.8.

<sup>11</sup> *Id.* at 607. There is, in fact, an Ohio “textbook” for prosecuting domestic violence cases without the complainant. See RONALD B. ADRINE & ALEXANDRA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW (West 1999), chs. 5-6.

<sup>12</sup> *United States v. Joy*, 192 F3d 761 (7<sup>th</sup> Cir1999); *State v. Ballos*, 1999 WL 733824 (Wis.App.).

<sup>13</sup> Prosecutors report roughly the same conviction rate in domestic violence cases tried with the complainant as in those tried without her. See note 60 *infra*. Some cases of acquittals have been reported in the press. See, e.g., Bruce Nichols, *Moon is Cleared of Assaulting Wife Last Year*, DALLAS MORNING NEWS, Feb. 23, 1996, at 1A. Warren Moon, the Minnesota Vikings’ quarterback was accused of assaulting his wife in 1995. The State of Texas proceeded with his prosecution over his wife’s objections and subpoenaed her to testify. She exculpated her husband in her testimony, but the prosecution asked the jury to find him guilty based on the other evidence in the case, including a 911 call placed by their son and Mrs. Moon’s statements to the police who responded to that call. Moon was acquitted; the prosecution may have had more luck had it gone forward without Mrs. Moon’s testimony.

<sup>14</sup> Most domestic violence cases are tried as misdemeanor cases. Misdemeanor convictions are rarely appealed, and when appealed rarely reported. But as summarized below there are already a substantial number of reported cases in which prosecutors won convictions based on statements to 911 operators and responding officers.

<sup>15</sup> See, e.g., *People v. Simpson*, 238 A.D.2d 611, 656 N.Y.S.2d 765, (2d Dept. 1997); *Commonwealth v. Brown*, 46 Mass. App. Ct. 279 (1999); *State v. McLaughlin*, 642 A.2d 173 (Me. 1994); *State v. Hernandez*, 127 N.M. 769, 987 P.2d 1156 (N.M. App. 1999); *State v. McGuire*, 1997 Minn. App. LEXIS 896; *State v. Issa*, 1998 Ohio App. LEXIS 686.

cases prosecutors use the evidence because, though the witness testifies at trial, she does so in a way that is unhelpful to the prosecution. It “has become lamentably common in cases of domestic violence” that the victim’s testimony at trial is directly contrary to the statements she earlier made on a 911 call and to a responding officer.<sup>16</sup> In such cases prosecutors have often been allowed to introduce those prior inconsistent statements – even without the need to prove that the prosecutor was surprised by the trial testimony – and have secured convictions.<sup>17</sup>

Increasingly, though, prosecutors are finding that there is no need to put the 911 caller on the witness stand at all in order to use her prior statements. In some cases, they have used the statements because, for one reason or another, the 911 caller is unavailable to testify at trial.<sup>18</sup>

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<sup>16</sup> Williams v. State, 714 So.2d 462, 463 (Fla. App. 3d Dist. 1997).

<sup>17</sup> See State v. Mineo, 2001 Wash App LEXIS 59; State v. Sloat, 2000 Ohio App LEXIS 387; Gutierrez v. Anchorage, 1999 Alas.App. LEXIS 35; State v. Johnson, 1999 Minn. App. LEXIS 1316; Williams v. State, 714 So.2d 462 (Fla. App. 3 Dist. 1997); State v. Smith, 1998 Ohio. App. LEXIS 6454; State v. Borelli, 227 Conn 153, 629 A2d 1105 (1993); Impson v. State, 721 N.E.2d 1275 (Ind. Ct. Apps. 2000); Bill Miller, *Officials Persist in Domestic Violence Case; D.C. Officer is Convicted Despite Victim’s Recanting*, WASHINGTON POST, April 11, 1996, at B01 (complainant alleged in 911 call that her fiancé, a police officer, had beaten her, but recanted before trial and repeated recantation in testimony; prosecution used earlier statement to gain a conviction); Jennifer Liebrum, *Jury Convicts Husband of Assault; Wife Testifies that He Didn’t Hit Her*, HOUSTON CHRONICLE, Apr. 26, 1996, at A32 (prosecutor used victim’s statements to the responding police officer, and the 911 tape of her daughter calling to report the incident, to gain a conviction when the witness testified that her husband did not hit her).

In one case tried for the defense by law students under McCormack’s supervision, the complainant testified that she lied to the 911 operator, and to the police officers who responded to her call, to get her husband, the defendant, out of the house. The complainant was an imperfect witness in more ways than this. She was facing her own domestic violence charges and admitted to having been very high when she called 911. The jury convicted the defendant, though the court later set aside the conviction and dismissed the complaint for unrelated reasons. Trial notes on file with authors.

<sup>18</sup> See State v. Edwards, 31 S.W.3d 73 (Mo. Ct. Apps. 2000) (5th amendment privilege; prosecution uses 911 tape to prove case); Kwon v. State, 517 238 Ga. App. 617, S.E.2d 83 (Ga. App 1999) (wife invoked spousal privilege to avoid testifying); Sorrow v. State, 234 Ga. App. 357, 505 S.E.2d 842 (Ga App 1998) (victim invoked spousal privilege to avoid testifying); People v. Hendrickson, 459 Mich 229, 586 N.W.2d 906 (1998) (victim recants after the defendant is arrested and informs prosecutor that she will be asserting her 5<sup>th</sup> amendment privilege and prosecutor proves case with her 911 call and statement to police at scene); State v. Archuleta, 955 S.W.2d 12 (Mo. App. 1997) (witness claimed that she could not remember anything about the night in question other than the police officer showing up at her door); Tejada v. State, 905 S.W.2d 313 (Tex. App. 1995); State v. Krakue, 726 A.2d 458 (R.I. 1999) (victim absented herself from the state); People v. Hernandez, 71 Cal.App.4<sup>th</sup> 417, 83 Cal. Rptr.2d 747 (1999); State v. Cornell, 129 Ohio App.3d 106, 717 N.E.2d 361 (1998). In *Cornell*, the complainant was apparently unavailable to testify because she would have asserted her 5<sup>th</sup> amendment privilege against incrimination, see 129 Ohio App. 3d at 115, and the state conceded “that its case rested entirely upon the

Most strikingly, prosecutors are now often using the prior statements even though the caller is available to testify at trial but does not do so. In such cases, the courts tend not to ask the prosecutors to account for the absence of the witness.<sup>19</sup> Thus, the prosecutor is free to present the secondary evidence rather than the live testimony of the caller because the caller would be an unhelpful witness, or would be subjected to a difficult cross-examination, or because she finds it distasteful to testify, or for any other reason.

Though occasionally other doctrines come into play,<sup>20</sup> the so-called “excited utterance” or

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admissibility of [hearsay] testimony,” *id.* at 112, specifically, her statements to the police officer who responded to the scene. Cornell’s conviction was reversed, not because the court had erred in admitting the hearsay, but because it refused to permit Cornell to raise the complainant’s previous conviction for falsely reporting a crime to 911 before the jury.

<sup>19</sup> *State v. Harris*, 1999 Ohio App. LEXIS 4585 (victim’s whereabouts unknown); *Dawson v. Commonwealth*, 867 S.W.2d 493 (Ky. App. 1993) (victim “declined to testify.”); *Matthews v. State*, 1999 WL 286626 (Ark. App) (no reason given for failure of witness to testify); *State v. Payne*, 2000 Ohio App. LEXIS 3274 (same); *Salt Lake City v. Alires*, 2000 Utah Ct. App. 244 (2000) (same); *State v. Jorden*, 34 Ohio App.3d, 730 N.E.2d 447 (1999) (same); *State v. Harris*, 531 S.E.2d 340 (W. Va. 2000) (same); *State v. O’Connor*, 1998 Minn. App. LEXIS 1268 (same); *Oldman v. State*, 2000 Wyo. LEXIS 46 (same); *Humphrey v. State*, 1999 WL 46541 (Alaska App.) (same); *State v. Sims*, 77 Wash. App. 236, 890 P.2d 521 (1995) (same); *State v. Butler*, 1999 Wash. App. LEXIS 1536 (same); *State v. Carter*, 1999 Wash. App. LEXIS 799 (same); *State v. Fields*, 176 Wis.2d 511 (Ct. App. 1993) (same).

<sup>20</sup> Sometimes, prosecutors invoke the hearsay exceptions for present sense impressions or for statements made for purposes of medical diagnosis or treatment in addition to the excited utterance exception. *See, e.g., Oldman v. State*, 2000 Wyo. LEXIS 46; *People v. Hendrickson*, 459 Mich 229, 586 N.W.2d 906 (1998); Mary E. Asmus, Tineke Ritmeester & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies From Understanding The Dynamics of Abusive Relationships*, 15 *HAMLIN LAW REV* 115, 139 (1991).

Where the declarant does testify but in variance with her prior statements, the prior statements will not be admissible in most American jurisdictions to prove the truth of what they assert under the hearsay exemption for prior inconsistent statements of a witness. As established in Fed. R. Evid. 801(d)(1)(A), that exemption applies only if the prior statement “was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition.” Statements made to 911 operators and to responding police officers do not satisfy these requirements. Some jurisdictions, though, do not insist on such restrictions on the admissibility of prior inconsistent statements, *see, e.g., Cal. Evid. Code* § 1235; *Williams v. State*, 714 So.2d 462 (Fla. App. 3 Dist 1997) (prior statements admitted under Fla. Evid. Code § 90.803, governing the admission of prior inconsistent statements, could be admitted for truth); *State v. Borelli*, 227 Conn 153, 629 A.2d 1105 (1993) (prior inconsistent statement of complainant, reduced to writing and signed by her, admitted for truth in Connecticut.).

In addition, Oregon has recently created a hearsay exception especially for victims of domestic violence. Or. Ev. Code R. 803(26). It allows a statement made within 24 hours, so long as it is recorded

“spontaneous declaration” exception to the hearsay rule provides the principal basis on which courts carry this evidence around the obstacles of the rule against hearsay and the defendant’s confrontation right. That exception is based on the idea that, if the declarant is speaking while still under the strong influence of a stressful event, she presumably has not had an opportunity to concoct a false account. Especially, but not exclusively, in the domestic violence context, the magic words seem to be “upset,” “excited,” and “crying,” with other words such as “agitated” or “hysterical” sometimes sharing the work.<sup>21</sup> Once the victim has been described in such terms, courts have been willing to treat this exception rather generously.

Thus, if the witness is still sufficiently excited (or hysterical or upset or crying) when she gives the statement, courts are often willing to admit the statement even though the time lapse between the startling event and the statement is quite considerable, even a matter of hours.<sup>22</sup>

Further, if the witness is sufficiently upset (or excited or crying), the exception will usually apply even though her “statement” is a series of responses to questions posed by a professional

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or made to a police officer or other designated officials or quasi-officials, and if it has sufficient “indicia of reliability,” recantation not being sufficient in itself to lead to a conclusion of unreliability.

<sup>21</sup> See *Tejada v. State*, 905 S.W.2d 313 (Tex. App. 1995) (“upset” and “show[ed] excitement”); *Matthews v. State*, 1999 WL 286626 (Ark. App) (“hysterical,” “crying” and “excited”); *Dawson v. Commonwealth*, 867 S.W.2d 493 (Ky. App. 1993) (“upset”); *State v. Cornell*, 129 Ohio App. 3d 106, 717 N.E.2d 361 (1998) (“very upset” and “crying”); *State v. Krakue*, 726 A.2d 458 (R.I. 1999) (“appeared upset” and “continued to cry and shake”); *State v. Barnies*, 680 A.2d 449 (Me. 1996) (“visibly upset” and “crying”); *State v. Smith*, 1998 Ohio App. LEXIS 6454 (“crying” and “very upset”); *State v. Harris*, 1999 Ohio App. LEXIS 4585 (“very upset” and “crying”); *State v. Jorden*, 34 Ohio App.3d, 730 N.E.2d 447 (1999) (“distraught”); *State v. McGuire*, 1997 Minn. App. LEXIS 896 (“visibly upset” and “shaken”); *State v. O’Connor*, 1998 Minn. App. LEXIS 1268, at \*4 (trial court committed harmless error by repeating suggestion that complainant was “upset and crying” until witness picked up on suggestion and so described complainant; see note 65 *infra*); *Salt Lake City v. Alires*, 2000 Utah Ct. App. 244 (2000) (“very upset, nervous, tearful, and shaky”); *but cf.* *West Valley City v. Hutto*, 398 Utah Adv. Rep. 3, 2000 Utah Ct. App. 188, 5 P.3d 1 (though victim was “extremely upset,” “very agitated,” and “quite nervous” at time of interview, prosecution did not overcome “presumption that the stress had subsided with her relocation to a safe environment and the elapse of several hours”).

<sup>22</sup> *State v. McGuire*, 1997 Minn. App LEXIS 896 (more than 2 hours); *Camp v. State*, 66 Ark App 134, 991 SW2d 611 (1999) (3 hours; issue held not preserved for appeal); *State v. Daugherty*, 1998 WL 401759 (Ohio App.) (1 ½ hours after being seen by emergency squad); *State v. Zembower*, 1998 WL 156858 (Ohio App.) (nearly 2 hours); *but cf., e.g., State v. Mineo*, 2001 Wash App LEXIS 59 (holding admission of statements harmless error to the extent they concerned beatings 2-5 days earlier, but proper to the extent they concerned beating earlier that day); *State v. O’Neal*, 87 Ohio St.3d 402, 721 N.E.2d 73 (2000) (holding admission of statements made several hours after assault to have been harmless error); *Commonwealth v. DiMonte*, 427 Mass. 233, 692 N.E.2d 45 (1998) (stating that time lapse of 9-10 hours was “at an outer limit,” but reversing trial court’s holding that statement fell within exception, because circumstances indicated premeditation).

inquisitor – a setting that suggests some opportunity for reflection – rather than her own spontaneous articulation. The typical 911 call consists largely of a series of questions by the operator and answers by the declarant, and most often the entire call is admitted.<sup>23</sup>

Finally, if the witness seems to have been sufficiently traumatized by the event, the court may be willing to admit the statement even though it admittedly included a self-interested lie – a factor that would seem to negate completely the lack of reflective capacity supposedly underlying the exception.<sup>24</sup>

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

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

## **II. The Changing Environment of Domestic Violence**

Many of the cases that have used dial-in testimony – statements made in 911 calls and to responding officers – have involved charges of domestic violence. This Part shows how changes in the way that the criminal justice system handles domestic violence charges have increased the incentives and opportunities for the use of such statements. It also shows that such statements are usually testimonial in nature, in that the caller knows she is not simply asking for help but providing information for the use of the criminal justice system.

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<sup>23</sup> Courts have held consistently that this question-and-answer format poses no threat to a successful excited utterance foundation and have admitted the testimony even over specific objection on this issue. *See State v. Wallace*, 37 Ohio St. 3d 87, 524 N.E.2d 466 (1998); *State v. Hernandez*, 127 N.M. 769, 987 P2d 1156 (Ct. Apps. 1999).

<sup>24</sup> In *People v. Simpson*, 238 A.D.2d 611, 656 N.Y.S.2d 765 (2d Dept. 1997), the complainant called 911 to report a robbery and sexual assault. At trial, she testified that she lied to 911 in reporting that the defendant had a gun, so that the police would respond to her call quickly. The 911 tape was nevertheless admitted as an excited utterance, and the conviction was upheld over the dissent of two judges. We find application of the exception to this case rather remarkable. We regard the admissibility of the tape as less troublesome than it otherwise would be because the complainant did testify, apparently in accordance with most of her assertions on the tape, and the prosecutor did not rely on the tape to prove the assertion, regarding the gun, that she repudiated.

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

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

## **A. Public and Official Responses**

### *1. Increased Awareness and Effort*

In recent years, the public, legislatures, law enforcement authorities, and the courts have gained a greater awareness of the extent and seriousness of domestic violence. Once domestic violence may have been regarded as largely a private matter, but that is so no longer.

Society's increased understanding of domestic violence has included recognition of the facts that domestic violence is a common, rather than an occasional, occurrence; that it often has devastating, and even fatal, consequences; that recidivism among those who commit domestic violence is very high; that acts of domestic violence that might, taken in isolation, appear to be of relatively slight significance are often indicators that the aggressor will likely commit far worse acts in the future; and that, for a variety of reasons, a victim of domestic violence often withdraws her accusation and declines to press the matter, even though the initial accusation is true.

This increased awareness has led to a great increase in the intensity of governmental efforts to curb and punish domestic violence. Even Congress has gotten involved, primarily by providing funds to assist efforts by state and local governments<sup>25</sup> – which, as in the case of most

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<sup>25</sup> The Violence Against Women Act of 1994 (VAWA) provided funding to states to prosecute domestic violence aggressively. 42 U.S.C. § 10415. The Violent Crime Control and Law Enforcement

crime, carry most of the burden. And those governments have responded forcefully as well. For example, many states have intensified the remedies for domestic violence, expanding the availability and the scope of personal protection orders and strengthening penalties for abusers.<sup>26</sup> And, of particular importance for our purposes, they have also greatly intensified their efforts in investigating and prosecuting domestic violence.

## 2. Police Practices

In 1984 Tracey Thurman sued the city of Torrington, Connecticut for its egregious failure to take seriously her calls to authorities complaining about domestic violence committed against her.<sup>27</sup> After a jury awarded her \$2.3 million,<sup>28</sup> the State of Connecticut dramatically strengthened

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Act of 1996, amended in 1998, provided additional funding for training of judges in state and federal courts handling domestic violence cases. 42 U.S.C. §§ 13991, 14001. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of titles 8 & 42 U.S.C.), which created the Temporary Assistance for Needy Families (TANF) program, 42 U.S.C. §§ 601-619, establishes a general 60-month cutoff for the receipt of benefits, but it allows the state to exempt a family from this limitation for hardship or “if the family includes an individual who has been battered or subjected to extreme cruelty,” up to a limit of 20% of the families receiving assistance from the state under the program. 42 U.S.C. § 608(a)(7)(C). In addition, the state has the option to certify that it has established and is enforcing standards to screen and identify recipients with a history of domestic violence and to refer them to counseling and supportive services. If it does so, it can waive various program requirements (including the 20% limit stated above) in cases where the requirements would make it harder for recipients to escape domestic violence or would unfairly penalize individuals who have been victims of domestic violence or at risk of future violence. 42 U.S.C. § 602(a)(7).

<sup>26</sup> See, e.g., Mich. Stat. Ann. § 27A.2950, the personal protection order (PPO) statute, which was amended for the first time since 1983 in 1994 and has been amended every year since then. Petitioners can, and regularly do, get PPOs ex-parte, see § 27A.2950(12). In addition to prohibiting the restrained individual from entering the petitioner's home, place of employment or place of education, PPOs can order that the restrained individual refrain from carrying a gun. § 2950(1)(e). Violation of a PPO can be charged as criminal contempt punishable by 93 days in jail 2950(11)(a)(I).

Note also Oregon's creation of a special hearsay exception for victims of domestic violence. See note 20 *supra*.

<sup>27</sup> Thurman v. City of Torrington, 595 F.Supp. 1521 (D. Conn. 1984). The Torrington police failed to do anything to assist Ms. Thurman's many pleas for help, and in one instance a police officer stood and watched as Charles Thurman kicked his wife in the head. *Id.* at 1524-26. See EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 102-03 (2d ed. 1996), for a detailed description of the case.

<sup>28</sup> The award was later reduced to \$1.9 million.

its law enforcement response to domestic violence.<sup>29</sup> As a general matter, a police officer may not arrest a person for a misdemeanor without a warrant unless the offense is committed in the officer's presence. Connecticut made an exception to this rule for cases in which the police are responding to a call that violence has been committed between family members.<sup>30</sup> Other municipalities and some states followed.

