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Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause

Eileen A. Scallen*

I. FOCUSING ON A CENTRAL PROBLEM OF HEARSAY REFORM—THE MEANING OF THE CONFRONTATION CLAUSE

In this Symposium, Professor Edward J. Imwinkelried discusses the Fifth and Sixth Amendments of the federal Constitution, examining the extent to which these provisions permit, or even require, liberalization of the hearsay rule.[1] Professor Imwinkelried's article raises a preliminary problem of definition for those of us who address the constitutional dimensions of hearsay reform.[2] When one moves beyond a discussion of the hearsay rule to a discussion of the constitutional dimensions of hearsay, "reform" has more than one meaning. The first meaning of "reform" is to liberalize the hearsay rule, *increasing* the amount of hearsay that may be admitted. However, as I will argue, hearsay reform in the constitutional arena can also mean *reducing* the amount of hearsay admitted. This route to hearsay reform develops through an understanding of the three-dimensional meaning of the Confrontation Clause of the Sixth Amendment and its counterpart in state constitu-

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* Assistant Professor of Law, University of California, Hastings College of the Law. I would like to thank: Margreth Barrett, David Faigman, Calvin Massey, Scott Sundby, and Dexter Westrum for their helpful suggestions on this Article; Professors Edward J. Imwinkelried and Eleanor Swift for their insights on this piece and their continued encouragement; my research assistants Randi Coven, Mary George, and Terry King; the participants in the Hearsay Reform Conference, especially Professor Roger Park; and the editors and staff of the *Minnesota Law Review*.

1. Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521 (1992).

2. *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992); Randolph N. Jonakait, *The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 615 (1992).

tions.[3] Although federal and state constitutions provide separate and independent sources of protection, in this Article, unless otherwise indicated, I will use "the Confrontation Clause" to refer to both federal and state provisions for confrontation.[4] The goal of this Article is both to develop a multidimensional interpretation of the Confrontation Clause and to show how that interpretation can be derived through a process of practical reasoning.

Professor Imwinkelried makes two observations with very serious consequences for the interpretation of the federal Confrontation Clause. First, he points out an asymmetry in the United States Supreme Court's treatment of the prosecutor's and the criminal defendant's burdens in meeting the reliability requirement in cases raising a Fifth or Sixth Amendment challenge to the admission of out-of-court statements.[5] Professor

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3. The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. In discussing the constitutional limitations on prosecution hearsay evidence in criminal cases, Professor Imwinkelried notes that "[t]he Confrontation Clause neither explicitly restricts the admissibility of hearsay nor expressly precludes a court from freely admitting hearsay." Imwinkelried, *supra* note 1, at 524. I disagree with Professor Imwinkelried's reading of the "plain language" of the Confrontation Clause. If one has a right "to be confronted with the witnesses against him," it would seem that the admission of *any* out-of-court statement, without producing the declarant, presents a hearsay problem. *See* FED. R. EVID. 801(c) (in relevant part, defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing"); Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 665 n.4 (1986). Indeed, as the Supreme Court noted, a literal reading of the Confrontation Clause would bar *all* hearsay, even hearsay admissible under traditional exceptions, When the declarant is unavailable. Bourjaily v. United States, 483 U.S. 171, 182 (1987). The Supreme Court has rejected this categorical interpretation of the Confrontation Clause. Thus, the question becomes: when does the Confrontation Clause permit the use of hearsay? That is the subject of this Article.

4. Several state courts have started to interpret their own state constitutional right to confrontation differently than the United States Supreme Court's interpretation of the Sixth Amendment. *See infra* notes 70-71 and accompanying text. These state court decisions are more consistent with a multidimensional view of the right to confrontation than the United States Supreme Court's current interpretation of the Sixth Amendment. Should the federal courts continue to be unwilling to acknowledge the full meaning of confrontation, separate Confrontation Clause challenges under state constitutions may be the accused's best option.

5. The Supreme Court recently has held that the prosecution may point only to the circumstances surrounding the making of the hearsay statement in order to prove the reliability of the statement. Idaho v. Wright, 110 S. Ct. 3139, 3150-51 (1990). An earlier case had suggested that the prosecution could point to corroborating evidence other than the hearsay statement to prove the

Imwinkelried suggests that the current Supreme Court may try to eliminate this anomaly between the defense and prosecution burdens.[6] Professor Imwinkelried also notes that in *White v. Illinois*[7] the United States Supreme Court eliminated the general requirement that the prosecution either produce the hearsay declarant for confrontation or prove that the declarant is unavailable.[8]

In *White*, the defendant was accused of sexually assaulting a four-year-old girl. The prosecution offered, and the trial court admitted, out-of-court statements describing the assault that the child made to her baby sitter, her mother, an investigating police officer, an emergency room nurse, and a doctor.

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accuracy of the hearsay statement. Lee v. Illinois, 476 U.S. 530, 546 (1986). However, Professor Imwinkelried demonstrates that this rule is inconsistent with the Court's approach to determining whether hearsay offered by a criminal defendant is reliable enough to trigger the accused's constitutional right to offer evidence under the Compulsory Process Clause. There, the Court has "consistently held that the reliability is a function of both the circumstances surrounding the statement and independent corroboration." Imwinkelried, *supra* note 1, at 528-29. Yet, it is significant that Professor Imwinkelried also suggests that the defense in some respects carries a heavier burden in proving reliability than the prosecution when it seeks to introduce hearsay evidence. He notes that the prosecution can show reliability and defeat a Confrontation Clause challenge by establishing the trustworthiness of the statement itself or by producing the declarant. *Id.* at 545. When the defense seeks to present hearsay evidence under the Compulsory Process Clause, it may be helpful to the defendant to show that the declarant is available, but that showing by itself is not enough to entitle it to introduce the hearsay evidence. *Id.* Thus, it is unclear that the defense and prosecution burdens are truly unequal when it comes to proving the reliability of hearsay evidence. Should the Court conclude that the prosecution and defense burdens are unequal, however, this inequality is justifiable. *See infra* note 104 and accompanying text.

6. Imwinkelried, *supra* note 1, at 545-46.

7. 112 S. Ct. 736 (1992).

8. Imwinkelried, *supra* note 1, at 525. Professor Imwinkelried notes that until *White* the majority of the Supreme Court had adhered to Justice Blackmun's statement in the majority opinion in *Ohio v. Roberts* that,

> in conformity with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. *In the usual case* (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

448 U.S. 56, 65 (1980) (emphasis added); *see also* Idaho v. Wright, 110 S. Ct. 3139, 3146 (1990) (there is a "general requirement" that the prosecution prove the unavailability of the declarant); Bourjaily v. United States, 483 U.S. 171, 182 (1987) (the prosecution must "as a general matter" prove that the declarant is unavailable to testify at trial).

Only in the co-conspirator context had the Supreme Court dispensed with the prosecution's need to show unavailability. *See* United States v. Inadi, 475 U.S. 387 (1986); Dutton v. Evans, 400 U.S. 74 (1970).

The trial court ruled that the statements were admissible under the state-law hearsay exceptions for spontaneous declarations and statements made for the purpose of medical diagnosis or treatment.[9] The Illinois Appellate Court held that admitting these statements did not violate the defendant's Sixth Amendment right to confront the witnesses against him, even though the prosecution neither produced the child for cross-examination nor demonstrated that she was unavailable.[10] The Supreme Court affirmed, holding that the Sixth Amendment does not require the prosecution to produce the hearsay declarant or show that the declarant is unavailable where the statements are admitted pursuant to the "firmly rooted" hearsay exceptions of spontaneous declarations and statements made for the purpose of medical diagnosis or treatment.[11]

I contend that when one considers the three dimensions of the Confrontation Clause, both the asymmetry of the defense and prosecution burdens for proving reliability and a general requirement that the prosecution prove the declarant's unavailability are justifiable.[12] Under a three-dimensional view of the Confrontation Clause, *White* was incorrectly decided. *White* should be limited to its unique and emotionally charged factual situation in federal courts, and should not be followed by state courts in interpreting their own state's confrontation clause. To make this argument, it is necessary to develop the multidimensional analysis I suggest for Confrontation Clause cases.

In this Symposium, Professors Margaret A. Berger and Randolph N. Jonakait both argue that the Confrontation Clause is not merely concerned with the evidentiary value of hearsay statements, but they differ over the nature of the "additional" aspects of confrontation.[13] I suggest that a complete interpretation of the Confrontation Clause requires careful consideration of all three of its dimensions: the evidentiary, the procedural, and the societal. The first two dimensions have been developed most completely by other authors.[14] I will fo-

9. *White*, 112 S. Ct. at 740.

10. *Id.* The Illinois Supreme Court denied discretionary review and the United States Supreme Court granted certiorari on the Sixth Amendment Confrontation Clause issue. *Id.*

11. *Id.* at 742 & n.8.

12. By a "general" requirement of unavailability, I do not mean an absolute requirement. A showing of unavailability may not be necessary where the three dimensions of confrontation are satisfied or inapplicable under the circumstances of a particular case.

