Smoke and Mirros: The Failure of the Supreme Court's Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation

Eleanor Swift

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Recommended Citation
SMOKE AND MIRRORS: THE FAILURE OF THE SUPREME COURT'S ACCURACY RATIONALE IN WHITE V. ILLINOIS REQUIRES A NEW LOOK AT CONFRONTATION

ELEANOR SWIFT*

In this article, I urge judicial and legislative resistance to the result and to the reasoning of the United States Supreme Court opinion in White v. Illinois1 decided last term. In White, the Court unanimously affirmed a conviction for the sexual assault of a child, upholding the admission of five hearsay statements made by the child shortly after the alleged incident.2 Before introducing the hearsay, the prosecution had not produced the child as a witness at trial, nor had it proved the child was unavailable or unable to testify. The defendant, White, therefore claimed that the admission of the child's hearsay against him violated the Sixth Amendment's Confrontation Clause.

In Ohio v. Roberts,3 the Supreme Court interpreted the Clause's guarantee that "[t]he accused shall enjoy the right ... to be confronted with the witnesses against him"4 as imposing a "two-prong" prerequisite on the government's use of hearsay against criminal defendants: (1) the requirement of necessity, whereby the government must either produce the hearsay declarant to confront the defendant or prove the declarant is unavailable;5 and (2) the requirement of reliability, whereby the hearsay statement itself must either fit within a "firmly rooted" hearsay exception or possess significant

2. Three of the child's hearsay statements describing the alleged assault were admitted under the Illinois "spontaneous declaration" hearsay exception, and two were admitted under the exception for statements made for medical diagnosis and treatment. People v. White, 555 N.E.2d 1241, 1250-51 (Ill. App. Ct. 1990). The principal evidence against White was the child's hearsay accusations, the testimony of the babysitter who saw him leaving the child's bedroom, and some evidence of physical trauma to the child. Id. at 1243-44.
4. U.S. CONST. amend. VI.
5. According to Justice Blackmun, writing for the majority, the requirement of necessity reflected "the Framers' preference for face-to-face accusation". Id. at 65.
circumstantial guarantees of trustworthiness. The Court stated this two-prong test broadly in Roberts, and no indication that it applied only to prior testimony, the category of hearsay at issue in that case.

In White, the prosecution clearly failed to meet the Robert's necessity requirement. However Chief Justice Rehnquist, writing for a seven-justice majority, found no violation of the defendant's right to confrontation. The majority rejected Roberts' necessity requirement or "unavailability rule", and held that the Confrontation Clause was satisfied solely because the child's hearsay had been admitted under "firmly rooted" hearsay exceptions.

While the result in White could have been predicted, its narrow approach to the Confrontation Clause, and its blanket rejection of an unavailability requirement in most cases, has not been greeted

6. The requirement of reliability reflected the Clause's "underlying purpose to augment accuracy in the factfinding process." Id.

7. Justices White, Blackmun, Stevens, O'Connor, Kennedy and Souter joined in the majority opinion authored by Chief Justice Rehnquist. Justice Thomas filed an opinion concurring in part, joined by Justice Scalia. The concurrence took the position that the "witness against" language of the Confrontation Clause limits its application to hearsay that takes the form of formalized testimonial evidence, such as witness affidavits or prior testimony. White v. Illinois, 112 S. Ct. 736, 747-48 (1992).

8. By unavailability rule, the Court meant "a rule which would require as a predicate for introducing hearsay testimony either a showing of the declarant's unavailability or production at trial of the declarant." Id. at 742 n.6.

9. Id. at 743.


Such predictions were based on United States v. Inadi, 475 U.S. 387 (1986), in which the Court sustained against a Confrontation Clause challenge the admission of the hearsay statements of a coconspirator without any showing of unavailability, expressly rejecting the proposition that Roberts had established a general rule. But just four years after Inadi and two years before White, the Court referred again to the Roberts two-prong test as the "general approach" under the Confrontation Clause. Idaho v. Wright, 497 U.S. 805, 814-15 (1990). See also Edward J. Imwinkelried, The Constitutionalization of Hearsay, 76 MINN. L. REV. 521, 532-36 (1992).

11. The unavailability requirement still holds for the government's use of prior testimony, as decided in Roberts. See White, 112 S. Ct. at 741. It may also hold as a matter of evidence law, if not confrontation analysis, for those categories of hearsay that require proof of the declarant's unavailability or (continued)
warmly by many evidence commentators. There is substantial scholarly support for some type of unavailability requirement, imposed through the Confrontation Clause, that would burden the government with producing at least some of its available declarants. However, none of this writing was cited in the White majority opinion.

As far as the Supreme Court is concerned, the prosecution bears no burden of keeping track of or producing most of the hearsay declarants it intends to use at trial. Instead, the burden of producing such declarants, and the risk of not doing so, falls on the criminal defendant. This result threatens to change the nature of criminal trials. Live witnesses with personal knowledge of the alleged offense will be superfluous if they have made a "firmly rooted" hearsay statement, thus substantially changing the nature of proof in inability to testify. See, e.g., FED. R. EVID. 804. The question of whether unavailability will be required for hearsay admitted under not-firmly-rooted exceptions—such as "catch-all" exceptions like Federal Rule 803(24), or special state child hearsay exceptions—is still unresolved. See Myrna S. Raeder, White's Effect on the Right to Confront One's Accuser, CRIM. JUST., Winter 1993, at 2, 4-6.


criminal trials. The Confrontation Clause, in regulating the prosecution's use of hearsay, has been drained of meaning.

The result in White is not acceptable because the reasoning used by the Supreme Court is so deeply flawed. The Court's accuracy rationale is the product of smoke and mirrors, rather than of a realistic analysis of the values underlying confrontation. The Court's willingness to shift the burden of producing declarants to the defendant is the product of an inadequate evaluation of the costs and benefits of doing so and, under the Court's Mathews v. Eldridge\(^\text{14}\) test, violates the due process rights of criminal defendants. After demonstrating the flaws in both the Court's result and its reasoning, I conclude that, whenever possible, courts and legislators should take a new look at confrontation and at the government's obligation to produce available hearsay declarants in criminal trials.

I. THE COURT'S ACCURACY RATIONALE IN WHITE IS A CONJURING TRICK, AND THE RESULT DOES NOT AUGMENT THE ACCURACY OF CRIMINAL TRIALS

In rejecting the Roberts unavailability requirement, the White majority focuses almost exclusively on accurate fact finding—the search for seemingly objective truth—as the basic goal of the constitutional requirement of confrontation.\(^\text{15}\) The Court's rationale for its holding consists of two major premises about accuracy.

The first premise is that admission of "reliable hearsay", identified through the application of firmly rooted hearsay exceptions, satisfies the accuracy goals of both the Confrontation Clause and the

---


15. White, 112 S. Ct. at 743. The White opinion refers to the "integrity" of the fact-finding process as a basic purpose of the Confrontation Clause, citing Coy v. Iowa, 487 U.S. 1012, 1020 (1988), which in turn quoted Kentucky v. Stincer, 482 U.S. 730, 736 (1987). If "integrity" as used in White means anything more than objective accuracy, the White opinion gives no hint of this. The Clause is satisfied, the Court concludes, simply by the admission of "trustworthy", "reliable" hearsay. 112 S. Ct. at 743. No other values or functions of confrontation are suggested. Accord Berger, supra note 12, at 558 ("[T]he only function the Court currently ascribes to the Clause is the promotion of accuracy in fact-finding, a goal which is the primary objective of evidentiary rules."). See also United States v. Inadi, 475 U.S. 387, 396 (1986) ("[T]he 'Confrontation Clause's very mission' . . . is to 'advance the accuracy of the truth-determining process in criminal trials.'") (quoting Tennessee v. Street, 471 U.S. 409, 415 (1985) (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970))); Jonakait, supra note 10, at 576 ("The Court's decisions are controlled by [this] proposition . . .").
hearsay rule. The opinion states that "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied."¹⁶ This is because, in the Court's view, firmly rooted hearsay is so inherently trustworthy that confrontation and cross-examination of the declarant is unnecessary. As the White majority puts it, "Adversarial testing can be expected to add little to its reliability."¹⁷

The second premise is that an unavailability requirement can be discarded because it adds little to the goal of accuracy. In fact, as astonishing as it may seem, it appears to be the Court's view that producing the declarant would actually reduce the accuracy of fact finding.¹⁸ Thus, the "firmly rooted" test previously established as one prong of confrontation analysis under Ohio v. Roberts is now sufficient.

Taking this "accuracy rationale" at face value, I now examine each of its underpinnings.

A. The White Majority's Reasoning Cannot Support Its Claim That Admission of Firmly Rooted Hearsay, Without Confrontation of the Declarant, Increases Accurate Fact Finding

There is reason to be skeptical of the Court's accuracy rationale even before examining it closely. Many would dispute the Court's apparent assumption that the purpose of criminal trials, and therefore of confrontation, is the "search for truth".¹⁹ Even accepting this assumption, the Court's claims about the objective accuracy of fact finding in litigation are unprovable. There simply is no definitive objective test for determining what are, and what are not, accurate

¹⁶. White, 112 S. Ct. at 743.
¹⁷. Id.
¹⁸. See infra text accompanying notes 54-59.
¹⁹. Professor Jonakait has written a strong attack on the Supreme Court's focus on accuracy as the pre-eminent Confrontation Clause goal. The goal of truth-seeking is not, in his view, synonymous with the procedural guarantees of the Sixth Amendment. "Instead, the accused is guaranteed an adversary criminal trial even if that is not the best truth-determining process for him." Jonakait, supra note 10, at 585. Accord, Stephen A. Saltzburg, Lawyers, Clients, and the Adversary System, 37 MERCER L. REV. 647, 652-55 (1986) ("[T]he adversary system that Americans have chosen as the procedural vehicle for applying substantive law principles is not based on a search for the truth.").

Jonakait thus stakes out his Confrontation Clause goal as "the adversary system" writ large. In Part III of this Article, I spell out more specifically the values attached to that system of proof: operational accuracy, legitimacy and autonomy. See infra p. 165 et seq.
results. Thus, the White majority's claim that accuracy is best served by the free admission of firmly rooted hearsay can not be substantiated empirically. It remains only a claim, best judged by the strength of its premises. And several very doubtful premises underlie the White majority's claim.

1. The Court adopts a false image of cross-examination

The Court seems to consciously adopt a simplistic and false view of cross-examination as a tool for producing "truth" out of those who are subjected to it, either by its threatened or its actual use. The opinion refers to it only as an "engine . . . for the discovery of truth," and refers to the function of "adversarial testing" as being possible to add to the reliability of hearsay. Not a word is written in the White opinion about the more realistic view that cross-examination is a tool to provide more information for the trier of fact.

Courts and advocacy experts alike reject the notion that cross-examination compels people to speak the truth. If it did, all trial testimony would be trustworthy, which of course is not possible. Nor does cross-examination always dramatically expose untruthfulness.

The emphasis in a discrediting cross-examination is not on 'destroying the witness.' This almost never occurs in actual trials. Rarely will you cross-examine a perjurer and be able to demonstrate that he has totally fabricated his testimony. Most witnesses, much like any other person telling a story, inject their own attitudes, perspectives, and

---

20. Eleanor Swift, A Foundation Fact Approach to Hearsay, 75 CAL. L. REV. 1339, 1348-51 (1987); Saltzburg, supra note 19, at 654 ("[D]isputes concerning what happened in the past to persons who are involved in litigation rarely will be subject to certain resolution.").


