

7-1-2001

Tales Out of School-Spillover Confessions and Against-Interest Statements Naming Others

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Professor Christopher B. Mueller, *Tales Out of School-Spillover Confessions and Against-Interest Statements Naming Others*, 55 U. Miami L. Rev. 929 (2001)

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Tales Out of School—Spillover Confessions and Against-Interest Statements Naming Others

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INTRODUCTION

Fortunately for the wellbeing of us all, people who commit crimes often talk about them afterwards, and effective police work depends heavily on exploiting this human reality.¹ Sometimes people who commit crimes talk to their friends, whom police locate for prosecutors. Sometimes investigative efforts successfully pressure suspects so that they talk directly to police. When two or more people commit crimes

* Henry S. Lindsley Professor of Law, University of Colorado. I wish to thank Professor Michael Graham for selecting the topics and generating the examples used in this Symposium, gathering the commentators, and helping the students come to grips with the very difficult legal issues examined in these pages. I wish to thank as well the University of Miami Law Review for sponsoring the Symposium, and the members of the law review. My thanks especially to Carlton Greer for his work on the details of organization, and to Jennifer Christianson, Bryant Richardson, and Richard Sahuc for contributing the excellent Comments that are mentioned in this Article.

1. From the standpoint of individual liberties, the world would be a better place if police could be expected to work like Sherlock Holmes or Hercule Poirot, drawing shrewd deductions from physical facts and seemingly innocent (certainly uncoerced) statements by witnesses and culprits, but that is only the stuff of lightweight fiction. In more serious fiction, such as Dostoevsky (*CRIME AND PUNISHMENT*, *THE BROTHERS KARAMAZOV*), as in life, interrogation is less like a clever conversation among well-mannered people, and is instead coercive and manipulative, in greater or lesser degree.

together, these conversations with friends or police may describe what they've done and what their colleagues did. When they (or one of them) later stand trial, the question arises whether and how their statements can be used. Multiple culprits make things more complicated, as a matter of both hearsay law and the Constitution, than they are when a lone actor commits a crime and talks about it.²

When one who speaks is *not* later brought to trial and does not testify—a situation that often arises because of a plea agreement and later disappearance or refusal to testify—her statement is sometimes offered in the trial of her friends under the against-interest exception.³ Using this exception is like using a fruit basket to carry beach sand: Co-offender statements tend to spill out beyond the confines of the exception, in effect testing the capacity of the hearsay doctrine, and related constitutional concerns, to work at all. Unfortunately Supreme Court pronouncements on this subject are garbled, analytically flawed, and split by deep divisions among the Justices on the proper use of hearsay and the meaning of the Constitution.

When the one who speaks *is* later brought to trial along with his friends, his statement is typically offered under the admissions doctrine, which makes it admissible only against the person who spoke, and not against his friends. In this situation, using the admissions doctrine is like asking the jury to listen to chamber music and follow each instrument one at a time, hearing sometimes only the viola and sometimes only the cello and so on. Once again, we severely test the capacity of hearsay doctrine and related constitutional concerns to work at all. Supreme Court pronouncements in this area are also deeply split, and constitutional doctrine is awkward in theory and vague in contour.

To start on a note of optimism, we can make progress in solving some of the problems, but to inject a note of realism, it isn't going to be easy and we won't fix everything. One of the topics at hand is the against-interest exception, and specifically the Supreme Court's fractured pronouncements on this doctrine in its decisions in *Williamson* and *Lilly*.⁴ The other topic is the admissions doctrine, and specifically the problems that come with "spillover confessions" and the special limitations on using admissions that we know as the *Bruton* doctrine, which

2. In the case of a lone culprit, constitutional issues may arise when his statement is offered, particularly those associated with the doctrines of the *Miranda* and *Massiah* cases, *see* note 47, *infra*. But there are essentially no hearsay issues because the admissions doctrine embodied in Federal Rule of Evidence 801(d)(2)(A) allows unlimited use of any statement against its maker.

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

4. The references are to *Williamson v. United States*, 512 U.S. 594 (1994), and *Lilly v. Virginia*, 526 U.S. 116 (1999).

the Court most recently refined in its decision in *Gray*.⁵

THE SETTING

Let us turn to the facts of the drug conspiracy case that has been set up to help us consider the issues. In the following account, I have let the characters speak in clipped sentences to make the analysis a bit easier. I have used my own words rather than guessing about the jargon and inflection that might typify one or another subgroup of the population. Still, I have tried not to oversimplify to the point that the example becomes unreal.

Harry, John, Bob, Stewart and Sam enter into a drug conspiracy. We are told that Harry confesses to police his guilt of conspiring to import and distribute heroin, implicating himself and the four others. Harry describes how the heroin is imported, and one can imagine Harry saying this:

I teamed up with John and Bob and Stewart and Sam to run heroin. Stewart brought the stuff in on the plane, and I drove my station wagon to the airport on June 1st and picked him up. He had the stuff in his luggage that he had apparently checked before getting on the plane. We picked up his stuff at the luggage carousel and got out of the airport okay, then we drove to my house. A couple days later, I cut the batch into lots. Then I turned over the cut lots to John and Bob, and they took orders and sold them all. Sam's been in on this all along, and he kept the books so we knew exactly how much went to John and Bob, and how much they'd sold and for what price.

Harry is not the only one who talks to police. Stewart does it too, confessing as Harry did, although his lawyer argues that Stewart's confession was coerced. In the end, Sam enters a plea and does not stand trial. And Bob disappears, after talking to a bartender in general terms ("I won't be around for awhile," he says, because "the heat is on").

Harry also told his girlfriend that he is "going to be rich" and he will "buy her anything she wants," and he says "he and his buddies John, Bob and Sam [have] this heroin scam going with some Thai illegals" and are "pushing a lot of shit all over the southeast." Unfortunately, Harry doesn't survive: He is found dead, shot in the back of the head, with a quarter in each eye, as if to say (but who knows?) "here's what happens to stoolies."

I. AGAINST-INTEREST EXCEPTION

At least since Justice Holmes made his famous comment that we

5. The references are to *Bruton v. United States*, 391 U.S. 123 (1968), and *Gray v. Maryland*, 523 U.S. 185 (1998).

ought to let a person accused of murder prove that another confessed to the deed,⁶ it has seemed fair and right to expand the against-interest exception to reach statements against *penal* interest. When the framers of the Federal Rules of Evidence did it formally in 1975, some American jurisdictions had already begun to move in this direction.⁷ It seems safe to say now, with the benefit of twenty-five years of hindsight, that nobody foresaw how useful this expansion might prove to be *for* prosecutors. Prosecutorial use of the against interest exception but has grown since the Rules were adopted, bringing serious problems.

A. *Applying the Exception*

1. BASIC DIFFICULTIES AND EASY SOLUTIONS

Every legal category brings questions of breadth, and such questions arise with every hearsay exception. With the against-interest exception, one way of framing the breadth question is to ask "how much of a single statement actually fits the exception, all or only part of it?" Not surprisingly, three answers have surfaced, and we can call them the broad view, the narrow view, and the intermediate view.⁸ The broad view holds that the exception reaches statements made in a situation

6. *Donnelly v. United States*, 228 U.S. 243, 277 (1913) (Holmes, J., dissenting) ("No other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man; . . . I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight") (internal citation omitted).

7. See generally Jay L. Hack, Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 B.U.L. REV. 148, 149 n.5 (1976) (reporting that seven states adopted statutes expanding the against-interest exception to reach statements against penal interest, that decisions in 14 other states did the same thing, and that two other states appear headed in the same direction).

8. The broad view is most often associated with Wigmore, who said the principle of the exception is that "the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy," which put him in a "trustworthy condition of mind." Accordingly, an against-interest statement "may be accepted" not merely as proof "as to the specific fact against interest, but also as to *every fact contained in the same statement*." 5 WIGMORE ON EVIDENCE §1465 (Chadbourn rev. 1974). Bernard Jefferson advocated the narrow view, rejecting the idea of a truthful frame of mind and arguing that the exception reaches statements of "the [very] fact which is against interest." McCormick is associated with the intermediate view. In the original edition of his treatise, he said courts should have some "latitude" to admit "contextual statements, neutral as to interest, giving meaning to the declaration against interest," but he would not extend this latitude to "self-serving statements." MCCORMICK, EVIDENCE § 279 (1954). In the current edition of the same book, the authors retract this view in connection with statements against penal interest offered to implicate the accused. Accepting the Supreme Court's decision in *Williamson*, the current authors conclude that the exception reaches only "the specific parts of the narrative that inculcate" the declarant, although a statement "mentioning a defendant" sometimes qualifies if it indeed implicates the declarant and is made to private persons (and not to curry favor with authorities) and does not "shift blame." MCCORMICK, EVIDENCE § 319 (John W. Strong, 5th ed. 1999).

congenial to a truthful state of mind, hence that everything said at the time is trustworthy. Practically speaking, this view has no currency.⁹ Fairly phrased, it does not turn on a proving that the speaker is in truthful mood or frame of mind, which is impossible to assess. Instead, it turns on the presence of circumstances conducive to candor, which are at the least very hard to assess (if not impossible), and courts do allude to such circumstances, usually as makeweight factors in the analysis. What is left are the narrow and intermediate views. Under the narrow view, there is no such thing as a truthful frame of mind that covers an entire statement, and circumstances conducive to candor are not enough. Instead, the narrow view stresses that it is human nature to avoid making against-interest concessions, so a statement making such concessions can be trusted as proof of only those very points. Under the intermediate view, we may not be able to trust the whole statement, but we can trust more than the concessions, and the exception also reaches parts of a statement that are not against interest but are more-or-less neutral in their coloration and go to points of detail, although the exception does not reach self-serving statements.¹⁰

The plurality opinion in *Williamson* purports to adopt the narrow view, concluding that a statement must *itself* be “self-inculpatory,” hence that the exception does *not* reach “collateral statements, even ones that are neutral” in character. Indeed, as the plurality argued, a good way to lie effectively is “to mix falsehood with truth.” But the Court was divided, and the plurality acknowledged that context is all-important, and that the statement “Sam and I went to Joe’s house” could be against

9. Only Wigmore is associated with the broad view, and he was writing when the exception reached only statements against pecuniary interest. He considered and endorsed extending the exception to statements against penal interest, quoting Holmes’ famous observation and decrying a rule that would exclude third-party confessions as “shocking to the senses of justice” and a “barbarous doctrine.” 5 WIGMORE §1477 (Chadbourn rev. 1974). Had Wigmore considered the third-party confession that implicates the accused while currying favor or shifting blame, he might well have receded from the broad view. And Wigmore understood the importance of circumstance in answering the question whether a statement is against interest. *Id.* §1463. He might well have concluded, if he’d thought about it, that statements motivated by a desire to curry favor with authorities or to shift blame to others do not fit the exception.

10. As Wigmore argued, the exception can apply even in the presence of a motive at cross-purposes with the idea that the statement is against-interest. But he said the real concern is the case where the speaker has a self-serving interest as well as a “dis-serving” one, where courts must choose between throwing out the statement or trying “to strike a balance between the two opposing interests,” and apparently he favored the latter approach. *See id.* §1464. I think it is almost impossible to distinguish between “motive” and “interest,” and at least rare to encounter situations in which a person has but one interest and in which her statement can only be viewed as dis-serving that one interest. The human psyche and the human condition are too complicated for that to happen very often.

interest.¹¹ So, it is not clear that *Williamson* really adopts the narrow view. It does not follow that *Williamson* lacks effect. At the very least, *Williamson* changed the way courts *talk* about the exception, and (more important) blocked its use to admit against a criminal defendant most third-party statements to police by co-offenders and statements where the speaker appears to be shifting blame from himself to the defendant.

At best, *Williamson* is a mixed success as a guide for applying the against-interest exception, and the plurality opinion is incoherent on the most basic points. The fine Comment by Richard Sahuc in this Symposium concludes that *Williamson* failed to “create uniformity” and contains a “fatal flaw,” because it tried to draw a “line in the sand” separating against-interest statements from collateral statements, but then blurred the line so as to let courts admit statements implicating others.¹² I agree that *Williamson* sends mixed signals, and believe the opinion is flawed, but I have a different take on the nature of the problem.

