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I gratefully acknowledge the support of the law firm Hunton & Williams, which provided research grants to make this project possible. For their patience and helpful insights, I thank my research assistants, John Guarino, Katherine Benson, Damian Santomauro, and Michael Gryzlov.

BALANCING HEARSAY AND CRIMINAL DISCOVERY

John G. Douglass[*]

"You can't hit what you can't see."

Walter Johnson[1]

INTRODUCTION

In the law of evidence, conventional theory suggests a direct connection between hearsay and discovery. Broader discovery allows for more liberal admission of hearsay. The logic of the connection goes something like this. We exclude hearsay because we lack the ordinary adversarial means of testing the out-of-court declarant through cross-examination.[2] Nevertheless, courts still admit

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1. Hall of Famer Walter Johnson was one of the hardest throwing pitchers in baseball history. In the course of his career with the Washington Senators from 1907 through 1927, he set the Major League record for shutouts. The quoted passage aptly describes a batter's futility in facing a Johnson fastball. *See The Baseball Almanac* (visited Apr. 12, 2000) <http://baseball-almanac.com/quojhns.shtml>.

2. The absence of some or all of the typical adversarial mechanisms for testing the truth of in-court testimony forms the principal justification for a general rule excluding hearsay. For example, in *Williamson v. United States*, 512 U.S. 594 (1994), the Court explained:

> The hearsay rule, Fed. Rule Evid. 802, is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements—the oath, the witness's awareness of the gravity of the proceedings, the jury's ability to observe the witness's demeanor, and, most importantly, the right of the opponent to cross-examine—are generally absent for things said out of court.

Id. at 598-602; *see also* Fed. R. Evid. art. VIII advisory committee's note (stating the justifications for excluding hearsay testimony); John W. Strong et al., McCormick on Evidence: Hornbook 426-27 (4th ed. 1992) [hereinafter McCormick Hornbook] (same); 6 John Henry Wigmore, Evidence § 1766 (Chadbourn rev. 1976) [hereinafter Wigmore] (same); Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 Hastings L.J. 477, 485 (1998) (same).

most hearsay, often out of necessity—the declarant is dead, or in Brazil—or even out of convenience—it is simply impractical to assemble all the clerks who provided the data for company payroll records. In most instances, we justify categorical exceptions to the basic hearsay rule because we find such categories of hearsay sufficiently reliable to allow those statements before a jury even without the typical process of adversarial testing through cross-examination.[3]

But the adversarial process does not simply evaporate once hearsay is admitted.[4] Where a declarant is available, the law of evidence permits the opponent to put her on the witness stand for cross-

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3. As Wigmore explained:

> The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.

Wigmore, *supra* note 2, § 450, at 251; *see also* Idaho v. Wright, 497 U.S. 805, 819 (1990) (quoting Wigmore).

Whether categorical hearsay exceptions developed at common law really provide an accurate measure of reliability, however, seems open to question. Professors Nesson and Benkler express a scepticism shared by many modern scholars:

> [M]any exceptions have worn too thin to remain convincing . . . . Consider, for instance, the dying declarations exception, which arises from the cultural experience of "facing one's Maker" as a moment of truth. But in a culture that only grows more cynical about the authenticity of religious experience, the exception loses its rhetorical force. Dying declarations no longer evoke the image of a person making a solemn statement on the death bed, before a confessor, surrounded by family members. Instead, we more commonly envision a drugged, whispering patient in an impersonal hospital, alone except for a detective holding a little black book and straining to hear a name gasped against the flow of pure oxygen. The contemporary image lacks the comforting effect of the traditional one.
>
> As knowledge of human psychology becomes more sophisticated and widely disseminated, that discomfort extends to more of the hearsay exceptions. Do we still believe that people excited by an upsetting event are more likely to tell the truth than to exonerate themselves, to distance themselves from blame? Do we still believe that a plaintiff is more likely to tell the truth to the physician hired to testify as an expert at the plaintiff's trial than to any other person whose testimony does not fit another hearsay exception?

Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 Va. L. Rev. 149, 156 (1995) (footnotes omitted); *see also* John W. Strong et al., 2 McCormick on Evidence: Treatise §§ 309-15, at 324-34 (4th ed. 1992).

4. Of course, the testing process is also relevant in defining some hearsay exceptions. Some hearsay is admissible because it has already been subject to an adversarial process, *see* Fed. R. Evid. 804(b)(1) (former testimony), while some is admissible because the declarant is subject to cross-examination at trial, *see id.* Rule 801(d)(1) (prior statement by witness).

examination.[5] Where the opponent does not, or cannot, call the declarant as a witness, he still may attack the credibility of the declarant with any evidence that would be admissible for that purpose had the declarant testified in court.[6] The testing process can go forward even after the hearsay is in evidence.[7]

This is where discovery enters the hearsay picture. Adversarial testing of hearsay requires information.[8] In the case of a live witness, effective cross-examination often depends on obtaining two kinds of information. The first is advance notice of what the witness is likely to

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5. Federal Rule of Evidence 806 provides:

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Id. Rule 806.

6. *See id.* When the declarant is absent, Rule 806 permits the opponent of hearsay to use much of the same material which one would expect to surface during live cross-examination if the declarant were in the courtroom. For example, an absent declarant's inconsistent statements, prior criminal convictions, the letter promising immunity or a favorable sentencing recommendation in exchange for testimony, and the medical record showing the eye-witness declarant to be legally blind are admissible under Rule 806. Of course, that evidence does not simply materialize in the courtroom. Much of it can, and should, be presented during the cross-examination of the government witness who relates the hearsay. Applied effectively then, Rule 806 envisions a process of "virtual cross-examination" which can have the look, the sound, and at least some of the drama of real cross-examination of the declarant. For a more complete description of the process of impeaching an absent hearsay declarant through virtual cross-examination, see John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 Geo. Wash. L. Rev. 191, 251-60 (1999).

7. Despite the clear opportunity provided by Rule 806, relatively few trial lawyers make effective use of their right to impeach an absent hearsay declarant. Trial lawyers and judges are quite accustomed to courtroom battles over the *admissibility* of hearsay, but few have much experience at contests over the *credibility* of hearsay. Though they may have fought hard to keep hearsay from the jury, once it is admitted in evidence even the most able advocates often proceed as if the hearsay battle were over, at least until the appeal. *See* Fred Warren Bennett, *How to Administer the "Big Hurt" in a Criminal Case: The Life and Times of Federal Rule of Evidence 806*, 44 Cath. U. L. Rev. 1135, 1142 (1995) (explaining how an attorney can dispute the credibility of a hearsay statement once it has been admitted); Anthony M. Brannon, *Successful Shadowboxing: The Art of Impeaching Hearsay Declarants*, 13 Campbell L. Rev. 157, 158 (1991) (noting trial lawyers' "virtual total neglect" of opportunities to impeach hearsay declarants); Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 Ohio St. L.J. 495, 495 (1995) (stating that Rule 806 is "overlooked by lawyers").

8. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39, 66 (1987) (Brennan, J., dissenting) ("[T]he right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial.").

say. Without that information, the cross-examiner scarcely knows where to begin.[9] The second is the "ammunition" necessary to attack credibility: the witness's prior convictions or bad acts, evidence of bias, failed memory or inaccurate perception, and—perhaps most important of all—the witness's prior statements.[10] Discovery operates in the same way when it comes to hearsay. Where the discovery process equips the opponent of hearsay with the necessary advance notice and "ammunition," he can often test the hearsay in much the same way he might challenge the testimony of a live witness.[11] And

9. In American courts, jury trials typically take place in a "unitary" or "one-shot" proceeding. The court empanels a jury, the parties present evidence, and the jury returns a verdict, all in a single, continuous proceeding. Many cases begin and end the same day. Because of the impracticality of reconvening a jury, lengthy adjournments are unusual after trial has begun. Unfair surprise poses a greater danger in this type of proceeding than it might in systems which adjudicate cases in an "episodic" or piecemeal fashion, with several proceedings over the course of weeks or months, where parties enjoy more time to react to testimony that unfolds unexpectedly. *See* Mirjan Damaška, *Of Hearsay and Its Analogues*, 76 Minn. L. Rev. 425, 428-30 (1992) (comparing Anglo-American common law trials to the more "episodic" proceedings of many Continental systems); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 Mich. L. Rev. 51, 62 (1987) [hereinafter Park, *Subject Matter Approach*] ("The unitary nature of the American trial makes surprise a greater danger than in other systems, where adjournments and continuances can mitigate its effect.").

In a unitary system, pretrial discovery becomes essential to effective cross-examination of any hostile witness. *See id.* ("Attorneys need time and preparation to be ready to impeach witnesses, to contradict them with the testimony of others, and to construct arguments dealing with their testimony."). In a system where trials begin and end with little interruption, hearsay creates special risks of unfair surprise. Parties may prepare to cross-examine witnesses whom they can anticipate will testify. But hearsay often appears unannounced. And even where the declarant is alive and available, a unitary trial can make it difficult or impossible for an opponent to find the declarant, subpoena her, and get her to court before it is too late.

10. In *Jencks v. United States*, 353 U.S. 657 (1957), the Court noted the importance of discovery, especially the discovery of witness statements, to the process of cross-examination:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness's testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness's trial testimony.

Id. at 667.

11. For live cross-examination, that "ammunition" serves two important functions. First, it is the predicate for tactical decision making. In preparing for cross-examination, a lawyer sifts through the available facts from the witness's past, trying to identify material which will convince the jury to discount the witness's story. When the lawyer finds such ammunition—an inconsistent statement or even a change in emphasis, a prior dishonest act, or evidence of failing memory—he can construct a line of questioning for cross-examination. Second, once the lawyer chooses to pursue a line of questioning, that ammunition provides the reins which control the witness. The lawyer confronts the witness with the impeaching material—a written prior statement, for example—to insure a predictable answer. If the witness denies an

discovery can perform an even more important function in the case of an available declarant who can be located and subpoenaed. It can turn an absent hearsay declarant into a testifying witness, subject to full cross-examination in front of the jury.

In this manner, hearsay rules and discovery rules are linked in conventional theory.[12] Where more complete discovery permits more complete testing of hearsay, our basic reason for excluding hearsay—lack of adversarial testing—becomes less of a concern. Thus, the more a party can discover about the opponent's hearsay, the more freely a court can admit hearsay.[13] This hearsay-discovery connection

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impeaching fact, the lawyer uses that material to prove that the denial is false. Most basic treatises on trial advocacy devote considerable attention to the process of "controlling" witnesses on cross-examination in this manner. *See* Steven Lubet, Modern Trial Advocacy 109-47 (2d ed. 1997); Thomas A. Mauet, Trial Techniques 221-26 (1996).

"Ammunition" serves essentially the same purposes in impeaching an absent hearsay declarant. In preparing to impeach a hearsay declarant, counsel surveys the available factual material to determine what "points" he can make about the declarant's credibility and how he can prove those points in the declarant's absence. At trial, though he has no concern about "reining in" an absent declarant, he uses that factual material to confront and to control the responses of the government witness who related the hearsay to the jury and who, on cross-examination, will be asked to confirm the weaknesses and limitations of that same hearsay. *See* Douglass, *supra* note 6, at 255-56.

For the opponent of hearsay, that ammunition plays another important role as well. In those not infrequent cases where the declarant is available to testify, though not called as a government witness, defense counsel will rely on that information in making the tactical decision whether to call the declarant to the stand for the hostile examination permitted by Rule 806. Without access to the necessary "ammunition" in the discovery process, he must make that decision in the dark. If he exercises the level of caution typical of most experienced trial lawyers, quite often he will forgo cross-examination altogether. *See* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. Rev. 557, 617 n.158 (1988) [hereinafter Jonakait, *Confrontation Clause*] ("Time-worn admonitions tell the advocate not to call someone without knowing what he will say."); Park, *Subject Matter Approach*, *supra* note 9, at 102 ("Without such information, calling the declarant is a risky proposition, and trial lawyers are notoriously reluctant to step onto untested ground. To call a witness for cross-examination and then fail to accomplish anything can be a dramatic setback—whatever the judge may have told the jury about the adverse nature of the examination.").

12. Comparative law scholars seem to recognize the link most readily. In an article comparing approaches to hearsay in Anglo-American and Continental courts, Professor Damaška argues that the difference between "episodic" Continental proceedings and "one-shot" Anglo-American trials accounts in part for the development of rules excluding hearsay in the Anglo-American system. *See* Damaška, *supra* note 9, at 428-30. The principal difference, as Professor Damaška points out, is the opportunity and time to gather information that might contradict hearsay or to locate and call the hearsay declarant as a witness. *See id.* In effect, more complete access to information makes the admission of hearsay less of a concern. *See* Van Kessel, *supra* note 2, at 519 ("[H]earsay dangers are particularly acute in jurisdictions that do not provide for effective pre-trial mutual discovery . . . .").

13. It is no accident, then, that the accelerating trend toward liberalized exceptions to the hearsay rule in the last quarter century has followed fast on the heels of the trend toward more liberal discovery rules, especially in civil cases. *See*

accounts for the near universal tendency to attach "notice" provisions to new rules creating nontraditional hearsay exceptions.[14] Likewise, the theory of a hearsay-discovery balance is at the heart of reform proposals that would limit or modify traditional restrictions on hearsay in exchange for broader notice requirements and increased access to information regarding a hearsay declarant.[15] And the theory accounts at least in part for the widely-held notion that trial judges apply hearsay restrictions more stringently in criminal cases, where discovery is more limited, than in civil matters.[16] The result, in theory,

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Van Kessel, *supra* note 2, at 479 n.7 ("Hearsay rules in the United States, as exemplified by the Federal Rules of Evidence, are in many instances more permissive in civil than in criminal cases, and in practice have been substantially weakened by modern expanded discovery systems and the relentless growth of hearsay exceptions."); *cf.* John J. Cound et al., Civil Procedure: Cases and Materials 761-63 (6th ed. 1993) (noting rapid expansion of modern discovery practices following adoption of the Federal Rules of Civil Procedure in 1938); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 Wash. U. L.Q. 1, 2 (1990) [hereinafter Brennan, *A Progress Report*] (noting significant advances in criminal discovery since the 1960s).

14. The best known hearsay-notice provision appears in Rule 807 of the Federal Rules of Evidence, the "residual" hearsay exception. *See infra* note 240 and accompanying text. Uniform Rule of Evidence 807, which provides for the admission in evidence of certain hearsay statements of child victims or witnesses, requires not only the pretrial disclosure of the statement itself, but also provides for out-of-court questioning of the child declarant at the opponent's request. *See* Unif. R. of Evid. 807(a), (b) (amended 1986). The California Evidence Code contains a similar provision, Cal. Evid. Code § 1360 (West Supp. 2000), as well as a broader hearsay exception for statements of unavailable victims of physical injury, Cal. Evid. Code § 1370 (West Supp. 2000). Both require the proponent to give pretrial notice of an intention to offer the statement, along with the particulars of the statement. *See id.* §§ 1360, 1370.

15. In civil cases, for example, Professor Roger Park has proposed a "notice-based residual exception that permits hearsay to be admitted in civil cases without being screened for reliability by the trial judge." Park, *Subject Matter Approach*, *supra* note 9, at 122. Professor Eleanor Swift has proposed an approach which would condition admissibility on a requirement that the proponent produce "foundation facts," that is, "[i]nformation about the declarant and the circumstances that influenced her when she perceived, remembered, and spoke about the relevant facts." Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 Cal. L. Rev. 1339, 1355 (1987) [hereinafter Swift, *Fact Approach*]; *see also* Ronald J. Allen, *A Response to Professor Friedman: The Evolution of the Hearsay Rule to a Rule of Admission*, 76 Minn. L. Rev. 797, 799 (1992) (noting that discovery systems are replacing hearsay restrictions, especially in civil cases).

England, along with some other common-law jurisdictions, has eliminated the hearsay rule in civil cases, replacing it with a requirement that the proponent give advance notice of intention to offer hearsay. *See* Richard D. Friedman, The Elements of Evidence 335 (2d ed. 1998) (citing the Civil Evidence Act 1995 (c. 38)).

16. *See* 5 Jack B. Weinstein et al., Weinstein's Federal Evidence § 802.04[3][b], at 802-14, § 802.05[1], at 802-15 (2d ed. 1999) (identifying limited criminal discovery as one factor which leads judges to apply the hearsay rule more strictly in criminal cases); Park, *Subject Matter Approach*, *supra* note 9, at 87 ("[W]hatever the specific content of the hearsay rules, the judicial attitude toward exclusion appears to be stricter in criminal cases."); Van Kessel, *supra* note 2, at 481 (observing that the Supreme Court has taken a more conservative approach toward some hearsay exceptions in criminal cases).

is a fair balance between hearsay admissibility and discovery rights in both civil and criminal cases.

But theory does not always reflect reality. If fairness requires that courts limit hearsay more carefully to protect parties with limited hearsay-related discovery rights, then it is worth asking whether courts actually behave that way.[17] My own conclusion is that they do not. At least in the federal courts—the focus of this Article[18]—hearsay and discovery have drifted out of balance. Despite serious disadvantages in the discovery process, federal criminal defendants actually face a broader range of admissible hearsay than civil litigants and prosecutors.

Part I of this Article argues that the conventional theory of hearsay-discovery balance does not reflect the reality of modern federal practice. An imbalance has arisen because, in the last quarter century, developments in the law of evidence and confrontation are at odds with developments—or one might say nondevelopments—in the law of criminal discovery. Since enactment of the Federal Rules of Evidence in 1975, both the law of evidence and modern Confrontation Clause doctrine have evolved toward broader admission of hearsay in criminal cases. Contrary to conventional theory, that evolution has at least matched—and probably has outpaced—the trend toward more liberal admission of hearsay in civil cases.[19] But while federal courts

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Of course, according to the conventional view, limited discovery is not the only factor which leads courts to apply hearsay rules more strictly in criminal than in civil cases. The Federal Rules of Evidence themselves include a few restrictions on hearsay that apply only in criminal cases. *See infra* note 58 and accompanying text. And, in theory at least, the Supreme Court views the Confrontation Clause as a rule excluding some otherwise admissible hearsay when offered against criminal defendants. *See* Idaho v. Wright, 497 U.S. 805, 814 (1990) ("The Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.").

17. Though the theoretical link between hearsay and discovery is widely recognized, there is little scholarly work devoted to testing the theory. As far as I am aware, there is no empirical study which demonstrates that courts actually limit hearsay more strictly in criminal cases than in civil matters, despite the conventional assumption to that effect. In fact, two relatively recent empirical studies suggest that the opposite is true. *See* Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 Minn. L. Rev. 473, 477-84 (1992) [hereinafter Swift, *Judicial Discretion*]; Myrna S. Raeder, *A Response to Professor Swift*, 76 Minn. L. Rev. 507, 508 & n.2 (1992) [hereinafter Raeder, *Response*].

18. I have limited my examination to federal cases because they provide a more manageable universe of cases for study, and are governed by a single set of evidentiary rules and rules of discovery. Most of my conclusions, and at least some of my suggestions for reform, however, should apply to many state systems as well, since the Federal Rules of Evidence and—to a lesser extent—the Federal Rules of both civil and criminal procedure have served as models for many states. I also believe that the federal system provides a clear illustration of a system that is out of balance. The federal system has relatively liberal rules admitting hearsay and liberal rules of civil discovery, but remains more conservative than many states in its criminal discovery practices.

19. *See infra* Part I.A.2.

are admitting more hearsay—and more problematic hearsay—in criminal cases, the rules of criminal discovery show no sign of adapting to that reality.[20] As a result, in comparison to other litigants, federal criminal defendants now face a litigation environment that features both minimum discovery and maximum admissible hearsay.[21]

Part II offers some proposals to address that imbalance by expanding a defendant's right to learn in advance what hearsay he must face, and his right to gather "ammunition" to contest that hearsay. Where appropriate, I have included proposals that would require the amendment of existing rules. But recognizing the practical difficulties facing any rule-making initiative,[22] my principal focus is to suggest more effective means of applying Rule 16,[23] the Jencks Act,[24] and the *Brady* doctrine[25]—the major discovery tools presently available to criminal defendants—to the task of contesting prosecution hearsay.[26]

This Article is not a critique of developments in the law of evidence, nor of the Court's application of the Confrontation Clause to

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20. *See infra* Part I.B.

21. To make matters worse, judging from the infrequency of reported opinions on the subject, criminal defense counsel seldom attempt to employ the existing rules of discovery—limited as they are—to anticipate the prosecution's use of hearsay or to obtain material which might serve to impeach an out-of-court declarant once hearsay has been admitted in evidence. For example, I have found only three federal cases in which criminal defendants sought to use the Jencks Act, 18 U.S.C. § 3500 (1994), as a tool for discovering prior statements of a hearsay declarant. *See* United States v. Williams-Davis, 90 F.3d 490, 512 (D.C. Cir. 1996) ("As far as we can tell, we are the first court of appeals to address this argument."); United States v. Pepe, 747 F.2d 632, 657 n.37 (11th Cir. 1984) (declining to order discovery on other grounds); United States v. Padilla, No. S1-94-CR-313-CSH, 1996 WL 389300, at *2 (S.D.N.Y. July 11, 1996) (finding that defendant failed to raise the issue in a timely manner).

22. The major practical roadblock to expanding the rules allowing criminal discovery relating to hearsay declarants appears to be the reluctance of Congress to adopt any rule compelling the government to disclose its witnesses before trial. *See infra* text accompanying notes 170-72.

23. Fed. R. Crim. P. 16.

24. 18 U.S.C. § 3500.

25. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

26. For contrasting perspectives on the current rules of criminal discovery in federal courts, compare Brennan, *A Progress Report*, *supra* note 13, at 3, 9-12 (applauding advancements under revised Rule 16, but criticizing continued limitations on discovery of, *inter alia*, the identities and prior statements of government witnesses), and H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent?: Restrictions on Criminal Discovery in Federal Court Belie this Presumption*, 43 Rutgers L. Rev. 1089, 1089 (1991) ("It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters."), and Steven H. Goldberg, *What Was Discovered in the Quest for Truth*, 68 Wash. U. L.Q. 51, 56-60 (1990) (arguing that the Supreme Court has simultaneously diminished defense discovery required by *Brady* while unfairly expanding reciprocal discovery from defendants), with Edward S.G. Dennis, Jr., *The Discovery Process in Criminal Prosecutions: Toward Fair Trials and Just Verdicts*, 68 Wash. U. L.Q. 63, 63-64 (defending current restrictions against pretrial discovery of names, addresses and prior statements of government witnesses).

hearsay.[27] It is not an argument that more, or less, hearsay should be admitted in criminal cases. Instead, it takes as a starting point the undeniable reality that, for good or ill, today's federal criminal trials include a wider variety of admissible hearsay than ever before.[28] My

27. In an earlier article I argued that, when it comes to hearsay, the Confrontation Clause should have less to do with exclusion of evidence and more to do with a process that allows for effective adversarial challenges to hearsay:

> If the Confrontation Clause is ever to become more than a redundancy, then we must move beyond exclusionary thinking and expand our notion of confrontation to encompass a broad, affirmative right to challenge hearsay. When a hearsay declarant is available, there is little reason to pause over the issue of reliability. Instead, courts should be serious about providing the defendant with an opportunity for real confrontation, if he really wants that confrontation. When the declarant is unavailable, confrontation-hearsay analysis should not begin with the assumption that confrontation is impossible. Effective challenge to hearsay often is possible despite, or sometimes especially because of, the physical absence of the declarant from the courtroom.

Douglass, *supra* note 6, at 272. The discovery reforms which I propose in this Article are an appropriate—indeed, a necessary—complement to a constitutional rule protecting the adversarial right to test hearsay even after it is admitted in evidence.

28. The law of evidence no longer treats the rule against hearsay like much of a rule. The modern history of hearsay exceptions has been a one-way street. Once born, hearsay exceptions almost never die. *See* Allen, *supra* note 15, at 799 ("[H]earsay exceptions, once formed, remain. To my knowledge, there are virtually no examples of hearsay exceptions being eliminated . . . ."). And once established, those exceptions tend to expand in scope. Some "expansions" result from legislative action. In *White v. Illinois*, 502 U.S. 346 (1992), for example, the Court faced a Confrontation Clause challenge to hearsay admitted under a 1988 revision to the Illinois Code dealing with statements for purposes of medical diagnosis. *See id.* at 348-51. In the state proceedings in the same case, the Appellate Court of Illinois characterized the revisions as an effort to "sever artificial restraints." People v. White, 555 N.E.2d 1241, 1251 (Ill. App. Ct. 1990). Other expansions of established hearsay exceptions occur through the process of judicial interpretation. For example, commentators have noted a tendency among modern courts, especially in child abuse prosecutions, to expand the "medical diagnosis" exception to admit statements identifying an abuser, *see* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 606 n.198 (1992), and to expand the "spontaneous declarations" exception by easing the time limitations traditionally imposed on the concept of "spontaneity," thereby admitting in evidence statements that occurred well after the abusive incident which provoked the "declaration," *see* Allison C. Goodman, Note, *Two Critical Evidentiary Issues in Child Sexual Abuse Cases: Closed-Circuit Testimony by Child Victims and Exceptions to the Hearsay Rule*, 32 Am. Crim. L. Rev. 855, 876, 882 n.202 (1995).

Some scholars contend that the hearsay rule is "dead." For example, Professor Allen asserts:

> The hearsay rule is, in short, no longer a rule of exclusion; it is instead a rule of admission that is doing its subversive work under the cover of darkness. Article VIII of the Federal Rules purports to continue the common law development of hearsay in most respects, but it is a false promise. The Federal Rules, in concert with modern discovery principles, are quite clearly the harbinger of its demise. My instinct is that it is a death well-deserved, and after a burial suitable to its station, the hearsay rule should be allowed to lie quietly, undisturbed, for eternity.

Allen, *supra* note 15, at 800; *see also, e.g.*, Faust F. Rossi, *The Silent Revolution in* The

aim is to show how the process of criminal discovery can and should adapt to that reality to correct the hearsay-discovery balance when the government relies on hearsay.

I. THE HEARSAY-DISCOVERY IMBALANCE IN FEDERAL CRIMINAL CASES

A. *Reality Defies Conventional Theory: Criminal Defendants Face More Hearsay—and More Problematic Hearsay—Than Other Litigants*

Adoption of the Federal Rules of Evidence in 1975 spurred an expansion in the scope of hearsay admissible in both civil and criminal cases.[29] The Rules included twenty-seven separately enumerated hearsay exceptions, and defined another handful of out-of-court statements as "not hearsay."[30] Though those categorical exceptions largely tracked exceptions recognized at common law,[31] the Rules typically opted for the more liberal versions of most common-law exceptions[32] and, in a few notable instances, broadened hearsay admissibility even further.[33] The *coups de grace* for expanded admissibility were the heavily-debated residual exceptions.[34] And the

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Litigation Manual: A Primer for Trial Lawyers 640, 653 (John G. Koeltl ed., 2d ed. 1989) (recounting the "rapid erosion of the doctrine of hearsay" as a result of the Federal Rules of Evidence). Others find that pronouncement a bit exaggerated. *See* Roger C. Park, *Hearsay, Dead or Alive?*, 40 Ariz. L. Rev. 647, 658 (1998) [hereinafter Park, *Dead or Alive?*] (concluding, based on a number of factors including the continuing quantity of judicial opinions and case reversals relating to hearsay, that the hearsay rule "retains significant influence").

29. *See* Rossi, *supra* note 28, at 645-53.

30. *See* Fed. R. Evid. 803(1)-(23), 804(b)(1)-(4) (exceptions to hearsay rule); *id.* Rule 801(d) (out-of-court statements which the Rules define as "not hearsay").

31. *See* Fed. R. Evid. art. VIII advisory committee's note ("The approach to hearsay in these rules is that of the common law.... The traditional hearsay exceptions are drawn upon for the exceptions....").

32. The Rule 803(4) exception for statements for purposes of medical diagnosis, for example, did not include the traditional prohibition on statements made to a physician consulted with respect to litigation. *See* Fed. R. Evid. 803(4) advisory committee's note. The Rule 804(b)(2) exception for dying declarations was extended to civil cases. *See id.* Rule 804(b)(2) advisory committee's note.

33. The Federal Rules of Evidence, for example, expanded the common-law concept of "statements against interest" to include not only statements affecting a pecuniary interest, but also statements against penal interest. *See id.* Rule 804(b)(3) & advisory committee's note. The Federal Rules also allow for a more generous approach to the admission of co-conspirator statements. *See* Bourjaily v. United States, 483 U.S. 171, 176-81 (1987) (holding that Fed. R. Evid. 104(a) modified the traditional "bootstrapping" rule of *Glasser v. United States*, 315 U.S. 60 (1942), which had required independent evidence of conspiracy as a foundation for admission of co-conspirator statements).

34. *See* Fed. R. Evid. 807 (originally codified at Fed. R. Evid. 803(24) and 804(b)(5)). The proposed rule first submitted to Congress would have admitted any hearsay "not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." Revised Draft of Proposed

process did not stop there. Since 1975, judicial construction of the Rules—especially of the residual exceptions—has probably pushed the boundaries of admissibility even beyond what the drafters envisioned.[35]

While expanded admissibility has been the clear trend since 1975, it is less than clear who have been the principal beneficiaries of that trend, the major "consumers" of this increasing supply of admissible hearsay. Civil litigants seem like the most likely candidates. After all, conventional theory suggests that courts should admit hearsay more cautiously in criminal cases than in civil cases.[36] But there is no simple

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Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 422 (1971). The House of Representatives deleted the provision, finding it injected "too much uncertainty." H.R. Rep. No. 93-1597 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7106. The Senate adopted a more limited version and the Conference Committee forged the current rule from the Senate version by adding the requirement of pretrial notice. *See id.* For a more detailed account of the history of the residual exception, see Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and is Devoured*, 25 Loy. L.A. L. Rev. 925, 925-28 (1992) [hereinafter Raeder, *Effect of Catchalls*].

Significantly, when the residual exception was recodified to Rule 807 in 1997, the Advisory Committee implicitly predicted new hearsay exceptions still to come. The avowed purpose of recodification was to "facilitate additions to Rules 803 and 804." Fed. R. Evid. 807 advisory committee's note.

35. *See* Raeder, *Effect of Catchalls*, *supra* note 34, at 928-34; Rossi, *supra* note 28, at 645-49.

36. Most contemporary observers conclude that courts behave as conventional theory suggests. Judge Weinstein argues:

> In criminal cases, the hearsay rule is suffused with constitutional hues and, therefore, applied more stringently than in civil cases. This recognizes the greater danger of prejudice to a criminal defendant, and the operation of other factors affecting the admissibility of evidence, such as the right of confrontation, limitations imposed by the privilege against self-incrimination, the right to counsel, and the rather limited discovery permitted in criminal cases.

Weinstein et al., *supra* note 16, § 802.04[3][b], at 802-14 (footnote omitted). Later, he asserts: "[T]he impact of the hearsay rule is different in civil and criminal cases. This results from the presence in criminal cases of such factors as the narrower scope of discovery . . . ." *Id.* § 802.05[1], at 802-15.

The observations of a jurist of Judge Weinstein's stature obviously should not be discounted. But the authorities he cites to support that observation actually say nothing about the differences between civil and criminal cases. Instead, the observation simply rests upon a few appellate decisions reversing criminal convictions where hearsay was admitted. The treatise makes no effort to account for the many federal decisions affirming convictions where controversial prosecution hearsay was admitted, nor does it offer any contrasting authority showing the supposedly more liberal attitude of judges toward hearsay in civil cases.

Other contemporary scholars make similar observations that hearsay is more strictly controlled in criminal cases. *See, e.g.*, Park, *Subject Matter Approach*, *supra* note 9, at 87 (noting that courts are "uniformly more liberal in receiving hearsay evidence in civil cases than in criminal cases"); Van Kessel, *supra* note 2, at 479, 481 & n.14 (noting that recent cases show a more conservative approach to interpreting hearsay exceptions). In part they rely on those hearsay exceptions in the Federal Rules which explicitly distinguish criminal cases, exceptions which—as I argue below, *see infra* Part I.A.1.b.—do very little to benefit criminal defendants as a practical

means to test the theory to determine who faces the widest range of admissible hearsay. Federal courts make no effort to "keep score" among the various classes of litigants. Empirical studies of reported cases offer some helpful, and surprising, insights.[37] But, when making statistical comparisons between civil and criminal cases, it is hard to be certain that we are comparing apples to apples.[38]

In the following sections, I assess conventional theory in two ways. First, I examine the three main pillars supporting the theory: (a) the Confrontation Clause, (b) the Federal Rules of Evidence, and (c) the exercise of discretion by trial judges in making hearsay rulings. In theory, each of these offers a source of special protection to criminal defendants against the expansion of admissible hearsay. Second, I look at judicial rulings on hearsay's frontiers, opinions expanding the boundaries of admissible hearsay beyond traditional limits. My conclusion is that the three pillars of conventional theory account for little in the way of special protection for criminal defendants. And at hearsay's frontiers, prosecutors are the most successful of any litigants in breaking new ground in the admission of hearsay. In reality, it appears that criminal defendants face a broader range of admissible hearsay than other litigants. And, more often than civil litigants, they must contend with the most problematic forms of hearsay: statements that fall outside the boundaries of traditional hearsay exceptions.

1. Three Pillars of Conventional Theory: Extra Protections Against Prosecution Hearsay, or the Illusion of Protection?

In theory, criminal defendants enjoy three sources of extra protection against the more liberal admission of hearsay that supposedly occurs in civil cases, or when the defendant himself offers hearsay. First, the Confrontation Clause limits a prosecutor's use of hearsay, but has no application when other litigants offer hearsay in evidence.[39] Second, the Federal Rules of Evidence include several specific limits on hearsay that are unique to criminal cases and, in

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matter. Their only other authority is Weinstein's treatise.

37. As far as I am aware, no comprehensive comparison of hearsay in civil and criminal cases exists to support the apparently widespread assumption that judges are more cautious toward hearsay when it is offered against criminal defendants. The only empirical studies on the subject reach the opposite conclusion. *See* Swift, *Judicial Discretion*, *supra* note 17, at 482-86 (finding that prosecutors were proportionately more successful in offering hearsay under Rules 803(1), (2), (3), (4), and (6) than other classes of litigants); Raeder, *Response*, *supra* note 17, at 508 & n.2 (finding prosecutors the most successful users of "residual" hearsay). My own survey, which essentially aimed to update Professor Raeder's 1991 survey of residual hearsay cases, likewise found that prosecutors succeeded more often than other litigants in offering hearsay under the residual exception, even though one might expect courts to be most cautious in admitting such "fringe" hearsay against criminal defendants. *See infra* notes 93-95 and accompanying text.

38. *See infra* note 96.