22. ROGER HAYDOCK & JOHN SONSTENG, TRIAL 513 (1991) ("The purpose of cross-examination is to obtain information necessary to support statements made in summation. The goal of cross-examination is to reveal information that supports the cross-examiner's case and that damages the opposing party's case.").

23. "All trial testimony is not trustworthy; a jury is commonly presented with contradictory trial declarations. Cross-examination does not invariably produce assurances that the testimony is reliable or trustworthy, but instead presents information to the jurors so they can properly assess the testimony." Randolph J. Jonakait, The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony, 36 CASE W. RES. L. REV. 431, 466 (1985).
selective recall into their testimony. It is this coloring, usually unintentional and often subconscious, that can realistically be developed and exposed.24

The goal of most cross-examinations is to produce more information concerning the witness—information such as prior statements, inconsistent facts, ability to observe and recollect, bias and prejudice, lack of truth and veracity—to increase the ability of the trier to evaluate the witness' story.25 This is the widely-acknowledged purpose of cross-examination: "to test and challenge the evidence in front of the jury so that the jury will have all the information necessary to best assess what weight the evidence should be given."26

It is not as if the Supreme Court Justices are unaware of this purpose. In Davis v. Alaska, for example, Chief Justice Burger described cross-examination as testing the "believability" of witnesses with reference to the many kinds of information it can elicit.27 Additionally, in United States v. Owens, the Court described the tools of cross-examination as "realistic weapons . . . to impugn the witness's statement [even] when memory loss is asserted."28 One can only conclude that, in White, the Court's refusal to acknowledge this broader purpose is a smokescreen. However, the Court's adoption of a false image of cross-examination fatally infects the next step in the Court's accuracy rationale, which concerns the reliability of admissible hearsay.


27. 415 U.S. 308, 316 (1973) (Cross-examination tests "the witness' perceptions and memory," produces "evidence of a prior criminal conviction," reveals "possible biases, prejudices, or ulterior motives" as well as other "motivation"). In California v. Green, 399 U.S. 149, 159 (1970), the Court referred to cross-examination as furnishing "a satisfactory basis for evaluating the truth of the prior statement."

28. 484 U.S. 554, 559 (1988). The Court emphasized the impeaching facts about the declarant that could be brought out by cross-examination even though the declarant had no memory of the underlying event and could therefore never recant. See infra note 61.
2. The Court's view of the reliability of admissible hearsay is an illusion

Under the White majority's accuracy rationale, there is no need for cross-examination of the declarant when hearsay is admitted under firmly rooted hearsay exceptions. The Court flatly states that such hearsay "is so trustworthy that adversarial testing can be expected to add little to its reliability."\(^{29}\)

This claim grossly exaggerates any sensible notion of the reliability of hearsay admitted under categorical exceptions. The Justices' claim is overbroad, unjustified and embarrassing. I know of no commentator--academic or practitioner--who shares this extreme view.\(^{30}\) Many evidence classes in law schools are spent analyzing the weaknesses in the generalizations about declarants' sincerity, perception, memory and narrative ability that underlie the categorical hearsay exceptions.

This is not to say that relevant hearsay, admitted through categorical exceptions, has no probative value. Of course it does. One of the major theorists in the field has argued for a liberal rule of admission precisely because so much hearsay has so much probative force.\(^{31}\) However, the White majority's view of hearsay is far more extreme: the opinion asserts that admissible hearsay is actually "so trustworthy that adversarial testing [questioning the declarant in court] can be expected to add little to its reliability."\(^{32}\)

This statement is so improbable that it is hard to believe the Court really means it. However, the Court did say it before in Idaho v. Wright.\(^{33}\) If the Court does mean it, it is because this statement

\(^{29}\) 112 S. Ct. 736, 743 (1992).

\(^{30}\) Much criticism of the current hearsay exceptions exists. Some criticism focuses on the categorical approach in general, see, e.g., Swift, supra note 20, at 1351-53 (the categories are both overbroad and under-inclusive); EDMUND MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 170-93 (1956) (demonstrating how irregularly the exceptions function to admit trustworthy and exclude untrustworthy hearsay), while other critics focus on the substance of particular exceptions, see, e.g., I. Daniel Stewart Jr., Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 UTAH L. REV. 1, 25-38 (1970).


\(^{32}\) White, 112 S. Ct. at 743 (emphasis added).

mirrors the false image of cross-examination just discussed above. The Court's position appears to be that every "admissible declarant"—every declarant making a firmly rooted hearsay statement—was subject to some compelling reason to speak the truth when speaking outside of the courtroom. Thus, subjecting this same declarant to the threat of cross-examination, if he or she is brought into the courtroom to testify at trial, will add little by way of truthfulness.\footnote{The Court advanced this theory in \textit{Idaho v. Wright}, stating that under certain exceptions (excited utterances, dying declarations and statements for medical treatment were mentioned) "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." \textit{Id.} at 820 (emphasis added).} This might be because the declarant's out-of-court motivation to speak the truth was as compelling as his or her in-court motivation, and there is no reason to require the declarant's in-court presence. Or, it might be because the out-of-court motivation to speak the truth is indeed so powerful that the declarant's statement cannot be false. Cross-examination, were it to occur, would yield nothing. Thus, in the Court's view, firmly rooted hearsay seems to be the one type of evidence whose probative value does not require any evaluation at all by the trier of fact.\footnote{The Court adopts this extraordinary position in \textit{Idaho v. Wright}. Excited utterances "are given under circumstances that eliminate the possibility of fabrication, coaching or confabulation . . . provid[ing] sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." \textit{Id.} If this position were to be stated in terms of a \textit{presumption}, the offense to the principle of jury assessment of credibility is clear. The inference of reliability could not pass the test for "mandatory" presumptions as presented in \textit{Ulster County Court v. Allen}, 442 U.S. 140, 157-58 (1979) and thus has no more force than a "permissive" presumption or inference which does not shift the prosecution's production burden. \textit{Id.} at 157. It should not, then, justify shifting the burden of producing the declarant for cross-examination, the tool by which credibility is assessed. \textit{See infra} text accompanying notes 71-81.}

But the Court's position—if a declarant had a motive to speak the truth out-of-court, cross-examination adds nothing to the fact-finding process in court—is an illusion. It ignores the role that cross-examination really does play in generating information for the trier of fact. It ignores the whole point of cross-examination for the criminal defendant, which is to glean other facts that \textit{subtract from} rather than \textit{add to} the trier's belief in the reliability of admissible hearsay. Perhaps still worse, it ignores other significant risks of hearsay. The Court equates reliability with only one testimonial quality—sincerity—as if perception, memory and narration risks were non-existent. The Court ignores the fact that information
necessary to expose and evaluate these other risks is produced by cross-examining the declarant in court.

In sum, it is the doing of, not the threat of, cross-examination that increases the accuracy of factfinding. This the White Court refuses to admit. Its conclusion that firmly rooted hearsay is so reliable that confrontation of the declarant is useless is simply wrong.

3. The Court's test of "firmly rooted" hearsay exceptions bears no meaningful correlation to the Court's own value of objective accuracy

The White majority’s accuracy rationale also fails because the doctrinal test it relies on—the concept of firmly rooted hearsay exceptions, originated in Ohio v. Roberts—shifts between longevity and political acceptance of the hearsay exceptions and, therefore, its application yields no meaningful guarantee of accuracy.

The Court states that spontaneous declarations have been admitted as an exception for "at least two centuries" and that the exception is currently established in the Federal Rules of Evidence and nearly forty states. What the opinion does not say is that, despite this pedigree, such spontaneous or excited statements are viewed as one of the least reliable types of admissible hearsay. The dubious connection between longevity and reliability is also demonstrated in the Court’s description in Idaho v. Wright of dying declarations as

36. 448 U.S. 56, 66 (1980). Justice Blackmun, writing for the majority in Roberts, did not spell out the meaning of the "firmly rooted" test in that opinion. From the text of the opinion, it appears that he derived the phrase from the idea that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection." Id. (quoting Mattox v. United States, 156 U.S. 237, 244 (1895) (emphasis added)). Solid foundations, in this context, would refer to the strength of the generalizations underlying the exceptions, not to their longevity or political acceptance. See Stanley A. Goldman, Not So "Firmly Rooted": Exceptions To The Confrontation Clause, 66 N.C. L. REV. 1, 15, 47 (1987) (proposing an even more stringent standard of "firmly rooted" exceptions that would require case by case analysis).


38. See, e.g., Robert M. Hutchins & Donald Schlesinger, Some Observations on the Law of Evidence, 28 COLUM. L. REV. 432, 439 (1928) (citing data that shows that "[w]hat the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation"); Stewart, supra note 29, at 28 ("The most unreliable type of evidence admitted under hearsay exceptions is the excited utterance . . . . The theory is faulty on every score."); Goldman, supra note 36, at 28-32 (questioning the psychological assumptions underlying spontaneous and excited statements).
firmly rooted and thus highly reliable hearsay.39 Empirical research, and common sense, contradict the generalization underlying the exception: the notion that the declarant's "sense of impending death . . . removes all temptation to falsehood."40 Finally, any special connection between longevity and reliability is severed by *Bourjaily v. United States,*41 where the Court accorded coconspirator statements the status of being firmly rooted and, therefore, reliable even though reliability has never been the justification for the admission of such statements.42

Longevity itself is promptly abandoned when the Court discusses the second category of hearsay in *White*—statements concerning incipient cause of injury when made for purposes of medical diagnosis or treatment. This is not a centuries' old exception, since it was firmly adopted only eighteen years ago in the Federal Rules of Evidence. The opinion does not mention this. Instead, this exception is treated as firmly rooted simply because of its recognition in the Federal Rules and its "wide acceptance" (not specified) in the states.43

The doctrinal "firmly rooted" test thus boils down to utility—whatever exceptions are in fact used, because they are found useful, are considered firmly rooted. The Supreme Court has not engaged in

39. Idaho v. Wright, 497 U.S. 805, 820 (1990). In *Wright*, the Court stated that firmly rooted exceptions are those that have "longstanding judicial and legislative experience." *Id.* at 817.

40. The *Wright* opinion states the generalization of sincerity as follows: "[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict adherence to the truth as would the obligation of oath". *Id.* at 820 (citing *Mattox v. United States*, 156 U.S. 237, 244 (1895)). This generalization is directly challenged by an attempt at empirical analysis of the question in Leonard R. Jaffee, *The Constitution and Proof by Dead or Unconfrontable Declarants*, 33 Ark. L. Rev. 227, 334-40 (1979). Jaffee's research also discounts the reliability of the perceptions and communications of dying people. *Id.* Accord Goldman, *supra* note 35, at 24-26 ("untruths by the dying are far from a rare occurrences.").


42. Indeed, the Federal Rules of Evidence do not classify coconspirator statements as hearsay exceptions at all, due to their doubtful reliability. *Fed. R. Evid.* 801(d)(2) advisory committee's note. *See also* Jonakait, *supra* note 10, at 572 n.52.