13. *See* Berger, *supra* note 2; Jonakait, *supra* note 2.

14. The evidentiary dimension addresses the concern that the reliability

cus on the largely ignored third dimension of the Confrontation Clause, the societal dimension. The societal dimension embodies communal values by granting criminal defendants the affirmative right to face their accusers. By interpreting the Confrontation Clause in light of all three of its dimensions, federal and state courts may arrive at both a more reasonable and a more consistent treatment of the constitutional right of confrontation.

II. MOVING BEYOND THE EVIDENTIARY DIMENSION OF THE CONFRONTATION CLAUSE

There is no dispute about the basic evidentiary dimension underlying the Confrontation Clause, that is, the testing of reliability through cross-examination.[15] As Professor Imwinkelried demonstrates, when the Court recognized the evidentiary value underlying confrontation, it was a natural step to permit litigants to substitute a showing of reliability for cross-examination when the declarant is unavailable.[16] Thus,

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of a statement offered as evidence be tested by cross-examination. The procedural dimension addresses the concern that a hearsay statement may be the product of misconduct by the prosecution or its agents. Professor Roger W. Kirst first identified and provided strong support for the existence of the procedural dimension. Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987). In this Symposium Professor Berger elaborates the contours of the procedural dimension with her proposal for a prosecutorial restraint model. Berger, *supra* note 2.

15. *See* Ohio v. Roberts, 448 U.S. 56, 64-65 (1980). It is possible that the concern for the reliability of testimony is more accurately characterized as a due process concern rather than a confrontation concern. *See* White v. Illinois, 112 S. Ct. 736, 747 (1992) (Thomas, J., concurring in part and in the judgment); *see also* United States v. Ianniello, 740 F. Supp. 171, 193 (S.D.N.Y. 1990) ("The Sixth Amendment guaranty of confrontation . . . should not blind us to the reality that the question of the admission of hearsay statements . . . , whether in a criminal or civil case, turns . . . on due process considerations of fairness, reliability and trustworthiness."), *rev'd on other grounds sub nom.* United States v. Salerno, 937 F.2d 797 (2d Cir. 1991). Although cross-examination may be the best test we have for reliability, cross-examination may not be able to do much to rattle a witness who is convinced he is telling the truth, even though he is mistaken. *See generally* RICHARD D. RIEKE & RANDALL K. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 144 (1990) (summarizing research finding that inaccurate eyewitnesses are often as confident as accurate eyewitnesses); Bernard E. Whitley & Martin S. Greenberg, *The Role of Eyewitness Confidence in Juror Perceptions of Credibility*, 16 J. APPLIED SOC. PSYCHOL. 387 (1986) (finding that perceived confidence has its strongest effect on the perceived accuracy of the witness's general account of events). Cross-examination may, however, help to satisfy the other two dimensions of the Confrontation Clause, and is thus an integral part of the right to confrontation.

16. Imwinkelried, *supra* note 1, at 525.

when one focuses on reliability, the purpose of the hearsay rule and the evidentiary dimension of the Confrontation Clause are parallel, although distinct.[17]

When the Supreme Court focuses only on the evidentiary dimension of confrontation, however, the other dimensions of the Confrontation Clause fade into the background, sometimes to the point where they can be overlooked or taken for granted.[18] An illustration of the inadequacy of this one-dimensional interpretation of confrontation is the dispute between the majority and the dissent in *Coy v. Iowa*[19] over Professor Wigmore's comments about the meaning of confrontation at common law. The dissent emphasized Wigmore's comment that " '[t]here never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.*' "[20] Justice Scalia, writing for the majority, interpreted Wigmore quite differently. Justice Scalia relied on the same passage from Wigmore,[21] but asserted his own interpretation:

> [Wigmore] was saying, in other words, not that the right of confrontation (as we are using the term, *i.e.*, in its natural sense) did not exist, but that its purpose was to enable cross-examination. [Wigmore] then continued: "It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Con-

17. The Federal Rules of Evidence Advisory Committee concluded that "a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in nonconstitutional areas." FED. R. EVID. 801 advisory committee's note.

18. Indeed, by limiting the meaning of the Confrontation Clause to its evidentiary dimension, the Supreme Court has made the Confrontation Clause superfluous.

19. 487 U.S. 1012 (1988).

20. *Id.* at 1029 (Blackmun, J., dissenting) (quoting 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 158 (James H. Chadbourn rev. ed. 1974)). The dissent added that "Wigmore considered it clear 'from the beginning of the hearsay rule [in the early 1700s] to the present day' that the right of confrontation is provided 'not for the idle purpose of gazing upon the witness, or of being gazed upon by him,' but, rather, to allow for cross-examination." *Id.* Even the dissent noted, however, that Wigmore acknowledged that another purpose to the right of confrontation was to permit the trier to evaluate the demeanor of the witness by presenting the witness to the tribunal. *Id.* However, the dissent characterized this element as "secondary and dispensable." *Id.*

21. Justice Scalia quoted Wigmore as saying: " 'There was never at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names.' " *Id.* at 1018 (quoting 5 WIGMORE, *supra* note 20, § 1397, at 158).

stitution." Of course that does not follow at all . . . .[22]

Actually, Wigmore's comment *does* follow if one moves beyond the evidentiary dimension. What the *Coy* majority and dissent overlooked in focusing only on the cross-examination function of confrontation was that, at common law, cross-examination necessarily meant physical confrontation between defendants and the witnesses against them (Justice Scalia's preferred reading), because in the vast majority of cases in England and colonial America, defendants either chose to or were forced to represent themselves.[23] If confrontation with the accusing witness occurred,[24] the defendants themselves conducted the cross-examination face-to-face.[25] Thus, in stressing the evidentiary dimension of cross-examination, the *Coy* majority and dissent, and perhaps Wigmore himself, overlooked the fact that confrontation traditionally meant both the process of cross-examination and the physical presence of the defendant before the accusing witness.

The question then becomes whether physical confrontation of the witness and the defendant has any additional meaning, given that self-representation in criminal cases is now the exception rather than the rule. Today, as a part of the Sixth Amendment, individuals are guaranteed the right to counsel; indeed, criminal defendants who cannot afford an attorney may

22. *Id.* Justice Scalia also noted that "[Wigmore said] that a secondary purpose of confrontation is to produce 'a certain subjective moral effect . . . upon the witness.' " *Id.* (quoting 5 WIGMORE, *supra* note 20, § 1397, at 153).

23. Faretta v. California, 422 U.S. 806, 823-24 (1975). Throughout most of English common law history, the accused had *no* right to counsel. *Id.* As English common law evolved, the criminal defendant gained more opportunities to be represented by counsel, but the common law tradition of self-representation continued in the American colonies. *Id.* at 826-28. At the time the Bill of Rights was adopted, "even where counsel was permitted, the general practice continued to be self-representation." *Id.* at 828. Colonial Americans continued to represent themselves for several reasons, but at least two are clear: this was perhaps the only time in American history when there were too *few* lawyers, and the lawyers that did exist were viewed with "dislike and distrust" as cronies and reminders of the abuses under the rule of the Crown. *Id.* at 826-27 (citing CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 7 (1911)). *See also* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 18 (1955) ("It is probably true that the English rule combined with the early shortage of lawyers in the colonies made it inevitable than an accused should defend himself in most cases.").

24. And often it did not, giving rise to the procedural dimension of the Confrontation Clause. *See* Berger, *supra* note 2; Kirst, *supra* note 14.

25. It is not difficult to imagine that in many cases of self-representation, "cross-examination" probably meant little more than the sheer physical confrontation of accuser and defendant.

have one appointed for them at the state's expense.[26] Moreover, lawyers are no longer as scarce as they were in colonial America.[27] The language and structure of the Sixth Amendment itself suggest that confrontation means more than just cross-examination. If confrontation meant only cross-examination, it would have been natural for the Framers of the Bill of Rights and the authors of the state constitutions to drop the Confrontation Clause once they added the right to counsel. Justice Harlan supported this structural argument in a different context. Concurring in *Dutton v. Evans*, Justice Harlan suggested rewriting the Confrontation Clause to read, "In all criminal prosecutions, the accused shall enjoy the right to be present *and* to cross-examine the witnesses against him."[28] If cross-examination and reliability are the only values behind confrontation, why grant the accused the right to be *present*?[29]

There is an additional question about whether the Confrontation Clause should be interpreted in cases involving hearsay statements in the same manner as in cases concerning in-court testimony. The majority in *White v. Illinois* drew a sharp distinction between these contexts, dismissing as irrelevant *Coy v. Iowa* and *Maryland v. Craig*, which were Confrontation Clause cases that dealt with procedures for in-court testimony in child sexual abuse cases.[30]

The *White* Court's refusal to apply *Coy* and *Craig* leads to inconsistent interpretations of the Confrontation Clause, depending on how the government chooses to present the testimony. Under the rule in *Craig*, if the government produces a hearsay declarant to give in-court testimony, the defendant has a right to face his or her accuser, at least by contemporaneous

26. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

27. However, they still seem to be viewed with "dislike and distrust." *Faretta*, 422 U.S. at 827. "What has been is what will be, and what has been done is what will be done; and there is nothing new under the sun." *Ecclesiastes* 1:9.