39. *See* Idaho v. Wright, 497 U.S. 805, 814 (1990).

some instances, apply only to prosecution hearsay.[40] Third, at least partly out of concern for defendants' limited discovery rights, trial judges are said to exercise their discretion to limit hearsay more strictly when offered against criminal defendants.[41] But a closer look at the first two of these pillars suggests that neither the Confrontation Clause nor the Federal Rules of Evidence actually serve to exclude much prosecution hearsay that would be admissible if offered by other litigants.[42] As for the third pillar, while the overall impact of judicial discretion is hard to measure, the best available evidence suggests that, on average, judicial judgment calls actually favor prosecutors over other litigants in a significant way.[43]

a. *The Confrontation Clause*

In theory, the Supreme Court applies the Confrontation Clause as a kind of super hearsay rule, a constitutional trump card to limit the admission of especially unreliable hearsay in criminal cases. "The Confrontation Clause," the Court tells us, "bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule."[44] When the Federal Rules of Evidence were

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40. *See* Fed. R. Evid. 803(8) (public records); *id.* Rule 803(22) (judgments); *id.* Rule 804(b)(1) (former testimony); *id.* Rule 804(b)(2) (dying declarations). Rule 804(b)(3) (declarations against interest) also distinguishes civil from criminal cases, but by limiting defense-offered hearsay in criminal cases more strictly than prosecution hearsay.

41. Weinstein's treatise contends, "[R]eversible error is found more often in criminal cases when hearsay is improperly admitted against a defendant. Consequently, the trial judge's discretion to admit hearsay evidence against a criminal defendant may be curtailed." Weinstein et al., *supra* note 16, § 802.04[3][b], at 802-14 to -15; *see also* Park, *Subject Matter Approach*, *supra* note 9, at 87 (highlighting that the judicial attitude towards exclusion appears to be stricter in criminal cases); Van Kessel, *supra* note 2, at 479, 481 (noting that judges in criminal cases have been "less radical [and] more uneven").

42. *See infra* Part I.A.1.a-b.

43. *See infra* Part I.A.1.c.

44. *Wright*, 497 U.S. at 814. In recent years, however, at least two members of the Court, the Justice Department, and several prominent scholars have challenged the notion that hearsay declarants are "witnesses against" the accused under the Confrontation Clause. They argue, therefore, that the Clause generally does not operate to exclude hearsay at all.

Through an *amicus* brief filed in *White v. Illinois*, 502 U.S. 346 (1992), the Justice Department argued that the Confrontation Clause applies only to in-court testimony and certain forms of "testimonial" hearsay (*e.g.*, affidavits, depositions, and prior testimony) created in anticipation of a criminal trial. *See id.* at 352. The majority in *White* rejected the argument with the simple statement that it "comes too late in the day to warrant reexamination" of the Court's many earlier opinions which, at least implicitly, had taken the broader view that "witnesses against" an accused included hearsay declarants in general. *Id.* at 353. Justice Thomas wrote a concurring opinion, joined by Justice Scalia, urging more thorough consideration of the government's position. *See id.* at 358-66 (Thomas, J., concurring).

The leading scholarly proponent of the argument is Professor Akhil Reed Amar. *See* Akhil Reed Amar, The Constitution and Criminal Procedure 89-144 (1997); Akhil

enacted in 1975, confrontation-hearsay doctrine was at a somewhat uncertain stage.[45] Still, there is little doubt that, twenty-five years ago, the constitutional exclusionary rule against unreliable hearsay appeared more formidable than it does today. Indeed, several early Warren Court opinions could be interpreted to suggest that hearsay from a nontestifying declarant was admissible only where the defendant had a reasonable opportunity to cross-examine the declarant in an earlier proceeding.[46] Against that background, it seems likely that in 1975 Congress expected that Confrontation Clause concerns ultimately would restrict the range of hearsay admissible against criminal defendants under the new Rules, while leaving more room for flexibility when courts applied the same rules in civil cases.[47]

But Confrontation Clause history took a different course. In the twenty-five years since the enactment of the Federal Rules of Evidence, the Supreme Court has never invoked the Confrontation Clause to exclude hearsay that was otherwise admissible under the Rules.[48] Instead of adapting, and narrowing, the codified hearsay

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Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 Geo. L.J. 1045, 1045 (1998); Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 Geo. L.J. 641, 647 (1996) [hereinafter Amar, *First Principles*].

In my view, both the text and history of the Confrontation Clause are consistent with the Court's view that hearsay declarants should be treated as "witnesses" for confrontation purposes. *See* Douglass, *supra* note 6, at 224-40. However, that does not lead to the conclusion that the Clause operates to exclude hearsay from criminal trials. As I have argued elsewhere in greater detail, the Clause guarantees the adversarial right to "test" whatever hearsay the rules of evidence and the Due Process Clause permit the prosecution to offer in evidence. *See id.*

45. The Advisory Committee observed: "Until very recently, decisions invoking the confrontation clause of the Sixth Amendment were surprisingly few, a fact probably explainable by the former inapplicability of the clause to the states and by the hearsay rule's occupancy of much the same ground." Fed. R. Evid. art. VIII, advisory committee's note. In drafting the final version of the Rules, the Conference Committee noted that confrontation-hearsay principles were "under development" by the courts. *See* S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7068. Rather than attempt to codify confrontation principles into all hearsay exceptions, the Rules left that process for future refinement by the Supreme Court. *See id.*

46. *See* Raeder, *Effect on Catchalls*, *supra* note 34, at 930-31 (citing Douglas v. Alabama, 380 U.S. 415 (1965), and Pointer v. Texas, 380 U.S. 400 (1965)).

Practically all of the Court's confrontation-hearsay opinions prior to 1975 dealt with hearsay in the form of testimony from prior judicial proceedings and, accordingly, focused almost exclusively on the adequacy of defendant's earlier opportunity to cross-examine. *See* Douglass, *supra* note 6, at 202-03 & n.50 (collecting pre-1975 cases). The 1970 plurality opinion in *Dutton v. Evans*, 400 U.S. 74, 87-88 (1970), departed from that approach, but offered no clear indication of the Court's future course.

47. This is especially true in relation to the residual exception. Professor Raeder makes a strong argument that the residual exception was passed in part because Congress felt it would have minimal application in criminal cases because of Confrontation Clause restrictions. *See* Raeder, *Effect of Catchalls*, *supra* note 34, at 931-32.

48. In *Williamson v. United States*, 512 U.S. 594 (1994), the Court avoided a

exceptions in criminal cases to conform with the Confrontation Clause, the Court has adapted its views on confrontation to conform with the rules of evidence.[49] The Court accomplished that feat by incorporating traditional hearsay exceptions into its "general approach" to confrontation-hearsay analysis. In its 1980 decision in *Ohio v. Roberts*,[50] the Court declared that hearsay falling within a "firmly rooted" hearsay exception satisfies the Confrontation Clause as well. And in the two decades since *Roberts*, other than the "residual" hearsay exception,[51] the Court has never found a hearsay exception that is *not* "firmly rooted."[52] As a result, other than hearsay

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Confrontation Clause challenge to hearsay admitted as a statement against interest by finding that the hearsay was improperly admitted under Rule 804(b)(3). *See id.* at 605. The opinion at least suggests that "genuinely self-inculpatory" statements properly falling within the bounds of 804(b)(3) would likewise satisfy Confrontation Clause concerns. *Id.* Perhaps the closest the Court has come to excluding, on constitutional grounds, hearsay that would have been admissible under the Federal Rules, was in *Idaho v. Wright*, 497 U.S. 805 (1990). There the Court found a Confrontation Clause violation where hearsay was admitted under a state "residual exception" identical to Federal Rule of Evidence 803(24). *Id.* at 811-12. But, because it was dealing with a state evidentiary ruling, the Court never considered whether the statement was properly admitted under the rules of evidence. Had the facts in *Wright* arisen in a federal court, the Court might simply have ruled the statement inadmissible under Rule 803(24), and avoided the constitutional issue.

49. *See* Douglass, *supra* note 6, at 211 ("The hearsay 'tail' now wags the constitutional 'dog.'"); Jonakait, *Confrontation Clause*, *supra* note 11, at 558 ("The confrontation clause is no longer a constitutional right protecting the accused, but essentially a minor adjunct to evidence law.").

50. 448 U.S. 56 (1980).

51. Fed. R. Evid. 807. In *Idaho v. Wright*, 497 U.S. at 817-18, the Court found that Idaho's "residual exception," identical to former Federal Rule 803(24), was not a "firmly rooted" hearsay exception.

52. The Court's standard for "firm roots" has been generous:

> History, rather than reliability, generally has driven the Court's decisions identifying "firmly rooted" hearsay exceptions. Even the search for historically adequate "roots," however, has been less than exacting. The Court has relied upon a rather amorphous mix of chronological age and widespread acceptance—a sort of historical popularity contest. The Court's test is so generous that virtually all recognizable hearsay exceptions have passed. Applying this approach, the Court has ruled that the exceptions for co-conspirator statements, spontaneous declarations, and statements for purposes of medical diagnosis are "firmly rooted." In dictum at least, the Court similarly has recognized the firm roots of the exceptions for public records, business records, dying declarations, and prior trial testimony subject to cross-examination. Following the Court's example, federal and state appellate courts have been quick to fill in the few remaining gaps, finding sufficiently firm roots in the exceptions for recorded recollection, admissions by an agent, statements regarding the declarant's state of mind, and the *res gestae* exception.

Douglass, *supra* note 6, at 209-10.

Moreover, given the Court's generous approach to identifying "firmly rooted" exceptions, it is hard to imagine that the Court would find any of the exceptions currently enumerated in the Federal Rules to be lacking "firm roots." Indeed, in the Court's view, the presence of a hearsay exception among those enumerated in the Federal Rules is a critical factor in determining that the exception has "firm roots."

admitted under the residual exception,[53] it seems almost certain that any hearsay admissible today under the Federal Rules of Evidence is likewise admissible under the Confrontation Clause.[54] Contrary to what many may have anticipated in 1975, the Court has not carved out a narrower range of hearsay admissible against criminal defendants.

When it comes to hearsay falling under the "residual" exception—the frontier of admissibility under the Federal Rules—the Court gives us at least a theoretical basis for applying a more restrictive standard in criminal than in civil cases. Under the "general approach" of *Roberts*, hearsay falling outside of a "firmly rooted" exception meets Confrontation Clause standards only where it possesses "particularized guarantees of trustworthiness."[55] But the Court has declined to give any teeth to that standard. In its only treatment of residual hearsay under the Confrontation Clause, the Court offered no more than a nonexclusive list of factors which might provide such "particularized guarantees," and granted trial courts "considerable leeway in their consideration of appropriate factors."[56] Judging from both the number and the language of reported opinions, the lower federal courts have used that leeway to admit residual hearsay against criminal defendants more frequently, and with no more demanding standard for reliability, than they apply in civil cases.[57]

See White v. Illinois, 502 U.S. 346, 355 n.8 (1992). *See generally* Douglass, *supra* note 6, at 209 nn.93, 94 (discussing the threshold of what constitutes "firm roots").

Of all the enumerated exceptions in the Federal Rules, there remains doubt that only one, the 804(b)(3) exception for statements against interest, may not qualify as "firmly rooted." In *Lilly v. Virginia*, 119 S. Ct. 1887 (1999), the Court failed to produce a majority on the issue. Four justices found that statements against interest by an accomplice that inculpate an accused are not within a firmly rooted exception. *See id.* at 1899. Three argued that the statements at issue were not "genuinely self-inculpatory" in any event, and declined to reach the question whether the exception was "firmly rooted." *Id.* at 1904-05 (Rehnquist, C.J., concurring). In its earlier opinion in *Williamson*, a majority of the Court strongly hinted that genuinely self-inculpatory statements admissible under Rule 804(b)(3) carried the kind of "particularized guarantees of trustworthiness" that would render the exception "firmly rooted" under the *Roberts* formula. *Williamson*, 512 U.S. at 605.

53. *See* Fed. R. Evid. 807.

54. *See* United States v. Salim, 664 F. Supp. 682, 693 (E.D.N.Y. 1987) (Weinstein, J.) ("Article VIII of the Federal Rules of Evidence is by now—ten years after promulgation by the Court and adoption by Congress—a 'firmly rooted' set of hearsay exceptions."); Stephen A. Saltzburg et al., Federal Rules of Evidence Manual 1702 (7th ed. 1999) ("The Supreme Court has come quite close to holding—if it has not in fact held—that a hearsay statement offered against a defendant in a criminal case will automatically satisfy the Confrontation Clause if it is admissible under one of the Rule 803 exceptions.").

55. *Roberts*, 448 U.S. at 66.

56. *Wright*, 497 U.S. at 821-22.

57. *See* Raeder, *Response*, *supra* note 17, at 508 & n.2. *See generally* Douglass, *supra* note 6, at 218-19 ("Lower courts searching for 'particularized guarantees of trustworthiness' have managed only to prove that reliability is in the eye of the beholder.... As an exclusionary rule that purports to establish a constitutional barrier against unreliable hearsay, independent of the law of evidence . . . , [*Wright*] is

In sum, the Confrontation Clause does little that the Federal Rules of Evidence do not already do to regulate hearsay in criminal trials. The constitutional standard and the rules are essentially redundant. And, with the few exceptions discussed below, those rules are the same in civil and criminal cases.

b. *The Federal Rules of Evidence*

On the surface, the Federal Rules of Evidence lend some support to the conventional view that criminal defendants face a more carefully restricted range of admissible hearsay than other litigants. After all, there are five enumerated hearsay exceptions which limit the admission of hearsay more severely in criminal cases than in civil cases.[58] But, just as with the Confrontation Clause, the appearance of a standard favoring criminal defendants is greater than the reality of modern hearsay practice.

Rule 804(b)(2) does not allow a hearsay exception for dying declarations in criminal cases other than homicide prosecutions.[59] But dying declarations are seldom admitted in civil cases either.[60] And their limitation in criminal cases applies whether the declaration is offered by the prosecution or defense. Moreover, where the government really needs the hearsay of a deceased declarant regarding the circumstances of her death, the residual exception can erase any limitation imposed by Rule 804(b)(2).[61]

The hearsay exception for judgments of previous felony convictions does not allow admission, in criminal cases, of a prior judgment against someone other than the accused.[62] But third party convictions

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too malleable to have much of an effect."); *see infra* text accompanying notes 90-95.

58. The five exceptions are Rules 803(8)(B) and (C) (public records), 803(22) (judgments), 804(b)(1) (former testimony), and 804(b)(2) (dying declarations).

59. The dying declaration exception provides:

> (2) Statement under belief of impending death:
> In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death.

Fed. R. Evid. 804(b)(2).

60. My own Westlaw search for dying declarations cases under 804(b)(2) produced 43 cases. Only seven were civil cases. Of those, only two admitted the hearsay.

61. *See* United States v. Canan, 48 F.3d 954, 959-61 (6th Cir. 1995); Government of Virgin Islands v. Joseph, 964 F.2d 1380, 1388 (3d Cir. 1992).

62. The Rule provides in part:

> (22) Judgment of previous conviction:
> Evidence of a final judgment . . . adjudging a person guilty of a crime . . . to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.

Fed. R. Evid. 803(22). The drafters imposed this limit to avoid conflict with *Kirby v. United States*, 174 U.S. 47 (1899). *See* Fed. R. Evid. 803(22) advisory committee's

are rarely used and seldom relevant in civil cases.[63] The principal use of Rule 803(22) in civil cases is to admit the prior conviction of a *party* to the civil case in order to establish an element of the civil cause of action or defense against the same party. For example, this occurs when the victim of an assault sues his already-convicted assailant or an insurer offers the property owner's arson conviction in defense of its denial of coverage. In any event, even where a third-party judgment is relevant, it may face exclusion for reasons other than the hearsay rule.[64]

Rule 803(8), the hearsay exception for public records and reports, contains two limits which apply only in criminal cases. The first, 803(8)(B), limits the use of police and other law enforcement reports in a criminal case.[65] As with dying declarations, the limitation applies whether the government or the defendant offers the report. For practical purposes, then, the limit probably creates more obstacles for defendants than for prosecutors. To prosecutors, police generally are available and predictably cooperative witnesses. Where a police report contains relevant observations, prosecutors typically prefer to present that information through the officer's testimony in court, rather than through hearsay. Thus, in most cases, Rule 803(8)(B) merely confirms the tactical choice most prosecutors would make in any event. Moreover, despite what appears to be unequivocal language in the Rule, most federal courts have ruled that 803(8)(B) allows the report in evidence where the reporting officer testifies in person at trial.[66] If the officer's report adds detail, enhances credibility, or simply reinforces the live testimony, the prosecutor may have the option to use the hearsay as well. On the other hand, defense counsel are understandably more wary that they may

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note. *Kirby* was an early Confrontation Clause case where the Court reversed a conviction for possession of stolen property. To prove the stolen nature of the property, the trial court had admitted in evidence the record showing conviction of the thieves. *See Kirby*, 174 U.S. at 49-50.

63. There appear to be only a handful of reported civil cases admitting third-party convictions under the hearsay exception. *See* Saltzburg et al., *supra* note 54, at 1806-09 (identifying only two such cases among the 17 annotated cases under Rule 803(22)).

64. *See* Rozier v. Ford Motor Co., 573 F.2d 1332, 1347-49 (5th Cir. 1978) (holding, in products liability suit against manufacturer of the vehicle occupied by plaintiff's decedent, that the manslaughter conviction of the driver of the other vehicle, though admissible under Rule 803(22), should have been excluded under Rule 403 since it might have led the jury to the mistaken conclusion that the manufacturer could not be liable if the other driver was criminally responsible for the accident).

65. The Rule provides a hearsay exception for records and reports of public agencies setting forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel." Fed. R. Evid. 803(8)(B).

66. *See* United States v. Hayes, 861 F.2d 1225, 1229-30 (10th Cir. 1988); United States v. King, 613 F.2d 670, 673-74 (7th Cir. 1980); Saltzburg et al., *supra* note 54, at 1685.

unwittingly elicit unfavorable details from a police witness. For the defense, Rule 803(8)(B) poses the tough choice between calling a potentially adverse witness or foregoing favorable hearsay that an officer included in her report.

Rule 803(8)(C) is the hearsay exception for reports of fact finding by government agencies.[67] Of the five hearsay provisions which distinguish criminal from civil cases, 803(8)(C) is probably the only one which creates any significant practical advantage for criminal defendants in comparison to other litigants. The Rule 803(8)(C) hearsay exception receives relatively wide use in civil cases, particularly auto accident and products liability cases, where litigants offer the findings of government agents—including police—who investigate accidents, injuries, and even whole industries.[68] The Rule, on its face, allows such reports in criminal cases only when offered against the government. But two judicial trends have limited the advantage which the Rule ostensibly creates for criminal defendants. First, even in civil cases, courts often exercise their discretion to redact or exclude such reports when they contain opinions, conclusions, or findings not clearly supported with fact.[69] Conversely, despite the Rule's apparently unequivocal exclusion of government fact finding reports offered against criminal defendants, some courts have admitted such reports when they merely record facts observed by investigators outside of the "adversarial" process of criminal investigation, or when they reach conclusions based on reliable scientific methods.[70] These two judicial trends have chipped away

67. The Rule provides a hearsay exception "in civil actions and proceedings and against the Government in criminal cases," for public agency reports setting forth "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8)(C).

68. *See, e.g.*, Simmons v. Chicago & N.W. Transp. Co., 993 F.2d 1326, 1327-28 (8th Cir. 1993) (admitting state trooper's accident investigation report in a FELA action); Lubanski v. Coleco Indus., 929 F.2d 42, 45-46 (1st Cir. 1991) (finding that a police officer's report regarding the circumstances of an auto accident may be admissible in a resulting products liability action if report's conclusions are trustworthy); *In re* Aircrash in Bali, Indonesia, 871 F.2d 812, 816 (9th Cir. 1989) (admitting an FAA report on an airline's safety record). *See generally* Saltzburg et al., *supra* note 54, at 1769-78 (providing annotations of cases holding evidence admissible when a witness is "trustworthy").

69. *See, e.g.*, Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777, 787 (3d Cir. 1996) (upholding trial court's redaction of diagnosis of mesothelioma from autopsy report and hospital records); Faries v. Atlas Truck Body Mfg. Co., 797 F.2d 619, 622-23 (8th Cir. 1986) (holding that a police report should not have been admitted where the officer did not measure skid marks, based conclusions on statements of interested persons, and report lacked corroboration). *See generally* Saltzburg et al., *supra* note 54, at 1783-84 (providing annotations of cases where police reports are admitted in civil trials).

70. *See* Saltzburg et al., *supra* note 54, at 1684-85 ("Where the risk of manipulation and untrustworthiness is minimal—in particular where the report contains unambiguous factual matter made under nonadversarial circumstances—

much of the advantage that Rule 803(8)(C) otherwise gives a criminal defendant by expanding the universe of government fact finding reports admissible against him, while narrowing the universe of reports admissible in civil cases or against the government.[71]

The fifth instance where the hearsay rules distinguish civil from criminal cases appears in Rule 804(b)(1), the exception for former testimony.[72] In criminal cases, the Rule allows former testimony only where the party against whom it is offered had an opportunity and similar motive to develop the testimony in a former proceeding.[73] In civil cases, the Rule is only slightly more liberal, allowing former testimony even where the opponent of the hearsay was not a party to the earlier proceeding, as long as "a predecessor in interest" had an opportunity to examine the declarant. But the Rule's more restrictive approach in criminal cases has been nullified by judicial interpretation of the residual hearsay exception. Under the residual exception, federal courts have consistently admitted former testimony offered by the government, even where the defendant was not a party to the earlier proceeding, as long as the declarant was cross-examined by someone—typically a co-conspirator—with a motive and interest similar to the defendant's.[74] Whatever slight advantage Rule

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Courts have held that the report should be admitted despite the apparently absolute language of the Rule."); *see also* United States v. Enterline, 894 F.2d 287, 288-91 (8th Cir. 1990) (admitting a police-created computerized list of vehicles reported stolen); United States v. Dancy, 861 F.2d 77, 79-80 (5th Cir. 1988) (admitting a fingerprint card offered to show defendant was a convicted felon); United States v. DeWater, 846 F.2d 528, 530 (9th Cir. 1988) (admitting a breathalyzer report).

71. What remains is a slightly greater willingness of courts in civil cases to admit agency findings that sound like opinions or conclusions, as long as they are rendered by someone with appropriate experience or expertise, and as long as they rest upon sufficient factual support. Still, the current approach to 803(8)(C) is far from one of categorical admission of fact finding against civil litigants and prosecutors, and categorical exclusion when offered against criminal defendants.

72. The exception reads in part:

> (1) Former testimony:
> Testimony given as a witness at another hearing . . . if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fed. R. Evid. 804(b)(1).

73. The legislative history of the Rule reflects that Congress felt it was "generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party." H.R. Rep. No. 93-650 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7088. Accordingly, the House rejected a more broadly drafted Rule that would have admitted former testimony where any party "with motive and interest similar" to that of the party against whom the former testimony is offered had an opportunity to examine the witness at the former proceeding. *Id.* The Conference Committee accepted the House amendment. *See id.*

74. *See* United States v. Sposito, 106 F.3d 1042, 1046-48 (1st Cir. 1997) (admitting testimony from an unrelated gambling trial against a different defendant under the residual exception where declarant was cross-examined thoroughly by defense attorney in the earlier trial); United States v. Shaw, 69 F.3d 1249, 1253 (4th Cir. 1995)

804(b)(1) may have given to criminal defendants, the residual exception has taken away.

c. *Judicial Discretion in Admitting Hearsay*

In admitting or excluding hearsay, as with most evidentiary rulings, trial courts exercise a range of discretion even when applying apparently fixed rules.[75] Therefore, even if neither the Confrontation Clause nor the Federal Rules of Evidence create any substantial hearsay-related advantage for criminal defendants, it remains possible that judicial discretion alone might provide that advantage. Perhaps courts more often make discretionary "judgment calls" in favor of criminal defendants, giving them the benefit of the doubt when prosecution hearsay gets near the edge of admissibility.[76]

Admittedly, it is difficult to measure the collective "discretion" of hundreds of federal trial judges. Reported opinions may not tell the full story.[77] And direct case comparisons are difficult, given the variety of factual contexts in which hearsay issues arise. Still, we can draw some conclusions from what courts say—or do not say—when they consider hearsay. If discretion is more limited in admitting prosecution hearsay, then we should expect courts to say so on occasion. But it is virtually impossible to find opinions in which trial courts acknowledge that their discretion to admit hearsay against criminal defendants is more limited than in other circumstances.[78] It is

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(finding the testimony of since-deceased witness, subject to cross-examination at trial of co-conspirator, admissible under the residual exception); United States v. Deeb, 13 F.3d 1532, 1536-37 (11th Cir. 1994) (admitting the testimony subject to cross-examination at the trial of defendant's accomplices under the residual exception); United States v. Zannino, 895 F.2d 1, 7-8 (1st Cir. 1990) (admitting the testimony of now-deceased witness from the earlier trial of codefendants under the residual exception).

75. *See* United States v. Scarpa, 913 F.2d 993, 1015 (2d Cir. 1990) ("[T]he trial judge is in the best position to weigh competing interests in deciding whether or not to admit certain evidence. Absent an abuse of discretion, the decision of the trial judge to admit or reject evidence will not be overturned by an appellate court." (internal quotations and citations omitted)). Professor Raeder argues that appellate courts too readily apply an abuse of discretion standard to uphold evidentiary rulings which really concern an issue of law that should be reviewed de novo. *See* Raeder, *Response*, *supra* note 17, at 517-18.

76. Several commentators, including Judge Weinstein, contend that judicial discretion plays an important role in placing stricter limits on hearsay when offered against criminal defendants. *See* Weinstein et al., *supra* note 16, § 802.04[3][b], at 802-14 to -15; Park, *Subject Matter Approach*, *supra* note 9, at 87; Van Kessel, *supra* note 2, at 479, 484-85.

77. Evidentiary rulings often are made during trial, without written opinion. And there is no guarantee that the issues which surface in published opinions provide a representative sample of hearsay decisions. This is especially true of appellate decisions in criminal cases, which, as a general rule, consist only of defense appeals from adverse evidentiary rulings. *See infra* note 96.

78. My research has disclosed none. Of course, the collective silence of trial courts on the issue is not especially surprising. Trial courts issue written opinions in

just as hard to find appellate opinions which say that it should be so limited. On the other hand, it is quite typical for appellate courts to begin their assessment of a trial court's decision to admit prosecution hearsay with the familiar refrain that such rulings will not be reversed absent an abuse of discretion.[79] And that refrain is almost always a prelude to an opinion affirming a conviction.[80]

Judge Jack B. Weinstein contends that trial judges' discretion to admit prosecution hearsay is curtailed because "reversible error is found more often in criminal cases when hearsay is improperly admitted against a defendant."[81] But the only available empirical evidence contradicts that assertion. In her 1991 study of federal court opinions addressing five hearsay exceptions over a ten-year period, Professor Eleanor Swift found reversible errors far more likely in civil than in criminal cases.[82] According to her study, even in cases where appellate courts identified an error in the admission of prosecution hearsay, they reversed less than 20% of the time, while affirming most cases under the harmless error standard. The rate of reversals where errors were identified in civil cases was three times that high.[83] My own survey of appellate action in post-1991 cases dealing with residual hearsay documents a similar reluctance among appellate courts to reverse cases where prosecutors have succeeded in offering residual hearsay at trial.[84] I found reversals in only 6% of such cases.

In sum, neither the language, the sheer numbers, nor the results of published opinions leave us with much hard evidence that trial judges, in the exercise of their discretion, apply a more stringent standard to prosecution hearsay in criminal cases than to hearsay proffered by other litigants. And a closer look at hearsay admitted under the residual exception, where judicial discretion is least confined by the

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part to justify their decisions in anticipation of appellate review.

79. *See* Swift, *Judicial Discretion*, *supra* note 17, at 479 n.17.

80. *See id.* at 478.

81. Weinstein et al., *supra* note 16, § 802.04[3][b], at 802-14.

82. *See* Swift, *Judicial Discretion*, *supra* note 17, at 479-80. Professor Swift surveyed 237 federal court opinions reporting hearsay rulings under Rules 803(1), (2), (3), (4), and (6). *See id.* at 478.

83. Professor Swift found only three reversals in the 16 criminal cases where appellate courts found that the trial court had erred in admitting prosecution hearsay, for a reversal rate of 19%. By contrast, of the 21 civil cases where appellate courts identified error in admitting hearsay, they reversed twelve, or 57%. *See id.* at 479-80.

Professor Park takes issue with Professor Swift's conclusion, arguing that the results of her survey show only that "criminal defendants are more likely to appeal from harmless errors." Park, *Dead or Alive?*, *supra* note 28, at 650 n.13. I believe there is more substance to Professor Swift's results. Criminal defendants, just like other litigants, have a tactical incentive to choose their best issues for appeal and to jettison those which may appear frivolous. And even if it is true that criminal defendants have a lower threshold for choosing issues to raise on appeal, the collective message sent to trial courts when over 80% of erroneous evidentiary rulings are nonetheless affirmed seems unmistakable.

84. *See infra* note 93.

Rules of Evidence, suggests that prosecutors may be the most frequent beneficiaries of judicial judgment calls.[85]

2. Hearsay's Frontiers: Where Criminal Defendant's Face the Most Troublesome, and Often the Most Critical, Hearsay

So far, we have seen that the three principal safeguards which might limit prosecution hearsay more strictly than hearsay in general do not impose much of a limit. The Confrontation Clause largely mimics the Federal Rules of Evidence, and those Rules create few meaningful limits that are unique to prosecution hearsay. To the extent that we can measure the impact of judicial discretion in the application of those Rules, there is no evidence that criminal defendants enjoy any advantage over other litigants.

But in order to appreciate fully the hearsay challenges facing criminal defendants, we should take one further step. Perhaps the best way to measure the relative impact of hearsay on criminal defendants is to look at hearsay's frontiers—the rules and judicial opinions which expand admissible hearsay beyond traditional limits. It is important to consider the fringes of admissible hearsay for two reasons. First, at least from the perspective of traditional evidence law, such hearsay poses the greatest risks. After all, if traditional hearsay exceptions rest upon reasonable assessments of reliability, then the further courts stray from the core of traditional exceptions, the less reliable such hearsay becomes.[86] Second, proponents typically offer "fringe" hearsay because they really need it. Courts allow it for the same reason: it is critical to the proponent's case and there is no available substitute.[87] In other words, courts typically admit new and controversial forms of hearsay where both the risks and the needs for such hearsay are high.[88] And if the stakes are high, then so is the defendant's need for adequate tools to contest such hearsay, including the tool of discovery.

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85. *See infra* notes 89-116 and accompanying text.

86. Whether traditional categorical exceptions actually measure "reliability" in any reliable fashion, of course, is subject to debate. *See supra* note 3.

87. In fact, the residual exception *requires* that hearsay be important to qualify for admission. The exception applies where "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Fed. R. Evid. 807(B).

88. Perhaps the clearest modern examples of need-driven expansions of traditional hearsay limits are (1) the admission of out-of-court statements by children regarding acts of abuse, and (2) the admission of grand jury testimony of unavailable prosecution witnesses. The first has evolved from both legislative and judicial action aimed primarily at expanding the limits of the traditional exceptions for "excited utterances" and statements for purposes of medical diagnosis. *See infra* text accompanying notes 122-27. The second is the product of a generous, and controversial, interpretation of the residual exception. *See infra* text accompanying notes 100-01. In both instances, prosecutors have been the impetus for the expansion of admissible hearsay.

Under the Federal Rules, much of hearsay's frontier is occupied by the residual exception, where the absence of categorical limits leaves more room for judicial adventurism.[89] But far from suggesting that courts apply stricter limits to hearsay in criminal cases, federal cases applying the residual exception suggest exactly the opposite. Based on the number of reported cases, prosecutors appear to be the most prolific users of the residual exception at trial.[90] And, statistically speaking, they are the most successful. A 1991 survey of residual hearsay cases found that prosecutors succeeded in 81% of the reported cases where they offered hearsay under the residual exception.[91] Civil litigants fared roughly half as well, while criminal defendants succeeded in only 15% of their efforts to use the residual exception.[92] My own survey of residual hearsay opinions since 1991[93]

89. Rule 807, the "residual exception," applies to "statement[s] not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness." Fed. R. Evid. 807. Courts have a considerable range of discretion in determining what statements are sufficiently reliable under this standard. *See* Weinstein et al., *supra* note 16, 807.03[2][a], at 807-12. In theory, the Confrontation Clause limits that discretion more severely when prosecutors offer hearsay. *See* Idaho v. Wright, 497 U.S. 805, 814-15 (1990). In practice, there seems to be little difference between the Rule's requirement of equivalent "circumstantial guarantees of trustworthiness" and the constitutional requirement that non-"firmly rooted" hearsay possess "particularized guarantees of trustworthiness." *See* Douglass, *supra* note 6, at 216-17 & n.142. Few angels could dance along the thread that separates the two standards.

90. *See* Raeder, *Response*, *supra* note 17, at 508 n.2. Professor Raeder surveyed 408 reported residual hearsay cases from federal courts from 1975 through July 1, 1991. Prosecutors offered residual hearsay in 171 cases. Civil plaintiffs were a distant second with 113 cases. *See id.*

91. *See id.* Most of the cases included in Professor Raeder's survey were decided before the Supreme Court's opinion in *Idaho v. Wright*, a case that certainly held the potential to cut back on successful use of residual hearsay by prosecutors. But *Wright* seems not to have stemmed prosecutors' tide of success. My own survey of post-1991 cases produced results every bit as favorable to prosecutors as Professor Raeder's. *See infra* note 93.

92. *See* Raeder, *Response*, *supra* note 17, at 508 n.2. Taking into account the final outcome of cases after appeal, Professor Raeder found that prosecutors ultimately succeeded in offering residual hearsay in 138 of 171 cases, for a success rate of 81%. In stark contrast, criminal defendants succeeded in only 11 of 75 cases, a success rate of 15%. Civil plaintiffs succeeded in 43% of cases (49 of 113), while civil defendants succeeded 43% of the time (24 of 49). *See id.*

93. In order to determine whether the trends identified by Professor Raeder were still apparent, my research assistant, Michael Gryzlov, performed a Lexis search for residual hearsay cases since July 1991, the cutoff date for Professor Raeder's survey, using a search request of "[807 or 804(b)(5) or 803(24)] w/10 hearsay." The request initially generated over 400 cases. After excluding irrelevant cases and those where the residual hearsay exception was only an alternative grounds for the court's ruling, I tabulated the results from the first 100 cases where the court made a definitive ruling under the residual hearsay exception. Of those 100 cases, 82 involved rulings on residual hearsay offered at trial. The remaining cases involved residual hearsay offered in connection with motions for summary judgment or motions for preliminary injunctions in civil cases. The final results of the survey are based on those 82 rulings where residual hearsay was offered at trial and no other hearsay exception applied.

