Rethinking the Limits of the Interpretive Maxim of Constitutional Avoidance: The Case Study of the Corroboration Requirement for Inculpatory Declarations Against Penal Interest (Federal Rule of Evidence 804(b)(3))

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"If adhering to this canon of construction [to preserve the constitutionality of an act] is torturing a word, then we all must be prepared to occasionally inflict forty lashes."

_In re Hathaway_¹

At trial, the Defense calls Witness _A_. On direct examination, the Defense attempts to elicit Witness _A_’s description of an out-of-court statement by Declarant _B_ that tends to exculpate the Accused _C_. The Prosecutor objects on hearsay grounds. The Defense argues that Declarant _B_’s statement qualifies as a declaration against her penal interest under Federal Rule of Evidence 804(b)(3).² At the time of the statement, Declarant _B_ should have realized that the statement exposed her to criminal liability, and Declarant _B_ is unavailable to testify at trial. The Prosecution concedes both the disserving quality of the statement and _B_’s unavailability at trial. However, the Prosecution points out that the statute requires the Defense to also establish “corroborating circumstances clearly indicat[ing] the trustworthiness of the statement.”³ The Defense admits that there is no independent corroboration for Declarant _B_’s statement. The trial judge rules as a matter of law that _B_’s statement is inadmissible.

Now the tables are turned. The Prosecution calls Witness _D_. On direct examination, the Prosecution endeavors to introduce _D_’s description of an out-of-court statement by Declarant _E_ that tends to inculpate the Accused. Now the Defense objects on hearsay grounds. Like the Defense in the prior hypothetical, the Prosecutor argues that Declarant _E_’s statement qualifies as a declaration against penal interest. Like Declarant _B_’s statement, Declarant _E_’s statement was contrary to _E_’s penal interest when he made it; and like _B, E_ is unavailable as a witness at trial. Like the Prosecutor in the prior hypothetical, the Defense now contends that the judge should require corroboration of “the trustworthiness of the statement” as a condition to admitting testimony about _E_’s statement. However, the Prosecutor properly points out that the statute, Rule 804(b)(3), requires corroboration only in the case of

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¹. 630 N.W.2d 850, 867 (Mich. 2001), quoted in 2A NORMAN J. SINGER & J. D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.11, at 82 n.13 (7th ed. 2007).

². FED. R. EVID. 804(b)(3) reads:
The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: [a] statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

³. _Id._
statements "offered to exculpate the accused." Consequently, the trial judge overrules the objection and permits the introduction of D's testimony.

At first blush, the differing outcomes seem unfair in the extreme. One tenet of the adversary system is the principle that rules such as evidence ought to be applied in an evenhanded fashion to both sides. As the late Professor Irving Younger observed, the adversary system is committed to "[t]he evenhandedness of justice." Professor Younger supported the basic assumption that, "once [the accused] confront[s] the [prosecuting] sovereign in court, the rules of the game [should] be the same for both." The differential application of the hearsay rule to prosecution and defense hearsay under Federal Rule 804(b)(3) appears to be at odds with that tenet.

Given the seeming unfairness of this differential treatment, on many occasions defense attorneys have argued that, although the text of Rule 804(b)(3) imposes a corroboration requirement only on hearsay "offered to exculpate the accused," the courts should construe the statute as also prescribing the requirement for hearsay incriminating the accused. The United States Supreme Court itself declined to reach the merits of the argument. Moreover, in a 1993 decision one court of appeal reserved decision on the question. However, as we shall see in Part I of this article, every federal court of appeal that has reached the merits of this question has sustained the defense argument.

4. Id. See United States v. Jackson, 540 F.3d 578 (7th Cir, 2008).
5. In the criminal context, the litigation system is accusatory as well as adversary. Hence, there are special limitations under the Fourth and Fifth Amendments on the extent to which the prosecution may force the accused to serve as a source of incriminating evidence against himself or herself. See U.S. CONST. amends. IV & V.
7. Id. at 2.
9. Id.
10. FED. R. EVID. 804(b)(3).
11. Williamson v. United States, 512 U.S. 594, 605 (1994) (Scalia, J. concurring) ("We . . . need not decide whether, as some Courts of Appeals have held, the second sentence of Rule 804(b)(3)—'A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement' . . . —also requires that statements inculpating the accused be supported by corroborating circumstances") (emphasis omitted); see also Am. Auto. Accessories, Inc. v. Fishman, 175 F.3d 534, 540 (7th Cir. 1999).
12. United States v. Williams, 989 F.2d 1061, 1068 (9th Cir. 1993).
13. E.g., Maugeri v. State, 460 So.2d 975, 977 n.3 (Fla. Dist. Ct. App. 1984) (explaining that it has been universally held that inculpatory statements must be supported by corroborating circumstances); see generally MICHAEL H. GRAHAM, 4 HANDBOOK OF FEDERAL EVIDENCE § 804:3, at 578 (6th ed. 2006).
The courts' receptivity to this defense argument is understandable. The critics mount several, plausible constitutional attacks on the differential treatment. Some argued that the difference runs afoul of the Equal Protection guarantee of the Fourteenth Amendment. Other critics suggest that a literal interpretation of Rule 804(b)(3) would violate the Sixth Amendment Confrontation Clause.