28. 400 U.S. 74, 95 (1970) (Harlan, J., concurring) (emphasis added). Professor Imwinkelried suggests that Justice Harlan was adopting the "Wigmore view" of confrontation as cross-examination. Imwinkelried, *supra* note 1, at 525. As I have argued, it is unclear *what* Wigmore meant by his comments on confrontation, but his comments, put in historical context, suggest that he could not correctly see confrontation as only embodying a right to cross-examination.

29. Indeed, why have a Confrontation Clause at all when due process ensures that the evidence will be reliable?

30. White v. Illinois, 112 S. Ct. 736, 743-44 (1992) (distinguishing Coy v. Iowa, 487 U.S. 1012 (1988) and Maryland v. Craig, 110 S. Ct. 3157 (1990).

closed-circuit television.[31] Yet under the rule in *White*, if the government presents the hearsay statements through another witness, the defendant has no right to face his or her accuser.[32] A hearsay declarant may be a witness against the accused to the same extent as an in-court witness.[33] There is no reasonable basis for treating a hearsay declarant and an in-court witness differently under the Confrontation Clause. By distinguishing these contexts, the Supreme Court has provided further evidence that it has taken inconsistent views of the Confrontation Clause.[34] Confrontation Clause cases should be considered together to produce a more consistent and reasonable interpretation.

Several evidence scholars believe that other values underlie confrontation *in addition to*, rather than *in lieu of*, the evidentiary value of reliability.[35] The critical issues then become the identification of the other dimensions to confrontation and their implications for hearsay doctrine.[36]

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31. *See Craig*, 110 S. Ct. at 3165-66 (holding that the right to face-to-face confrontation is not absolute and may be subordinated to a case-specific finding of necessity).

32. *White*, 112 S. Ct. at 744. Assuming, of course, that the hearsay statements are "admitted under established exceptions to the hearsay rule." *Id.* This is not much of an assumption given the Court's liberal interpretation of "established" or "firmly rooted" hearsay exceptions in *White*. *See id.* at 743.

33. A hearsay declarant stands on essentially the same footing as an in-court witness under Federal Rule of Evidence 806, which permits a hearsay declarant to be impeached by any means that would have been available if the declarant had testified in court.

34. For example, *Craig* implicitly embodies the procedural dimension that the *White* majority rejects. *See* 110 S. Ct. at 3165-66. When a child witness testifies by closed-circuit television, subject to cross-examination, it is unlikely that the government manufactured or orchestrated the testimony against the accused. Under *White*, however, the government can simply avoid the procedural dimension of the right to confrontation by offering a hearsay statement through another witness. *See* 112 S. Ct. at 744.

35. *See* Berger, *supra* note 2; Jonakait, *supra* note 2; Kirst, *supra* note 14, at 487-90. The Federal Rules of Evidence advisory committee stressed that the Confrontation Clause had substantive meaning beyond the hearsay rule, although it did not elaborate on the additional values of the constitutional provision:

> Under the earlier cases, the confrontation clause may have been little more than a constitutional embodiment of the hearsay rule, even including traditional exceptions but with some room for expanding them along similar lines. But under the recent cases the impact of the clause clearly extends beyond the confines of the hearsay rule.

FED. R. EVID. 801 advisory committee's note.

36. The other dimensions of confrontation have implications for both the asymmetry between the prosecution and defense burdens in proving the reliability of a hearsay statement before it can be admitted over a constitutional

III. MOVING BEYOND THE PROCEDURAL DIMENSION OF THE CONFRONTATION CLAUSE

Professor Berger argues extensively and persuasively in this Symposium for the procedural dimension of the Confrontation Clause.[37] Professor Berger contends that the Confrontation Clause, considered on its own and in the context of the entire Bill of Rights, functions to restrain "the capricious use of governmental power," most notably the ability of the government to convict criminal defendants on the basis of manufactured or carefully orchestrated hearsay statements.[38] Professor Berger views confrontation as going beyond reliability issues to incorporate concerns about the abuse of prosecutorial power. Accordingly, she argues that courts should adopt a "prosecutorial restraint model" in analyzing Confrontation Clause objections.[39]

Professor Berger notes that her prosecutorial restraint model has some resemblance to the proposals contained in the government's amicus brief and Justice Thomas's concurring opinion in *White* in that all three proposals concern the procedural dimension of confrontation.[40] In *White*, the government suggested that the Confrontation Clause applies "only to those persons who provide in-court testimony or the functional equivalent, such as affidavits, depositions, or confessions that are made in contemplation of legal proceedings."[41] Justice Thomas correctly noted that this is an ambiguous standard that

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objection, and whether "unavailability" is ever a general and genuine requirement for the admission of prosecution hearsay. *See infra* part V. In addition, the existence of the "extra" dimensions of confrontation raises the following questions: Although any hearsay statement is by definition made "out-of-court," must the hearsay statements be made in the presence of the defendant? And if the defendant's presence is required, what do we mean by "presence" of the defendant, i.e., will presence by telephone, videotape, or closed-circuit television suffice? These are among the thorniest evidentiary problems courts face today.

37. The label for this dimension and the arguments behind it originated with Professor Kirst. *See* Kirst, *supra* note 14, at 490-98.

38. Berger, *supra* note 2, at 560; *see id.* at 561-62; *see also* Kirst, *supra* note 14, at 490-98.

39. Professor Berger would require a court to determine whether hearsay statements were elicited by the prosecution or by its agents. Those statements would be presumptively inadmissible unless the prosecution were to produce the declarant or provide proof that the statements were not the result of leading or suggestive questions. *See* Berger, *supra* note 2, at 561-62.

40. *Id.* at 563-64.

41. White v. Illinois, 112 S. Ct. 736, 747 (1992) (Thomas, J., concurring in part and in the judgment).

would be difficult to apply.[42]

However, Justice Thomas's alternate proposal exalts form over substance[43] and dispenses with the reliability dimension. Justice Thomas suggested that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[44] Under Justice Thomas's proposal the prosecution would have to produce the declarant or prove that the declarant was unavailable before it could introduce "formalized testimonial materials."[45] Yet such "formalized" materials are arguably more reliable than oral statements repeated by an in-court witness because they are usually made under oath and are memorialized. Nevertheless, under Justice Thomas's analysis, the prosecution could avoid the Confrontation Clause entirely by presenting the statements orally. The prosecution could simply have a witness repeat in court the oral accusations made out of court. In *White*, for example, the statements the child made to the police officer might fall under the Confrontation Clause under the government's approach, because they "arguably were made in contemplation of legal proceedings."[46] But none of the statements in *White* present a Confrontation Clause problem under Justice Thomas's approach. Indeed, under his analysis, the prosecution seldom, if ever, would be restrained by the Confrontation Clause.

Professor Berger's prosecutorial restraint model, however, is distinguishable in several ways from, and is preferable to, both the goverment's and Justice Thomas's schemes.[47] Professor Berger's model is not as ambiguous as the government's proposal, nor is it a wooden, formalistic standard such as the one proposed by Justice Thomas.[48] The danger of the proce-

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42. *Id.*

43. *See* Berger, *supra* note 2, at 564.

44. *White*, 112 S. Ct. at 747 (Thomas, J., concurring in part and in the judgment).

45. *Id.*

46. *Id.*

47. *See* Berger, *supra* note 2, at 563 (distinguishing her model from Justice Thomas's proposal).

48. As much as I prefer Professor Berger's proposal to those advanced in *White*, I do not think it provides a complete solution to the Confrontation Clause problems, both because of severe practical problems in its application and because it fails to deal explicitly with the societal dimension of confrontation.

Professor Berger's proposal depends on the court's determination of who the hearsay declarant is and how the statement was created. Three earlier au-

dural dimension in any formulation, however, is that a court may fixate on it to the exclusion of other dimensions. While Professor Berger would not suggest focusing on the procedural dimension to the exclusion of other dimensions,[49] the government and Justice Thomas (joined by Justice Scalia) in *White* did just that, producing an incomplete and unsatisfying interpretation of the Confrontation Clause.[50]

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thors have attempted to state limiting theories for the Confrontation Clause based on the type of witness and how the witness's statement was used. *See* Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 129 (1972) (proposing that the "witnesses against" language of the Sixth Amendment be limited to "principal witness[es]" for the prosecution); Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151, 192 (1978) (suggesting that "witnesses against" be interpreted to refer to those witnesses who testify in court for the prosecution or those declarants who have made "accusatory" statements regarding the defendant); Peter Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1206-07 (1979) (suggesting that "witnesses against" be limited to available declarants "whose statements the prosecution introduces into evidence against the accused *and* whom the prosecution can reasonably expect the defendant to wish to cross-examine at that time"). These suggestions have been criticized as posing significant practical problems in application, for it is difficult to determine which categories of witnesses and declarants fit these tests. *See* Kirst, *supra* note 14, at 497-98; Kirkpatrick, *supra* note 3, at 679-81.