In order to distinguish the impact of appellate action, I further divided the sample.

confirms that prosecutors may still be the most prolific users of residual hearsay at trial.[94] And these more recent cases suggest an even higher rate of success for prosecutors.[95]

Admittedly, factors unrelated to judicial views on hearsay skew these statistically apparent success rates in favor of prosecutors.[96]

There were 70 cases with opinions from a United States Court of Appeals, and 12 cases where we identified a trial court ruling with no record of appellate action. The following tables reflect the results:

Residual Hearsay Offered at Trial—Appellate Opinions

Proponent	# Cases	Fed. Dist. Ct.		U.S. Ct. App.		Success Rate	
		Admits	Excludes	Error	Reverses	Adm.	Total
Civil Plaintiff	7	3		0	0	3/7	43%
			4	0	0		
Civil Defendant	9	5		1	1	4/9	44%
			4	0	0		
Criminal Pros.	35			7	2	33/35	94%
			0	0	0		
Criminal Def.	19	0		0	0		
			19	1	1	1/19	5%

Residual Hearsay Offered at Trial—No Appellate Opinions

Proponent	# Cases	Fed. Dist. Ct.		U.S. Ct. App.		Success Rate	
		Admits	Excludes	Error	Reverses	Adm.	Total
Civil Plaintiff	7	4	3			4/7	57%
Civil Defendant	3	1	2			1/3	33%
Criminal Pros.	1	1	0			1/1	100%
Criminal Def.	1	0	1			0/1	0%

Residual Hearsay Offered at Trial—All Cases

Proponent	# Cases	Fed. Dist. Ct.		U.S. Ct. App.		Success Rate	
		Admits	Excludes	Error	Reverses	Adm.	Total
Civil Plaintiff	14					7/14	50%
Civil Defendant	12					5/12	42%
Criminal Pros.	36					34/36	94%
Criminal Def.	20					1/20	5%

94. My survey identified 70 appellate opinions and 12 district court opinions ruling on hearsay offered at trial under the residual exception. Of those 82 opinions, 36 (44% of the total) were cases where prosecutors were the offering party. Criminal defendants and both classes of civil litigants trailed far behind. Criminal defendants offered residual hearsay in 20 cases (24%). Civil plaintiffs were proponents in 14 cases (17%) while civil defendants offered residual hearsay in only 12 cases (15%).

95. My survey showed prosecutors succeeding in an astounding 94% of reported cases where they were the proponents of residual hearsay. At the opposite end of the spectrum, criminal defendants succeeded as proponents only 5% of the time. Civil litigants fell squarely in the middle, with plaintiffs succeeding in 50% of cases where they were the proponent and defendants succeeding 42% of the time.

96. The biggest problem with empirical comparisons, at least those involving appellate decisions, is that in criminal cases the government cannot appeal from an adverse evidentiary ruling at trial. As a result, essentially all appellate opinions dealing with hearsay in criminal cases arise where the defendant lost the issue at trial,

Still, the statistics offer clear support for at least one important conclusion: federal prosecutors seldom see their trial victories reversed based upon erroneous admission of prosecution hearsay under the residual exception.[97] Application of the harmless error doctrine accounts for a fair percentage of prosecution victories.[98] But the greater number of appeals, typically citing the "abuse of discretion" standard of review, simply find no error in admitting residual hearsay offered by the government. Thus, at a minimum, the statistics cast serious doubt on the conventional assumption that trial courts face stricter limits on discretion in admitting "fringe" hearsay offered by prosecutors.

Looking beyond statistics, there is further evidence that federal

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either because the trial court admitted prosecution hearsay or excluded hearsay tendered by the defense. That was true of all of the 70 appellate decisions which my survey identified. The cases where the defendant prevailed in offering or opposing hearsay at trial are never presented on appeal. Civil litigants, like criminal defendants, are free to appeal adverse hearsay rulings. Therefore, if we judge the relative success rate of the parties only by review of appellate decisions, our statistical success rates will be skewed. We have no way to tell how many defense "successes" and government "failures" in criminal trials have been screened out of our sample of cases by the government's inability to appeal. This factor alone probably accounts for much of the difference among the statistically apparent success rates of prosecutors, criminal defendants and civil litigants.

In an effort to account for this appellate "screening" factor in criminal cases, my own survey looked separately at federal district court opinions. Unfortunately, the vast majority of reported district court opinions on residual hearsay are in civil cases, primarily cases where the court addresses residual hearsay in ruling on a summary judgment motion or motion for preliminary injunction. Of the 100 cases surveyed, only two were district court opinions addressing residual hearsay at trial in criminal cases. True to form, the government succeeded as proponent of the hearsay in one, while the defendant failed as proponent in the other.

From my own experience as an Assistant United States Attorney, I also believe a fair amount of "screening" of inadmissible hearsay occurs in the prosecutor's office before trial. Sensible prosecutors seek to avoid creation of serious appealable issues that might result in reversal and retrial. By contrast, because the government cannot appeal from an acquittal, defense counsel has the opposite incentive when it comes to hearsay. If the hearsay is favorable, his incentive is to offer it, no matter how debatable its admissibility. Accordingly, in comparison to defense counsel, prosecutors screen more inadmissible, or seriously debatable, hearsay before it is even offered in evidence.

But, in a different way, this "screening" factor may only highlight the importance of the generous attitude that federal courts seem to take with residual hearsay offered by prosecutors. Prosecutors are less likely to "screen" their own hearsay in those cases where they need it most. In other words, they are more likely to "push the envelope" with debatable hearsay in those cases where they most need the hearsay to prove guilt. Those are the very cases where judicial scrutiny ought to be most exacting. Yet the high rate of prosecution success with residual hearsay suggests the opposite. Courts seem quite generous in admitting important prosecution hearsay under the residual exception.

97. My survey found 35 appellate decisions reviewing a trial court's admission of prosecution hearsay under the residual exception. Only two ended in reversal. *See supra* note 93.

98. The appellate court found error 7 of the 35 appeals in the sample surveyed. The harmless error doctrine saved five out of seven convictions. *See supra* note 93.

courts admit "fringe" hearsay most readily at the behest of prosecutors. The admission of grand jury testimony from unavailable witnesses is probably the clearest example of judicial adventurism at hearsay's frontier.[99] Practically without exception, courts make that departure in admitting hearsay against criminal defendants.[100] Grand jury testimony no doubt represents one of the riskier classes of hearsay admitted under the residual exception. It lacks the principal guarantee of trustworthiness required to admit former testimony under the traditional hearsay exception: prior examination by the opposing party. Grand jury testimony is obtained in secret, in an ex parte proceeding, and by a prosecutor whose principal aim often is to develop evidence that a particular target committed a particular crime. Yet, in an increasing number of cases, federal courts have found adequate "circumstantial guarantees of trustworthiness" in grand jury testimony to satisfy both the residual exception and the Confrontation Clause.[101]

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99. By admitting grand jury testimony under the residual exception, courts circumvent the limit which Rule 804(b)(1) imposes on former testimony, namely, the requirement that the opponent had an opportunity to examine the witness in the earlier proceeding. Professor Jonakait argues that admission of grand jury testimony under the residual exception subverts the basic framework of the Federal Rules, by ignoring the clear limits Congress intended to place on hearsay under the "former testimony" exception. *See* Randolph N. 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, 441 (1986). Judge Sarokin made a similar argument in rejecting government efforts to admit grand jury testimony: "[I]f we allow the residual exception to relax Rule 804(b)(1)'s fairness inquiry and admit 'trustworthy' grand jury testimony under Rule 804(b)(5), we have allowed the residual exception to subvert 804(b)(1)'s purpose." United States v. Vigoa, 656 F. Supp. 1499, 1505 (D.N.J. 1987), *aff'd*, 857 F.2d 1467 (3d Cir. 1988).

100. My own survey of 100 post-1991 cases found 11 cases where the prosecution succeeded in offering grand jury testimony of an unavailable declarant. I found none where criminal defendants or civil litigants succeeded. Civil cases, of course, seldom relate to matters which involve a grand jury investigation. And, even where civil and criminal cases pertain to the same subject matter, rules of grand jury secrecy can prevent civil litigants from gaining access to grand jury transcripts. *See* Fed. R. Crim. P. 6(e).

101. *See, e.g.*, United States v. Earles, 113 F.3d 796, 799-802 (8th Cir. 1997) (holding that the totality of circumstances can create enough trustworthiness to make the hearsay admissible); United States v. McHan, 101 F.3d 1027, 1037-38 (4th Cir. 1996) (same); Curro v. United States, 4 F.3d 436, 437 (6th Cir. 1993) (same); United States v. Kladouris, 964 F.2d 658, 664 (7th Cir. 1992) (refusing to exclude the testimony simply because the witness was not cross-examined); United States v. Panzardi-Lespier, 918 F.2d 313, 316-17 (1st Cir. 1990) (finding evidence admissible after "exhaustive factual analysis" of "the encompassing circumstances of the case"); United States v. Donlon, 909 F.2d 650, 652-55 (1st Cir. 1990) (same). One commentator remarked, "The admission of grand jury testimony under Rule 804(b)(5) is a widespread practice, constituting what has become virtually another enumerated exception." Joseph W. Rand, Note, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 Geo. L.J. 873, 902 (1992) (footnote omitted).

That observation may be a bit overstated. There are still a handful of cases where courts have reversed convictions, typically on Confrontation Clause grounds, based

The receptiveness of federal courts to prosecution hearsay from unavailable government witnesses has not been limited to grand jury testimony. Despite Rule 804(b)(1)'s explicit limitation on former testimony offered against criminal defendants,[102] prosecutors have consistent success in offering hearsay from prior judicial proceedings where someone—whether or not related to the defendant—had an opportunity to cross-examine the declarant,[103] and sometimes where—as in the grand jury—there was really no adversarial examination at all.[104] In addition, federal courts have proved remarkably flexible in their application of the residual exception to hearsay gathered by police with an eye toward criminal prosecution. A number of cases admit such statements from crime victims, eye witnesses, and even accomplices, even though such hearsay often bears little resemblance to statements admissible under traditional exceptions.[105]

Of course some civil cases "push the envelope" under the residual exception as well.[106] But such cases seem fewer in number than those

upon erroneous admission of grand jury testimony under the residual exception. *See, e.g.*, United States v. Gomez-Lemos, 939 F.2d 326, 330-32 (6th Cir. 1991) (reversing a conviction on Confrontation Clause grounds when a co-conspirator's grand jury testimony was admitted into evidence when the co-conspirator refused to testify at trial); United States v. Gonzalez, 559 F.2d 1271, 1272-74 (5th Cir. 1977) (reversing a conviction because a co-conspirator's grand jury testimony was erroneously admitted).

102. *See supra* note 72.

103. *See* United States v. Sposito, 106 F.3d 1042, 1046-48 (1st Cir. 1997) (affirming a gambling conviction where the trial court admitted testimony from an unrelated gambling trial where the defendant was not present); United States v. Shaw, 69 F.3d 1249, 1253-54 (4th Cir. 1995) (admitting testimony from the trial of defendant's co-conspirators which occurred while the defendant was a fugitive); United States v. Deeb, 13 F.3d 1532, 1538-39 (11th Cir. 1994) (admitting testimony from co-conspirator's trial where witness was subject to cross-examination by co-defendants); United States v. Zannino, 895 F.2d 1, 7-8 (1st Cir. 1990) (admitting the testimony of a deceased witness from the trial of co-defendants).

104. *See* United States v. Seavoy, 995 F.2d 1414, 1418-20 (7th Cir. 1993) (admitting unavailable accomplice's testimony from guilty plea proceeding).

105. *See, e.g.*, United States v. Dunford, 148 F.3d 385, 393-94 (4th Cir. 1998) (finding statements made to government investigators by defendant's daughters were properly admitted under residual exception); United States v. Bradley, 145 F.3d 889, 894-96 (7th Cir. 1998) (approving admission, under residual exception and Confrontation Clause, of hearsay statement made by the defendant's wife to police detective, since statement describing domestic violence was made while events were fresh in her mind, she knew police would investigate and attempt to confirm her statement, she made statement voluntarily, and she never recanted); United States v. Accetturo, 966 F.2d 631, 635-36 (11th Cir. 1992) (admitting deceased victim's voluntary, written statements to police); United States v. Ellis, 951 F.2d 580, 583-84 (4th Cir. 1991) (admitting deceased accomplice's statements to prosecutors and investigators pursuant to plea agreement).

106. *See, e.g.*, Brookover v. Mary Hitchcock Mem'l Hosp., 893 F.2d 411, 420-21 (1st Cir. 1990) (admitting the testimony of patient's mother in a medical malpractice case concerning patient's disclosure of his futile efforts to summon help from nurses); Robinson v. Shapiro, 646 F.2d 734, 741-43 (2d Cir. 1981) (admitting testimony of co-worker who reported hearing deceased declarant's statements about conditions which later led to fatal accident).

admitting prosecution hearsay.[107] Where parallels can be drawn between civil and criminal cases, the results seem to confirm the notion that prosecutors hold the advantage over other litigants. For example, in contrast to the generally favorable treatment of grand jury testimony offered by prosecutors, the one court which has addressed the issue in a civil case was far less receptive to such hearsay.[108] In contrast to criminal cases admitting the statements of unavailable declarants to police during investigation, hearsay statements obtained by investigators seem less readily admissible under the residual exception in civil cases.[109] Extrajudicial statements of deceased or unavailable victims and witnesses, though occasionally admitted under the residual exception in civil actions,[110] certainly receive no more favorable treatment than in criminal cases.[111]

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107. My survey found only 12 cases admitting residual hearsay at trial in civil cases, compared to 34 cases where prosecutors succeeded in offering residual hearsay. More often in civil cases, courts encountered residual hearsay tendered in connection with motions for summary judgment or for preliminary injunctions. My survey found 18 such cases out of the sample of 100. *See supra* note 93.

108. In excluding the hearsay, the court wrote:

> [T]he grand jury testimony does not have the requisite circumstantial guarantees of trustworthiness required by Rule 807. The grand jury proceeding is the government's show. The government calls the witnesses, frames the questions, and presents only testimony that is favorable to the government's theory of the case. The government is under no obligation to and, as a general rule, does not ask questions that might be exculpatory to the target of the grand jury investigation. The government may frame the questions in a way that even neutral testimony appears inculpatory. If the questions posed by the prosecutor are framed in a way that violates the rules of evidence, there is no one there to object, much less to make a ruling. Moreover, a grand jury witness knows that he is not going to be subjected to cross-examination and that his testimony will not be made public.

In re Industrial Silicon Antitrust Litig., No. 95-2104, 1998 U.S. Dist. LEXIS 20459, at *9 (W.D. Pa. Oct. 13, 1998).

109. *Compare, e.g.*, *In re* Corrugated Container Antitrust Litig., 756 F.2d 411, 414-15 (5th Cir. 1985) (in civil case, excluding statements made in an interview with government lawyers pursuant to a grant of immunity), *and* Land v. American Mut. Ins. Co., 582 F. Supp. 1484, 1485-89 (E.D. Mich. 1984) (in civil case, excluding statements of deceased victim of personal injuries made to an insurance claims adjuster), *with Bradley*, 145 F.3d at 894-95 (admitting hearsay statement of defendant's wife to police), *and Accetturo*, 966 F.2d at 634-36 (affirming conviction where trial court admitted hearsay statements made by unavailable declarant to government agents and finding that the declarant's expectation that agents would conduct further investigation to corroborate his statements is an indicator of the statements' reliability), *and Ellis*, 951 F.2d at 582-84 (affirming conviction where trial court admitted statements made to government investigators pursuant to cooperation agreement).

110. *See, e.g.*, Doe v. United States, 976 F.2d 1071, 1079-81 (7th Cir. 1992) (alleging child abuse, in civil case, at an Air Force day care center; admitting hearsay statements of children to their parents). Interestingly, the court in *Doe* relied almost exclusively on earlier criminal cases to reach its result. *See also* Nowell v. Universal Elec. Co., 792 F.2d 1310, 1314-15 (5th Cir. 1986) (admitting a widow's testimony that her husband told her an empty varnish drum, which exploded and injured husband, came from the defendant); Crawford v. City of Kansas City, 952 F. Supp. 1467, 1472-73 (D. Kan. 1997) (admitting hearsay statements, in a civil case, of deceased security

Criminal defendants fare the worst of all litigants in offering hearsay under the residual exception. Defendants have very limited success in offering hearsay statements gathered during investigation by police.[112] Hearsay statements made to defense investigators seldom find their way into criminal trials.[113] Remarkably, defendants have less success than prosecutors when they offer hearsay out of the grand jury, even though a prosecutor was present and questioned the declarant in that setting.[114] Finally, defendants have almost no success under the residual exception in offering their own out-of-court

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guard made during police internal affairs investigation).

111. *Compare* Wilander v. McDermott Int'l, Inc., 887 F.2d 88, 92 (5th Cir. 1989) (excluding accident witness's hearsay statement made in anticipation of litigation), *aff'd* 498 U.S. 337 (1991), *and* Katona v. Federal Express Corp., No. 95-Civ. 10951 (JFK), 1998 U.S. Dist. LEXIS 3496, at *9-*16 (S.D.N.Y. Mar. 19, 1998) (in civil case, excluding deceased declarant's statements to his wife regarding circumstances of accident), *and Land*, 582 F. Supp. at 1487-89 (in civil action, excluding accident victim's statements to claims adjuster), *with Bradley*, 145 F.3d at 894-97 (admitting wife's statement to police who responded to her 911 call regarding abuse), *and* United States v. Dunford, 148 F.3d 385, 392-94 (4th Cir. 1998) (admitting statements of defendants' daughters to government investigators), *and* United States v. Rouse, 111 F.3d 561, 569-70 (8th Cir. 1997) (admitting statements of alleged child abuse victims to FBI agent).

112. *See, e.g.*, United States v. Trujillo, 136 F.3d 1388, 1395-96 (10th Cir. 1998) (affirming trial court's ruling to exclude two FBI 302 reports of unavailable declarants' descriptions of bank robber); United States v. Colson, 662 F.2d 1389, 1392 (11th Cir. 1981) (excluding taped statements between witness and police in which witness claimed he procured false testimony against defendant).

113. *See* United States v. Gaines, 969 F.2d 692, 697-99 (8th Cir. 1992) (affirming conviction where trial court excluded defense investigator's testimony regarding statements of defendant's husband). *But cf.* United States v. Sanchez-Lima, 161 F.3d 545, 547-49 (9th Cir. 1998) (reversing conviction where trial court declined to admit videotaped interviews of defense investigator with later-deported aliens where aliens were under oath and defense offered government opportunity to attend and participate in interviews).

114. When defendants offer exculpatory grand jury testimony, they rely most often on Rule 804(b)(1), the former testimony exception. Under the Supreme Court's ruling in *United States v. Salerno*, 505 U.S. 317, 320-25 (1992), grand jury testimony may meet the requirements of 804(b)(1) where, under the particular facts of the case, it appears that the prosecutor had a "similar motive" to develop the testimony in the grand jury. *See id.* at 322. Defendants appear to have failed more often than they have succeeded in meeting that test. *Compare* United States v. Omar, 104 F.3d 519, 522-24 (1st Cir. 1997) (affirming conviction where trial court excluded exculpatory grand jury testimony offered by defense), *and* United States v. DiNapoli, 8 F.3d 909, 912 (2d Cir. 1993) (finding no "similar motive" in the *Salerno* case upon remand from the Supreme Court), *and* United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1984) (finding the exclusion of grand jury testimony proper after examining the prosecutor's "motive and interest"), *with* United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990) (suggesting grand jury testimony offered by the defense will almost always meet the "similar motive" test). Somewhat surprisingly, defendants typically fail to raise, or courts fail to address, the residual exception as an alternative theory of admissibility. *Salerno* never addressed the residual exception. *See* Salerno, 505 U.S. at 320-25; *see also Omar*, 104 F.3d at 523-24 (noting that defendant failed to pursue admissibility under residual exception, apparently because the testimony was unlikely to be viewed as reliable).

statements or those of their accomplices.[115] And the residual exception has done little to overcome the traditional reluctance of the law of evidence to admit hearsay "confessions" of unavailable declarants offered to exculpate the accused.[116]

The success of prosecutors at the fringes of admissible hearsay is evident not just in residual hearsay cases, but in cases dealing with traditional hearsay exceptions as well. Co-conspirator statements are among the most widely used form of hearsay[117] for federal prosecutors. For decades, federal courts followed the traditional rule requiring independent evidence of conspiracy as a foundation for admitting co-conspirator statements.[118] But the Supreme Court eased that limitation in 1987, accepting the view of the Department of Justice that the Federal Rules of Evidence allowed a trial court to consider the hearsay statement itself as part of the foundation for admissibility.[119] As a result, co-conspirator statements can effectively create their own basis for admission. This expansion of traditional hearsay boundaries benefits prosecutors almost exclusively. Criminal defendants make almost no use of the co-conspirator exception.[120] And civil litigants offer co-conspirator statements much less frequently than prosecutors.[121]

The modern expansion of two other traditional hearsay exceptions has come largely at the behest of prosecutors. The last two decades have witnessed a significant increase in judicial acceptance of out-of-court statements made by crime victims, especially victims who are

115. *See, e.g.*, United States v. Washington, 106 F.3d 983, 999-1002 (D.C. Cir. 1997) (affirming conviction where trial court excluded defendant's out-of-court statement to a friend); United States v. Hooks, 848 F.2d 785, 796-98 (7th Cir. 1988) (excluding statements of two alleged co-conspirators in interview with prosecutor and agents); United States v. Ferri, 778 F.2d 985, 990-91 (3d Cir. 1985) (excluding defense-offered hearsay statement of accomplice made to informant after accomplice became aware of investigation); United States v. DeLuca, 692 F.2d 1277, 1285 (9th Cir. 1982) (holding trial court properly excluded taped phone conversation in which defendant, aware he was under investigation, made exculpatory statements).

116. Rule 804(b)(3), the exception for statements against interest, sets a higher standard for admissibility where such statements are offered to exculpate the accused. If a statement fails to meet that standard, it almost certainly would not satisfy Rule 807's demand for "circumstantial guarantees of trustworthiness."

117. *See* Fed. R. Evid. 801(d)(2)(E) (defining co-conspirator statements as "not hearsay").

118. *See* Glasser v. United States, 315 U.S. 60, 74-75 (1942). The traditional rule requiring independent evidence was said to prevent hearsay statements from creating their own foundation for admissibility, that is, pulling themselves up by their own "bootstraps." *Id.* at 75.

119. *See* Bourjaily v. United States, 483 U.S. 171, 176-81 (1987).

120. The exception applies to statements made by co-conspirators of the opposing party. In theory, a criminal defendant could invoke the exception only where the declarant had "conspired" with the United States Government.

121. While the co-conspirator hearsay "exception" certainly applies in civil cases, the vast majority of reported 801(d)(2)(E) cases are criminal cases. *See* Saltzburg et al., *supra* note 54, at 1586-1625 (collecting cases); Weinstein et al., *supra* note 16, at §§ 801-807 (same).

unavailable to testify at trial.[122] The trend is most pronounced in criminal cases where prosecutors offer hearsay statements from young children reporting incidents of sexual abuse,[123] but it extends as well to statements of adult victims of spousal abuse, sexual assaults, and other crimes.[124] Prosecutors enjoy a remarkable rate of success when they offer such hearsay.[125] In large measure, that success rests upon the judicial expansion of the hearsay exceptions for excited utterances and statements for purposes of medical diagnosis in ways which clearly depart from traditional limits.[126] At least in the federal courts, that departure principally serves to increase the range of hearsay admissible against criminal defendants.[127]

With respect to another traditional hearsay exception, statements against interest,[128] federal courts have ventured more cautiously

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122. *See* Swift, *Judicial Discretion*, *supra* note 17, at 490-92.

123. *See id.* at 490-501. The residual exception also accounts for the admission of a great deal of child-victim hearsay offered by prosecutors. *See, e.g.*, United States v. Rouse, 111 F.3d 561, 569-70 (8th Cir. 1997) (allowing admission of testimony of FBI agent of what three child victims said during initial interview). *See generally* Saltzburg et al., *supra* note 54, at 1951-53 (collecting cases).

124. *See, e.g.*, United States v. Cherry, 938 F.2d 748, 756-57 (7th Cir. 1991) (admitting rape victim's statements to her doctor about the circumstances of the assault).

125. *See* Swift, *Judicial Discretion*, *supra* note 17, at 490-501.

126. *See id.* at 492-98. In fact, the Supreme Court's general approach to hearsay under the Confrontation Clause may actually have encouraged the expansion of traditional hearsay exceptions like those for excited utterances or statements for purposes of medical diagnosis. By effectively exempting hearsay within "firmly rooted" exceptions from further Sixth Amendment scrutiny, the Court has given litigants and lower courts an incentive to "pigeonhole" new forms of hearsay within "firmly rooted" exceptions by expanding the boundaries of those exceptions. Douglass, *supra* note 6, at 211 & n.108. *See generally* Allison C. Goodman, Note, *Two Critical Evidentiary Issues in Child Sexual Abuse Cases: Closed-Circuit Testimony by Child Victims and Exceptions to the Hearsay Rule*, 32 Am. Crim. L. Rev. 855 (1995) (exploring evidentiary issues in child sexual abuse cases in the context of the Confrontation Clause of the Sixth Amendment).

127. Perhaps because federal courts handle few civil cases alleging sexual abuse of children, there are comparatively few federal civil cases using the expanded exceptions to admit victims' hearsay statements. In at least one federal case, a civil plaintiff profited from the same expansion of traditional hearsay limits, though she did so by relying on precedent from criminal cases where similar hearsay was offered by prosecutors. *See* Morgan v. Foretich, 846 F.2d 941, 948-50 (4th Cir. 1988). In another federal civil case, the Seventh Circuit relied on the residual exception to reach a similar result. *See* Doe v. United States, 976 F.2d 1071, 1079-82 (7th Cir. 1992).

128. The exception provides:

> (3) Statement Against Interest.
> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

toward hearsay's frontier.[129] Still, they have opened the door, if only partially, to a class of hearsay that poses unique challenges to criminal defendants: an accomplice's self-inculpatory statements that also incriminate the defendant. Typically, such cases begin when an accomplice gives a full or partial confession shortly after his arrest and, in the process, implicates his partner in crime. The hearsay-confrontation issue arises when the accomplice fails to testify in person at his partner's trial.[130] When the Federal Rules were enacted, there were few reported cases where prosecutors even attempted to offer an accomplice's hearsay under the exception for statement's against penal interest.[131] At that time, it was unclear whether such statements could be admitted under any circumstances without violating the Confrontation Clause.[132] The Supreme Court has since reviewed three cases where trial courts admitted accomplice hearsay as statements against interest, ruling that the hearsay should have been excluded in each case.[133] Nevertheless, the Court has declined to

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Fed. R. Evid. 804(b)(3).

129. Contrary to the judicial trend toward expanding other hearsay exceptions, the hearsay exception for statements against penal interest has retained somewhat stricter limits. In *Williamson v. United States*, 512 U.S. 594 (1994), the Court held that Federal Rule of Evidence 804(b)(3), the federal version of the exception for statements against interest, applies only to those portions of a narrative which are "genuinely self-inculpatory" and not to other "collateral" portions of the same statement. *Id.* at 600-01.

130. In *Lilly v. Virginia*, 119 S. Ct. 1887 (1999), for example, the confrontation issue arose when the defendant's brother gave a videotaped statement to police, implicating the defendant as the shooter in a homicide. At trial, Lilly's brother asserted his Fifth Amendment privilege. The trial court permitted the prosecution to offer the videotaped statement in evidence, over Lilly's Confrontation Clause objection. *See id.* at 1894-1900.

131. In part, this was because the common-law exception for statements against interest, as applied in federal courts, extended only to statements against pecuniary interest, not statements against penal interest. *See* Donnelly v. United States, 228 U.S. 243, 273 (1913). The Advisory Committee's Note to Rule 804(b)(3) reports several state decisions expanding the exception to cover statements against penal interest, but mentions no federal decisions to that effect.

132. As late as 1986, the Supreme Court gave reason to conclude that the Sixth Amendment might categorically prohibit use of an accomplice's hearsay statement implicating the accused, absent cross-examination of the accomplice. *See* Lee v. Illinois, 476 U.S. 530, 541 (1986) ("[W]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.").

In the process of enacting the Federal Rules, the House inserted an amendment that would have rendered inadmissible an accomplice's out-of-court statement implicating both himself and the accused. The amendment was added to codify the Confrontation Clause principle established in *Bruton v. United States*, 391 U.S. 123, 135-37 (1968). The Conference Committee deleted the provision, preferring to leave development of constitutional limits to the courts. *See* S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7068.

133. *See Lilly*, 119 S. Ct. at 1887, 1898-1901 (reversing state conviction on Confrontation Clause grounds because trial court admitted nontestifying accomplice's videotaped statement inculpating accused); *Williamson*, 512 U.S. at 605 (holding

adopt a categorical approach excluding such statements. Indeed, *Lilly v. Virginia*,[134] the Court's most recent foray into the murky world of accomplice hearsay, produced no majority for any approach. The Court's fragmented opinion leaves lower courts with considerable leeway to admit "genuinely self-inculpatory" hearsay statements from accomplices.[135] Accordingly, *Lilly* may do little to curb the trend of lower federal courts to admit accomplice hearsay at the behest of prosecutors where they can show such statements are "genuinely" self-inculpatory, or where they can show other "guarantees of trustworthiness."[136] By contrast, criminal defendants have had comparatively little success in offering self-inculpatory hearsay from their nontestifying accomplices. Indeed, Rule 804(b)(3) itself imposes stricter limits on such hearsay when offered to exculpate a defendant.[137] And civil litigants have comparatively few occasions to

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accomplice's blame-shifting statements were not "genuinely self-inculpatory" and therefore not properly admissible under Rule 804(b)(3)); *Lee*, 476 U.S. at 539-47 (1986) (finding Confrontation Clause violation where the trial court admitted accomplice's confession inculpating defendant).

134. 119 S. Ct. 1887 (1999).

135. *Williamson* held that "genuinely self-inculpatory" statements are admissible under Rule 804(b)(3). *Williamson*, 512 U.S. at 605. And the *Williamson* Court further observed, "the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Id.* *Lilly* does not disturb that finding. In his concurring opinion joined by two other Justices, Chief Justice Rehnquist holds out the possibility that "genuinely self-inculpatory" statements of accomplices might fit a "firmly rooted" hearsay exception and thereby satisfy the Confrontation Clause without further inquiry. *See Lilly*, 119 S. Ct. at 1904-05 (Rehnquist, C.J., concurring). Justice Thomas agrees that "the Clause does not impose a 'blanket ban on the government's use of accomplice statements that incriminate a defendant.'" *Id.* at 1903 (Thomas, J., concurring). Justice Stevens' opinion for the four-member plurality contends that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule." *Id.* at 1899. Accordingly, it seems that the Court has split four to four, or perhaps four to three, on the question whether any "genuinely self-inculpatory" accomplice statements may fit within a firmly rooted exception (*i.e.* Rule 804(b)(3)) and thereby qualify for automatic admission under the Confrontation Clause. But even Justice Steven's plurality opinion in *Lilly* notes that such statements will satisfy the Confrontation Clause if the admitting court finds sufficient "indicia of reliability." *See id.* at 1901 (quoting Idaho v. Wright, 497 U.S. 805, 822 (1990)). At least eight members of the Court, therefore, leave the door open to such hearsay in some circumstances.

136. *See* United States v. Keltner, 147 F.3d 662, 670-71 (8th Cir. 1998) (admitting accomplice statement that clearly subjected declarant to criminal liability); Earnest v. Dorsey, 87 F.3d 1123, 1134 (10th Cir. 1996) (admitting hearsay where entire statement inculpated declarant and defendant equally); United States v. Sasso, 59 F.3d 341, 345-50 (2d Cir. 1995) (admitting out-of-court statement by accomplice to defendant's girlfriend); United States v. Workman, 860 F.2d 140, 143-46 (4th Cir. 1988) (affirming conviction where trial court admitted a tape-recorded statement of a deceased accomplice under residual exception).

137. Rule 804(b)(3) provides: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Fed. R. Evid. 804(b)(3). The residual exception seems not to have opened the door

use accomplice statements.[138] Once again, at the fringes of admissibility, prosecutors hold most of the cards.

One final example of prosecutorial success at hearsay's frontier deserves mention, though it is a phenomenon that has been limited to the states. So far, we have examined the apparent willingness of federal courts to expand the boundaries of admissible hearsay at the behest of prosecutors. But federal judges are not alone when it comes to liberalizing hearsay rules at the expense of criminal defendants.[139] In the states, legislatures seem even more anxious to open criminal courts to inculpatory hearsay. A number of states have enacted statutes designed to broaden the range of admissible hearsay statements of child victims of sexual abuse.[140] Some have included similar "designer hearsay" provisions regarding elderly victims and victims of spousal abuse.[141] In reaction to public sentiment expressed over evidentiary rulings in the O.J. Simpson case, California enacted an even broader provision dealing with hearsay statements of unavailable victims of any "physical injury."[142] Venturing even further, Florida amended its evidence code in 1990 in an effort to allow admission of certain self-inculpatory statements of nontestifying co-defendants.[143] Some of these legislative initiatives apply only in

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any wider to exculpatory third-party confessions offered by defendants. *See, e.g.*, United States v. Hinkson, 632 F.2d 382, 386 (4th Cir. 1980) (excluding third-party confession where declarant later denied making statement).

138. Though criminal cases present the issue more frequently, there are a few reported civil cases which address "blame-shifting" statements similar to those at issue in *Williamson* and *Lilly*. *See, e.g.*, Ciccarelli v. Gichner Sys. Group, 862 F. Supp. 1293, 1297-1300 (M.D. Pa. 1994) (applying the 804(b)(3) hearsay exception in an ERISA case).

139. There is ample evidence that state courts have been equally, if not more, receptive to prosecution hearsay at the fringes of traditional evidentiary limits. *See, e.g.*, Lilly v. Commonwealth, 499 S.E.2d 522, 534 (Va. 1998) (admitting, as statement against penal interest, accomplice's videotaped confession implicating the defendant in murder); People v. White, 555 N.E.2d 1241, 1246-50 (Ill. App. Ct. 1990) (relaxing the requirements of spontaneity and immediacy to admit child victim's statements as spontaneous declarations).

140. The Comment to the 1986 Amendment to Rule 807 of the Uniform Rules of Evidence notes that "[m]ore than twenty states have promulgated rules or enacted legislation modifying the hearsay rule in various respects to permit the introduction . . . of extrajudicial statements and testimony of children who are the victims of physical or sexual abuse or who witnessed violent or sexual acts committed against others." Unif. R. Evid. 807 cmt.

141. *See, e.g.*, Fla. Stat. Ann. § 90.803(24) (West 1999) (creating hearsay exception for statements of elderly victims of abuse where the circumstances of the statement provide "sufficient safeguards of reliability").

142. Cal. Evid. Code § 1370 (West Supp. 1998). For commentary on the California legislation, see Van Kessel, *supra* note 2, at 530, 538.

143. *See* Escobar v. State, 699 So. 2d 988, 991 n.2 (Fla. 1997) (describing amendment to Fla. Stat. § 90.804(2)(c)). Of course, the amended statute has given rise to several successful Confrontation Clause challenges. *See id.* at 992-93 (citing Franqui v. State, 699 So. 2d 1312 (Fla. 1997)).

criminal cases.[144] All of them are intended, and used, primarily to assist prosecutors. There is nothing in the realm of civil litigation that compares to this groundswell of legislative and rule making interest in expanding hearsay exceptions for prosecutors.[145]

In sum, if conventional theory is correct, courts should be most adventurous in admitting nontraditional hearsay in civil cases or against prosecutors, and most cautious when considering hearsay offered against criminal defendants.[146] But the reality of modern practice defies that theory. Successful efforts to liberalize hearsay have come most often where conventional wisdom would least expect them: in criminal cases with hearsay offered by prosecutors. As a result, criminal defendants probably face more "fringe" hearsay than other litigants.