We might fix *Williamson* by insisting that against-interest statements can only be admitted to prove acts by, or events or conditions involving, the speaker. But this is in fact a separate condition, unsupported by the logic of the plurality opinion. When I say “fix,” I mean we could craft a rule that is clearer and more certain—also more just if you believe statements by one of several co-offenders to police or friends should never be admitted to prove the guilt of another. Looking only at what seems to be the heart of the plurality opinion, this solution *appears* to be the one intended: We are told that only “some” of what Reginald Harris told DEA Agent Walton was against Harris’s interest, and that “other parts” of what he said—“especially the parts that implicated Williamson”—were not against interest, for these other parts “did little to subject Harris himself to criminal liability.” Thus, his concession that he “knew there was cocaine in the suitcase” in the trunk of his car fit the exception, but not his statements that he was transporting the cocaine *for* Williamson, or that Williamson owned it and was in charge, and was driving another car and had seen the agents stop Harris.¹³

11. *Williamson v. United States*, 512 U.S. 594, 599 (1994) (opinion by Justice O’Connor, speaking for herself and three others).

12. Richard Sahuc, Comment, *The Exception that Swallows the Rule: The Disparate Treatment of Federal Rule of Evidence 804(b)(3) as Interpreted in United States v. Williamson*, 55 U. MIAMI L. REV. 867, 888 (2001).

13. *Williamson v. United States*, 512 U.S. 594, 596-604 (1994) (commenting that Harris, when he first talked to Agent Walton, said he had gotten the drugs from a Cuban friend of Williamson’s, and that the Cuban friend put the drugs in the car with a note telling Harris to make a delivery using a dumpster; later Harris said this statement was a lie; admitting his knowledge of the cocaine cost Williamson “his only possible defense to a charge of cocaine possession, lack of knowledge”). See also the opinion by Justice Ginsburg. *Id.* at 608 (noting that Harris said that the

If we adopt this reading, then *Williamson* gives us a bright-line rule. Handling the against-interest exception in this way would also bring a kind of harmony with the admissions doctrine, which usually blocks use of a statement by one of several defendants to prove what another did. But both the exception and the admissions doctrine operate in a world that is inconveniently untidy: The reason, simply stated, is that co-offender statements are likely to refer to what others do. This general problem—that the parameters of an exception do not very well match the parameters of statements offered under the exception—is not unique to this setting. Something similar happens all the time with the state-of-mind exception. Just as bad actors tend to talk about what their partners have done when they describe their own misdeeds, so one who describes her mental state tends to talk about the acts, events, or conditions in the world that help explain one's feelings, thoughts, and intentions. But state-of-mind statements cannot be used *to prove* such acts, events, or conditions, and we thus have a similar disconnect between the reach of the exception and the statements offered under it.¹⁴ Still, the fact that a statement to which an exception applies is so much broader in context than the exception allows is inconvenient and poses major difficulties in application.

In cases applying the *Bruton* doctrine (discussed below), we redact admissions by one of several codefendants implicating another, deleting references to the other or accomplishing something similar by substituting vague personal pronouns in place of references to particular people. We could do the same with against-interest statements. The most troublesome cases involve statements to law enforcement officials, as happened in *Williamson* itself, and many of these are recorded or reduced to writing, which is helpful in terms of redacting them to remove or “sanitize” unwanted references to others.

Maybe this solution will work, or at least help, and indeed courts sometimes take exactly this approach.¹⁵ The bad news, however, is that

cocaine belonged to Williamson, that Harris had rented the car a few days earlier and included Williamson's name on the contract, and that Williamson made arrangements to acquire and transport the cocaine).

14. For an account of this phenomenon, see CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.38 (2d ed., Aspen Law & Business 1999) (arguing in favor of a broad construction of the state-of-mind exception to reach fact-laden statements even though they can only be used, under the exception, to prove state of mind) [hereinafter MUELLER & KIRKPATRICK].

15. See *United States v. Petrillo*, 237 F.3d 119, 122-23 (2d Cir. 2000) (admitting guilty plea allocutions by co-offenders, redacted to delete references to defendant, and rejecting the claim that these co-offenders “had a substantial incentive” to provide allocutions “containing inculpatory information” because they were simultaneously negotiating pleas; the pleas were made under oath in open court before the sentencing judge following extensive pretrial proceedings, with assistance of counsel, and statements were against penal interest of declarants).

this approach is not very satisfactory. One reason is practical: Redaction is hard to do fairly and effectively (a point examined below), so broadening this requirement from admissions to the against-interest exception is not an attractive prospect. More importantly, the Court has acknowledged that redaction does not prevent juries from misusing confessions by one as evidence against other defendants, and the pressure to redact effectively would be even more intense when the statement (or part of it) is to be used against others.¹⁶

2. ONE BIGGER PROBLEM—WHAT DOES “AGAINST INTEREST”
REALLY MEAN?

There is another problem, which is that the concept of “interest” embedded in *Williamson* is divorced from reality. Even if the against-interest exception, given its proper scope, embraces only self-incriminating (“self-inculpatory”) statements, it does not follow that the way to enforce this limit is to draw a line separating what the speaker says about his own behavior from what he says about others. When Harris told Walton that Williamson owned the cocaine, made arrangements to acquire and transport it, and was traveling the same route with Harris in another car, these statements too incriminated Harris in many different ways.

To start with, the criminal culpability of one person often turns upon, or is directly affected by, the activity of others. Concepts of conspiracy and complicity come to mind, and many “substantive” crimes, including the major drug trafficking offenses (importation, possession with intent to distribute, selling), some of which formed the main charges in *Williamson*, can be committed by multiple persons, and often are.¹⁷ As a matter of federal law under the *Pinkerton* doctrine, every conspirator is guilty of any substantive offense that is within the contemplation of all when the physical acts that constitute the substantive offense are committed by one member of the venture (or by some members but not all).¹⁸ Under modern theories of criminal law, in the state

16. See *Richardson v. Marsh*, 481 U.S. 200 (1987) (described in the text accompanying note 65, *infra*).

17. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §30.01 (Mathew Bender, 1999 Reprint). Dressler describes two theories of complicity. One “may be held accountable for the conduct of another person if he assists the other in committing the offense.” In many states, “a person may be held accountable for the conduct of a coconspirator who commits a crime in furtherance of their agreement,” where “the mere existence of the conspiracy is sufficient to justify liability” and “assistance in the commission of the crime is not required.”

18. *Pinkerton v. United States*, 328 U.S. 640 (1946). See generally 2 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW §6.8 (1986) (describing that *Pinkerton* is the source of the idea that membership in a conspiracy makes one guilty of substantive crimes committed by other conspirators, but the better view is that mere membership in the conspiracy is

and federal system alike, accomplice liability attaches to people who actively cooperate with others in committing crimes. If, for example, Abe “cases” the store and buys the tools needed to break in, Bob transports Carl to the store with the tools Abe has bought, Carl enters the store and burglarizes it while Bob stands guard, and the three assemble afterward to divide the spoils, then all three may be guilty of burglary, even if only one actually entered the store and carried the goods out.

More importantly, statements expose a person to criminal liability *not only* by conceding that the speaker committed one act or another, but also by describing or setting forth the circumstances in which those acts occurred. Recall the Supreme Court’s decision in *Old Chief*, which raised the question whether a court must accept a defense offer to stipulate that defendant has been previously convicted of a felony in a felon-in-possession trial. The purpose of the stipulation was to keep the jury from hearing that Johnny Lynn Old Chief, who was charged this time with assault with a deadly weapon as well as being a felon in possession, had already been convicted of a similar assault causing serious bodily injury involving another gun.

Like *Williamson* before it and *Lilly* afterward, *Old Chief* split the Court. A bare majority concluded that the trial court erred in refusing the defense stipulation because the risk of prejudice outweighed probative value under Federal Rule of Evidence 403. But the same majority—and on this point the dissenters agreed—also believed emphatically that the name of the prior conviction was relevant. The Court said that even though it made no difference whether the conviction was for theft or assault, still proving that defendant had been convicted of assault “was a step on one evidentiary route to the ultimate fact,” placing him “within a particular subclass of offenders” who cannot legally carry firearms. Elsewhere the Court spoke about relevancy. It invoked the principle that “the prosecution”—and the Court might have just as well have said “every litigant”—is entitled to “prove its case by evidence of its own choice.” Hence the Court held that the defendant—and the Court might plausibly have said “the other side”—is not entitled “to stipulate or admit [its] way out of the full evidentiary force” of the proof to be offered in the case.¹⁹ And the Court went on thus:

not itself enough, and the idea of “aiding” in the commission of the crime requires something more). See also Model Penal Code § 2.06 and accompanying comment, at 307-09 (ALI 1985) (rejecting conspiracy as the basis of accomplice liability; black letter rule states that accomplice liability attaches if one “solicits” another person to commit the offense or “aids or agrees or attempts to aid” another in “planning or committing” the offense; comment adds that purpose is to “confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise”).

19. *Old Chief v. United States*, 519 U.S. 172, 178-79 (1997) (thus it didn’t matter, for

Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.²⁰

In short, *Old Chief* recognizes that legal categories, which are always framed in general terms because they are designed to fit many situations, are always applied to particular facts. Even though points of detail contained or exemplified in the particular may not matter for purposes of the broader category, they are all relevant. From the perspective given in *Old Chief*, the discussion in *Williamson* of collateral statements looks bizarre. While it is true enough that we must draw a line between against-interest statements and others, it is also clear that concepts like "collateral" or "collateral neutral" or "collateral self-serving" do not help. They wrongly suggest that the line can be drawn by looking at literal (plain or facial) meaning. They wrongly suggest that the line should separate what the speaker says about his own acts from what he says about other people, and from matters like time and place. The truth is that statements are against interest in varying degrees, that references to others and to time and place can be against interest, and that statements may embody both self-serving and against-interest elements that cannot readily be separated, one from another. We are stuck with the vocabulary of "collateral" because the Supreme Court deployed it in *Williamson*, but the exception does not use it, nor do the Advisory Committee Notes. And, despite *Williamson*, some modern opinions have begun to grasp the emptiness of this kind of analysis.²¹

purposes of determining relevancy, that the question of whether defendant had been convicted for theft or for assault "was not itself an ultimate fact").

20. *Old Chief v. United States*, 519 U.S. 172, 187 (1997) (going on to note that juror expectations may be so disappointed, if stipulations and admissions take the place of proof, that it will penalize the prosecutor for failing to meet those expectations). See also Justice O'Connor's dissenting opinion, which noted that the government was allowed to prove that on the occasion of the offense giving rise to the present charges, defendant was carrying "a 9-mm. Semiautomatic pistol," even though possessing "any number of [other] weapons would [equally] have satisfied" the statutory definition of the offense of being a felon in possession. *Id.* at 195 (O'Connor, J., dissenting) (joined by three other Justices).

21. See *State v. Henderson*, 620 N.W.2d 688, 696 (Minn. 2001) (in murder trial arising out of attack by five gang members, admitting statements by participant *E* to a friend; *E* said, among

Let us recall our drug conspiracy example. If the prosecutor proves all the facts, both those asserted in Harry's statements and those given in the example, all five of our fictional friends are guilty of conspiring to traffic in heroin. Additionally, all five are guilty of drug trafficking offenses, including importation of heroin, possessing it with intent to distribute, and selling (or distributing) it. If Harry had not been rubbed out, and if he was prosecuted alone, everything Harry said could be used against him as his personal admission under Federal Rule of Evidence 801(d)(2)(A) to prove the prosecution's case.

It is worth considering this point carefully: When Harry describes Stewart's role (he "brought the stuff on the plane"), *this fact* is relevant as part of the proof against Harry because it tends to show the operation of the conspiracy in which Harry has joined *and* because it indicates that *Harry* (as well as Stewart and the others) imported heroin and possessed heroin with intent to distribute. When Harry says he turned the stuff over to John and Bob and that they "took orders and sold all the lots," *those facts too* are relevant in proving the case against Harry because they show the operation of the conspiracy *and* they indicate that *Harry* (and John and Bob and the others) possessed the heroin with intent to distribute and that *Harry* (and the others) distributed or sold heroin. When Harry says that Sam has been in on things all along, and kept the books and recorded the orders and sales, *these facts too* are relevant as part of the proof against Harry. Again, these facts indicate conspiracy, possession with intent to distribute, and distribution of heroin. Taken in full, Harry's statement puts him at the heart of a drug-trafficking conspiracy as a major player.