Professor Berger's proposal presents similar practical problems. I do not think it will be an easy task for a court to determine whether an informant who is a declarant is acting as an "agent" for the prosecution. Moreover, even if this determination is possible, I doubt whether a court can determine that the informant was "passive" or "active" in producing a "product of inquisitorial questioning." Berger, *supra* note 2, at 608. For example, the federal courts have had little success and much frustration in their attempts to apply a similar standard in the interrogation context. In Massiah v. United States, 377 U.S. 201 (1964), the Supreme Court held that a defendant's Fifth and Sixth Amendment rights were violated when part of the evidence against him at trial was statements that were "deliberately elicited" from him in the absence of his counsel after he had been indicted. *Id.* at 204-07. There has been substantial confusion about when a statement has been "deliberately elicited." *See* Maine v. Moulton, 474 U.S. 159, 173-80 (1985); United States v. Henry, 447 U.S. 264, 278-89 (1980) (Blackmun, J., dissenting).

The problem with identifying hearsay statements that are actually "product[s] of inquisitorial questioning" is even more difficult in the child sexual abuse cases, where, because of the vulnerability of child witnesses, there is a finer line between suggestion and recollection. For example, is a social worker an "agent" of the prosecutor? Is an examining physician? Is the child's teacher? For a recent discussion of the conflicting views on the suggestibility of children and problems with their recollection, see THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY (John Doris ed., 1991) [hereinafter SUGGESTIBILITY].

49. *See* Berger, *supra* note 2, at 572.

50. In rejecting the government's argument, the majority in *White* noted that as the Court's Confrontation Clause cases have developed, there is more

Professor Jonakait agrees with Professor Berger that the Confrontation Clause is concerned with more than reliability. But Professor Jonakait argues that the primary function of confrontation is *not* to act as a restraint on governmental abuses. He contends that the Sixth Amendment's purpose is to grant the accused affirmative rights; "The question is not what the prosecution did, but whether the accused got a trial by jury."[51] Thus, to pull these views together, Professors Berger and Jonakait and I agree that the Confrontation Clause embodies dimensions beyond the evidentiary or reliability concerns that are also the province of the hearsay rule. Where I differ with Professor Berger is that I see an additional dimension to confrontation which makes her prosecutorial restraint model seem incomplete. I differ with Professor Jonakait in that I do not see the need to designate any one dimension as "primary" or "central" as long as the full meaning of confrontation is brought to the foreground and considered in the Court's rationales for its decisions. To suggest a hierarchy of meanings to confrontation poses the danger that the Court will lose sight of one or more dimensions as it focuses on the alleged "primary" dimensions, as it has seemed to do by focusing on the evidentiary dimension alone.

IV. THE THIRD DIMENSION OF THE CONFRONTATION CLAUSE: THE SOCIETAL DIMENSION

Although the first two dimensions of the Confrontation Clause have been analyzed extensively, the third dimension has been relatively ignored. Thus, in this Part, I want to develop the societal dimension of confrontation.[52] In doing so, I will employ the kind of "practical reasoning" that has an ancient history[53] and a modern following.[54] Although I will use the

to the Confrontation Clause than just a concern with the procedural dimensions. White v. Illinois, 112 S. Ct. 736, 741 (1992).

51. Jonakait, *supra* note 2, at 617.

52. I do not contend that this is the "final" dimension to confrontation, and welcome additional interpretations. However, it seems that the Confrontation Clause has at least these three dimensions.

53. Practical reasoning was first prominently discussed by Aristotle as "dialectical reasoning" in *On Rhetoric, On Sophistical Refutations*, and *The Topics*.

54. *See e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989); William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Daniel A.

practical reasoning approach to develop the concept of the societal dimension of confrontation, I suggest that federal and state courts should also use practical reasoning in interpreting the Confrontation Clause. The Supreme Court has rejected attempts to state one unified "theory" of the Confrontation Clause.[55] A practical reasoning approach combines the desire for clarity and consistency in decision making with the need for flexibility that the Supreme Court has expressed in its past treatment of Confrontation Clause cases.

Under a practical reasoning approach, interpreters, whether analyzing a statute or constitutional language, try to consider all of the possible relevant sources for statutory or constitutional interpretation.[56] In the American legal culture, these sources may include the content and structure of the actual text, the intentions of the drafters of the provision, the historical context of the provision, the pragmatic aspects of potential interpretations, and the evolution of the language over time.[57] In examining these sources, interpreters must keep an open mind and attempt to reconcile inconsistencies as best they can.[58] The result of the process is

> likely to be the product of a congeries of supporting, interactive arguments, rather than a single deductive conclusion from one source of meaning. In this way, . . . "construction" takes on a somewhat literal meaning and often consists of supporting arguments working like the " 'legs of a chair and unlike the links of a chain.' "[59]

Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

55. *See* Kirst, *supra* note 14, at 486-87; Kirkpatrick, *supra* note 3, at 681-82.

56. Frickey, *supra* note 54, at 1208.

57. *See id.*

58. This is not a simple process, which may account in part for the "motivational" tone of Farber and Frickey's description of practical reasoning:

> [practical reasoning includes] a concern for history and context; a desire to avoid abstracting away the human component in judicial decisionmaking; an appreciation of the complexity of life; some faith in dialogue and deliberation; a tolerance for ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies; and an overall humility.

Farber & Frickey, *supra* note 54, at 1646. There remains the question of how one evaluates an attempt at decision making through practical reasoning. Presumably, the most serious charge that can be levied against someone who purports to engage in a practical reasoning approach to decision making is that they relied on a reason which they do not or will not make explicit.

59. Frickey, *supra* note 54, at 1209 (discussing practical reasoning in the context of statutory construction (quoting Farber & Frickey, *supra* note 54, at

Thus, to interpret, or rather to "construct," the meaning of the Confrontation Clause, one needs to consider the full three-dimensionality of confrontation. In other words, any discussion of only one or even two dimensions of confrontation that ignores the third will result in a "shaky" construction or interpretation.

The third dimension of the constitutional right to confrontation is a societal dimension. By a societal dimension, I mean one that considers the quality of human relationships. The societal dimension centers on two accusatorial relationships. First, there is the relationship between the accused and the individual who makes the statements offered against the accused. Second, there is the relationship between the accused and the formal accusers, in the form of the prosecution and the power of the state.[60] The societal dimension of confrontation is concerned with how these relationships operate, independent of the reliability of the trial outcome. To describe the societal dimension, I will rely on arguments based on the content and structure of the text; on the history of the Confrontation Clause, in both federal and state versions; and on the ethical and pragmatic aspects of confrontation.

A. Textual Grounds for a Societal Dimension to the Confrontation Clause

Arguments based on the content and structure of the Sixth Amendment's text support a societal dimension to confrontation. The Sixth Amendment states that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."[61] In *Coy v. Iowa*, Justice Scalia summarized the literal interpretation of "confrontation":

> [A]s Justice Harlan put it, "[s]imply as a matter of English" [the Confrontation Clause] confers at least "a right to meet face to face all those who appear and give evidence at trial." Simply as a matter of Latin as well, since the word "confront" ultimately derives from the prefix "con-" (from "contra" meaning "against" or "opposed") and the noun "frons" (forehead).[62]

Thus, Justice Scalia's literal reading of the text invokes the visual image of a head-to-head meeting of individuals.

Justice Scalia's etymology is subject to another interpreta-

1645 (in turn quoting Robert Summers, Instrumentalism and American Legal Theory 156 (1982)))).

60. *See infra* note 83 and accompanying text.

61. U.S. Const. amend. VI.

62. Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (citations omitted).

tion, however. The prefix "con-" does not derive from the adverb "contra," but instead derives from "com," a form of the Latin preposition "cum," which means "together."[63] This reading strongly suggests the societal dimension of confrontation—a bringing together of heads rather than an opposition of heads—conveying an image of dispute resolution by and within a community.[64]

The structure of the text places the actual "confrontation" between the accused and the witnesses. An early Supreme Court case suggests that part of the Confrontation Clause is the right to have the jury view the demeanor of the witness.[65] This textual reading cannot stand. The observation of witness demeanor may be one of the core functions behind the Sixth Amendment right to a "trial, by an impartial jury"[66] (to have your accusers evaluated by your peers), but the structure of the Confrontation Clause itself provides no role for the jury. The clause speaks only of the accused's right. Thus, both the content and the structure of the Confrontation Clause denote a right to a direct physical meeting between defendant and witness. Yet a textual analysis alone seems weak: What is so significant about a personal meeting of criminal defendants and

63. 1 ERNEST KLEIN, A COMPREHENSIVE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 326, 333 (1966); THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 85, 89, 91 (T.F. Hoad ed., 1986).