There is no doubt that plenty of hearsay finds its way into civil cases. But the notion that criminal defendants somehow face a smaller dose of admissible hearsay than other litigants is almost certainly out of touch with modern practice. Absent readily enforceable constitutional limits on hearsay—which do not exist under current Confrontation Clause doctrine—criminal prosecution generates unique pressures on the hearsay rule. Simply put, prosecutors need more hearsay.[147] And they often need it from less than trustworthy sources. More often than other litigants, prosecutors must look to accomplices, co-conspirators, reluctant victims, and intimidated, absconded, or dead declarants[148] for the evidence which will help them meet the heaviest burden of proof that our system imposes on any litigant. Increasingly, courts and legislatures have responded to that need by pushing the limits of traditional hearsay doctrine. One may view such developments as an appropriate response to antiquated principles of law which limit the search for

144. *See, e.g.*, Cal. Evid. Code § 1228 (applying only "for the purpose of establishing the elements of the crime" of child sexual abuse); 725 Ill. Comp. Stat. 5/115-10 (West 1998) (same); Md. Code Ann. [Cts. & Jud. Proc.] § 775 (1998) (out-of-court statements of child abuse victims).

145. In fact, concerns over expert testimony—primarily arising from civil cases—gave impetus to the only proposal in the history of the Federal Rules which might actually narrow the range of hearsay admissible in federal courts. A 1999 proposal to amend Rule 703 would restrict the admissibility of hearsay which forms the basis of expert opinion. *See* Proposed Amendments to the Federal Rules of Evidence, Rule 703, *reprinted in* Christopher B. Mueller & Laird C. Kirkpatrick, 1999 Federal Rules of Evidence 283, 295.

146. *See supra* notes 1-17 and accompanying text.

147. *See* Richard O. Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence 493-94 (1977); Van Kessel, *supra* note 2, at 508 ("The prosecution generally calls more witnesses and relies on hearsay more often than criminal defendants . . . .").

148. *See, e.g.*, Park, *Subject Matter Approach*, *supra* note 9, at 109 ("In civil cases, problems of declarant unreliability and witness fabrication are probably less serious than in criminal cases because of the different sources from which evidence is derived.").

truth. Or one may view them as a shortsighted assault on individual liberty under the banner of crime control. But whatever one's views on the developing law of hearsay and confrontation, the result has been to put criminal defendants at a serious disadvantage when it comes to contesting hearsay. They face more hearsay, and more problematic hearsay, than prosecutors or civil litigants. But they do not possess comparable tools to learn what they are up against.

B. *Nondevelopments in the Law of Criminal Discovery: How Criminal Discovery has Failed to Keep Pace with the Expanding Admissibility of Hearsay*

A wider variety of hearsay is admissible in federal courts today than ever before. And prosecutors have been major beneficiaries of the trend toward expanded admissibility since adoption of the Federal Rules of Evidence in 1975. Against that background, I now turn to the other side of the hearsay-discovery balance. In this section, I take a brief look backward at developments—or, more accurately, nondevelopments—in the world of hearsay-related discovery. My aim is to show how criminal discovery rules and practices have failed to keep pace with the expansion of admissible hearsay spurred by enactment of the Federal Rules of Evidence.

Of course, it would be misleading to suggest that federal criminal discovery has remained entirely static throughout the modern period of hearsay expansion. Indeed, criminal discovery was born and raised to adolescence in the last half-century. As late as 1963, it was still possible to argue that federal criminal defendants had no pretrial discovery rights at all.[149] The Supreme Court had not yet identified a clear constitutional basis for discovery even of exculpatory material.[150] Federal courts occasionally asserted an inherent power to govern discovery in criminal cases,[151] but discovery was a matter for the court's discretion, not a defendant's right. Rule 16 originally codified that approach, providing only that district courts were authorized to order discovery of defendant's statements and of certain documents and tangible evidence material to the defense.[152] In 1957, *Jencks v.*

149. *See* Brennan, *A Progress Report*, *supra* note 13, at 4-5.

150. Before *Brady v. Maryland*, 373 U.S. 83 (1963), the Court had not identified any clear constitutional right to discovery. It had come close in *Jencks v. United States*, 353 U.S. 657, 665-72 (1957), but it ultimately rested that decision on its supervisory powers, rather than on the Confrontation Clause. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 68 (1987) (Brennan, J., dissenting).

151. The notion of a court's inherent power to order discovery, in the absence of any constitutional or legislative mandate, traces its roots to the observations of Justice Cardozo, who found "at least the glimmerings" of such power when writing as a Justice of the Court of Appeals of New York. *See* People *ex rel.* Lemon v. Supreme Court, 156 N.E. 84, 86 (N.Y. 1927).

152. *See, e.g.*, Gevinson v. United States, 358 F.2d 761, 766 (5th Cir. 1966) (treating Rule 16 discovery of documents as discretionary); United States v. Kaminsky, 275 F.

United States[153] first established a defendant's right to obtain the prior statements of government witnesses. But Congress quickly retrenched. The Jencks Act[154] narrowly defined which statements were discoverable and prohibited courts from ordering disclosure before the witness testified at trial.

By the early 1960s, criminal discovery restrictions had come under fire from respected jurists and academics.[155] Even earlier, in the Nuremburg War Crimes Trials, American prosecutors faced the embarrassment of a Soviet protest that American rules of discovery were unfair to defendants.[156] In the face of mounting criticism, the 1960s and 1970s brought significant reforms in criminal discovery. In *Brady v. Maryland*,[157] the Court first recognized a defendant's Due Process right to discover exculpatory evidence.[158] With *Giglio v. United States*,[159] that right expanded to cover material for impeachment of government witnesses. The *Brady* right was still growing as late as 1976, when *United States v. Agurs*[160] confirmed the government's obligation to disclose some materials even in the absence of a specific request from the defendant.[161] In 1975, only six months after enacting the new Rules of Evidence, Congress approved important amendments to Rule 16 of the Federal Rules of Criminal Procedure, calling for pretrial discovery of a defendant's prior

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Supp. 365, 367-68 (S.D.N.Y. 1967) (same); United States v. Louis Carreau, Inc., 42 F.R.D. 408, 412 (S.D.N.Y. 1967) (stating that if Rule 16 had been intended to require disclosure of defendant's statements, it would have used the word "shall" rather than "may"). *See generally* Fed. R. Crim. P. 16 advisory committee's note to 1974 Amendment ("[I]t is desirable to require broader disclosure by the defendant under certain circumstances.").

153. 353 U.S. 657 (1957).

154. 18 U.S.C. § 3500 (1994).

155. Justice Brennan and California Supreme Court Justice Traynor were probably the most prominent critics of traditional limits on criminal discovery. *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U. L.Q. 279, 280; Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. Rev. 228, 229-30 (1964). The level of controversy over criminal discovery is reflected in an outpouring of scholarly commentary in the late-1950s and early-1960s. *See* Fed. R. Crim. P. 16 advisory committee's note to 1966 amendment (collecting articles).

156. *See* Robert H. Jackson, *Some Problems in Developing an International Legal System*, 22 Temp. L.Q. 147, 150-52 (1948).

157. 373 U.S. 83 (1963).

158. Earlier cases had recognized that prosecutors violate due process through deliberate use of perjured testimony or fabricated evidence, or deliberate suppression of exculpatory evidence. *See* Pyle v. Kansas, 317 U.S. 213, 215-16 (1942) (finding prosecutor's misconduct in deliberately suppressing exculpatory evidence violated fundamental fairness required by Due Process Clause); Mooney v. Holohan, 294 U.S. 103, 112-13 (1935) (stating, in dictum, that prosecutor's deliberate use of fabricated evidence violated due process). But those early cases turned upon the prosecutor's deliberate misconduct, not defendant's constitutional right to discovery.

159. 405 U.S. 150 (1972).

160. 427 U.S. 97 (1976).

161. *See id.* at 110.

statements, the results of scientific tests, and "material" documentary or tangible evidence.[162] In contrast to the earlier version of the Rule, discovery was no longer a matter of the court's discretion.[163] It was a defendant's right under the new Rule 16.[164]

But the growth of criminal discovery—at least in federal courts—largely ended by the mid-1970s. In contrast to their expansive approach to the admission of hearsay under both the Federal Rules and the Confrontation Clause, federal courts have been cautious in their approach to issues of "materiality" under Rule 16.[165] The Supreme Court has said little about the Rule, other than to limit its application to items which rebut the government's case-in-chief, as opposed to evidence which might support other defense claims.[166] And *Agurs* seems to have set the high water mark for the *Brady* doctrine.[167] Later cases have limited *Brady* by tying "materiality" to

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162. Act of July 31, 1975, Pub. L. No. 94-64, § 2, 89 Stat. 370, 374-75.

163. The earlier version of Rule 16 provided that "the court may order" discovery of the items specified in the Rule. Most courts viewed that language as permissive, not mandatory, meaning that courts still had discretion to deny discovery where they saw fit. *See, e.g.*, United States v. Louis Carreau, Inc., 42 F.R.D. 408, 412-13 (S.D.N.Y. 1967) (stating that under Rule 16 courts had the discretion to deny a defendant's discovery request). The amendments proposed in 1974 and enacted in 1975, made discovery a self-executing process between the parties, much as in civil cases. And, by providing that "the government shall permit" discovery of the items listed in the Rule, the amendments give defendants a basis for compelling discovery from the government. Fed. R. Crim. P. 16 advisory committee's note to 1974 amendments.

164. The amendments adopted in 1975 required the government to disclose defendant's prior statements, *see id.* Rule 16(a)(1)(A), his criminal record, *see id.* Rule 16(a)(1)(B), documents and tangible objects material to the preparation of the defense or intended to be offered in evidence by the government, *see id.* Rule 16(a)(1)(C), and the results of scientific tests, *see id.* Rule 16(a)(1)(D).

165. *See, e.g.*, United States v. Vue, 13 F.3d 1206, 1208-09 (8th Cir. 1994) (holding that disclosure was properly denied where the defendant failed to show he would have been acquitted had INS records been introduced before jury); United States v. Stevens, 985 F.2d 1175, 1179-81 (2d Cir. 1993) (finding telephone record not discoverable under Rule 16 where it would not have rebutted government's case and would only have impacted defendant's decision to testify); United States v. Phillip, 948 F.2d 241, 250 (6th Cir. 1991) (holding videotaped statements of six-year-old child abuse victim were not material to defense because inconsistent answers would not have been exculpatory at trial).

166. *See* United States v. Armstrong, 517 U.S. 456, 458-62 (1996). In *Armstrong*, the Court ruled that a defendant was not entitled to discover government documents which might back up a selective prosecution claim, absent a preliminary showing of discriminatory effect and discriminatory intent. *See id.* at 468. With respect to Rule 16, the Court rejected defendant's claim that such evidence was "material to the preparation of defendant's defense." *Id.* at 462. The Court stated, "[W]e conclude that in the context of Rule 16 'the defendant's defense' means the defendant's response to the Government's case in chief." *Id.*

167. *See* Sarokin & Zuckerman, *supra* note 26, at 1104-08 (arguing that the Court has retreated from its earlier, more liberal application of *Brady* principles by adopting a "result-oriented" standard of materiality in *United States v. Bagley*, 473 U.S. 667, 684 (1985), and subsequent cases); *cf.* Goldberg, *supra*, note 26, at 56-58 (contending that *Agurs* was actually the beginning of *Brady*'s decline).

the likelihood that undisclosed evidence would have changed the result at trial.[168]

Limitations on witness-related discovery—the limits most relevant when it comes to hearsay—remain virtually untouched since the Jencks Act of 1957. Ironically, at almost the same time that Congress passed new Rules of Evidence and opened the doors of federal courts to an expanding variety of hearsay, it rejected proposed amendments which would have expanded witness-related discovery under Rule 16. In 1974, the Advisory Committee drafted, and the Supreme Court adopted, a proposed amendment requiring the government to identify its witnesses before trial.[169] Based primarily upon Justice Department concerns over witness tampering and intimidation,[170] the Senate ultimately killed the proposal.[171] Many proponents of liberalized discovery would have gone further than the Court's relatively modest proposed amendment. The American Bar Association's Standards Relating to Discovery and Procedure Before Trial called for pretrial disclosure not only of the identities of government witnesses, but of their prior statements as well.[172] But Congress left intact the Jencks

168. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court set the standard for "materiality" that governs *Brady* disputes today. *Bagley* held, "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. In dissent, Justice Marshall took the Court to task for recasting a *Brady* standard that defines materiality "not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial." *Id.* at 699 (Marshall, J., dissenting); *see also* Sarokin & Zuckerman, *supra* note 26, at 1105 (arguing that *Bagley* marks a retreat from *Brady* through its shift to a "result-oriented" standard).

169. The proposed amendments included a new provision, Rule 16(a)(1)(E), which would have required the government to disclose the names and criminal records of witnesses it intended to call at trial. *See* Fed. R. Crim. P. 16 advisory committee's note to 1974 amendments. The committee supported the proposal by noting that many states already required such disclosures before trial, and that the American Bar Association's Standards Relating to Discovery and Procedure Before Trial called for pretrial disclosure not only of witness's names but of their prior statements as well. *See id.*

170. For a summary of Justice Department opposition to the 1974 amendments, see Brennan, *A Progress Report*, *supra* note 13, at 6, and Dennis, *supra* note 26, at 65-69.

171. The House was willing to accept the proposal, after amending it to make the witness-discovery obligation reciprocal, limiting discovery to three days before trial, and providing that the court could deny discovery of witness lists upon a showing of good cause. The Senate struck proposed Rule 16(a)(1)(E) altogether. The Conference Committee ultimately adopted the Senate version, stating:

> A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

H.R. Rep. No. 94-414, at 12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 713, 716.

172. *See* ABA Standards Relating to Discovery and Procedure Before Trial §

Act's prohibition on compelled pretrial disclosure of government witness statements, never seriously considering the ABA Standard.

Although the 1975 debate over government witnesses did not deal with hearsay directly, it had important implications for hearsay-related discovery. Absent a rule requiring pretrial notice of the government's intention to offer hearsay, pretrial identification of government witnesses would at least provide defendants a place to start. After all, some government witnesses may consent to an interview. And an interview can disclose what information is first-hand, and what may be presented as hearsay. An interview can also identify a potential hearsay declarant and can disclose details about the declarant or the circumstances under which she spoke. Without a pretrial witness-disclosure rule, however, defendants are left without even a starting point for tracking down hearsay. Of course, the prior statements of government witnesses would offer an even more direct means for a defendant to learn about prosecution hearsay. If the government expects to call a witness to relate hearsay to the jury, chances are strong the same hearsay will appear in the witness's prior statements. But the 1975 amendments did nothing for defendants on that score either.

In sum, 1975 saw Congress enact Rules of Evidence that set in motion the most rapid expansion of hearsay admissibility in our history. Yet, at virtually the same time, Congress rejected or ignored proposals that would have given criminal defendants the names and prior statements of government witnesses—tools that would have provided at least indirect opportunities to anticipate and challenge prosecution hearsay. By taking a 1970s view of hearsay, but a 1950s view of criminal discovery, Congress set the stage for the hearsay-discovery imbalance we see today in federal criminal cases.

Developments in the quarter century since 1975 have done little to address that imbalance. Later amendments to Rule 16 have broadened criminal discovery a bit, especially discovery relating to experts,[173]. But the bar to pretrial discovery relating to government witnesses and witness statements remains largely intact today.[174]

2.1(b)(i) (Approved Draft 1970). Although several of the proposed Rule 16 amendments were modeled after the ABA Standards, the proposals before Congress in 1975 conspicuously omitted the ABA's Standard relating to witness statements. Apparently, the drafters concluded that proposed Rule 16(a)(1)(E) would be controversial enough without calling for a new look at the Jencks Act's prohibition on compelled pretrial disclosure of government witness statements.

173. A 1993 amendment added Rule 16(a)(1)(E) and Rule 16(b)(1)(C), requiring both the government and defense to disclose an intention to rely on expert testimony and a summary of the expert's opinion and its basis.

174. There has been only one significant crack in the armor protecting against pretrial disclosure of witness statements. A 1983 amendment added subsection (i) to Rule 12, requiring the government at a suppression hearing to produce prior statements of its witnesses. In 1993, an amendment to Rule 26.2 likewise required disclosure of prior statements after government witnesses testified at detention

Despite continuing concerns voiced by the judiciary,[175] Congress still bows to Justice Department arguments that the risks of witness intimidation are too serious to require such disclosures. With very few exceptions, federal courts have rejected defense efforts to require pretrial disclosure of government witness lists.[176] And, insulated by the Jencks Act, prosecutors remain free to choose when, or if, they will disclose witness statements before trial.[177]

In one respect, a defendant's right to early discovery of prosecution hearsay may actually have diminished since 1975. The Federal Rules of Evidence include only one provision that directly links discovery and hearsay: the pretrial notice requirement attached to the residual exceptions.[178] But despite their willingness to admit increasingly adventurous forms of hearsay under the residual exception in criminal cases, federal courts have been less than demanding in their application of the notice requirement.[179] The language of the pretrial notice provision is mandatory.[180] But courts have been generous in forgiving government failures to comply.[181]

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hearings and preliminary examinations. *See* Fed. R. Crim. P. 26.2(g) and advisory committee's note to 1993 amendment; *infra* text accompanying notes 371-72.

175. *See, e.g.*, Brennan, *A Progress Report*, *supra* note 13, at 10-14 (discussing the concern that state and federal discovery rules may be too broad); Sarokin & Zuckerman, *supra* note 26, at 1099-1100 (noting that restrictions on defendants' access to information about the government's witnesses before trial impedes facilitation of plea agreements). In 1994, judicial concerns came to a head when the Judicial Conference of the United States considered yet another Advisory Committee proposal regarding pretrial disclosure of government witnesses' names and their statements. *See Pretrial Disclosure Revision to Criminal Procedure Rule Stirs Controversy*, Inside Litig., June 1994, at 11, 11 (1994) [hereinafter Inside Litig.].

176. In capital cases, a federal statute requires the government to disclose a list of its witnesses before trial. *See* 18 U.S.C. § 3432 (1994). In noncapital cases, few courts compel such disclosure. There is no due process right to discover the identities of prosecution witnesses before trial. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

177. Most federal circuit courts view the mandatory language of the Jencks Act as a strict limit on their power to order pretrial disclosure of government witness statements. *See, e.g.*, United States v. Malone, 49 F.3d 393, 396-97 (8th Cir. 1995) (finding that defendant was entitled to discover witness's statements only after witness testifies on direct examination); United States v. Neal, 36 F.3d 1190, 1197 (1st Cir. 1994) (same); United States v. Tarantino, 846 F.2d 1384, 1414-15 (D.C. Cir. 1988) (same). The Fifth Circuit, has held that trial courts retain discretion to order such pretrial disclosure. *See* United States v. Blackburn, 9 F.3d 353, 357-58 (5th Cir. 1993).

178. *See* Fed. R. Evid. 807. In order to invoke the residual exception, the proponent of hearsay must provide notice of its intention to offer the statement, the "particulars" of the statement, and the name and address of the declarant, all "sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet" the hearsay. *Id.*

179. *See* Raeder, *Effect of the Catchalls*, *supra* note 34, at 936 ("The catchall notice provision has not provided a sufficient opportunity to challenge the hearsay evidence because of the flexible approach taken by many courts that have permitted notice at trial."); Rand, *supra* note 101, at 883-88.

180. The Rule provides, in pertinent part: "[A] statement may not be admitted under this exception unless the proponent . . . makes known . . . in advance of the

Pretrial hearsay "notice" provisions, like that in the residual exception, seem like a natural accompaniment to rules admitting new forms of hearsay. Nevertheless, neither the courts nor Congress has sought to balance the expanding range of hearsay admissible under the categorical exceptions in the Rules with similarly expanded pretrial notice requirements. Outside of the residual exception, there is no notice requirement for newly admissible forms of "fringe" hearsay,[182] even though the challenge of contesting such hearsay is no different than with residual hearsay.

In some measure, the absence of development in the law of hearsay-related discovery stems from a lack of pressure from the defense bar. For a variety of reasons, defense counsel seldom press the limits of the existing rules of discovery in order to pursue prosecution hearsay.[183] For example, the *Brady* rule entitles defendants to exculpatory material, including so-called *"Giglio"* material that may serve to impeach a government witness. There are dozens of reported cases debating the *Brady-Giglio* rule in connection with testifying witnesses.[184] In stark contrast to those numbers, only a handful of cases apply *Brady-Giglio* doctrine to the discovery of

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trial . . . the proponent's intention to offer the statement." Fed. R. Evid. 807.

181. *See, e.g.*, United States v. Parker, 749 F.2d 628, 633 (11th Cir. 1984) (upholding the admissibility of evidence despite the prosecution's failure to provide notice); United States v. Carlson, 547 F.2d 1346, 1355 (8th Cir. 1976) (allowing evidence to be admitted despite the government's failure to provide notice on the ground that the notice requirement is not "inflexible").

182. *See supra* text accompanying notes 117-38.

183. The principal reason that defendants seldom pursue hearsay-related discovery may be that they seldom think about impeaching hearsay declarants in the same way they are familiar with attacking testifying witnesses. An experienced state court trial judge writes:

> As a trial judge . . . I sometimes wonder at what seems to me the passing up of golden opportunities by the able advocate. Foremost among these lost opportunities is the virtual total neglect to do anything about the other side's hearsay once it has been admitted by the trial judge into evidence. True enough, the able advocate fought valiantly against the hearsay admission; but, having lost that position, he does not fall back to the next logical position—impeaching the hearsay declarant.

Brannon, *supra* note 7, at 158. The reasons that defense counsel frequently ignore such opportunities may be more complex. *See* Douglass, *supra* note 6, at 222-23 (arguing that Confrontation Clause doctrine itself is partially to blame, by diverting counsel's time and attention to questions of admissibility to the exclusion of matters relating to the testing of hearsay before a jury, and by giving defense counsel a tactical incentive to forego opportunities to impeach hearsay declarants in favor of preserving "pure" confrontation issues for appeal).

Of course, one practical reason for defense counsel's inaction may be that the lack of information regarding the government's expected witnesses stymies any efforts to learn about hearsay declarants. Until a defendant knows who the testifying witnesses are, and what they are likely to say, he often has no place to start in preparing to meet hearsay.

184. *See* Symposium, *Twenty-Sixth Annual Review of Criminal Procedure*, 85 Geo. L.J. 775, 1089-90 nn.1113 & 1114 (1997) (collecting cases applying *Giglio* to a variety of impeachment material).

material to impeach the growing legion of hearsay declarants.[185] Similarly, there has been little effort to extend the Jencks Act to obtain discovery of prior statements of hearsay declarants after their out-of-court statements have been admitted in evidence. Only one federal court of appeals has considered a defendant's effort to obtain "Jencks material" relating to a hearsay declarant.[186] And that court rejected the argument.[187]

Finally, no discussion of discovery developments would be complete without reference to informal discovery. The federal system of limited discovery has weathered a variety of criticisms in recent decades. One could argue that the system has survived only because most federal prosecutors are reluctant to rely on the strict limits imposed by the rules.[188] Most discovery in most federal cases occurs informally, and much of it is earlier and broader than the letter of the law requires.[189] In many cases, informal discovery provides defendants with important insights about prosecution hearsay.[190] But there are serious problems with a system that counts on informal, voluntary disclosure to solve most of its discovery problems. For one

185. *See* United States v. Williams-Davis, 90 F.3d 490, 513-14 (D.C. Cir. 1996); United States v. Hawryluk, 658 F. Supp. 112, 117 (E.D. Pa. 1987).

186. *See Williams-Davis*, 90 F.3d at 512-13.

187. *See id.* at 513.

188. The Justice Department itself appears to recognize that the current system would crumble under the weight of judicial criticism if federal prosecutors themselves did not routinely provide more discovery than the rules require. In an effort to forstall Rule 16 amendments requiring pretrial disclosure of government witnesses and their statements, Jo Ann Harris, Chief of the Department's Criminal Division, appeared at a meeting of the Advisory Committee and offered to implement a new internal policy requiring prosecutors to make such disclosures except in unusual cases. *See* Inside Litig., *supra* note 175, at 11.

189. One former Assistant United States Attorney writes:

> In practice . . . prosecutors and courts recognize that strict compliance with the rules can easily result in trial by ambush. As such, the practice of many U.S. Attorney's Offices is to offer earlier and broader discovery to the defense. That is not to say that there is an "open file" attitude, but there is a recognition that mere compliance with the rules, unless there is a compelling reason to refuse to go further, may not be sufficient to fulfill the prosecutor's duty.

Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 Fordham Urb. L.J. 553, 554 (1999) (footnote omitted). For example, it has become typical practice in most cases for federal prosecutors to disclose "Jencks material" (*i.e.*, witness statements) before trial, rather than waiting until after the witness's direct testimony as the Jencks Act permits. *See id.* at 562-63; *see also* United States v. Murphy, 569 F.2d 771, 773 n.5 (3d Cir. 1978) (noting the prevailing practice of prosecutors to provide Jencks material before trial).

190. Usually, those insights will be somewhat limited. Where prosecutors disclose witness statements before trial, defendants may be tipped off that a witness will relate important hearsay. But defendants still lack the formal means to follow up on that information by compelling the witness or the declarant to submit to pretrial questioning. *Cf.* Raeder, *Effect of Catchalls*, *supra* note 34, at 936 (stating that when prosecutors provide notice that they intend to use hearsay, it is of limited value where defense has no right to depose witnesses or available declarants).

thing, the system tends to work best when it matters least. Prosecutors aiming for guilty pleas have the strongest incentive to disclose in cases where their evidence is most overwhelming.[191] In the weaker cases, the very ones where discovery is most likely to make a difference to the defendant, there is less incentive for a prosecutor to disclose and more reason to play "hard ball" when the rules permit it. Moreover, voluntary informal disclosure works best when it is most convenient for the prosecutor. Understandably, defense counsel may feel that an informal discovery request will be more favorably received if it is not too ambitious or burdensome. In such an environment, defense counsel are more likely to focus their requests on the items they deem most essential, particularly prior statements and impeachment material for prospective government witnesses. They may be less inclined to push their luck in seeking identification of hearsay declarants and related impeachment materials, since the burden of producing such material may appear to be heavier and its value may appear to be less significant. In effect, an informal system makes beggars of defense counsel. And, as the old saying goes, "beggars can't be choosers."

In sum, though criminal trials may no longer be the "game of blindman's bluff"[192] that spurred discovery reformers in the 1960s, the advances in criminal discovery since that time have offered little when it comes to hearsay. Other than for residual hearsay, defendants have no right to pretrial notice of the hearsay they must face. *Brady*, *Giglio*, and the Jencks Act remain undiscovered and underused tools for contesting hearsay. And most significantly, the continued bar against compelled pretrial disclosure of government witness lists and witness statements leaves defendants without an important, albeit indirect, means to stumble across the hearsay they will have to contest at trial.

C. *The Short End of the Stick: Hearsay-Related Discovery Rights of Criminal Defendants Compared to Those of Civil Litigants and of Prosecutors*

During the last quarter century, criminal discovery practices have failed to keep pace with the expansion of admissible hearsay in federal courts. As a result, compared to other litigants, today's federal criminal defendants are in a precarious position when it comes to

191. The United States Attorneys' Manual counsels prosecutors to consider pretrial disclosure of the names of government witnesses in appropriate cases. One reason is to "enhance the prospects that the defendant will plead guilty." U. S. Dep't of Justice, United States Attorneys' Manual § 9-6.200 (2d ed. 1998), *reprinted in* Lloyd L. Weinreb, Criminal Process: Cases, Comment, Questions 867 (5th ed. 1993). The manual is available on-line at <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/>.

192. United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958) (Douglas, J.).

hearsay. It is no secret that civil litigants have vastly greater formal discovery rights than criminal litigants. For reasons which I explain below, those differences are magnified when it comes to discovery relating to hearsay. It is perhaps less obvious, though equally true, that prosecutors enjoy an advantage over criminal defendants in anticipating an opponent's use of hearsay and in assembling the "ammunition" necessary to contest it. Thus, if we compare the hearsay-related discovery opportunities of all classes of litigants, we find criminal defendants at the bottom of the list.

1. Civil vs. Criminal Discovery Relating to Hearsay

Neither the Federal Rules of Civil Procedure nor the Rules of Criminal Procedure explicitly address discovery relating to hearsay.[193] But the two systems of discovery produce starkly different results when it comes to hearsay.[194] Hearsay seldom takes civil litigants by

193. The one explicit link between hearsay and discovery appears in Rule 807 of the Federal Rules of Evidence, which requires a proponent of hearsay to provide notice in advance of trial of an intent to offer hearsay under the residual exception. *See* Fed. R. Evid. 807.

194. In large measure, the handicaps facing criminal defendants in preparing to contest prosecution hearsay simply mirror the fundamental differences between civil and criminal discovery in general. The scope of civil discovery is designedly broad, encompassing virtually anything relating to the subject matter of the litigation. *See* Fed. R. Civ. P. 26(b) (providing that parties may discover any matter "relevant to the subject matter involved in the pending action" as long as it "appears reasonably calculated to lead to the discovery of admissible evidence"). By contrast, there is no general rule allowing a criminal defendant to learn the government's case against him. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Except for clearly exculpatory "*Brady* material," criminal discovery is confined to categories of information enumerated in Rule 16 and to the narrow category of "witness statements" defined in the Jencks Act. *See* 18 U.S.C. § 3500 (1994).

Rule 16 gives defendants the right to discover their own statements, *see* Fed. R. Crim. P. 16(a)(1)(A), their criminal record, *see id.* Rule 16(a)(1)(B), documents and tangible objects which are "material" to the defense or which the government will offer at trial, *see id.* Rule 16(a)(1)(C), the results of scientific tests, *see id.* Rule 16(a)(1)(D), and the substance of anticipated testimony from government experts, *see id.* Rule 16(a)(1)(E). The Rule provides for roughly comparable reciprocal discovery from the defense. *See id.* Rule 16(b).

The Jencks Act, codified at 18 U.S.C. § 3500, defines defendant's right to discover the statements of government witnesses. The Jencks Act prohibits federal courts from ordering discovery of witness statements until after a government witness has testified on direct examination at trial. *See* 18 U.S.C. § 3500(a) (1994). Once the witness testifies, the Jencks Act requires the government to produce a narrowly defined category of prior statements of the witness. *See id.* § 3500(b). Rule 26.2 of the Federal Rules of Criminal Procedure essentially restates the Jencks Act, and provides for reciprocal discovery of the prior statements of defense witnesses. *See* Fed. R. Crim. P. 26.2. Significantly, Rules 26.2(g), 12(i), and 46(i) now extend the obligation to disclose "Jencks" material—witness statements—to include witnesses testifying in pretrial suppression hearings, preliminary hearings, and detention hearings. *See id.* Rules 12(i), 26.2(g), 46(i).

Several provisions in the Rules of Evidence also require pretrial disclosures. *See, e.g.*, Fed. R. Evid. 404(b) (requiring prosecution to disclose evidence of "other

surprise. Before trial, they can learn the content of any hearsay statements they must face, identify and, quite often, locate and question the declarant, and assemble virtually any information relevant to contest that hearsay or impeach the declarant. By contrast, the process of criminal discovery often leaves criminal defendants guessing at the first stage of the learning process. Criminal defendants have no reliable means even to identify the out-of-court statements they will face at trial, much less the power to assemble information to contest such statements. Two aspects of civil discovery, not present in the criminal process, account for most of the difference: (1) a civil litigant's obligation to identify both witnesses and hearsay declarants well before trial,[195] and (2) discovery depositions.[196]

At an early stage in civil litigation, typically without even a formal discovery request, each party must disclose the names and identifying data of "each individual likely to have discoverable information,"[197]—a category which includes not only prospective witnesses but also the declarants of any hearsay which a party might seek to introduce at trial. By contrast, as we have seen, Congress rejected a proposed rule requiring pretrial disclosure of anticipated government witnesses.[198] Instead, the Jencks Act provides that government witness statements—which obviously would serve to identify witnesses—shall not be the subject of discovery or subpoena before trial.[199] And there is no criminal counterpart to Rule 26's broad command to disclose any "individual likely to have discoverable information." As a result, criminal defendants have no formal discovery tool designed to inform

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crimes" which it intends to offer); *id.* Rule 412 (intent to offer sexual history of victim); *id.* Rule 413 (evidence of similar crimes in sexual assault cases); *id.* Rule 414 (evidence of similar crimes in child molestation cases); *id.* Rule 609 (evidence of conviction over ten years old).

Though the reasons for liberal discovery—promoting truth-seeking by avoiding surprise, narrowing issues for trial, and encouraging settlement—exist just as fully in criminal as in civil litigation, they are offset in criminal cases by other concerns, typically cited to justify more limited discovery in criminal cases: (1) fear that defendants may seek to influence or intimidate witnesses (or worse); (2) fear that defendants will use discovered information as a reference point for fabricating evidence or committing perjury; and (3) unfairness to the government stemming from supposed constitutional limits on a court's power to order reciprocal discovery from the defense. *See generally* Frank W. Miller et al., Cases and Materials on Criminal Justice Administration 781 (4th ed. 1991) (summarizing the arguments against broad discovery in criminal cases).

195. *See* Fed. R. Civ. P. 26(a)(1)(A).

196. *See id.* Rule 30.

197. *Id.* Rule 26(a)(1)(A). The Rule allows courts to opt out of the process of compelled initial disclosures through local rule or by order in a specific case. Even in those districts which have such local rules, however, it is commonplace to request similar information through written interrogatories.

198. *See supra* text accompanying notes 169-72.

199. *See* 18 U.S.C. § 3500(a) (1994).

them who will testify for the government,[200] much less to identify declarants whose "testimony" will come only in the form of hearsay.

Even when a criminal defendant manages to learn of the prosecution's intention to offer an important hearsay statement at trial,[201] his opportunity to prepare to contest that hearsay pales in comparison to the rights afforded a civil litigant under comparable circumstances. The major difference is that the civil litigant has the right to compel discovery depositions.[202] Where the declarant is alive, subject to subpoena, and does not invoke a privilege to avoid testifying—a situation more typical of declarants in civil than in criminal cases[203]—the opponent's right to depose that declarant virtually eliminates the adversarial concerns at the heart of the hearsay rule. In a deposition, the opponent can subject the declarant to the full dose of adversarial cross-examination, often more exhaustively than might be permitted at trial.[204] If he likes the results of the deposition, the opponent often has the option to call the declarant as a witness at trial, or to use parts of the deposition to impeach any hearsay offered by the other party.[205] By contrast,

200. Capital cases are the exception. There, the government must provide a list of witnesses before trial. *See id.* § 3432.

201. While nothing assures a criminal defendant that he has learned about all significant government hearsay before trial, criminal defendants are not wholly without means to anticipate prosecution hearsay. Typically, where defendants can identify prosecution hearsay before trial, it is because: (1) the hearsay consists of a written statement appearing in a document which the government intends to offer at trial and the document has been disclosed by the government under Rule 16(a)(1)(C); (2) the hearsay forms the basis of an expert opinion disclosed under Rule 16(a)(1)(E); (3) the government gives notice of its intention to offer "residual" hearsay under Rule 807; (4) the government files a pretrial motion in limine which identifies the hearsay and seeks a pretrial ruling on admissibility; (5) the hearsay is identified in an affidavit supporting a search or arrest warrant or in testimony at a preliminary hearing; or, most typically, (6) the government voluntarily provides informal discovery earlier and broader than the rules require.