There is more to say. Some points of detail are not what you might call "inherently incriminating," but this fact turns out to have little or no importance. There is, for example, nothing illegal about driving a stationwagon, or going to the airport, or meeting a friend there (things Harry said he did), and nothing illegal in flying on an airplane (as Stew-

other things, that *H* fired the first shot, which did not "directly inculcate" *E*, but "taken in context" it did incriminate him because that shot came "only after [*E*] and the other gang members formed a pretense to meet with [victim], decided on a method to kill him, and arrived at the desired location," so the first shot "was a step in the progression of events for which [*E*] could have been held liable" and *E*'s statement fit the exception) (considering "totality of the circumstances," statement was reliable, so admitting it did not offend the confrontation clause as interpreted in *Lilly*); *Gabow v. Commonwealth*, 34 S.W.2d 63, 76-78 (Ky. 2001) (admitting *G*'s statement to police that *C* said the killing "needed to be done before Monday," to which *C* replied that "it would be done before Monday," since *G*'s statement satisfied against-interest exception; being against interest is "a particularized guarantee of trustworthiness," and *C*'s statement "neither minimized his role" nor "shifted the blame" to *G*; here "the very subject of the conversation" implicated *C* in the plot in trial of *C* and *G* for murdering *G*'s husband, where the crime also involved *B* and *M*, who actually shot the victim).

art did) or keeping books on the lots of heroin and on orders and sales (as Sam did). But so what? Would anyone seriously argue that these points are irrelevant in a prosecution for drug conspiracy just because, standing alone, they do not constitute crimes? In conjunction with other facts, they are absolutely criminal in nature, and the sum is greater than the parts. Here, as in *Old Chief*, the specifics bring the participants within the categories that are critical in applying substantive criminal law.

In short, the apparent belief of the plurality in *Williamson* that statements by someone like Harry are against interest only to the extent that they describe what he himself did is simply mistaken. There are signs that the plurality recognized this point. Justice O'Connor wrote that the question whether a statement is against interest "can only be determined by viewing it in context," and that the statement "Sam and I went to Joe's house" might fit the exception if the speaker ("a reasonable person in the declarant's shoes") would know that "being linked to Joe and Sam" would implicate the speaker in a conspiracy.²² Far from being concessions that unravel a good argument, this part of the opinion saves it from being nonsense. Reading the opinion as a whole, the problem is that it looks as though the plurality actually believed that the only utterance that fit the exception was the statement by Harris that he knew there were drugs in the trunk. So resolutely does the opinion point toward that conclusion that Justice Scalia, who concurred in the judgment, felt constrained to say that a statement by an accused bank robber confessing that he "drove in my 1958 blue Edsel and parked in front of the First City Bank" could fit the exception because the "context" of this statement is a full-blown confession to having robbed the bank, and these points of detail count. They count, even though Justice Scalia believed that the person who describes this drive in the Edsel "has not confessed to any element of a crime" in making that statement.²³

3. A STILL BIGGER PROBLEM—WHAT ABOUT "CURRYING FAVOR" AND "SHIFTING BLAME"?

The problem with statements in which one offender refers to others is *not* the lack of against-interest elements, but the presence of countervailing interests or motives—to "curry favor" with authorities and "shift blame" to others. The plurality in *Williamson* said as much, but this point should have taken center stage. Consider the matter further: One

22. *Williamson v. United States*, 512 U.S. 594, 603 (1994) (adding that other statements giving "significant details" may also be against interest).

23. *Id.* at 606 (adding that a statement may be against interest even if it "names another person or implicates a possible codefendant").

who is questioned by police, and is under arrest or soon may be, is already in trouble. The question in the mind of the rational actor is not whether to concede points that police have discovered or soon will, but how to make the best of a bad situation. The likely human response is to give up what must be conceded anyway and make peace with the other side—in other words, to curry favor with police and prosecutors and become a witness in someone else's trial, while making the best possible deal for oneself. All nine Justices in *Williamson* thought Harris was doing just that, and surely he was.

Someone who has committed a crime also has an interest in shifting or spreading blame to others. These terms, which are often used in conjunction but sometimes alone, seem to mean slightly different things.²⁴ Both *could* refer to an accurate statement that tries to change police perceptions, or to an inaccurate statement that seeks to mask the speaker's role by falsely claiming someone else is partly responsible. I use "blame-shifting" to refer to the latter, and "blame-sharing" to refer to the former. Police investigation and questioning magnify the interest of the speaker in doing both these things, because the person who can offer the most information while being least culpable is the one who is most likely to get a deal. Even if the speaker is scrupulously honest, human nature inclines us toward minimizing personal blame and maximizing that of others. This inclination also operates outside the investigative setting. Even in statements to trusted friends, someone who has committed a crime may fall prey to these inclinations in order to put as much distance as one can from shameful or wrongful acts.

These realities bring home a salient point, which is that the against-interest exception is uncommonly hard to apply because, in the nature of things, human interests are many, varied, shifting, conflicting and hard to identify and assess.²⁵ In our example, possibilities abound for con-

24. To my mind, the term "blame-shifting" is clearer than "blame-sharing" in suggesting a distortion the truth, where the purpose is not only to persuade the police of something (to change their perceptions) but to mislead by false accusation. To my mind, the idea of "blame-sharing" more clearly suggests an attempt to persuade in a way that might well be entirely truthful.

25. I am certainly not the first to recognize this point, but I think it poses far more serious problems than others do. See, e.g., 5 WIGMORE, EVIDENCE § 1464 (Chadbourn rev. 1974) (observing that it is not required that there be no motive to misrepresent, but it is "not uncommon" for a fact to have both a self-serving and a dis-serving aspect, and the question in these cases is whether to admit such statements, leaving the self-serving aspect to be assessed as a matter of weight, or to ask judges to compare the self-serving and dis-serving aspects and admit only if the latter preponderates; most courts take the latter course); MCCORMICK, EVIDENCE § 279 (1954) (following Wigmore, but allowing for exclusion of statements exhibiting "some other motive . . . which was likely to lead him to misrepresent"). Elsewhere, my colleague and I described this problem more fully. See MUELLER & KIRKPATRICK, *supra* note 14, § 8.72 (stating that interest is not "singular or simple," but usually "complicated and many-sided, contextual and

flicting interests.²⁶ Harry the drug trafficker confesses to police and boasts to his girlfriend, promising that she too will benefit from the profits to come. In his confession, everything Harry says could be used later on to convict him of drug crimes, and is against interest in that sense. But we suspect his statements are also self-serving in holding out the promise that Harry will help in exchange for better treatment, and we wonder whether he is dividing responsibility among his colleagues to lessen it for himself (shifting blame). Not always, of course: For assorted reasons—like puffing to impress girlfriends and others, or spreading fear—sometimes people exaggerate their own criminality.

These problems, which we would ordinarily describe in terms of motive, affect the against-interest exception more than others. The reason is *not* that such motives *only* affect statements offered under this exception, but that *only* this exception actually *depends* on assessing motives. Other exceptions compensate for motive problems in other ways. Individual admissions are only *admissible* against the speaker, and the exception makes no pretense that such statements are trustworthy or reliable. Present sense impressions and excited utterances cannot stray far from a particular event or condition, thus leave less room for interest or motive to operate. Medical statements must relate to a medical condition, and expanding the exception to cover statements identifying abusers is justly subject to serious criticism. Statements of identification are narrow in scope, and the declarant is cross-examinable. The co-conspirator exception departs glaringly from this pattern, and I have argued that this exception should be changed.²⁷

B. *Against-Interest Statements and Confrontation*

1. BASIC DIFFICULTIES

In the existing constitutional framework, the question whether admitting an out-of-court statement against a criminal defendant violates the Confrontation Clause of the Sixth Amendment turns on whether the statement is reliable enough. A statement is sufficiently reliable, the Court held in *Roberts*, if it fits a firmly-rooted exception to the hearsay doctrine, and otherwise reliability must be determined by examining

individualized,” and “facially neutral” statements may in fact be “self-serving or against interest,” and statements that are facially self-serving or against interest may be “very much the opposite”).

26. The examples cited in this paragraph find echoes in reported cases. See, e.g., *State v. Sheets*, 618 N.W.2d 117, 133 (Neb. 2000) (holding that it was error to admit *B*'s statement implicating defendant, in part because *B* may have wanted “to seek revenge against Sheets because of the sexual encounter” between him and *B*'s girlfriend).

27. See Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 923 (1984).

guarantees of trustworthiness.²⁸ The guarantees that count are “inherent” in the statement and surrounding circumstances, the Court held in *Wright*, and corroborative evidence indicating the correctness of the statement does not count.²⁹ Under this approach, the Court has given its imprimatur to the exceptions for dying declarations, various forms of prior testimony, statements of identification by a testifying witness, coconspirator statements, and medical statements, and in various ways the Court has indicated that excited utterances and business records often pass muster.³⁰

The most important exception remaining in doubt is the against-interest exception. The Supreme Court addressed this issue in *Lilly* in 1999, but produced another fractured opinion in which all nine Justices agreed (as they had in *Williamson*) that a statement by a co-offender to a law enforcement officer, naming and implicating the accused, could not be used against him.³¹ But again, Justices disagreed sharply on the appropriate reach of the constitutional constraint. A plurality opinion by Justice Stevens, joined by three colleagues, says the against-interest exception is *not* firmly rooted under *Roberts*, when applied to such statements. Justice Scalia concurred in the outcome, but joined only in the conclusion that the facts presented a “paradigmatic Confrontation Clause violation.”³² Justice Thomas also concurred, arguing that the Confrontation Clause should cover “formalized testimonial material,” which includes statements to police. Justice Thomas, however, disagreed with any “blanket ban” against accomplice statements incriminating the accused.³³ Chief Justice Rehnquist and two others would leave room to admit “genuinely” self-incriminating statements that also incriminate the

28. *Ohio v. Roberts*, 448 U.S. 56 (1980) (approving use of testimony given in preliminary hearing, where defense actually examined the witness at that time, engaging in the functional equivalent of cross-examination).

29. *Idaho v. Wright*, 497 U.S. 805 (1990) (holding that it was error to admit statement by child victim under state’s catchall exception because trial court largely relied on corroborative evidence in concluding that statement was trustworthy, and corroborative evidence does not count from purposes of the confrontation clause).

30. The following modern opinions hold that the indicated exception is well-rooted for purposes of the confrontation clause: *Bourjaily v. United States*, 283 U.S. 171 (1987) (coconspirator exception); *White v. Illinois*, 502 U.S. 346 (1992) (excited utterances; medical statements). See also *United States v. Owens*, 484 U.S. 554 (1988) (rejecting constitutional challenge to the use of statements of identification by testifying witness, even though witness had insufficient present memory to repeat the identification and remembered his prior statement only a little bit); *Mattox v. United States*, 146 U.S. 140 (1892) (dying declarations); *Mattox v. United States*, 156 U.S. 237 (1895) (prior trial testimony).

31. *Lilly v. Virginia*, 526 U.S. 116 (1999).

32. *Id.* at 143. At one paragraph in length, this concurrence is laconic even by the astringent standards of Justice Scalia.

33. *Id.* at 143-44 (another single-paragraph concurrence).

defendant.³⁴

It is possible to cobble together an argument that, as a matter of constitutional law, *Lilly* in conjunction with other opinions means co-offender statements to police naming others are per se inadmissible against others. At least some Justices subscribe to the view that such statements are “inherently” untrustworthy, and a majority in the *Wright* case (involving children describing abuse to a doctor) said statements that fall outside the “firmly rooted” exceptions can be admitted only if they are “inherently” trustworthy.³⁵ But a statement within a class of “inherently untrustworthy” statements might be “inherently” trustworthy after all. In the end, I do not think the former use of the term means *all* such statements are untrustworthy, and there remains room to find that *some* such statements are trustworthy.

As Jennifer Christianson ably develops in her Comment for this Symposium,³⁶ *Lilly* leaves us with three practical problems.

The first and biggest is that we remain unclear about the status of precisely the kinds of statements that raise the greatest concern—those in which one co-offender talks to law enforcement officers, naming another as being part of a criminal venture and describing his or her activities. Despite the uncertainties, a number of modern decisions parse the opinions in *Lilly* and conclude that even though the Court was split, still one can tell that most (maybe all) Justices support a rule requiring a particularized showing of trustworthiness for such statements. There is a risk, as Ms. Christianson suggests, that *Lilly* could be read as carving out for special treatment those statements naming others that are (in the words of the Rehnquist concurrence) “truly self-inculpatory,” but that would be an extravagant reading of an opinion in which *that* issue was not actually presented and in which only four Justices subscribed to that proposition.³⁷ I agree with her that this reading would be unfortunate. The quickest fix (and I think the best one) is to adopt the constitutional rule preferred by the plurality, which held that these statements are presumptively unreliable and can rarely be admitted, and of course it is possible to read *Lilly* as having accomplished this result.³⁸ One can

34. *Id.* at 144-49 (Rehnquist, C.J., concurring) (joined by Justices O'Connor and Kennedy).