64. One dictionary definition of "confrontation" emphasizes a *process* rather than a static moment: "[confrontation is] 1. The bringing of persons face to face, esp. for examination eliciting of the truth. . . . 2. The action of bringing face to face or together for comparison." 2 OXFORD ENGLISH DICTIONARY 815 (1933). In our legal system the state initiates and guarantees the defendant this process of confrontation. This suggests that the constitutional right to confrontation involves more than a concern with the relationship between individuals; it also involves the relationship between an individual and the state.

65. The Court stated that:

> The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895). This language was also quoted in California v. Green, 399 U.S. 149, 157-58 (1970), Kentucky v. Stincer, 482 U.S. 730, 736-37 (1987), and in the dissent in Coy v. Iowa, 487 U.S. 1012, 1026 (1988) (Blackmun, J., dissenting).

66. U.S. CONST. amend. VI.

the witnesses against them? For the answer to this question, it is more helpful to turn to other sources of interpretation.

B. HISTORICAL GROUNDS FOR A SOCIETAL DIMENSION TO THE CONFRONTATION CLAUSE

The historical grounds for a societal dimension center on arguments about the historical purpose for the Confrontation Clause, the historical context in which it was adopted, and the evolution of the concept since its adoption. It is now commonplace to argue that little is known about the Framers' intent in drafting the Confrontation Clause.[67] Apparently, the clause was a thoroughly uncontroversial part of the Bill of Rights.[68] This is not surprising, however, when one considers the historical context. As I argued earlier, confrontation at common law necessarily meant both the physical meeting of the criminal defendant and witness and the process of cross-examination. To the Framers, the clause could have meant no less than this. Yet we are still left with the question of what value to assign to a physical, interpersonal meeting.

Today it is possible to separate defendants and the witnesses against them and still have a "meeting" via videotape or closed-circuit television.[69] The development of this technology has forced courts to ponder aspects of confrontation they would not previously have had to consider. State supreme courts are beginning to venture forth with their own interpretations of confrontation in interpreting their own constitutions. Because the state declarations of rights and the federal Bill of Rights share a common historical context, it may be profitable for the federal courts to look to state constitutional decisions as persuasive authority when interpreting the federal Bill of Rights.

The supreme courts of Indiana, Massachusetts, and Pennsylvania have held that testimony given by a child witness outside of the physical presence of the defendant violates their state constitutions.[70] These courts stressed the literal language

67. *See* White v. Illinois, 112 S. Ct. 736, 744 (1992) (Thomas, J., concurring in part and in the judgment).

68. *See* Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH L. REV. 67, 75-76 (1969).

69. While the *White* majority might argue that closed-circuit television testimony presents no hearsay problem, it would have to concede that videotaped testimony is "a statement, other than one made by the declarant, while testifying at the trial or hearing" and is hearsay if offered "to prove the truth of the matter asserted." FED. R. EVID. 801(c).

70. Brady v. State, 575 N.E.2d 981 (Ind. 1991) (child's testimony was video-

of their confrontation clauses, which are more precise than the federal version in that they guarantee defendants the right "to meet the witnesses against [them] face-to-face."[71] The difference in precision between the federal and state confrontation clauses may not be significant for two reasons. First, the literal interpretation of confrontation, which both Justice Scalia and Justice Harlan gave to the federal Confrontation Clause, is consistent with these state provisions. Second, it is unlikely that, in the days before portable video cameras and closed-circuit television, the Framers could have understood confrontation to mean anything other than physical confrontation.

The Framers forged the federal and state constitutions in an age when society valued the spoken word in a way that we, the video generation, have perhaps forgotten.[72] At that time, direct and personal oral communication was prized as a central part of a democratic society.[73] As one historian has noted, "Americans, and all others who 'live' democracy as well as value it, talk out their mutual concerns. There is no substitute for face-to-face confrontation."[74] Although our technology has advanced, perhaps we should consider the historical sense of what it means to "confront" another human being.

C. ETHICAL GROUNDS FOR A SOCIETAL DIMENSION TO CONFRONTATION

In striking down a criminal conviction based in part on testimony given outside the physical presence of the defendant, the Massachusetts Supreme Court quoted extensively from an Eighth Circuit Court of Appeals decision that reversed the usual focus of the Confrontation Clause:

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taped outside of the presence of the defendant); Commonwealth v. Bergstrom, 524 N.E.2d 366, 367 (Mass. 1988) (testimony was given by simultaneous but one-way closed circuit television); Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991) (same).

71. IND. CONST. art. I, § 13; MASS. CONST. art. XII; PA. CONST. art. I, § 9. This language is more precise than the federal "confrontation" language, and is used by 19 of the 47 state constitutions that contain confrontation clauses. *See* LEGISLATIVE DRAFTING RESEARCH FUND, CONSTITUTIONS OF THE UNITED STATES, NATIONAL AND STATES (1991) (collecting state constitutional provisions).

72. However, anyone who has spoken to a "live" audience has experienced the connection that comes from the physical confrontation of speaker and listener.

73. *See* ROBERT T. OLIVER, HISTORY OF PUBLIC SPEAKING IN AMERICA (1965).

74. *Id.* at xviii.

> Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place . . . . While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment. Of course, confrontation requires cross-examination in addition to a face-to-face meeting. The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right *additional to* the right of cold, logical cross-examination by one's counsel.[75]

In stressing the value of the physical confrontation of the defendant and witness, the Massachusetts Supreme Court appeared to be primarily concerned with the reliability dimension of confrontation, but when the court noted the effect of confrontation on communication, it was also emphasizing the societal dimension of confrontation. The court was acknowledging that the function of an interpersonal meeting is to produce a very real, but intangible effect.

Justice Scalia made a similar argument in *Coy v. Iowa*, arguing that human beings regard personal confrontation as "necessary for fairness."[76] Justice Scalia supported this argument with essentially literary evidence: a quote from the Bible regarding Roman practice,[77] a quote from Shakespeare's *Richard II*,[78] and a homely anecdote told by President Eisenhower,[79] all illustrating the societal value of a personal confrontation be-

75. Commonwealth v. Bergstrom, 524 N.E.2d 366, 371-72 (Mass. 1988) (citing United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979) (citations omitted, emphasis added)).

76. Coy v. Iowa, 487 U.S. 1012, 1018 (1988).

77. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."

Id. at 1015-16 (quoting *Acts* 25:16).

78. "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .' *Id.* at 1016 (quoting WILLIAM SHAKESPEARE, RICHARD II, act 1, sc. 1).

79. President Eisenhower once described face-to-face confrontation as part of the code of his home town of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow."

Id. at 1017-18 (quoting press release of remarks given to the B'nai B'rith Anti-

tween individuals. The dissent chided Justice Scalia for his use of these examples,[80] and it is fascinating to see Justice Scalia, not known for using literary sources as guides to constitutional interpretation, defend his examples: "We have cited [Shakespeare and Eisenhower] merely to illustrate the meaning of 'confrontation,' and both the antiquity and currency of the human feeling that a criminal trial is not just unless one can confront his accusers."[81] Although somewhat self-conscious, Justice Scalia's attempt to argue in this manner may provide support for those who contend that one value of the "Law and Literature" movement is to explore dimensions of the law generally unexpressed in traditional legal sources.[82]

These arguments support the claim that confrontation is necessary as part of the social relationship between the individual defendant and the accusing witness. However, defendants are actually guaranteed a right to confrontation on two levels: confrontation with the individual witnesses against them and confrontation with the state through its agents. Indeed, the draft of the Sixth Amendment proposed before the House of Representatives by Virginia's representative, James Madison, borrowed from his state's Declaration of Rights, seemed to distinguish between these two levels by providing a criminal defendant the right "to be confronted with his accusers *and* the witnesses against him."[83] Although the final version of the

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Defamation League, November 23, 1953). Justice Scalia also relies on the common saying, "Look me in the eye and say that." *Id.* at 1018.

80. *Id.* at 1029 (Blackmun, J., dissenting). The dissent even tried to take on the validity of the Shakespearian view of confrontation as being inconsistent, according to Wigmore, with the common law view of confrontation as cross-examination. *Id.* at 1029-30. As I argued earlier, either Wigmore himself or this interpretation of Wigmore is flatly wrong. At common law, confrontation by necessity meant *both* physical confrontation *and* cross-examination. *See supra* notes 19-25 and accompanying text.

81. *Coy*, 487 U.S. at 1018 & n.2. In fact, this was Justice Scalia's second attempt at defending himself on this point; earlier in the opinion he stated: "This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Id.* at 1017 (citation omitted).

82. *See, e.g.*, RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984); James B. White, *What Can a Lawyer Learn From Literature?*, 102 HARV. L. REV. 2014 (1989) (book review of RICHARD A. POSNER, LAW & LITERATURE: A MISUNDERSTOOD RELATION (1988)).

83. 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789). The House approved Madison's language without debate. 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1121-38 (1971). The Senate also approved

Sixth Amendment was shortened to its present form, the two levels of responsibility inherent in the Confrontation Clause remain. The language and structure of the Sixth Amendment, taken as a whole, constitutionalize the adversarial "meeting" of the individual and the state.[84] In this sense, the Confrontation Clause represents the societal relationships underlying the adversary system.