202. *See* Fed. R. Civ. P. 30.

203. Criminal cases are more likely to involve hearsay from unavailable declarants for a variety of reasons. It is quite common in criminal cases that the witnesses with the most intimate knowledge of the facts will refuse to testify and invoke the Fifth Amendment privilege. *See, e.g.*, Lilly v. Virginia, 119 S. Ct. 1887, 1892-93 (1999) (discussing how declarant, who was defendant's brother and an accomplice in the crime, refused to testify at trial). It is much less typical for witnesses in civil cases to invoke the Fifth Amendment privilege. Criminal cases more often give rise to hearsay from declarants who run or hide out of fear of retribution, or declarants who are themselves fugitives from the law. Finally, an increasing number of criminal cases involve hearsay from abused children who are found unable to testify in court or from abused spouses who are unwilling to testify.

204. Questioning in depositions tends to be longer, more detailed, and covers a broader subject matter than questioning at trial. Discovery depositions are not confined to matters admissible at trial, but may encompass any subject reasonably calculated to lead to admissible evidence. With no judge controlling the proceedings, and no jury to bore with detail, parties typically feel few time constraints in a deposition.

205. *See* Fed. R. Civ. P. 32(a)(1) ("Any deposition may be used by any party for the

criminal defendants have no right to take discovery depositions.[206] As a result, where the government relies on hearsay from an available declarant,[207] the defendant faces a tough dilemma with little assistance from the discovery process. If the court admits the hearsay, the defense may choose to call the declarant to the stand for cross-examination.[208] But with no opportunity to depose the declarant before trial, defense counsel must make that strategic decision in the dark. Unless he has another reliable source for "ammunition" to impeach the declarant, or unless he is a risk-taker of the highest order, counsel often will forgo that opportunity and the hearsay will go unchallenged.[209]

Where the declarant of important hearsay is unavailable, a civil litigant still can depose the witness who relates the hearsay statement, or other witnesses familiar with the declarant or the circumstances of the statement, and gather any available information that might expose weaknesses in the declarant's memory, perception, or credibility. Moreover, a civil litigant has a broad right to require pretrial production of documents which might lead to information impeaching a declarant, whether such documents are in the possession of his opponent or a third party.[210] By contrast, a criminal defendant has no means to depose anyone who may shed light on the credibility of a hearsay statement. And his ability to require either the government or third parties to produce documents before trial is more limited than a civil litigant's.[211]

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purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence."). Rule 806 of the Rules of Evidence permits use of deposition testimony to impeach a hearsay declarant in the same manner. *See* Fed. R. Evid. 806.

206. The Rules of Criminal Procedure provide for depositions. *See* Fed. R. Crim. P. 15. But the Rule permits the taking of depositions only "for use at trial" and only in "exceptional circumstances." *Id.* Typically, parties employ the Rule when they anticipate that a crucial witness will become unavailable before trial. The Rule does not permit discovery depositions. *See* Fed. R. Crim. P. 15 advisory committee's notes to 1974 amendment ("Subdivision (a) . . . makes explicit that only the 'testimony of a prospective witness of a party' can be taken. This means the party's own witness and does not authorize a discovery deposition of an adverse witness.").

207. Under current doctrine, except in cases of hearsay in the form of former testimony, the Confrontation Clause does not require the government to demonstrate that a declarant is unavailable in order to introduce her hearsay statements. *See* White v. Illinois, 502 U.S. 346, 353-54 (1992).

208. *See* Fed. R. Evid. 806.

209. *See supra* note 11.

210. A civil litigant can obtain any relevant document from his opponent merely by filing a "Request for Production of Documents." Fed. R. Civ. P. 34. He can obtain access to third-party documents by issuing a subpoena under Rule 45. *See id.* Rule 45. In either case, the scope of permissible discovery is not limited to admissible documents. It encompasses anything reasonably calculated to lead to discovery of admissible evidence.

211. The government must provide a criminal defendant only those documents it intends to offer at trial, or other documents "material" to preparation of the defense. *See* Fed. R. Crim. P. 16(a)(1)(C). The concept of materiality under Rule 16 is less

The obvious impact of these differences in discovery rights is to leave a criminal defendant in a much more difficult position than a civil litigant when it comes to contesting hearsay. The civil discovery process largely eliminates surprise from hearsay, often allows an opponent to question the declarant in person, and equips an opponent with documents and testimony useful to impeach an unavailable declarant. Criminal defendants, on the other hand, often first learn of significant, incriminating hearsay when they hear it at trial. Where they learn about it earlier, they have few formal tools available to investigate the declarant or the circumstances of the out-of-court statement.

2. Prosecution vs. Defense Discovery

On the surface, the process of criminal discovery seems to favor the defense over the prosecution. Constitutional discovery principles protect only the defendant; there is no reciprocal *Brady* obligation requiring the defense to disclose incriminating evidence to the prosecution. The Fifth Amendment generally prohibits such compelled disclosure.[212] Most of a defendant's reciprocal discovery obligations under Rule 16 arise only after the government has complied with defense requests for disclosure.[213] And the defendant's right to government disclosure of documents and tangible objects is broader than the defendant's reciprocal obligation.[214] Indeed, the

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generous than the civil discovery standard in Rule 26. *See* Fed. R. Civ. P. 26(b) (allowing discovery of anything "reasonably calculated to lead to the discovery of admissible evidence"). A criminal defendant may subpoena documents from third parties under Rule 17(c). *See* Fed R. Crim. P. 17(c). But Rule 17(c) is essentially a means to gain pretrial access to otherwise admissible material. It was not intended as a discovery rule at all. *See* Bowman Dairy Co. v. United States, 341 U.S. 214, 218-21 (1951) ("Rule 17(c) was not intended to provide an additional means of discovery.").

212. The Fifth Amendment, however, does not make all criminal discovery a "one-way street." In *Williams v. Florida*, 399 U.S. 78, 85-86 (1970), the Court upheld a Florida notice-of-alibi provision in the face of a Fifth Amendment challenge. Three years later, a unanimous Court held that a notice-of-alibi provision which accorded defendant no reciprocal discovery rights violated the Due Process Clause. *See* Wardius v. Oregon, 412 U.S. 470, 474-75 (1973). In the wake of *Williams*, reciprocal discovery provisions expanded significantly in state practice. *See* Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Cal. L. Rev. 1567, 1574-84 (1986). Reciprocal discovery, conditioned upon defendant's first invoking his own discovery rights, became a part of federal practice with the 1975 amendments to Rule 16. *See* Fed. R. Crim. P. 16(b) advisory committee's notes to 1974 amendment.

213. *See* Fed. R. Crim. P. 16(b)(1)(A)-(B). The only exception is Rule 16(b)(1)(C), which requires a defendant to disclose a summary of expert testimony where he has filed a notice under Rule 12.2(b) of intent to present expert testimony regarding his mental condition.

214. The defendant need only disclose those documents he intends to offer in evidence, while the government must also disclose any documents "material to the preparation of the defendant's defense." *Compare* Fed. R. Crim. P. 16(a)(1)(C), *with id.* Rule 16(b)(1)(A). The difference is designed to avoid the clash with the Fifth Amendment that would arise if defendant were required to produce all "material"

limited power of the government to compel disclosure of information from the defense is a principle justification for the limited discovery rights afforded criminal defendants.[215] The rules are fair, the argument goes, because discovery is limited in both directions. There may not be much discovery, but at least there is a rough parity in the process.

In reality, this notion of "discovery parity" is largely a fiction. Merely comparing the parties' formal, post-indictment rights tells us little about the relative discovery opportunities of the prosecution and defense. In many federal prosecutions, that comparison means little because it ignores the fact that the government does most of its "discovery" in a grand jury investigation before the indictment is ever filed. Like discovery depositions in civil cases, grand jury proceedings empower the government to compel witness examinations on the record and under oath long before trial, unhampered by rules of evidence, and subject to very broad concepts of relevance.[216] Thorough prosecutors can, and do, exercise that power to anticipate defenses, to "lock in" witnesses who might prove favorable to the defense, and to gather impeachment material for use in cross-examining defense witnesses at trial.[217]

When it comes to anticipating and contesting adverse hearsay, the grand jury offers prosecutors most of the advantages that civil litigants obtain through discovery depositions. Before the grand jury, prosecutors can question prospective trial witnesses and identify statements likely to appear at trial in the form of hearsay. With grand jury subpoenas, prosecutors can compel available hearsay declarants

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information regardless of his intent to disclose it at trial. *Williams v. Florida* rests largely on the notion that a court does not violate the Fifth Amendment by requiring an "accelerated" pretrial disclosure of evidence that the defendant will disclose at trial in any event. *See* Yale Kamisar et al., Modern Criminal Procedure: Cases, Comments, and Questions 1228-29 (9th ed. 1999).

215. *See* State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969) ("[S]ince the State cannot compel the defendant to disclose his evidence, disclosure by the State would afford the defendant an unreasonable advantage at trial."). *See generally* Brennan, *A Progress Report*, *supra* note 13, at 7 (summarizing and responding to the claim that Fifth Amendment restrictions on reciprocal discovery justify limits on the government's obligations to disclose).

216. *See* United States v. R. Enters., Inc., 498 U.S. 292, 301 (1991) (holding that a grand jury subpoena will not be quashed if there is any reasonable probability that subpoenaed material will lead to information relevant to the investigation); Kastigar v. United States, 406 U.S. 441, 443 (1972) (acknowledging the government's power to compel testimony before the grand jury).

217. Federal courts have held that a prosecutor unlawfully abuses grand jury power by using the grand jury after indictment solely for the purpose of gaining information for an advantage at trial. *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels), 767 F.2d 26, 29-30 (2d Cir. 1985) (quashing subpoena as an abuse of the grand jury process). But there is little practical limit on the government's ability to use the grand jury before indictment to shore up its case and anticipate defenses. No rule compels the government to terminate a grand jury investigation and present an indictment as soon as it has developed probable cause to indict.

to appear for examination in person. And the grand jury offers the power to compel testimony and documents from any source that might limit, contradict, or impeach an unavailable declarant. Better yet, unlike a civil deposition, the whole process occurs ex parte and in secret.[218] The prosecutor proceeds unhampered by objections. The witness testifies without counsel at her side.

There is, of course, no "parity" in a grand jury investigation. Defendants have no control over the grand jury process. In many cases, they are unaware of the grand jury's investigation until it is over. Once the investigation is complete, as a general rule defendants are not even entitled to the transcribed record of grand jury proceedings unless and until a grand jury witness later testifies for the government at trial.[219] In sum, of all litigants, civil or criminal, only criminal defendants lack the single most effective tool available to anticipate and contest most hearsay: the right to compel pretrial examination of witnesses, especially adverse witnesses.[220]

The government has another power, not possessed by any other litigant, that allows prosecutors not only to contest hearsay, but often to choose whether critical information will appear at trial as hearsay or through the testimony of a live witness. The government alone has the power to grant a hearsay declarant immunity from prosecution.[221] Equally important in many instances, the government can pursue a course that other litigants cannot pursue without facing criminal sanctions for witness tampering. Prosecutors can make "deals" with witnesses, offering immunity, reduced charges, or favorable sentencing recommendations in exchange for information or testimony.[222] These powers give the government tremendous leverage

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218. *See* Fed. R. Crim. P. 6(d)-(e).

219. *See* 18 U.S.C. § 3500(a) (1994) (Jencks Act); Fed. R. Crim. P. 16(a)(3).

220. Opportunities to examine adverse witnesses occasionally arise at preliminary hearings or in other pretrial proceedings. But the Federal Rules of Criminal Procedure do not require preliminary hearings once an indictment is filed. *See* Fed. R. Crim. P. 5(c). In most cases, federal prosecutors avoid preliminary hearings by indicting the case before arrest, within ten days after arrest for defendants in custody, or within 20 days for defendants released pending trial. *See id.* Most other pretrial hearings do not require live testimony on the merits of criminal charges and, hence, provide little opportunity for effective discovery. By contrast, preliminary hearings are part of routine practice in many states, and they often create significant opportunities for examination of the prosecution's principal witnesses.

221. *See* 18 U.S.C. § 6002. The immunity statute provides that, upon application of the prosecutor, the court "shall" issue an order compelling a witness to testify. *See* 18 U.S.C. § 6003. The effect of the compulsion order is to grant "use immunity" for testimony compelled by the order. *See generally Kastigar*, 406 U.S. at 443 (granting "use immunity" in exchange for compelled testimony). Prosecutors may accomplish a similar result through contract, by entering into an "immunity agreement" with a cooperating witness. *See* United States v. Thompson, 25 F.3d 1558, 1562 (11th Cir. 1994) (noting that "basic principles of contract law" govern immunity agreements).

222. *See* United States v. Singleton, 165 F.3d 1297, 1299-1302 (10th Cir. 1999) (en banc) (holding that 18 U.S.C. § 201(c)(2), which forbids giving gratuities to witnesses in return for testimony, does not apply to the acts of prosecutors in entering into plea

to shape the hearsay landscape of a criminal trial. It is not unusual for a hearsay declarant in criminal cases to become "unavailable" for live testimony solely because she asserts her Fifth Amendment privilege.[223] By exercising, or choosing not to exercise, its immunity granting power, the prosecution can determine whether that declarant's story is presented at trial as hearsay or live testimony. Not surprisingly, that decision will be governed in large part[224] by which version—live testimony or hearsay—is more likely to favor the prosecution. If the declarant seems likely to make a credible witness, the government may bargain for her live testimony by offering a favorable plea. On the other hand, where the hearsay comes from an unsavory declarant, the government may choose to "stand pat" and offer the hearsay.[225] By contrast, the defense has no power to open a declarant's mouth through a grant of immunity.[226]

Even in gathering information outside of formal, compulsory processes, the government enjoys substantial practical advantages over most defendants. Most federal prosecutors have the support of investigating agents throughout the trial preparation stage of a criminal case. Once the government has identified a potential defense witness, or a declarant of significant, exculpatory hearsay, it is a rare case where the prosecution lacks the resources to contact the witness or investigate the circumstances of the hearsay. By contrast, most defendants are represented by appointed counsel who can devote little time to pretrial interviews or other investigation of prospective

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agreements which offer leniency in exchange for cooperation and testimony).

223. *See, e.g.*, Lilly v. Virginia, 119 S. Ct. 1887, 1892-93 (1999) (discussing how declarant became "unavailable" when he invoked his Fifth Amendment privilege).

224. Another consideration, of course, is the government's interest in prosecuting the prospective witness. The government can sometimes control that factor as well, merely by controlling the timing of prosecutions.

225. The government's power to alter the hearsay landscape of a case can extend to defense hearsay as well. Where the government is able to anticipate a defendant's intention to offer exculpatory hearsay, the prosecutor's "deal-making" powers can alter a defendant's plans. In some cases, the government can effectively preempt defense use of exculpatory hearsay by reaching an immunity agreement with the declarant, discovering incriminating information through pretrial interviews or grand jury testimony, then calling the declarant as a government witness at trial. The witness then explains the earlier hearsay statement as incomplete, out of context, or inaccurately reported.

226. A number of circuits have ruled that federal courts have no power to grant immunity to witnesses absent a request from the prosecutor. *See, e.g.*, United Staes v. Robaina, 39 F.3d 858, 863 (8th Cir. 1994) (holding that "use immunity" can only be granted upon the Attorney General's request); United States v. Quintanilla, 2 F.3d 1469, 1483 (7th Cir. 1993) (declining to grant immunity in the absence of a formal offer from the prosecutor); Grand Jury Proceedings (Williams) v. United States, 995 F.2d 1013, 1017 (11th Cir. 1993) (finding that federal courts cannot grant use immunity to witnesses testifying under a Rule 26(c) protective order). The Second and Fourth Circuits have suggested that courts may order immunity in cases where misconduct by the prosecutor would otherwise result in injustice. *See* United States v. Abbas, 74 F.3d 506, 512 (4th Cir. 1996); United States v. Bahadar, 954 F.2d 821, 826 (2d Cir. 1992).

government witnesses, much less of hearsay declarants.[227] And defendants' disadvantage in resources is compounded by another problem: witnesses typically cooperate more readily with police and prosecutors than with defense counsel or defense investigators. With time and investigative resources in short supply, defense counsel may not devote time and energy to pursuing witnesses who are likely to slam the door in their faces.

II. CORRECTING THE BALANCE: EXPANDING CRIMINAL DISCOVERY TO CONTEND WITH EXPANDED ADMISSION OF PROSECUTION HEARSAY

There are two ways to adjust any balance: subtract from one side, or add to the other. Most scholarly treatment of hearsay in criminal cases looks only at one side of the balance. There is an extensive ongoing debate over adjustments to the rules of admissibility, both under the law of evidence[228] and under the Confrontation Clause.[229] Most of that discussion assumes a fixed model of the criminal process:

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227. One survey of appointed counsel in New York City found that defense counsel actually interviewed witnesses before trial or guilty plea in only 21% of homicide cases and only 4% of other felony cases. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 42 (1997) (citing Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. Rev. L. & Soc. Change 581, 762 (1986-87)).

228. *See, e.g.*, Randolph N. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 Ind. L.J. 551, 553 (1996) (suggesting a text-centered approach to interpretation of the Rules of Evidence); Park, *Subject Matter Approach*, *supra* note 9, at 106-07 (advocating the retention of existing hearsay rules for criminal cases); Swift, *Fact Approach*, *supra* note 15, at 1342-43 (formulating a "foundation fact approach" to hearsay admissibility); Van Kessel, *supra* note 2, at 485-92 (reviewing arguments and analyses regarding admission of hearsay).

229. A number of excellent works debate the limits of hearsay admissibility under the Confrontation Clause. *See, e.g.*, Amar, *First Principles*, *supra* note 44, at 693-97 (arguing that Confrontation Clause applies only to testifying witnesses and declarants who testify through, for example, deposition and affidavit); Berger, *supra* note 28, at 561-62, 607-12 (arguing for a higher standard of admissibility for statements elicited by prosecutors and government agents); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1031-32 (1998) (arguing that the Confrontation Clause applies only to "testimonial statements," excluding such statements absent confrontation of the declarant, with no exception for "reliable" hearsay); Jonakait, *Confrontation Clause*, *supra* note 11, at 622 (arguing that the Confrontation Clause should be restored to its true purpose of preserving the adversarial process, rather than allowing the clause to fulfill the goals of evidence law); Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration under the Confrontation Clause*, 81 Va. L. Rev. 149, 173-74 (1995) (rejecting the Court's reliance on "arcane rules of evidence" to define the constitutional rule and arguing that hearsay is admissible under the Clause only where (1) the trial court "has made an independent foundational finding that the hearsay is competent" and (2) the "hearsay is independently corroborated"). The full list is too long to include here. For a collection of earlier confrontation-hearsay articles, see *Ohio v. Roberts*, 448 U.S. 56, 66 n.9 (1980), where the Court chronicled the "outpouring of scholarly commentary" on the hearsay-confrontation issue.

a criminal trial which takes place in one, typically brief episode,[230] preceded by relatively little discovery. But if we look at hearsay and discovery as part of a single system that should be in balance, then we must consider a second way to adjust that balance.[231] Rather than debating only whether to subtract some hearsay from one side, we also should consider how we might add some discovery to the other.

In the four sections which follow, I examine the "discovery" side of the balance and make some suggestions for expanding a defendant's access to information relating to prosecution hearsay. Section A considers a defendant's right to pretrial notice of the hearsay which a prosecutor expects to use at trial. In Section B, I suggest how *Brady* principles,[232] Rule 16,[233] and the Jencks Act[234] may serve as tools for obtaining ammunition to impeach hearsay. Section C proposes the limited use of depositions in criminal cases where necessary to give defendants pretrial access to available hearsay declarants. Finally, Section D argues for an approach to the question of admissibility which would increase a prosecutor's incentive to provide early and complete disclosure regarding hearsay.

In arguing for expanded discovery, I am mindful that any reforms must accommodate the legitimate public concerns which presently restrict discovery in criminal cases. Principal among those concerns is the protection of witnesses.[235] The need for speed and efficiency in

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230. *See, e.g.*, Park, *Subject Matter Approach*, *supra* note 9, at 62 ("The unitary nature of the American trial makes surprise a greater danger than in other systems, where adjournments and continuances can mitigate its effect."); Van Kessel, *supra* note 2, at 525, 532. Professor Van Kessel recognizes that certain aspects of the adversary system in criminal cases, notably limited discovery and the parties' control over investigation and presentation of evidence, account in large measure for the hazards of unreliability and unfair surprise which justify the rule against hearsay. *See id.* at 525. He calls for an expanded notice requirement for hearsay, and notes with approval the trend in some states toward broader criminal discovery. *See id.* at 532. Because of his view that significant procedural reform faces "insurmountable barriers" in the American system, *id.* at 525, however, Professor Van Kessel's principal focus is on adjustments to rules affecting admissibility.

231. Scholars who look at hearsay from a comparative law perspective tend to focus more on procedural reforms rather than looking solely at rules governing admissibility. *See, e.g.*, Sean Doran, *A Comment on Gordon Van Kessel's Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 Hastings L.J. 591, 593 (1998) ("[I]t is worth paying just as much attention to the possibilities of procedural reform as to the methods whereby the hearsay rule can be best accommodated within the existing procedural framework."); *cf.* Damaška, *supra* note 9, at 428-30 (exploring the connection between common-law hearsay rules and the "one-shot" nature of common-law trials).

232. *See* Brady v. Maryland, 373 U.S. 83 (1963).

233. *See* Fed. R. Crim. P. 16.

234. *See* 18 U.S.C. § 3500 (1994).

235. Witness-related concerns have formed the heart of Department of Justice resistance to discovery amendments that would require pretrial disclosure of government witnesses. *See, e.g.*, H.R. Rep. No. 94-247, at 41 (1975), *reprinted in* 1975 U.S.C.C.A.N. 674, 712 (arguing that proposed 1974 amendment to Rule 16 was "dangerous and frightening in that government witnesses and their families will even

the criminal process also cannot be overlooked.[236] Critics have blamed expanded discovery for the increased cost and delays which plague much modern civil litigation.[237] The criminal process need not emulate those failures. My aim is to suggest some avenues for incremental reform, broadening defense access to information relating to hearsay, but with minimal impact on other legitimate interests at stake in the criminal process.

A. *Advance Notice of Prosecution Hearsay*

"You can't hit what you can't see." Baseball legend Walter Johnson's account of his pitching aptly describes a defendant's predicament in the face of some hearsay.[238] The first step in contesting hearsay is simply knowing what is coming. But, like Johnson's fastball, prosecution hearsay can burst upon a criminal defendant with little or no time to react. The following sections discuss two avenues through which a criminal defendant might learn before trial of the prosecution's intention to introduce a hearsay statement, and learn the substance of the statement itself. The first avenue is the most direct: a rule requiring such notice. Today such a rule exists only for "residual" hearsay admitted under Rule 807.[239] I argue for expansion of that notice requirement to other forms of prosecution hearsay. A second avenue for learning the substance of some prosecution hearsay may already exist under Rule 16(a)(1) of the Rules of Criminal Procedure. I argue that Rule 16(a)(1)(C)—the rule providing for discovery of documents and tangible evidence—provides an important avenue for defendants to discover "documentary" hearsay, statements written or signed by the hearsay declarant herself, or "recorded" hearsay, statements directly from the mouth of the declarant which the government possesses in the form of an audio or video recording. Application of Rule 16(a)(1)(C) to pretrial discovery of hearsay, however, requires us to address an additional, complex question: whether the hearsay declarant is a "government witness" whose statements are protected against pretrial discovery by Rule 16(a)(2) and the Jencks Act. I suggest several approaches which would resolve that question in favor of broader discovery of prosecution hearsay.

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be more exposed than they now are to threats, pressures, and physical harm").

236. In federal courts, defendants have both constitutional and statutory rights to a speedy trial. *See* U.S. Const. amend. VI; 18 U.S.C. § 3161 (1994) (Speedy Trial Act).

237. *See* Cound, supra note 13, at 762-63. The extensive amendments to the Federal Rules of Civil Procedure in 1993 aimed largely to simplify and streamline discovery.

238. *See supra* note 1.

239. *See* Fed. R. Evid. 807.

1. Expanding a Defendant's Right to Pretrial Notice of Prosecution Hearsay

Under current practice, a defendant's opportunities to anticipate prosecution hearsay are best described as "haphazard." The Federal Rules of Evidence explicitly require advance notice only when the proponent intends to rely on the residual exception.[240] In theory, notice of "residual" hearsay is designed to protect an opponent from surprise by the most unpredictable, nontraditional, and presumably least reliable forms of hearsay. But, given the judicial expansion of some of the more "traditional" exceptions,[241] the theory which limits a notice requirement to "residual" hearsay is open to question. In the case of a child's hearsay statement alleging sexual abuse, for example, defense counsel's need for advance notice is not diminished where the child makes the statement to a doctor or a psychologist, rather than to a police investigator. Yet a defendant's right to pretrial notice depends upon whether the trial court ultimately fits a particular statement into the "pigeonhole" for statements for purposes of medical treatment[242]—for which no advance notice is required—or admits it under the residual exception.[243] Presently, no rule entitles a defendant to pretrial notice that a police officer will testify at trial and recount an accomplice's post-arrest "statement against interest" which implicates the defendant.[244] But few would argue that a defendant has any lesser need to prepare to meet such hearsay than he would if, for example, the same accomplice made the same statement before a grand jury and the court found it admissible only under Rule 807.[245]

Moreover, absent a rule requiring pretrial notice, the current system's heavy reliance on informal discovery[246] can add to a defendant's uncertainty in anticipating hearsay. Regardless of the good faith of the prosecutor, even "open file" discovery may turn out to be a trap for the unwary. The prosecutor's file may include agents'

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240. Rule 807 reads:

> [A] statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

241. *See supra* text accompanying notes 117-38. For a more detailed discussion of the modern expansion of some of the traditional, categorical exceptions, see Douglass, *supra* note 6, at 210-14.

242. *See* Fed. R. Evid. 803(4).

243. *See id.* Rule 807.

244. The admissibility of accomplice confessions as "statements against interest" has occupied considerable attention from the Court in recent years. *See supra* text accompanying notes 128-38.

245. *See* United States v. McHan, 101 F.3d 1027, 1037-38 (4th Cir. 1996) (admitting grand jury testimony of deceased co-conspirator).

246. *See supra* text accompanying notes 188-89.

memoranda of interviews with some government witnesses. But the written record of a witness's prior statement is typically less complete than fully developed trial testimony, which might include hearsay statements that a memorandum does not. Also, there may be no grand jury transcripts or interview memoranda at all for some government witnesses.[247] Even after pouring through an "open file," defense counsel has no real assurance that he has seen all significant government hearsay.

A hearsay-notice rule covering more than just residual hearsay would provide a measure of protection against such uncertainty. It would avoid the unfairness that now exists where notice is tied to the happenstance of which "pigeonhole" ultimately provides the legal basis for admitting the hearsay. Perhaps most important of all, more regular advance notice of important hearsay would help to wean defense counsel from a tradition of "exclusionary thinking,"[248] and allow more realistic opportunities to contest hearsay after it is admitted in evidence. With more regular pretrial notice, defense counsel are more likely to find and use ammunition that may contradict hearsay or impeach a declarant, or to subpoena available declarants for in-court cross-examination. Since advance notice is the first step in contesting hearsay, expanding such notice is probably the most important single reform one could make toward restoring an adversarial balance when the prosecution proves its case through hearsay.

One way to accomplish that reform would be to impose a general rule requiring pretrial notice for all prosecution hearsay.[249] But a rule

247. Prosecutors have no obligation to "create" Jencks material. *See* United States v. Houlihan, 92 F.3d 1271, 1289 (1st Cir. 1996) (holding that the prosecutor did not violate the Jencks Act by instructing agents not to take notes during witness interview); United States v. Bernard, 625 F.2d 854, 859 (9th Cir. 1980) (same). In some instances, prosecutors may choose not to place a witness before the grand jury, especially at an early stage in an investigation, in part to avoid creating discoverable Jencks material.

248. I use the term "exclusionary thinking" to describe an approach to hearsay which begins and ends with the question of admissibility. Beginning with the basic law school course on Evidence, lawyers devote considerable attention to excluding hearsay from trials. But few lawyers, even experienced trial lawyers, pay sufficient attention to the process of contesting hearsay after it is admitted in evidence. *See* Brannon, *supra* note 7, at 158 (noting trial lawyers' "virtual total neglect" of opportunities to impeach hearsay declarants).

In a previous article, I argued that the Court's treatment of the Confrontation Clause as a rule of admissibility leads to exclusionary thinking, and can cause defense counsel to ignore, or even to avoid, available opportunities to impeach hearsay. *See* Douglass, *supra* note 6, at 221-24.

249. *See* Van Kessel, *supra* note 2, at 532 (calling for pretrial notice as a precondition for admission of all hearsay). Such a proposal may be less revolutionary than it appears at first blush. For practical purposes, a broad hearsay-notice requirement already exists in federal civil cases as a result of the command in Rule 26 that parties disclose "all persons with knowledge" about the case, a category which obviously includes declarants of any significant hearsay. Fed. R. Civ. P. 26. Once a

requiring the prosecution to identify "all persons with knowledge," as Rule 26 requires of civil litigants, would run into the familiar Congressional roadblock against compelled pretrial disclosure of the identity of government witnesses.[250] An expanded hearsay-notice rule, modeled after Rule 807 but covering "all out-of-court statements which a party intends to offer in evidence," raises the prospect of voluminous, time-consuming, and largely unhelpful pleadings which could bury important hearsay amidst a catalogue of every business record that a party might choose to offer at trial.[251] A more realistic approach would extend a notice requirement in criminal cases to those forms of hearsay where surprise is most likely to disadvantage a defendant. In a rough way, such an approach may provide a means to balance hearsay and criminal discovery, by expanding notice requirements generally for those categories of hearsay where the law of evidence and Confrontation Clause rulings have already expanded the admissibility of prosecution hearsay.

One problem, of course, would lie in identifying the categories where pretrial notice should be required. It seems doubtful that a line-up of selected hearsay exceptions—presumably chosen from among the categories currently in the Federal Rules—would serve the purpose. Not all "excited utterances," for example, are equally significant or equally subject to challenge through attacks on the credibility of the declarant. Indeed, a major problem with the current approach is that it ties pretrial notice to the "pigeonhole" under which the hearsay happens to be admitted. Since our aim would be to identify types of hearsay where surprise would be most costly, then we should require pretrial notice: (1) where the hearsay was most likely to be important, that is, to have an impact on the jury; and (2) where adversarial testing is most likely to make a difference, that is, where the risk of unreliability is greatest.[252] Using these criteria, we might

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declarant is identified under Rule 26, an opponent in a civil case can learn the substance of any hearsay statements either through written interrogatories or by taking the declarant's deposition. *See id.*

A similarly broad requirement is not without precedent in criminal discovery systems. For example, New Jersey requires prosecutors to disclose "names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information...." 31 New Jersey Criminal Practice and Procedure § 476, at 538-39 (3d ed. 1999-2000) (discussing Rule 3:13-3(c)(6) of the New Jersey Rules Governing Criminal Practice).

250. *See supra* text accompanying notes 170-72.

251. This is McCormick's principal complaint about expanded hearsay-notice provisions. *See* McCormick Hornbook, *supra* note 2, at 545 ("[A] notice requirement has the disadvantage of adding a further complication to an already overcrowded array of pretrial procedures....").

252. Similar criteria govern "notice" requirements in other contexts, scattered through the Federal Rules of Evidence and the Rules of Criminal Procedure. Such notice requirements typically appear in situations where evidence poses particular risks of unreliability because, in the absence of adversarial inquiry, the opportunity and the incentive to fabricate or manipulate such evidence are relatively high. *See,*

require advance notice of hearsay from "impact" declarants like crime victims and—where identity is in issue—identification eyewitnesses, as well as from "risky" declarants like accomplices and co-conspirators.[253] Then, we might add any hearsay statements made to police during criminal investigation, both because police witnesses are likely to have an increased impact on many jurors, and because the adversarial nature of criminal investigation adds to the risk of unreliability.[254] We would then arrive at a notice requirement for all hearsay from crime victims, identification eyewitnesses, accomplices, and all hearsay offered through the testimony of a law enforcement agent reporting statements made in response to criminal investigation. One could debate whether this list is too broad or too narrow. A rule requiring pretrial notice of these categories of hearsay would not eliminate all danger of unfair surprise at trial. It might include some rather insignificant hearsay on occasion. But it would provide an effective counterweight to prosecution hearsay in those cases where liberal admission of hearsay seems most out of balance with limited criminal discovery rights.

Of course, an expanded pretrial notice rule would not come without costs. Arguments against the rule might raise (1) witness-related concerns, (2) concerns with reciprocity of discovery, and (3) efficiency concerns. The Justice Department has maintained that compelled pretrial disclosure of witness lists or witness statements poses a serious threat of witness tampering, harassment, intimidation, or worse.[255] No

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e.g., Fed. R. Crim. P. 12.1 (notice of alibi), 12.2 (notice of insanity defense). Other notice requirements focus on evidence most likely to surprise a party because it relates to issues only tangential to the central claim or defense in the case. *See* Fed. R. Evid. 404(b) ("other crimes" evidence), 412(c) (evidence of victim's past sexual behavior), 413(b) (evidence of similar crimes in sexual assault cases), 414(b) (evidence of similar crimes in child molestation cases), 609(b) (criminal convictions more than ten years old).

253. Professor Swift developed the paradigm of the "risky declarant" as one whose "self-serving" interests raised particular concerns about reliability. *See* Eleanor Swift, *Abolishing the Hearsay Rule*, 75 Cal. L. Rev. 495, 508 (1987). An accomplice whose confession implicates her partner in crime clearly fits the model.

254. Indeed, historical fears of the power of police to manipulate evidence obtained through interviews conducted in secret probably induced the Framers to write the Confrontation Clause into the Bill of Rights in the first place. *See* Berger, *supra* note 28, at 561. To the extent that modern confrontation theory allows the admission of such hearsay, a pretrial notice provision would be an important first step toward shedding any available light on the process that gave rise to the hearsay statements.

Including hearsay reported by the police makes sense for another reason. Because of the typically close cooperation between police and prosecutors, it will seldom prove inconvenient for a prosecutor to identify and disclose such hearsay. Typically, the hearsay will already be recorded in a police report which the prosecutor has in his file. If the officer testifies to recount the hearsay, his report will be discoverable at trial under the Jencks Act in any event. *See, e.g.*, United States v. Welch, 810 F.2d 485, 490-91 (5th Cir. 1987) (holding that the Jencks Act requires the disclosure of a government agent's summaries and notes when the agent testifies at trial).