35. *Idaho v. Wright*, 497 U.S. 805, 820 (1990).

36. Jennifer Christianson, Comment, *Against-Interest Statements Under Lilly*, 55 U. MIAMI L. REV. 891 (2001).

37. The four are Chief Justice Rehnquist, who wrote the concurring opinion in which Justices O'Connor and Kennedy joined, see *Lilly v. Virginia*, 527 U.S. 116, 144 (1999), and *perhaps* Justice Thomas, who wrote that he agreed with Chief Justice Rehnquist that there is no “blanket ban” against government use of accomplice confessions implicating a defendant. See *id.* at 143.

38. The plurality opinion in *Lilly*, which claims the support of Justices Stevens, Breyer, Ginsburg, and Souter, adopts this position. One can read the concurring opinion of Justice Scalia as supporting this view: His statement that admitting the statement in *Lilly* was a “paradigmatic”

quote the line in the plurality indicating that “it is highly unlikely that the presumptive unreliability” of such statements “can be effectively rebutted” whenever the state is “involved” in producing the statement and when it describes “past events” and has not been “subjected to adversarial testing.”³⁹

Another problem, as Ms. Christianson points out, is that *Lilly* does not carry forward the discussion in *Williamson* of “collateral statements,” and thus apparently leaves room for the possibility that state courts could constitutionally apply their exceptions somewhat more broadly than is permissible in the federal system under *Williamson*. For reasons examined above, I am less disturbed by this situation because the inquiry into collateral statements is misconceived and unhelpful. The right question isn’t whether a statement is collateral, or what its literal or facial meaning might be, or whether it refers to others or to matters of time and place, but whether the statement is sufficiently against interest to satisfy the exception. Still more importantly, it is not such a bad idea to leave some space between the safeguarding principle of confrontation and the reach of the federal against-interest exception.

Finally, *Lilly* does not provide a constitutional rule for a statement made by one co-offender to a friend (to anyone other than law enforcement officers).⁴⁰ Perhaps it isn’t fair to complain too much, however, since *Lilly* itself doesn’t involve such a statement, and the constitutional question and proper interpretation of the exception are very much affected by the two salient differences that appear when we move away from statements to police. First, the “curry favor” motive disappears. Second, the absence of police involvement matters in some emerging theories of confrontation.

2. LARGER DIFFICULTIES, POSSIBLE SOLUTIONS

Since *Lilly* does not create an absolute rule excluding statements to police implicating co-offenders, and does not address statements to

confrontation violation could mean that such statements are *at least* presumptively inadmissible under the clause. And the position of Justice Thomas that the clause excludes “formalized testimonial material” could be read similarly, at least when it comes to statements gathered by law enforcement personnel.

39. *Lilly v. Virginia*, 527 U.S. 116, 137 (1999).

40. In her Comment, Ms. Christianson suggests that it is “inconsistent” to treat confessions to friends different from confessions to police, and that the Court “would do better to treat all confessions the same.” See Christianson, *supra* note 36, at 927. She is right in recognizing at least implicitly that current confrontation jurisprudence does not distinguish between statements to police and statements to others, and I would agree that statements to friends implicating others are not necessarily trustworthy, but I don’t accept the *Williamson* approach to the question whether a statement is against interest. I think the absence of a “curry favor” motive in statements to private parties justifies being more receptive to their use.

friends implicating co-offenders, the decision leaves courts to determine when the Constitution allows the use of such statements.

Let us begin with statements to police. Interpreting *Lilly* as adopting a the rule that using such statements is a *presumptive* violation of confrontation rights, a court is bound to decide whether a statement proffered in this way is trustworthy. Thus, the court addresses again the same question it addressed in applying the exception. This time the court cannot consider corroborating evidence, which it is theoretically free to consider in applying the exception itself, because corroborating evidence doesn't count for purposes of the confrontation clause.⁴¹ For obvious tactical reasons, however, courts generally do not consider corroborative proof even in applying the exception.⁴² Presumably the court may consider *other* factors bearing on trustworthiness, such as spontaneity or repetition, even though these are not elements in the exception.⁴³

One major problem with this approach is that the same difficulties facing courts trying to apply the exception bedevil the constitutional inquiry. Inevitably, the court is caught up in the assessment of motives and interests and how they play out in the mind of the speaker. Beyond the fact that this inquiry is just plain hard, it is stultifying to take two logical journeys over what is very much the same ground, and what tends to happen is that the constitutional inquiry dominates because every judge knows that satisfying the exception counts for nothing if the Constitution is violated.⁴⁴ Presumably constitutional law does not move

41. Federal Rule of Evidence 804(b)(3) actually requires corroboration for statements offered by defendants in criminal cases to exonerate them from the charged crimes. It says nothing about corroboration for statements offered by the prosecutor *against* the defendant. To even things out, and in the process to remove an element in the legal rules that seems unfair and perhaps unconstitutional, a number of courts have "read into" Rule 804(b)(3) a requirement to offer corroborating evidence for statements offered against the accused. See, e.g., *United States v. Barone*, 145 F.3d 1284, 1300 (1st Cir. 1997); see generally 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* §501 (2d ed. 1994).

42. A judge knows that, in applying the exception in this setting, she must next resolve the constitutional issue. She would know that counting corroborative proof in applying the exception would lead her into a trap: How can one be sure the statement is trustworthy for constitutional purposes, where corroboration does not count, if one has already counted corroborating evidence in finding that against-interest elements sufficed to make it trustworthy for purposes of the exception?

43. Since the heart of the against-interest exception is an appraisal of the interests of the speaker to see whether a statement is *sufficiently* against interest that the speaker would not make the statement unless it was true, courts are justified—even in applying the exception itself—in considering lots of other things. Hence even application of the exception itself could lead courts to consider factors like spontaneity and repetition, despite the fact that they are not mentioned as criteria in the exception.

44. A similar phenomenon appears in at least one other area: Cases considering state court jurisdiction tend to dwell more on constitutional issues than on issues of statutory construction of long-arm statutes. Almost nobody thinks a state court should exercise *less* jurisdiction than is constitutionally permissible, and of course some longarm statutes shortcut the process by directing

with every shift in the contours of the exception, and constitutional pronouncements such as *Lilly* do not change the content of the exception. Either the Constitution bars, on account of concerns over trustworthiness, certain things that the exception itself allows, or, the exception itself does not reach as far as the Constitution allows because a statement must be *more* trustworthy under the exception than would be required by constitutional concerns. This state of affairs is unsatisfactory.

The decisions in *Williamson* and *Lilly* vividly point out the inadequacy of existing confrontation jurisprudence. Instead of asking the question whether co-offender statements are trustworthy, it would be preferable to move in the direction advocated by able commentators⁴⁵ and now noted by several Justices on the Supreme Court with evident interest.⁴⁶ Here is not the place to spell out the approach in detail, but the heart of it is that confrontation jurisprudence would stop looking like “super-hearsay law” and become a procedural right, more closely akin with constitutional jurisprudence growing up around the Fourth, Fifth and Sixth Amendments, which regulate police behavior by means of “prophylactic rules” designed to discourage: (a) unreasonable searches that violate rights of privacy; (b) custodial questioning that violates the dignity interests protected by the privilege against self-incrimination; (c) police questioning that takes place after the defendant has retained a lawyer that violates the right to effective representation; and (d) improper lineups that similarly violate the right to effective representa-

courts to exercise as much jurisdiction as the Constitution allows. It’s hard to imagine a state legislature, if confronted with a request by District Attorneys, saying “no” to a proposal to admit co-offender statements implicating the accused whenever it is constitutionally permissible to do so.

45. See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992); Richard D. Friedman, *Confrontation: The Search For Basic Principles*, 86 GEO. L.J. 1011 (1998); Randolph A. Jonakait, *The Right to Confrontation: Not A Mere Restraint on Government*, 76 MINN. L. REV. 615 (1992); David E. Seidelson, *The Confrontation Clause and the Supreme Court: Some Good News and Some Bad News*, 17 HOFSTRA L. REV. 51, 90 (1988) (arguing that the Court should abandon an approach “essentially equating” confrontation jurisprudence with hearsay doctrine, and should use the confrontation clause to block the use of “accusatory extrajudicial declarations” where defendant has no opportunity at trial to confront the declarant).

46. See *Lilly v. Virginia*, 527 U.S. 116, 140-43 (1999) (Breyer, J., concurring) (criticizing today’s confrontation jurisprudence as being both too narrow in letting in some statements that should be excluded and too broad in excluding some that should be admitted, and showing interest in approaches advocated by Professors Friedman, Berger, and Amar; also concurring opinion by Justices Thomas reiterating what he said in *White*; also concurring opinion by Justice Scalia referring to what he said in *White*); *White v. Illinois*, 502 U.S. 346, 366 (1992) (concurring opinion by Justices Thomas and Scalia indicating interest in a confrontation jurisprudence focusing on “testimonial” statements or their equivalent, including especially police-gathered statements).

tion.⁴⁷ As reformulated, confrontation jurisprudence would entitle defendants to exclude statements that were made or developed by police in the investigation of the case, or statements that are “accusatory” or “testimonial” in nature, having been gathered essentially for the purpose of making out a case against the defendant. Moving in this direction, it has been convincingly argued, would bring confrontation jurisprudence more into line with the abuses that the right of confrontation was designed to curb.⁴⁸

To be sure, such a shift would bring new issues, some of which will be hard to solve. Consider the task of drawing a line between “testimonial equivalents” and other statements. Apparently, we would have to decide whether the speaker knew that what he said may be evidence in a case some day. Does “testimonial equivalent” include accounts of circumstantially relevant facts, such as a statement that the speaker saw the defendant wearing a red shirt on the day of the crime? Such a statement could be an “innocent” observation of a point far removed from any criminal act. Furthermore, drawing a line between statements produced by police and other statements would require courts to figure out whether informants to whom co-offenders make statements are always part of law enforcement, or only sometimes, and exactly when a such person *becomes* part of law enforcement. Still, these difficulties seem minor in comparison to the inadequacies of the current approach.

If we cannot move confrontation jurisprudence in this direction, I would throw out the rule against considering corroborative evidence. A five-member majority adopted this requirement in *Idaho v. Wright* in stressing that the *Roberts* “indicia of trustworthiness” requires “inherent trustworthiness,” which in turn bars consideration of corroborative proof. It is not that a court must look only at the face of the statement, for *Wright* itself suggested that courts consider such factors as “consistent repetition” or “lack of motive to fabricate.” Instead, the bar against considering corroborative evidence is linked to the need for confidence

47. The list in the text refers, respectively, to the doctrines associated with: (a) *Weeks v. United States*, 232 U.S. 383 (1914) (holding that Fourth Amendment requires exclusion of illegally seized evidence in federal trials) and *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying same exclusionary rule to state trials); (b) *Miranda v. Arizona*, 384 U.S. 436 (1966) (finding that, unless defendant is warned of his rights, Fifth Amendment requires exclusion of answers generated by custodial interrogation) and *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that the *Miranda* rule of exclusion does indeed rest on Fifth Amendment); (c) *Massiah v. United States*, 377 U.S. 201 (1964) (requiring exclusion of answers obtained during police interrogation after defendant had counsel); and (d) *United States v. Wade*, 388 U.S. 218 (1967) (finding that right to counsel applies during police lineups, and identifications obtained in violation of this right are sometimes excludable).

48. See especially the articles by Professors Margaret Berger and Richard Friedman, cited in note 45, *supra*.

in the reliability of a statement untested by cross-examination.⁴⁹ It is very hard to understand why a court may look beyond the statement at the factors mentioned by the Court, or at the factors that courts must consider in applying other major exceptions, but may not consider corroborative evidence. Among the first things anyone would want to know in appraising trustworthiness is whether the statement is correct on important particulars. To put this resource out of bounds is to ask judges to perform a task while tying one hand, so to speak, behind their backs. As exemplified in *Lee v. Illinois*, which is considered in the last section of this article, some confessions can be trusted because there are so many other proofs that show that they are correct.⁵⁰

For statements to friends, like Harry's statements to his girlfriend in the example, the current state of the law is less troublesome because the "curry favor" motive disappears. But the "blame-shifting" motive remains, and many other motives could come into play. Under new theories of confrontation, such as the ones sketched above, constitutional obstacles would largely disappear, but the task of appraising other motives would be undertaken in applying the exception itself.