43. *White* v. Illinois, 112 S. Ct. 736, 742 n.8 (1992). As pointed out by others, the broadening of this "medical statements" exception by Federal Rule 803(4) to include statements of causation was a substantial liberalization that has not been accepted by all states. *See* Raeder, *supra* note 12, at 54. The determination that a class of hearsay is so trustworthy that cross-examination is superfluous "surely requires more than simply counting jurisdictions that have adopted an exception." Mosteller, *supra* note 13, at 164.
careful empirical scrutiny of the generalizations of trustworthiness underlying the hearsay exceptions," nor does it discuss why evaluation of the particular hearsay admitted in White would not benefit from cross-examination of the declarant. It seems likely that whatever hearsay is admitted under state or federal evidence law will, over time, satisfy the reliability requirement of the Confrontation Clause. The Supreme Court does not appear to be interested in setting more principled limits by using its adjudicatory power to decide constitutional questions.

4. Expansive application of the traditional hearsay exceptions also belies the Court's claim that firmly rooted hearsay is always trustworthy

The White majority opinion also exhibits an expansive, even slapdash, application of the hearsay exceptions. This casual approach, which is not unusual, belies any serious claim that admitted hearsay is so trustworthy that cross-examination of the declarant would be pointless.

The traditional view has been that spontaneous or excited declarations cease to be "spontaneous" or "excited" when they are repeated, over time, to several different listeners, and particularly when they are made in response to interrogation. At least one of the three spontaneous statements made in White—the child's statement to the police officer—violated all of these limits.

44. See, e.g., Wright, 497 U.S. at 820. Accord Massaro, supra note 13, at 886 ("Dying declarations, statements of coconspirators, renounced confessions, or excited utterances ... simply are not 'great hearsay'; the reliability theory fails to explain these results.").

45. In several of the statements made by the hearsay declarant in White, the child described the alleged sexual touching differently. People v. White, 555 N.E.2d 1241, 1243-44 (Ill. 1990) aff'd, 112 S. Ct. 736 (1992). This could be explored in cross-examination as pertinent to the declarant's suggestibility.

46. Accord Raeder, supra note 12, at 7 ("It is disquieting that a state's definition of its hearsay exceptions has become outcome-determinative for purposes of Confrontation Clause inquiry."); Jonakait, supra note 10, at 567 ("A defendant ... should look not to the Confrontation Clause for protection, but to evidence law.").

47. The defendant in White was charged with aggravated criminal sexual assault on a four-year-old girl. The child made five out-of-court statements to five different individuals, describing the alleged assault:

(a) To her babysitter, immediately after the sitter had been awoken by the child's screams, and immediately after the sitter saw the defendant White leaving the child's room.

(continued)
Statements made for purposes of medical treatment are admitted only when they are "reasonably pertinent"\textsuperscript{48} to the symptoms or incipient cause of the medical problem, under the generalization that they are then self-interested and sincere. Chief Justice Rehnquist, writing for the \textit{White} majority, does not even acknowledge this doctrinal limit. He refers to the exception as "a statement made in the course of procuring medical services",\textsuperscript{49} a category so broad that it would seem to include anything the patient chooses to talk about with a doctor! And, in \textit{White}, it is questionable whether one of the responses made by the declarant to the medical questioning—that similar touching by the defendant had happened before\textsuperscript{50}—was "reasonably pertinent" to diagnosis or treatment. This casual, slapdash approach to the doctrinal language further undercuts any general assumptions about the reliability of firmly rooted exceptions. There are two other problems with the Court's application of the "medical statements" exception, not mentioned in the opinion. The first is the level of awareness that a child declarant has of the self-interested "diagnosis or treatment" purpose of her statements. It may be reasonable to infer that when adults, and even older children, visit a doctor after complaining of a trauma, they are motivated to be truthful. But for children as young as four, the age of the declarant in \textit{White}, is this generalization valid? Some judges have insisted that there be some objective indication that the very youthful declarant understands the

(b) To her mother, 30 minutes later, in the course of questioning about what had happened.

(c) To a police officer, roughly 45 minutes after the incident, during questioning alone with the child in the kitchen.

(d) To an emergency room nurse, four hours after the incident, again in response to questioning.

(e) To a physician, as in (d) above.  
\textit{White}, 555 N.E.2d at 1243-44.

As can be seen even from the minimal facts recited above, it is highly doubtful that the child's statements to the police officer, or even to the mother, should have qualified under the traditional view of spontaneous or excited utterances. The idea put forward in \textit{Idaho v. Wright}, that the declarant's circumstances "eliminate the possibility of fabrication, coaching, or confabulation" is far-fetched after such a passage of time, loss of excitement, and deliberate questioning. 497 U.S. at 820. Moreover, the hearsay elicited from the police officer was not just cumulative, but included the child's response to a question about two scratches on her neck. The officer testified the child had answered that "Randy had done that to her when he had his hand on her." \textit{White}, 555 N.E.2d at 1244.


50. \textit{White}, 555 N.E.2d at 1245.
need to be truthful during the doctor's examination and questioning.\textsuperscript{51} No such indication was mentioned in the White case.

The majority opinion similarly was silent regarding the second problem with the "medical statements" exception. The declarant in White made statements identifying the alleged assailant in both of the statements admitted under this exception. This is an "extremely controversial interpretation of the liberalized rule" which is now being hotly debated.\textsuperscript{52} It is true that identity was not a key issue in White, since the defendant was seen leaving the child's bedroom. However, the Court's blanket acceptance of the declarant's statements, without even flagging the issue, illustrates the kind of expansive and casual application of doctrinal limits that erode the underlying generalizations of trustworthiness.\textsuperscript{63}

In sum, the Court's accuracy rationale is deeply flawed, insofar as it relies on its first major premise that firmly rooted hearsay is so reliable that producing the declarant for cross-examination would be "superfluous".\textsuperscript{64} It is flawed in its false image of cross-examination, in its failure to acknowledge the real purpose of cross-examination, in its exclusive focus on sincerity, in the lack of correlation between the "firmly rooted" doctrine and reliability, and in ignoring the effects of expansive and slapdash applications of the firmly rooted exceptions. The Court's second major premise of its accuracy rationale, that an unavailability requirement would actually reduce the accuracy of fact finding, fares no better under careful scrutiny.

\textsuperscript{51} See Raeder, supra note 11, at 54; Robert P. Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C. L. Rev. 257, 278-79 n.92 (1989) (citing those state court opinions barring statements of children who did not "comprehend the importance of being truthful with their doctor.").

\textsuperscript{52} Statements identifying the perpetrator have traditionally been excluded under the medical statements exception. Raeder, supra note 12, at 54. Recent case law admitting such statements does not rely on a theory of the declarant's self-interested honesty. See Mosteller, supra note 51, at 275-77, 281-83 for a discussion of the controversy over the use of the "medical statements" exception to admit statements of identification.

\textsuperscript{53} Other examples of expansive reading of doctrinal limits further illustrate the danger of relying on firmly rooted exceptions to produce reliable hearsay. State v. Zimmerman, 829 P.2d 861, 865 (Idaho 1992) (suggesting that the excited utterance exception can generally be applied after longer periods of intervening time in sex crimes cases because "the distress of the event can remain bottled up until the victim has the opportunity to talk about the incident").

B. The White Majority's Claim That an Unavailability Requirement Would Actually Reduce the Accuracy of Fact Finding is Wrong

The second major premise of the White majority opinion is that enforcement of an unavailability requirement—that is, producing the declarant at trial as a prerequisite for introducing the declarant's hearsay—would actually harm the value of accuracy. The reasoning underlying this premise requires three steps. First, the Court emphasizes that firmly rooted hearsay carries special evidentiary value because of the circumstances under which it was spoken outside of court. Next, the Court contends that this value "cannot be recaptured even by later in-court testimony . . . [presumably by the declarant, who would make] a similar statement offered in the relative calm of the courtroom." Finally, the Court concludes that producing the declarant thus presents a "threat of lost evidentiary value if the out-of-court statements [are] replaced with live testimony." It is this replacement that, according to the Court, threatens a loss of accuracy in fact finding: "Simply calling the declarant in the hope of having him repeat his prior out-of-court statement is a poor substitute for the full evidentiary significance that flows from statements made" in an out-of-court context.

However, there is no threat of lost evidentiary value if the out-of-court statement is also admitted when the declarant is produced as a witness. As Justice Marshall stated in United States v. Inadi, "If a declarant takes the stand, his out-of-court statements will still be admitted as evidence, so long as they are sufficiently reliable and there are no other grounds for their exclusion." The

55. White v. Illinois, 112 S. Ct. 736, 742 (1992). The Court also states two arguments against an unavailability requirement apart from the accuracy rationale. Id. First, it accomplishes little because it does not keep hearsay out when the declarant is unavailable. Of course it does not, and should not, because that is not its purpose. Second, it accomplishes little because one or the other of the parties will call most declarants anyway. Here, the Court refuses to acknowledge that it is allocating the burden of calling the declarant that is the whole point of the requirement. See infra notes 76-81.

56. In White, this special value is limited to whatever indicia of reliability exist in the out-of-court circumstances of the declarant and qualify it for admission under a hearsay exception. 112 S. Ct. at 742.

57. Id. at 742-43.

58. Id. at 743 (emphasis added).

59. Id. at 742.

60. 475 U.S. 387, 407 (1986) (Marshall, J., dissenting). Prior statements of a witness that fall within firmly rooted hearsay exceptions are obviously "sufficiently reliable." Prior statements are often excluded as unnecessary "bolstering" of the story that the witness tells from the witness stand. (continued)
declarant/witness who makes an in-court statement that recalls the same event as the hearsay statement is subject to the full range of cross-examination and impeachment techniques. If the declarant/witness does not remember the underlying event, there still can be cross-examination "concerning" the out-of-court statement. Under either scenario, there is no threat of lost evidentiary value at all. There is no risk of "replacing" valuable

McCormick on Evidence § 49 at 115 n.1 (Cleary ed., 1984). However, they might also be admitted as probative "corroboratory evidence", as are acts of the witness consistent with his testimony, id., and as were the five prior statements of the hearsay declarant in the White case itself. Judge Weinstein has indicated that prior consistent statements are admitted under Federal Rule of Evidence 801(d)(1)(B) as an independent line of proof in the case in chief. United States v. Obayagbona, 627 F. Supp. 329 (E.D.N.Y. 1985).

The rationale for the rule against bolstering with prior statements has been both waste of time and lack of probative value: "[The witness'] testimony under oath is better evidence than his confirmatory declarations not under oath, and the repetition of his assertions does not carry his credibility further, if so far, as his oath." United States v. Smith, 490 F.2d 789, 792 (D.C. Cir. 1974) (quoting Justice Story in Ellicott v. Pearl, 35 U.S. 412, 439 (1836)). The Supreme Court in White now rejects this rationale; it considers firmly rooted hearsay to be so reliable because of its unique context that it has probative value that cannot be duplicated in trial testimony. White, 112 S. Ct. at 743. Therefore, under White, firmly rooted hearsay would not be rejected as improper bolstering, but would be admitted as a highly probative corroboration, subject only to objection under Federal Rule of Evidence 403 if too many duplicative statements were offered.

Not even the doctrine of bolstering would apply if the declarant's in-court statement had been impeached. An independently admissible hearsay statement would not even have to meet the requirements of Federal Rule of Evidence 801(d)(1)(B), limiting admission of prior consistent statements to cases in which the witness has been impeached by a charge of recent fabrication or improper motive.