255. *See supra* text accompanying notes 170-72.

doubt, similar arguments would greet any proposal requiring pretrial disclosure of hearsay declarants and their statements. No one questions the importance of witness security, particularly in cases of violent crime or organized crime where convincing witnesses to talk may be the prosecution's most difficult challenge. But, as discovery reform proponents argue, courts could address witness-security concerns by ordering disclosure as a general rule, but limiting discovery where the government produced evidence suggesting a realistic threat of witness tampering or intimidation.[256] In fact, pretrial disclosure of witnesses is often the practice in federal prosecutions today. It is simply left to the unreviewable discretion of the prosecutor who decides what he will provide through informal discovery.[257]

The case for compelled disclosure is even stronger when it comes to hearsay declarants. Often, the government's need for hearsay arises because a declarant is dead, has disappeared, or refuses to testify in court. In those circumstances, the necessity which opens the door to hearsay largely eliminates witness-security concerns. Unavailable witnesses are an unlikely—sometimes an impossible—target for tampering and intimidation. Even in the case of available declarants, the very nature of hearsay reduces concerns over pretrial disclosure of the declarant's identity. The declarant's story has already been told, and will be repeated at trial even in the declarant's absence. The defendant cannot change the hearsay by intimidating the declarant. Nor can the defendant profit by harming a declarant whose damaging story will be told in court in any event.[258] If the declarant can add something that might qualify or explain the damaging hearsay, the

256. *See, e.g.*, Brennan, *A Progress Report*, *supra* note 13, at 14 ("[T]he proper response to the intimidation problem cannot be to prevent discovery altogether; it is rather to regulate discovery in those cases in which it is thought that witness intimidation is a real possibility.").

257. Federal law requires pretrial disclosure of witness lists in capital cases. *See* 18 U.S.C. § 3432 (1994). Most states have rules either permitting or requiring disclosure of witness lists, and many foreign systems make such disclosures routinely. In fact, most federal prosecutors *voluntarily* disclose witnesses ahead of trial in most cases. In light of these practices, none of which has been tied to evidence of increased threats to witnesses, it seems less than convincing to insist on a rule that leaves disclosure of witnesses and their statements entirely in the discretion of the prosecutor. Indeed, one could argue that intimidation and harassment are just as likely to occur in the absence of disclosure. Defendants awaiting trial are inclined to make educated guesses about the prosecution's witnesses in any event. Speculation about who is "snitching" is not an uncommon jailhouse topic. Where defendants are inclined to threaten or intimidate, they do not require formal notice to start the process. In some instances, formal pretrial notice might actually serve to protect some nonwitnesses who would otherwise become targets of a defendant's misguided speculation.

258. Admittedly, retaliation against the declarant is a concern, even though it would not affect the reporting of hearsay. But the same concern will arise in any event, as soon as the government offers the hearsay at trial. Pretrial disclosure neither increases nor decreases the prospect of retaliation.

defendant's only incentive is to deliver her safely to court to tell the rest of the story.[259]

Historically, another typical argument against expanded criminal discovery stems from lack of reciprocity.[260] The same argument might be made against a rule requiring disclosure of the prosecution's intent to use hearsay. But the Court's approach to reciprocal discovery under the Fifth Amendment largely undercuts this claim.[261] Rule 807's notice requirement applies to the defense as well as the prosecution. Properly drafted, a broader hearsay-notice rule, applying equally to prosecution and defense, would satisfy Fifth Amendment standards and still eliminate concerns that hearsay disclosure would be a one-way street in favor of the defense.

Finally, one might oppose an expanded pretrial notice rule on grounds of efficiency. The rule would be an inconvenience to the disclosing party, who might chafe at the burden of previewing his entire case in an attempt to disclose which witnesses or documents were likely to recount hearsay. Moreover, every new rule brings new litigation. A pretrial disclosure requirement might turn routine hearsay objections into extended discovery disputes.[262]

These efficiency concerns, however, are probably more theoretical than real. There is no evidence that notice provisions under Rule 807 and in other contexts[263] have created overwhelming burdens for litigants. Most trial lawyers take account of any significant hearsay in preparing for trial in any event, as they construct arguments in favor of admissibility. Notice to the opponent would impose a comparatively minor burden and would reduce unnecessary guesswork in the opponent's trial preparation. Moreover, disclosure of documents, transcripts, recordings and sometimes agents' interview memoranda—which often contain the hearsay statements which the government expects to use at trial—is already a routine part of

259. Of course, there might remain witness-security concerns regarding any witness who must appear in court to relate hearsay statements. Disclosure of the hearsay typically would disclose its source. But, as with any other witness, the court could limit discovery in response to evidence justifying real concerns over safety or tampering. Of course, federal courts already have a track record with a hearsay-notice rule. Nothing suggests that Rule 807's notice provision has created serious hazards for hearsay-relating witnesses.

260. *See* Brennan, *A Progress Report*, *supra* note 13, at 7.

261. In *Williams v. Florida*, 399 U.S. 78 (1970), for example, the Court upheld Florida's notice of alibi rule against a Fifth Amendment challenge. *See id.* at 102-03; *supra* text accompanying notes 212-14.

262. *See* McCormick Hornbook, *supra* note 2, at 545 (noting that hearsay-notice requirements might unnecessarily complicate pretrial proceedings).

263. *See, e.g.*, Fed. R. Evid. 404(b), 412(c), 413(b), 414(b), 609(b) (requiring the government to provide notice of "other crimes" evidence, evidence of victim's past sexual behavior, evidence of similar crimes in sexual assault cases, evidence of similar crimes in child molestation cases, and criminal convictions more than ten years old, respectively).

voluntary discovery provided by federal prosecutors in many cases.[264] Finally, if properly administered, an expanded hearsay-disclosure rule need not lead to lengthy discovery disputes. The purpose of notice is to avoid unfair surprise, not to increase the odds of excluding probative evidence.[265] A disclosure rule should be flexible enough to permit courts to grant recesses or change the order of presenting some evidence to avoid surprise to an opponent. By showing such flexibility in dealing with other discovery conflicts in both civil and criminal trials, courts have proved quite able to dispose of notice-related disputes without serious disruption to the trial process.[266]

In fact, a broader rule requiring pretrial notice of hearsay likely would add to the efficiency of federal criminal trials. Important hearsay issues too often arise in the heat of a criminal trial. A notice rule would encourage resolution of such issues through the more deliberate process of a pretrial motion in limine. Perhaps most important, assuming that most parties would comply with a pretrial notice rule in good faith, the rule should actually reduce the number of claims of unfair surprise—and resultant delays—that now arise when hearsay erupts unexpectedly in a criminal trial.[267] Finally, in the case of available declarants, pretrial notice would minimize delays and disruptions at trial by allowing time for defense counsel or investigators to contact the declarant and serve a trial subpoena.

Of course, rulemaking for federal courts is a laborious process. And there is no prospect that an expanded hearsay-notice provision in the Federal Rules of Evidence is close at hand. Still, even in the absence of an amendment to the Rules, federal courts have the power to order pretrial notice of the government's intention to rely on hearsay. The drafters of Rule 16 of the Federal Rules of Criminal

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264. *See* Levenson, *supra* note 189, at 562-63. A pretrial disclosure rule could be drafted to provide that disclosure of documents or recordings containing the hearsay statements would satisfy the rule. That would avoid the unnecessary burden of requiring a party to file a separate pleading, for example, identifying every business record as a hearsay statement.

265. Exclusion, of course, could remain an available sanction for repeated or willful violations.

266. In fact, federal courts already pursue such a flexible approach when they apply Rule 807. *See* Rand, *supra* note 101, at 885-88.

267. Federal courts already possess the power to grant recesses and regulate the order of proof to address problems of unfair surprise. *See* Fed. R. Evid. 611(a). It is less certain that they possess the power to exclude evidence based on surprise alone. *Compare* United States v. Cole, 857 F.2d 971, 976 (4th Cir. 1988) (suggesting evidence can be excluded under Rule 403 on grounds of unfair surprise), *with* Fed. R. Evid. 403 advisory committee's note ("The rule does not enumerate surprise as a ground for exclusion . . . ."). A rule requiring pretrial notice of hearsay would make that power explicit, as Rule 807 now does for residual hearsay. *See* Fed. R. Evid. 807. But the grant of such power does not require the court to use the sanction of exclusion in every case. Courts have exercised flexibility in administering Rule 807, with the aim of avoiding surprise without excluding probative evidence. They could, and should, follow a similar approach under an expanded pretrial notice rule.

Procedure explicitly noted that the Rule "prescribe[s] the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases."[268] The Supreme Court has recognized the inherent power of federal courts to order discovery in the absence of a legislative mandate,[269] and lower federal courts have exercised that power in a variety of circumstances.[270] Most closely on point, federal courts have exercised that inherent power to order the government to disclose witness lists before trial,[271] even though Congress has rejected proposals that would mandate such disclosure as a general rule.[272] If federal courts can compel pretrial identification of witnesses, then certainly they can require identification of hearsay declarants where witness security concerns are diminished and unfair surprise is more likely.

Whether courts have the same inherent authority to order pretrial disclosure of the substance of hearsay statements is more problematic. It is arguable that the Jencks Act precludes such compelled disclosure under the theory that the declarant is a "government witness."[273] But, as outlined below, there are substantial reasons to dismiss the Jencks Act as a limit on pretrial discovery of prosecution hearsay.

2. Rule 16: An Opportunity to Discover Written or Recorded Hearsay, Or a Rule Against the Compelled Pretrial Disclosure of Hearsay?

Aside from discovery controlled by *Brady*'s constitutional principles,[274] Rule 16 governs most aspects of pretrial discovery in

268. Fed. R. Crim. P. 16 advisory committee's notes to 1974 amendment.

269. *See, e.g.*, United States v. Nobles, 422 U.S. 225, 231 (1975) (recognizing "the federal judiciary's inherent power" to require discovery of witness statements). A similar power exists in civil cases. *See* Weinstein et al., *supra* note 16, § 802.05[1], at 802-15 (noting that the trial judge has discretion, pursuant to Rule 16 of the Rules of Civil Procedure, to require parties at the time of the pretrial conference to indicate the existence of statements whose admissibility is problematic).

270. *See, e.g.*, United States v. Moore, 936 F.2d 1508, 1515 (7th Cir. 1991) (recognizing court's inherent authority to order pretrial disclosure of list of government witnesses); United States v. Carrigan, 804 F.2d 599, 603 (10th Cir. 1986) (recognizing the district court's inherent authority to order pretrial deposition of a government witness even though Rule 15 did not authorize such a deposition).

271. *See* United States v. Fletcher, 74 F.3d 49, 54 (4th Cir. 1996) (recognizing court's inherent authority to order pretrial disclosure of list of government witnesses); *Moore*, 936 F.2d at 1515 (same).

272. *See supra* text accompanying notes 170-72.

273. 18 U.S.C. § 3500(a) (1994) ("[N]o statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena [sic], discovery, or inspection until said witness has testified on direct examination in the trial of the case.").

274. *See infra* text accompanying notes 333-37.

federal prosecutions.[275] Rule 16(a)—which relates to defense discovery from the government[276]—gives us two, somewhat antagonistic commands. First, Rule 16(a)(1) is a rule compelling disclosure. It specifies five categories of information which, upon request, the government must provide to the defense.[277] Second, Rule 16(a)(2)—which incorporates the Jencks Act[278]—is a rule forbidding courts to compel disclosure. It limits the reach of the discovery rights created in Rule 16(a)(1) by prohibiting any compelled pretrial disclosure of the statements of government witnesses and prospective witnesses.[279] These dual commands reflect an uneasy compromise between the drafters' efforts to permit discovery of the most critical elements of the government's case on the one hand, and Congress' reluctance to require pretrial discovery that would disclose the identity and statements of government witnesses on the other.

Unfortunately, the drafters left us with little clue where to fit hearsay in that compromise. Neither Rule 16, nor the Jencks Act, nor their respective legislative histories explicitly mentions hearsay. To understand how, or if, these rules apply to prosecution hearsay, we must consider two questions. First, what hearsay-related information does Rule 16(a)(1) compel the government to disclose? Second, are hearsay declarants government "witnesses" or "prospective witnesses" whose statements are protected from compelled pretrial

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275. Defendants have no general right to learn the government's case. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

276. Rule 16(b) provides for reciprocal discovery from the defense. *See* Fed. R. Crim. P. 16(b).

277. Rule 16(a)(1) requires the government, upon request of the defendant, to disclose: (A) statements of the defendant, (B) defendant's criminal record, (C) documents and tangible objects material to preparation of the defense or which the government intends to offer in evidence at trial, (D) reports of scientific examinations and tests, and (E) a summary of expert witness testimony. *See id.* Rule 16(a)(1)(A)-(E).

278. 18 U.S.C. § 3500. The Jencks Act requires disclosure of a narrowly defined category of government witness statements, but only after the witness has testified at trial or in a pretrial proceeding. *See id.*

279. Rule 16(a)(2) provides:

> (2) Information Not Subject to Disclosure.
> Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

Fed. R. Crim. P. 16(a)(2). Thus, the Rule contains two limits on disclosure. First, it creates a form of government "work product" privilege, exempting internal government reports and memoranda from discovery that Rule 16(a)(1)(C) might otherwise require. Second, Rule 16(a)(2) makes it clear that, with respect to government witness statements, the Jencks Act trumps any disclosure that Rule 16(a)(1) might otherwise require.

disclosure under Rule 16(a)(2) and the Jencks Act? We will consider these questions in turn.

a. *What Hearsay-Related Information Does Rule 16(a)(1) Require to Be Disclosed?*

Of the five categories of discoverable information listed in Rule 16(a)(1), only one—Rule 16(a)(1)(A), which relates to discovery of the defendant's own statements—has attracted much attention as a tool for discovery of hearsay. In retrospect, that attention has proved unfortunate because 16(a)(1)(A) is ill-suited to that task and because litigation over 16(a)(1)(A) may have diverted attention from potentially more fruitful arguments. Instead, Rule 16(a)(1)(C)—which relates to discovery of documents and tangible objects—may offer more promise as a device for discovering prosecution hearsay before trial.[280]

i. Rule 16(a)(1)(A)

This subsection of the Rule establishes defendant's right to pretrial discovery of his own statements. On its face, it seems to have nothing to do with discovery of the out-of-court statements of anyone other than the defendant. For the first decade after the Rule took effect, however, defendants enjoyed some success in extending the reach of the Rule to cover an important and widely-used form of prosecution hearsay: the out-of-court statements of defendant's co-conspirators. Following the lead of Judge Weinstein,[281] a number of courts reasoned that, since co-conspirator statements are admissible under the hearsay rules as "vicarious admissions" of the defendant,[282] they should likewise be treated as defendant's statements for purposes of pretrial discovery.[283] The theory of co-conspirator statement discovery under Rule 16(a)(1)(A), however, reached its zenith by 1985.[284] Today, it

280. In requiring discovery of the basis of an expert opinion, Rule 16(a)(1)(E) also may bring about disclosure of some prosecution hearsay. In fact, it may reveal inadmissible hearsay which will nonetheless form the basis of the expert's opinion. *See* Fed. R. Evid. 703 (expert need not base opinion on admissible evidence).

281. *See* United States v. Percevault, 61 F.R.D. 338 (E.D.N.Y. 1973) (Weinstein, J.), *rev'd*, 490 F.2d 126 (2d Cir. 1974).

282. *See* Fed. R. Evid. 801(d)(2)(E). The rule classifies co-conspirator statements as "not hearsay." *Id.*

283. This breakthrough was especially significant in light of the growing number of drug and organized crime conspiracy cases in federal courts since the 1970s. Such cases often rely upon co-conspirator "hearsay" statements admissible under Rule 801(d)(2)(E), and discovery of such statements can be a critical step in preparing the defense.

284. *See* United States v. Roberts, 793 F.2d 580, 583-86 (4th Cir. 1986) (statements of co-conspirators discoverable under Rule 16(a)(1)(A) where co-conspirator not expected to testify as government witness), *rev'd en banc*, 811 F.2d 257, 258-59 (4th Cir. 1987); United States v. McMillen, 489 F.2d 229, 231 (7th Cir. 1972) (same);

stands rejected after a series of appellate decisions relying on the "plain language" of the Rule to establish that, Rule 801(d)(2)(E) notwithstanding, co-conspirators are not "the defendant" and their statements are not discoverable under Rule 16(a)(1)(A).[285]

Despite its early success, Rule 16(a)(1)(A) seems unlikely to be resurrected as a tool for discovering co-conspirator hearsay, and probably for good reason.[286] Aside from the fact that the "vicarious admission" theory stretches both the language and the purpose of the Rule, the theory seems doomed for more practical reasons as well. The government typically comes into possession of co-conspirator statements through one of three means: either (1) a co-conspirator makes post-arrest statements to a law enforcement agent who reports them in a memorandum and will testify about them at trial; or (2) during the course of criminal activity, a co-conspirator makes statements to an undercover agent or informant who can then testify at trial regarding the statements; or (3) the government obtains an audio or video recording of a co-conspirator's statement in the course of committing the crime. Regardless of one's view of the "vicarious admission" theory, Rule 16(a)(1)(A) is either unhelpful or unnecessary in each of these three cases. In the first case, the vicarious admission theory does not even apply, because the post-arrest statement is not made "in furtherance of the conspiracy" and, hence, would not be admissible under Rule 801(d)(2)(E) in any event. In the second case, in order to disclose the co-conspirator's statement, the government must also disclose the "statement" of a prospective

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United States v. Konefal, 566 F. Supp. 698, 706 (N.D.N.Y. 1983) (same). By 1985, one treatise noted, the view reflected in these decisions was the "more widely accepted interpretation of R. 16(a)(1)(A)." *See* 8 Jeremy C. Moore et al., Moore's Federal Practice ¶ 16.05[1], at 16-77 (2d ed. 1985).

In a clear example of the widening hearsay-discovery imbalance, federal courts retreated from this rule of discovery at the same time the Supreme Court was expanding the admissibility of co-conspirator hearsay. *See* Bourjaily v. United States, 483 U.S. 171, 176-81 (1987) (holding that Federal Rule of Evidence 104(a) modified the traditional "bootstrapping" rule of *Glasser v. United States*, 315 U.S. 60, 74-75 (1942), which had required independent evidence of conspiracy as a foundation for the admission of co-conspirator statements); United States v. Inadi, 475 U.S. 387, 400 (1986) (abandoning the unavailability requirement for admission of co-conspirator hearsay under the Confrontation Clause).

285. *See* United States v. Rivera, 6 F.3d 431, 439 (7th Cir. 1993); United States v. Tarantino, 846 F.2d 1384, 1418 (D.C. Cir. 1988); *In re* United States, 834 F.2d 283, 286-87 (2d Cir. 1987); United States v. Roberts, 811 F.2d 257, 258-59 (4th Cir. 1987) (en banc); *see also* United States v. Jackson, 757 F.2d 1486, 1493 (4th Cir. 1985) (Wilkinson, J., concurring) ("To attempt, as some courts have done, to justify discovery of the co-conspirator's statement as a 'vicarious admission' of the defendant is to make one person out of two . . . ." (citations omitted)).

286. In cases where one of the defendants is an organization such as a corporation or labor union, Rule 16(a)(1)(A) still carries some potential to provide pretrial access to some important hearsay statements. In 1994, the Rule was amended to require the government to disclose statements of corporate officers or agents whose words or conduct might legally bind the defendant organization.

government witness—the undercover agent or informant who will relate the hearsay at trial. Such a statement of a prospective government witness is protected from disclosure by the Jencks Act.[287] Finally, the "vicarious admission" theory is unnecessary in the third case because, as I outline below, the audio or videotape is a "document or tangible object" discoverable under Rule 16(a)(1)(C).

ii. Rule 16(a)(1)(C)

The unsuccessful effort to bring co-conspirator statements under Rule 16(a)(1)(A) was the defense bar's only sustained foray into hearsay-related discovery under Rule 16. That choice seems misguided in retrospect, not only for the reasons outlined above, but also because Rule 16(a)(1)(C) is a rule of potentially broader application when it comes to prosecution hearsay. Ironically, Rule 16(a)(1)(C) has been largely ignored as a device for discovering hearsay.[288]

Rule 16(a)(1)(C) gives defendants a right to discover any "documents and tangible objects" which are "material to the preparation of the defendant's defense" or which "are intended for use by the government as evidence-in-chief at the trial."[289] Though the Rule says nothing of hearsay, its language literally covers a broad category of important hearsay frequently used by prosecutors: out-of-court statements which the government will offer in evidence in their "original" written or electronically recorded form, rather than through the testimony of a third party.[290] Thus, documents and tangible objects discoverable under Rule 16(a)(1)(C) can include some of the most critical hearsay a defendant may face. For example, Rule 16(a)(1)(C) would include: the tape recording of a phone call between co-conspirators discussing an upcoming transaction involving the defendant; the medical record reflecting a child's account of sexual abuse; a murder victim's recorded "911" call; an accomplice's videotaped confession to police; and, more routinely, a wide variety of business or public records documenting anything from complex

287. 18 U.S.C. § 3500(a) (1994).

288. In the many cases debating discovery of co-conspirator statements under Rule 16(a)(1)(A), most defendants appear to have ignored the alternative argument that Rule 16(a)(1)(C) permits discovery of co-conspirator statements contained in "documents" (other than internal government memoranda) or in "tangible objects" such as audio tapes.

289. Fed. R. Crim. P. 16(a)(1)(C). The Rule also applies to documents and things which were "obtained from or belong to the defendant." *Id.* On occasion, such items might contain important admissible hearsay, such as a co-conspirator's statements recorded on defendant's answering machine or found in a letter written to the defendant.

290. The function of the third-party witness in introducing such hearsay is to authenticate the document or recording that contains the hearsay statements. *See* Fed. R. Evid. 901.

financial transactions to the daily weather.[291] Indeed, such hearsay can have special impact on a jury precisely because it is in writing, or in a tangible, audible, or viewable form.[292]

Of course, not every government document or tape recording is discoverable under Rule 16(a)(1)(C) simply because it contains a hearsay statement the government may offer at trial. Rule 16(a)(2) precludes discovery of internal government memoranda. Such a memorandum would not become discoverable merely because it reported hearsay.[293] Likewise, the Jencks Act protects against compelled pretrial disclosure of any statement of a witness who will testify at trial for the government. The testifying witness's statement does not become discoverable merely because it recites hearsay statements of someone else. Still, the potential reach of Rule 16(a)(1)(C) as a device for discovering written or recorded hearsay is significant; it applies typically where the government possesses the most devastating forms of hearsay: statements written by the declarant, or recorded from the declarant's own mouth.[294]

There remains, however, a potential roadblock to discovery of hearsay under Rule 16(a)(1)(C). Hearsay statements cannot be the subject of a pretrial discovery order if the hearsay declarant is a

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291. Given the scarcity of reported decisions, it is hard to gauge how frequently today's criminal defendants employ Rule 16(a)(1)(C) in this manner, or how often federal courts support those efforts. Certainly prosecutors routinely disclose volumes of documentary evidence under the Rule without giving a moment's thought to the fact that they are really disclosing the written or reported statements of multiple, sometimes anonymous, hearsay declarants. But whether prosecutors and courts always view audio and video recordings of hearsay—or even some forms of written hearsay—as discoverable under 16(a)(1)(C), is far from clear. A number of decisions seem to assume that such recordings are "tangible objects" discoverable under 16(a)(1)(C). Throughout the co-conspirator hearsay debates under 16(a)(1)(A), however, defendants and courts alike seemed to ignore the possibility that tape recordings of co-conspirator statements were discoverable under an alternate theory provided by 16(a)(1)(C).

292. An audio or videotape, for example, brings the declarant's voice to the jury's ears or his image to their eyes. Jurors are more likely to remember and place emphasis upon such statements than upon hearsay that is merely related by another government witness.

293. If an agent testified at trial regarding hearsay he recorded in a memorandum, however, the memorandum might then become discoverable after his direct testimony. The agent would be a "witness called by the United States," and his prior written statement—the memorandum—would be subject to discovery at trial under the Jencks Act, 18 U.S.C. § 3500(b). *See* United States v. Welch, 810 F.2d 485, 490-91 (5th Cir. 1987).

294. Rule 16(a)(1)(C) can operate not only to require disclosure of documentary or recorded hearsay, but also to provide additional discovery relating to that hearsay. The Rule covers documents and things "material" to preparation of the defense, a category broad enough to include any document or tangible evidence that may shed light on the credibility of the declarant or the circumstances under which the hearsay statement was made. Thus, a defendant may invoke Rule 16(a)(1)(C) before trial, first, to obtain access to written and recorded hearsay in government hands, and second, to gather some of the ammunition that may assist in impeaching a hearsay declarant or discrediting a hearsay statement.

"government witness" under the Jencks Act. To that question we turn next.

b. *Are Hearsay Declarants "Witnesses" or "Prospective Witnesses" Whose Statements are Protected by Rule 16(a)(2) and the Jencks Act from Compelled Pretrial Disclosure?*

We often think of the Jencks Act as a rule of discovery. It functions that way at trial. After a government witness has testified on direct examination at trial, the Jencks Act requires the government, upon defendant's request, to produce a narrowly defined category of the witness's prior statements.[295]

In the first instance, however, the Jencks Act is a rule against compelled discovery. The first sentence of the Jencks Act provides:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena [sic], discovery, or inspection until said witness has testified on direct examination in the trial of the case.[296]

Rule 16(a)(2) makes it clear that, as a rule against compelled pretrial discovery, the Jencks Act trumps any provision in Rule 16(a)(1) that might otherwise require pretrial disclosure of government witness statements.[297] To determine whether Rule 16 creates any right to discover hearsay before trial, therefore, we must first determine whether the hearsay declarant is a "Government witness or prospective Government witness" under the Jencks Act. If

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295. The Jencks Act states:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

18 U.S.C. § 3500(b).

Under the Jencks Act, a "statement" is: (1) a written statement made by the witness; (2) "a stenographic, mechanical, electrical or other recording;" or (3) a grand jury transcript. 18 U.S.C. § 3500(d). The notes or memoranda of an agent or attorney reporting the substance of an interview with a witness are not "statements" of the witness under the Jencks Act unless the notes or memoranda are shown to the witness and "signed or otherwise adopted or approved" by her. *See* United States v. Roseboro, 87 F.3d 642, 645-46 (4th Cir. 1996) (defendant not entitled to discover agent's notes where agent did not read them in their entirety to witness and ask witness to approve them); United States v. Ramos, 27 F.3d 65, 69-70 (3d Cir. 1994) (defendant not entitled to discover agent's notes which were neither verbatim recital of interview nor writings signed or approved by witness).

296. 18 U.S.C. § 3500(a).

297. Rule 16(a)(2) provides: "Nor does [Rule 16] authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500." Fed. R. Crim. P. 16(a)(2).

she is a witness, then her hearsay statements are not discoverable until trial. If she is not, then—as we explored in the previous section—Rule 16(a)(1)(C) may authorize discovery of a wide range of documentary and electronically recorded hearsay and related information.[298]

At the outset, we can set aside one category of declarant from all the others. The declarant whom the government expects to call at trial is obviously a "prospective Government witness" as described in the Jencks Act. The clear language of the Jencks Act prohibits compelled pretrial disclosure of her statements. But what of the more typical hearsay declarant—the one who is never expected to testify at trial?

There are more than a few reasonable arguments for treating nontestifying declarants as "witnesses" under the Jencks Act. We might begin with a textual argument. After all, the word "witness," in its broadest sense, simply means someone who sees, hears, or perceives an event. Hearsay declarants certainly fit that definition. Functionally, hearsay declarants fit an even narrower definition of the term "witness." The government uses hearsay declarants, like other "witnesses," to relate information to the jury. Hearsay declarants simply do so indirectly through the words of a testifying witness or through a writing or recording.

There is more to the textual argument. The Jencks Act restricts discovery regarding government witnesses "other than the defendant." But the Fifth Amendment prohibits the government from calling the defendant as a prosecution witness.[299] He could only be a "government witness," therefore, through the admission in evidence of his earlier hearsay statements. If hearsay declarants are not "witnesses" under the Jencks Act, one could argue, there would be no need to include the phrase "other than the defendant" in its text. To avoid treating that phrase as meaningless surplusage, the textualist might argue, hearsay declarants must be "witnesses."

We could turn next to judicial interpretation of the Rule. In an en banc ruling on discovery of co-conspirator statements, the Fourth Circuit embraced a government argument that discovery was precluded under Rule 16(a)(2) and the Jencks Act.[300] The court found that even nontestifying co-conspirator declarants should be treated like testifying "government witnesses" under the Jencks Act. Its decision rested on a broad view of the "witness safety" purposes which gave rise to the Jencks Act. The Fourth Circuit majority argued that treating declarants as "witnesses" under the Jencks Act comports with the congressional purpose of protecting from pretrial harassment

298. *See supra* text accompanying notes 289-94.

299. *See* Harris v. New York, 401 U.S. 222, 225 (1971) (stating that criminal defendants have an unqualified right not to testify).

300. *See* United States v. Roberts, 811 F.2d 257, 258-59 (4th Cir. 1987) (en banc).

or intimidation those who provide information which the government needs to prove its case.[301] That approach, the court noted, also provides an added measure of protection for those testifying witnesses who must relate spoken hearsay at trial, since disclosure of hearsay could likewise disclose the identity of the testifying witness and the information he provided to the government.[302] The Fourth Circuit does not stand alone. The Second Circuit likewise has applied the Jencks Act to overturn a pretrial order compelling the government to disclose statements of nontestifying co-conspirators.[303]

There is also an attractive constitutional basis for treating hearsay declarants as "witnesses" under the Jencks Act. In applying the Confrontation Clause to hearsay, the Supreme Court has explicitly stated that the hearsay declarant is a "witness against" the accused for Sixth Amendment purposes.[304] Congress passed the Jencks Act in part to implement the Court's ruling in *Jencks v. United States*,[305] a decision which—though not explicitly based on constitutional principle—was clearly driven by Confrontation Clause concerns.[306] If the Jencks Act, at least indirectly, is a child of the Confrontation Clause, then it makes sense to interpret the key term in the Jencks Act just as we interpret the same term in the Sixth Amendment. Following that reasoning, the declarant is a "witness" under both the Confrontation Clause and the Jencks Act.[307]

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301. *See id.* at 259 ("The phrase 'witness safety' incorporates our concerns about those persons whose inculpatory statements may be introduced at trial. The dichotomy the dissent would have us draw between declarants and witnesses is utterly unrealistic.").

302. *See id.*

303. *See In re* United States, 834 F.2d 283, 287 (2d Cir. 1987). At least one district court within the Second Circuit, however, contends that *In re United States* does not reach so far. *See* United States v. Murgas, 967 F. Supp. 695, 715 (N.D.N.Y. 1997) ("The Jencks Act has no application to the statements of those other than actual or prospective government witnesses. It does not expressly prohibit the pretrial cross-disclosure of nonwitness coconspirator codefendant statements. Indeed, that particular issue could not have even been before the Second Circuit in *In re United States*.").

304. *See* White v. Illinois, 502 U.S. 346, 352 (1992). For a more detailed discussion of the status of declarants as "witnesses" under the Confrontation Clause, see Douglass, *supra* note 6, at 225-26; *supra* note 44.

305. 353 U.S. 657 (1957).

306. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 68 (1987) (Brennan, J., dissenting) ("*Jencks* was based on our supervisory authority rather than the Constitution, 'but it would be idle to say that the commands of the Constitution were not close to the surface of the decision.'" (quoting Palerno v. United States, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring))).

307. In a previous article, I suggested that the Court's treatment of declarants as "witnesses" under the Confrontation Clause called for similar treatment under the Jencks Act:

> The Jencks Act provides for the discovery of the witness's statements "[a]fter a witness called by the United States has testified on direct examination." For Confrontation Clause purposes at least, the Court tells us that a hearsay declarant is a "witness against" an accused. The hearsay

Finally, treating declarants as "witnesses" under the Jencks Act fits neatly with their treatment under Rule 806 of the Federal Rules of Evidence. Rule 806 provides that the opponent may attack the declarant's credibility with any evidence that would be admissible for that purpose if the declarant testified in person.[308] When a government witness testifies at trial, the Jencks Act requires the government to disclose prior statements by the witness on the same subject matter.[309] Such "Jencks material" often forms the grist for defendant's cross-examination. If Jencks applies to declarants just as to testifying witnesses, then it likewise requires production of the declarant's other relevant statements once hearsay is admitted in evidence. Rule 806 then permits defendant to use those statements to impeach the declarant just as he might use them in impeaching a testifying witness.

Despite this array of arguments, however, serious difficulties arise if we recognize the declarant as a "witness" under the Jencks Act. For one thing, we would put the Jencks Act and Rule 807 at odds. Rule 807 compels the government to disclose residual hearsay statements before trial. But if the declarant is a "government witness," then the Jencks Act forbids courts to compel the same disclosure that Rule 807 requires. The easy answer to that conflict may be that Rule 807, enacted years after the Jencks Act, is simply an exception to Jencks' general rule against compelled disclosure. Pretrial disclosure of residual hearsay is especially important, one might argue, so the exception makes sense.

But an even larger problem looms if nontestifying hearsay declarants are "witnesses" under the Jencks Act. Business records, public records, and other documents routinely disclosed by the government during pretrial discovery are chock full of assertions by declarants who will never testify. If such declarants are government witnesses covered by the Jencks Act, then no court could compel

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> declarant's "testimony," in the form of hearsay, is offered in evidence in the government's case-in-chief. As an exercise in interpreting statutory language, then, it takes no large leap to conclude that a declarant is a "witness called by the United States" under the Jencks Act and that she has in effect "testified on direct examination" once the government has introduced her hearsay statements.

Douglass, *supra* note 6, at 265-66.

While I continue to believe that a defendant's right to discover statements of government "witnesses" should extend to statements of hearsay declarants, I am now convinced that application of the Jencks Act to hearsay is far more complex than I originally believed. As I outline below, *see infra* text accompanying notes 309-18, there are perhaps equally persuasive arguments that at least some hearsay declarants should not be treated as "witnesses" under the Jencks Act. Of course, since the Jencks Act is a two-edged sword—requiring discovery at trial, but prohibiting pretrial discovery of witness statements—neither interpretation offers an unqualified opportunity to expand the range of hearsay-related discovery.

308. *See* Fed. R. Evid. 806.

309. *See* 18 U.S.C. § 3500(b) (1994).

production of such documents before trial under Rule 16(a)(1)(C). The absurdity of such a rule would be immediately apparent to any prosecutor or defense attorney who has ever tried a white-collar case, a money-laundering charge, an organized crime matter, or any other case where the government's proof includes a volume of significant documentary evidence. Of course, if all hearsay declarants are "witnesses" under the Jencks Act, then defendant has no right to pretrial discovery of the recorded 911 phone call of a victim, the videotaped post-arrest "statement against interest" of an accomplice, the medical record reflecting the child-victim's account of sexual abuse, or the tape-recorded phone call between his co-conspirators, even where the government expects to offer those very items in evidence at trial. It is hard to imagine that Congress expected the Jencks Act to gut Rule 16(a)(1)(C) so severely.