3. SHOULD WE EVER ADMIT THIRD-PARTY STATEMENTS TO POLICE?

Putting aside *Williamson* and *Lilly* for a moment, what should we do about statements by people like Harry who implicate others while confessing to police?

To start with, any court trying to apply the against-interest exception should recognize that two interests are in play, and the task is to determine which is the dominant one. In terms of Federal Rule of Evidence 804(b)(3), the question is whether a statement is *sufficiently* against interest that the speaker would not make the statement if it were untrue. Finding the right answer maybe hard (even impossible), but that is the nature of the task. To make a wise decision, assessing the pressures on the speaker and the nature and directions of his interests, requires the court to learn about: (a) the course of the investigation; (b) the charges brought or considered and the evidence gathered against him; (c) his relationship to others in the venture; (d) the nature of his interaction with police when he talks to them; (e) the nature and content of his statements, and particularly the degree of logical and narrative connection between obvious concessions and references to others; and

49. *Idaho v. Wright*, 497 U.S. 805, 821-22 (1990) (commenting as well that a statement "made under duress" may be true, but that the circumstances may provide "no basis" to suppose the speaker is being truthful, and may indeed make it "particularly unlikely" that she is being truthful).

50. See the discussion in Part III, *infra*.

finally (f) the plausibility or, better yet, accuracy of his statements as indicated by other proof.⁵¹ It goes almost without saying that courts tend *not* to mention the last point because, under current law, it does not count for constitutional purposes. In thinking about the interaction of the speaker with police, it may be significant to consider whether he is under arrest (or about to be arrested), whether he has been given *Miranda* warnings, and what kinds of hints or suggestions police have given about cooperation.

Harry's elaboration, mentioning others and describing their roles, provides more data: Stewart brought the heroin, carrying it in his luggage on the plane, and Harry cut the batch, turning the lots over to John and Bob, who took orders and sold everything. Depending on the circumstances, the elaboration may have a "ring of truth," sounding plausible and even convincing. It would be useful to test these statements against other facts (other *evidence*), including statements made by others. If everything checks out, if other evidence *corroborates* what the statement says, it looks more and more trustworthy. And of course the *reason* why Harry is truthful may be the very reason underlying the exception: He concedes his own involvement in a drug plot, and he would not make the concession if it weren't true.

Unsurprisingly, courts often focus on the statement itself. Sometimes the interests and motivation of the speaker *can* be adequately assessed by looking primarily at the statement and immediate surrounding circumstances, but often focusing on the statement itself is not enough. Consider Harry's statement that he "teamed up with John and Bob and Stewart and Sam to run heroin." The statement seems evenhanded, perhaps blame-sharing but not blame-shifting. Yet the truth might be that Harry recruited the others, even pressed them to join him, and that their roles were trivial compared to Harry's. Evenhanded statement uttered by a participant in a horrible crime is best viewed as blame-shifting when it concedes only a minor role where *somebody* must have behaved dreadfully. In the *Barrow* case in Delaware, for example, one Johnson made a custodial statement saying he was "the lookout at the back steps" of a sporting goods store, that he "assisted in carrying the bag of guns back" to an apartment where he "changed his clothes," and that he was later arrested "while lying on the living room floor."⁵² By

51. See generally, MUELLER & KIRKPATRICK, *supra* note 14, §§ 8.72 and 8.75 (discussing the exception).

52. *Barrow v. State*, 749 A.2d 1230, 1236, 1244 (Del. 1999) (excluding statement because it was not "truly self-inculpatory", inasmuch as speaker described himself as "the lookout" while assigning "higher criminal culpability" to others in the manner of "accomplice finger-pointing"). See also *State v. Madrigal*, 721 N.E.2d 52, 60-62 (Ohio 2000) (finding it was error in murder trial to admit statement by C that he remained in car while defendant went into KFC to commit robbery

commenting on his own personal and apparently peripheral involvement in a brutal murder, Johnson cast the lion's share of blame on others.

And there are likely to be lots of reason for doubt: What is the judge to decide about the trustworthiness of Harry's statement if Stewart says he didn't know what was in his luggage, and was bringing it into the country as a favor for Harry? What is she to decide if John and Bob agree that they delivered packages for Harry, but say they did not arrange for sales or collect the money? Many other things could be going on, and these may be largely hidden from view. For example, Harry could have spoken to his priest and is repentant, and he wants to speak the truth. Or he recalls that Sam snuck out with Harry's girl, and wants revenge. Or Harry resents John and Bob, believing they set him up, misrepresented things, or forced him to take unnecessary risks. Or Harry has an abiding bond with Stewart, who once gave Harry the tip that led to his best job, and Harry tells police only the things about Stewart that Harry thinks they already know. Or Harry knows his girlfriend mistrusts George, who is actually one of the conspirators, so Harry substitutes Sam in what he tells her.

In sum, taking into account the relevant factors is a large undertaking requiring knowledge and discernment. The process is almost as elaborate as deciding guilt or innocence, and it involves the court in assessing credibility. Expecting a court to do so much is expecting a lot. A judge being honest in performing such tasks is likely to admit that she is not certain which motive is most strongly operative in any given statement.

Beyond these points, judges will find in most cases that the instinct of self-preservation, which is the wellspring of attempts to curry favor, dominates. Recognizing a rule of thumb (or presumption) to this effect would be a good thing. It would mean that when courts are in doubt the exception does not apply. Modern courts have moved in this direction,⁵³

that resulted in death; *C*'s "attempts to portray himself as the innocent bystander" did not fit against-interest exception and admitting statement violated confrontation rights).

53. See *State v. Sheets*, 618 N.W.2d 117, 133 (Neb. 2000) (finding error in admitting *B*'s custodial statement implicating defendant in murder; *B* was talking "pursuant to a plea bargain" avoiding murder charge and had strong motive to curry favor); *Doret v. United States*, 765 A.2d 47 (D.C. 2000) (finding error in admitting statement to police investigator in trial for murder and drug offenses; speaker was not under arrest, nor suspected of crime, but was involved in drugs and had a motive "to deflect attention from himself" with respect to the murder and to "curry favor" with police, so statement was not sufficiently against interest to satisfy exception); *State v. Holmes*, 536 S.E.2d 671, 672-73 (S.C. 2000) (finding error in admitting redacted confession, even though it did not "directly refer" to defendant, where "main purpose" was to implicate defendant by inference; confession did not fit against-interest exception, and use of it violated confrontation rights); *Commonwealth v. Young*, 748 A.2d 166, 191 (Pa. 2000) (admitting statements to police by *S* and *C* violated confrontation clause; both statements blamed defendant and acknowledged only minimal personal blame).

as Ms. Christianson's study in this symposium issue confirms, although they often rely on *Lilly* rather than the terms of the exception. *Williamson* itself points in this direction, reaching the right result even if the logic is flawed.

In the end, however, I do not think the law as we have it requires exclusion of all such statements. The right conclusion is *not* that we must always exclude them, but that they can be admitted in unusual cases. Where a statement is evenhanded in incriminating both the speaker and her colleague in crime, does not attempt to put the speaker in an advantageous position relative to her colleagues, where the police have *not* pushed the speaker to help them develop a case against others, where the speaker knows she has something to lose by talking and little to gain, and where references to her colleague are also incriminating to her because they too are part of the case that the state would develop in any likely prosecution, then both the against-interest exception and the confrontation standard (as we have it) can be satisfied.

Occasional courts say yes to such statements. For example, in a decision handed down shortly after *Williamson* (but before *Lilly*), the New Mexico Supreme Court approved a statement by Chico Barnett, introduced in the trial of Jerry Torres for depraved murder arising out of an episode in which Torres and Barnett drove to a house where a New

The following federal cases exclude such statements. See *United States v. Westmoreland*, 240 F.3d 618, 625-29 (7th Cir. 2001) (in drug conspiracy trial, A and J made statements to police while in custody, each naming defendant M and describing what he said and did; these statements fit against-interest exception, but their use violated confrontation rights under *Lilly*; A's statements mentioning M implicated A in a larger conspiracy and indicated his knowledge of the conspiracy, and none of his statements were an effort to shift blame; still A's statements do not survive analysis under the Confrontation Clause because A was in custody; statements by J describing his services as a pilot for A and M were against J's interest, but they too fail confrontation standard announced because they were an attempt to exonerate J and were blame-shifting) (errors were harmless); *United States v. Ochoa*, 229 F.3d 631, 637-38 (7th Cir. 2000) (third party's statement to FBI agent implicating himself and defendant in a chop shop operation did not fit against-interest exception; the speaker had been told that talking to FBI would better his position; such statements are presumptively unreliable for confrontation purposes, and presumption was not overcome here in light of speaker's strong incentive to curry favor); *United States v. McCleskey*, 228 F.3d 640, 644-45 (6th Cir. 2000) (admitting MR's post-Miranda-warning statement that he was running drugs for RC in RC's drug trial; a statement implicating defendant "by spreading or shifting onto him some, much, or all of the blame" is "garden-variety hearsay," even though speaker knew he was exposing himself to criminal liability and had received no promises); *Vincent v. Seabold*, 226 F.3d 681, 689 (6th Cir. 2000) (granting habeas corpus relief from state conviction for constitutional error in admitting custodial confession in which one of three participants in murder implicated the other two while seeking to distance the speaker from the murder and minimize his participation); *United States v. Castelan*, 219 F.3d 690, 694-96 (7th Cir. 2000) (finding that parts of statement implicating others are not more credible simply because the speaker "broadly inculcates himself as well," and a statement to law enforcement officials in which speaker inquires about benefits of cooperation lack inherent particularized guarantees of trustworthiness and error was harmless).

Year's Eve party was going on. Torres allegedly fired a pistol into a crowd of people, killing one and injuring two others. Barnett talked to police shortly after the incident, and described driving there with Torres. He said both of them got out of the car, and that he (Barnett) fired a shotgun at the crowd once, while Torres fired his pistol three times. The court stressed that what he said subjected Barnett to criminal charges, and that "the degree of detail" in his statement would "significantly aid law enforcement officials" in convicting Barnett, that Barnett did not know when he spoke whether he or Torres had fired the fatal shot, and that Barnett was not promised leniency.⁵⁴ In another case, a court admitted the guilty plea allocutions of an alleged co-offender as proof that there was a conspiracy, on the theory that those allocutions confessed guilt of a crime and led to imprisonment, but the statements were edited (redacted) to avoid mention of the defendant in the trial at hand, and they were admitted only to prove there was a conspiracy.⁵⁵

Another decision, which came down prior to both *Williamson* and *Lilly*, approved use of a statement to an FBI agent by defendant's sister. The statement quoted the defendant as saying that he had not been photographed in a bank during a robbery, which implicated defendant in the robbery. What the sister told the agent, reciting what her brother told her, was against *her* interest because she was under investigation for a second bank robbery. Referring to her brother's confession suggested her own motive in the second robbery (to help her brother get money for an escape) and implicated her as an accessory in the earlier robbery. The court also stressed that the sister was only "fictively" unavailable (she was present and could be cross-examined) and that her account of her brother's statement was "integral" to her statement describing her own involvement in the second robbery.⁵⁶

These cases seem right. They show that a per se rule of exclusion goes too far, and that sometimes even statements to police implicating others should be admitted.

4. WHAT ABOUT THIRD-PARTY STATEMENTS IN OTHER CONTEXTS?

Consider Harry's statement to his girlfriend predicting that he's going to be rich, that he'll buy her anything she wants, and that Harry and "his buddies John, Bob and Sam have this heroin scam going with

54. *State v. Torres*, 971 P.2d 1267, 1273-75 (N.M. 1998) (concluding that Barnett "thought he was incriminating himself and Torres equally for the shooting" and rejecting "speculative assertion" that he was trying to shift blame to Torres).

55. *United States v. Moskowitz*, 215 F.3d 265, 268-70 (2d Cir. 2000) (finding that statements fit the against-interest exception as interpreted and did not offend confrontation clause); *see also* *United States v. Gallego*, 191 F.3d 156, 167-68 (2d Cir. 1999) (similar).

56. *United States v. Garris*, 616 F.2d 626, 629-30 (2d Cir. 1980).

some Thai illegals” and are “pushing a lot of shit all over the southeast.” Can some or all of these statements be admitted, after Harry’s death, in the trial of John and Stewart?