61. Fed. R. Evid 801(d)(1). The Federal Rules of Evidence acknowledge the usefulness of cross-examining a declarant concerning a prior statement. Three kinds of not-firmly-rooted prior statements are admitted as hearsay exemptions under Federal Rule of Evidence 801(d)(1) solely because the declarant is testifying as a witness. Even when the declarant does not remember the underlying event, the prior statement is still admissible. United States v. Owens, 484 U.S. 554, 559 (1988). The Court in Owens emphasized that defendant had the opportunity "to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory." Id. Professor Mosteller urges more rigorous protection of the cross-examination right than does the Court in Owens when prior statements produced ex parte by the government are offered. Mosteller, supra note 13, at 108.
out-of-court hearsay with the declarant's live testimony when both can be introduced. 62

Actually, the Court even agrees. It flatly states, at a different point in the White opinion, that "if the declarant . . . is available and produced for trial, the [prior out-of-court] statements can be introduced." 63 Either the Court is unaware of this internal contradiction in its own opinion or, in raising the spectre of loss in the first place, the Court dissembles.

Either way, nothing is left of the Court's second premise to its accuracy rationale. The idea that an unavailability requirement would actually harm the fact finding process is wrong. In fact, the opposite is true, as Part II will show.

II. ASSUMING THAT ACCURACY IS AN IMPORTANT VALUE, AN UNAVAILABILITY REQUIREMENT WOULD INCREASE THE OPERATIONAL ACCURACY OF THE TRIER'S FACT FINDING IN CRIMINAL TRIALS

Still accepting the Court's premise that accuracy is an important value to be served by the Confrontation Clause, an unavailability requirement would increase the accuracy of the fact-finding process. It is better, and more realistic, to think about the accuracy of fact finding in terms of the trier's ability to evaluate inputs such as hearsay, not in terms of the objective "truthfulness" of those inputs. This concept of accurate fact finding—which I call "operational accuracy" 64—is based on different premises than the Court's. It does not imbue firmly rooted hearsay with being right or wrong, reliable or unreliable, in any objective sense. Its focus is on the trier's ability to make decisions about accuracy.

Operational accuracy would be well-served by imposing an unavailability requirement on the prosecution in all cases where the

62. This same point was also made by Justice Marshall, dissenting in United States v. Inadi, 475 U.S. 387, 407 (1986):

Whether or not a [declarant] produced in court affirms, denies, or qualifies the truth of his out-of-court statement, his presence will contribute to the accuracy of the factfinding enterprise. Whatever truth is contained in his extrajudicial declarations cannot be lost. It can only be supplemented by additional information of no less use to the triers of fact.

Id. (Marshall, J., dissenting).

63. White, 112 S. Ct. at 742.

64. Swift, supra note 20, at 1350-51.
trier of fact will be better able to evaluate the probative value of hearsay if the hearsay statement and the declarant are both produced at trial.65 Cross-examination and confrontation of hearsay

65. This may suggest that the unavailability requirement should not cover all prosecutorial hearsay, but should be limited to those categories of hearsay where declarants are most likely to produce useful information when cross-examined in court. Some commentators argue for a requirement that the government produce those declarants who can be effectively cross-examined about their hearsay statements. See, e.g., Kirkpatrick, supra note 13, at 682. Under this view, all of the statements made by the declarant in White qualify for the production requirement. See supra note 47. Other confrontation values might require the government to produce only those declarants who possess the most risk to defendants; for example, when hearsay poses significant probative value about an important fact. See, e.g.,Westen, supra note 13, at 617 (declarant is someone the defendant could "reasonably be expected to wish to examine"); Kenneth W. Grahm, Jr., supra note 13, at 129. Other commentators construe the "witnesses against" language of the Clause to mean persons who "are aware that their testimony is elicited by the party accusing the defendant of committing the crime charged." Michael H. Grahm, supra note 13, at 594. See also, Friedman, supra note 13, at 726 n.10 ("The Confratation Clause should . . . exclude [hearsay], regardless of the declarant's availability, if the declarant made the statement with the anticipation that it might be used in the investigation or prosecution of a crime and the accused has not had an adequate opportunity to examine the declarant."); Massaro, supra note 13, at 870-71, 908 (declarants making "focused accusations" that are "central to the government's charge against the accused"). While all of the statements made by the declarant in White were "focused accusations" and were "central" to the case, the mental state of awareness or anticipation might be problematic to prove.

Professor Mosteller argues that the core values of confrontation would be served if cross-examination were required of those declarants making "inquisitorial statements", that is, statements exhibiting at least some of the following characteristics: "The evidence was produced for testimonial purposes; it was documentary; it was produced by the state; it was prepared ex parte; it substituted for the live testimony of the declarant; and it was accusatory when made." Mosteller, supra note 13, at 97. Under Mosteller's view, only the statements made to the police officer and to the medical personnel in White would qualify.

A stricter view of the government's burden would require production of the declarant generally, except where the prosecutor can prove that there is no reasonable probability that cross-examination would have benefitted the defendant. Jonakait, supra note 10, at 622. See also Berger, supra note 12, at 607-13 (The prosecutorial restraint model requires an absolute obligation to produce some declarants, which would apply to the statements made by the declarant in White to the police officers and to the medical personnel.).

In this Article, I do not define the precise contours of an unavailability requirement, but I do suggest a possible approach. Two separate issues are involved. First, the kinds of unavailability that will excuse production of the (continued)
declarants would allow the defendant to present more information to the trier about factors bearing on the weight of the declarant's out-of-court statement, as discussed above. The more factors, the more the trier will be able to bring its general knowledge and experience to bear on its evaluation task. Even if one believes that firmly rooted hearsay bears significant indicia of trustworthiness, there still could be much to learn from cross-examination about the declarants and their testimonial qualities—such as information about their perceptual abilities and opportunities, their recall of details, their motives at the time, as well as explanations of ambiguities or inconsistencies—that can improve the trier's performance of its evaluative task. Cross-examination is not the perfect tool, nor the declarant by the government must be specified. I accept the standards of the Federal Rules of Evidence. See infra note 129 and text accompanying notes 100-102. Second, the kinds of declarants that the government must produce must be identified, as the proposals just discussed attempt to do. The key factors are the type of declarant (indicating how profitable cross-examination will be), the role of the state in producing the statement, and the importance of the statement to the case (how accusatorial it is).

However, the due process analysis presented in the following text suggests another possible approach. See infra text and accompanying notes 114-132. Statements of victims, confederates of the defendant, and police personnel form the core group of declarants whose uncross-examined statements create the greatest general risk of error in criminal trials. They are the sources of statements most frequently used by the prosecution, likely to be most central to the case, most likely accusatory when made, or made when the declarant is aware that the statement may be used in the investigation of a crime, and are not burdensome for the government to produce. If, as I suspect, the Supreme Court is now using an incomplete version of the Mathews v. Eldridge due process test in deciding confrontation claims, then using the complete version of that same test to establish the scope of an unavailability rule could be considered. See infra notes 121-27 and accompanying text.

66. Christopher B. Mueller, Post-Modern Hearsay Reform: The Importance of Complexity, 76 MINN. L. REV. 367, 375 (1992) ("In ordinary life, after all, we always pay more attention to particulars and draw on a lifetime of experience in assessing the reported say-so of others . . . . In contrast, the hearsay exceptions focus on a few factors that only begin to touch the question of reliability.").

67. Accord United States v. Inadi, 475 U.S. 387, 407 (1986) (Marshall, J., dissenting). See generally David Schum, Hearsay from a Layperson, 14 CARDOZO L. REV. 1, 41-42, 62 (1992) (concluding completeness of the evidence concerning the credibility-relevant attributes of a hearsay declarant is important); Jonakait, supra note 10, at 587-88 (Cross-examination gives the adversary "the opportunity to test and challenge the evidence in front of the jury so that the jury will have all the information necessary to best assess what weight the evidence should be given.").
only tool, to develop relevant information about the declarant for the trier. But without it, the trier's information is more likely to be seriously incomplete.

The White majority never acknowledges or addresses this central benefit of confrontation. Of course this is not surprising, given the Court's false image of cross-examination discussed above. If the Court were to acknowledge the beneficial function that cross-examination really does serve in generating information for the trier of fact, it would have to depart from its accuracy rationale.

In fact, in the White opinion the majority does make the alternative argument that whenever confrontation and cross-examination of a declarant would benefit the fact-finding process, the defendant can produce the declarant himself.\(^\text{68}\) The government should not have to "repeatedly locate and keep continuously available" potential declarants.\(^\text{69}\) The cost to the government of complying with an unavailability requirement is too high.

In this conclusory fashion, the Court suddenly makes a burden-shifting argument that rests on values far more complex than its view of accurate fact finding. Indeed, the values and interests at stake in this argument are those at stake in the Court's due process calculus set forth in Mathews v. Eldridge,\(^\text{70}\) to be discussed in Part IV. Yet the Court does not undertake a complete analysis of these values and interests. The Court's contention that criminal defendants can and should bear the costs of producing declarants whose hearsay is used against them is dropped almost as an afterthought to the Court's deeply flawed accuracy rationale. But I suspect that the burden-shifting argument is not an afterthought, that perhaps it is the main point, the driving force behind the result in White, obscured by the smokescreen of the accuracy rationale. It is, in any event, the primary effect of White that threatens to change the nature of proof in criminal trials for years to come.

If burden-shifting—the desirability of removing constraints on the government's ability to obtain convictions—is really the principal justification for the result in White, then the Court's accuracy rationale is virtually a sham. Whether a sham, or just deeply flawed as shown in Part I, the accuracy rationale is a failure. Abandoning the unavailability requirement as a prerequisite to the prosecution's use of hearsay cannot be justified on grounds that greater accuracy in fact finding will be achieved.


\(^{69}\) Id.

\(^{70}\) 424 U.S. 319, 335 (1976).
The question then remains, on what grounds should the burden of producing hearsay declarants, and the risk of being unable to locate and keep track of them, be allocated as between the prosecution and the criminal defendant? The burden-shifting effect of White requires more careful analysis than the Court gave it, both because of its substantial long-term effects on criminal trials and because the values of due process are deeply implicated, as Part IV will show.

Part III first undertakes this analysis under the framework of the Confrontation Clause. In Part IV, a Due Process approach yields the same result.

III. VALUES OF FACE-TO-FACE CONFRONTATION JUSTIFY BURDENING THE GOVERNMENT WITH AN UNAVAILABILITY REQUIREMENT

In this Part, I conclude that, as between the prosecution and the criminal defendant, it is the government that should bear the burden of producing available declarants when it uses hearsay in criminal trials. Many values associated with confrontation support this conclusion.