Today every state except North Carolina permits warrantless arrests in domestic violence cases. Twenty states provide discretionary arrest authority to police,<sup>31</sup> eight instruct police that an arrest is the preferred action,<sup>32</sup> and twenty-one states and the District of Columbia *require* the police to make an arrest on responding to a domestic violence complaint if the officer has probable cause to believe that a domestic assault has occurred.<sup>33</sup> In states that do not require arrest by law, municipal ordinances or police department policies often fill the gap, mandating in

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<sup>29</sup> In addition to passing the first "must-arrest" statute, Connecticut mandated pre-trial family violence counseling for people charged with violating the family violence statute. *See* Conn. Gen. Stat. Ann. § 46b-38c.

<sup>30</sup> Conn. Gen. Stat. Ann. § 46b-38b(a).

<sup>31</sup> Ala. Code § 15-10-3; Del. Code Ann. Tit. 11 § 1904; Ga. Code Ann. § 17-4-20(a); Haw. Rev. Stat. § 709-906; Idaho Code § 19-603; 725 Ill. Cons. Stat. 5/107-2; Ky Rev. Stat. Ann § 431.005(2); Md. Ann. Code Art. 27 § 594b (D)(1); Minn. Stat. Ann. § 629.341; Mo. Rev. Stat. § 455.085.1; Neb. Rev. Stat. § 29-404.02(3); N.H. Rev. Stat. Ann. §§ 173-b:9, 594:10(i)(6); N.M. Stat. Ann. § 31-1-7; N.C. Gen Stat. § 15a-401 (B(2)(B(2), (B(2))(D); Okla. Stat. Tit. 22 § 40.3 (B); 18 Pa. Cons. Stat. Ann. § 2711; Tex. Crim. Proc. Code Ann. § 14.03(a)(4); Vt. Rules Crim. Proc. Rule 3; W. Va. Code §§§-14; Wyo. Stat. §§ 7-20-102(a), 35-21-107 (B)(Iv).

<sup>32</sup> Ark. Code Ann. § 16-81-113; Cal. Penal Code § 836; Fla. Stat. Ann. § 741.29 (4)(B); Mass Gen. Laws Ann. Ch. 209a § 6; Mich. Stat. Ann. § 28.874(1); Mont. Code Ann. § 45-6-311 (B); N.D. Cent. Code § 14-071-10; Tenn Code Ann. § 36-3-619.

<sup>33</sup> Alaska Stat. § 18.65.530; Ariz. Rev. Stat. Ann. § 13-3601; Colo. Rev. Stat. § 18-1-803.6; Conn. Gen. Stat. Ann. § 46b-38b(a); D.C. Code Ann. § 16-1031; Iowa Code Ann. §§ 236.12; Kan Stat. Ann. § 22-2037(b)(1); La. Rev. Stat. Ann. § 46-2140; Me. Rev. Stat. Ann. Tit 19 § 770 (5); Miss. Code Ann. § 99-3-7(3); Nev. Rev. Stat. § 171.137; N.J. Stat. Ann. § 2c:25-21; N.Y. Crim. Proc. Law § 140.10(4); Ohio Rev. Code Ann. § 2935.032 (A)(1)(A); Or. Rev. Stat. § 133.055 (2)(A); R.I. Gen. Laws § 12-29-3; S.C. Code Ann. § 16-25-70; S.d. Codified Laws Ann. §§ 23a-3-2.1 (2), 21; Utah Code Ann. § 77-36-2.2; Va. Code Ann. 19.2-81.3; Wash. Rev. Code Ann. § 10.31.100(2); Wis. Stat. Ann. § 947.075(2). Missouri requires arrest at the second complaint in 12 hours. Mo. Rev Stat. § 455.085.1.

States adopted mandatory arrest statutes because of the concern that police were not appropriately using discretionary authority. *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV.1498, 1537 (1993).

prescribed circumstances that the responding officer make an arrest.<sup>34</sup> Although mandatory arrest has its critics,<sup>35</sup> the trend toward it has not slowed.<sup>36</sup>

Most pro-arrest statutes require or encourage the police to arrest the “primary aggressor” in a domestic dispute.<sup>37</sup> “Primary aggressor” is generally defined as the most significant, rather than the first, aggressor.<sup>38</sup> Aggressive arrest policies in domestic violence cases have resulted in an increase in arrests of both of men and of women.<sup>39</sup> While the increase in arrests of men was what was expected and intended by advocates – for there is general agreement that most domestic violence is committed by men against their female partners – increased arrests of women were not expected.<sup>40</sup>

Because arrest followed by short-term incarceration has been found to be the most

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<sup>34</sup> See, e.g., City of Ann Arbor Code § 9:68.

<sup>35</sup> See Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999) (arguing generally that state actors and mandatory policies do emotional violence to battered women and also that mandatory arrest policies are part of the cause of rising levels of abuse directed at African-American women); Donna M. Welch, *Mandatory Arrest of Domestic Violence Abusers: Panacea or Perpetualization of the Problem of Abuse*, 43 DEPAUL L. REV. 1133 (1994) (analyzing research on the efficacy of mandatory arrest laws in reducing recidivism and finding that, for some segments of the population, mandatory arrest leads to increased violence).

<sup>36</sup> See generally Mills, *supra* note 35, at 558-560.

<sup>37</sup> For examples of “primary aggressor” statutes, see N.Y. Crim. Proc. Law §140.10(4); Mich. Stat. Ann. § 28.874(1).

<sup>38</sup> Mo Rev. Stat. § 455.085(3); Alaska Stat. § 18.65.530(b); N.Y. Crim. Proc. Law § 140.10(4)(c); Haw. Rev. Stat. § 709-906.

<sup>39</sup> John Johnson, *A New Side to Domestic Violence: Arrests of Women Have Risen Sharply since the Passage of Tougher Laws*, L.A. TIMES, Apr. 27, 1996, at A1.

<sup>40</sup> See Carey Goldberg, *Spouse Abuse Crackdown, Surprisingly, Nets Many Women*, N. Y. TIMES, Nov. 23, 1999, at A1; Johnson, *supra* note 39, at A1. There is no accepted explanation for this. Some argue that women are finally being held accountable for their own violence. Others argue that police are misinterpreting “primary aggressor” to mean the person who strikes first instead of the person who strikes hardest. Still others feel that there may be police backlash over the domestic violence movement. See Goldberg, *supra*; Andrea Lyon, *Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns in Domestic Violence Cases in Two Cities in Michigan*, 5 MICH J. GEN. & LAW 253 (1999).

effective deterrent against subsequent domestic violence,<sup>41</sup> pro-arrest policies are sometimes accompanied (as the mayor of Miami recently learned) by laws effectively requiring overnight lock-up of the suspected offender.<sup>42</sup>

Police practices have changed in other ways as well. Many jurisdictions require police to advise the complainant about the services available to her,<sup>43</sup> and officers often do this even absent legal compulsion.

Furthermore, many states have required increased record-keeping in domestic violence cases.<sup>44</sup> Such requirements tend to give the officer greater incentive to make an arrest; when police officers are required to complete a detailed report whether they make an arrest or not, they are less likely to leave the scene without arresting someone.<sup>45</sup> Increased record-keeping requirements also can be an evidence-gathering tool. Police are required to take a statement from the complainant, and they are taught that these statements may be used to prove the case,

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<sup>41</sup> *Developments, supra* note 33, at 1536 (describing results of study reported in Lawrence A. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984)).

<sup>42</sup> *See Mayor's Case Handled Correctly Domestic Violence a Serious Crime*, SOUTH FLA. SUN-SENTINEL Feb.10, 2001, p. 18A; Mich. Stat. Ann. 28.872(2a) (providing that suspect shall be held until he can be brought before a magistrate, and for 20 hours if no magistrate is available); N.D. Cent. Code § 14-071-109(3) (defendants charged with domestic violence are not to be released on personal recognizance or bond until they have been brought before a magistrate); Novi (Michigan) Code of Ordinances Sec 22-50(c) (no interim bond permitted when suspect charged with domestic violence unless he or she has been held for 20 hours).

<sup>43</sup> *See, e.g.*, Mich. Stat. Ann. § 764.15c; Fla. Stat. Ann. § 741.29 (1); Okla. Stat. Tit. 22 § 40.2.

<sup>44</sup> Most states require police to complete domestic violence incident reports when they respond to a domestic violence complaint, whether or not an arrest is made. The Michigan reporting statute requires the police to include the names of the persons involved, contact information for those people, whether there is a restraining order in effect, the name of the person who called law enforcement, names and contact information of other witnesses, the relationship between parties, a narrative of the incident, details of the assault, a description of injuries and property damage and a description of previous domestic violence between the parties. Mich. Stat. Ann. § 28.874(3)(2). This report must be retained by the law enforcement agency and a copy sent to the prosecutor within forty-eight hours. Mich. Stat. Ann. § 28.874(3)(3). *See also* Fla. Stat. Ann. § 741.29 (2); Ohio Rev. Code Ann. § 2935.032 (D); La. Rev. Stat. Ann. § 46-2141.

<sup>45</sup> *See* Buzawa, Hotaling, Klein & Byrne, *Response to Domestic Violence in a Pro-Court Setting*, (March 1999); *Developments, supra* note 33, at 1553.

especially if the officer can lay the foundation for the excited utterance exception.<sup>46</sup> Thus, since 1993 Florida prosecutors have been training police officers how to prepare a case so that, if necessary, it can be tried without the victim's testimony; Duluth, Minnesota has made the police task easier by creating a form that "provides a list of emotional states that officers can check off to describe the victim's demeanor at the time the statements were made," including "crying," "hysterical," and "sobbing".<sup>47</sup> Given such preparation, police officers naturally see it as their role to supply evidence for victimless prosecution.<sup>48</sup>

### 3. Prosecution practices

Prosecutors have responded to their increased domestic violence caseload with aggressive new tactics for getting convictions. Special prosecution units to handle domestic violence cases, some supported by federal grant money, are now common.<sup>49</sup>

An aggressive prosecution strategy now supported by federal grant money is a "mandatory prosecution" or "no drop" policy.<sup>50</sup> These policies vary from place to place. Sometimes they encompass a strict refusal to plea bargain in any domestic violence case.<sup>51</sup> At their heart, though,

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<sup>46</sup> Asmus et al., *supra* note 20, at 152; Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution*, 63 FORDHAM L REV 853, 862 n.65 (1994).

<sup>47</sup> See Alison Frankel, *Domestic Disaster*, AMERICAN LAWYER, June 1996, at 54, 63 (Florida); Kristin Littel, et al., *Assessing Justice System Response to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses*, available at <http://www.vaw.umn.edu/Promise/pplaw.htm> (Duluth).

<sup>48</sup> Frankel, *supra* note 47, at 65.

<sup>49</sup> Washtenaw County, for example, received a grant of approximately \$10 million over five years under VAWA and the National Institute of Justice to prosecute domestic violence cases and to collect data about those cases. This money is funding a special domestic violence prosecution team with its own attorneys, investigators, "pre-trial services" officers and police and probation officers. See notes of interview with Blaine Longworth, chief prosecutor of the Domestic Violence Unit, February 14, 2001, on file with authors; Washtenaw County Grant Planning Meeting Minutes, December 17, 1999 at 2, on file with authors.

<sup>50</sup> VAWA grants are intended to promote aggressive prosecution policies including a "no-drop" prosecution policy. See 42 U.S.C. § 10415 (b)(3) (A)-(B); see also, e.g., *People v. Hendrickson*, 459 Mich. 229, 232, 586 N.W.2d 906, 907 (1998) (referring to a Michigan County's "no drop" policy).

<sup>51</sup> In Washtenaw County, the Prosecutor, Brian Mackie, has a policy of making no plea offer in any domestic violence case. This policy includes never authorizing a "deferred sentence" to a defendant who would be eligible for one. A deferred sentence permits a defendant who pleads guilty and successfully complies with the terms of his sentence to have his record expunged at the end of his sentence. See Martha

is a determination that the prosecutor will pursue the case even over the complainant's objections. A prosecutor might adopt such a policy for a variety of reasons – in part because of recognition that domestic violence is a matter of public, not merely private significance; because of a paternalistic realization that the complainant may face greater danger than she realizes from recurrent violence; and because of a practical judgment that, by stripping the victim of a domestic violence crime of any authority to control the outcome of the case and investing it wholly with the prosecutor, the policy will make the victim safer, removing at least one issue between the alleged abuser and her.<sup>52</sup> The policies are highly controversial, both because they deprive the complainant of choice in a matter that may fundamentally affect her<sup>53</sup> and because their effectiveness is in doubt.<sup>54</sup>

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

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Churchill, *Prosecutor In Grips of Ultra-Feminists*, DET. NEWS, Dec. 10, 1999, at A13, col 1.

<sup>52</sup> See Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. UNIV. L. REV. 297, 310 (1993).

<sup>53</sup> Some argue that mandatory prosecution is a creative and effective solution to the problems associated with domestic violence prosecution. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996). But that view is not unanimously held among advocates. See Mills, *supra* note 35 (arguing that mandatory arrest and prosecution polices abuse women in ways that parallel the abuse they receive from their batterers, by reinforcing batterer judgements of them and by silencing them further by limiting their options; suggesting that mandatory polices reflect patriarchal influence on feminist perspective); Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. LAW REV. 937 (1999) (critiquing mandatory policies for silencing victims); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173 (arguing that aggressive prosecution but not mandatory prosecution will be more effective in curbing domestic violence and treating victims respectfully); Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 977 (1998) ("[N]o-drop policies deprive or constrict the victim's choices and refuse deference to her own assessment . . .").

<sup>54</sup> For a summary of the research conducted so far about the effects of mandatory prosecution strategies on reducing domestic violence, see Mills, *supra* note 35, at 567 n.85. Mills concludes that there are, at best, mixed findings about the effectiveness of mandatory prosecution strategies in reducing domestic violence.

overnight to compel her testimony.<sup>55</sup>

Sometimes when the reluctant complainant does testify she does so inconsistently with the statements she made in her call to 911 or to the responding officer. And so the prosecutor offers those statements into evidence, asking the fact-finder to credit those statements over the complainant's in-court testimony.<sup>56</sup>

Often, however, prosecutors do not bother with an unwilling or a recanting complainant. Instead, they simply go forward without her,<sup>57</sup> and instead of her live testimony they use the statements carefully taken from her by the 911 operator and the police.<sup>58</sup> In some cases, the prosecutor's decision to pursue a "victimless prosecution" is based on a well-founded belief that misconduct by the defendant has inhibited the complainant from testifying.<sup>59</sup> But often the prosecutor evidently concludes that it is easier to go forward with unsworn, untested testimony

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<sup>55</sup> See Hanna, *supra* note 53, at 1866. In Duluth complaining witnesses were forced to testify against their will as early as 1991. See Asmus et al., *supra* note 20, at 135-36.

<sup>56</sup> See note 17 *supra* and accompanying text.

<sup>57</sup> As of 1995, 30 to 40% of jurisdictions were going forward in domestic violence cases without complainants. See Mark Hansen, *New Strategy in Battering Cases*, 81 A.B.A. JOURNAL 14 (Aug. 1995). In some jurisdictions, San Diego among them, prosecutors were doing so in a majority of their cases. *Id.* Judging from reported cases, other literature and conversations with attorneys, jurisdictions in Alaska, California, Colorado, the District of Columbia, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, Ohio, Rhode Island, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming are successfully prosecuting domestic violence cases without the in-court testimony of the complainant. In Washtenaw County, approximately half of the domestic violence cases are prosecuted without the complaining witness. See Notes of February 14, 2001, interview with Blaine Longworth, chief prosecutor of the domestic violence unit, on file with the authors.

<sup>58</sup> The San Diego Police Department's Domestic Violence Manual instructs officers that "[s]ince victims are often uncooperative, everything possible is done to develop a solid case that does not depend on participation by the victim." Manual on file with authors. The Duluth prosecution plan in domestic violence cases directs the city attorney's office to work with the police to gather statements from victims and other witnesses. See Corsilles, *supra* note 46, at 862 n.65. This is also true in Washtenaw County, where police and prosecutors (and judges) are trained about victimless prosecution by local advocates. See Grant Planning Meeting Notes, Dec. 17, 1999, at 2, on file with authors.

<sup>59</sup> In such a case, the accused should often be held to have forfeited his confrontation right and hearsay objection. See Part IV *infra*. There is, however, a suspicion that any recanting witness is doing so because she is afraid of the defendant. The rush to that conclusion, absent any showing of its applicability in a particular case, is unjustified and sits uneasily at best alongside the defendant's right to be presumed innocent.

than to expose a witness to the risks of testifying at trial.<sup>60</sup>

#### 4. *Judicial Endorsement*

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

Judges, like other participants in the criminal justice system, have gained a deeper

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<sup>60</sup> Gael Strack, assistant city attorney in San Diego has said, “The San Diego track record for winning domestic violence assault cases has been so good, prosecutors now prefer that the victim not testify.” See Jane Armstrong, Rita Daly & Caroline Mallan, *Hitting Back in San Diego*, TORONTO STAR, March 16, 1996 at C 1; Gwinn & O’Dell, *supra* note 52, at 304 (indicating that San Diego was already prosecuting 60% of its cases without victims and had an 88% conviction rate). Prosecutors in Duluth, Minnesota were reporting an 87 percent conviction rate as of 1994. See Sandra G. Boodman, *What Can Be Done?*, WASHINGTON POST, June 28, 1994, at Z11. And prosecutors in Washington, D.C. report the same conviction rate for cases tried with complainants as for those tried without them. See Deborah Epstein, *Effective Intervention In Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE JOURNAL OF LAW AND FEMINISM 4, 18 (1999).

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

In the second case, tried for the defense by law students under McCormack’s supervision, the 102-pound defendant allegedly hit her 250-pound husband. Although the complainant was in court ready to testify, the prosecutor preferred to go forward without calling him to the stand and instead playing the tape of his call to 911. In that call, the complainant claimed that his wife was going crazy and that he had “bruises all over [his] ass.” The prosecutor also presented the arresting officer, who testified that the complainant told him that the defendant had hit her in the face. As a result of defense counsel’s successful confrontation argument, the prosecutor did call the complainant to the stand. The complainant admitted that he called 911 and lied to “mess with” his wife. The court acquitted the defendant. Trial notes on file with authors.

understanding of domestic violence in recent years.<sup>61</sup> Judges are often trained about domestic violence issues and expected to be current on domestic violence trends.<sup>62</sup> At the same time, the increased public consciousness about domestic violence has put judges under considerable pressure: If a judge shows leniency to the wrong domestic violence defendant, it can be career ending.<sup>63</sup> Courts are increasingly receptive to expert testimony explaining victim absence or recantations in domestic violence prosecutions.<sup>64</sup> It is not surprising that some judges openly advocate greater receptivity to complainants' hearsay statements to ease the way for victimless prosecution.<sup>65</sup>

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<sup>61</sup> Florida State's Attorney Barry Krishner credited the O.J. Simpson case with the change in judicial consciousness. Frankel, *supra* note 47, at 63-64.

<sup>62</sup> In many states judges have taken an active role in grant planning teams and other efforts to reform domestic violence prosecutions. See Cindy S. Lederman & Neena M. Malik, *Family Violence: A Report on the State of the Research*, 73 FLA. B.J. 58 (Dec. 1999) (arguing that judges should keep current on family violence research to inform decision-making in domestic violence cases; first author, a judge, was one of the architects of Florida's domestic violence courts); David M. Gersten, *Evidence Trends in Domestic Violence*, 72 FLA. B.J. 65 (July/Aug. 1998) (a judge explaining the growing use of hearsay exceptions in proving domestic violence cases where the victim is unwilling to cooperate). In Washtenaw County, all of the judges who preside over criminal cases are involved in the community response domestic violence grant team, which meets regularly to oversee the projects the grant money funds. In addition, judges attend training sessions put on annually by domestic violence advocates. As one Washtenaw County judge, John Collins, said at a recent meeting about the domestic violence grant, "We are told, and we believe, that every time a defendant gets arrested for domestic violence it is, on average, the seventh time he has assaulted her. As judges, we don't have the luxury of thinking about the six times that came before." Grant Planning Meeting, February 8, 2000, notes on file with authors.