To begin with, there is more room to admit statements by a co-offender implicating another when the setting is a private conversation. “Curry favor” concerns do not arise. Under the law as we have it, *Williamson* charts the wrong course because the decision misapplies the against-interest concept. Still, a constructive reading of *Williamson* would stress that the statement being offered must itself be against interest. Arguably *Lilly* is silent on the constitutional question because the decision is so focused on the problem of statements to police. If we changed confrontation jurisprudence in the manner noted above, there probably would be no constitutional issue because Harry’s conversation with his girlfriend is not connected with law enforcement efforts, and not apparently “testimonial,” although the result would change if the girlfriend were acting as an agent for the police, or if Harry were incriminating his friends in hope that his girlfriend would contact police.⁵⁷

Perhaps it is a tribute to Professor Michael Graham, who suggested the example, but I think Harry’s statement to his girlfriend presents a close case. The statement looks casual, vague, and conclusory, and Harry appears almost to be bragging and certainly concedes very little. Unlike his confession to police, where Harry (in my elaboration) goes into detail about what he does in the criminal undertaking, his bragging about accomplishments and riches to come is virtually archetypal in human mating rituals, and viewing such a claim as an against-interest statement strains credulity. In the end, I probably would not let it in.

Suffice it to say, however, that I think the law as we have it leaves room to admit some such statements. If Harry had said to his girlfriend all that he said to police, much of it could be admitted under the exception. In a 1999 Delaware case decided between *Williamson* and *Lilly*, for example, Kim Schiappa was tried for manslaughter in the death of her husband James. The state showed that she and her friend Stephen had sex, and that the two then attacked James, when he accosted them. The state introduced testimony describing statements by Stephen, made shortly afterwards to his roommate in the presence of Kim, to the effect that Stephen “just killed somebody,” and that “this stuff has to go” (referring to clothing and a knife) and adding that Kim “beat his ass

57. See generally Friedman, *supra* note 45, at 1042-43 (preferring a “testimonial” standard in applying the confrontation clause, but entertaining the thought that a statement by a victim describing a crime is “usually testimonial, whether made to the authorities or not,” and suggesting that in some cases a statement to a private party should be viewed as “testimonial” if it is made “with the anticipation that it would be passed on to the prosecution and used at trial”).

too.” These “dual inculpatory statements” incriminated both Stephen and Kim and fit the exception.⁵⁸ I think this outcome is defensible under both *Williamson* and *Lilly*. At least a handful of other modern decisions approve the use of similar statements.⁵⁹

II. SPILLOVER CONFESSIONS—THE *BRUTON* PROBLEM

Taking the example of our drug traffickers, suppose John and Stewart are charged with importing, possessing for sale, and selling heroin, and with conspiring to do these things. Recall that Stewart told police the same things Harry told them. Thus, Stewart said “I teamed up with John and Bob and Sam to run heroin.” In its 1968 decision in *Bruton*, the Supreme Court held that such a statement, in which one defendant implicates another by name, cannot be admitted in evidence in their joint trial, even if the jury is told to consider the statement as evidence only against the speaker.⁶⁰

In *Bruton* itself, William Evans told a postal inspector in substance, “Bruton and I did the robbery.” This statement was offered in the trial of the two of them, with instructions advising the jury not to consider

58. *State v. Schiappa*, 728 A.2d 466, 470-73 (Conn. 1999).

59. The following state decisions approve use of such statements: *Robinson v. State*, 11 P.3d 361, 369-70 (Wyo. 2000) (in murder trial, approving statement by juvenile victim to friend, indicating that she and defendant had an intimate relationship; victim was “an adjudged delinquent for similar misconduct,” and statement was sufficiently against her interest); *State v. Gonzales*, 989 P.2d 419, 421 (N.M. 1999) (in murder trial admitting statement in which C told friend that he shot the victims and that defendant “paid him eight rocks of crack” for doing so; court rejects claim that references to defendant were “separate” and “freestanding,” finding that in context these statements provide a “motive” and supports an inference that C “deliberately and willfully” committed the killings; also these references expose C to liability for “conspiracy to commit murder” and possession of drugs).

The following federal decisions approve use of such statements: *United States v. Boone*, 229 F.3d 1231, 1233-34 (9th Cir. 2000) (in the robbery in trial for armed robbery of Oriental rug stores and related conspiracy admitting statement by alleged co-offender LW to his girlfriend indicating that defendant had shown “a lot of heart”; LW thought he was in “a private setting” having no police involvement, and he was simply “confiding to his girlfriend” while inculpatory and making no effort to mitigate his own conduct); *United States v. Shea*, 211 F.3d 658, 668 (1st Cir. 2000) (statements to friends outside the situation of custodial interrogation, where there was no blame-shifting, are unaffected by *Lilly*, which cast constitutional doubt only on custodial statements that shift blame); *United States v. Toco*, 200 F.3d 401, 414-15 (6th Cir. 2000) (in RICO trial, admitting statements by third party to his son linking himself to others in conspiracy); *United States v. Malieszewski*, 161 F.3d 992, 1008-09 (6th Cir. 1998) (in drug trial, admitting third-party statement to wife implicating himself in drug conspiracy); *United States v. Moses*, 148 F.3d 277, 280 (3d Cir. 1998) (in trial of M for tax fraud admitting statement by G that he was taking care of M “moneywise” and describing payment arrangements; these statements “made to a friend during lunch conversations” fit the exception); *United States v. Sasso*, 59 F.3d 341, 348-50 (2d Cir. 1995) (admitting statement by A to his girlfriend K, in which A said he owed a favor to defendant’s father and was repaying the debt by running guns for defendant; there was “no effort to shift blame” and statement implicated A and defendant “equally”).

60. *Bruton v. United States*, 391 U.S. 123 (1968).

what Evans said as evidence against Bruton. The Court concluded that no instruction could adequately protect Bruton against what Evans had said, under the theory that confessions represent a particularly vivid kind of evidence that cannot be effectively cabined by instruction. Since Bruton could not call Evans, he had no way to cross-examine Evans, so Bruton's confrontation rights were violated. *Bruton* represented an attractive case to establish this principle because Evans's confession was not even admissible against Evans (it was taken in violation of *his* Fifth Amendment rights). Evans got his conviction reversed, and the question was whether Bruton could also get a reversal.⁶¹

A. *Costs and Choices*

The *Bruton* doctrine carries costs. Sometimes it puts prosecutors to a stark choice. They can try the defendants together, but then they must do without what either has said that names and implicates the other. Alternatively, they can make full use of such a statement against the person who made it, but then they must separately try others who are named in the statement (in a trial in which the statement is never mentioned), in order to avoid the spillover problem. The *Bruton* issue was raised, for example, in the Oklahoma City bombing case. Timothy McVeigh and Terry Nichols were tried separately on the basis of a *Bruton* objection, since each had made statements to FBI agents implicating the other.⁶²

Sometimes there are less onerous alternatives, but each is problematic:

First, *Bruton* itself says prosecutors may "redact" confessions, meaning "edit" them to delete references to other defendants, or simply

61. A confession that is suppressed because police violated *Miranda* is not necessarily unreliable or "coerced" in the sense of being extorted by threats of violence or other forms of intimidation, although obviously *Miranda* sought to diminish the advantage that police enjoy during custodial interrogation by making sure that defendants know that they have no obligation to speak. Conversely, the fact that police comply with *Miranda* does not necessarily mean that a defendant who talks is *not* being coerced, or that he is *not* desperate to find some way out of the jam. If the *only* basis to admit what one defendant says is to invoke the admissions doctrine, suppression of the confession under *Miranda* should mean it is excluded altogether, since it cannot properly be used against any other defendant. Whether a violation of Stewart's *Miranda* rights should require exclusion of Stewart's statement, if it fits the against-interest exception and Stewart is not himself on trial, is a harder question. The fact that Stewart's *Miranda* rights were violated must be considered in the mix of things that count for purposes of determining whether his statement fits the against-interest exception and whether it can be constitutionally used against his colleague, John.

62. See *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998) (noting the severance of the trials of McVeigh and Nichols, and affirming judgment imposing death sentence on McVeigh); see also *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999) (affirming judgment imposing life sentence on Terry Nichols).

offer only those parts of what each said that make no mention of the other. But it is hard, sometimes impossible, to redact effectively. If a confession was neither written nor recorded, and must be presented through testimony by a witness who heard it, redaction is nearly impossible. Consider the dilemma of a witness who is bound by oath to tell “the truth” but also instructed not to mention parts of what he has heard, and the human difficulty of keeping such a directive in mind while answering questions on the stand.⁶³ Redaction is hard to accomplish well for other reasons. For one thing, *the one who made the confession* may have objections if its wording is changed to delete part of what he said that bears on the case. And removing references to one codefendant might not work so well if the redacted confession can then be understood as possibly referring to *other defendants* in the case, apart from the one who was named but whose name has been taken out of the redacted version. To this subject we return below.

Second, it may be possible to empanel multiple juries, so that when the confession of one defendant is offered, the jury for another is out of the room. This approach sometimes works, but it is hard to manage because: (a) courts are ill-designed for it; (b) such trials are hard to orchestrate (references to confessions may be made any time); and (c) it is hard to keep juries separated so that what one has heard does not come to the attention of another.

Third, the confrontation issue is sometimes avoided if the defendant who confesses takes the stand and can be cross-examined by the one named in the confession.⁶⁴ But neither prosecutors nor other defendants in the case can count on this solution. A defendant cannot be forced in advance to commit to testify or not, and generally confessions are proved during the prosecution’s case-in-chief, which comes before a defendant would take the stand. If a defendant does testify after his confession has been proved, so others mentioned in it can cross-examine, the *Bruton* objection disappears.

63. See *Bruton v. United States*, 391 U.S. 123, 134 n.10 (1968) (quoting a law review article stating that redaction is “patently impractical” where a confession is presented by means of oral testimony because of the “human frailty” of the witness and because “an intentional or accidental slip” cannot be remedied by instructions) (citation omitted).

64. It seems settled that the lack of opportunity to cross-examine when a statement is made is not a constitutional problem if defendant can cross-examine the declarant at trial. See *United States v. Owens*, 484 U.S. 554 (1988) (cross-examination at trial sufficed for purposes of a prior statement of identification even though the witness no longer remembered the event well enough to repeat the identification at trial); *Nelson v. O’Neil*, 402 U.S. 622 (1971) (in similar setting, cross-examination at trial was sufficient to satisfy the confrontation clause even though the declarant denied making the prior statement); *California v. Green*, 399 U.S. 149 (1970) (cross-examination at trial justifies admitting prior statements inconsistent with the present testimony of the witness).

We reach a somewhat odd result, however. The confession is *still* inadmissible against other defendants, but the confrontation clause is satisfied because we suppose that those defendants, against whom the confession is inadmissible, will cross-examine about it. But since these other defendants are entitled to an instruction not to consider the confession as evidence against the others, it is not entirely clear that going forward with cross-examination is a good idea. If the jury is told not to consider the confession against another defendant, a thoughtful juror might wonder why the other cross-examined, so it might actually be better for the other *not* to cross-examine and to rely on the limiting instruction alone.

B. *Basic Challenges and Solutions*

Bruton created a bedrock principle that offers some protection against being convicted on the basis of jury misuse of a codefendant's confession. Two major questions, however, were to arise. One is whether *Bruton* applies to confessions that incriminate other defendants without naming or referring to them. The other is whether redaction, in order to satisfy *Bruton*, must delete anything that could possibly be understood as a reference to codefendants, or whether it would suffice to replace names with blanks or pronouns.

The first question arose because *Bruton* on its facts involved a confession by one defendant that implicated another by name. In condemning the use of such a confession, *Bruton* could be interpreted as protecting defendants from improper use of a confession by one defendant as evidence against another, or as protecting *only* against misuse of a confession against another who is *named* in the confession (or mentioned by obvious reference). The question is important because it is of course true that a confession can incriminate others *not only* by naming them, but also by describing acts by the speaker himself. Recall from our example that Stewart told police in substance that he "brought the stuff on the plane," that Harry "picked me up at the airport in his station wagon," that Stewart had the stuff in his bag which he checked, that the two of them "went to the carousel, picked up my bag, got out of the airport OK, and went to Harry's," where Harry "cut the batch into lots." In the trial of Stewart and John, these statements *also* incriminate John, even though they do not mention John by name or reference and they say nothing about anything John may have done. The statements *still* incriminate John because they tend to prove a larger conspiracy in which other evidence implicates John, and they tend to prove coordinated activities by others that the jury will think about in assessing John's own culpability.