The "witness safety" rationale which led the Fourth and Second Circuits to extend Jencks protection to hearsay declarants is also open to question. Certainly, there are plenty of hearsay declarants for whom safety, intimidation, and witness tampering poses no concern at all. Some declarants are dead, some are inaccessible, and some are even anonymous. Moreover, unlike trial testimony, the content of hearsay is fixed before trial. No amount of tampering with the declarant will change the statement. Of course, tampering with a witness who might recount the declarant's out-of-court statement remains a problem. But, in most cases of written or recorded hearsay, there is no such witness. The jury gets the hearsay straight from the mouth—or the pen—of the absent declarant.[310] Using the Jencks Act to prevent pretrial disclosure of hearsay in every case seems like exploding a bomb to kill a mosquito. It may hit the desired target, but the residual damage is hard to justify.[311]

Finally, when it comes to judicial authority, there is precedent conflicting with the views of the Second and Fourth Circuits, but in a different context. In *United States v. Williams-Davis*,[312] the District of Columbia Circuit ruled on the defendant's request at trial for disclosure of Jencks material of a nontestifying hearsay declarant after the government introduced the hearsay in evidence.[313] The court held

310. One could theorize a "witness safety" concern for the witness whose testimony might be necessary to authenticate written or recorded hearsay. But such an argument seems far-fetched.

311. It is worth observing that Rule 807 of the Federal Rules of Evidence requires pretrial disclosure of the substance of hearsay, along with the name and address of the declarant. Yet Congress incorporated that notice requirement in the residual hearsay exceptions with no apparent fear for "declarant safety." There is no evidence that hearsay disclosure under the Rule has led to harassment of declarants. And if a particular case gave rise to realistic safety concerns, courts certainly have the power to delay disclosure.

312. 90 F.3d 490 (D.C. Cir. 1996).

313. *See id.* at 512-13.

that the declarant was not a "witness" under the Jencks Act and, accordingly, the Jencks Act created no right to discover the declarant's prior statements.[314] Reciting the arguments for and against treatment of the declarant as a "witness" under the Jencks Act, however, is easier than resolving the issue. Still, a few observations may point toward solutions. First, judicial interpretation of the Act has been inconsistent, and that inconsistency is unfair to defendants. When defendants have sought pretrial discovery, courts have shielded hearsay from disclosure by ruling that declarants are "witnesses" under the Jencks Act.[315] When defendants have sought discovery at trial, courts have denied discovery on the grounds that declarants are not witnesses.[316] In other words, "Heads, I win. Tails, you lose." Obviously, the government cannot have it both ways. At a minimum, defendants should be entitled to (1) discovery of written and recorded hearsay before trial with no restriction imposed by the Jencks Act, or (2) discovery at trial of all relevant prior statements of the declarant, after hearsay has been received in evidence. Either result, applied consistently, would improve the current state of affairs.

Second, it is at least worth considering whether a middle-ground might avoid some of the disadvantages of either interpretation of the Jencks Act. One could support an argument that some nontestifying declarants are "witnesses" under the Jencks Act, while others are not. In the Jencks Act, the word "Government" prominently precedes the word "witness." An observer of an event, one might argue, only becomes a "Government witness" when she testifies at trial[317] or a "prospective Government witness" when she reports her observations to the authorities for the purpose of using the information in a

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314. *See id.* at 513 ("[T]hat a declarant is treated as a witness for purposes of Rule 801(d)(2)(E) or Rule 806 does not mean he becomes one for purposes of the Jencks Act."). At least one federal district court has reached the same conclusion. *See* United States v. Padilla, No. S1-94-CR-313-CSH, 1996 WL 389300, at *2 (S.D.N.Y. July 11, 1996).

315. *See In re* United States, 834 F.2d 283, 286-87 (2d Cir. 1987); United States v. Roberts, 811 F.2d 257, 259 (4th Cir. 1987) (en banc).

316. *See Williams-Davis*, 90 F.3d at 512-13; *Padilla*, 1996 WL 389300, at *2.

317. In the Confrontation Clause context, Justice Scalia made a similar argument:

> The Sixth Amendment does not literally contain a prohibition upon [hearsay], since it guarantees the defendant only the right to confront "the witnesses against him." As applied in the Sixth Amendment's context of a prosecution, the noun "witness"—in 1791 as today—could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," *i.e.*, "[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." The former meaning (one "who knows or sees") would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses *against him*." The phrase obviously refers to those who give testimony against the defendant at trial.

Maryland v. Craig, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting).

prosecution.[318] Hearsay statements made under other circumstances by someone who will never testify in court—like the "statements" of a payroll clerk compiling a business record, a co-conspirator's phone call to order the next shipment of heroin, or even the frightened 911 call of an assault victim seeking aid—are not the statements of a "Government witness" under this view, even though the government might later choose to offer them in evidence in a criminal trial. A sworn statement to police or a videotaped interrogation of an accomplice, on the other hand, would be the statement of a "Government witness" even though the declarant never appeared in the courtroom.

There are several virtues to this middle-ground approach. First, it gives defendant pretrial access under Rule 16(a)(1)(C) to written or recorded hearsay which the government will put in evidence in its original form, except where the declarant made the statement in an interview with police or prosecutors. And statements to authorities in connection with prosecution are seldom admissible in any event,[319] except where the government relies on the residual exception.[320] In those cases, Rule 807 would provide an independent avenue for pretrial discovery.[321] Second, at trial this approach would provide discovery of Jencks material in cases where the government succeeded in introducing grand jury testimony of an unavailable declarant, post-arrest statements of an accomplice, or a victim's statement identifying her assailant to police. These and similar cases of hearsay created during criminal investigation are often the ones where impeaching a hearsay declarant is most important and where access to Jencks material is, therefore, most critical.[322] On the other hand, this middle-

318. At least one circuit has concluded that persons interviewed by government agents are "prospective Government witnesses" under the Jencks Act even if the government decides not to call them as witnesses. *See* United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). Logically, those same interviewees would remain "prospective Government witnesses" if the government intended to present their "testimony" in the form of hearsay through the mouth of the interviewing agent.

319. *See, e.g.*, Lilly v. Virginia, 119 S. Ct. 1887, 1901 (1999) (finding an accomplice's post-arrest confession not admissible under Confrontation Clause); Williamson v. United States, 512 U.S. 594, 600-01 (1994) (holding that only "genuinely self-inculpatory" portions of accomplice's post-arrest statement may be admitted under hearsay exception for statements against interest).

320. The many federal cases admitting grand jury testimony would fall in this category. *See supra* text accompanying notes 99-101.

321. The Rule 807 pretrial notice requirement would have to be viewed as an exception to the Jencks Act's prohibition on pretrial disclosure of statements of government witnesses. No other interpretation of the Rule, however, would make sense. Otherwise, Rule 807 and the Jencks Act would be hopelessly contradictory. *See supra* text accompanying notes 309-10.

322. As a general rule, these are the cases where the credibility and consistency of the declarant, rather than the circumstances giving rise to the statement, are our principal concern in assessing the accuracy of the statement. Hearsay created during the adversarial process of criminal investigation often carries the greatest dangers of unreliability. *See, e.g., Lilly,* 119 S. Ct. at 1905 (Rehnquist, C.J., concurring) (noting

ground approach would not require production of Jencks material relating to a business record or a co-conspirator statement—forms of hearsay which are viewed as reliable more because of the context in which they are made than because of the credibility of the declarant.[323] Finally, this approach to the "witness" dilemma may be most consistent with the witness-security aims of the Jencks Act. It provides comfort to witnesses approached by police investigators, and thereby encourages cooperation with authorities. But it does not preclude disclosure when the statement is made without regard to any criminal investigation.[324]

Admittedly, neither the "pick one" nor the middle ground solution to the declarant-as-witness dilemma is fully satisfactory.[325] A better solution would be to change the rules and eliminate the problem. The complexity of this issue, evidenced by the inconsistent judicial approaches, cries out for a legislative or rulemaking "clean up." The present muddle exists because rulemakers really gave no thought to hearsay when they wrote the discovery rules, and gave little thought to discovery when they wrote the hearsay rules.[326] A coordinated approach makes more sense.

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that "accusatory statements taken by law enforcement personnel with a view to prosecution" raise more serious reliability concerns than similar statements made to friends or family members outside of an investigative context); *cf.* Berger, *supra* note 28, at 561-62 (arguing that concerns over police power to manipulate evidence obtained through ex parte investigation was a principal concern underlying the right of confrontation).

323. *See* United States v. Inadi, 475 U.S. 387, 395 (1986) (noting that co-conspirator's in-court testimony "seldom will reproduce . . . the evidentiary value of his statements during the course of the conspiracy").

324. Of course, declarants whose statements merely found their way into police hands would not be without protection. Courts, in their discretion, can always delay disclosure in the face of real security concerns.

325. One problem with any middle-ground approach is that it adds a layer of complexity. It would require a court to determine if a statement was made in an investigative setting before deciding whether the Jencks Act applied. A rule applying consistently to all declarants would be simpler to administer.

There is another possible approach that would preserve both defendant's right to discover documentary hearsay under 16(a)(1)(C) and also his right to obtain the equivalent of "Jencks material" after a hearsay declarant testified at trial. Courts might adopt the view that a nontestifying declarant is not a "witness" for Jencks Act purposes, thereby freeing Rule 16(a)(1)(C) discovery of written or recorded hearsay from the impediments the Jencks Act would otherwise impose. Under this approach, the Jencks Act itself would create no right to "Jencks material" regarding the declarant even after the hearsay was introduced in evidence. Nevertheless, one might argue that the Confrontation Clause creates such a right, especially where the declarant's prior statements are essential to effective impeachment of the hearsay statements. *See* Douglass, *supra* note 6, at 267-68 (suggesting that Confrontation Clause creates right to discover prior statements of hearsay declarants); *cf.* Pennsylvania v. Ritchie, 480 U.S. 39, 61-62 (1987) (Blackmun, J., concurring) ("[T]here might well be a confrontation violation if . . . a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness.").

326. To add to the muddle, declarants—as "witnesses"—are not exactly fish and

The simplest step would be to amend Rule 16 by providing that nothing in subsection (a) of the Jencks Act would preclude pretrial discovery of any hearsay statement which the government will offer in evidence at trial.[327] Such a rule would at least remove the Jencks Act as an impediment to discovery of written and recorded hearsay under Rule 16(a)(1)(C) and would explicitly harmonize the Jencks Act with Rule 807 and any future hearsay-notice provisions that Congress might approve.[328] A helpful second step would be to amend subsection (b) of the Jencks Act to make it clear that, once hearsay is offered in evidence, the defendant is entitled to see any other statements the declarant may have made on the same subject matter. Without such a right, the defendant's opportunities for contesting hearsay under Rule 806 would be substantially diminished.

Amendments such as these would allow defendants to see and hear before trial the same written or recorded hearsay that the government expected the jury to hear. At trial, they would give the defendant the same basic tools to contest hearsay that the Jencks Act provides when a government witness testifies. Perhaps most important, they would bring predictable rules to a difficult area where, so far, judicial inconsistency has added to the hearsay-discovery imbalance that already plagues criminal cases.

B. *Discovering Ammunition to Impeach the Hearsay Declarant*

Learning what hearsay "fastballs" the government may throw is only the first step in contesting prosecution hearsay. The next step is gathering ammunition that will help to impeach the declarant's story. In the case of a testifying government witness, much of the ammunition a defendant needs for impeachment rests in government files. During investigation, the government may have assembled a substantial volume of information about key government witnesses. Often, the prosecutor's file will contain notes and memoranda of interviews, transcripts of grand jury testimony, written statements and documents, or correspondence authored by the witness. In the case of cooperating or immunized witnesses, the government will have the agreements reflecting any benefits available to the witness as a result

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not exactly fowl. They function like witnesses. But only on limited occasion do they pose the same witness-security concerns as testifying witnesses.

327. Alternatively, an even more cautious approach would provide that nothing in subsection (a) of the Jencks Act would preclude pretrial discovery of any statement of a *nontestifying* declarant which the government expected to offer in evidence at trial. This approach would give testifying declarants the same protection as other witnesses.

328. A broader approach would be to repeal subsection (a) of the Jencks Act altogether. That would at least allow federal courts, in their discretion, to order pretrial discovery of witness statements in those circumstances where witness security was not a significant concern. Of course, that solution takes us well beyond hearsay, and into the broader debate about federal discovery reform generally. *See generally* Brennan, *A Progress Report*, *supra* note 13, at 11-14.

of her testimony. Police records will report the witness's prior arrests and convictions. Presentence reports often will contain unsavory details of the witness's past. Government agents may have memorialized statements of one witness that undercut the credibility of another.

In many cases, especially where hearsay is crucial to the prosecution's case, government files will offer a source of impeachment material for hearsay declarants no less fertile than that available for testifying witnesses.[329] The most obvious example would be the now-unavailable declarant whose former testimony the government plans to offer under Federal Rule of Evidence 804(b)(1) or Rule 807. In an earlier proceeding—perhaps at a preliminary hearing, before a grand jury, or even in an earlier trial—the government already examined that witness. As a result, the government's files are likely to include the kinds of information assembled for any other testifying witness. Co-conspirator hearsay,[330] a staple of modern federal prosecutions, comes from a class of declarants—usually the defendant's confederates in crime—in whom the government obviously has an investigative interest, and about whom it is likely to have obtained considerable, often unflattering information. Young child-abuse victims, whose stories often emerge at trial through the mouths of others, quite often will have been interviewed by police, physicians, or counselors. The records of those contacts may prove critical in assessing the credibility of child declarants. In all of these instances, and more, government files may contain a raft of raw material useful for impeachment of the hearsay declarant.

Federal criminal defendants have three basic tools for discovering ammunition to impeach government witnesses. First, *Brady v. Maryland*[331] creates a constitutional right to discovery of exculpatory evidence. Second, Rule 16(a)(1)(C) allows for discovery of documents and tangible items that may serve to impeach a witness. Third, once a witness testifies at trial, the Jencks Act requires the government to disclose all relevant written or recorded statements of the witness.[332] Properly applied, these same three tools can provide a defendant a fair opportunity to impeach prosecution hearsay.

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329. In other instances, of course, the government is likely to have assembled a much slimmer record—if any at all—regarding hearsay declarants whose statements it will offer at trial in the form of hearsay. After all, investigating agents are unlikely to devote significant effort to compiling dossiers on individual payroll clerks whose collective input creates a report admissible at trial under the business records exception to the hearsay rule.

330. *See* Fed. R. Evid. 801(d)(2)(E).

331. 373 U.S. 83 (1963).

332. *See* 18 U.S.C. § 3500(b) (1994).

1. Applying *Brady* and *Giglio* to Hearsay

The Due Process Clause creates limited rights to discover exculpatory material.[333] In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[334] A decade later, in *Giglio v. United States*,[335] the Court extended *Brady* to evidence which undermined the credibility of a government witness. *Brady* and *Giglio* establish the right to discover a significant variety of information critical to the cross-examination of government witnesses.[336] For example, courts have found *Brady* violations in the nondisclosure of benefits offered to a witness in exchange for testimony, a witness's prior criminal convictions, "bad acts," or inconsistent statements.[337]

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333. Aside from the basic Sixth Amendment right of an accused to "be informed of the nature and cause of the accusation," *see* U.S. Const. amend VI, the Constitution does not address criminal discovery rights. Perhaps not surprisingly, then, the Court has made it clear that defendants have no comprehensive constitutional right to learn the government's evidence before trial. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

334. *Brady*, 373 U.S. at 87.

335. 405 U.S. 150 (1972).

336. Although *Brady* is typically regarded as a tool of pretrial discovery, it is not a rule of fixed time limits. Belated *Brady* disclosures seldom lead to reversal of convictions, as long as the information becomes available in time for defendant to use it at trial. Moreover, the Jencks Act, which prohibits discovery of a government witness's "statements" until after the witness has testified on direct examination, can preclude pretrial discovery of the witness's prior inconsistent statements absent government agreement to earlier disclosure. *See* United States v. Trevino, 89 F.3d 187, 189 n.2 (4th Cir. 1996); United States v. Lewis, 35 F.3d 148, 151 (4th Cir. 1994).

337. *See, e.g.*, East v. Scott, 55 F.3d 996, 1004 (5th Cir. 1995) (requiring disclosure of a witness's criminal history); United States v. Kelly, 35 F.3d 929, 936-37 (4th Cir. 1994) (requiring disclosure of witness's suspicious banking activity and cult membership); Jacobs v. Singletary, 952 F.2d 1282, 1287-89 (11th Cir. 1992) (requiring disclosure of witness's prior inconsistent statements); United States v. Kiszewski, 877 F.2d 210, 215-16 (2d Cir. 1989) (requiring disclosure of agent-witness's personnel file containing allegations of professional misconduct).

Still, *Brady* is far from a rule requiring pretrial disclosure of all information useful to defense counsel in preparing to cross-examine government witnesses. It falls short of that mark in at least two important respects. First, since the *Brady* rule applies only to "exculpatory" information and not to incriminating or merely neutral information, *Brady* does not protect a defendant against inculpatory surprises—against government "land mines." *Brady* discovery alone, then, provides defense counsel incomplete information in making the important tactical choices of which lines of questioning to pursue, or even whether to cross-examine a given witness at all. Second, although *Brady* generally requires disclosure of a government witness's prior inconsistent statements, without access to the full record of all the witness's prior statements the defendant may miss important opportunities for impeachment by omission or subtle change in emphasis. *See* Jencks v. United States, 353 U.S. 657, 667 (1957).

> Flat contradiction between the witness's testimony and the version of events given in his reports is not the only test of inconsistency. The omission from

Brady and *Giglio* should apply just as readily where the "witness" to be impeached is a hearsay declarant, even though she may never appear in person at trial.[338] Information is discoverable under *Brady* where it is both "favorable to an accused" and "material." Undisclosed evidence is "material" under *Brady* where there is "a reasonable probability that its disclosure would have produced a different result."[339] Information impeaching a hearsay declarant can fit comfortably within that formula. First, incriminating hearsay, just like the testimony of a live government witness, can lead a jury to convict. Accordingly, evidence impeaching that declarant is just as "favorable" as evidence impeaching a live witness. And, in appropriate cases, evidence impeaching a hearsay declarant will meet the *Brady* standard of "materiality." Although hearsay is "second hand" testimony, it is not always "second rate." It is not hard to find cases where an absent hearsay declarant is the government's star witness.[340] While it is probably true that juries tend to discount hearsay in comparison to live testimony,[341] that tendency makes it no

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> the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness's trial testimony.

Id.

338. Surprisingly, there are only a small handful of reported cases applying *Brady* principles to discovery aimed at impeachment of hearsay declarants. *See, e.g.*, United States v. Williams-Davis, 90 F.3d 490, 513-14 (D.C. Cir. 1996) (finding that the requested material was not in fact favorable to the defense); United States v. Hawryluk, 658 F. Supp. 112, 116-17 (E.D. Pa. 1987) (granting defendant's request for production of documents in part). But there seems to be no controversy over the notion that *Brady* applies to information impeaching hearsay declarants, just as it applies to impeachment material for testifying witnesses. Both *Williams-Davis* and *Hawryluk* readily reach that conclusion.

339. Kyles v. Whitley, 514 U.S. 419, 422 (1995). That "reasonable probability," the Court tells us, arises "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* at 434 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)). If the undisclosed evidence relates solely to impeachment of a government witness, then it is "material" only when there is (1) a reasonable probability that it would affect the jury's assessment of the witness's credibility, and (2) a reasonable probability that the witness's testimony would affect the outcome of the trial. Nondisclosure of powerfully impeaching evidence may not constitute a *Brady* violation where it relates to the credibility of a witness whose testimony is insignificant or merely cumulative. Similarly, nondisclosure of evidence relating to a crucial government witness may not violate *Brady* where its impeachment value is limited, or where the defendant had other, equally effective means of impeaching the witness.

340. *See, e.g.*, Lilly v. Virginia, 119 S. Ct. 1887 (1999) (declarant is defendant's brother and accomplice in robbery-murder); White v. Illinois, 502 U.S. 346, 349-50 (1992) (young child, alleged victim of abuse, is hearsay declarant); Idaho v. Wright, 497 U.S. 805, 809 (1990) (same); Mattox v. United States, 146 U.S. 140, 142 (1892) (declarants are two key witnesses in murder case).

341. *See* Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 Minn. L. Rev. 703, 719-22 (1992) (concluding that jurors rely more heavily on eyewitness testimony than on hearsay); Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 Minn. L. Rev. 683, 688-

less likely that information impeaching a hearsay declarant will satisfy the *Brady* standard of materiality. Impeaching evidence which provides the "last straw" which would cause the jury to reject entirely the already-discounted story of a hearsay declarant is no less material than evidence which might raise the first glimmer of doubt about an otherwise unimpeached witness who testifies in person.

Moreover, treating declarants as witnesses for *Brady-Giglio* purposes is consistent with the Supreme Court's treatment of hearsay declarants under the Confrontation Clause. The Court insists that the hearsay declarant is a "witness against" an accused within the meaning of the Sixth Amendment.[342] It would make little sense to ignore the declarant's role as "witness" in applying discovery principles under the Due Process Clause.

While it seems clear as a general notion that *Brady* applies with equal force to information which may impeach a hearsay declarant, hearsay does present some special considerations in applying the *Brady* materiality standards. Three important differences come to mind. The first, and most obvious, is a matter of timing. Consider, for example, the classic method of impeachment designed to demonstrate bias or self-interest of the witness. The cross-examiner may confront the witness with her plea agreement, demonstrating that she has bargained for a sentence reduction in exchange for testimony. Implicitly at least, counsel's questions will suggest that the witness has shaded her story to please the government in an effort to win a more favorable sentencing recommendation. The plea agreement is significant, and its nondisclosure may violate *Brady*, because it relates to the witness's self-interest at the time she testifies. By contrast, a hearsay declarant "testifies" before trial, at the time she utters the hearsay statement. To be "material" for *Brady* purposes, impeaching information relating to self-interest must reflect the declarant's motivation at the time she made the hearsay statement. Thus, for example, if the hearsay consists of the recorded statements of a co-conspirator declarant during the course of the conspiracy, a plea agreement signed following arrest weeks later is not "material" under *Brady*, though that same agreement may well be material if the same declarant had made the same statements as a testifying witness at trial.[343]

92, 699 (1992) (concluding that jurors discounted hearsay in comparison to other evidence).

342. *See White*, 502 U.S. at 353.

343. *Bowman v. Gammon*, 85 F.3d 1339 (8th Cir. 1996), offers a straightforward example of this timing issue. There, the state's principal witness, Anthony Lytle, initially offered testimony on direct examination that failed to implicate Bowman in the charged murder. The state then introduced the text of a prior inconsistent statement, given by Lytle to the police, in which he claimed to have seen Bowman stab the victim to death. In his live testimony, Lytle said his hearsay statement was a lie, induced by police mistreatment. On federal habeas corpus review, Bowman

A second special consideration in applying *Brady* materiality concepts to hearsay can arise from the context in which the declarant utters the hearsay statement. Some hearsay consists of former testimony in a judicial proceeding. But most hearsay arises from a context quite different from the courtroom. That difference can matter when we attempt to assess the impeachment value—and therefore the "materiality" under *Brady*—of some types of evidence relating to the hearsay declarant. When the patient tells the doctor "where it hurts," for example, we expect the patient to reply truthfully out of pure self-interest.[344] An oath and cross-examination hardly seem necessary.[345] It is the context that lends credibility to the

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claimed a *Brady* violation when the government failed to disclose an alleged "secret deal" which provided sentencing benefits to Lytle. The district court found that there was such a deal and that it had not been disclosed before trial. Normally, of course, nondisclosure of a government "deal" with a significant prosecution witness would be a classic *Brady* violation. *See* United States v. Agurs, 427 U.S. 97, 103 (1976). But on these facts, the district court found no *Brady* violation and the Eighth Circuit affirmed. The critical fact was the timing of the "deal" in relation to the hearsay statement. The deal was struck sometime after Lytle made the hearsay statement implicating Bowman in the murder. The deal could not have motivated Lytle to lie in his earlier statement. The undisclosed deal, therefore, was not "material" under *Brady*. *See Bowman*, 85 F.3d at 1343-44; *see also Williams-Davis*, 90 F.3d at 514 ("Many of [the declarant's] statements introduced at trial were recorded as he and others went about committing the crimes, and it seems improbable that these would be vulnerable to impeachment. All the statements of his that were admitted were made before his arrest, so that they could not have been affected by his later plea agreement." (emphasis omitted).

Other methods of impeaching a hearsay declarant may not raise such concerns about timing. In cases of impeachment by inconsistent statement, for example, it may not matter whether the declarant uttered the inconsistent version before or after making the statement which the government offers in evidence at trial. The declarant's change of story, at either time, could affect the jury's view of her credibility. The same analysis might apply to the declarant's criminal convictions or "bad acts." Though the conviction or the act might occur after the declarant made the hearsay statement, they still might be probative of an untrustworthiness that would affect the jury's assessment of the declarant's credibility.

344. *See* Fed. R. Evid 803(4) advisory committee's note.

345. In the courtroom, we rely on three basic conditions to promote reliable testimony, or at least to permit the jury to detect unreliable testimony. First, the witness testifies under oath, a process which, in theory at least, both "induce[s] in the witness a feeling of special obligation to speak the truth," McCormick Hornbook, *supra* note 2, at 426, and subtly reminds her of the legal sanction of a perjury conviction for lying. Second, the witness faces both the accused and the jury, in person, when she testifies. Personal presence serves both to chasten the witness—it is harder to lie before an audience, and especially to lie "to the face" of the subject of the falsehood—and to permit the jury to assess credibility by observing the demeanor of the witness. Finally, the defendant can cross-examine the testifying witness. The very prospect of cross-examination tends to induce truth-telling, while cross-examination itself exposes limits, inconsistencies, and personal weaknesses that the jury may take into account in assessing credibility.

The principle justification for the hearsay rule, of course, is that some or all of those three protections are absent when the declarant tells her story outside of the courtroom. Still, a great deal of hearsay is admissible under exceptions to that general rule. Typically, we justify those exceptions where the circumstances

statement, not the honesty or dishonesty of the declarant. In weighing the evidentiary value of some admissible hearsay, then, the circumstances under which the statement was made can be more important than any assessment of the personal trustworthiness of the declarant. Because the personal trustworthiness of the declarant may play a limited role in evaluating some forms of hearsay, information relating to a declarant's honesty may prove less "material" under *Brady* than similar information that would impeach a live witness. Conversely, since the circumstances surrounding the hearsay statement may be critical to an assessment of its truth, information raising questions about those circumstances is especially likely to meet the materiality standard of *Brady*.

An example helps to illustrate the difference. Imagine a defendant, "Dan," on trial for conspiracy to distribute cocaine. Imagine the government calls two co-conspirator witnesses, "Cory" and "Connie," who testify that they regularly went to Dan's house to pick up packages of cocaine. If the prosecution possesses records showing that Cory had three prior convictions for perjury, and that Connie twice falsified her name and personal data to obtain employment, chances are strong such information may be "material" to Dan's defense under the *Brady* standard because of its likely effect in impeaching the government's two principal witnesses.[346]

Now change the facts a bit. Assume now that Cory and Connie never testify at trial. Instead, the government plays an audio tape of a recorded phone conversation in which Cory tells Connie, "meet me at Dan's for the shipment," to which Connie responds, "Okay, but don't forget the money to pay Dan for our three kilos of you-know-what." The court admits the recording as the statements of co-conspirators under Federal Rule of Evidence 801(d)(2)(E). Under this scenario, Cory's perjury convictions and Connie's fraudulent acts take on far less significance in evaluating the evidentiary value of their statements. Both Cory and Connie may be untrustworthy characters. But now their personal trustworthiness seems less important than their obvious self-interest in being in the right place with the money to complete their transaction.[347] As a result, their convictions and

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surrounding the statement provide a reasonably adequate substitute for the usual in-court safeguards.

346. *See, e.g.*, East v. Scott, 55 F.3d 996, 1004 (5th Cir. 1995) (finding witness's criminal history "material"); United States v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994) (considering a witness's suspicious banking activity and cult membership "material" under *Brady*); United States v. Kiszewski, 877 F.2d 210, 215-16 (2d Cir. 1989) (holding agent-witness's personnel file "material" where it contained evidence of professional misconduct).

347. As the Court noted in *United States v. Inadi*, 475 U.S. 387 (1986):

> When the Government... offers the statement of one drug dealer to another in furtherance of an illegal conspiracy, the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in

fraudulent acts are less likely to make a difference to a jury and therefore are less likely to be "material" for *Brady* purposes.[348] On the other hand, if the government possessed evidence that, at the time of the phone call, Cory and Connie were aware their calls were being recorded by police and that they had a motive to "frame" Dan, those facts might be powerful evidence of fabrication and thus "material" under *Brady*.

A third issue may arise in applying *Brady* principles to hearsay-related discovery. And this issue takes us back to the question of admissibility. What if the government fails to disclose information that would have led the court to exclude the hearsay altogether?[349] For example, imagine a case in which the court admits hearsay under a Rule 804 exception, finding that the declarant is "unavailable" because her whereabouts are unknown.[350] But imagine further that the prosecutor has neglected to look carefully through his file which,

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> furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

Id. at 395.

348. The diminished impeachment value of prior convictions or "bad acts" in impeaching co-conspirator statements is important for another reason as well. Often co-conspirators are tried together, and frequently the government's evidence includes the out-of-court statements of one or more co-conspirators admitted under Rule 801(d)(2)(E). A serious dilemma can arise where one defendant seeks to introduce a prior conviction to impeach a co-conspirator declarant who also happens to be a nontestifying codefendant. Admission of the conviction prejudices that co-defendant, but failure to admit it might limit the first defendant's right to challenge the hearsay statements.

In many cases the solution to that dilemma becomes apparent by recognizing the diminished value of a prior conviction to impeach most co-conspirator hearsay. If the conviction has limited impeachment value, but poses a significant risk of prejudice to the nontestifying co-defendant, then the court has discretion to exclude the conviction, either under Rule 609 or Rule 403. *Compare* United States v. Robinson, 783 F.2d 64, 67 (7th Cir. 1986) (affirming the trial court's refusal to admit a prior conviction for the purpose of impeaching hearsay where declarant was nontestifying co-defendant), *with* United States v. Bovain, 708 F.2d 606, 613 (11th Cir. 1983) (allowing prior convictions to impeach nontestifying co-defendant whose hearsay statements had been admitted in evidence).

349. Few federal courts have had occasion to consider the application of *Brady* principles where undisclosed evidence may have affected an evidentiary ruling. In *United States v. Williams*, 10 F.3d 1070, 1075-77 (4th Cir. 1993), the defendant argued that the government improperly withheld information that would have changed the trial court's ruling on a suppression motion. The Fourth Circuit "decline[d] to address definitively on the merits the issue of whether *Brady* should call for disclosure of material evidence at pre-trial suppression hearings." *Id.* at 1077. The court found that the nondisclosed information would not have affected the suppression decision in any event.

350. *See* Fed. R. Evid. 804(b) ("The following are not excluded by the hearsay rule if the declarant is unavailable as a witness."). Rule 804(b) creates hearsay exceptions for (1) former testimony, (2) dying declarations, (3) statements against interest, and (4) statements of personal or family history. *See id.*

in fact, contains a note from the declarant showing her new address.[351] Is such information "favorable to an accused" under *Brady* where it would lead to the exclusion of incriminating hearsay? If it is, then how do we apply the *Brady* materiality standard to such a case?[352]

The first question seems easy enough. *Giglio* tells us that the government must disclose information that serves to discredit a government witness. It follows that information would be at least as "favorable" under *Brady* where it would remove that witness's testimony from the trial altogether. Logically, the same analysis would hold true for information that would result in the exclusion of hearsay. What could be more favorable to the defense than to exclude the evidence altogether? One could argue, perhaps, that disclosure is required only where information negates the substance of a criminal charge, but not where it aids the defendant only "indirectly" by affecting an evidentiary or procedural ruling. But the language of *Brady* is quite broad, encompassing any "favorable" information, not just directly exculpatory evidence. Both *Giglio* and later comments from the Court seem to foreclose any narrower reading.[353]

The "materiality" issue is more complex. Normally, exculpatory information is "material" where there is a "reasonable probability that

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351. Under *Brady*, it would not matter whether the prosecutor's oversight was inadvertent or intentional. Bad faith is not an element of a *Brady* violation. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

352. Where *Brady* material may have an impact on admissibility, the timing of disclosure obviously takes on additional importance. Consider, for example, a case where the government seeks a pretrial ruling under the "residual" hearsay exception in an effort to introduce hearsay statements from a young child abuse victim to a social worker. To admit the statement, the court must find sufficient "circumstantial guarantees of trustworthiness." Fed. R. Evid. 807; *see also* Idaho v. Wright, 497 U.S. 805, 817-18 (1990) (stating that the Confrontation Clause requires courts to find "particularized guarantees of trustworthiness" in order to admit hearsay under the residual exception). In making that finding, the trial court may consider a variety of factors including, among others, the child's consistency in repeating the same information without contradiction on several occasions. *See id.* at 821-22. Imagine further that the government possesses a written or recorded prior statement of the child that is inconsistent with the account she gave to the social worker. Certainly, if the court admits the hearsay, the prior inconsistent statement is discoverable, as *Giglio* material, and perhaps also as *Jencks* material, so that the defendant can use it to impeach the declarant. But disclosure should come earlier, since the court must consider the inconsistent statement among the factors relating to admissibility. In such a case, the government's constitutional obligation to disclose *Brady* material affecting the admissibility determination would "trump" any time limits imposed by the Jencks Act, even if the court found the declarant to be a "witness" under the Jencks Act.

353. A passage in *United States v. Bagley*, 473 U.S. 667 (1985), supports the notion that *Brady* principles apply to any nondisclosures that adversely affect the defense, not simply to nondisclosure of information that is "directly" exculpatory. There, the Court stated that "the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond [to a discovery request] might have had on the preparation or presentation of the defendant's case." *Id.* at 683.

its disclosure would have produced a different result."[354] Where undisclosed information might affect the court's decision to admit hearsay, the issue of "materiality" requires a two-step inquiry. First, the court must determine whether the nondisclosed information would have changed the ruling that admitted the hearsay in evidence. Unlike most *Brady* "materiality" questions, which require a court to assess the likely impact of evidence on a jury's fact finding, this inquiry simply requires the court to reconsider a ruling under the law of evidence. The only difference is that the court now takes into account the previously undisclosed information. If the court would have admitted the same hearsay statements in any event, then the previously undisclosed information is not "material" under *Brady*, unless it would have impacted the trial in some other way.

But what if, as in our hypothetical case, disclosure of the information would have caused the court to exclude the hearsay altogether? The government's nondisclosure has allowed the jury to hear inadmissible hearsay. Under the typical *Brady* standard, a reviewing court still would not disturb the conviction unless it found a "reasonable probability" that the jury would have reached a different result without the inadmissible evidence.[355] But the typical *Brady* standard seems out of place here. Normally, when an appellate court finds that a jury has heard inadmissible hearsay, the court must reverse the conviction unless it finds the error was "harmless,"[356] a standard more generous to the defendant than the "reasonable probability" standard under *Brady*.[357] Which materiality standard should we apply?

One might argue that we should treat this case like other *Brady* nondisclosures, and require the defendant to show a "reasonable

354. Kyles v. Whitley, 514 U.S. 419, 422 (1995).

355. *See supra* note 168 and accompanying text.