<sup>63</sup> Judge Lorin Duckman, who sat in New York City Criminal Court, became a target of public outcry when a criminal defendant who he had released on bail after assaulting his girlfriend killed her. Mayor Rudolph Giuliani and Governor George Pataki called for his removal, and Pataki filed a complaint with the Commission on Judicial Conduct. See John Sullivan, *Report Says Judge in Domestic Violence Cases Abused Power*, N.Y. TIMES, Sept. 9, 1997, at B1, col 2. Similarly, Maryland Governor Parris N. Glendening and some state legislators urged the state Commission on Judicial Disabilities to "take appropriate action" against Baltimore County Judge Thomas J. Bollinger, Sr., after he agreed to erase the conviction of a man who had beaten his wife. See David Montgomery, *Judge Erases Conviction, Draws Outcry; Man's Record Cleared of Domestic Violence*, WASHINGTON POST, Feb. 8, 1997, at C1.

<sup>64</sup> See Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: from Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67 (1998); Adam Nossiter, *When Battered Women Recant: New Witness for the Prosecution*, N.Y. TIMES, June 9, 1996 at § 4, p.4, col.1.

<sup>65</sup> See Gersten, *supra* note 62 (1998) (explaining the growing use of hearsay exceptions in proving domestic violence cases where the victim is unwilling to cooperate); Renee Esfandiary & Krista Newkirk, *Interview with The Honorable John E. Klock of the Alexandria Circuit Court Defending Mandatory Arrest*, 3 WM. & MARY J. WOMEN & L. 241 (1997) (supporting Virginia's victimless prosecution policy). Michigan's Domestic Violence Benchbook directs judges to consider all of the evidentiary possibilities in

## B. The Participants' Awareness

Increased law-enforcement responses to domestic violence have been accompanied by greater awareness on the part of those who are involved in the violence – whether as victim or as perpetrator – about those responses and about domestic violence itself. Part of that awareness, we believe, is an understanding that statements made in 911 calls or in follow-up interviews are

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victimless prosecutions, because “some criminal trials on charges involving allegations of domestic violence may be similar to murder trials in that the victim will not appear as a witness.” MARY M. LOVIK, DOMESTIC VIOLENCE BENCHMARK (Mich. Judicial Inst. 1998), p. 5-1 (part of a section titled *Evidentiary Issues Where the Complaining Witness Cannot Participate Effectively at Trial*).

For a rather extreme example of judicial receptivity to a complainant's hearsay statement, see *State v. O'Connor*, 1998 Minn. App. LEXIS 1268. The complainant “did not appear at trial,” and the prosecutor attempted to introduce her statements through the responding police officer by claiming they constituted a business record. Defense counsel objected, and the court suggested that the prosecutor try the excited utterance exception. When the prosecutor hesitated because the statement was taken “some time after the incident took place,” the court responded that what was important was whether the victim was “upset and crying.” The prosecutor still hesitated, telling the court that the statement was taken “about some 20 minutes later.” Perhaps frustrated by the lack of prosecutorial assistance, the court then took over the examination of the officer and led him through the excited utterance foundation:

THE COURT: Did the person say anything as to how she got injured when she was upset and crying when you saw her?

THE WITNESS: Yes.

THE COURT: What did she say?

THE WITNESS: She said she was assaulted by her husband.

THE COURT: She was upset and crying at that time?

THE WITNESS: Yes.

[DEFENSE COUNSEL]: Objection, Your Honor, that is not in the report.

THE COURT: Well, that is not – you can cross examine on that, but tell me – you have testified that when you were at the scene she was upset and crying, her left eye was puffy to the temple area?

THE WITNESS: Yes.

THE COURT: Did you talk to her then?

THE WITNESS: I talked to her shortly before I took the statement.

[DEFENSE COUNSEL]: Then, your honor–

THE COURT: Well, when she was upset and crying, at that point did she say something to you?

THE WITNESS: Yes, she said she was hit by her husband.

THE COURT: Describe her demeanor at the time she said that?

THE WITNESS: She was upset and crying.

The appellate court held that the trial court “exceeded its prerogative to interrogate witnesses by suggesting an exception to the hearsay rule that the prosecutor had not only failed to consider but deemed inapplicable,” but it upheld O'Connor's conviction on the ground that the error was harmless.

likely to lead to arrest and prosecution and to be used against the alleged abuser.

Domestic violence cases are grist for the daily mill of the popular media. Local media give close attention to local cases,<sup>66</sup> and dramatizations of cases, real or fictional, are presented on national television and in the movies.<sup>67</sup> The O.J. Simpson criminal case, probably the most observed trial of the twentieth century, focused public attention for an extended period on domestic violence and responses to it. Millions of Americans heard a tape recording of a 911 call by Nicole Brown Simpson being introduced into evidence against Simpson.

Recognizing that domestic violence is terribly under-reported, governments and social service agencies have made concerted efforts to foster awareness of the problem and of the responses to it. Indeed, President Clinton issued a proclamation in October 1996 designating that month as National Domestic Violence Awareness Month.<sup>68</sup> Frequent advertisements in a wide variety of media remind us that domestic violence is a crime and encourage victims to report it.<sup>69</sup> In the stalls at a women's room at a movie house in Ann Arbor, for example, one finds posters, pamphlets and small cards announcing the different phone lines, including 911, victims of domestic violence can call to get a response. This information is repeated on the big screen before the show starts, between movie trivia and ads for local businesses.<sup>70</sup> The same messages are presented on the sides of local buses and on posters in all courthouses and county buildings and in some commercial and other buildings.

Because the principal aim of these efforts is to encourage victims of domestic violence to report it, a major theme is that reporting will not be futile. Your complaint will be taken seriously, victims are reminded; protective and punitive action to assist you will follow. Thus,

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<sup>66</sup> The San Diego domestic violence prosecution and police units "launched an on-going media campaign to change the way everyone in San Diego thinks about domestic violence cases" to accompany changes in police and prosecution strategy. Gwinn & O'Dell, *supra* note 52, at 303-04. In 1999, the Boston Globe and Detroit Free Press ran 244 and 105 articles, respectively, using the term "domestic violence." Searches conducted at <http://www.newslibrary.com/> (Globe) and <http://www.freep.com/newslibrary/> (Free Press). These searches, of course, do not include articles that covered incidents of actual or alleged domestic violence but did not use the term.

<sup>67</sup> *E.g.*, SLEEPING WITH THE ENEMY; THE BURNING BED.

<sup>68</sup> Presidential Proclamation No. 6927, 61 Fed. Reg. 52677 (Oct. 3, 1996).

<sup>69</sup> The national "There's No Excuse for Domestic Violence" public education campaign, launched in 1994, and run by the Family Violence Prevention Fund, won nearly \$100 million in media support in its first five years. The campaign's public service announcements aired on all the major networks and print versions ran in many major newspapers and other outlets. See <http://www.fvpf.org/publiced/>.

<sup>70</sup> Observations made at the Quality 16 Theater, Jackson Road, Ann Arbor, and State Theater, State Street, Ann Arbor.

five pages of a pamphlet distributed statewide by the Michigan Women's Commission describe the dangers and risks of domestic violence and the responses the law can and will make when it occurs. Victims of domestic violence are encouraged to call the police because the police can help in a number of ways – including using the report they are required to complete to prove the case in court.<sup>71</sup>

Mandatory law enforcement strategies – mandatory arrest and lock-up laws and “no drop” prosecution policies – also are a significant part of the picture. They seem to play well in the local media.<sup>72</sup> Law enforcement officials have a clear incentive – to allow these strategies to have their intended deterrent effect – to make sure that both potential victims and potential abusers know about them.<sup>73</sup> There has been a substantial increase in calls to 911 reporting domestic violence since mandatory law enforcement strategies took hold across the country.<sup>74</sup> People know now that if they call 911 and report domestic violence there will probably be an arrest and prosecution.

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<sup>71</sup> *Domestic Violence is a Crime*, pamphlet issued by Michigan Women's Commission, p. 5, on file with authors.

<sup>72</sup> Churchill, *supra* note 51.

<sup>73</sup> The “There's No Excuse” campaign directed public service announcements (PSAs) at victims, assailants and friends and neighbors of both. One aimed at friends of abusers depicts a woman whose face has been beaten, and then in large print the legend: “IT'S HARD TO CONFRONT A FRIEND WHO ABUSES HIS WIFE. BUT NOT NEARLY AS HARD AS BEING HIS WIFE.” Underneath, the text of the advertisement reads:

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

See <http://www.fvpf.org/publiced/posterthumbs.html> for a look at this particular PSA and others used in the campaign.

<sup>74</sup> See Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is it Enough?* 1996 U. ILL. L. REV. 533, 550. There is evidence that not every segment of the population avails itself of the service equally. In one New York study, African-American participants expressed the view that reporting batterers to the police was a breach of loyalty. See INSTITUTE ON VIOLENCE, INC., VIOLENCE IN THE LIVES OF AFRICAN-AMERICAN WOMEN: A FOCUS GROUP STUDY at 18-19 (Beth E. Ritchie ed., 1996). Mistrust of 911 services by African-Americans has been reflected in popular culture, see *911 is a Joke*, Track 3 in PUBLIC ENEMY, FEAR OF A BLACK PLANET (1994). Studies finding that mandatory arrest policies lead to greater violence against African-American women, see note 35 *supra*, may suggest that the mistrust is well-founded.

Indeed, “under mandatory arrest laws, a battered woman’s call to the police is tantamount to a request for arrest.”<sup>75</sup>

This awareness is reinforced by the fact that many of those who are involved in incidents of domestic violence have been involved before,<sup>76</sup> and even if they have not it is likely that they know someone who has been.<sup>77</sup> Whether their prior experience was as suspect or as complainant, potential callers are not naive about the system. They are almost sure to know that when a police officer responds to a domestic violence complaint the officer will likely feel compelled to leave the scene with someone in custody.

Furthermore, repeat players are likely to understand another phenomenon: The person first to call and complain is most likely to get to stay home, while the other person is the one charged and taken in custody. We know of no formal research establishing this proposition, but it has held true in every case handled by McCormack and other lawyers who have shared their experiences with us. It also helps explain a phenomenon noted above, that increasing numbers of women have been arrested for domestic violence.<sup>78</sup> To some extent, this phenomenon probably reflects an underlying reality, that men are sometimes the victims of domestic violence and until recently had failed to report it. But we believe that, to a greater extent, it reflects merely a race to the phone by abusers who have been through the system and who know that they will be in a

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<sup>75</sup> *Developments, supra* note 33, at 1538.

<sup>76</sup> Approximately one in five victims of domestic abuse report three or more similar assaults within that six-month period. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 2 (1994). Recidivism rates are high regardless of police practices. See Hirschel & Hutchinson, *Realities & Implications of the Charlotte Spousal Abuse Experiment*, in EVE S. BUZAWA & CARL G. BUZAWA, EDS., DO ARRESTS AND RESTRAINING ORDERS WORK? 73 (1996).

<sup>77</sup> Though domestic violence occurs frequently in all aspects of the population, it is particularly common in some sub-populations. See JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 23 - 26 (Northeastern U. Press 1999) (discussing the correlation between poverty and violence); Donna Coker, *Piercing Webs of Power: Identity, Resistance, and Hope in Latcrit Theory And Praxis: Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1036 (2000) (discussing studies that have shown over-representation of domestic violence to be correlated with race and socio-economic status).

<sup>78</sup> See notes 39-40 *supra* and accompanying text.

much better position if they are the first to call,<sup>79</sup> batterers, skilled at controlling their victims,<sup>80</sup> are likely to manipulate as well the law enforcement and evidence gathering system to which 911 is the threshold.

In more than one case handled by McCormack's office, the complainant reported having won a race to dial 911 and be the first to report the incident that led to the defendant's arrest. In one case, the fight for the phone became the primary issue in the case. Having been through the mandatory prosecution system already himself as a defendant, the husband understood the problems he would face when he got into an argument with his wife that got physical and she went for the phone. As she reached for it, he ripped it out of the wall. Once he had successfully insulated himself from her allegations, he went outside with his cell phone and placed his own call to 911, claiming that she had assaulted him.<sup>81</sup> As he expected, his allegation was treated seriously; his wife was charged with assault, though the prosecutor eventually dismissed the charges.<sup>82</sup>

In another series of local cases, a divorced couple has had three domestic violence charges between them; the wife has been charged twice, the husband once. Each time one is arrested there is a claim that there was a race to the phone with competing allegations. And each time, the prosecutor uses the winner's phone call to prove yet another conviction.<sup>83</sup> There was a running threat between the parties to call and falsely report more domestic violence.

Similar cases have arisen in California. Some men injure themselves superficially and then call the police and have their partners arrested. One Sacramento man scratched a scab on his ear

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<sup>79</sup> Even O.J. Simpson seems to have learned the advantage of getting to the phone first. Simpson and his new girlfriend apparently have had visits from the police on more than one occasion, and on one of those it was Simpson who called 911 to report the domestic incident. Although he ultimately refused to press charges, the police report of the incident has Simpson listed as the victim. See Anne Pressley, *O.J. Simpson, From One Hot Spot to Another; He's Traded California for Florida, But Can't Dodge Scandal*, WASHINGTON POST (Aug. 31, 2000), at C1.

<sup>80</sup> See generally DONALD G. DUTTON WITH SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* (1995); NEIL JACOBSON & JOHN GOTTMAN, *WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS* (1998); JAMES PTACEK, *supra* note 77, at 74-91.

<sup>81</sup> According to his neighbor, after calling 911 from his cell phone he laughed and said, "Got you now bitch." Case notes on file with authors.

<sup>82</sup> The prosecutor did so after learning how manipulative the "victim" was. He had two convictions for child abuse, and a history of abusing and controlling his wife and ex-wife. But the prosecutor could have proved the case against the wife with his 911 call and follow-up statements to the police, and the jury might never have known any of his history. Case notes on file with authors.

<sup>83</sup> Case notes on file with authors.

to make it bleed and then called the police and had his wife arrested.<sup>84</sup> A Los Angeles man born with a pronounced bump on his head had his wife arrested three times before the police realized that he was manipulating the mandatory system to his advantage.<sup>85</sup>

These attempts at manipulation do not always succeed to the point of securing a trial and conviction of the other person.<sup>86</sup> In any event our principal point is not that 911 callers are manipulative – we do not believe that most are – but that they know what they are doing. They know that by making the call they are practically ensuring that the other person will be arrested, and that a criminal prosecution will probably follow. And we believe that in most cases they also understand that the prosecutor may attempt to use the statements they make to the 911 operator or to the police officer who follows up on the call. In short, many 911 callers realize they are creating evidence for the prosecution as they call.<sup>87</sup> If we are wrong about this last point, we will

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<sup>84</sup> Another northern California man hit himself in the head with a brick and then reported to police that his wife assaulted him. As neighbors saw the police arresting the wife, they spoke up and the additional facts came out. A California administrator of counseling groups for male batterers reports that some abusers freely admit using the system to get revenge. Johnson, *supra* note 39.

<sup>85</sup> Johnson, *supra* note 39. Similar incidents have occurred in Washtenaw County. According to Blaine Longworth, chief prosecutor of the Domestic Violence Unit, “Usually it is a person who has been through the system previously and understands the decision making process that the police utilize. These folks realize that if they can show the cops a visible injury, they can tell the police the victim attacked first.” Interview, Feb. 14, 2001, notes on file with authors.

<sup>86</sup> Sometimes, police and prosecutors get to the bottom of a false report to 911, or to police, before a complaint is brought. See Chris Tisch, *Man Arrested in Phony Complaint*, ST. PETERSBURG TIMES, Dec. 29, 2000 at 3 (a man who wanted his girlfriend’s 79-year-old mother out of his house called 911 and reported that she had attacked him with a knife); *Keller v. State*, 208 Ga. App. 589, 431 S.E.2d 411 (Ga. App. 1993) (the defendant falsely reported the man with whom she had been living for robbery). In yet another case handled by law students supervised by McCormack, the wife was the first to dial 911, but the husband grabbed the phone and hung it up before she could make her report. The 911 operator called back a moment later, and the husband answered the phone and reported that his wife had scratched and kicked him. When the responding officer arrived, the “victim” told the same story he had told 911, and the officer – who had been called out to this family’s home on more than one prior occasion – arrested the defendant. But when interviewed by the student attorney representing his wife, the husband admitted that he had been drunk, had pushed his wife into a wall, and had grabbed the phone when she tried to make a 911 report. Only then did the prosecutor, who had been prepared to try the wife without the husband’s live testimony, arrange for the wife to take a police-administered lie detector test. She passed it, and the prosecutor dismissed the charge against her. Case notes, on file with authors.

<sup>87</sup> The same problem can occur with reports directly to police. In another case handled by law students supervised by McCormack, the complainant, after an argument with his girlfriend in his truck, instead of going to a phone to call 911 he drove directly to the police station and reported that his girlfriend had scratched him, punched him and threatened him with a screwdriver. The prosecutor issued a complaint based on his allegation, without ever interviewing the girlfriend. Had an officer done so, he or she would

not be for long, assuming present trends continue. As more courts admit statements made by 911 callers, a message created by the Simpson case will be more and more deeply ingrained in the consciousness of the public, and especially of those who are involved in domestic violence: If you call 911, your statements will make their way to court, whether you do or not.

### C. Summary

We are eager to avoid misunderstanding. Domestic violence, as we have said, is a blight on society, and we applaud the increased efforts to combat it, and to encourage victims to report it. We take no position on the complex question of the merits of mandatory law enforcement strategies. Our basic point is simply this. The web of developments that we have discussed – increased public concern and political attention to the problem, aggressive strategies by police and prosecutors, a receptive attitude by courts, and understanding by participants – means that statements made in calls to 911 or in follow-up interviews with police are likely to result in arrest and prosecution and to be deemed admissible at trial, and that callers are aware of this. So long as courts remain receptive to this evidence, callers will effectively be able to dial in their testimony, without having to appear at trial, take an oath, or subject themselves to cross-examination.

### III. The Doctrinal Framework

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

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

In Section B, we turn to hearsay law, with a focus on the “spontaneous exclamation” or “excited utterance” exception, which principally underlies the admission of statements made in 911 calls and follow-up conversations. We will show that this exception emerged out of the traditional *res gestae* doctrine, which originally was sensitive to the testimonial nature of narrative statements describing an event that would predictably lead to litigation. Thus, nineteenth-century

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have seen the extensive bruising the girlfriend suffered as a result of the “argument.” She had no prior experience with the criminal justice system up to that moment and was afraid to report her boyfriend’s escalating abuse. He, on the other hand, had a great deal of experience with the system, which may explain why he made a point to report her first.

courts resisted the admission of statements that were narrative in nature or that had been made after the close of the events they described. Under the influence of John Henry Wigmore in the first half of the twentieth century and of the Federal Rules of Evidence in the second half, American courts eventually abandoned these restraints. The exception is well established, no longer limited to statements offered for what might be considered a non-hearsay purpose, and no longer confined to genuinely spontaneous exclamations, made without any opportunity for reflection. Instead, it has been stretched to reach many statements that, while purportedly made while the declarant was still affected by a stressful event, were made with ample opportunity for reflection and with the anticipation that the statement would be used in investigating or prosecuting crime. Furthermore, while the issue may have been in doubt before, a pronouncement by Wigmore and its adoption by the Federal Rules established for most American courts that the exception is applicable even if the declarant is available to be a witness.