The question whether *Bruton* applies to statements describing other

acts, events or conditions without naming or referring to a codefendant arose in *Richardson v. Marsh* in 1987. There the Court held that a statement of this sort can be admitted in a joint trial of the speaker and others, even if the statement *does* implicate another defendant when she is linked by other proof to events described in the statement.⁶⁵ In effect, *Richardson* sets the outer boundary of the *Bruton* doctrine, distinguishing between what we might call the “directly incriminating” effect and the “indirectly incriminating” effect of a codefendant’s confession. A statement *naming* another *directly* incriminates him. One that makes *no reference* to another, but describes events to which he is connected by other proof, incriminates him *indirectly*. Of course the admissions doctrine authorizes neither direct nor indirect incrimination of another, because an admission is evidence only against the declarant himself (unless the coconspirator exception applies, or some other extension of the admissions doctrine resting on theories of agency). In joint trials, however, the Constitution only forbids use of a confession that *directly* implicates another, and does *not* forbid use of a conviction (with appropriate limiting instructions) that *indirectly* implicates another.

The other question—relating to the extent of redaction required by *Bruton*—took longer to resolve, but it finally came to the Supreme Court in *Gray v. Maryland* in 1998.⁶⁶ To illustrate the problem, recall that Stewart said he “teamed up with Bob, Harry, John, and Sam to run heroin.” Now suppose we redact the statement so the jury is told that Stewart said “I teamed up with blank, blank, blank and blank to run heroin.” Or suppose we redact it so the jury is told “I teamed up with some other people to run heroin.” Such tinkering removes express references to John. Still, nobody would doubt for a moment that a jury might still conclude, in the trial of Stewart and John, that Stewart was referring to John in his statements. Once again *Bruton*’s protections appear to be partial, and far from complete.

65. *Richardson v. Marsh*, 481 U.S. 200 (1987) (approving use of a redacted statement by defendant Benjamin Williams in his joint trial with Clarissa Marsh; in its original form, the statement by Williams described going to the home of Ollie Scott with Clarissa Marsh and a third person named Kareem Martin, who had disappeared; at the Scott home, Williams and Martin committed armed robbery and apparently Martin murdered Ollie Scott and a four-year-old boy; the boy’s mother, Cynthia Knighton was there too and was shot, but survived; in the version of the Williams confession heard by the jury, “all references” to Clarissa Marsh were deleted).

66. *Gray v. Maryland*, 523 U.S. 185, 192-93 (1998) (in trial of Anthony Bell and Kevin Gray for beating Stacy Williams to death, the state read Bell’s confession to the jury, substituting “blank” for every reference to Gray; thus jury heard that Bell answered the question “Who hit and kicked Stacy?” by saying “Me, blank, and a few other guys,” and later learned that Bell said “About six guys” beat Williams; substituting “an obvious blank” for a name “will not likely fool anyone,” and a juror who understands law enforcement will know the blank refers to the other defendant, while one who knows nothing of the matter “need only lift his eyes” to the codefendant “to find what will seem the obvious answer.”).

In *Gray*, the Court held that the first method of redaction violates *Bruton*, as interpreted in *Richardson*, concluding that a statement substituting “blank” for a codefendant still incriminates the codefendant directly. The Court also suggested in *Gray* that the second method might be all right, rhetorically asking why the jury couldn’t have been told, in answer to the question what was said about the group that beat the victim, “Me and a few other guys” instead of “me, blank, and blank.” Then the Court cited *Richardson* as approving this kind of redaction. In short, *Gray* seems to say that the constitutional line is drawn between the confession “I teamed up with Harry, blank, blank, and blank” and “I teamed up with Harry and others.”⁶⁷

It is at least possible to argue that *Gray* doesn’t go far enough, or to read *Gray* more expansively. Writing in this Symposium issue, Bryant Richardson argues that the majority in *Gray* does not actually say it is alright to substitute neutral pronouns for names,⁶⁸ and that *Gray*’s reference to *Richardson* means that *Gray* even requires more. In *Richardson*, after all, the confession was redacted to remove “all indication that anyone other than” declarant and a third person not on trial were involved in the crime.⁶⁹ Hence *Gray* might be read to mean that only a *truly effective* redaction passes muster, so using neutral pronouns is alright only if it is truly effective. Otherwise redaction must delete everything that might conceivably point to anyone who is a codefendant in the case.

C. *Compromised Theory and Interlocking Proof*

Clearly the *Bruton* doctrine, as developed in *Richardson* and *Gray*, represents a compromise in theory rather than the broadest possible application of the bedrock principle. The Court extended constitutional protection against jury misuse of “spillover confessions” naming others, but not against all misuse of confessions by one person as evidence against others. This narrowness is visible in the *Bruton* opinion itself—in its focus on statements naming others,⁷⁰ in the cases that the Court cites,⁷¹ and in the sharply divided opinions of the

67. *Id.* at 196-98.

68. Bryant Richardson, Comment, *Casting Light on a Gray Area: An Analysis of the Use of Neutral Pronouns in Nontestifying Codefendant Redacted Confessions Under Bruton, Richardson, and Gray*, 55 U. MIAMI L. REV. 826, 842 (2001).

69. *Gray*, 523 U.S. at 196-97.

70. *Bruton v. United States*, 391 U.S. 123, 129 n.3, 136 (1968) (Evans’ statement was “powerfully incriminating” to Bruton; impossible to know whether jury “did or did not ignore” what Evans said inculcating Bruton; in this situation, some courts require “deletion of references to codefendants where practicable”).

71. *Bruton* expressly overruled *Delli Paoli v. United States*, 352 U.S. 232 (1957), described in *Bruton* as approving use of limiting instructions to disregard a statement by one defendant that another “participated with him in committing the crime.” *Bruton* also drew on *Douglas v.*

Court.⁷² Interestingly, Justice White saw in *Bruton* a far broader principle of exclusion, and for that reason he dissented from the holding.⁷³

Richardson, however, clearly rejected this broader principle. It approved use of a redacted statement by Benjamin Williams describing a conversation in a car going to what was to be a scene of robbery and murder—a conversation in which one Martin told Williams they would kill the victims. Marsh was being tried with Williams, and she was in the car too, but Martin—the other participant in the conversation—had disappeared. If the jury believed that Marsh was in the car, it might conclude that she was part of a murder plot. Marsh was not mentioned in the statement, and her presence in the car was established, as it turns out, by her own testimony, although she said she didn't hear the conversation. The Court found that "an important distinction" separated *Richardson* from *Bruton*. The Williams statement did not incriminate Marsh "on its face," but "only when linked with evidence introduced later," where it is "a less valid generalization" that instructions lack effect, since (after all) an express reference to a codefendant is "more vivid than inferential incrimination" (hence "more difficult to thrust out of mind"). Expanding *Bruton* to cases involving inferential incrimination would make it impossible to redact the statement of one of several codefendants and "not even possible to predict" whether it could be used. Echoing what Justice White had said (dissenting in *Bruton*), the *Richardson* majority refused to let *Bruton* threaten the possibility of joint trials.

There is no claim in *Richardson* that the Williams statement *didn't* damage Marsh, but only a claim that it was "less valid" to suppose limiting instructions wouldn't work. Perhaps the jury did credit the Williams account, in deciding his fate, as proof that he talked with Martin about killing the victims, but ignored the same statement and forgot the same conversation, in deciding the fate of Marsh. Maybe the jury did that, but it's hard to believe. To take a conversation as both proved and unproved in a single trial against defendants apparently engaged in serious crime would surely seem unfair, to put it mildly.

In joint criminal trials the proof tends to be interlocking because the

Alabama, 380 U.S. 415 (1965), described in *Bruton* as "analogous" because the prosecutor read at trial statements by one defendant that inculpated the other. *Bruton*, 391 U.S. at 126.

72. *Bruton* itself was a 7-3 opinion favoring the defense. See also *Gray v. Maryland*, 523 U.S. 185 (1998) (5-4 opinion favoring defense); *Richardson v. Marsh*, 481 U.S. 200 (1987) (6-3 opinion favoring prosecutor); *Cruz v. New York*, 481 U.S. 186 (1987) (5-4 opinion favoring defense rights) (holding that *Bruton* applies even though objecting codefendant made a confession interlocking with confession the subject of the objection).

73. Justice White argued that courts would have to exclude not only "direct and indirect" references to codefendants, but any assertion that "could be employed against [codefendants] once their identity is otherwise established." *Bruton*, 391 U.S. at 143 (White, J., dissenting).

defendants have acted together. For the same reasons that actions by Stewart, Bob, Sam, and Harry would count against John in his trial, so the actions of Williams and Martin counted against Marsh in her trial. The fact of life in applying the *Bruton* doctrine is that deleting references to the defendant does not completely protect her from jury misuse of her friend's confession. Even if the Williams statement had *only* referred to himself (he also referred to Martin, who was not on trial), Marsh could be damaged by the Williams statement. This would also be true if Williams had said "I was going there knowing I would have to kill them if I robbed them" because the jury might infer from this statement that this point was part of a common understanding among the thieves and assailants, given everything else that was going on, and Williams's statement is some evidence of that understanding.

D. *The Right Amount of Protection—Finding a Middle Ground*

Gray seems a necessary addition to the *Bruton* line, and it settles the point that the crudest form of redaction (substituting "blanks" for names of codefendants) does not suffice. Arguably *Gray* stands more broadly for the proposition that a court should go as far as it reasonably can to remove language that could be understood as referring to codefendants. But it is at least doubtful that *Gray* requires courts to go to this length in all cases, redacting confessions so thoroughly that nothing in their terms could even be understood as referring to codefendants. There are three reasons to stop short of such a conclusion.

One reason is that *Bruton* is a compromised doctrine (as argued above), and it has never been what might be called a purist or absolute approach. *Bruton* protects against some jury misuse of confessions—that which happens when statements *naming* or *referring* to codefendants are offered—but does not purport to block every misuse of such statements. It may be that statements *naming* or *referring* to codefendants are, as a class, more dangerous to them than statements that do *not* name or refer to them. So arguably this group of statements demands the greatest measure of protection. It is not true, however, that only these statements pose risks to codefendants. In *Richardson* itself, for example, the part of the statement naming the codefendant, which was redacted and never mentioned at trial, ascribed a minor role to her (she came along, but did not personally commit either the robbery or the murder described in the statement), and what proved damaging to her was the part of the statement describing a conversation that apparently took place in her presence, but in which she played no part (the argument was that she heard what others were saying, and so she knew the purpose of the mission they were on).

Secondly, redaction that *entirely* deletes incriminating references to others is likely to be unfair to the speaker. Suppose, for example, that Stewart actually said “I teamed up with John and Bob to run heroin” (a variant of what he said in our example). If Stewart were tried with John, Bob and Sam, and if we are constrained to redact the statement so as to omit *all* reference to the codefendants, we would end up with a statement in which Stewart says “I decided to run heroin.” The problem is that Stewart said no such thing, and what he actually said is in some ways more incriminating to him, and in some ways less. What he actually said is *more* incriminating than the redacted version in the sense that it confesses involvement with others in what might be a conspiracy. What he actually said is *less* incriminating, however, in the sense that it *spreads* responsibility to others and leaves the declarant’s role (and those of the others) vague. In other words, Stewart’s actual statement leaves room for jurors to infer that Stewart had only minor involvement in the venture, while the redacted form protects codefendants completely at the cost of tending to concentrate blame in Stewart. Redaction that recasts what the speaker said in order to protect others is unfair to the speaker when such distortions result. Stewart surely has a legitimate and powerful objection to any such redaction.

Third, fixing on the need to remove references in a confession that could embrace codefendants is actually too narrow a focus. There are some cases where redaction is unfair to other defendants, even if the resultant confession contains no words that could refer to them. In a gruesome trial in *Gonzales-Garcia*, for example, an apparently minor player in a murder gave a statement to police that, in its redacted form, described the behavior of the declarant on the scene.⁷⁴ It would be obvious in listening to this redacted statement that the victim was alive, that the speaker was there watching what someone else was doing, that the victim was killed by someone or something, and that the speaker had seen what happened and was reacting to it. Just as silent moments in a symphony or song can have great meaning, so the absence of words in a longer narration can have as much impact as words themselves. Arguably in these cases too, as in cases where references to codefendants are replaced with “blanks,” redaction should be improper under *Gray*.