A. The Value of Operational Accuracy is Served by Obligating the Prosecution to Produce Its Own Available Declarants

Besides cost issues, which will be considered below, the most significant argument in favor of burden-shifting by the government is that it will allow more relevant hearsay to be admitted for the prosecution. This, it could be argued, serves the value of operational accuracy, as defined in Part II, by getting more information to the trier of fact. An unavailability requirement will exclude some of the government's hearsay. If the government chooses not to produce a particular hearsay declarant, or cannot prove that this declarant is unavailable, the item of hearsay will be lost to the fact-finding process. But the effect of this potential loss on fact finding, even in terms of operational accuracy alone, cannot be evaluated in the abstract. It must be measured against the alternative harm to

71. The criteria for proving unavailability under the Federal Rules of Evidence and the "good faith effort" requirement of Ohio v. Roberts do not make proof of unavailability a difficult task. See infra note 128 and accompanying text. The Comment by Professor Barbara Rook Snyder to this Article argues that some of the criteria of the unavailability and the showing of "good faith effort" should be more strictly enforced. Barbara Rook Snyder, Defining the Contours of Unavailability and Reliability for the Confrontation Clause, 22 Cap. U. L. Rev. 189, 192-200 (1993).
Removing this constraint will expand the tactical choices of state and federal prosecutors. After White, prosecutors are free to use firmly rooted hearsay in place of live witnesses at will and to shift the risks and burdens of producing the declarants to the defendant. This creates significant risks of harm to the value of operational accuracy. The first risk is tactical advantage-taking. Having the freedom to choose between using the same person, as a hearsay declarant or as a witness, is always a tactical advantage. If there is any downside risk to producing the person as a live witness—such as the risk of the discovery of specific negative facts known by the person, or the risks of many forms of impeachment, or the risk of a poor performance—the prosecution may want to present the person as an admissible hearsay declarant instead. While there may be an incentive to produce the live witness because of a belief that juries find live testimony more persuasive in general, having the freedom to choose permits the lawyer to make this calculus and to make the choice that appears to be strategically advantageous.

Such advantage-taking can distort, not serve, the operational accuracy of the fact-finding process. The prosecution can avoid adversarial testing of its witnesses, even those who are the only eyewitnesses to the alleged crime; can substitute a high performance witness to the hearsay statement for the low performance hearsay declarant; and can avoid the defendant's and the trier's access to


73. Id. (spelling out the advantages of using a hearsay statement over a live witness including certainty, avoiding the risk of poor performance, avoiding a witness who knows too much, or who is hostile to the prosecution, or whose live testimony is being saved for a more important case). See also Bulkley, supra note 12, at 698 (other reasons for not calling a child witness include parental unwillingness to allow the child to testify, the availability of excellent testimony from several adults as to what the child told them, high standards of proof for showing mental distress); Raeder, supra note 11, at 5 ("If in doubt about how well the child will respond to direct or cross-examination, the prosecutor can eliminate the child as a witness without arguing that the child is unavailable.").

Of course, if there is no such admissible hearsay statement the lawyer must either use the witness or forego the relevant knowledge that the witness possesses.

74. See Raeder, supra note 11, at 5 ("Children are notoriously bad witnesses. . . . By contrast, the adults to whom the children relate their statements are frequently very strong witnesses.").
additional information useful to the evaluation of the declarant's statement; in short, can use tactics that diminish the trier's fact-finding ability.76

It is no answer to say that the prosecution "knows" that its witness is telling the truth, but fears that a poor performance could discredit the in-court testimony, so that the tactical freedom to present the more believable hearsay statement actually serves the value of accuracy. Prosecutors cannot know what is "true".76 Nor are they immune from the desire simply to win cases. Moreover, requiring the prosecution to produce the declarant in such a situation would not keep the "more believable" hearsay out; by hearing both the witness and her out-of-court statement, it would promote the only version of "the truth" that our judicial system recognizes—better evaluation by the trier of fact.

The disadvantages suffered by the defendant from the government's burden-shifting is the second risk to operational accuracy. The prosecution's freedom to use hearsay declarants without an unavailability requirement increases the burdens on the defense. Proving information about the declarant's testimonial qualities is burdensome if the declarant is not produced by the prosecution for cross-examination. The defendant must then produce, prepare and present impeachment witnesses.77 The defense must use time during its own case-in-chief for the impeachment, perhaps even drawing more attention to the hearsay. It must suffer the risk that the trier of fact will accept the declarant's uncross-examined statement if it lacks the resources to locate impeachment material.

75. According to Seigel, supra note 72, at 923, "[P]arties would offer hearsay evidence precisely when the risks associated with its use were maximized and the ability of the opponent to counter the risks minimized. Without doubt, total elimination of the hearsay rule would severely impede the jury's quest for the truth." Accord Jonakait, supra note 10, at 618. (Doing away with the unavailability requirement "eliminates an incentive for the prosecutor to make the fullest presentation of evidence.").

76. Cf. Saltzburg, supra note 19, at 666. (While "[i]t would be wonderful if the legal community could know when litigants are proceeding in good faith," ascertaining this is "probably impossible.").

77. Federal Rule of Evidence 806 permits the full range of impeachment techniques against hearsay declarants, but all of the information would have to be produced through extrinsic witnesses. Seigel, supra note 72, at 922-23 (discussing the hidden costs and inefficiencies resulting from a shift in the burden of producing the declarant from the proponent to the opponent of hearsay); Eleanor Swift, Abolishing the Hearsay Rule, 75 CAL. L. REV. 495, 516 and n.54 (1987) (discussing the means available to opponents to present information about the declarant).
The ultimate in burden-shifting is endorsed by the White majority opinion when it states that defendants can themselves call hearsay declarants as hostile witnesses. This idea borders on the ludicrous, particularly when such declarants are the victims of the alleged crime, as was the case in White. The risks of calling a non-prepared and therefore unpredictable hostile witness, let alone the victim, are enormous. When a declarant is not under the control of either party, no one knows what he or she will say.

Moreover, the defendant has to wait until his or her case in chief, while the prosecutor's hearsay remains unchallenged in the trier's mind. Examination of the declarant, when it finally occurs, allows the declarant to repeat the hearsay statement, potentially increasing its impact and letting the trier think that it is significant enough to require challenging. Even worse, examination of the declarant can have a damaging effect on the defendant's case if it does not live up to the jury's expectations.

78. White v. Illinois, 112 S. Ct. 736, 742 (1992). The defendant would do so, presumably, to obtain with cross-examination the additional information that the theory of operational accuracy assumes will improve the trier's ability to evaluate the declarant's statement.

79. Jonakait, supra note 10, at 617 ("Each side face[s] the fact that while the declarant's testimony might help its position, it also might hurt. Calling him to the stand [is] a gamble."). The burden-shifting position of the White majority allows the prosecutor to avoid this gamble and transfer it to the defendant.

80. Peter Westen, Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense, 66 CAL. L. REV. 934, 983 (1978) ("[T]he right of a defendant to interrupt the state's presentation of evidence by cross-examining prosecution witnesses is at the core of the sixth amendment right to confrontation.").

81. Friedman, supra note 13, at 730-31. There is also a risk that the jury will hold the defendant responsible for the declarant's testimony and that unfavorable evidence from the declarant will weigh that much more heavily. See ROBERT J. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS 37 (1990). Professor Myrna Raeder notes other risks, particularly when child witnesses are involved:

Jurors may believe that the child already withstood one trauma and should not be assaulted by the criminal justice system in the guise of vigorous examination, particularly when the prosecutor did not consider it appropriate to call the child. ... Although examining a child witness always requires sensitivity, cross-examining a witness called by the prosecutor is quite different from calling the witness and developing the testimony as if on cross-examination.

Raeder, supra note 11, at 6.
None of these effects of White’s "hostile witness" option can be said to further the accuracy of fact finding. Indeed, the disadvantages of calling such a witness militate against the use of the option at all. The trier of fact suffers the loss of relevant information, and the defendant, rather than risk the distortions of the process cited above, risks the trier’s acceptance of broad, non-specific generalizations about the declarant’s sincerity. In cases where the hearsay declarant is available, and could be produced by the prosecution, this is not the best that our fact-finding process can do.

One might ask why, if we tolerate such threats to operational accuracy in civil cases, it should be different for criminal cases? One answer is, of course, because the Confrontation Clause applies to the government as the primary actor in criminal cases. In civil cases, the risks to operational accuracy may be counterbalanced by the heavier weight given to the value of competitive fairness in the adversary system. But criminal cases are not conceived of as sporting events. The following section contends that the prosecution has obligations that differentiate it from civil parties.

B. In Criminal Proceedings, the Government Has a Special Obligation to Promote Accurate Fact Finding That Should be Acknowledged Under the Confrontation Clause

The adversary system of justice is premised on private incentives to win. These incentives can generate adversarial behavior that resembles the morals of the marketplace. The criminal defendant, too, we expect to be motivated by a powerful personal incentive to avoid conviction. But the public prosecutor is not conceived of, nor supposed to function as, a privately motivated, advantage-seeking litigant.

Obligations to a larger sense of justice, including the values of truth-seeking and fairness, are imposed on the prosecutorial role: "The prosecutor is expected to seek justice and never to win a case against an innocent defendant." This duty derives from the public’s interest in protecting individual freedom, an interest that generates other obligations as well, such as that of producing exculpatory evidence. Constitutional rules that constrain the government’s gathering and presentation of evidence also protect the

82. Saltzburg, *supra* note 19, at 665 (citing Standards for Criminal Justice 3-1.1(c), 3-3.9(a) (1982)). This role has deep roots in the English criminal justice system: "The counsel for the prosecution ought to make it obvious, and in England he almost always does so, that his object is not to get a conviction, without qualification, but to get a conviction only if justice requires it." Glanville Williams, *The Proof of Guilt* 178 (2d ed. 1958) (quoting Herbert Stephen, *The Conduct of an English Criminal Trial* 11 (1926)).
public from incentive-driven, advantage-taking prosecutorial behavior.  

A prosecutor's decision to use a hearsay statement in order deliberately to suppress the defendant's traditional opportunities for fact-gathering through cross-examination is behavior that does not suit this broader ethical role. An unavailability requirement imposed under the Confrontation Clause is thus an appropriate, even desirable, means of constraint on the prosecution's freedom.

C. Other Values Related to the Legitimacy of Criminal Trials Are Served When the Prosecution is Required to Produce its Available Declarants

Values related to the legitimacy of the criminal justice system are also served by face-to-face confrontation in criminal trials. Recent academic writing discusses these other values, seeking to expand the Supreme Court's narrow focus on accuracy under the Confrontation Clause to an inquiry into the functional effects that confrontation has on the participants in trials. These effects are salutary because they increase the participants' personal dignity and autonomy, and the participants' and the public's belief in the legitimacy of the system. For these values to be effectuated, government must assume responsibility for them.

1. Confrontation controls the unaccountable use of governmental power outside of court during the investigation of crimes

The argument has been made by Professor Margaret Berger that an absolute obligation should be imposed on the prosecution under the Confrontation Clause to "bar [its use of] hearsay statements elicited by government agents unless the declarant is produced at trial". Berger

83. See Andrew Taslitz, Catharsis, The Confrontation Clause, and Expert Testimony, 22 Cap. U. L. Rev. 103, 118-19 (1993) (outlining the constitutional limits on police and prosecutorial conduct); Saltzburg, supra note 19, at 666 (discussing these constitutional rules and concluding that "the legal system must control the desire to win in criminal investigations and prosecutions and the desire to convict and punish all persons believed by prosecutors to be guilty").

84. Accord Bulkley, supra note 12, at 700 (It is hoped that "White [will] not create the spectre of prosecutors routinely deciding not to call a child, the primary accusatory witness, despite his or her ability to testify...").