356. In cases of nonconstitutional error, a conviction will be set aside where the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kyles*, 514 U.S. at 435 (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)). Some errors in the admission of hearsay may fall in that category. But, because the standard for hearsay admissibility under the Confrontation Clause has been tied so closely to the hearsay rules themselves, *see* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (finding that hearsay falling within a "firmly rooted" exception is presumptively admissible), many errors in admitting hearsay against criminal defendants will amount to constitutional error as well. In such cases, the standard for harmless error is more generous to the defendant, requiring that a conviction be reversed unless the error was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967); *see also* Lilly v. Virginia, 119 S. Ct. 1887, 1901 (1999) (calling for the application of the *Chapman* standard where hearsay was admitted in violation of Confrontation Clause).

357. The Court has explicitly recognized that the *Brady* standard of materiality imposes a higher burden on the defendant than the harmless error standard for nonconstitutional errors. *See Kyles*, 514 U.S. at 435-36. The defendant's burden is lower still in cases of constitutional error, such as Confrontation Clause violations. *See supra* note 356.

probability" of a different outcome. After all, why should the government pay the heavier price when it fails to disclose information that only indirectly relates to guilt? But the better argument favors use of the "harmless error" standard. It would be anomalous for the government to profit from a higher standard where its own failure to disclose exculpatory information led to the erroneous admission of the evidence in the first place. It makes more sense to treat this case like any other where a court admits evidence in error. The error requires reversal and a new trial, unless it is "harmless."

In sum, though hearsay raises a few special considerations in applying *Brady*'s materiality standard, the general principles of *Brady* should apply with equal force when the target of impeachment is hearsay rather than live testimony. Indeed, courts should demand an even more exacting adherence to *Brady* in the case of hearsay, where the lack of traditional cross-examination increases the danger of undiscovered contradictions. Properly applied, *Brady* should be a defendant's principal tool for compelling disclosure of material for impeachment of hearsay.

2. Rule 16(a)(1)(C)—Documents Material to Preparation of the Defense

Earlier, I discussed Rule 16(a)(1)(C) as a tool for obtaining pretrial disclosure of written or recorded hearsay which the government intends to offer in evidence at trial.[358] The Rule has a second function relating to government hearsay. Its broad command to disclose documents and tangible items "material to the preparation of defendant's defense" should encompass any items which may assist a defendant in preparing to impeach or rebut a hearsay statement. Such items might range from a declarant's "rap sheet," to crime scene photos depicting a declarant's obstructed vantage point, to written correspondence suggesting inconsistencies or ambiguities in a declarant's account of events.

For most such items, Rule 16 overlaps with *Brady*. Any tangible item "material" under the *Brady* standard should be covered by Rule 16(a)(1)(C) as well.[359] But a specific Rule 16 request for items shedding light on government hearsay may require the government to go beyond *Brady*. In theory at least, the threshold of "materiality" under Rule 16 is lower than under *Brady*.[360] *Brady* "materiality"

358. *See supra* text accompanying notes 288-94.

359. The Advisory Committee's Notes to Rule 16 reflect that the Rule was designed to encompass *Brady* material: "Although the Advisory Committee decided not to codify the Brady Rule, the requirement that the government disclose documents and tangible objects 'material to the preparation of his defense' underscores the importance of disclosure of evidence favorable to the defendant." Fed. R. Crim. P. 16 advisory committee's notes to 1974 amendment.

360. In practice, many courts seem to merge the two. Often, courts simply treat

requires a showing that undisclosed evidence is significant when measured against the government's evidence as a whole. By contrast, information may be "material to the preparation" of the defense simply because it helps defendant get ready for trial.[361] Rule 16, then, should cover more than those items which directly impeach a hearsay declarant. It should extend, for example, to documents which might assist a defendant to locate and interview an available declarant, to identify another witness who could contradict or qualify a hearsay statement, or to prepare his own witnesses to respond to hearsay.[362]

3. Jencks Material: Prior Statements of the Hearsay Declarant

One of the most common, and most effective, forms of cross-examination is impeachment by prior inconsistent statement.[363] When a government witness testifies, the Jencks Act often provides the defendant with ammunition for such impeachment. Once a government witness has testified on direct examination, the Jencks Act requires the government, upon the defendant's request, to disclose all relevant prior statements of the witness.[364] In some instances, of course, the Jencks Act merely duplicates the requirements of *Brady* and *Giglio*. Prior inconsistent statements can be both "favorable to the accused" and "material" under the *Brady* standard. But Jencks goes further. It requires disclosure of any prior statements that fall within its coverage,[365] regardless of whether they are inconsistent or exculpatory. That difference can be significant, because changes in testimony often are subtle. A witness may be impeached by change of emphasis or by prior omission, as well as by direct contradiction.[366] By providing access to the complete record of a witness's prior statements, Jencks may open avenues for impeachment that *Brady* material would not.

Rule 16 and *Brady* requests together, with little effort to distinguish their standards of "materiality." *See, e.g.*, United States v. Cadet, 727 F.2d 1453, 1468 (9th Cir. 1984). Other courts cite different materiality standards while reaching the same results under both. *See, e.g.*, United States v. Uphoff, 907 F. Supp. 1475, 1480 (D. Kan. 1995).

361. *See* United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990) (holding that Rule 16 permits discovery that is "relevant to the development of a possible defense" if the defendant can show that the "[g]overnment is in possession of information helpful to the defense." (citation omitted)).

362. *See* United States v. George, 786 F. Supp. 56, 58 (D.D.C. 1992) (holding that documents, to be discoverable under Rule 16, must "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony or assisting impeachment or rebuttal" (citation omitted) (internal quotations omitted)).

363. *See, e.g.*, Mauet, *supra* note 11, at 246 ("Raising prior inconsistent statements is the most frequently used impeachment method at trial.").

364. 18 U.S.C. § 3500(b) (1994).

365. The Jencks Act's definition of "statement," however, is a rather narrow one. *See supra* note 295.

366. *See* Jencks v. United States, 353 U.S. 657, 667 (1957).

The Jencks Act can be just as important when the defendant seeks to impeach hearsay. As we have already seen, whether the Jencks Act applies at all to hearsay declarants is a complex and unsettled question.[367] Jencks is also a two-edged sword, preventing pretrial discovery of witness statements, while allowing limited discovery at trial. But to the extent that courts adopt the view that hearsay declarants are "government witnesses" under the Jencks Act, then defendants should take full advantage of the side of that sword that cuts in their favor.[368] When the government succeeds in offering hearsay in evidence, Jencks should compel the same kind of disclosure it requires for a testifying witness. The government must turn over the complete record of the declarant's relevant prior statements. And though the declarant may never appear in the courtroom, the defendant nevertheless can use those prior statements to challenge the credibility of hearsay in much the same manner that he would use prior statements to impeach a testifying witness.[369] Indeed, impeachment of an absent declarant by prior inconsistent statement offers a major advantage over live cross-examination. The absent declarant cannot explain away the inconsistency.[370]

One final issue regarding application of the Jencks Act to hearsay is worth noting. A 1983 amendment to Rule 12 of the Federal Rules of Criminal Procedure made the Jencks Act applicable at suppression hearings. Similar amendments in 1993 extended Jencks discovery to various other proceedings, including preliminary hearings and pretrial detention hearings.[371] If hearsay declarants are "government witnesses" for Jencks purposes, then these amendments may have

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367. *See supra* text accompanying notes 295-316.

368. Unfortunately, the dearth of reported cases suggests that few defendants use the Jencks Act in an effort to obtain prior statements of hearsay declarants. *See* United States v. Williams-Davis, 90 F.3d 490, 512-13 (D.C. Cir. 1996) (noting that this case was the first in any Circuit to raise the question whether the Jencks Act requires disclosure of prior statements of a hearsay declarant).

369. *See* Fed. R. Evid. 806. For a more detailed description of the process of impeaching an absent hearsay declarant, see Douglass, *supra* note 6, at 251-60.

370. Typically, the defendant would impeach the declarant by offering extrinsic evidence of the prior inconsistent statement, for example, a transcript, written or recorded prior statement, or the testimony of a witness who can recount the prior inconsistent statement. In the case of a testifying witness, Rule 613(b) requires that the witness be given an opportunity to explain or deny the prior statement. *See* Fed. R. Evid. 613(b). But Rule 806 explicitly removes the requirement that the declarant be afforded an opportunity to deny or explain the prior statement. *See id.* Rule 806.

371. *See* Fed. R. Crim. P. 5.1(d) (relating to preliminary hearings), 26.2(g) (relating to various proceedings outside of trial), 46(i) (relating to detention hearings).

The utility of these rules as a pretrial discovery device is limited for several reasons. First, suppression hearings generally do not address the merits of criminal charges. As a result, few suppression hearings require the government to call its principal trial witnesses. Second, because many cases are indicted before arrest, or shortly thereafter, there are few preliminary examinations in federal practice. Third, though detention hearings under Rule 46 occur often, the evidence often focuses on the defendant's criminal history and other personal history, rather than the crime itself.

created much broader discovery opportunities than their drafters may have anticipated. Unlike suppression hearings, preliminary hearings always, and detention hearings sometimes, require the government to present evidence on the merits of the criminal charge. At preliminary hearings and pretrial detention hearings, it is quite typical for the government to present its case largely through hearsay. Rather than calling the witnesses they expect to use at trial, prosecutors more often use investigating agents to summarize the accounts of those witnesses. Clearly, these expanded "pretrial Jencks" rules require the government, upon request, to turn over relevant prior statements of the testifying agent.[372] But if hearsay declarants are "witnesses" as well, then the government also must disclose the relevant prior statements of each declarant whose information the agent summarizes. As a result, the preliminary or detention hearing could turn into a broad vehicle for discovering the grand jury testimony, and the written or recorded statements of witnesses who will testify for the government at trial.

C. *Discovery Depositions of Available Hearsay Declarants*

Confrontation Clause doctrine now allows the prosecution to present most hearsay without first showing that the declarant is unavailable to testify in person.[373] While the most troublesome forms of prosecution hearsay tend to come when declarants are unavailable,[374] there remain important classes of hearsay admitted regularly against criminal defendants when the declarant is alive, capable of testifying, and subject to subpoena. Co-conspirator statements, spontaneous declarations, statements for purposes of medical diagnosis, and business records—among others—all are admissible under the Rules of Evidence and the Confrontation Clause regardless of the declarant's availability.[375]

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372. Often, such materials would include the agent's investigative reports on matters mentioned in his testimony.

373. *See* White v. Illinois, 502 U.S. 346, 353-54 (1992) (holding that under the Confrontation Clause, in cases involving forms of hearsay other than former testimony, the government is not required to show unavailability of the declarant as a condition to admitting hearsay); United States v. Inadi, 475 U.S. 387, 391-400 (1986) (holding co-conspirator hearsay admissible without showing that declarant unavailable).

374. *See, e.g.*, Lilly v. Virginia, 119 S. Ct. 1887 (1999) (overruling state court's admission of confession of accomplice who invoked Fifth Amendment privilege). Almost all of the cases admitting grand jury testimony under the residual hearsay exception involve unavailable declarants. *See, e.g.*, United States v. Earles, 113 F.3d 796, 799-801 (8th Cir. 1997); United States v. McHan, 101 F.3d 1027, 1037-38 (4th Cir. 1996); Curro v. United States, 4 F.3d 436, 436-37 (6th Cir. 1993); United States v. Kladouris, 964 F.2d 658, 663-64 (7th Cir. 1992); United States v. Panzardi-Lespier, 918 F.2d 313, 315-19 (1st Cir. 1990); United States v. Donlon, 909 F.2d 650, 652-54 (1st Cir. 1990).

375. *See* Fed. R. Evid. 801(d)(2)(E) (co-conspirator statements), 803(2) (excited utterances), 803(4) (statements for purposes of medical diagnosis), 803(6) (business

The Supreme Court has hinted at least that the defendant's right to subpoena such declarants and cross-examine them at trial effectively eliminates any concern over confrontation. After all, the Court suggests, if the defendant wants confrontation he has the means to bring it about.[376] But as a practical matter, there are significant risks to a defendant in the Court's approach. Cross-examining an adverse witness is a bit like tap dancing through a minefield. And without sufficient discovery, counsel performs that dance in the dark. Few experienced trial lawyers will risk asking questions on cross-examination when they cannot safely anticipate the answers.[377] Even fewer will take the risk of calling a witness to the stand for the sole purpose of asking such questions.[378]

The Court's recent rulings on confrontation of available declarants illustrate the dangers inherent when the admissibility of hearsay falls out of balance with a defendant's discovery opportunities. The Court offers nothing to balance expanded admissibility under the Confrontation Clause with access to the information necessary to contend with it. Confrontation law has put new pressure on the adversarial process of impeaching available declarants. But without some kind of pretrial access to the available declarant, the right to impeach her may be little more than an illusion.

In civil cases, an opponent of hearsay can achieve such access through discovery depositions.[379] However, in criminal cases, the Federal Rules of Criminal Procedure do not authorize discovery depositions by the prosecution or defense.[380] And there has been no serious effort to install them as a regular part of the federal criminal process.[381] But without debating the merits of more extensive

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records).

376. *See* Inadi, 475 U.S. at 397 ("[If the defendant] independently wanted to secure [the declarant's] testimony, . . . [t]he Compulsory Process Clause would have aided [him] in obtaining the testimony . . . .").

377. *See* Mauet, *supra* note 11, at 220 ("Ask questions that you know the witness should answer in a certain way . . . ."); Irving Younger, The Art of Cross-Examination 23 (ABA Litigation Section Monograph Series No. 1, 1976) ("[N]ever, never ask a question to which you do not already know the answer.").

378. *See* Jonakait, *Confrontation Clause*, *supra* note 11, at 617 n.158 ("Time-worn admonitions tell the advocate not to call someone without knowing what he will say.").

379. *See* Fed. R. Civ. P. 30.

380. Rule 15 authorizes depositions, but only for the purpose of preserving testimony, not for discovery. *See supra* note 206.

381. Discovery depositions in criminal cases are not without precedent. A few states allow defense discovery depositions as a matter of right. *See* N.D. R. Crim. P. 15; Vt. R. Cr. P. 15. Florida and Texas, populous states with large urban jurisdictions and active criminal dockets—and with no reputation for being "soft on crime"—both permit discovery depositions in criminal cases. Fla. R. Crim. P. 3.220(h); Tex. Crim. Proc. Code Ann. § 39.02 (West 1999). The American Bar Association, admittedly an organization where defense lawyers tend to dominate criminal justice policy, calls for discovery depositions in criminal cases under limited circumstances. *See* Standards for Criminal Justice, Standard 11-5.2 (3d ed. 1996) [hereinafter ABA Standands]. As

reforms, the idea of discovery depositions has special merit in that limited class of cases where the government is allowed to rely on hearsay to prove significant, contested facts without putting an available declarant on the witness stand. There are at least three good reasons for allowing depositions under these limited circumstances: (1) enhancing accuracy; (2) fairness to the defendant; and (3) cost-effectiveness.

First, allowing depositions of available declarants increases accuracy in the fact-finding process at trial. When neither side chooses to call an available declarant for live testimony, it is not necessarily because the hearsay is accurate and incontestable. Frequently, it is because neither side is willing to take the risk of what an uncooperative witness might say.[382] The hearsay is fixed and predictable. The uncooperative declarant is not. Thus, the proponent of the hearsay is content to leave "well enough" alone. Without pretrial access to the declarant, the opponent often will choose to avoid the risk of calling a live witness who may merely confirm or even amplify the hearsay statement. The jury never hears the full version from the mouth of the declarant. It remains in the dark because of the tactical choices made by the parties. But neither choice is based upon the likelihood that the hearsay is accurate. More important, in the absence of an opportunity to question the declarant before trial, neither choice is made with complete knowledge of the facts. If we believe that an adversary system produces accurate results, it is at least in part because we expect each party to present

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early as 1974, the Uniform Rules of Criminal Procedure called for discovery depositions as of right for criminal defendants. *See* Unif. R. Crim. P. 431, 10 U.L.A. 130 (1974).

382. This was exactly the case in *United States v. Inadi*, 475 U.S. 387 (1986). Inadi was charged and convicted of conspiracy to manufacture methamphetamine. *See id.* at 388-89. At trial, the government offered in evidence several audio tapes which contained statements of co-conspirators, including a person named Lazaro who was reluctantly willing to testify. Over defense objection, the court admitted the tapes under Federal Rule of Evidence 801(d)(2)(E). *See id.* at 390-91. Inadi then raised a Confrontation Clause objection, arguing that the Clause prohibited introduction of hearsay unless the government first demonstrated that the declarant was unavailable. The trial court asked defense counsel if she wanted the government to produce the witness, and counsel responded only that she would ask her client. *See id.* at 390. The government apparently had no interest in Lazaro as a witness and made only a perfunctory effort to secure his presence. The defendant, who could have issued his own subpoena and insisted on further efforts to produce Lazaro, never even answered the Court's simple question, "Do you want him to testify?" *See id.*

Inadi is not an aberration. The *Inadi* Court noted, "[T]he actions of the parties in this case demonstrate what is no doubt a frequent occurrence in conspiracy cases—neither side wants a co-conspirator as a witness." *Id.* at 397 n.7. Similarly, in *Dutton v. Evans*, 400 U.S. 74 (1970), the Court noted, "Counsel for Evans informed us at oral argument that he could have subpoenaed [the declarant] but had concluded that this course would not be in the best interests of his client." *Id.* at 88 n.19; *see also* Lowery v. Collins, 988 F.2d 1364, 1368-70 (5th Cir. 1993) (noting that neither the plaintiff nor the defendant sought to secure the testimony of the child-complainant).

the facts favorable to its side. Allowing hearsay from available, nontestifying declarants defeats that expectation when the opponent has no way to learn what the declarant might say on the witness stand.

Second, the case of the available declarant presents the starkest example of unfairness that results when rules of admissibility are out of balance with rules of discovery. Modern confrontation doctrine and the law of evidence allow the prosecution to shift to the defendant all the risk of dealing with an uncooperative, but available declarant.[383] No other litigant in the federal system must contend with such risk, because criminal defendants are the only class of litigant with no right to compel pretrial examination of adverse witnesses or hearsay declarants.[384] Confronted with the prospect of adverse hearsay, a civil litigant need only schedule a deposition and can cross-examine the declarant at will. Although prosecutors cannot take discovery depositions, the ex parte process of grand jury investigation is typically a more than adequate substitute.[385] Only the criminal defendant has no means of access to an available defendant before trial, other than through a voluntary interview. And those can be hard to come by.

Third, allowing depositions of at least some available declarants may actually reduce the costs of criminal justice. Opponents argue that the principal costs of discovery depositions are associated with the time they demand from prosecutors and defense counsel, costs born entirely by the state in cases with public defenders or other appointed counsel.[386] Especially in those systems which allow depositions as of right, opponents complain of the number and length of discovery depositions. And, they note, when the state is paying the tab the defendant has no cost-driven incentive to set any limits. But a rule limiting discovery depositions to hearsay declarants whom the government does not expect to call at trial would have different economic consequences. First, there would be little concern with the number of such depositions. Cases of important hearsay from available declarants are relatively few in number.[387] In addition,

383. *See* Jonakait, *Confrontation Clause*, *supra* note 11, at 614-19 (arguing that *Inadi* unfairly transfers the risk of confronting an available declarant from the prosecution to the defense).

384. *See supra* text accompanying notes 202-09.

385. The prosecutor might not have the option to put the declarant before a grand jury, however, where the hearsay comes to light only after the case has been indicted. Due Process concerns can restrict a prosecutor's use of the grand jury to continue investigation after an indictment has been returned. *See In re* Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels), 767 F.2d 26, 29-30 (2d Cir. 1985) (stating that the prosecutor may not use grand jury subpoena for the sole purpose of trial preparation).

386. *See* John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 Fla. St. U. L. Rev. 675, 684-86 (1988) (summarizing arguments advanced by opponents and proponents of criminal discovery depositions).

387. Normally, a prosecutor would prefer to call an available and cooperative

where defendant regarded such hearsay as significant enough to call for a deposition, the prosecutor would have the option to avoid the burden of a deposition simply by informing the defense that he would call the declarant as a witness at trial.[388]

If we take the Supreme Court at its word, allowing such depositions would virtually eliminate any Confrontation Clause contests at trial or on appeal over the admission of hearsay from an available declarant.[389] Moreover, one might limit costs by permitting depositions only upon a motion establishing a particular need, as in cases where the available declarant refused counsel's request for an interview.[390] Given such a rule, the very prospect of a deposition would lead some reluctant declarants to speak informally with counsel in order to avoid the burden of a formal deposition. Public defenders and defense investigators might spend less time on unproductive encounters with reluctant witnesses. In that respect, a deposition rule limited to uncooperative declarants might actually simplify the process of trial preparation and decrease costs. And, in cases where witness intimidation was a legitimate concern, appropriate protective orders could issue. Finally, a rule authorizing discovery depositions would carry the same benefit as any rule expanding discovery. It would assist both prosecution and defense counsel in evaluating the case. A likely result might be an increase in resolutions through plea agreement.[391]

Of course, justifying reform in theory may be a great deal easier than bringing it about in practice. In light of the fate of much less ambitious discovery reform proposals,[392] one could expect that a proposal to amend Rule 15 to permit discovery depositions as a general practice in criminal cases would be a political nonstarter

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declarant as a trial witness, rather than rely on hearsay.

388. By making prosecutors more likely to present live testimony in the place of hearsay, the mere prospect of a deposition would tend to avoid trial and appellate contests over the admissibility of such hearsay. More importantly, as a matter of fairness, it would reduce the number of occasions where prosecutors choose to use hearsay and thereby shift to the defendant the burden of producing the declarant at trial. For a variety of practical reasons, the government is normally in a better position than the defense to locate and subpoena an available declarant. *See* Jonakait, *Confrontation Clause*, *supra* note 11, at 616.

389. *See* United States v. Inadi, 475 U.S. 387, 397 (1986) (suggesting, at least implicitly, that the defendant's Compulsory Process right to subpoena an available declarant, combined with his right under Federal Rule of Evidence 806 to subject that declarant to hostile questioning, satisfied any concerns over confrontation).

390. This is the approach called for by the ABA Standards. *See* ABA Standards, *supra* note 381, Standard 11-5.2. The ABA Standard permits discovery depositions, upon motion by either prosecution or defense, where there is no writing summarizing the witness's knowledge, where the witness has refused a voluntary interview, and where the interview is necessary "in the interests of justice." *Id.*

391. *See* Unif. R. Crim. P. 431 commentary at 112, 10 U.L.A. 130 (1974), *reprinted in* Yetter, *supra* note 386, at 679.

392. *See supra* text accompanying notes 169-72.

before Congress.[393] A more modest alternative, aimed only at correcting the existing hearsay-discovery imbalance in cases of available declarants, may be more attainable. A sensible starting point would be a rule authorizing federal courts, in their discretion, to allow a discovery deposition where: (1) hearsay was disclosed before trial; (2) the court found it admissible; (3) the hearsay was important evidence regarding a contested fact of consequence to the case; and (4) the declarant refused informal requests for an interview with the opponent.

An alternative approach might achieve the same result with no amendment to existing Rules. At least one federal Circuit Court of Appeals has held that, Rule 15 notwithstanding, federal courts have the inherent authority to order discovery depositions in unusual cases. The Tenth Circuit upheld a trial court's order allowing the defense to take depositions as a sanction for government misconduct which discouraged prospective government witnesses from talking informally with defense counsel.[394] But there is nothing that restricts that inherent power to cases of misconduct affecting access to witnesses.[395] A defendant is just as severely disadvantaged when a witness makes an independent choice to refuse an interview. That disadvantage is multiplied when the Confrontation Clause allows the government to proceed by hearsay, in effect daring the defense to take the risk of putting the declarant on the stand for "blind" cross-examination. If "unusual circumstances" can justify the exercise of a court's inherent power to ensure the fairness of its own proceedings, then few circumstances present a better case for asserting that power. Exercise of this inherent power in appropriate cases would allow federal courts to experiment with the use of depositions where they would be most effective to remedy the imbalance that the Court's confrontation doctrine has created. And, in the process, federal courts and rule makers might learn that discovery depositions in criminal cases are not so frightening after all.

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393. Rule 15 now authorizes depositions only for the purpose of preserving testimony for use at trial. Though the language of the Rule is not explicit, its history and subsequent judicial interpretation make it clear that the Rule does not authorize a federal court to order depositions solely for purposes of discovery. *See* Fed. R. Crim. P. 15 advisory committee's note; United States v. Carrigan, 804 F.2d 599, 602 (10th Cir. 1986) (noting that Rule 15 "does not contemplate use of depositions of adverse witnesses as discovery tools in criminal cases").

394. *See Carrigan*, 804 F.2d at 602-04.

395. The inherent power of federal courts to order discovery has been established for decades, and extends to circumstance where discovery is necessary to avoid unfairness. *Jencks v. United States*, 353 U.S. 657 (1957), requiring disclosure of prior statements of government witnesses, is probably the most prominent example of the exercise of such power. *See id.* at 670-71.

D. *Creating An Incentive for the Prosecutor to Disclose: Discovery as a "Circumstantial Guarantee of Trustworthiness"*

The preceding sections have addressed a variety of methods to enhance the opportunities of criminal defendants for learning more about prosecution hearsay and learning it earlier in the litigation process. Each of those methods involves the use of discovery devices such as Rule 16, *Brady*, discovery depositions, or pretrial notice rules like Rule 807. But there may be an even more effective way to shed greater light on prosecution hearsay before trial. Courts can increase disclosure simply by making evidentiary rulings which place a substantial value on discovery as a factor in admitting hearsay. The framework for doing so is already in place, under both the Federal Rules of Evidence and the Confrontation Clause.

Rule 807 requires a proponent to give advance notice of his intention to offer residual hearsay.[396] In effect, the Rule encourages disclosure by making it the "price" for admitting hearsay. If the proponent fails to give notice, he risks the exclusion of hearsay. The same principle can apply in a broader context. To admit hearsay under Rule 807, a court must find "circumstantial guarantees of trustworthiness" that are "equivalent" to those which support other hearsay exceptions.[397] If courts regard full discovery as one such "guarantee," then the proponent of hearsay has a strong incentive to reveal all he can about the declarant and the circumstances surrounding the hearsay statement.

The same notion holds true where hearsay must overcome a Confrontation Clause challenge. For hearsay fitting traditional—or "firmly rooted"—exceptions, the Confrontation Clause no longer forms much of a barrier.[398] But for residual hearsay, and perhaps a few other controversial forms of hearsay, the Clause requires courts to find "particularized guarantees of trustworthiness" before admitting such hearsay.[399] Prosecutors would have more of an incentive to make full disclosure if courts insisted that discovery was an important "guarantee" of trustworthiness in admitting hearsay under the Confrontation Clause.

It is not hard to envision how courts might apply this approach in practice. The clearest example would arise in a case where the government sought a pretrial ruling on the admissibility of residual

396. *See* Fed. R. Evid. 807.

397. *Id.*

398. Hearsay falling within a "firmly rooted" exception is presumptively admissible under the Court's current approach to confrontation. *See* Lilly v. Virginia, 119 S. Ct. 1887, 1894 (1999) (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

399. *See id.* at 1899-1901 (plurality opinion) (holding that accomplice statements inculpating the accused are not within a "firmly rooted" hearsay exception); Idaho v. Wright, 497 U.S. 805, 817-18 (1990) (finding that the residual exception is not "firmly rooted").

hearsay from an available declarant whom the prosecutor did not expect to call as a witness at trial.[400] The court could simply inform the prosecutor that it would be more inclined to look favorably upon such hearsay if the government produced the declarant for pretrial examination by the defense, along with copies of any prior statements by the declarant. The court's power to order a discovery deposition would not be in issue; nor would the court have to determine whether the Jencks Act prevented it from ordering production of declarant's prior statements before trial. Instead, the government would have the incentive to provide discovery "voluntarily" if it wanted the hearsay in evidence. The same approach would work to encourage discovery where the declarant was unavailable. If the court viewed discovery as an important guarantee of trustworthiness, then it might condition its ruling admitting hearsay on full disclosure of the declarant's prior statements, criminal record, and any other information that might shed light on the declarant or her statement. If the court was satisfied that full disclosure gave defendant a fair chance to contest the hearsay, then the court would admit the statement in evidence.

There is a sound basis supporting an approach which views discovery as a "guarantee of trustworthiness" under both Rule 807 and the Confrontation Clause. In both contexts, the term "trustworthiness" is something of a misnomer. Hearsay testimony may have sufficient guarantees of trustworthiness even though it is not particularly believable. For example, former testimony can be admissible under the Rules of Evidence and the Confrontation Clause even though it may contain internal contradictions or inherently implausible statements.[401] Cross-examination, the core of the

400. In fact, there are relatively few cases of residual hearsay from available declarants, because of the requirement that the hearsay be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Fed. R. Evid. 807. Normally, the live testimony of the available declarant would be "more probative," except in unusual cases involving failing memories or recalcitrant witnesses with changing versions of events.

The scenario described in the text might also arise in cases where the declarant was physically accessible but not deemed "available" to testify as a witness at trial as, for example, in the case of a small child who made out-of-court complaints regarding sexual abuse. Indeed, some state rules condition the admission of such hearsay on procedures giving defense counsel discovery opportunities, including pretrial notice of the particulars of the statement and the right to take the deposition of the witness who will relate the hearsay at trial. *See, e.g.*, Md. Ann. Code art. 27, § 775(c)(4) (1957). In similar cases, the Uniform Rules of Evidence grant defendant a right to question the child in a setting less formal than the courtroom. *See* Unif. R. Evid. 807(b) ("Before a statement may be admitted . . . the court shall, at the request of the defendant, provide for further questioning of the minor in such manner as the court may direct.").

401. "Classic" former testimony, where the same defendant was present at an earlier proceeding and had an opportunity to cross-examine, is admissible under Rule 804(b)(1). Federal courts have also admitted other forms of "near miss" former testimony under the residual exception as well, in cases where a party having similar interests conducted cross-examination of the witness. *See, e.g.*, United States v. Shaw,

adversarial testing process, is a sufficient "guarantee of trustworthiness." In formulating the Confrontation Clause standard, the Court explicitly equated "guarantees of trustworthiness" with circumstances where "adversarial testing would add little to [the hearsay statement's] reliability."[402] In effect, "guarantees of trustworthiness" are substitutes for cross-examination. And discovery certainly fits that definition better than many "guarantees" which federal courts have endorsed as grounds for the admission of hearsay.[403] Discovery directly enhances an opponent's ability to test hearsay, either through actual cross-examination in a deposition, or through access to information that may be offered at trial to impeach or qualify the out-of-court statement of an absent declarant.

If federal courts are inclined to admit a broader range of hearsay against criminal defendants—as they clearly seem to be—then they should be equally inclined to allow defendants the tools for a fair challenge to that hearsay. At least when they venture toward hearsay's frontiers—admitting hearsay which falls outside "firmly rooted" exceptions for Confrontation Clause purposes—federal courts already possess the power to provide those tools in the form of more complete discovery. That power arises whenever they look for "guarantees" that hearsay is trustworthy. They need only make it clear that full disclosure is one such guarantee. Prosecutors will understand the message.

CONCLUSION

Hearsay and discovery are out of balance in the federal system. Despite theoretical protections in both the Federal Rules of Evidence and the Confrontation Clause, in reality federal criminal defendants face a broader range of admissible hearsay than other litigants. But they have fewer tools to contend with it.

I have suggested a handful of new discovery tools that would help to correct that imbalance, including amendments to Rule 15 allowing discovery depositions of some available declarants; changes in the Rules of Evidence to expand pretrial notice beyond the residual exception; and amendments to Rule 16 and the Jencks Act to require

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69 F.3d 1249, 1254 (4th Cir. 1995) (admitting testimony from trial of defendant's co-conspirators which occurred while defendant was fugitive); United States v. Deeb, 13 F.3d 1532, 1539 (11th Cir. 1994) (admitting testimony from co-conspirators trial where witness was subject to cross-examination by co-defendants).

402. *Wright*, 497 U.S. at 821.

403. In *Wright*, the Court provided a nonexclusive list of "guarantees of trustworthiness" to guide courts in applying its flexible standard for assessing non-firmly rooted hearsay. *See id.* at 821-22. Accepting *Wright*'s broad invitation, lower federal courts have found sufficient "guarantees" in a wide variety of circumstances, and often have contradicted one another in the process. *See* Douglass, *supra* note 6, at 218 ("Lower courts searching for 'particularized guarantees of trustworthiness' have managed only to prove that reliability is in the eye of the beholder.").

pretrial disclosure of written or recorded hearsay and disclosure at trial of prior statements of hearsay declarants. Further, I have suggested how the *Brady* doctrine can create important opportunities for shedding light on prosecution hearsay. But courts need not await new rule-making or legislation to begin a process that is already overdue. Federal courts possess the inherent power to order broader discovery than existing rules now require. Equally important, at least in cases of hearsay falling outside of traditional exceptions, they have the power to condition evidentiary rulings on the government's willingness to make earlier and broader disclosures. In those cases, courts can begin to correct the hearsay-discovery balance simply by making discovery a factor in their decisions to admit hearsay.

I do not pretend to offer a complete prescription for discovery reforms that would shed light into every unexplored corner of prosecution hearsay. Nor do I suggest that even the most liberal discovery rules would justify the elimination of all restrictions on hearsay in criminal cases. What I hope to do through this Article is to encourage a new discussion about hearsay that begins where most traditional discussions end: when hearsay is admitted in evidence. In my view, the time is ripe for such a discussion because the major battles for excluding hearsay in the last two decades have been lost, often for very good reasons,[404] and there is little reason to expect a large-scale counterattack in favor of excluding more hearsay from criminal trials. Today, criminal defendants cling to a Maginot Line of admissibility, hunkered down behind increasingly futile evidentiary and constitutional objections to hearsay, while more advanced weaponry rumbles around their flanks.[405] Given that state of affairs, I wonder that the future of "hearsay reform" in criminal cases may lie not so much with rules which regulate admissibility, but with pretrial and trial procedures which enhance a defendant's ability to contest whatever hearsay is admitted in evidence. Rather than limit our discussion to adjustments in the rules of admissibility, we should give

404. While observations that the hearsay rule is "dead" may be a bit exaggerated, *see* Park, *Dead or Alive?*, *supra* note 28, few would deny that the rule is showing the wear and tear of battle. The truth is that in a world of increasingly complex litigation in an increasingly mobile society, hearsay evidence has become increasingly convenient. And particularly when compared with the carefully rehearsed trial testimony of many courtroom witnesses, much hearsay no longer sparks judicial concern over its reliability. Indeed, the Supreme Court itself has expressed a preference for "the evidentiary value" of some forms of hearsay over that of live testimony. United States v. Inadi, 475 U.S. 387, 395 (1986) (noting that co-conspirator's in-court testimony "seldom will reproduce . . . the evidentiary value of his statements during the course of the conspiracy.").

405. The Maginot Line, constructed after World War I along the eastern border of France, was conceived in an age of trench warfare and viewed as an impenetrable barrier to any German assault. In May 1940, it proved ineffectual against a mechanized German army which swept around it to the north and captured Paris in a matter of weeks. *See* John Keegan, The Second World War 59-67, 84-85 (1990).

more thought to adjusting the criminal process itself to account for the increasingly generous rules admitting prosecution hearsay. The process of criminal discovery offers a natural place to begin that discussion.