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

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

#### **A. Historical Development of the Confrontation Right<sup>88</sup>**

Most adjudicative systems rely on the testimony of witnesses for fact-finding, rather than on irrational methods like the ordeal or trial by battle. If a system is to rely on testimony, then it must determine the conditions under which acceptable testimony must be given. Since ancient times, most western systems have required that testimony be given under oath, or some similar affirmation.<sup>89</sup> The oath not only provides solemnity and a reminder of the witness’s obligation to tell the truth, but it assures that if the witness testifies falsely she exposes herself to considerable risk. In older days, many witnesses believed that if they swore falsely they risked eternal damnation. Today, probably few witnesses have that fear – but false testimony still exposes the witness to prosecution for perjury or cognate crimes.

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<sup>88</sup> This section draws on a portion of the *amicus* brief submitted by the American Civil Liberties Union in *Lilly v. Virginia*, 527 U.S. 116 (1999). Friedman and Prof. Margaret Berger were the principal authors of the brief.

<sup>89</sup> See Helen Silving, *The Oath: I*, 68 *YALE L.J.* 1329 (1959).

Another fundamental condition for testimony is that it be given in front of the adverse party. The right of an accused to confront the witnesses against him has received its fullest development within the Anglo-American tradition, but it has also been a critical feature of other judicial systems. The ancient Hebrews required accusing witnesses to give their testimony in front of the accused.<sup>90</sup> And so did the Romans. The Book of Acts quotes the Roman Governor Festus as saying: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."<sup>91</sup>

When medieval Continental systems began to rely on the testimony of witnesses, they allowed the parties to examine the witnesses, but on written questions.<sup>92</sup> These systems took the testimony behind closed doors, for fear that witnesses would be coached or intimidated. By contrast, the open and confrontational way in which testimony was taken – an “altercation” between accuser and accused, in a celebrated 16<sup>th</sup> century description by Sir Thomas Smith<sup>93</sup> – was the most critical characteristic of the common law trial. Beginning in the fifteenth century, and continuing for centuries afterwards, numerous English judges and commentators praised the open and confrontational nature of the English trial in contrast to its Continental counterpart.<sup>94</sup> For example, Sir Matthew Hale lauded the "open Course of Evidence to the Jury in the Presence of the Judges, Jury, Parties and Council" in English procedure. Among other advantages, this procedure allowed "Opportunity for all Persons concern'd" to question the witness and "Opportunity of confronting the adverse Witnesses."<sup>95</sup> In a passage closely following Hale, Blackstone articulated many of the same advantages – including "the confronting of adverse witnesses" – of "the English[] way of giving testimony, ore tenus."<sup>96</sup> Thus, by 1696, in the

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<sup>90</sup> Deut. 19:15-18.

<sup>91</sup> Acts 25:16, quoted in *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988); *Greene v. McElroy*, 360 U.S. 474, 497 (1959). The NEW ENGLISH BIBLE (2d ed. 1970) translates the key passage as "before he is confronted with his accusers."

<sup>92</sup> R. C. VAN CAENEGEM, HISTORY OF EUROPEAN CIVIL PROCEDURE, in 16 INT'L. ENCYC. OF COMP. L., ch.2 (Civil Procedure), at 19, 58-59, 62 (c. 1972).

<sup>93</sup> DE REPUBLICA ANGLORUM 74 (Mary Dewar ed. 1982).

<sup>94</sup> Around 1470, even before the roles of witnesses and juries were clearly distinguished, Sir John Fortescue praised the openness of the English system in contrast to that of the civil law. "In Praise of the Laws of England," in ON THE LAWS AND GOVERNANCE OF ENGLAND 38-39 (Shelley Lockwood ed. 1997).

<sup>95</sup> THE HISTORY OF THE COMMON LAW OF ENGLAND 163-64 (written between 1660 and 1676; Charles M. Gray ed. 1971).

<sup>96</sup> 3 W. Blackstone, COMMENTARIES at \*373. BLACK'S LAW DICTIONARY defines *ore tenus* as meaning "by way of mouth," or "orally." Hale and Blackstone spoke of "confronting" one witness against another. Similarly, in 1730, Sollon Emlyn, in the Preface to his monumental collection, STATE TRIALS, at

celebrated case of *R. v. Paine*, it was clearly established that, even if a witness had died, his statement made to a justice of the peace could not be admitted against a misdemeanor defendant because the defendant was not present when the examination was taken and so "could not cross-examine" the deponent.<sup>97</sup>

To be sure, the norm of confrontation was not always respected.<sup>98</sup> Thus, a set of courts in England, including the equity courts, followed the Continental system rather than the common law, relying largely on testimony taken out of court and out of the presence of the parties.<sup>99</sup> These courts appeared to be arms of an unlimited royal power, and so many of them, notably the court of Star Chamber, did not survive the upheavals of the seventeenth century.<sup>100</sup> And sometimes even in the common law courts, especially in politically charged cases, the Crown, eager to use the criminal law as a means of controlling its adversaries, used testimony taken out of the presence of the accused. Thus, it is in the treason cases of Tudor and Stuart England that we find the battle for the confrontation right most clearly fought.

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iii-iv, emphasized the "Excellency" of English criminal procedure. "In other Countries," he wrote, "the Witnesses are examin'd in private, and in the Prisoner's Absence; with us, they are produced face to face, and deliver their Evidence in open Court, the Prisoner himself being present, and at liberty to cross-examine them . . ." Also, in the Case of the Union of the Realms, Moore (K.B.) 790, 798, 72 E.R. 908, 913 (1604), Lord Chief Justice Popham, arguing for the superiority of English over Scots law, contended that "the Testimonies, being viva voce before the Judges in open face of the world" was "much to be preferred" over "written depositions in a corner."

<sup>97</sup> 1 Salk. 281, 91 E.R. 246, 1 Ld. Raym. 729, 91 E.R. 1387, 5 Mod. 161, 87 E.R. 584, Holt 294, 90 E.R. 1062, Comb. 358, 90 E.R. 527.

<sup>98</sup> For example, *Paine* itself distinguished felony cases. Since the mid-sixteenth century, justices of the peace had been required to examine felony witnesses, and these examinations were admissible at trial if the witness was then unavailable and the examination was taken under oath. JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 27-29 (1974). This anomalously lenient treatment – which was probably one of the abuses at which the Confrontation Clause was aimed – was controversial by the early seventeenth century, see *R. v. Westheer*, 1 Leach 12, 13, 168 E.R. 108, 109 (1739), and it was eliminated by statute in the nineteenth century. Stats, 11 & 12 Vict. ch.42 § 17 (1848).

<sup>99</sup> See, e.g., WILLIAM HUDSON, A TREATISE OF THE COURT OF STAR CHAMBER 204 (Francis Hargrave ed. 1792; repr. 1986). The equity courts did, however, carefully preserve the ability of the parties to examine adverse witnesses, albeit on written questions. See, e.g., *Rushworth v. Countess de Pembroke & Currier*, Hardres 472, 145 E.R. 553 (1668). For this reason, the law courts were willing to accept depositions as a substitute for trial testimony when the witness was unavailable to testify at trial and the party against whom the deposition was offered, or a privy, had the opportunity to examine the witness at the deposition. See, e.g., *Howard v. Tremaine*, 4 Mod. 146, 87 E.R. 314, 1 Salk. 278, 91 E.R. 243, 1 Shower K.B. 363, 89 E.R. 641, Cartheew 265, 90 E.R. 757 (K.B. 1692-93).

<sup>100</sup> THE STUART CONSTITUTION 106 (J.P. Kenyon ed., 2d ed. 1986).

As early as 1521, treason defendants, often using the term "face to face," demanded that the witnesses be brought before them.<sup>101</sup> Sometimes these demands were heeded,<sup>102</sup> sometimes not – but what is most notable is that they found recurrent support in acts of Parliament, which repeatedly required that accusing witnesses be brought "face to face" with the defendant.<sup>103</sup> By the middle of the seventeenth century, the battle was won, and courts routinely required that treason witnesses must testify before the accused, subject to questioning by him.<sup>104</sup>

Well into that century, prosecutorial authorities often tried to use confessions of alleged accomplices of the accused that were not made according to the usual norms of testimony, under oath and before the accused. The case of Sir Walter Raleigh is the most notorious, but far from the only one. The theory was that self-accusation was "as strong as if upon oath."<sup>105</sup> But the judges soon realized the iniquity of allowing an exception to the usual norms of testimony simply

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<sup>101</sup> E.g., Seymour's Case, 1 How.St.Tr. 483, 492 (1549); Duke of Somerset's Trial, 1 How.St.Tr. 515, 520 (1551).

<sup>102</sup> According to EDWARD HALL, THE UNION OF THE TWO NOBLE AND ILLUSTRIOUS FAMILIES OF LANCASTRE & YORKE (1548), published under the title HALL'S CHRONICLE (1809), p.623, the witnesses against the Duke of Buckingham in 1521 were produced at his request. Hall's account of Buckingham's trial appears to be the ultimate source for the one offered by Shakespeare and Fletcher in King Henry VIII, II:1.

John Spelman, a judge of the King's Bench, was careful to note in his report of a treason trial of 1531 that the accuser confronted the defendant "face to face." R. v. Rice ap Griffith, in 1 J.H. BAKER, ed., THE REPORTS OF SIR JOHN SPELMAN, 93 PUBLICATIONS OF THE SELDEN SOCIETY (1976).

<sup>103</sup> Stats. 5 & 6 Edw.6, ch.11, § 9 (1552), and 1 & 2 Phil.& M., ch.10, § 11 (1554), required witnesses to be "brought forth in person" before the accused. Stats. 1 Eliz.1, ch.1, § 21 (1558), 1 Eliz.1, ch.5, § 10 (1558). 13 Eliz.1, ch.1, § 9 (1571), and 13 Car.2, ch.1, § 5 (1661), all used the "face to face" formulation.

<sup>104</sup> For example, in the celebrated case of John Lilburne in 1649, there was no doubt that the witnesses would testify live in front of Lilburne: "hear what the witnesses say first," said the presiding judge in postponing one of Lilburne's arguments. 4 How.St. Tr. 1270, 1329. When the witnesses did testify, Lilburne was allowed to pose questions to them, through the court. *Id.* at 1333, 1334, 1335, 1340. In John Mordant's Case, just nine years later, there does not seem to have been any doubt that he could question the witnesses directly, which he did, 5 How.St. Tr. 907, 919-21. Indeed, at one point the presiding judge solicitously inquired whether Mordant wished to ask a witness any questions, *id.* at 922, a practice that soon became routine. *E.g.*, Colledge's Case, 8 How.St.Tr. 549, 599, 603, 606 (1681).

<sup>105</sup> Earl of Somerset's Case, 2 How.St.Tr. 966, 986 (1616)(Coke, C.J.). The theory was remarkably similar to the one adopted by the Virginia Supreme Court in *Lilly v. Commonwealth*, 255 Va. 558, 499 S.E.2d 522 (1998), *rev'd*, 527 U.S. 116 (1999).

because the accomplice accused himself as well as another.<sup>106</sup> In 1662, the judges of the King's Bench ruled unanimously and definitively in *Tong's Case* that, though a pretrial confession was "evidence against the Party himself who made the Confession" and, if adequately proved could indeed support conviction of that person without witnesses to the treason itself, the confession "cannot be used as evidence against any others whom on his Examination he confessed to be in the Treason."<sup>107</sup> Thus, the judges stated in clear terms a fundamental principle<sup>108</sup> that, as we shall see, the Supreme Court's modern Confrontation Clause jurisprudence has occluded to a substantial degree.

The confrontation right naturally found its way to America.<sup>109</sup> Thus, a Massachusetts statute of 1647 provided that "in all capital cases all witnesses shall be present wheresoever they dwell."<sup>110</sup> But the Americans did not simply draw on English law. American criminal procedure developed in a distinctive way. The right to counsel in felony trials developed far more quickly in America than in England, and with it rose an adversarial spirit that made the opportunity for confrontation of adverse witnesses especially crucial.<sup>111</sup> In addition, the right became especially

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<sup>106</sup> In 1631, the judges concluded that, at the trial of a peer before the House of Lords, "certain Examinations [clearly confessions from the context] having been taken by the lords without an oath . . . could not be used until they were repeated upon oath." Lord Audley's Case, 3 How.St.Tr. 401, 402 (1631).

<sup>107</sup> Case of Thomas Tong and Others, Kelyng 17, 18, 84 E.R. 1061, 1062 (1662). See *Lilly v. Virginia*, 527 U.S. 116, 141 (1999) (Breyer, J., concurring) (citing *Tong* for the principle that an "out-of-court confession may be used against the confessor, but not against his co-conspirators").

<sup>108</sup> For important early endorsements of this principle, see GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 99 (Garland Publ'g. 1979) (1754). See also 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 429 (1721). Gilbert's treatise, published posthumously, was apparently written before 1710. Michael Macnair, *Sir Jeffrey Gilbert and His Treatises*, 15 J. LEG. HIST. 252, 266-67 n.107 (1994).

<sup>109</sup> This importation was no doubt aided, especially towards the end of the seventeenth century, by the arrival of substantial numbers of lawyers who had been trained at the Inns of Court "and brought with them, applied, and enforced the procedural modifications enacted in England after the Revolution of 1688." FRANCIS H. HELLER, *THE SIXTH AMENDMENT* 20 (1969). See also BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30-31 (1967).

<sup>110</sup> *BOOK OF THE GENERAL LAUUES AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS* 54 (Cambridge 1648), in 1 *LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691* 60 (John D. Cushing ed. 1975). The same statute provided that in other cases the testimony of a witness might be taken by a magistrate or a commissioner, but that if the witness lived within ten miles of the court and was not disabled, this pretrial statement "shall not be received, or made use of in the Court, except the witnes be also present to be farther examined about it."

<sup>111</sup> See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995).

relevant to American concerns when Parliament began in the 1760s to regulate the colonists through inquisitorial means like the Stamp Act, which provided for the examination of witnesses upon interrogatories.<sup>112</sup> In the Revolutionary period the right to confrontation was frequently expressed, especially in the early state constitutions. Some used the time-honored "face to face" phrase;<sup>113</sup> others, following Hale and Blackstone, adopted language strikingly similar to that later used in the Confrontation Clause of the Sixth Amendment.<sup>114</sup> It is clear that the Framers were aware not only of the American history of the confrontation right but also of the abuses in the sixteenth and seventeenth century treason trials and of the defendants' demands for meeting their accusers "face to face."<sup>115</sup>

Note that in this account of the background of the Confrontation Clause, we have not mentioned reliability. To be sure, one of the advantages perceived by those who lauded the common law system of open confrontation of witnesses was its contribution to truth-determination.<sup>116</sup> But neither in the statutes, nor in the case law, nor in the commentary was there a suggestion that, if the courts determined that a particular item or type of testimony was reliable, then the accused lost his right of confrontation. On the contrary, the confrontation principle was a categorical rule, a basic matter of the procedures by which testimony was taken.

Similarly, the law against hearsay has not played a role in this account. Hearsay doctrine,

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<sup>112</sup> See generally Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH. L. REV. 67 (1969).

<sup>113</sup> E.g., MASS. CONST., pt. 1, art. XII (1780), in RICHARD L. PERRY, *SOURCES OF OUR LIBERTIES* (1955), at 376 (right of accused "to meet the witnesses against him face to face"); N.H. CONST., pt. 1, art. XV (1784), *id.* at 384 (identical language).

<sup>114</sup> See MD. CONST. § 19 (1776), in PERRY, *SOURCES*, at 348, providing that "in all criminal prosecutions, a man hath a right . . . to be confronted with the witnesses against him." See also VA. CONST. § 8 (1776), *id.* at 312 ("a right . . . to be confronted with the accusers and witnesses"); N.C. CONST. § 7 (1776), *id.* at 355 ("a right . . . to confront the accusers and witnesses with other testimony"), PA. CONST. § 9 (1776), *id.* at 330 ("a right . . . to be confronted with the witnesses"); VT. CONST. § 10 (1777), *id.* at 366 (identical language).

<sup>115</sup> They had access to the reports of the state treason trials first published in 1719, Symposium, *Historical Development of the American Lawyer's Library*, 61 L. LIBR. J. 440, 444 (1968), standard treatises such as Gilbert's and Hale's that relied heavily on the state trials, and they read and revered Blackstone. See L. M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 101 (2d. ed. 1985).

<sup>116</sup> Hale, for example, argued that cross-examination "beats and boults out the Truth much better" than privately taken examinations with "limited . . . Interrogatories in Writing." *HISTORY OF THE COMMON LAW*, at 164. Similarly, Blackstone contended, "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" in the manner of the civil law. 3 COMMENTARIES \*373.

like evidentiary law more generally,<sup>117</sup> was not well developed even at the time the Clause was adopted, much less during the previous centuries.<sup>118</sup> The tendency to meld the confrontation right and hearsay, as we shall show, is a latter-day development. As this historical account and the language of the Confrontation Clause indicate, the Clause was not an attempt to constitutionalize the nascent law of hearsay.<sup>119</sup> Rather, it plainly expressed a basic procedural principle, that if a person acts as a witness against an accused, the accused must have an opportunity to confront that person. Confrontation, like the oath, is one of the fundamental conditions under which testimony must be given.<sup>120</sup>

## B. Development of the Modern “Excited Utterance” Exception

The confrontation principle discussed above, though powerful, is relatively narrow: It does not apply to all out-of-court statements but only to those that constitute the giving of testimony. Beginning late in the seventeenth century, however, courts and scholars, non-legal as well as legal, manifested significant concern over the epistemological problems created generally

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<sup>117</sup> As late as 1794, Edmund Burke remarked in the House of Commons that the rules of “the law of evidence . . . [were] very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half hour, and repeat them in five minutes.” *Quoted in* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 *COL. L. REV.* 1168, 1186-1190 (1996); *see also, e.g.*, Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 *ILL.L.REV.* 691. Burke was overstating the point, of course; there was an identifiable law of evidence well before this time. But at least until relatively late in the 18<sup>th</sup> century much of the law of evidence was a matter of general principles and did not result in the exclusion of evidence with the degree of consistency now associated with it. Richard D. Friedman, *Anchors and Flotsam: Is Evidence Law “Adrift”?*, 107 *YALE L.J.* 1921, 1944 n.13 (1998).

<sup>118</sup> *See* T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 *IOWA L. REV.* 499 (1999), at 531 (the rule against hearsay “was applied inconsistently, if at all, in the middle of the eighteenth century but . . . this approach had changed measurably by the early 1820s”), 533 (“If the treatises are to be believed, the rule against hearsay began to mature into its modern form during the late eighteenth century.”), 536 (“Until the 1780s, the courts rarely discussed the hearsay rule,” and “hearsay controversies in criminal cases were almost non-existent before then,” but there was a burst of activity in that decade). *See generally* Stephen Landsman, *From Gilbert to Bentham. The Reconceptualization of Evidence Theory*, 36 *WAYNE L.REV.* 1149 (1990); John H. Langbein, *The Criminal Trial Before Lawyers*, 45 *U. CHI.L.REV.* 263 (1978).

<sup>119</sup> Indeed, Justice Story faulted the drafters of the Sixth Amendment for failing to incorporate the law of evidence into the Sixth Amendment even while showing “undue solicitude” for procedural protections. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* (1833) (1991 ed.).