85. Berger, supra note 12, at 561-62 (emphasis added). Berger carefully analyzes types of hearsay most likely to be elicited by the government, and (continued)
grounds this argument on two values that she claims are part of the broader mission of the Confrontation Clause that has been ignored by the Supreme Court: "[k]eeping the overwhelming prosecutorial powers of the government in check." 86 and "making crucial workings of the government visible." 87 Berger relies on the historical background of the Clause, and on a holistic reading of the Bill of Rights, "as aiming to keep government agents under control through provisions enhancing the monitoring and deterrence of governmental abuse, and ensuring the ability of ordinary citizens to participate in this process." 88

One abuse Berger cites is the power that government agents have, during private interviews of all types, to create evidence—that is, to "shape the witness's answers in accordance with [the state's] theory of the case." 89 As two examples of the potential for this abuse, she describes the "over-zealousness" of prosecutorial involvement in child sexual abuse and drug cases. 90 This concern is related to the ultimate accuracy of convictions that the government obtains. Statements shaped by the suggestive or intimidating government agent may be less than truthful. But distortion of the facts is not the only harm resulting from governmental zeal. Berger is also concerned that capricious and intrusive prosecutorial behavior is coercive, and threatens individual liberties, including personal safety, dignity and autonomy. 91

Berger's main points are that the jury, "as the public's representative", 92 needs to know as much as possible about the government's role in creating evidence for criminal trials, and that such publicity will curb capricious and abusive behavior. Ordinary citizens sitting on the jury can play a role in scrutinizing and monitoring governmental behavior when the witness whose statement was taken outside the courtroom also appears to testify at trial. Cross-examination can disclose details of the private interview before the jury. Requiring the prosecution to produce the person interviewed, rather than shifting this burden to the defendant, will better deter abusive out-of-court conduct.

---

86. Id. at 562.
87. Id.
88. Id. at 560.
89. Id. at 561.
90. Id. at 564-67.
91. Id. at 567 n.40.
92. Id. at 566.
2. Confrontation has effects on the participants in trials that increase the legitimacy of the trial process

Professor Eileen Scallen has written that confrontation makes the defendant "more likely to view the law and its authorities as legitimate." Scallen attributes this increased sense of legitimacy to the defendant’s belief that the proceedings are fair, citing research that identifies participation in decision-making as critical to perceptions of fairness. Personal exposure to the other side of the case, in particular to the alleged victim or other witnesses involved in bringing the case, increases defendants' sense that they have participated in the proceeding.

Particularly if the person who is a defendant believes that the accusers testifying against him are lying or mistaken, confrontation can affect beliefs and feelings beyond fairness. Criminal defendants may never accept as fully legitimate the processes used against them. But confrontation with a live witness, rather than with an absent hearsay declarant, is at least more responsive to basic needs to be treated with dignity.

Confrontation also respects the dignity of witnesses, including witnesses who are victims, even though it means undergoing the unpleasant process of cross-examination. Face-to-face confrontation emphasizes the personal moral responsibility of the witness’ role. By

93. Scallen, supra note 12, at 648. Scallen’s argument is that the mission of the Confrontation Clause is broader than typically acknowledged by the Supreme Court. Id. at 628 n.18. This mission includes evidentiary, procedural, and societal dimensions. Id. at 626. A "societal" dimension, she argues, is an independent inquiry to consider the effects of confrontation on the quality of human relationships—here, between the accused, the accusers, and the state—and on the values involved in those relationships. Id at 637. She grounds this argument on historical, ethical and pragmatic analyses of confrontation. It is, in particular, the pragmatic analysis that justifies her conclusion that confrontation makes a special contribution to the legitimacy of criminal trial.

94. Id. at 647-48, relying on Tom R. Tyler, Why People Obey the Law (1990), which in turn cited John Thibaut & Lauren Walker, Procedural Justice: A Psychological Analysis (1975).


96. Social scientists relied on by Scallen identify confrontation, in a non-courtroom context at least, as providing people with the means to influence the behavior of others, a means of venting frustration with others, a means for catharsis, a way to maintain a relationship, and a means for retribution and perhaps even for enhanced understanding. Scallen, supra note 12, at 645-46. See also Taslitz, supra note 83, at 121-24 (pages 23-26).
testifying under oath, in public, witnesses are assumed to exercise their individual conscience.\textsuperscript{97} The Confrontation Clause, if read to require production of the government's hearsay declarants as witnesses, would differentiate criminal from civil trials. Most of us are, I think, imbued with a sense that there is a difference. What is at stake in a criminal trial, the conviction and punishment of another person, adds a moral dimension to the proceeding. And, since most criminal acts are perceived as immoral, the criminal trial is set up as an exercise in moral authority. For both of these reasons, the cautionary constraints on the moral judging of others apply. Requiring hearsay declarants to appear in court, to exercise their personal conscience before the state can convict a criminal defendant, is such a constraint.

When the witness is also the victim of the alleged crime, as is often the case, confrontation is an even more significant event. Victims' rights advocates argue that the victim's respect for, and willingness to comply with, the outcome of the criminal proceeding is a crucial component of the legitimacy of the system. Participation in the proceeding, these advocates argue,\textsuperscript{98} is as important for the victim's belief in its fairness as it is for the defendant's. The victim's respect and dignity are also at stake. Obviously feelings of frustration, catharsis, retribution and understanding are powerfully operative when a victim confronts a criminal defendant.\textsuperscript{99}

Of course it may be painful, and perhaps even harmful, for some victims to confront those they accuse. It has been argued that some children who are victims of sexual abuse and attacks are harmed by

\textsuperscript{97} See Kenneth W. Graham, Jr., supra note 13, at 133.

The idea that one who accuses another of wrong ought to do so in a forum where he assumes the consequences of his statement has sufficient power that no amount of cynical sneering about the utility of the oath, incidence of perjury prosecutions, or the value of cross-examination will suffice to overcome it as an important symbol of fairness.


\textsuperscript{99} Scallen, supra note 12, at 645-46.
the experience of confronting their alleged attacker in court. Others say that testifying permits the child to experience vindication and a form of closure with the events. The conflict between the interests of children and the legal interests of those they accuse has become a central issue in recent confrontation cases and in academic writing. To substitute for the live in-court testimony of a potentially traumatized child, the Court has adopted a compromise: alternative testimonial formats, such as closed-circuit television or the use of screens, to be used when a specific showing is made that the child is likely to suffer emotional distress that impairs live testimony. This compromise has been criticized as well as applauded, but there is no reason why its basic premise—that risk of emotional trauma in young children should be avoided—cannot be acknowledged as a type of unavailability satisfying the unavailability requirement. In other words the socially negative consequences of confrontation may be minimized when necessary, while its individual and social benefits are maintained.

Finally, confrontation affects the autonomy of the trier of fact. Philosophers Mortimer Kadish and Michael Davis offer a justification of the legal system's preference for face-to-face confrontation with a non-consequentialist argument that is not about confrontation's contribution to accurate fact finding.


102. See State v. Naucke, 829 S.W.2d 445, 450-51 (Mo. 1992) (en banc) (adding "emotional and psychological trauma" from testifying in presence of the defendant to the kinds of unavailability that would satisfy the Confrontation Clause), cert. denied, 113 S. Ct. 427 (1992). But see Snyder, supra note 71 at 201-03 (pages 19-20) (suggesting that alternative methods of testifying, such as closed-circuit television, be tried before a child is found unable to testify); Mosteller, supra note 13 (advancing a wide-ranging and thorough critique of the unjustified use of videotaped interviews of children, and proposing an analytical system for controlling their admission into evidence).

103. Mortimer R. Kadish & Michael Davis, Defending the Hearsay Rule, 8 LAW & PHIL. 333 (1989). Their article is primarily interested in justifying the central exclusionary principle of the hearsay rule and does not purport to be a full analysis of hearsay issues, such as exceptions to the rule of exclusion or the requirement of unavailability under confrontation analysis. However, the central value of autonomy that it identifies is a value that should be taken into account by courts in evaluating the admissibility of children's testimonial statements.
Confrontation, they say, exemplifies a commitment to judicial integrity because our justice system deals with controversies that put persons who have knowledge of disputed events to the test of judicial inquiry. Evidence is taken, and cases are decided, under the constraints appropriate to dealing with persons who are also sources of knowledge. Since the trier of fact is also a person, the appropriate procedures are those through which the trier can reach her own judgment using data from others. This is personal autonomy; seeing for ourselves; respecting ourselves as the means to ascertain truth. Seeing for ourselves means, for Kadish and Davis, "[t]aking the direct testimony of those who have seen or heard a disputed fact" because this "places the trier of fact as close to that fact as the nature of adjudication allows."\textsuperscript{104} Hearsay evidence "puts the trier of fact at least one remove" from the person who has seen or heard a disputed fact, "in a role resembling that of a court of appeals."\textsuperscript{105}

Kadish and Davis contend that hearsay cannot be treated as just another form of evidence, i.e., admitted freely, without diminishing the autonomy of the trier of fact and thus transforming adjudication into another process altogether. An unavailability requirement would, under their view, produce more available declarants in court and thus maintain the direct connection between trier and witness.

Each of these arguments that tie the value of legitimacy to an unavailability requirement under the Confrontation Clause is, taken separately, nuanced and highly evaluative. Yet it is hard to deny that, taken together, they do show face-to-face confrontation to be a mode of proceeding more expressive of our self-governing political system than the polar opposite mode of faceless informers.

IV. BURDEN-SHIFTING BY THE GOVERNMENT MAY ALSO VIOLATE VALUES OF DUE PROCESS

As we have just seen in Part III, the White majority's refusal to interpret the Confrontation Clause as burdening the government with producing its available hearsay declarants ignores many of the values that the Court itself, as well as other commentators, have identified as part of the Clause's mission. Why has the Supreme account in this discussion of the government's constitutionally imposed obligations.

\textsuperscript{104} Id. at 349.

\textsuperscript{105} Id. Kadish and Davis also assert, somewhat obliquely, that the autonomy of the criminal defendant is linked to the autonomy of the trier of fact. "Trier of fact and person tried each dance in time with the other. The persons tried are the responsibility of the trier. The practices protecting the trier's autonomy protect as well the autonomy of those tried." Id.
Court taken such a narrow, restrictive approach to the Confrontation Clause?

One explanation may be that the Court has confined the criteria of decisions under the Confrontation Clause in order to conform to the general *Mathews v. Eldridge*\(^{106}\) test of procedural due process in administrative proceedings. This test "views the sole purpose of procedural protections as enhancing accuracy."\(^{107}\)

In *Mathews*, the Court announced the follow-up set of criteria, or "due process calculus,"\(^{108}\) to evaluate the constitutional validity of administrative hearing procedures:

- First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.\(^{109}\)

This set of factors bears an uncanny resemblance to the *White* majority's accuracy rationale— to wit, that the prosecution's use of firmly rooted hearsay (the *procedures used*) are so trustworthy (the *risk of an erroneous deprivation*) that confrontation and cross-examination (the *additional or substitute procedural safeguards*) would have no value (the *probable value of the additional safeguards*) at all. The majority even concludes with the statement that requiring confrontation "is likely to impose substantial additional burdens on the fact-finding process"\(^{110}\) (the *Government's interest, including... fiscal and administrative burdens*).