The Federal Rules of Evidence took effect in 1975. A few years later, the Supreme Court handed down its decision in Ohio v. Roberts. The Roberts Court invoked the Confrontation Clause and announced a general rule that prosecution hearsay must be reliable. The Court explained that the prosecution could satisfy the rule by demonstrating that the testimony either fell "within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." It was difficult to satisfy Roberts by contending that a declaration against penal interest fell within a "firmly rooted hearsay exception." The treatment of such statements as exceptionally admissible was a minority view at both the time of the adoption of the Sixth Amendment and the effective date of the Federal Rules. In that light, there was a strong case that absent "particularized guarantees of trustworthiness" in the form of corroboration, the introduction of this type of prosecution hearsay offends the Confrontation Clause. The lower courts extended Rule 804(b)(3)'s corroboration requirement to inculpatory prosecution hearsay in order "[t]o bring [the statute] within [the Confrontation Clause's] mandate for reliability . . . ."


17. Id. at 66.

18. Id.

19. See, e.g., Lilly v. Virginia, 527 U.S. 116, 134 (1999) ("accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.").


21. Idaho v. Wright, 497 U.S. 805, 819-20 (1990) (holding that in determining whether prosecution hearsay testimony is sufficiently reliable, the trial judge must consider only the circumstances surrounding "the making of the statement"). The prosecution may not rely on other extrinsic circumstances, even those corroborating the statement, to satisfy the Confrontation Clause. Id. at 22.

22. United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978); see also United States v. Riley, 657 F.2d 1377, 1383 n.7 (8th Cir. 1981) ("in order to provide the 'indicia of reliability' and
evidence provides the needed "particularized guarantees of trustworthiness." In effect, the courts invoked the hoary interpretive maxim of constitutional avoidance. If a statutory language is subject to two plausible interpretations—one raising substantial doubts about the constitutionality of the legislation and another mooting those doubts—the second interpretation is preferable. In short, the existence of doubts about the validity of a literal interpretation of Rule 804(b)(3) under the Sixth Amendment cuts in favor of construing the statute as extending the corroboration requirement to both prosecution and defense hearsay.

Two developments now necessitate a rethinking of this line of authority. To begin with, Ohio v. Roberts is no longer the law of the land. In 2004, the Supreme Court rendered its decision in Crawford v. Washington. In Crawford, the Supreme Court abandoned the reliability approach taken in Roberts. Writing for the majority, Justice Scalia disparaged the reliability test as "amorphous" and "manipulable." Instead, drawing on historical accounts of the development of the Confrontation Clause, the Justice stated that the key to the Confrontation Clause is a distinction between testimonial and nontestimonial statements. He elaborated:

Various formulations of this . . . class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, . . . extrajudicial statements . . . contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions;" "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. . . "

When the statement is testimonial in character, the Sixth Amendment requires that the prosecution show that the accused had a prior opportunity to question the declarant and that the declarant is unavailable at trial. Crawford was a bit unclear as to the status of nontestimonial statements. On the one hand, the Court did not squarely rule that such statements are exempt from constitutional scrutiny under the Confrontation Clause. Crawford left open the possibility that nontestimonial statements remained subject to Roberts' requirement for a showing of reliability. On the other hand, Justice Scalia stated that the Court's