For these reasons, I would not go so far as Mr. Richardson, who argues for an “anti-incrimination” standard that would block even the use approved in the Court’s decision in *Richardson*.⁷⁵ The Court seems unlikely to take such a step, but in any event *Bruton* simply does not require it. The task seems impossible, and it does not make sense to

74. *United States v Gonzales-Garcia*, 73 F. Supp. 2d 819 (W.D. Mich. 1999).

75. Bryant Richardson, *supra* note 68, at 855.

force prosecutors to choose between joint trials and the use of confessions. We can remove names and substitute pronominal references, and it may sometimes be possible to go further (deleting all references to others), but often that will be impossible, and it should not be absolutely required.

III. THIRD-PARTY STATEMENTS TO POLICE— ONE PROBLEM OR SEVERAL?

Like the cases, this article treats co-offender statements as raising two different problems, depending on who goes to trial later. One possibility is that the speaker is tried along with his friends, and the admissions doctrine applies, subject to *Bruton* limits. His statement is *admissible* only against him, and the problem is to get the jury to think only about him when it considers his statement, and not about his friends—to think only about the viola when it hears the viola and only about the cello when it hears the cello. Achieving this end involves redacting the statement—admitting only bits and pieces and removing the lion's share, or vice versa. Another possibility is that the speaker is *not* tried and is unavailable, so the against-interest exception might apply. Usually the exception isn't broad enough to contain the whole statement, and the Constitution gets in the way too. The problem is to trim the statement—to keep it from spilling out beyond the limits like beach sand through a fruit basket. Achieving this end may involve selecting from it—again admitting only bits and pieces and keeping out the lion's share, or vice versa.

There is so much overlap that it is plausible to consider transposing the doctrines. Should we apply the against-interest exception where we normally apply *Bruton*—to statements by one defendant naming and implicating another? (If the defendant who has talked does not testify, he satisfies the unavailability requirement as far as the prosecutor or the other defendant is concerned.⁷⁶) Or should we apply *Bruton* where we normally apply the against-interest exception—to statements by a speaker who is *not* named as a defendant? The easy answer to the latter question is no: *Bruton* does not apply when the speaker is not named as a defendant because *Bruton* only limits the admissions doctrine. There is no easy answer to the former question, although it is true that the against-interest exception *normally* does not apply when the one who

76. *United States v. Robbins*, 197 F.3d 829, 838 n.5 (7th Cir. 1999) (government could not call defendant, who was unavailable for purposes of against-interest exception); *United States v. Gossett*, 877 F.2d 901, 907 (11th Cir. 1989) (defendant could not call codefendant as witness, so the latter was unavailable for purposes of against-interest exception) (but the latter's statement did not fit the exception).

talked is tried with his friends because his statement is presumptively beyond reach of the exception and beyond what the Constitution permits. *Bruton* left open the possibility that a codefendant's statement might fit some other exception,⁷⁷ and the fact that such statements *normally* cannot fit the against-interest exception does not mean they *never* do.

The issue arose in *Illinois v. Lee*,⁷⁸ which was decided in 1986, after *Bruton* but before *Gray*, *Richardson*, *Lilly*, *Williamson*, and *Wright*. *Lee* is a striking case, and once again the Court was split. A bare majority decided that a statement by one of two defendants in a dual murder case could not be considered against the other as an against-interest statement. Each defendant confessed to killing one of the victims, and each confession said the other defendant killed the other victim. Apparently Edwin Thomas fatally stabbed Odessa Harris in the kitchen of an apartment shared by his friend Millie Lee and her Aunt Beedie, and then Millie Lee stabbed Aunt Beedie in her bedroom. Police arrested Lee first, took her statement describing both murders, and then arrested Thomas. The two were brought in contact, and police told Thomas that Lee had confessed. Lee reminded Thomas in the name of love that they had agreed not to "let one or the other take the rap alone," and Thomas confessed too. Only Lee's claim of error was before the Supreme Court.

To Justice Brennan and his four colleagues in the majority, these confessions "diverge[d]" on points that were not "irrelevant or trivial," relating to "the roles played by the two defendants" in killing Harris and "the question of premeditation" in the killing of Aunt Beedie. Each confession was an "accusation" by one who "stood to gain" by pointing the finger, and each was "presumptively unreliable" as an accomplice statement. There is an "inherent danger" in every such statement because of its "selective reliability," which makes descriptions of "conduct or culpability" suspect because the speaker wants to "shift or spread blame, curry favor, avenge himself, or divert attention to another."

To Justice Blackmun and his three colleagues in dissent, Thomas' confession had sufficient "indicia of reliability" to be considered against Lee. What Thomas said was "thoroughly and unambiguously adverse to his penal interest," indeed "less favorable" to him than Lee's own con-

77. *Bruton v. United States*, 391 U.S. 123, 129 n.3 (1968) (Evans' statement "was clearly inadmissible" against Bruton "under traditional rules of evidence," for there was no "recognized exception to the hearsay rule" that would make Evans' statement admissible against Bruton, and Court would "intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause").

78. *Lee v. Illinois*, 476 U.S. 530 (1986) (opinion for 5-member majority by Justice Brennan, joined by Justices White, Marshall, Stevens, and O'Connor; dissenting opinion by Justice Blackmun, joined by Chief Justice Burger and Justices Powell and Rehnquist).

fession. Thomas had *not* made the usual accomplice statement, "ascribing the bulk of the blame" to another, and what he said did *not* have the qualities that make such statements "inevitably suspect." Nobody claimed Thomas "actually was more culpable" than he admitted, and his references to Lee "in no way diminished his own complicity," particularly on the matter of "joint planning." On that point, the Thomas statement that he and Lee "consulted about the crimes immediately before carrying them out" was as damaging to Thomas as to Lee, subjecting both "to possible charges of criminal conspiracy." Elsewhere the dissenters noted that what Thomas said was "extensively corroborated by other evidence," including Lee's own confession. Not surprisingly, said the dissenters, the two confessions "were not identical" on every point, which one "could not expect," and only Thomas spoke of a conversation between the two before the killings. Still, this part of the Thomas confession was "in no way inconsistent" with what Lee said (she didn't say they had *not* talked about it first). Furthermore, what Thomas said, far from an attempt to "shift blame," was in fact an assertion that "increased his potential liability."⁷⁹

Lee crystallizes the difficulties and divisions in the area of co-offender statements. The majority recognizes that the question isn't whether *Bruton* applies, but it quotes *Bruton*'s condemnation of confessions naming others as "inevitably suspect" and "devastating." The majority purports to follow the newly-minted *Roberts* approach, which requires examining the statement to see whether it has "particularized guarantees of trustworthiness," and the majority then goes to extraordinary lengths to find that what Thomas said cannot satisfy that criterion. The opinion brushes aside in a single line any thought that his statement could fit the against-interest exception, even though *Roberts* had held that "firmly rooted" exceptions pass constitutional muster, commenting that the concept "defines too large a class for meaningful Confrontation analysis." It is hard to escape the conclusion that the *Lee* majority would prefer a per se rule barring the use of confessions against co-offenders and, although they cannot quite bring themselves to say it, the *Lee* majority is closer to modern reformers of confrontation jurisprudence than to the *Roberts* regime.⁸⁰

The dissenters in *Lee* believe that confessions naming others are sometimes reliable, and that the against-interest exception should be

79. *Id.* at 551-56 (Blackmun, J., in a dissenting opinion joined by Burger, C.J., Powell, and Rehnquist, J.J.).

80. *See generally*, 30 WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE § 6368, 843-44 (2000) (observing that in *Lee*, the Brennan opinion "does not follow the *Roberts* analysis," and instead "attempts to revive a broader view of the Confrontation Clause more in keeping with the Founders' holistic vision").

available to prosecutors in this setting. Indeed, the dissenters astonishingly characterize the exception as “firmly established” for purposes of constitutional analysis under *Roberts*,⁸¹ which would lead to arguments that confessions naming others are *routinely* admissible, although the dissenters apparently recognize the kinds of limits to proper application of the exception that are described above in this article.⁸² In concluding that the Thomas confession was trustworthy, the dissenters in *Lee* relied heavily on the corroboration provided by Lee’s own confession, which of course did *not* corroborate the Thomas confession on the critical point of whether and how the two had discussed the murders before they happened.⁸³

CONCLUSION

The cases and the analyses by Richard Sahuc, Jennifer Christianson, and Bryant Richardson in this symposium show that the Court is struggling with major issues in the use of co-offender statements implicating others. When the speaker is unavailable, his statement is sometimes admissible against others under the against-interest exception. If he was talking to police, the *Williamson* plurality mistakenly thought references to others were out of bounds because the exception does not reach “collateral” statements. But trying to distinguish collateral from

81. It would, of course, be astonishing to put the against-interest exception into the “firmly established” category in light of the fact that its use by prosecutors against defendants in criminal cases is a very recent development. But the Court has a poor record of affixing this label to exceptions at the very moment when they are being changed in material ways or applied in entirely new settings. See *White v. Illinois*, 502 U.S. 346 (1992) (finding that medical statements exception firmly rooted, even when applied in the new setting of a statement by a victim of abuse identifying his abuser); *Bourjaily v. United States*, 483 U.S. 171 (1987) (finding that coconspirator exception firmly rooted in the very opinion that removes a significant element in the exception, which was that the predicate facts needed to be shown by evidence independent of the statement itself).

82. See *Lee*, 476 U.S. at 552-53 (holding that accomplice confessions “ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant,” and one can often advance one’s interest “by ascribing the bulk of the blame to one’s confederates”).

83. It is worth comparing what Justice Brennan and the majority think on this point with what Justice Blackmun thinks. For Justice Brennan, it is critical that Lee said only that Thomas had been “talking about doing something to [Aunt Beedie] but he never said what,” while Thomas “repeatedly mentions” a “joint plan” to do “something to Aunt Beedie.” And Lee’s confession said she “called Odessa into the kitchen only to discuss the rent,” while Thomas said Lee was “suppose[d] to get Odessa [Harris] to stand, with her back toward the front room, looking into the kitchen” so Thomas could stab her. *Lee*, 476 U.S. at 545-46. For Justice Blackmun in dissent, Lee’s confessions “mirrors” the Thomas confession “in striking detail,” and the fact that only Thomas mentioned “the discussion just before the killings” did not matter because Lee’s omission of any reference to this discussion was “in no way inconsistent” with its having happened, and because Thomas could not be understood as attempting to “shift blame” to Lee in describing this conversation. *Id.* at 555-56.

other statements is not helpful, and the question should be whether the statement is sufficiently against interest to assure trustworthiness, in light of conflicting motivations. Particularly important are motives to curry favor and shift blame, which usually mean the exception cannot apply. It would be useful to recognize a presumption to this effect, so that where it is impossible to say which conflicting interest prevails, the statement is excluded. When the speaker was talking with friends outside the investigative setting, there is more room to apply the against-interest exception. Still, caution is required. The curry-favor motive drops from the picture, but blame-shifting and other motives operate.

Lilly tried to fashion a constitutional standard for statements to police naming others, but there was no majority opinion, and *Lilly* leaves room to admit such statements. *Lilly* means this use of the against-interest exception is not firmly rooted, but does not speak to using statements to friends. Under the *Roberts* regime, the constitutional inquiry tracks hearsay analysis, which is difficult and unsatisfactory. Confrontation jurisprudence should be recast to bar statements generated by law enforcement or statements that are testimonial equivalents. If such a development does not happen, the *Roberts* regime would be improved by lifting the bar against considering corroborative evidence.

When the person who makes a statement implicating another is tried with the other, the statement fits the admissions doctrine when offered against the speaker. Under *Bruton*, the statement cannot be admitted insofar as it incriminates a codefendant by name. But *Bruton* is a compromised doctrine because it permits use of a statement that does not name others but proves points relevant in determining their guilt or innocence. This compromise reflects a determination to permit joint trials *and* use of confessions.

As interpreted in *Gray*, *Bruton* requires effective redaction of a statement offered as the admission of one defendant. Effective redaction cannot mean substituting "blanks" that a jury would understand as a reference to another, but it is not absolutely required that a confession be cleansed of every pronoun that might be understood as referring to a codefendant. Redaction should not be used where it distorts a statement and makes it more damaging to the speaker, or exposes a defendant not originally named in it, or describes such a small role for the speaker that it points a finger of blame at another.

Bruton and *Williamson* reflect deep suspicion of co-offender statements implicating others, but neither creates an absolute right not to be incriminated by a codefendant's confession. At least sometimes the against-interest exception can be used in cases where the speaker is a defendant.