<sup>120</sup> Interestingly, until near the end of the eighteenth century, lack of the oath appears to have been a greater concern with respect to out-of-court statements than was absence of cross-examination. *See* Gallanis, *supra* note 118, at 533.

whenever one person reports what another said<sup>121</sup> – hearsay in the terminology of the day, and in the lay understanding of our own day.

In the early eighteenth century, the principle that “a mere Hearsay is no Evidence”<sup>122</sup> was a commonplace, but this rule – which was understood to refer to oral statements only, what the witness “heard another say”<sup>123</sup> – was not carefully worked out or consistently applied by the exclusion of evidence. By the end of the century, however, an exclusionary rule had gelled. Soon it gained all the breadth, and even more, of the modern rule,<sup>124</sup> which defines hearsay as an out-of-

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<sup>121</sup> Friedman, *Anchors and Flotsam*, *supra* note 117, at 1944-45. For example, in a non-legal religious publication written around 1670, Sir Matthew Hale argued: “That which is reported by many Eyewitnesses hath greater motives of credibility than that which is reported by few . . . and finally, that which is reported by credible persons of their own view, than that which they receive by hear-say from those that report upon their own view.” MATTHEW HALE, *THE PRIMITIVE ORIGINATION OF MANKIND* 129 (London, William Godbid 1677).

<sup>122</sup> GEOFFREY GILBERT, *supra* note 108, at 107.

<sup>123</sup> WILLIAM NELSON, *THE LAW OF EVIDENCE* 278 (2d ed. 1735) (“A Witness shall not give Evidence of what he has heard another say.”) *See also id.* at 277 (“Hearsay, or a Report of what another Man said, is no Evidence against a Prisoner.”); GEOFFREY GILBERT, *supra* note 108, at 107 (“The Attestation of the Witness must be to what he knows, and not to that only which he hath heard, for a mere Hearsay is no Evidence . . . .”); 2 WILLIAM HAWKINS, *supra* note 108, Bk. II, c. 46, § 14, at 431 (“It seems agreed, That what a Stranger has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other Side hath no Opportunity of a cross Examination . . . .”).

<sup>124</sup> In the early years of the nineteenth century, we can see the category of hearsay expanding to cover writings. THOMAS PEAKE, *A COMPENDIUM OF THE LAW OF EVIDENCE* 10 (1801) says, in its discussion of hearsay, that certain written memoranda made in the ordinary course of business are admissible as “not within the exception as to hearsay evidence.” Peake is using “exception” in the same sense that today we would use “objection.” The statement, therefore, is that these memoranda are not excluded by the hearsay rule; apparently implicit is the inchoate idea that other writings would be. In 1815 S.M. Phillipps made the principle clear: The exclusionary rule “is applicable to statements in writing, no less than to words spoken,” the only difference in this respect being that there is greater facility of proof in the case of writings than of oral statements. 1 S.M. PHILLIPPS, *A TREATISE ON THE LAW OF EVIDENCE* 173 (1st Amer. ed. 1816 from the 2d London ed. 1815). (The first edition of Phillipps’ influential treatise was published in 1814 but is not readily available today. Gallanis, *supra* note 118, at 532 n.247.) Phillipps’ analysis did not gain instant universality. In a passage not present in earlier editions, FRANCIS BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* (Richard Whalley Bridgman, ed., 7th ed. 1817), at 294b n., follows Peake’s treatment, virtually to the point of plagiarism. 3 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 447-48 (1827), treats written evidence as distinct from hearsay, but claims that the same rules apply to both.

Soon, too, the hearsay rule expanded to include the long-established rules, *see supra* note 99, governing when depositions of a witness, taken under oath before trial, could be introduced in lieu of trial

court statement offered to prove the truth of a matter asserted in the statement,<sup>125</sup> and renders the statement presumptively inadmissible for that purpose.<sup>126</sup>

The scope of the hearsay rule, therefore, extended beyond out-of-court statements that might be considered testimonial. But such statements lay at the core of the rule, and the rule was supported on the basis that it preserved the conditions that should govern the giving of testimony. Thus, S. March Phillipps, in one of the most important evidence treatises of the nineteenth century, explained that "the reason of the rule is, because evidence ought to be given under the sanction of an oath, and that the person, who is to be affected by the evidence, may have an opportunity of interrogating the witness . . . ."<sup>127</sup>

Because the rule was now so broad, it could not be applied without qualification or exception. Indeed, even before 1800 several recognizable hearsay exceptions had developed to a considerable extent.<sup>128</sup> But these exceptions were, at least for the most part, consistent with the principle that testimonial statements should be given under oath in the presence of the adverse party – in the case of most of the exceptions because they principally concerned statements made *ante litem*, before the dispute giving rise to the litigation.<sup>129</sup> Drawing on recent cases, Phillipps

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testimony. See PHILLIPPS *supra*, at 177-78 (discussing the celebrated *Berkeley Peerage Case*, 4 Camp. 401, 171 E.R. 127 (1811)).

In 1838, in the famous case of *Wright v. Tatham*, 5 Cl. & F. 670, 47 Rev. Rep. 136 (H.L. 1838), extended the reach of the rule against hearsay to conduct that apparently reflected the belief of an actor in a proposition and was offered to prove the truth of that proposition, even though the actor did not assert the proposition. This conception goes beyond the modern American definition of hearsay, which is limited to conduct that is intended as an assertion of the proposition that the conduct is offered to prove.

<sup>125</sup> FED. R. EVID. 801(c).

<sup>126</sup> FED. R. EVID. 802.

<sup>127</sup> S.M. PHILLIPPS, *supra* note 124, at 173.

<sup>128</sup> Gallanis, *supra* note 118, at 533 ("[T]he treatises indicate that most of the modern exceptions to the rule against hearsay were in place by the end of the eighteenth century, even if their contours in particular cases required clarification. These exceptions were: legitimacy, family relationships, pedigree, prescription, custom, general reputation, prior consistent and inconsistent statements, and dying declarations.") (footnotes omitted). To Gallanis' list might be added former testimony and personal admissions.

<sup>129</sup> This is true of the first six exceptions listed by Gallanis, *supra* note 118 – statements concerning legitimacy, family relationships, pedigree, prescription, custom, and general reputation. With respect to prior consistent or inconsistent statements of a witness (to the extent that these were actually admitted), at least the witness had to testify under ordinary conditions at trial. We believe that the dying declaration exception was at base a groping effort towards recognition of the doctrine under which the confrontation right may be forfeited by misconduct of the party opponent that causes the unavailability of

distinguished between "the natural effusions of a party, who must know the truth, and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth,"<sup>130</sup> and statements made "for the express purpose of being given in evidence."<sup>131</sup>

Shortly after 1800, commentators began articulating the doctrine to which some attached the label *res gesta* or *res gestae*<sup>132</sup> – literally, “things that have been done.” In its origin, this principle was not clearly an exception to the rule against hearsay. Rather, it was an expression of a basic limitation on the scope of the exclusionary rule. Thus, Sir William Evans, in his *Appendix on evidence* published in 1806, explained the concept, though without using the term:

What is called hearsay, may be properly divided under two principal heads: 1<sup>st</sup>, Those in which it is a mere narrative of an event: 2<sup>d</sup>, Those in which it is the actual occurrence of a fact, which fact may be materially connected with the general conclusion intended to be drawn upon the subject of the enquiry. . . . [T]he distinction between the cases, in which the immediate action of speech furnishes a material indication with respect to the object of the inquiry, and those in which it is a mere act of narration, will in most cases furnish the proper principle for ascertaining whether the evidence of its occurrence is or is not properly admissible.<sup>133</sup>

Similarly, though Phillipps said that hearsay “is often admitted in evidence, as part of the *res gesta*,” he explained the concept in terms that clearly distinguish it from hearsay in the modern definition. According to Phillipps, the meaning of *res gesta* “seems to be, that where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence, for the purpose of showing its true character.”<sup>134</sup> And the same point was made about a decade later in another important treatise, that of Thomas Starkie, who explained *res gestae* this

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the witness. With respect to former testimony, the conditions of oath and adverse examination were sedulously protected, *see supra* note 99. With respect to personal admissions, the idea of confrontation does not apply, and there is little if any need for oath, because the statement is offered against the person who made it.

<sup>130</sup> S.M. PHILLIPPS, *supra* note 124, at 175, citing Thurlow, L.C. in the *Berkeley Peerage* case.

<sup>131</sup> S.M. PHILLIPPS, *supra* note 124, at 175, quoting Eldon, L.C., in *Whitlocke v. Baker*, 13 Ves. Jr. 510, 514 (1807).

<sup>132</sup> Gallanis, *supra* note 118, at 533.

<sup>133</sup> WILLIAM DAVID EVANS, APPENDIX, to 2 ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS (William David Evans ed. & trans. London, A. Strahan 1806), at 284.

<sup>134</sup> S.M. PHILLIPPS, *supra* note 124, at 202.

way:

If the declaration or entry has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute, and depending for its effect entirely on the *credit* of the person who makes it, it is not admissible in evidence; but if, on the contrary, any importance can be attached to it as a circumstance which is part of the transaction itself, and deriving a degree of credit from its connection with the circumstances, independently of any credit to be attached to the speaker or writer, then the declaration or entry is admissible in evidence.<sup>135</sup>

The basic idea of *res gestae*, then, was that if an utterance was part of the event at issue rather than a report about it then it should not be excluded by the hearsay rule. Thus, courts sometimes stated the test for admissibility in terms that today sound almost amusingly metaphysical: “Were the facts talking through the party or was the party talking about the facts?”<sup>136</sup> But when the courts in the nineteenth and early twentieth centuries spoke in operational terms, they were often very restrictive, in accordance with the principles set out by the early commentators.

First, courts were rigorous in limiting the principle to statements that were made while the events at issue were occurring, or immediately thereafter. Some cases purported to preclude admissibility if the event was already closed. For example, in the well-known – and much criticized – case of *R. v. Bedingfield*, the victim, whose throat had been cut by the defendant no more than a minute or two earlier, exclaimed “See what Harry has done!”<sup>137</sup> and died ten minutes later.<sup>138</sup> The court ruled the statement inadmissible. “Anything . . . uttered by the deceased at the time the act was being done would be admissible,” ruled Lord Chief Justice Cockburn; if the utterance was, “Don’t, Harry!” it would not have been excluded as hearsay. “But here it was

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<sup>135</sup> 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE (1<sup>st</sup> American ed. 1826), Pt. I, § 28, at 47.

<sup>136</sup> 2 S.E.2d 337, citing Corpus Juris. See also 249 P. 947 (“‘Res gestae,’ as said by Mr. Wharton, in his work on Criminal Evidence (section 262), ‘are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that speaks.’”).

<sup>137</sup> The statement is rendered somewhat differently in James B. Thayer, *Bedingfield’s Case: Declarations as a Part of the Res Gestae*, 14 AM. L. REV. 817, 826 (1880).

<sup>138</sup> The court ruled that the statement was not admissible as a dying declaration because there was no evidence that the victim knew she was dying.

something stated by her after it was all over, whatever it was, and after the act was completed.”<sup>139</sup> Other courts, even though not quite so restrictive, usually confined admissibility to cases in which the statement was made a very brief time after the events being described. Courts and commentators put the requirement in various ways. Many spoke of a requirement of contemporaneity.<sup>140</sup> A typical expression of the rule was that the statement must be “in a general sense, contemporaneous with the main occurrence; although, in case of a sudden accident or attack, the declaration would not be inadmissible merely because the blow or collision immediately preceded it.”<sup>141</sup> In another formulation, the statement had to be “an integral part of

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<sup>139</sup> 14 Cox Crim. Cas. 341, 342-43 (Crown Ct. 1879). *See also* Chicago West Div. Ry. Co. v. Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144 (1889) (declaring that “according to all the authorities” a statement is inadmissible if “it is itself a part, or is merely a history or a part of a history of a completed past affair.”); Elder v. State, 69 Ark. 648, 65 S.W. 938 (1901) (“mere narrations of a past event, or the declarations of a witness concerning such past event, giving his relations to it and his knowledge or opinion of it, made after the event is complete, and having no immediate connection with it, are not admissible as evidence to prove such event”); Waldele v. N. Y. C. & H. R. R. Co., 95 NY 274, 47 Am. Rep. 41 (1884) (rejecting evidence of statements as “giving an account of a transaction not partly past, but wholly past and completed”); Williams v. S. P. Co., 133 Cal. 550, 554, 65 P. 1100, 1102 (1901) (“Expressions of persons who are actors, made during the occurrence, may generally, but not always, be proved. If spontaneous and caused by the event, they may nearly always be shown. But if afterwards, no matter how shortly afterwards, there is an attempt to explain what has happened, or to account for it, or to defend one’s self, or the like, it is incompetent and inadmissible as *res gestae*.”). *Cf.* People v. DelVermo, 192 N.Y. 470, 85 N.E. 690 (1908) (“Strictly speaking, the spontaneous declaration [admitted in another case, and made 20 seconds after the injury] did not really form part of the *res gestae*, as being itself a verbal act contemporaneous with the principal occurrence; for the exclamation was uttered after the act of stabbing had been wholly completed and after the assailant had fled, although it is true that the time which had elapsed was very short.”).

<sup>140</sup> This was the position of James Bradley Thayer. *See* James B. Thayer, *Bedingfield’s Case-Declarations as a Part of the Res Gestae*, 15 AM. L. REV. 71, 84, 86 (1881) (“There can seldom be a perfect coincidence of time, but the . . . rule calls for a declaration which is made either while the matter in question is actually going on, or immediately before or after it. . . . [T]he nearness in time should be such that the declaration may in a fair sense be said to be a *part* of the *res gesta*, *i.e.* a part of the transaction of which it purports to give an account.”; “it is the closeness of the declaration to the fact in point of time, coupled with its own import, that gives it its legally recognized quality of proof.”). The Thayer view, emphasizing contemporaneity and not stress, eventually was reflected in the hearsay exception for statements of present sense impressions, now expressed in FED. R. EVID. 803(1).

<sup>141</sup> Heckle v. Southern Pac. Co., 123 Cal. 441, 442, 56 P. 56, 57 (1899). *See also, e.g.* Missouri, O. & G. R. Co. v. Adams, 52 Okl. 557, 153 P. 200, 202 (“the statement must be substantially contemporaneous with the transaction, made on the spur of the moment, and induced by the happening of the events concerning which the statement is made”); Chicago West Div. Ry. Co. v. Becker, 128 Ill. 545, 547, 21 N.E. 524, 524 (1889) (excluding statements made by decedent after a 40-foot walk from the place of injury: “The declarations were not a part of the *res gestae*. They were not made at the time of the accident . . . . They were not concurrent with the injury, nor uttered contemporaneously with it, so as to be

the transaction, occurring *dum fervet opus*<sup>142</sup> – while the work glows, or in the heat of action.<sup>143</sup> Whatever the time element, courts insisted that the rule applied only if the statement “bears no evidence of reflection or deliberation or calculation.”<sup>144</sup>

Second, the courts frequently said that the statement must not be “a narrative of a past occurrence.”<sup>145</sup> Such narrations, they pointed out, depended for their probative value “upon the accuracy and reliability” of the out-of-court declarant, as well as on the veracity of the witness who reported the statement in court – and so there was no way that “the truth of the declarations could be tested” by “cross examination of the witness testifying, or by the examination of other

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regarded as a part of the principal transaction. They were made after the injury was received . . . .”); *Commonwealth v. Hackett*, 2 Allen 136, 84 Mass. 136 (1861) (statement by victim 20 seconds after fatal stabbing admitted, being “an exclamation or statement contemporaneous with the main transaction, forming a natural and material part of it”).

<sup>142</sup> *Kenney v. State*, 79 S.W. 817, 65 L. R. A. 316 (Tex. Cr. App. 1903).

<sup>143</sup> BLACK’S LAW DICTIONARY (6<sup>th</sup> ed. 1990). The operating principle appears to have been that the question begged by one Latin phrase could be begged again by another. This, of course, is essentially the same principle applied by many tourists: If the locals don’t understand you, talk louder.

<sup>144</sup> *Washington-Virginia Ry. Co. v. Deahl*, 126 Va. 141, 100 S.E. 840 (1919). In perhaps the first case to articulate a rationale for admissibility of spontaneous utterances, *Thompson v. Trevanion*, *Skinner* 402 (1693), the court “allowed that what the wide [the alleged victim of an assault and battery] said immediate upon the hurt received, and before that she had time to devise or contrive anything for her own advantage, might be given in evidence.”

<sup>145</sup> *Upton v. Commonwealth*, 172 Va. 654, 659, 2 S.E.2d 337, 339 (1939) (“As stated in *Corpus Juris*, the true test is this: . . . Was the statement made *dum fervet opus* or was it a narrative of a past occurrence?”). *See also, e.g.*, *Largin v. State*, 20 Ala. App. 610, 612, 104 So. 556, 558 (1925) (statements must have been “instinctive from the occurrences to which they relate rather than the retrospective narration of a past fact”); *Heckle v. Southern Pac. Co.*, 123 Cal. 441, 442, 56 P. 56, 57 (1899) (“if it be a mere narrative of past events, it then is clearly within the category of inadmissible hearsay, and must, beyond doubt, be excluded”); *Schaff v. Coyle*, 121 Okla. 228, 249 P. 947, 953 (“‘*Res gestae*,’ as said by Mr. Wharton, in his work on Criminal Evidence (section 262), ‘are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events.’”); *Missouri, O. & G. R. Co. v. Adams*, 52 Okl. 557, 153 P. 200, 202 (asserting that “the rule is universal that, to be admissible as part of the *res gestae*” the utterance must not be “a narrative or statement of what has occurred”); *Prickett v. Sulzberger & Sons Co.*, 57 Okl. 567, 578, 157 P. 356 (1916) (quoting from *McKelvey on Evidence*, that *res gestae* statements “exhibit the mind’s impression of immediate events, and are not narrative of past happenings”); *Chicago West Div. Ry. Co. v. Becker*, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144 (1889) (holding inadmissible declarations that “were made after the injury was received, and were merely narrative of what had taken place”); *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N.Y. 274, 47 Am. Rep. 41 (1884) (rejecting evidence of statements deemed to be “purely narrative”); *Williams v. S. P. Co.*, 133 Cal. 550, 554, 65 P. 1100, 1102 (1901) (“A narrative, even if given during the occurrence, is inadmissible.”).

witnesses.”<sup>146</sup> On the other hand, if the statements were deemed to be “so nearly contemporaneous with [the occurrence] as to characterize it, or throw any light upon it”<sup>147</sup> then they would be considered part of the *res gestae*, or in one formulation “a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part,” as opposed to “merely a history or a part of a history of a completed past affair.”<sup>148</sup>

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

[S]tatements not under oath . . . are frequently made under such circumstances as entitle them to very great, and frequently to implicit confidence; and yet they do not answer the requirements of the law – that a party prosecuted shall be confronted with the witnesses, shall have an opportunity of cross-examination, and that the evidence against him shall be given under the test and sanction of a solemn oath. Declarations which are received as part of the *res gesta* are to some extent a departure from or an exception to the general rule; and when they are so far separated from the act which they are alleged to characterize that they are not part of that act or interwoven into it by the surrounding circumstances so as to receive credit from it and from the surrounding circumstances, they are no better than any other unsworn statements made under any other circumstances. They then depend entirely upon the credit of the person making them and of the persons who testify to them, and hence are of no more value as evidence in a legal proceeding than the unsworn declarations of a person under any other circumstances.<sup>149</sup>

By the time Wigmore published the first edition of his treatise in 1904, courts were beginning to display a more receptive attitude towards spontaneous exclamations. Wigmore

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<sup>146</sup> *Waldele v. N. Y. C. & H. R. R. R. Co.*, 95 N.Y. 274, 47 Am. Rep. 41 (1884).