Although he did not use these terms, Justice Scalia made a strong argument for the societal dimension of confrontation between the individual and the state in *Coy v. Iowa*.[85] He stated that "confrontation 'contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.' "[86] Justice Scalia argued that *both* elements of confrontation—a physical face-to-face meeting between the accused and the witness and the right to cross-examine the witness—" 'ensur[e] the integrity of the factfinding process.' "[87]

The social relationship between the individual and the state as accuser imposes obligations that have practical consequences in applying the Confrontation Clause. Professor Eleanor Swift has argued that "the confrontation clause may impose a moral limit on the extent to which the government may de-

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it as written and sent the proposed Bill of Rights back to the House to consider other suggested changes. *Id.* at 1145-57. The House Conference Committee, which considered the Senate's proposed changes, shortened the Confrontation Clause to its present form, which was accepted and forwarded to the states for ratification. *Id.* at 1159-66. The language of the Sixth Amendment was not controversial and was apparently adopted by the states without debate. *Id.* at 1171-93.

84. Faretta v. California, 422 U.S. 806, 818 (1975). The *Faretta* Court stated that:

> The rights to notice, confrontation, and compulsory process when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice .... In short, the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

Id. (citing California v. Green, 399 U.S. 149, 176 (1970) (Harlan, J., concurring)).

85. 487 U.S. 1012 (1988).

86. *Id.* at 1018-19 (quoting Lee v. Illinois, 476 U.S. 530, 540 (1986)). *See also* Olin G. Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1092 (1991) ("Live testimony may be essential to perceptions of fairness, regardless of the real relation between live testimony and accuracy of outcomes.").

87. *Coy*, 487 U.S. at 1020 (quoting Kentucky v. Stincer, 482 U.S. 730, 736 (1987)).

part from offering witnesses."[88] Professor Swift argues that not only is the prosecution traditionally held to higher ethical standards in proving its case, but also that

> [t]he preference for face-to-face accusation also represents a basic political commitment to shared responsibility for outcomes underlying our system of trial adjudication. The presence of witnesses in criminal cases, as well as the use of juries, contributes individual conscience to judgments of guilt. The prosecution cannot succeed without witnesses whose knowledge is stated in court in the presence of the defendant, and whose credibility is tested by nonaccountable lay juries. A commitment to interpose the personal moral responsibility of witnesses as accusers and juries as decisionmakers between the individual defendant and the state may distinguish criminal prosecutions from civil trials.[89]

To satisfy the ethical demands of its relationship with the individual criminal defendant, the state must do all that it can to provide an actual confrontation on the individual level, and when this actual confrontation is impossible, the state must do its best to protect the other dimensions of confrontation. The state cannot guarantee a criminal defendant an accurate outcome to the trial; witnesses may lie, may be mistaken, or may not recall events.[90] The state can, however, guarantee its criminal defendants that it will do everything possible to produce a hearsay declarant to afford these defendants an actual confrontation with their individual accusers. When the state cannot produce the declarant because the declarant is dead, or otherwise unavailable in the traditional sense,[91] the state must do its

88. Eleanor Swift, *Abolishing The Hearsay Rule*, 75 CAL. L. REV. 495, 512 (1987).

89. *Id.* at 512 n.45.

90. *See* United States v. Owens, 484 U.S. 554, 558-59 (1988). The result in *Owens* makes sense under a three-dimensional view of the Confrontation Clause. In *Owens*, little, if any, reliability could be provided by cross-examination because the declarant had suffered major brain trauma from an attack allegedly committed by the defendant. *Id.* at 556. Although the declarant recalled telling an FBI agent that the defendant attacked him, he did not recall anything about the underlying incident. *Id.* Nor did he recall much of anything else about his hospital stay. *Id.* The prosecution did, however, produce the declarant to testify. *Id.* This may not wholly satisfy the second dimension of confrontation, but it does support the conclusion that the prosecution did not totally fabricate the testimony. *See* Berger, *supra* note 2, at 595. Producing a declarant, even one that has little recall, does, however, satisfy the societal dimension of confrontation.

91. *See* FED. R. EVID. 804(a) (definition of unavailability). This is not to suggest that courts may not recognize other grounds of unavailability in a particular case, such as where a witness may experience "severe and long lasting emotional trauma" by testifying. *See* Commonwealth v. Bergstrom, 524 N.E.2d 366, 376 (Mass. 1988) (considering the effect on a child testifying in court). I would not, however, limit this ground of unavailability to child witnesses. Any

best to protect the nonsocietal dimensions of confrontation. That is, the state must require high standards of reliability for the hearsay statement and prove that the statement was not the product of the prosecution or an inquisitorial process. These normative prescriptions, aside from their intrinsic appeal, can be justified on pragmatic grounds.

D. Pragmatic Grounds for a Societal Dimension to Confrontation

The textual, historical, and ethical bases for a societal dimension are intellectually and intuitively very appealing. For those who prefer more "concrete" arguments, however, a societal dimension of confrontation also appears to have pragmatic value.

Confrontation between individuals is a special kind of communication event, and the interpersonal effects of confrontation, although still the subject of much research, are not exactly as "undefined" as the Massachusetts Supreme Court has suggested.[92] Two prominent communications scholars have concluded that confrontation has significant value for individuals.[93] Although their research did not involve courtroom confrontation,[94] Professors Sara E. Newell and Randall K. Stutman's conclusions regarding social confrontation seem especially relevant to developing an understanding of the societal dimension of physical confrontation in the courtroom. Under their analysis, "confrontation" occurs when one person challenges another over a social or private rule violation.[95] In the courtroom context, the "rule-violating behavior" would be lying about or misreporting the defendant's conduct.

Thus, it is especially helpful to understand what individuals hope to achieve through confrontation. Newell and Stutman found that:

> Generally, individuals share five strategic goals as confronters. First,

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method of Confrontation Clause analysis that relies on simple categories as opposed to a multidimensional practical reasoning approach to the problem is likely to produce unjustifiable, unclear, and inconsistent results.

92. *Bergstrom*, 524 N.E.2d at 372.

93. Sara E. Newell & Randall K. Stutman, *The Episodic Nature of Social Confrontation*, 14 COMM. Y.B. 359, 359 (1991).

94. The research focused on confrontation as embodied in social conversations between acquaintances. *Id.* Although this research was not courtroom-based, Professor Stutman is an expert in legal communication. He recently coauthored an excellent book applying current argumentation and persuasion theory to the legal advocacy process. *See* RIEKE & STUTMAN, *supra* note 15.

95. Newell & Stutman, *supra* note 93, at 359.

> actors confront others as a means of influencing their behavior. The desired influence most commonly concerns a correction or cessation of a rule-violating behavior. Second, individuals confront others as a means of venting frustration. Individuals often allow dissatisfaction with another to build. Confrontation provides an outlet for this dissatisfaction and thus serves as a means for catharsis. Third, individuals view confrontation as a vehicle for the maintenance of a strong relationship. Through the establishment and clarification of relational or social rules, individuals reaffirm the value of the relationship. Through confrontation, individuals may manage how the other views the relationship and foster their own views. Fourth, individuals use confrontation as a means of retribution. By establishing a rule violation, individuals can seek restitution in forms ranging from apology to aggressive acts. For some actors, confrontation is the legitimating action that allows them to seek retribution without being seen as aberrant or cruel. Finally, individuals may use confrontation to gain enhanced understanding of the other person.[96]

This research strongly suggests why individuals feel that confrontation is significant to communication, and why they would believe that confrontation is a critical part of a fair adversarial proceeding.[97] These points, however, focus on the societal dimension of confrontation between the defendant and the individual witness. It is also important to examine pragmatic arguments for the existence of the societal dimension of confrontation between the individual and the state.

Recent social science research suggests that the legitimacy and integrity of our adversary process are strengthened by the societal dimension of confrontation.[98] In one such study, Professor Tom R. Tyler sought to identify factors contributing to respect for and compliance with the law and legal authorities.[99] He concluded that individuals are more likely to comply with

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96. *Id.* at 387.

97. This research dealt with unmediated, face-to-face confrontation. One should not expect the same results from confrontation that was conducted via videotape or closed-circuit television because these media remove the direct interpersonal interaction that is at the heart of confrontation.

In addition, other communication research suggests that jurors pay more attention to testimony that is presented to them in mediated forms, such as videotape, than to live testimony. *See* GERALD R. MILLER & NORMAN E. FONTES, VIDEOTAPE ON TRIAL: A VIEW FROM THE JURY BOX 100 (1979). This research supports a pragmatic argument that any "mediated" confrontation—confrontation via screens, videotape or closed-circuit television—is not only ineffective in satisfying the three dimensions of the Confrontation Clause, but by itself unduly prejudices the defendant by "spotlighting" the witness's testimony. This mediated communication alone suggests that the defendant is guilty of something, if not this particular charge, if the witness must be shielded by mediated, indirect communication.

98. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

99. *Id.* at 3-7.

the law if they believe that legal authorities are legitimate, and their beliefs about legitimacy are tied to judgments about the fairness of the procedures used by legal authorities.[100]

His conclusion that participation in decision making is critical to the perception of procedural justice sheds light on the societal value of confrontation:

> One important element in feeling that procedures are fair is a belief on the part of those involved that they had an opportunity to take part in the decision-making process. This includes having an opportunity to present their arguments, being listened to, and having their views considered by the authorities. Those who feel that they have had a hand in the decision are typically much more accepting of its outcome, irrespective of what the outcome is. An additional advantage of procedures that allow both sides to state their arguments is that each side is exposed to the other. Because a party to a dispute is often unaware of the feelings and concerns of the other party, this exposure is very important.[101]

Professor Tyler's work not only affirms the personal value of confrontations between individual disputants, but also suggests the value of confrontation for an individual and the state.[102]

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100. *Id.* at 170-73. In defining what is perceived to be a "fair procedure," Professor Tyler contrasted the instrumental perspective and the normative perspective. *Id.* at 5, 163-69. Under an instrumental perspective, "people define fairness primarily by the extent to which they are able to influence the decisions made by the third party." *Id.* at 163 (citing JOHN W. THIBAUT & LAUREN S. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 1-2 (1975)). In contrast, under a normative perspective, judgments of fairness may depend on many different aspects of a procedure "which have little or nothing to do with outcomes or the control of outcomes." *Id.* Professor Tyler concluded that his study supported the normative perspective on defining procedural fairness. *Id.* He found that "seven different aspects of procedure independently influenced judgments about whether the procedure was fair." *Id.* Of these seven aspects, he found that

> the criterion of fair procedure most closely related to outcomes (that is, consistency) [which is the primary value from an instrumental perspective] is found to be of minor importance. In contrast, *judgments about the social dimensions of the experience, such as ethicality, weigh very heavily in assessments of procedural justice.*

Id. (emphasis added).

101. *Id.* at 163 (citations omitted). Justice Scalia's arguments for the societal dimension of confrontation support this research with literary analogues.

102. Professor Swift also acknowledged the legitimizing value of requiring the prosecution to produce the declarant for confrontation with the defendant if the declarant is available. She wrote:

> [r]equiring production of witnesses controls tactical advantage-taking by government prosecutors and places less risk and burden of impeaching and discrediting on criminal defendants. This restraint legitimizes the use of government coercion and upholds the integrity of public officials. The prosecution is held to be above the morals of the marketplace and must refrain from some of the adversarial behavior that free choice of declarants would otherwise permit.

Where the state grants individuals the constitutional right to be confronted with the witnesses against them, and does all that it can do to guarantee this confrontation and to protect the purposes behind it when actual confrontation is impossible, an individual is more likely to view the law and its authorities as legitimate. In short, zealously guarding the right of confrontation may help, if even in a small way, to legitimize authority and in turn to encourage people to obey the law.

V. THE CONSEQUENCES OF A THREE-DIMENSIONAL CONFRONTATION CLAUSE

What are the implications of acknowledging a third dimension to our understanding of the Confrontation Clause and employing a practical reasoning approach to Confrontation Clause cases? When a court considers the full, multidimensional meaning of confrontation, it becomes much more difficult to admit into evidence a statement made out-of-court and out of the physical presence of the defendant. This is a hearsay problem, but in a criminal case it becomes a constitutional problem as well.[103]

Swift, *supra* note 88, at 512 n.45. Professor Tyler's work empirically supports Professor Swift's argument.

103. Although the focus of this Symposium is hearsay reform, a multidimensional analysis of the Confrontation Clause also helps to reconcile the constitutional problems posed by the Confrontation Clause in other contexts, such as limitations on cross-examination, impeachment, and privilege. *See* James B. Haddad, *The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?*, 81 J. CRIM. L. & CRIMINOLOGY 77 (1990) (arguing that the Supreme Court's decisions in the hearsay context conflict with the Court's decisions in the cross-examination and impeachment, privilege, and limiting instruction cases). For example, when one applies the three dimensions of the Confrontation Clause, the Supreme Court's decision in Olden v. Kentucky, 488 U.S. 227 (1988), makes sense. There, the Court found a violation of the Confrontation Clause where the defendant has been deprived of the opportunity to cross-examine and impeach a witness on a critical issue. *Id.* at 232-33. In *Olden*, the procedural dimension of confrontation was not threatened; there was no concern that the prosecution had manufactured out-of-court statements. However, the evidentiary and societal dimensions were concerns. First, without being able to cross-examine and potentially impeach the witness on an essential issue, the reliability of the result would be diminished. Yet the reliability of the evidence could not have been the Court's only concern. As I have argued earlier, we have never recognized a constitutional guarantee to a perfect result. We can and do, however, guarantee that, absent compelling circumstances, we will give defendants the satisfaction of being able to face the individuals and the state that will share the responsibility for depriving them of their liberty. This concern embodies the societal dimension of confrontation. The state has not done all that it can to provide this confrontation if it

The desire for reliability, the desire to provide a check on prosecutorial abuses, and the desire to meet the societal demands for confrontation—all of these dimensions combine to form the "legs" of the Confrontation Clause. When a court recognizes and applies all three dimensions of the Confrontation Clause to a particular case, only a truly compelling need can infringe on this constitutional right. Moreover, when a court consciously decides to infringe on the right to confrontation, the court must do so in the manner that least violates the dimensions of the confrontation right.

What does this mean in practical terms? First, the inequality between the defense and prosecution burdens for proving the reliability of a hearsay statement that Professor Imwinkelried noted turns out to be entirely justifiable. The prosecution's burden is warranted, even if it is heavier than the defendant's burden, for three reasons. Each reason corresponds to one of the three dimensions of confrontation. On the evidentiary dimension, both the prosecution and defendant are required to prove a basic level of reliability when introducing hearsay; thus, the prosecutor's initial burden is no greater than the defendant's.[104] Because of the procedural dimension of confrontation, however, the prosecution's burden is heavier in that the state must prove reliability by demonstrating the circumstances of the statement's making as a check on the evidence's integrity. Finally, the societal dimension of confrontation also places a heavier burden on the prosecution in order to assure the defendant that when the statement must be admitted because of sheer necessity, such as the unavailability of the declarant, the system will do its best to require the strongest showing of reliability possible.

The practical reasoning approach to the three-dimensional

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produces the accusing witness but prohibits the defendant from impeaching the witness on the most critical points of his or her testimony.

Compare *Olden* with United States v. Owens, 484 U.S. 554 (1988). In *Owens* the state produced an accusing witness who had no recollection of the underlying events. *Id.* at 555-56. The procedural dimension was satisfied because the prosecution proved that it had not fabricated or orchestrated the witness's statements. The evidentiary dimension was not much of a consideration; confrontation of this witness was futile in producing a more reliable result. However, the state had done everything in its power to satisfy the societal dimension—that is, to provide the defendant with the right to confrontation, the only satisfaction it could guarantee.

104. This is true simply as a matter of evidentiary *rule* analysis. Unreliable evidence could have no probative value on any matter to be proved. Thus, it would have to be excluded under the basic rules of relevancy. *See* FED. R. EVID. 401, 403.

Confrontation Clause supports the conclusion that, except in extraordinary cases, the prosecution must produce the declarant or provide a specific showing that the declarant is unavailable. What would constitute an extraordinary case? *United States v. Inadi*[105] was unique in that it dealt with statements that were made during the crime, not during an investigation after the crime. Indeed, one could argue that the statements were *part* of the crime because the statements of co-conspirators can function as criminal acts themselves.[106] Because the statements had independent legal significance, that is, significance apart from their truth or falsity, the reliability dimension was not relevant. Moreover, the *Inadi* Court could be confident that it was not violating the second dimension of the Confrontation Clause because no government agent or inquisitorial process helped to create the statement.

One might argue that the *Inadi* Court recognized the societal dimension, but decided to dispense with it because of practical considerations, such as the burden that an unavailability requirement placed on the prosecution in conspiracy cases and because the defendant could call an available declarant under the Compulsory Process Clause.[107] It is not clear from the *Inadi* opinion that the Court truly considered the societal dimension to the Confrontation Clause as I have outlined it here. Moreover, even if the Court was aware of the societal dimension, the justifications for dispensing with it in the co-conspirator context are not compelling.[108] Thus, the *Inadi* decision is inconsistent with a three-dimensional interpretation of the Confrontation Clause.

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105. 475 U.S. 387 (1986).

106. *See* FED. R. EVID. 801(c). In this sense, the statements are not hearsay (out-of-court statements offered for the truth of the matter asserted), but instead are statements that have independent legal significance. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 6.2, at 183-86 (2d ed. 1987).

107. *See* White v. Illinois, 112 S. Ct. 736, 742 (1992).

108. As Professor Berger and others have so persuasively demonstrated, the rights secured by the Sixth Amendment were meant together to serve as a restraint on government. *See* Berger, *supra* note 2; Kirst, *supra* note 14. Thus, burden on the prosecution cannot serve as an excuse for infringing on the Sixth Amendment rights of the accused. Moreover, it is absurd to argue that because the defendant has a constitutional right to compulsory process, the Court may dispense with the accused's independent right of confrontation. The defendant has no obligation to put on a defense by calling witnesses. It is the prosecution's obligation to prove its case without violating the defendant's constitutional rights. *See* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 612-22 (1988).