Thus, the Court appears to be using the *Mathews* due process test in *White* to determine, prospectively and as a general rule, the constitutional necessity for imposing the additional procedural safeguard of confrontation when the government uses firmly rooted

---

108. Id. at 29. *See Laurence Tribe, American Constitutional Law* 674 (2d ed. 1988) ("[T]he Court's increasingly instrumental approach [to due process] is reflected in its increased reliance on the balancing test outlined in Mathews v. Eldridge.").
hearsay against criminal defendants. This is not what the Court has done in using a due process "fundamental fairness" analysis to resolve other Sixth Amendment claims retrospectively, on a case by case basis. A retrospective balancing of the costs and benefits of confrontation in the particular case has been used to decide due process claims in parole revocation hearings where the Confrontation Clause does not apply. In criminal trials, where the Clause does apply, some argue that the text of the Confrontation Clause, and its Sixth Amendment context, impose such a limit on applying due process doctrines at all. However, if the Court is going to generalize to the Mathews v. Eldridge calculus, even implicitly, to justify doing away with a textual and traditional procedural safeguard like confrontation in criminal trials, it should at least get the calculus right. In White, the majority got the calculus wrong. The following look at the Mathews factors applied to White shows that the Court's rejection of the unavailability requirement may violate this concept of due process.

111. Professor Massaro agrees that "the reliability theory fails to explain" the Court's confrontation holdings. Massaro, supra note 13, at 886. She advances as reasons that better explain those holdings the Court's "interest in effective law enforcement" and the necessity of using some hearsay in criminal prosecutions, balanced against a "fear of admitting hearsay that is devastating" to the defendant. Id. at 887-90. This balancing is a rough version of the more deliberate Mathews v. Eldridge analysis undertaken here. Massaro concludes, as I do, that "[t]he reliability theory . . . masks [the] importance [of these other reasons] by attaching a single 'reliable' label to outcomes that turn on multiple factors." Id. at 893.


113. The confrontation claim is evaluated on a case by case basis, balancing "[t]he parolee's right to confront witnesses . . . against the grounds asserted by the government for not requiring confrontation." State ex rel. Mack v. Purkett, 825 S.W.2d 851, 855 (Mo. 1992) (en banc). The parolee's interest in confrontation has been established by the Supreme Court. See Morrissey v. Brewer, 408 U.S. 471, 489 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (probation revocation). The right is viewed as "less stringent than the Sixth Amendment's confrontation guarantee in a criminal trial." Purkett, 825 S.W.2d at 855.

114. Jonakait, supra note 10, at 581-86.
A. The Due Process Calculus Applied to White

In this section, I apply the Mathews factors narrowly, as the Court has conceived of them and applied them.\(^{116}\) In the next section a broader range of values attached to procedural protections will be considered.

1. The private interest

Amazingly, the Court in White conveniently omitted this pivotal factor of "private interest" from its analysis. It should have acknowledged that the private party seeking the additional safeguard of confrontation is the criminal defendant. The private interest of the defendant is liberty—freedom from an erroneous criminal conviction and resulting punishment. In our system of justice, this is an interest traditionally accorded the highest degree of procedural protection.\(^{116}\) Indeed, there probably is no higher interest, save freedom from an erroneous sentence of death. Thus the evaluation of the private interest in White is not difficult or complex, unlike the evaluation of the private interest at stake in most administrative hearings.\(^{117}\) Its overarching importance in our country's value system should not be minimized.\(^{118}\)

2. The value of additional procedural safeguards

The second factor of the Mathews calculus asks what degree of risk does hearsay present to the fact-finding process in criminal
trials, and what value would confrontation of the hearsay declarant have in reducing that risk? The *White* majority's answer—that firmly rooted hearsay is so trustworthy that it creates *no* risk to fact finding, and that therefore confrontation and cross-examination would have no value at all—is wrong. It is the product of smoke and mirrors, as Part II of this Article shows. In my view, the correct answer is quite simple that confrontation and cross-examination have great risk-reducing value as I have tried to show in Part III.

Firmly rooted hearsay, as a class of evidence, cannot be considered to be objectively trustworthy. Instead, it must be evaluated by the trier of fact. Admitting it without producing the declarant reduces the trier's evaluative ability; admitting it with the additional safeguards of confrontation and cross-examination increases the trier's evaluative ability. Thus, the additional safeguard has significant value.

So far, then, the *Mathews* calculus weighs heavily in favor of the criminal defendant's claim for the additional safeguard of confrontation. The private interest in freedom from criminal sanctions is of the highest rank; the additional safeguard would reduce the risk of erroneous deprivation of that interest. Is there any public interest that could dramatically alter this balance of values?

3. The public interest

The costs to the public from burdening the prosecution with an unavailability requirement can be enumerated as follows: (1) the increased cost to the government of locating, keeping track of, and producing its declarants as witnesses; (2) the burden of litigating the issue of unavailability when the declarant is not produced; and (3) the risk of acquitting a guilty defendant when the government cannot prove that a particular declarant is unavailable and is therefore deprived of a declarant's hearsay in its case.

None of these costs overcomes the calculus in favor of the criminal defendant's interest. First, the cost to the government of producing declarants is not significant. The *White* majority called it a "substantial additional burden . . . to repeatedly locate and keep continuously available each declarant."119 There is no empirical or common sense backing to this statement. The *White* opinion itself points out that the prosecution may want to call many of its own declarants as witnesses. But what it did not consider was the government's cost of locating, keeping track of, and producing these declarants as witnesses.

---

119. *White v. Illinois*, 112 S. Ct. 736, 742 (1992). See Massaro, *supra* note 13, at 897 ("The Court has made explicit that the government's interest in effective law enforcement should counterbalance the defendant's interest").
declarants anyway. Several important kinds of hearsay can in fact only be introduced through the declarant, or a declarant-substitute.

Moreover, the burden of locating and keeping track of the kinds of hearsay declarants primarily used by prosecutors is not great. Victims are a major source of prosecutorial hearsay, and they obviously are kept in contact with the case. Confederates of the defendant are another major source of hearsay for prosecutors, and they often are under arrest, in prison, or on probation or parole. Effort may have to be expended to transport them, but they are not difficult to find. Ironically, even imposing the financial cost of producing such declarants on the defendant would not result in actual public savings in the many cases where the defense of indigent defendants is financed with public funds. Police personnel, the other major source of hearsay for the prosecution, are obviously not difficult to keep track of.

These three types of declarants—victims, confederates and police—are sources of the exactly the kinds of hearsay that the declarant will need to try to impeach. And, it is not so clear that defendants

120. Id.
121. Past recollection recorded, as under Federal Rule of Evidence 803(5), and prior statements of witnesses, as under Rule 801(d)(1), require the declarant to testify. Business and public records, under Rules 803(6) and 803(8), can only be introduced through the declarant herself or through the testimony of a declarant substitute—a knowledgeable person available for cross-examination on the underlying foundation of the document.
123. See Swift, supra note 77, at 484, 498-99 nn.84, 92 (1992) (study of reported use of hearsay under Federal Rules of Evidence 803(1)-(4) and analogous rules in Michigan and Florida showing that almost half of the hearsay statements offered under these exceptions by prosecutors were made by crime victims). Research undertaken for this Article shows that over 50% of the state and federal cases with clear rulings on the confrontation issue since White concern the hearsay statements of victims.
124. Raeder, supra note 11, at 5 (Victims are "often the only eyewitness[es] to the alleged crime and [their] location can be ascertained easily.").
125. Generally, the hearsay statements offered from these declarants satisfy all of the criteria used to identify the hearsay that should be burdened with an unavailability requirement. See supra notes 13, 64. These declarants make statements that are accusatory in nature; are in anticipation of or even during an investigation; and concern events that are likely to be remembered by the declarants. Imposing an unavailability requirement on their hearsay would (continued)
actually have the ability to produce these declarants, despite the Court's casual reference in *White* to the Compulsory Process Clause and evidentiary rules permitting the examination of "hostile" witnesses.\(^{126}\) It has been pointed out that the Compulsory Process Clause may not extend to witnesses called solely for impeachment purposes.\(^{127}\) Additionally, since criminal defendants have no constitutional right to discover the hearsay to be used against them, they may not even know until trial what hearsay declarants they should be trying to impeach.\(^{128}\) If defendants cannot in fact obtain access to the government's declarants as easily as can the prosecution, then even the burden-shifting justification of the *White* majority fails. And the main point remains there is little practical difficulty, and no significant cost, in the government's keeping track of the kinds of hearsay declarants that it actually uses and that the defendant needs to test.

Second, the public expense of litigating the issue of unavailability when the declarant is not produced cannot possibly outweigh the defendant's interest in confrontation. That cost is no greater than the cost of litigating the applicability and the limits of any procedural right. If such expenses counted for much in the due process calculus, every safeguard could conceivably be trumped.

Third, the public's interest in crime control would be harmed only when the government cannot prove its case with a crucial item of hearsay due to the unavailability requirement. But this risk of harm is not substantial. Not many cases will turn on a single item of hearsay. Moreover, the unavailability requirement only requires exclusion of hearsay when the government is unwilling to produce an available hearsay declarant, or is unable, because of lack of effort or lack of good faith, to prove that the declarant is unavailable. If such harm is the product of the government's strategic choice, it should not weigh against the defendant. And, the practical criteria of unavailability under federal evidence law, together with the standard of "good faith effort" under *Ohio v. Roberts*, limit the number of cases where the government cannot prove unavailability.\(^{129}\)

satisfy confrontation values of operational accuracy, of ethical prosecutorial behavior, and of legitimacy and autonomy.


\(^{127}\) Jonakait, *supra* note 10, at 614. See Imwinkelried, *supra* note 10, at 547 ("To successfully invoke the constitutional right to present evidence, the accused must persuade the judge that the testimony in question is crucial to the defense.").


\(^{129}\) The federal criteria of unavailability, set forth in Federal Rule of Evidence 804(a), represent the recurring fact patterns that confront proponents (continued)
Finally, the Mathews test requires a classic judgment of justification: whether the social benefits of confrontation, enforced through an unavailability requirement, are outweighed by the social costs of such a requirement. The social value of the private interest at stake in criminal prosecutions is high; the benefits of confrontation are significant; the possible social costs outlined above do not outweigh these benefits.

If the confrontation right of the defendant were absolute, that is, if hearsay could not be used by the prosecution without confrontation of the declarant no matter what the reason, then the public's interest in crime control might affect the due process calculus differently. When there is nothing the government can do to produce a declarant, then the prosecution's use of that declarant's unconfronted hearsay is motivated by necessity, not advantage-seeking. It may not be unfair, under the circumstances. Nevertheless, the defendant and the trier of fact would be deprived of the benefits and legitimizing effects of cross-examination and confrontation.

Weighing these costs and benefits, most commentators, but not all, agree that the public's interest in having the government be able to prosecute alleged crimes effectively justifies the use of unconfronted hearsay statements in such situations of necessity. An unavailability requirement which permits this can thus be viewed, in terms of the due process calculus, as a compromise of the private and public interests at stake.

In rejecting this compromise without even carefully thinking it through, the Court in White has gone too far. Relieving the prosecution of its burden to produce declarants generally defines the public's interest not as merely prosecuting alleged crimes, but as convicting all those who are accused. This violates the basic values of due process. The Due Process Clause imposes on federal and state prosecutors the highest burden of persuasion—persuasion beyond a

such as the exercise of privilege, refusal to testify, loss of memory, death or other inability to testify. In Ohio v. Roberts, the Court applied a "duty of good faith effort" to test whether the prosecution's inability to prove the declarant's whereabouts satisfied the unavailability requirement: "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness . . . . The ultimate question is whether the witness is unavailable despite good faith efforts undertaken prior to trial to locate and present that witness." Ohio v. Roberts, 448 U.S. 56, 74 (1980) (quoting California v. Green, 399 U.S. 149, 189 (1970)).