<sup>147</sup> *Id.*

<sup>148</sup> *Chicago West Div. Ry. Co. v. Becker*, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144 (1889).

<sup>149</sup> *Waldele v. N. Y. C. & H. R. R. R. Co.*, 95 N.Y. 274, 47 Am. Rep. 41 (1884).

greatly fostered the development. Some spontaneous statements, he pointed out, were admissible notwithstanding the hearsay rule because they were not offered for a hearsay purpose. But others were hearsay and were nevertheless admissible under an exception to the hearsay rule that he contended had been discernible in the cases for a generation.<sup>150</sup>

Wigmore not only acknowledged but embraced the narrative nature of such statements: “Such statements are genuine instances of using a hearsay assertion testimonially; *i.e.* we believe that Doe shot the pistol, or that the bell was rung, *because* the declarant so asserts, – which is essentially the feature of all human testimony.”<sup>151</sup> Wigmore put less emphasis on timing than did many of the cases, and more on external shock. The exception, he said, was

based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's testimony to those facts.<sup>152</sup>

This supposed psychological phenomenon – though unsupported by any scientific finding – struck Wigmore as so powerful that it satisfied the two basic criteria he set out for an exception to the hearsay rule, trustworthiness and necessity. Because the declaration was likely to be “the unreflecting and sincere expression of [the declarant’s] actual impressions and belief,” it had sufficient trustworthiness “to exempt it from the ordinary test of cross-examination on the stand.”<sup>153</sup> And “[t]he extrajudicial assertion being better than is likely to be obtained from the same person upon the stand, a necessity or expediency arises for resorting to it.”<sup>154</sup>

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<sup>150</sup> 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1745, 1746 (1904).

<sup>151</sup> § 1746. In his digest of *Dismukes v. State*, 83 Ala. 287, 289, 3b So. 671, 673 (1887), Wigmore quoted the court’s assertion that the statement in question, “being uttered so near the scene of the transaction, and being apparently spontaneous in its nature . . . was free from all suspicion of device, premeditation, or afterthought” – but he excised the court’s conclusion that the statement “cannot be regarded in any respect as merely narrative of a past transaction.”) § 1747.

<sup>152</sup> § 1747.

<sup>153</sup> § 1749.

<sup>154</sup> § 1748.

Wigmore acknowledged that this last point was “rarely noted” by courts, a phenomenon he believed “may be ascribed to the influence of the Verbal Act doctrine,” which “usually obviated argument” as to whether the proponent had to show “a specific necessity” for resorting to the statement.<sup>155</sup> In other words, when a court admits a spontaneous statement for a non-hearsay purpose – as part of the events being proved rather than as a report of those events – the hearsay rule does not apply and it generally does not weigh against admissibility that the declarant could be, but has not been, made a witness in court. Glibly, Wigmore simply extended the principle to the hearsay exception that he discerned. With essentially no support in the case law, especially in the context of prosecution evidence,<sup>156</sup> he pronounced “a proposition never disputed” – that “the *death, absence, or other unavailability* of the declarant need never be shown under this Exception.”<sup>157</sup>

To Wigmore, the key to the exception was that “[t]here must be some *shock, startling enough* to produce [the] nervous excitement and render the utterance spontaneous and unreflecting.” Though in his view there was “*no definite and fixed limit of time*” to the exception, “[t]he utterance must have been *before there has been time to contrive and misrepresent, i.e.* while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance.” Further, the statement had to “*relate to the circumstances of the occurrence preceding it*” – a requirement that Wigmore had some difficulty justifying but that he thought provided some extra assurance of trustworthiness and necessity.<sup>158</sup>

Wigmore’s analysis was dubious in several respects. Later commentators have challenged his supposition that a statement made while the declarant’s reflective faculties are dominated by a stress-inducing event is more likely to be accurate than the run-of-the-mill narrative statement.<sup>159</sup> The premise that the reflective powers are “in abeyance” for more than an instant is questionable. In many situations, the ability to recognize one’s self-interest and articulate a statement that supports it does not take much time at all. And, whatever its impact on the sincerity of the

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<sup>155</sup> § 1748.

<sup>156</sup> He cited two criminal cases discussing the asserted superiority of the spontaneous statement. In one, the declarant was dead, a result of the murder being tried, *State v. Wagner*, 61 Me. 178,195 (1873), and in the other she was a witness. *Jordan v. Commonwealth*, 25 Gratt. 9443 (Va. 1874).

<sup>157</sup> § 1748.

<sup>158</sup> § 1750.

<sup>159</sup> Many of the criticisms are ably summarized in Aviva Orenstein, “*MY GOD!*”: *A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 178-82 (1997). One of the classical critical commentaries is Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432 (1928).

declarant, extreme stress is likely to distort her perception, memory, and communicative ability.<sup>160</sup>

Wigmore's cavalier treatment of the unavailability question is also subject to question. Even if he was right that an out-of-court statement made under stress is "better than is likely to be obtained from the same person upon the stand," it does not follow that the statement should be admissible without a showing that the declarant is unavailable to be a witness. Presumably, better evidence than the statement alone is the statement taken *together with* the declarant's testimony, given under oath and cross-examination – which Wigmore himself famously characterized as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."<sup>161</sup> The threat of exclusion of the evidence if the declarant is available but not produced is a means of ensuring that the proponent will in fact produce the declarant. Arguably, therefore, the out-of-court statement should not be admitted if the declarant is unavailable but not produced by the proponent.

Nevertheless, Wigmore's analysis had a large influence on American courts and on other commentators in the twentieth century.<sup>162</sup> According to the notable evidence scholar Edmund Morgan, "but few cases prior to 1880 gave weight directly to the element of spontaneity, and fewer still to the fact that spontaneity was insured by the startling nature of the event"; it was, he said "only since the publication of Dean Wigmore's work that this exception to the hearsay rule has gained wide recognition."<sup>163</sup> Though even then the exception was "by no means universally accepted,"<sup>164</sup> many American courts followed the framework set out by Wigmore, excepting from the hearsay rule, without reference to the availability of the declarant, statements made a short

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<sup>160</sup> Cf. *State v. Harris*, 1999 WL 797159 (Ct. Apps. Ohio 3d Dist. 1999) ("She was so incoherent because she was so agitated[,] crying, upset, yelling, that I couldn't, I really couldn't get a lot of information out of her.")

<sup>161</sup> § 1367.

<sup>162</sup> See, e.g., Zechariah Chafee, Jr., *The Progress of the Law, 1919-1922: Evidence. II*, 35 HARV. L. REV. 428, 447-48 (1922); *Showalter v. Western Pacific Railroad Co.*, 16 Cal.2d 460, 106 P.2d 895, 899 (1940); *People v. Poland*, 22 Ill.2d 175, 181, 174 N.E.2d 804, 807 (1961). In the end, however, Wigmore's analysis did not occupy the entire field formerly designated by the term *res gestae*. Some courts treated simultaneity, as well as stress, as a basis for relieving a statement from the hearsay rule. See, e.g., *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942). The Federal Rules of Evidence now include a hearsay exception for statements of present sense impression, FED. R. EVID. 803(1), alongside the exception for excited utterances, FED. R. EVID. 803(2).

<sup>163</sup> Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 238 (1922).

<sup>164</sup> *Id.*

time after, under the influence of, and relating to, a stressful event.<sup>165</sup> Over time, they applied the exception even more leniently than Wigmore’s formulation suggested they should. Wigmore had demanded that the statement be “spontaneous and unreflecting,” made “*before there has been time to contrive and misrepresent, i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance.*” But courts began to invoke the exception in cases in which, though the declarant may well still have been substantially affected by the stressful event, one could not reasonably say that the nervous excitement was still dominant or that the declarant had little opportunity to reflect on her statement before making it.<sup>166</sup> This development may have been attributable in large part to a growing general disaffection with the hearsay rule, especially in civil cases,<sup>167</sup> and the disinclination of courts to craft a different set of evidentiary rules for civil and criminal cases. In any event, it is clearly reflected in the two main precursors to the Federal Rules of Evidence, the original Uniform Rules of Evidence of 1953<sup>168</sup> and the California Evidence Code of 1966.<sup>169</sup> Neither of these speaks of the dominance of nervous excitement or the abeyance of reflective powers. Instead, they merely demand that the

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<sup>165</sup> *E.g.*, *Wheeler v. United States*, 93 U.S. App. D.C. 159, 211 F.2d 19 (D.C. Cir. 1953); *New York, Chicago & St. Louis Rd. Co. v. Kovatch*, 120 Ohio St. 532 (1929). English courts appear to be willing to apply the exception only if the declarant is unavailable, and only if the time between the event and the statement is very brief. COLIN TAPPER, *CROSS AND TAPPER ON EVIDENCE* 548-49 (9<sup>th</sup> ed. 1999).

<sup>166</sup> *E.g.*, *Soto v. Territory*, 12 Ariz. 36, 40, 94 P. 1104, 1105 (1908) (statement of four-year-old boy to mother an hour and a half after the assault: “Where the victim of an assault is of an age to render it improbable that his utterance was deliberate and its effect premeditated in any degree, we do not think it is required that such utterance to be admissible as evidence shall have been so nearly contemporaneous with the event which gave rise to it as in the case of an older person, whose reflective powers are not presumed to be so easily affected or keep in abeyance.”); *Guthrie v. United States*, 207 F.2d 19, 92 U.S. App. D.C. 361 (D.C. Cir. 1953) (accusatory statement to police by incoherent adult victim at least eleven hours after assault and several days before death held admissible as spontaneous utterance); *State v. Novak* 151 Iowa 536, 132 N.W. 26 (1911) (holding admissible as a spontaneous statement one made by 71-year-old woman after running half a mile from her home, where assault occurred, to nephew’s house; declarant testified at trial).

<sup>167</sup> *E.g.*, Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).

<sup>168</sup> Kan. Stat. §6-460(d)(2), based on the original Uniform Rules, excepts from the hearsay rule a statement made “while the declarant was under the stress of a nervous excitement” caused by perception of “the event or condition which the statement narrates, describes or explains.”

<sup>169</sup> Cal. Evid. Code § 1240 provides:

Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

- (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
- (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

statement have been made while the declarant was “under the stress” of the exciting event. And the Federal Rules of Evidence, effective in 1975, followed suit. The “excited utterance” exception of Rule 803(2) provides that, without regard to the availability of the declarant, the rule against hearsay does not exclude

"[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Like its precursors, Rule 803(2) applies whether or not the declarant is available; the drafters appear to have followed the lead of Wigmore in this respect without much consideration.<sup>170</sup> Codifications based on the Federal Rules have now been adopted in more than 40 states, and all but one of these codifications include rules identical (or, in the case of Florida, virtually and substantively identical) to Rule 803(2).<sup>171</sup> The remaining one of these codifications, New Jersey, also has a very similar rule; like its prior codification, which was adapted from the original Uniform Rules, it purports still to insist that the statement have been made “without opportunity to deliberate or fabricate,” but the courts appear not to have made much of the difference.<sup>172</sup>

Outside as well as within the context on which this article focuses, statements made in 911 calls and follow-up conversations, the courts have continued to apply the exception with increasing lenience, often tolerating great time lapses between the stressful event and the statement.<sup>173</sup> It appears, however, that, until relatively recently, the exception was never used to

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<sup>170</sup> The English rule is to the contrary. *See* note 170 *supra*.

<sup>171</sup> *See* DAVID F. BINDER, *HEARSAY HANDBOOK* (3d ed. 1991), at 144-45 & Supp.; 2 GREGORY P. JOSEPH, STEPHEN A. SALTZBURG, ET AL., *EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES* ch. 58, at 6 (1989 replacement pamphlet) & Supp.

<sup>172</sup> *See* *Truchan v. Sayreville Bar & Restaurant, Inc.*, 323 N.J. Super. 40, 731 A.2d 1218 (1999) (“Even where the time interval between the event and the statement is long enough to permit reflective thought, the statement is not necessarily excluded if the proponent can establish that the statement was nevertheless made under the stress of the event without reflective thought.”).

<sup>173</sup> *E.g.*, *State v. Starceвич*, 139 Ariz. 378, 387-88, 678 P.2d 959 (Ct. App. 1983) (9 hours); *United States v. Rosetta*, 1997 U.S. App. LEXIS 28862 at \*\*2 (10<sup>th</sup> Cir. Oct 20, 1997) (9 hours); *United States v. Farley*, 992 F.2d 1122, 1126 (10<sup>th</sup> Cir. 1993) (“full day”); *People v. Nevitt*, 135 Ill.2d 423, 443-446, 553 N.E.2d 368 (1990) (5 hours); *State v. Crowhurst*, 470 A2d 1138, 1145 & n.4 (R.I.1984) (3 hours); *State v. Stipek*, 1995 Ohio App. LEXIS 1355, at \*3, 1995 WL 152488 at \*1 (Ohio Ct. App.), appeal dismissed, 652 N.E.2d 799 (1999) (allowing a statement made “four to six weeks” after the alleged offense); *Guthrie v. United States*, 207 F.2d 19, 23 (D.C. Cir. 1953) (11 hours); GREGORY P. JOSEPH, ET AL., *supra* note 171, ch. 58 at 36 (“Statements made after lapses of one to two and one-half hours, five hours to seven or eight hours or more are admissible, if the proof establishes the appropriate excitement.”); *but see* *Pacifico v. State*, 642 So. 2d 1178, 1187 (Fla. Dist. Ct. App. 1994) (suggesting that time lapse of approximately one hour may have been “sufficient to permit reflective thought,” but not reaching issue because statements were admissible under “first complaint” doctrine); *State v. Barnies*, 680 A.2d 449 (Me.

allow the prosecution to prove its case by introducing a statement describing a crime and made to law enforcement authorities or their agents by a declarant who is available to testify at trial but whom the prosecution has not called.<sup>174</sup> The reason is not easy to discern; nothing in the articulation of the exception would appear to preclude its use in this way. But we suspect that courts and prosecutors had a residual sense that such a use of the exception would violate the defendant's right to confront the witnesses against him. As we will now show, the Confrontation Clause jurisprudence of the Supreme Court has – at least for now – removed that obstacle to dial-in testimony.

### C. The Confrontation Right Subsumed by Hearsay Law

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

In early cases, most notably *Mattox v. United States*, the Supreme Court took the view – which squares well with the historical account we have given in Section A – that the "primary object" of the Clause was to prevent the use of testimony taken ex parte.<sup>175</sup> Neither in *Mattox* nor in most of the other early confrontation cases, nor in *Pointer v. Texas*, the 1965 case in which the Supreme Court held the Clause applicable against the states,<sup>176</sup> is the word hearsay even mentioned.<sup>177</sup> In the years shortly after *Pointer*, the Court tended to emphasize the degree to

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1996). Courts have been particularly lenient with respect to statements made by children. See, e.g., GREGORY P. JOSEPH, ET AL., *supra*, ch. 58 at 37. It may also be that courts are more tolerant of extended time lags outside the domestic violence context – note the cases cited in note 22 *supra* imposing some restraints – but we are not sure if this is so, so far as we know the courts have never articulated a differential standard, and if there is such a differential we have no ready explanation for it.

<sup>174</sup> We base this assertion on a survey of virtually all the cases cited by Wigmore in [], performed for us by Hannah Weiss of the Harvard Law School Class of 2003. It appears that in all or nearly all these cases in which a narrative statement was admitted under the exception the declarant was either unavailable or present and testifying.

<sup>175</sup> 156 U.S. 237, 242 (1895).

<sup>176</sup> 380 U.S. 400 (1965).

<sup>177</sup> In *Pointer*, the Court offered *Mattox* and three other cases, *Dowdell v. United States*, 221 U.S. 325, 330; *Motes v. United States*, 178 U.S. 458, 474; *Kirby v. United States*, 174 U.S. 47, 55-56, as principal citations for the proposition that "a major reason underlying the constitutional confrontation rule

which the Confrontation Clause and the law of hearsay are distinct.<sup>178</sup>

More recently, however, the Court has tended to emphasize the degree to which they are similar.<sup>179</sup> The Court took a significant step towards melding the law of Confrontation and of hearsay in 1980 when, in *Ohio v. Roberts*, it offered a “general approach” to the law of confrontation as it applies to hearsay statements made by out-of-court declarants:

[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.<sup>180</sup>

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

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is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him.” None of these cases mentioned the word hearsay. Two cases presented as secondary citations, *Queen v. Hepburn*, 7 Cranch (11 U.S.) 290, 295 (1813), and *Hopt v. People of Territory of Utah*, 110 U.S. 574, 581 (1884), the former a civil case, did discuss hearsay – but did not mention confrontation.

<sup>178</sup> See *Dutton v. Evans*, 400 U.S. 74, 80-81 (1970) (“[Although the Sixth Amendment’s Confrontation Clause and the evidentiary hearsay rule stem from the same roots [,] ... this Court has never equated the two, and we decline to do so now.” (footnotes omitted)); *California v. Green*, 399 U.S. 149, 155-56 (1970) (“While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.”); see also *United States v. Inadi*, 475 U.S. 387, 393 n.5 (1986) (noting that the Confrontation Clause and hearsay doctrine do not overlap completely).

<sup>179</sup> See *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987); *White v. Illinois*, 502 U.S. 346, 353 (1992) (discussing how “hearsay rules and the Confrontation Clause are generally designed to protect similar values” and how they “stem from the same roots” (quoting *Green*, 399 U.S. at 155-56, and *Dutton*, 400 U.S. at 80-81)); *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980) (same); see generally *Idaho v. Wright*, 497 U.S. 805 (1990).

<sup>180</sup> 448 U.S. 56, 66 (1980).

to the admissibility of prosecution evidence than does ordinary hearsay law.

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

Like *Pointer* and *Mattox*, *Roberts* involved prior testimony given in a formal proceeding.<sup>181</sup> The prosecution offered the statements under the hearsay exception for former testimony, now expressed in Federal Rule of Evidence 804(b)(1), which applies only if the declarant is unavailable. And so the *Roberts* Court articulated the unavailability requirement. In other settings in which unavailability would be a requisite for admissibility under the Federal Rules, the Court has held out the possibility that the Confrontation Clause requires unavailability as a constitutional matter.<sup>182</sup>

In *United States v. Inadi*,<sup>183</sup> however, a majority of the Court held that *Roberts* established an unavailability requirement only for prior testimony, and not for all out-of-court statements. The *Inadi* Court refused to apply the unavailability requirement to statements that fit within the hearsay exemption for statements of a conspirator. That exemption, as expressed in the Federal Rules, does not require the declarant to be unavailable for the exemption to be applicable.<sup>184</sup> And

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<sup>181</sup> *Mattox* involved testimony given at a prior trial, and *Pointer* and *Roberts* involved testimony given at preliminary hearings.

<sup>182</sup> In *Lee v. Illinois*, 476 U.S. 530, 539 (1986), in which the prosecution's argument was that the statement was against penal interest, the Court noted that it did not need to reach the question of unavailability, because it held the statement inadmissible on grounds of unreliability. In *Lilly v. Virginia*, 527 U.S. 116 (1999), the prosecution also argued that the statement was one against penal interest, and the plurality assumed explicitly that, to the extent unavailability of the declarant was required for admissibility, the condition was satisfied. *Id.* at 124 n.1. The exception for statements against interest is established for federal courts in Fed. R. Evid. 804(b)(3), which applies only if the declarant is unavailable. Also, in *Idaho v. Wright*, 497 U.S. 805, 816 (1990), the Court made a point of saying that it would "assume without deciding that, to the extent the unavailability requirement applies in this case, the [declarant] was an unavailable witness." There, the state argued that the statement fit within the residual exception to the hearsay rule, but the Court properly refused to regard this open-ended exception as a firmly rooted one for purposes of Confrontation Clause analysis.