The Supreme Court's recent decision in *White v. Illinois* is even less justifiable than its decision in *Inadi*. Although the majority in *White* purported to focus on the reliability or evidentiary dimension of confrontation, it failed to satisfy even this dimension. The Court looked to the fact that the statements were admitted under the "firmly rooted hearsay exceptions" of "spontaneous declarations" and "statements made in the course of securing medical treatment" as evidence that they were sufficiently reliable to meet the Confrontation Clause.[109] However, the "reliability" rationale of the exception for spontaneous declarations has been more the result of tradition than of fact, and has been soundly criticized by commentators—a fact ignored by the Supreme Court.[110] Moreover, even assuming that the exception for statements made for purposes of medical diagnosis or treatment, which Chief Justice Rehnquist misstated as the exception for a "statement made in the course of procuring medical services,"[111] is firmly rooted, the *White* Court misapplied the exception to statements revealing the identity of the defendant. While misstating the *cause* of an injury might result in misdiagnosis or mistreatment, statements

109. *White*, 112 S. Ct. at 742. This is actually a misstatement of the exception, correctly identified in the Court's footnote as the exception for statements made for the purpose of diagnosis or treatment. *Id.* at 740 n.2.

110. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432, 439 (1928) ("What the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation."). More recent commentators have continued to emphasize the questionable reliability of "excited utterances" or "spontaneous exclamations." *See, e.g.*, Mason Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271, 286 (1952) ("If judged from the standpoint of the reliability of the representations on the basis of perception, the law relating to the admission of spontaneous exclamations is amazing. If the observer speaks before he thinks, the evidence is admissible; if he thinks before he speaks, it is excluded."); Comment, *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 WAYNE L. REV. 1077, 1114-15 (1969) (suggesting that because of the unreliability of excited utterances, their admissibility should be limited to cases of necessity in which the declarant is unavailable). *Compare* Charles W. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 210 (1960) ("[I]f unavailability is required [under the rules of evidence] before the admission of such reliable hearsay as former testimony at least a showing of inconvenience should be required before admitting the much less reliable spontaneous exclamation. The logic of this proposal seems unassailable.") *with* White v. Illinois, 112 S. Ct. 736, 741 (1992) ("*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.").

111. *White*, 112 S. Ct. at 743.

regarding the specific *identity* of the assailant are irrelevant to diagnosis and treatment. Statements of identity thus carry *no* "special guarantees of credibility,"[112] and traditionally have been excluded under this exception.[113] Although the *White* majority suggested that the reliability of the statement is the key to satisfying the Confrontation Clause, it showed little actual concern for the reliability dimension of confrontation.

Moreover, when a child makes a statement about sexual abuse that has already occurred, the statement immediately becomes part of the adversarial, inquisitorial process, and it may become nearly impossible to reconstruct which statements are the product of the child's own recollection and which come from someone else involved in the government investigation by, perhaps quite innocent or mistaken, suggestions.[114] In such a case, the admission of hearsay violates the procedural dimension of the Confrontation Clause.

Perhaps our judicial system could minimize the danger of violating the procedural dimension of confrontation if, as Professor Berger suggests, the state videotapes children's statements so that the trier of fact can scrutinize the investigator's conduct.[115] Videotaping or using closed-circuit television is not a solution to the confrontation problem, however, if the child is available, in the evidentiary sense, to testify.[116] For, even if the

112. *Id.* at 743.

113. *See* United States v. Nick, 604 F.2d 1199, 1201-02 (9th Cir. 1979). When statements concern the identity of the perpetrator of the injury or the fault of the party causing the injury, the relevance to diagnosis and treatment vanishes, and the guarantees of reliability vanish with it. *See* FED. R. EVID. 803(4) advisory committee's note; 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 803(4)[01] (1988). In United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985), the court held that statements made by a child to a physician regarding the identity of the person who abused her were admissible when there was no evidence to indicate that the child made the statement for a reason other than treatment. The court noted, however, that the child was available and did actually testify at trial. *Id.* at 440.

114. *See* SUGGESTIBILITY, *supra* note 48 (collecting articles).

115. Berger, *supra* note 2, at 612.

116. It is beyond the scope of this Article to consider the related issue of whether a particular child may be proved to be unavailable because he or she would suffer severe and permanent psychological damage from testifying. There are several excellent decisions on this point, most notably Commonwealth v. Bergstrom, 524 N.E.2d 366 (Mass. 1988). However, the *Bergstrom* court suggests that the prosecutor would have to establish unavailability beyond a reasonable doubt. *Id.* at 369. It seems unnecessary, for the purposes of protecting a defendant's constitutional rights, to "convict" a witness of being a potential mentally ill patient. A lower, but realistic standard, such as "clear and convincing" evidence of unavailability, might be more equitable and ethical for both sides.

state had videotaped the child's statements in *White*, they could not have been played before the trier of fact if they were taped outside the presence of the defendant. To do so would violate the third dimension of confrontation; the state would have deprived the defendant of the societal right to confront the person accusing him of a heinous act, a person who might have been mistaken but persuasive to the trier of fact.

Nevertheless, there are occasions when, out of compelling need, a court may consider and yet dispense with the societal dimension. One instance is when the societal dimension must give way to absolute necessity, such as when the declarant is unavailable.[117] Another instance might be where no real societal value is provided by confrontation. This may very well be the case in a confrontation between a child and an adult. Because of the difference in vulnerability and power between the individuals, a confrontation between child and adult may be qualitatively and ethically different than a confrontation between two adults.

Yet this is not the kind of determination that one can or should make as a general black letter rule, as the *White* court would suggest. The accused, who loses the societal dimension of confrontation, is at least entitled to a court's evaluation of whether the sacrifice of the societal dimension is necessary in this particular case. This is the approach suggested by the Massachusetts Supreme Court's decision in *Commonwealth v. Bergstrom*, which requires a case-specific finding of unavailability in order to satisfy the Confrontation Clause of its state constitution.[118] This is also the approach the petitioner requested and the Court rejected in *White*.[119]

The damage of the *White* decision is that it dispenses with the societal dimension of confrontation in *all* cases of statements by a child admitted under the spontaneous declarations and medical diagnosis or treatment hearsay exceptions, regardless of the particular circumstances. Many children might be justifiably excused from testifying, and many hearsay statements admitted, under the *Bergstrom* rule that the danger of "severe and permanent psychological damage" is a ground of

117. *See* Mattox v. United States, 156 U.S. 237, 243-44 (1895).

118. 524 N.E.2d 366, 369 (Mass. 1988).

119. White v. Illinois, 112 S. Ct. 736, 743 (1992). The petitioner had argued for "a general rule that hearsay testimony offered by a child should be permitted only upon a showing of necessity—*i.e.*, in cases where necessary to protect the child's physical and psychological well-being." *Id.*

unavailability.[120] However, it is not clear that such unavailability would be found in *every* case of child testimony. Moreover, *White*'s language is quite broad, applying to cases beyond the painful and emotionally charged context of a child sexual abuse case. Where the confrontation is not between a child and an adult, the need to dispense with the societal dimension of confrontation becomes much less compelling.

Consideration of all three dimensions of confrontation, under a process of practical reasoning, leads to the conclusion that direct and unmediated physical face-to-face confrontation between criminal defendants and the witnesses against them, including hearsay declarants, is constitutionally required in the absence of compelling reasons for infringing on that right and the provision of all possible safeguards. The United States Supreme Court is acting in an inconsistent fashion in its Confrontation Clause cases.[121] The damage to the Sixth Amendment can be contained by limiting *Inadi* and *White* as much as possible to their special factual contexts, but state courts, interpreting their own state constitutions, should not follow the Supreme Court's one-dimensional interpretation of the Confrontation Clause.[122] Courts, both federal and state, should face the full meaning of the constitutional right to confrontation.

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120. *Bergstrom*, 524 N.E.2d at 369.

121. *See* Haddad, *supra* note 103, at 78-80.

122. Perhaps the Supreme Court will eventually acknowledge the other dimensions of confrontation. Justices Thomas and Scalia appear to be aware of the procedural dimension in *White*. *See* 112 S. Ct. at 744 (Thomas and Scalia, JJ., concurring in part and in the judgment). Moreover, Justice Scalia seems to be acutely aware of the societal dimension of confrontation. *See* Coy v. Iowa, 487 U.S. 1012 (1988). All the Court needs to do is put these dimensions *together with* the reliability dimension to produce more consistent and justifiable decisions in its Confrontation Clause cases. *Cf.* Kirst, *supra* note 14, at 489 ("It is clearly wrong to assume that all possible dimensions of confrontation doctrine have been expressly mentioned in the Court's opinions. Common law development is possible only if the Court is free to employ dimensions it has not previously cataloged.").