130. See Jonakait, supra note 10, at 611-12.
reasonable doubt— in criminal trials.\textsuperscript{131} This high burden is justified not because it yields the highest rate of convictions, or even the highest rate of accurate outcomes. Rather, it is justified because of the political commitment of our system to avoid a certain type of inaccuracy: conviction of the innocent.\textsuperscript{132} This is a basic public interest that must be acknowledged and enforced. Burdening the prosecution with the obligation to produce its available hearsay declarants serves this public interest. Not all tactical advantages, particularly those that burden criminal defendants with risks and costs, should be open to the prosecution when it is conviction of the innocent that we fear.

Thus, the Supreme Court's own due process calculus, were it applied to the procedural protection of confrontation sought by the defendant in \textit{White}, would weigh in favor of the confrontation claim. The due process analysis returns us to the place where we began. Generalizing to \textit{Mathews v. Eldridge} produces the same result as evaluating burden-shifting under the Confrontation Clause. This conclusion is reinforced when we look again at values other than accuracy that are involved in the concept of due process.

\textbf{B. Other Values of Due Process Are Served When the Prosecution Is Required to Produce Its Available Declarants}

Apart from the calculus of \textit{Mathews v. Eldridge}, there are at least three other theories of the values that underlie due process review of government procedures: "individual dignity, equality, and tradition."\textsuperscript{133} Even a brief sketch shows that any and all of these theories would support the criminal defendant's due process claim to confrontation, enforced through the government's obligation to produce its available hearsay declarants. Not surprisingly, they

\begin{itemize}
\item \textsuperscript{131} \textit{In re Winship}, 397 U.S. 358, 362-64 (1970) (As well as reducing the margin of error, the beyond a reasonable doubt standard commands "the respect and confidence of the community in applications of the criminal law.").
\item \textsuperscript{132} John Kaplan, \textit{Decision Theory and the Factfinding Process}, 20 \textit{Stan. L. Rev.} 1065, 1073-77; Williams, \textit{supra} note 82, at 154 (the quantum of proof is set in criminal cases by the question of "how far is it permissible, for the purpose of securing the conviction of the guilty, to run the risk of innocent persons being convicted?").
\item \textsuperscript{133} Mashaw, \textit{supra} note 107, at 47. Jane Rutherford, \textit{The Myth of Due Process}, 72 \textit{B.U. L. Rev.} 1, 42 (1992) also cites three major theories, but her list is a little different: dignity theory, utility theory, and contract theory. Rutherford also believes that the value of equality "inheres" in the concept of due process. \textit{Id.} at 71.
\end{itemize}
parallel the values of confrontation discussed in Part III, and they lead to the same conclusions.

**Tradition.** Using tradition as a guide, we look to precedent. Most Supreme Court precedents since the 1890’s until 1986 assumed an obligation on the government to produce its available declarants.\(^{134}\) In professional, academic, and popular culture, fairness in criminal trials is synonymous with the presentation of live witnesses: "When the life, liberty or at least reputation . . . is at stake, it is not right to be content with second-best evidence."\(^{135}\) Predictions as to how criminal trials may now change reveal the extent to which the result in *White* departs from our political tradition of preventing "trials by anonymous accusers, and absentee witnesses".\(^{136}\)

---

134. The early Supreme Court cases emphasize the importance of the process in which the proof is taken:

But a fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.


This process, consisting of both a physical meeting and cross-examination, is to be contrasted with inquisitorial questioning by the government. *Berger,* supra note 12, at 589; *Jonakait,* supra note 10, at 581-82 (The mission of confrontation is "to prescribe, along with other Sixth Amendment rights, that a criminal trial is to be an adversary proceeding where the accused has the right to defend himself.").

This tradition was acknowledged in *Ohio v. Roberts,* 448 U.S. 56, 65 (1980) ("the Framers' preference for face-to-face accusation"). The specific values and interests involved in this process are discussed supra text accompanying notes 84-104. *See also* *Coy v. Iowa,* 487 U.S. 1012 (1988) (discussing how a face-to-face meeting between accuser and accused promotes feelings of fairness and legitimacy). *Dutton v. Evans,* 400 U.S. 74 (1970), is the exception to this tradition.

135. *Williams,* supra note 82, at 163.

136. *California v. Green,* 399 U.S. 149, 179 (1970) (Harlan, J., concurring); David S. Davenport, *The Confrontation Clause and the Coconspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 *Harv. L. Rev.* 1378, 1403 (1972) ("There is something innately unfair and reminiscent of trial by affidavit in a process that allows the prosecutor to build a case with hearsay, while the defendant is forced to scramble about and exhaust his own, often scarce, resources to attempt to produce the declarants.").
The Court's devaluation of live testimony may ultimately affect what trials look like more than keeping a showing of necessity would. In the future, prosecutors may reevaluate whether to call declarants in all types of cases, since they now realize that they can obtain guilty verdicts with second-hand testimony whenever statements meet firmly rooted hearsay exceptions found in Rule 803.137

**Individual dignity.** A process that provides for participation in decisions affecting one's interests serves the value of individual dignity.138 As discussed in Part III, participation is also central to feelings of legitimacy. Confrontation with hearsay declarants clearly provides more meaningful participation by criminal defendants in their own trial. It is the government's actions, not the defendant's, that can guarantee this form of participation.

**Equality.** In terms of procedural fairness, "the degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated."139 Cross-examination, immediately upon a witness's direct testimony, is a paradigm example of a procedure that facilitates equal opportunities for influencing the decision. The proponent produces the witness— the source of knowledge that can influence the trier of fact for direct examination, and then turns that witness over to the opponent for cross. Producing hearsay without producing the declarant does not facilitate such an equal opportunity. Rather, the opponent's opportunity is unequal. It becomes a burden, a gamble, and a strategic risk to consider calling the declarant for cross-examination during the opponent's case-in-chief.140 The government's production of the declarant for cross-examination,

137. Raeder, supra note 11, at 53.
138. Mashaw, supra note 107, at 50-52. Dignity is the "intrinsic value in the due process right to be heard, since it grants to the individuals . . . against whom government decisions operate the chance to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as a person." Tribe, supra note 108, at 666. Professor Tribe contends that this intrinsic dignity interest in meaningful participation has been recognized in Carey v. Piphus, 435 U.S. 247, 266-67 (1978) (awarding at least nominal damages to students denied procedural due process, regardless of the outcome of the process). Tribe, supra note 108, at 671-73. See also Massaro, supra note 13, at 897-918 (advancing a theory of the Confrontation Clause as protecting the defendant's right to be treated as "an equal, active and dignified participant in the proceeding").
139. Mashaw, supra note 107, at 52.
140. See supra text accompanying notes 78-81.
enforced through an unavailability requirement, clearly facilitates the criminal defendant's equal opportunity to influence the decision in his or her case.

Thus, the other values relevant to due process, in addition to the *Mathews* factor, call for an unavailability requirement.

CONCLUSION

Whenever possible, courts and legislatures should take a new look at confrontation. The accuracy rationale used in *White* to reject any constitutional preference for face-to-face confrontation between criminal defendants and their hearsay accusers simply does not work.

State courts can reject the accuracy rationale in *White* and develop their own confrontation analysis when applying confrontation rights found in their state constitutions.\(^{141}\) Realistic analysis of the hearsay exceptions, and of the function of cross-examination, leads to the conclusion that confrontation increases the operational accuracy of fact finding and serves other important values of dignity, legitimacy and autonomy as well. A cost-benefit analysis of requiring confrontation through an unavailability requirement shows that the cost to the government is low, while the benefits to the defendant and to the public's interest in a fair and legitimate criminal justice system are high. Shifting the burden of producing declarants onto the defendant violates basic values of due process.

Courts, both federal and state, can re-examine the rationale in *White* when other kinds of declarants and other kinds of hearsay are involved. *White*'s rejection of the government's obligation to produce an available declarant could be limited to its particular facts—a very young declarant in a sexual abuse prosecution—either because of the potential harm to the child\(^{142}\) or the likelihood that cross-examination will yield no meaningful information. Consideration of cases involving other kinds of declarants, and other contexts, may lead to a reconsideration of the value of cross-examination for the defendant.

---


which can be implemented through an unavailability requirement imposed on the prosecution.\textsuperscript{143}

Courts can protect defendants' confrontation interests even under the result in \textit{White} when deciding federal confrontation claims. Courts can be rigorous in their examination of the reliability of existing categorical exceptions.\textsuperscript{144} Courts can be rigorous, rather than expansive, in their application of hearsay doctrine.\textsuperscript{145}

Principles of evidence law can also be used to protect confrontation interests. By judicial decision, common law jurisdictions can impose unavailability requirements on new, evolving exceptions. In code jurisdictions, the legislatures would have to do so. Or, as some are beginning to suggest, evidence law may have to treat the general question of how hearsay should be used in criminal cases separately from how it is used in civil disputes.\textsuperscript{146}

\begin{itemize}
\item \textsuperscript{143} See \textit{State v. Wicker}, 832 P.2d 127, 130 n.7 (Wash. Ct. App. 1992) (requiring production of an expert who verified a fingerprint analysis on the ground that "in-court testimony would provide a meaningful addition to the truth-finding process in the case at bar"). Cf. \textit{United States v. Johnson}, 971 F.2d 562 (10th Cir. 1992) (rejecting an unavailability requirement for the author of repetitive business records who would typically have little recollection of their contents, but indicating that such a requirement might apply in other circumstances).
\item \textsuperscript{144} Some courts have refused to grant "firmly rooted" status to statements against penal interest, and have instead insisted on a case-by-case analysis of the reliability of the hearsay statement. See, e.g., \textit{State v. Cook}, 610 A.2d 800 (N.H. 1992) (applying state confrontation clause to statements implicating persons other than the declarant). Cf. \textit{Crutchfield v. Texas}, 842 S.W.2d 304 (Tex. Ct. App. 1992) (confession of accomplices presumptively unreliable). Special child sexual abuse statutes creating hearsay exceptions have also been held not firmly rooted. \textit{Ring v. Erickson}, 968 F.2d 760, 763 (8th Cir. 1992).
\item \textsuperscript{145} In \textit{Ring v. Erickson}, 968 F.2d at 762, the court rejected a child's statement to a doctor as a firmly rooted "medical statement" where the child did not seek medical help (the mother did) and the child did not even know she was talking to a doctor. In \textit{Hutchcraft v. Roberts}, 809 F. Supp. 846, 849 (D. Kan. 1992) the court found that a declarant's statements cannot be admitted as having "particularized guarantees of trustworthiness" when the state trial court had found at a preliminary hearing that declarant to be unavailable because she could not distinguish between truth and falsehood. In \textit{People v. Watkins}, 475 N.W.2d 727, 730-747 (Mich. 1991), \textit{cert. denied}, 112 S. Ct. 933 (1992), the Supreme Court of Michigan imposed a stringent evidentiary and constitutional analysis on supposedly "against interest" confessions.
\item \textsuperscript{146} Most reformers urging radical liberalization of the hearsay rule reject or avoid the issue of such liberalization in criminal cases. See \textit{Park}, \textsuperscript{supra} note 122, at 67; \textit{Friedman}, \textsuperscript{supra} note 13, at 725-26; Ronald J. Allen, \textit{The Evolution of the Hearsay Rule to a Rule of Admission}, \textit{76 MINN. L. REV.} 797, 800-01 (1992).
\end{itemize}
The failure of the reasoning in White to justify its result challenges us to take a new look at confrontation in all of these ways.