<sup>183</sup> 485 U.S. 387 (1986).

<sup>184</sup> FED. R. EV. 801(d)(2)(E).

in 1992, in *White v. Illinois*,<sup>185</sup> the Court held that the unavailability requirement did not apply to statements that fit within Illinois' hearsay exception for statements made for purposes of medical treatment or – most importantly for purposes of this article – within its exception for “spontaneous declarations.” Illinois did not then have an evidentiary codification based on the Federal Rules, but its statutory medical statement exception was very similar to the exception provided by Federal Rule of Evidence 803(4).<sup>186</sup> And it articulated its common law “spontaneous declaration” exception in terms identical to the “excited utterance” exception of Federal Rule of Evidence 803(2).<sup>187</sup> And those exceptions, too, apply even if the declarant is available.

At the same time, the *White* Court held that the “excited utterance” exception, as well as the medical statement exception, is “firmly rooted” for purposes of Confrontation Clause analysis. Thus, the way is clear: If a statement is deemed to be within the “excited utterance” exception, then under the Supreme Court’s interpretation the Confrontation Clause poses no obstacle to its admission, even if the declarant is available to be a witness but is not called by the prosecution.<sup>188</sup> As we have shown, prosecutors soon began in earnest to take advantage of this opportunity.

#### **IV. Revamping Confrontation Theory**

To us, the willingness of courts to allow prosecutors to prove their cases through dial-in testimony, without even demonstrating why the caller has not been brought to court as a witness, demonstrates that something has gone very wrong with the jurisprudence of the confrontation right; it seems to us self-evident that a proper conception of the right would not tolerate the practice. We expect that some readers will agree – but not all. In this Part, we explain what we think is wrong with the Supreme Court’s conception of the confrontation right, and we argue that the Court should adopt a radically different approach, one that would not tolerate this use of dial-in testimony. In effect, we argue from both ends: We contend that the phenomenon of dial-in testimony helps demonstrate that confrontation jurisprudence should be revamped along the lines we suggest, and we contend that a proper conception of the confrontation right would lead to a

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<sup>185</sup> 502 U.S. 346 (1992).

<sup>186</sup> Illinois Rev.Stat., ch. 38, ¶ 115-13 (1989), provided that in certain prosecutions

“statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.”

<sup>187</sup> See *People v. White*, 198 Ill.App.3d 641, 648, 144 Ill.Dec. 722, 727, 555 N.E.2d 1241, 1246 (1990).

<sup>188</sup> A state constitution’s confrontation clause may still pose an obstacle to admission, however. See, e.g., *State v. Ortiz*, 845 P.2d 547, 557 (Hawaii 1993); *State v. Lopez*, 926 P.2d 784, 788-789 (N.M. App 1996).

far different judicial attitude towards dial-in testimony.

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

In Section B, we argue that a better approach, more consistent with the language and history of the Clause and with an intuitive sense for what the confrontation right is all about, can be articulated independently of hearsay law. Under this approach, the Clause does not apply to hearsay in general, but only to statements that are deemed testimonial. As to those, however, it creates a categorical rule: The statement should not be admitted against the accused unless he has had an adequate opportunity to cross-examine the declarant under oath. To this rule, we would admit only one qualification: If the declarant is unavailable to testify at trial because of misconduct of the accused, then the accused should be deemed to have forfeited the right. We will show how this approach can be applied in the case of statements made in 911 and follow-up conversations.

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

## **A. Flaws of the Current Doctrine**

### *1. Language and Structure*

It is important to pay attention to the language of the Sixth Amendment. That is self-evidently true if one is a textualist or any other kind of originalist. But even if one is not, the articulation of the confrontation right in the Amendment, and the context in which it is set out, may contain significant indications of how the right should be construed. Even if we accord no prescriptive force to the constitutional text, it is an important articulation of the right.

The Sixth Amendment reads in full as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Note at the outset that the Amendment does not read like a balancing doctrine. On the contrary, it provides rights to apply “[i]n all criminal prosecutions.” That language has not been construed as broadly as it might be; the Supreme Court has, for example, held with considerable historical support that “there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provisions.”<sup>189</sup> Moreover, in some cases, the exact bounds of the rights are limited by the open-textured words used to describe them – how slow can a trial be and still qualify as speedy?<sup>190</sup> And the rights are subject to waiver<sup>191</sup> or forfeiture.<sup>192</sup> But within their bounds, the rights are categorical. That is, they are stated and applied without qualification.<sup>193</sup> Thus, the Amendment does not say, nor has it been construed to provide, that the accused shall enjoy the right to be tried by a jury *unless* the facts are so complicated that a jury would not likely understand them or be able to render an accurate verdict, or that he shall enjoy the right “to have the Assistance of Counsel for his defence” *unless* his guilt is so clear that such assistance would probably do little good, or in the circumstances of the case it would actually obstruct the search for truth. Even in an “age of balancing,”<sup>194</sup> there are some absolutes.

Now focus on the Confrontation Clause itself. In simple and straightforward terms, it

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<sup>189</sup> *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). *See also, e.g., Scott v. Illinois*, 440 U.S. 367 (1979) (holding that the federal constitution is not violated if a state trial court fails to appoint counsel in a case in which the accused is not actually punished with imprisonment).

<sup>190</sup> Pretty slow. *See Barker v. Wingo*, 407 U.S. 514 (1972) (holding no violation created in the circumstances by a delay of well over five years between arrest and trial); *id.* at 521 (“the right to speedy trial is a more vague concept than other procedural rights. . . . We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.”).

<sup>191</sup> *See, e.g., Von Moltke v. Gillies*, 332 U.S. 708 (1948) (discussing criteria for waiver of right to counsel); *Patton v. United States*, 281 U.S. 276 (1930) (permitting waiver of jury trial).

<sup>192</sup> WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 546 (2d ed. 1991) (“Although commonly described as involving waivers, cases in which defendants have been forced to proceed pro se because they failed to obtain counsel prior to trial are more appropriately characterized as forfeiture cases.”).

<sup>193</sup> *See, e.g., Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that “absent a knowing and voluntary waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial”).

<sup>194</sup> T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943 (1987).

provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Like the other clauses in the Amendment, it seems to establish a procedural right of the accused, in this case a right that takes effect if a person acts as a witness against him. And, like the other rights established by the Amendment, this one appears to be categorical. This is most easily seen with respect to what now appears to be the core case for application of the Clause, the witness who testifies at trial.<sup>195</sup> The Clause does not speak about the reliability of the witness’s testimony – it does not say that the accused shall enjoy the right to be confronted with the witnesses against him *unless* their testimony is so reliable that the right is of little value. (“Thank you, Ms. Witness for that helpful testimony. You are excused; there is no need for the accused to cross-examine you.”) Nor does the Clause suggest that if a witness testifies before trial, without the accused having the right to confront her, but later becomes unavailable through no fault of the accused, then the prosecution may use the pre-trial testimony and the confrontation right does not apply. Of course, there is ambiguity in the term “witnesses,” which we shall explore. But it is important to bear in mind that this is the key term used in the Clause. The Clause does *not* speak about hearsay declarants – it does not say the accused shall enjoy the right to be confronted with the declarants of any hearsay offered against him.

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

First, rather than viewing the Clause as setting forth a *procedural* right, the current doctrine focuses on the Clause as a rule of *evidence*. The difference, though not airtight (for the procedure is enforced in part through exclusion of evidence that violates it), is significant. As suggested above, categorical procedural rights are common in our system.<sup>196</sup> It is not strange for us to conclude, when presented with a procedural alternative that is tempting in a particular case, that we just don’t do things that way. Rules of evidence, by contrast, tend away from absolutism, because they involve an assessment of whether the evidence will help or hurt in determining truth, and that assessment almost inevitably involves attention to the details of the particular case.

Second, as a related matter, there is no serious attempt under current doctrine to come to grips with the term “witnesses.” The *Roberts* Court did not view the term as a significant limitation on the scope of the Clause. It implicitly assumed that any hearsay declarant is a witness

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<sup>195</sup> We say that this *now* appears to be the core case for application of the Clause because, as our historical review has suggested, in its origins the Clause was more concerned with ensuring that witnesses be brought before the accused than with prescribing what happened when they were brought there.

<sup>196</sup> Another example, in addition to those discussed above, is that no matter how truthful it seems a witness will be she must testify under oath or affirmation. FED. R. EVID. 603 (requirement applicable to “every witness”).

within the meaning of the Clause, for it spoke of a potential Confrontation issue arising whenever “a hearsay declarant is not present for cross-examination at trial.” How did hearsay get into this picture, one might ask? Rather than attempt to define the word “witnesses” – not an easy matter, as we shall see – the Court simply borrowed a concept that seemed related. But note how broad this makes the reach of the Confrontation Clause. Any person who makes an assertion that is later offered to prove the truth of the assertion is a hearsay declarant, even if in doing so she was just going about her daily business, with no anticipation of litigation. The clerk who makes a routine entry in a business record, or the conspirator who conducts a mundane conversation with her colleagues, may turn out to be a hearsay declarant, depending on the use that a litigant later attempts to make of the statement at trial.

Third, given that it applies the right over such a broad region, the current doctrine inevitably dilutes the right. A system that excluded all hearsay is untenable.<sup>197</sup> Thus, the Court has had to develop a mechanism for limiting the right. Given that the Court has equated the scope of the right to the scope of hearsay law, it is not surprising that the principal mechanism that the Court has chosen has been the prime criterion that Wigmore articulated for the admissibility of hearsay, reliability or trustworthiness. Thus, the confrontation right, instead of being sturdily defined within defensible boundaries, has become an amorphous right against the admission of untrustworthy evidence. And that, as we will now argue, is an inappropriate standard.

## *2. The Inappropriateness of the Trustworthiness Standard*

The Supreme Court has said that the “underlying purpose” of the Confrontation Clause is “to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence.”<sup>198</sup> Because cross-examination is considered, in the famous words of Wigmore, the “greatest legal engine ever invented for the discovery of truth,”<sup>199</sup> ordinarily an out-of-court statement will not be admitted against an accused unless he has had an adequate opportunity to examine the declarant of the statement. But because the Court regards the Clause as evincing “a practical concern for the accuracy of the truth-determining process in criminal trials,”<sup>200</sup> it has concluded that in some settings other assurances that “the trier of fact [has] a

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<sup>197</sup> *Cf.* *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (“If one were to read this language [of the Confrontation Clause] literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. . . . But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.”).

<sup>198</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>199</sup> 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940), quoted in *California v. Green*, 399 U.S. 149, 158 (1970), and *Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980).

<sup>200</sup> *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (plurality opinion).

satisfactory basis for evaluating the truth of the prior statement” will satisfy the Clause.<sup>201</sup> In particular, a statement may be admitted without violating the Clause if the Court deems the statement to be “so trustworthy that cross-examination of the declarant would be of marginal utility.”<sup>202</sup> The Court has failed to recognize, however, that if this standard is truly the measure of trustworthiness, very little evidence would satisfy it.

In justifying the admissibility of statements fitting within the “dying declaration” exception to the hearsay rule, for example, the Court has in recent years approvingly quoted the old wisdom that “the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath,<sup>203</sup> and that “no person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips.”<sup>204</sup> One must really have faith in the old-time religion to make these perceptions the basis of jurisprudence of the Confrontation Clause.

Let’s perform a simple thought experiment. Victim, having identified Defendant as the person who fatally wounded him, promptly meets his Maker. But as it happens, the Maker is willing to cooperate to allow Victim to testify by remote hookup – there aren’t really any technological limitations in this thought experiment – and respond to cross-examination by Defendant’s counsel. How likely is it that Defendant’s counsel would say, “No thanks,” thinking to herself, “Couldn’t do anything with him. He made the statement when he knew the gates of heaven were about to open, so it’s obviously reliable beyond any genuine doubt”? Not at all likely. This is the prime witness in a murder case, and – even if she thinks that Victim’s sincerity is beyond doubt – counsel will take the opportunity to explore such matters as reasons to believe that Victim did not have a good chance to observe his assailant, or that in fact his accusation was a conclusion based on questionable inferences that he did not disclose. Beyond that, counsel may want to explore whether Victim has minimized his role in provoking the attack or whether he had a grudge against Defendant. Thus, it strikes us as nearly laughable to say that Victim’s statement is so trustworthy that we can comfortably conclude that cross-examination of Victim would be essentially worthless.

Similarly, the Court has said that “[t]he basis for the ‘excited utterance’ exception . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examina-

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<sup>201</sup> *California v. Green*, 399 U.S. 149, 161 (1970).

<sup>202</sup> *Idaho v. Wright*, 497 U.S. 805, 823 (1990).

<sup>203</sup> *Mattox*, 156 U.S. at 244, *quoted in Idaho v. Wright*, 497 U.S. at 820.

<sup>204</sup> *Queen v. Osman*, 15 Cox Crim.Cas. 1, 3 (Eng.N.Wales Cir.1881) (Lush, L.J.), *quoted in Idaho v. Wright*, 497 U.S. at 820.

tion would be superfluous.”<sup>205</sup> *Superfluous?! Consider the statements we have discussed in this article, made to 911 operators or to responding officers. Sometimes, we have shown, there are substantial reasons to doubt the truthfulness of such statements. Could one really say with a straight face that as a general matter defense counsel could get no benefit from cross-examining the declarants? Certainly when a caller does testify, defense counsel do not as a rule conclude that the statement is so clearly reliable that cross-examination would obviously be worthless, and so decline even to try.*

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

Consider, then, an alternative definition of trustworthiness – “so probably truthful that the truth-determining process is better off with the statement admitted, even though the declarant has not been cross-examined, than without any statement on the subject from the declarant.” But such a standard would provide slight resistance to the admission of hearsay. There is no psychological evidence or other persuasive reason to believe that jurors tend to overvalue hearsay evidence by so much that the truth-determining process is improved by shutting their eyes and ears to the evidence rather than exposing them to it and allowing them to assess its deficiencies.<sup>206</sup>

In addition, such a standard is static, not taking into account the impact that an exclusionary rule has in encouraging a prosecutor to present the declarant as a live witness, and so avoid the exclusion, if doing so is feasible – that is, if the declarant is available. So another alternative definition of trustworthiness might be “so probably truthful that it is not worthwhile to induce the prosecution to produce the declarant as a live witness.” But this third definition fares no better than the other two. If the declarant is unavailable, it is congruent with the second definition, because the prosecutor cannot feasibly produce the declarant – and hence virtually any hearsay would be admissible. If the declarant is available, this standard would seem to call for a balance of the difficulties in producing her against the additional difficulties for truth-determination created if she is not produced. Application of such a grand, overall balance would be erratic and unpredictable, which may account in part for the Supreme Court’s lack of disposition to attempt

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<sup>205</sup>Idaho v. Wright, 497 U.S. at 820.

<sup>206</sup> Empirical evidence suggests that jurors do not fail to discount hearsay evidence to take its weaknesses into account. See, e.g., Margaret Bull Kovera, Roger C. Park, & Steven D. Penrod, *Jurors’ Perceptions of Eyewitnesses and Hearsay Evidence*, 76 MINN. L. REV. 703 (1992). Indeed, it may be that in some circumstances jurors tend to discount hear say too much rather than too little. See Peter Miene, Roger C. Park, & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683 (1992).

it.<sup>207</sup>

Indeed, whatever standard of trustworthiness might be used, application is bound to be difficult. A good assessment of the probability that a given statement is accurate depends on an assessment of all the facts in the case. To the extent that the standard of trustworthiness attempts to take all those facts into account,<sup>208</sup> the confrontation right becomes essentially a case-by-case assessment of how likely the declarant was speaking accurately – which often is effectively an assessment by the court of how likely the defendant appears to be guilty. To the extent that the standard attempts to make the determination more uniform, by cropping certain types of information out of the inquiry<sup>209</sup> or acting on generalizations,<sup>210</sup> it can aspire only to rough accuracy.

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

Justice Scalia was far closer to the mark in saying that “the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence . . . .”<sup>211</sup> But even this statement, with a proper emphasis on procedure, over-emphasizes the reliability of evidence. That a witness has been cross-examined does not make her statement reliable: Witnesses often speak falsely, and much of what a trial is about is the attempt to determine when they are doing so. Moreover, that a statement is not reliable does not mean that it does not contribute to accurate fact-finding. An accurate factual finding may and often does depend on an accumulation of evidence, no single piece of which points infallibly to the

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<sup>207</sup> Indeed, as discussed above, except in the context of prior testimonial statements the Court has thus far refused to make the availability of the declarant a ground for excluding her hearsay statement.

<sup>208</sup> As the current doctrine does by asking about “particularized guarantees of trustworthiness.”

<sup>209</sup> As the current doctrine does in prescribing that a court may not consider corroborating evidence in determining whether the “particularized guarantees” standard is met.

<sup>210</sup> As the current doctrine does in asking whether the statement fits within a “firmly rooted” hearsay exception.

<sup>211</sup> *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting), *quoted in Lilly v. Virginia*, 527 U.S. 116, 142 (Breyer, J., concurring).

finding. In the common phrase, “a brick is not a wall,”<sup>212</sup> and a brick that itself may not be characterized as reliable may form part of a wall of evidence supporting an accurate finding.

### 3. *Making Easy Cases Hard*

Because it does not proceed from a good sense of what the confrontation right means, the current approach makes easy cases hard. Consider, for example, *Lilly v. Virginia*.<sup>213</sup> In that case, three men went on a crime spree during which one of them shot another young man to death. One of the three, Mark Lilly, made statements to the police admitting to various crimes and identifying his brother Benjamin as the triggerman. Mark asserted the privilege against self-incrimination at Benjamin’s trial, and so was deemed unavailable to testify. Accordingly, the prosecution offered his prior statements into evidence. Over the defendant’s objection, the statements were admitted. Benjamin was convicted and the Virginia Supreme Court affirmed.

Recall that in *Tong’s Case* in 1662 the judges of King’s Bench established that a confession could be offered only against the person who made it, not against another person who did not have a chance to cross-examine him.<sup>214</sup> Under traditional principles, therefore, it appears that this ought to have been an easy case.<sup>215</sup> And Justice Scalia saw the case that way. In a one-paragraph opinion, he said that use of Mark Lilly’s statement without making him available for cross-examination constituted “a paradigmatic Confrontation Clause violation.”<sup>216</sup>

Most of the Court, however, operated under the *Roberts* rubric, and that made *Lilly* a rather difficult case, yielding a 5-4 decision and six separate opinions. First, the justices had to compare the statements at issue to the hearsay exception for statements against interest. This inquiry posed two questions: Within what bounds, if any, should the given exception be

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<sup>212</sup> MCCORMICK ON EVIDENCE § 185, at 641 (John W. Strong, gen. ed., 5<sup>th</sup> ed. 1999).

<sup>213</sup> 527 U.S. 116 (1999). For further commentary on *Lilly*, see Richard D. Friedman, *Lilly v. Virginia: Glimmers of Hope for the Confrontation Clause?*, INT’L COMMENTARY ON EVIDENCE (July 10, 2000), available at <http://www.law.qub.ac.uk/ice/>.

*Lee v. Illinois*, 476 U.S. 530 (1990), which like *Lilly* involved an accomplice confession and was decided by a 5-4 vote, would furnish nearly as good an illustration of how the current doctrine makes what should appear to be a blatant violation of the Confrontation Clause look like a hard case. And, on the other side of the coin, we believe that in other cases, e.g., *United States v. Inadi*, 475 U.S. 387 (1986), the current doctrine forces the Court to struggle with some cases that properly conceived do not pose a genuine Confrontation Clause concern at all.

<sup>214</sup> See note 107 *supra* and accompanying text.

<sup>215</sup> We put aside the possibility – because it is not one that the courts addressed – that Mark asserted the privilege because of persuasion or inducement by Benjamin or someone acting in his interests.

<sup>216</sup> 527 U.S. at 143 (Scalia, J., concurring in part and concurring in the judgment).

considered “firmly rooted”? Do the particular statements at issue fit within those bounds? Justice Stevens, for the plurality, focused on the first question and dissected the exception, concluding that “accomplices’ confessions that inculcate 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.”<sup>217</sup> Chief Justice Rehnquist, for himself and two other justices, declined to make such a categorical pronouncement, but concluded that Mark’s statements against his penal interest were so far removed in time and place from the statements inculcating Benjamin in the shooting that the latter could not be considered within the exception for Confrontation Clause purposes.<sup>218</sup> That was not the end of the matter, however. The statements might still satisfy the reliability requirement of *Roberts* if they showed sufficient “particularized guarantees of trustworthiness.” After what he recognized to be a “fact-intensive” inquiry<sup>219</sup> – one that the Chief Justice thought was premature – Justice Stevens concluded that they did not. The inquiry was confined, however, because in accordance with the Court’s decision in *Idaho v. Wright* it was willing to examine only indicia of reliability that indicated the “inherent reliability” of the statements; the Court was precluded from relying on a basis, corroborative evidence, that frequently offers strong guarantees of trustworthiness.<sup>220</sup>

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

It is highly unlikely that the presumptive unreliability that attaches to accomplices’ confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice – that is, when the government is involved in the statements’ production, and when the statements describe past events and have not been subjected to adversarial testing.<sup>221</sup>

Justice Breyer, while joining the plurality opinion, wrote separately to suggest that the law of the

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<sup>217</sup> 527 U.S. at 134.

<sup>218</sup> 527 U.S. at 145 (Rehnquist, C.J., concurring in the judgment).

<sup>219</sup> 527 U.S. at 134, 136.

<sup>220</sup> 497 U.S. 805, 822 (1990). *See id.* at 828 (Kennedy, J., dissenting) (“It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence.”).

<sup>221</sup> 527 U.S. at 137.

Confrontation Clause might be improved by breaking its link to hearsay law and by recognizing that the Clause was meant to principally to protect “[t]he right of an accused to meet his accusers face to face” rather than the trustworthiness of evidence.<sup>222</sup> We agree, and in the next section we will discuss how the Confrontation Clause might be re-conceptualized, and how doing so would help solve the problem of dial-in testimony.

## **B. A Re-conceptualized Confrontation Right: Protecting the Conditions for Testimony**

It is tempting to think that a witness is one who testifies at trial, or at formal pre-trial proceedings, and that the Confrontation Clause is a protection primarily drawn to govern the procedure for taking testimony from such persons, with some peripheral (and necessarily uncertain) application to out-of-court declarants.<sup>223</sup> But we think the history that we have summarized in Part III shows that the core idea behind the Clause is to *ensure* that those who provide testimony against the accused do so openly, under oath, in the presence of the accused,<sup>224</sup> subject to examination by the accused, and, if reasonably possible, at trial.<sup>225</sup> And the language of the Clause points in the same direction – an accused has a right to “be confronted with” the witnesses against him, meaning that they must be drawn together – presumably at trial, presumably “face to face” – for the giving of testimony. The Confrontation Clause certainly is concerned with what happens when a prosecution witness testifies at trial. But its first concern is to make sure that the witness *does* testify, if at all, at trial or in another forum where the confrontation right can be preserved.

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<sup>222</sup> 527 U.S. at 140; *see id.* at 142 (“[W]hy should we, like Walter Raleigh’s prosecutor, deny a plea to ‘let my Accuser come face to face,’ with words (now related to the penal interest exception) such as, ‘The law presumes, a man will not accuse himself to accuse another’? “).

<sup>223</sup> *See* Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1046, 1048-49 (1998) (“the word ‘witnesses’ in the Confrontation Clause means in-court ‘witnesses’ who testify rather than out-of-court . . . eyewitnesses who do not,” but concluding that the Clause should cover “government-prepared affidavits and depositions” and “[p]olice station confessions and statements”).

<sup>224</sup> We elide here questions of the type posed by *Maryland v. Craig*, 497 U.S. 836 (1990), whether the presence requirement can be satisfied in some circumstances, even though the accused and the witness are in separate rooms, by a video connection. In *Craig*, a bare majority of the Supreme Court held in the affirmative with respect to those child witnesses who, case-specific findings indicate, would be traumatized by having to testify with the accused in the same room.

<sup>225</sup> If the witness is unavailable to testify at trial, testimony previously taken under oath and subject to cross-examination may suffice. *See, e.g., Ohio v. Roberts*, 448 U.S. 56 (1980) (holding that admission at trial of testimony given at preliminary hearing by a witness deemed unavailable at trial did not violate Confrontation Clause); *cf. FED. R. EVID.* 804(b)(1) (providing hearsay exception for former testimony given by witnesses now unavailable).

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

Of course, this approach requires us to have a sense of what constitutes a testimonial statement. Crafting a precise definition is not a simple matter, but we believe the history and policy of the Clause yield tolerable clarity: The Clause is meant to prevent a prosecution from being based on testimony given behind closed doors, not under oath or subject to examination by the accused. Imagine, then, that there were no confrontation right. If a person made a statement with the anticipation that it would be used in prosecuting the accused, and the statement was so used, then the person should be deemed to be testifying against the accused. That the statement was made informally, perhaps privately and without oath or adverse examination, would not undercut this conclusion. Rather, this hypothetical system without a confrontation right would tolerate such informal testimony. Now, clearly such methods of testimony are just what the Confrontation Clause is meant to prevent. So we might say that if a person makes a statement in circumstances in which – but for the confrontation right – she would understand that the statement would likely be used as evidence against the accused, the person is acting as a witness against the accused, making a testimonial statement. But application of that standard may be overly complex, both because of the conditional (“but for the confrontation right”) and because it focuses on the subjective state of mind of the person. A standard somewhat easier to apply, but yielding similar results, would be: If a statement is made in circumstances in which a reasonable person would realize that it was likely to be used in investigation or prosecution of a crime, then the statement should be deemed testimonial. Various rules of thumb can assist in application of this standard.<sup>226</sup>

If a statement is testimonial, so the declarant is a witness for purposes of the Confrontation Clause, then it must not be offered against the accused unless the conditions for testimony have been satisfied – among which are that the witness must have made or confirmed the statement under oath and that the accused must have had an adequate opportunity to cross-

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<sup>226</sup> 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.

examine her. This is a categorical rule, subject to but one qualification: If the inability of the witness to testify under these procedures is attributable to wrongdoing by the accused, then the accused may be deemed to have forfeited the confrontation right.<sup>227</sup>

Let us see how this standard would apply in two recurrent types of cases. First, consider accomplice confessions, as in *Lilly*. Mark Lilly's statements to the police were certainly testimonial. A murder had been committed, and Mark Lilly knew that the police were investigating it. Furthermore, his statement identified his brother as the triggerman. Clearly, a reasonable person in Mark Lilly's position would know that he was providing information to the police for investigation and prosecution of the crime. Accordingly, the statement was testimonial, and it should not have been admitted against Benjamin Lilly unless Mark confirmed it under oath and subject to cross-examination. The case was every bit as easy as Justice Scalia's brief concurrence made it appear. This was indeed "a paradigmatic Confrontation Clause violation" – without reference to whether the statement was reliable or not.

Now consider statements made in 911 calls and to responding police officers. A reasonable person knows she is speaking to officialdom – either to police officers or to agents whose regular employment calls on them to pass information on to the police, from whom it may go to the prosecutorial authorities.<sup>228</sup> The caller's statements may therefore serve either or both of two primary objectives – to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation, and to provide information for investigation and possible prosecution related to that situation. In occasional cases, the first objective may dominate – the statement is little more than a cry for help – and such statements may be considered non-testimonial, at least to the extent that they are not offered to prove the truth of what they assert. But as our discussion in Part I has shown, these statements are often more detailed, providing significant information that the police do not need for immediate intervention but that may be useful to the criminal justice system in investigation and prosecution. Such statements should be considered testimonial, and the confrontation right should apply to them.

Interestingly, the standard that this approach suggests is quite similar to that of the excited utterance exception as it originally emerged, and as we have described it above in Part III, but without the metaphysical distinctions that the nineteenth century courts sometimes invoked. The

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<sup>227</sup> For a discussion of the bounds of this forfeiture principle, taking the view that it applies even when the crime being charged is the act that allegedly rendered the witness unable to testify, see Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997).

<sup>228</sup> Interestingly, the new Oregon hearsay exception for statements by victims of domestic violence, *see note 20 supra*, seems drafted almost purposefully to facilitate admission of statements that are testimonial in nature. The exception applies to a victim's description of an incident of domestic violence, made within 24 hours after the incident, if it has "sufficient indicia of reliability" and it was "recorded, either electronically or in writing, or was made to a peace officer . . . , corrections officer, youth corrections officer, parole and probation officer, emergency medical technician or firefighter." Or. Ev. Code R. 803(26).

more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial.

Thus, if any significant time has passed since the events it describes, the statement is probably testimonial. When, as is often the case, the 911 call consists largely of a series of questions by the operator, and responses by the caller, concerning not only the current incident but the history of the relationship, the caller's statements should be considered testimonial. When O.J. Simpson called 911 to report an assault by his girlfriend,<sup>229</sup> his call was testimonial, not a plea for urgent protection.

Often, of course, a 911 call definitely is such a plea. Even in such a case, a court should closely scrutinize the call. To the extent it is necessary to tell about the call because the call itself is part of the incident being tried, then it should be admitted. Often, though, the contents of the call are significant only as the caller's report of what has happened, and such a report should usually be considered testimonial.

We do not deny that there will sometimes be close cases. But usually the proper result will be quite clear, for the guiding principle is clear: The Confrontation Clause is meant to prevent a system in which a witness can testify against a defendant without taking an oath and submitting herself to examination by the person she has accused.

### C. Related Theories

The theory that we have presented here is close in some respects to theories that have been presented by Justice Thomas and by Professors Akhil Amar and Margaret Berger, but it also differs in critical respects. In Justice Thomas's view, "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."<sup>230</sup> Professor Amar takes a very similar view, though he puts somewhat less emphasis on formalization and more on the governmental role in preparation of the statement. According to him, "the Clause encompasses only those 'witnesses' who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like."<sup>231</sup> Similarly, Professor Berger makes government

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<sup>229</sup> See note 79 *supra*.

<sup>230</sup> *White v. Illinois*, 502 U.S. 346, 365 (Thomas, J., concurring in part and concurring in the judgment). See also *Lilly v. Virginia*, 527 U.S. 116, 143 (1999) (Thomas, J., concurring in part and concurring in the judgment).

<sup>231</sup> Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045 (1998).

participation in the preparation of the statement the hallmark of her analysis.<sup>232</sup> We will contend here that, if a statement is testimonial in the sense we have described, it should be covered by the Confrontation Clause, whether or not it is formalized and whether or not the government participated in making it.

The trouble with making formalization a prerequisite to coverage by the Confrontation Clause is that it gets matters almost precisely backwards. Formalities such as the oath are not necessary to render a statement testimonial. Rather, they are necessary, but not sufficient, to render testimony acceptable. Imagine a judicial system that advertised to the public as follows:

“If you want to make a criminal accusation against a person, make the statement however you wish and present it to us in a way that we can pass it on to the fact-finder. If you want, you can make it in person to the fact-finder, but you don’t have to. You can make it on audio or video tape, you can make it in writing (no need for a signature), you can make it by telephone (we’ve set up a special number, 911, for just that purpose), or you can make it to any person you want, with the request that he or she pass it on to us. And you don’t have to take an oath. In fact, if you want to do the whole thing anonymously, that’s OK, too.<sup>233</sup> We can use the statement at trial however you make it.”

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

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

A rule that the Confrontation Clause does not cover a statement unless the statement is

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<sup>232</sup> Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 559, 561 (1991). Like Amar and us, Berger would make the proscription of the Clause a categorical, bright-line rule. See ACLU Brief, *supra* note 88. By contrast, it appears from Justice Thomas’ opinion in *White* that he would hold that, even if a statement fits within the scope of the Confrontation Clause, it is exempted from the proscription of the Clause if it also fits a “firmly-rooted” hearsay exception.

<sup>233</sup> *Cf. Smith v. Illinois*, 390 U.S. 129 (1968) (holding that the right to confront a prosecution witness includes the right to ask the witness’s name and address).

formalized breaks down most obviously with respect to confessions. It is obvious that accomplice confessions – such as those in the *Raleigh*, *Tong*, and *Lilly* cases, among many others – must be covered by the Confrontation Clause; it is practically a commonplace that the *Raleigh* case was one of the principal targets at which the Clause was aimed. Justice Thomas brought confessions within the ambit of the Clause as he would define it by simple fiat; that is, he declared that confessions were among the “formalized testimonial materials” covered by the Clause. But why is a confession a formal statement? As in *Lilly*, it can be made quite informally. This may be why Amar admits to some difficulty in fitting confessions into his theory. He regards out-of-court confessions as a hard case,<sup>234</sup> a conclusion that does not square well with the clear evidence that, as Justice Scalia has said, accomplice confessions are a “paradigmatic” concern underlying the Confrontation Clause.

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

Amar’s principal reason for bringing declarations made in the police station within the Clause is that they “are prepared by the *government* for in-court use and are then used in court.”<sup>235</sup> There is no doubt that, in modern criminal procedure, the government is *usually* involved in the taking or preparation of a testimonial statement by a witness for the prosecution. After all, the paradigm for acceptable testimony is live testimony of the witness at trial in response to questions from the prosecution and then cross-examination by the accused. And the prospect of the government taking or preparing testimony without affording the accused confrontation rights may be particularly disturbing. But this does not mean that government involvement is *necessary* to render a statement testimonial.

Indeed, such a theory is profoundly ahistorical. Until the 18<sup>th</sup> century most prosecutions were private lawsuits,<sup>236</sup> and yet the norm of the “altercation” between accuser and accused, described by Thomas Smith in the 16<sup>th</sup> century,<sup>237</sup> was established long before. The right of the accused to confront his accusers does not lose force in a system in which an accuser rather than

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<sup>234</sup> Amar, *supra* note 231, at 1048-49. Amar acknowledges that “[p]olice station confessions and statements” are “often made without oath,” but argues that “they typically have other formal indicia of testimony – response to precise questions, purportedly precise rendition or transcription or taping, signature, and the like.” *Id.* at 1049.

<sup>235</sup> *Id.* at 1049.

<sup>236</sup> Jonakait, *supra* note 111, at 97-98.

<sup>237</sup> See note 93 *supra* and accompanying text.

the state is the adverse party. Recall the insistence of the Roman governor Festus that the accused have an opportunity to confront his accusers face to face.<sup>238</sup>

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

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

And that, of course, is in substance often what happens with 911 calls. In some areas, the 911 system is operated by a governmental agency, and in others it is operated by the regional telephone company or some other private organization.<sup>239</sup> But it would be absurd for these mechanics of operation – which the caller is unlikely to know – to determine the Confrontation

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<sup>238</sup> See note 91 *supra* and accompanying text. Cf. Amar, *supra* note 231, at 1048 (“The Sixth Amendment is triggered when Carl [the defendant in a hypothetical posed by Amar] is “accused” by the state, not by Abner [the person who has made an accusatory statement].”). Of course, Amar is right that the Sixth Amendment is not triggered until an accusation is tried; the Confrontation Clause does not give a person a right to confront one who has accused him of crime if no charges are brought. But if a charge is tried, the accused has a right to confront the accusing witnesses, whatever the identity of the accusing party may be.

<sup>239</sup> See *Consumer FAQ: Will 911 Emergency Services Function in 2000?*, available at <http://www.zdnet.com/zdy2k/1999/01/5489.html> (“Some [911 answering centers] are owned by private companies, including the regional phone company, which contract their services to local government. Others are operated by governments, but the agency that actually ‘owns’ the 911 system varies from one jurisdiction to another; in some towns and counties, the fire department operates the emergency system, while the police or an emergency services office might in another.”).

Clause standing of the statement. The significant fact is that a 911 caller knows that, if she is not connected to the police, her message will be transmitted to the police.<sup>240</sup>

Perhaps one contending that the critical fact is governmental involvement would respond that, even if a private organization owns and operates the 911 system, it does so under contract with governmental agencies, and so the 911 operators should be considered governmental agents for purposes of the Confrontation Clause. This argument relies heavily on but stretches the concept of agency. We doubt that a private 911 operator would indeed be considered a government agent rather than an independent contractor, but the whole question seems irrelevant to the applicability of the Confrontation Clause.

Moreover, a government-agent theory would not be able to handle all similar cases. Suppose a rape counselor, with no ties to the government at all, advises her clients, “Make your accusatory statements to me, and I will pass them on to the authorities, who will then be able to use them in prosecuting your assailant. There will be no need for you to come to court or to take an oath.”<sup>241</sup> Amar’s only response to this argument is that “the Constitution is mainly addressed to *state* action.”<sup>242</sup> That is true but irrelevant. Even assuming the Confrontation Clause requires state action, the criterion is easily satisfied. The Clause is not violated when the counselor takes the statement, or even when she passes it on to the authorities, but only when the prosecutor (presumably a state official) introduces it against the defendant at trial, seeking a judgment of guilt in a court operated by the state.

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

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<sup>240</sup> Similarly, we think it would be odd if a 911 call were deemed outside the scope of the Confrontation Clause, because the operator was not an agent of the state, and yet a statement made by the same declarant to the police officer responding to the 911 call were deemed covered by the Clause.

<sup>241</sup> For a somewhat more elaborate version of this hypothetical, see Friedman, *supra* note 226, at 1041.

<sup>242</sup> Amar, *supra* note 231, at 1048.

deemed testimonial, and the declarant should be treated as a witness for purposes of the Confrontation Clause.

Ultimately, though our approach and approaches like that of Amar yield similar results in most cases, they proceed from very different points. Amar tries to develop an understanding of the word “witnesses” by beginning at the core meaning of the term in common modern parlance and then extending it somewhat outwards.<sup>243</sup> We believe the best way of approaching the Confrontation Clause is to construe it to ensure the result at which it was aimed, that prosecution testimony be given in formal proceedings, subject to the oath and confrontation by the accused. If a statement is testimonial in function but fails to meet those criteria, those failures do not mean that the statement falls outside the reach of the Confrontation Clause because the statement does not fit the core meaning of testimony. On the contrary, those failures mean that the statement falls within the Clause because otherwise our system would countenance testimony given in an intolerable way.

### Conclusion

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

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<sup>243</sup> *See id.* at 1046 (“Consider first the ordinary, everyday, common-sense understanding of the word ‘witness’: someone who testifies in the courtroom.”). Amar also makes an ultimately unsuccessful effort to devise a common meaning of the word “witness” wherever it appears in the Constitution. *See id.* at 1049 n.15 (“Even if a police station statement were viewed as ‘witnessing’ for Treason Clause purposes, the statement still might not qualify under that Clause, because it was not given under oath and arguably was not, strictly speaking, ‘testimony’ within the meaning of the Clause.”). Suppose that in response to a demand under the Sixth Amendment’s Compulsory Process Clause, which grants the accused “the right . . . to have compulsory process for obtaining witnesses in his favor,” the state responded, “OK, give us the names of your witnesses and we’ll compel them to come to the police station and answer *our* questions. You can then introduce their responses at trial.” Under Amar’s theory, it would appear, this should suffice: A statement in a police station in response to police questioning is witnessing, and so the state has compelled the production of witnesses in the defendant’s favor. But this result seems patently absurd.