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23. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:130, at 196 (3d ed. 2007).
24. See SINGER ET AL., supra note 1, § 45:11, at 81-83.
26. Id. at 63, 68.
27. Id. at 51-52 (citations omitted).
rationale in *Crawford* "casts doubt" on the assumption that the Sixth Amendment applies to nontestimonial hearsay. Nontestimonial statements "are far removed from the core concerns of the Clause." The question, though, seems to have been resolved by the Court's 2006 decision in *Davis v. Washington*. Once again, Justice Scalia authored the lead, majority opinion. He remarked that the specific facts in *Crawford* made it unnecessary to decide "whether the Confrontation Clause applies only to testimonial hearsay . . . " Surveying the Court's prior decisions under the clause, the Justice generalized that "[w]ell into the 20th century" the Court had "carefully applied" the Clause "only in the testimonial context." He concluded that neither precedent nor policy requires the extension of the Clause to nontestimonial hearsay. This Sixth Amendment development severely weakens the argument that a literal interpretation of 804(b)(3), dispensing with a corroboration requirement for prosecution hearsay, violates the Confrontation Clause. Post-*Davis*, if the statement is nontestimonial, the Clause is inapplicable. Alternatively, if the statement is testimonial, corroboration is irrelevant; the dispositive issues are whether there was a prior opportunity to question and whether the declarant is presently unavailable.

The second development is statutory rather than constitutional. As Part II of this article notes, in the past thirty years, the federal courts in particular have substantially changed their approach to statutory construction. At one time, the courts mostly followed the legal process approach to statutory interpretation. That approach posited that legislators act reasonably and in good faith to pursue public interest. On that benign premise, the courts made the further assumption that just as legislators endeavored to provide reliable insights into legislative intent in the statutory text, they would also furnish trustworthy guidance in extrinsic materials such as committee reports. Legal process theorists placed so much trust in extrinsic material, the net result was a relative depreciation of the importance of the statutory text.

In contrast, during the past thirty years, the courts have shifted away from legal process and toward a more textualist philosophy. Relying on political science research, contemporary courts tend to conceive of legislation as compromises struck between the legislature and special interest groups. That conception has prompted

28. See id. at 61.
29. Id. at 59-60.
31. Id. at 823.
32. Id. at 824. See Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford's Birth did not Require that Roberts Had to Die*, 15 J.L. & POL'y 685, 686 (2007) ("Whorton v. Bockting, [127 S.Ct. 1173 (2007),] . . . states in unmistakable terms that Roberts is dead and that the Confrontation Clause of the Sixth Amendment has no role in excluding unreliable hearsay that is nontestimonial.").
34. See Imwinkelried, supra note 33, at 229-30.
courts to assign greater value to the statutory text. The text is the only thing that has
the force of law, and the political science research establishes that special interest
groups often attempt to manipulate extrinsic legislative materials. As previously
stated, under the constitutional avoidance maxim, the court should prefer and select a
statutory interpretation that moots significant doubts about the statute's
constitutionality if the interpretation is a "plausible" one. The advent of textualism
raises the bar for characterizing an interpretation as plausible; if text is primary, the
interpretation must be one that the statutory text can reasonably support.

The thesis of this article is that the courts' past interpretation of Rule 804(b)(3) is
unsound. The statutory text simply cannot bear the interpretation that the statute
extends the corroboration requirement to inculpatory statements as well as
exculpatory ones. As we shall see in Part II, moderate textualist courts usually
consider extrinsic legislative history material; but they allow such material to trump
the apparent plain meaning of text only when the material establishes a contrary
meaning with great clarity. A careful review of the legislative history of Rule
804(b)(3) reveals no such intent. More broadly, this article urges that textualism
demands a more scrupulous application of the constitutional avoidance maxim in the
future. For its part, the Supreme Court has invoked this maxim in a growing number
of cases. However, if the maxim is to be applied consistently with the new
textualist philosophy of interpretation, the proposed interpretation mooting the
corresponding doubts should ordinarily have a firm grounding in the statutory
language. The courts' prior interpretation of Rule 804(b)(3) lacks such a grounding.

I. THE HISTORY OF THE DRAFTING PROCESS CULMINATING IN THE FINAL, ENACTED
VERSION: THE EVOLUTION OF FEDERAL RULE OF EVIDENCE 804(B)(3)

This part of the article is primarily descriptive. It traces the history of the
corroboration requirement under Rule 804(b)(3) through four stages: the initial
adoption of the Federal Rules of Evidence; the ensuing criticism of the omission of a
corroboration requirement for inculpatory hearsay; the courts' subsequent addition of
a requirement by way of judicial gloss to the statute; and finally the attempts to
amend the statute to incorporate such a corroboration requirement.

A. The Adoption of the Federal Rules of Evidence

1. The Basic Chronology

To appreciate the history of the statute, we must review two earlier Supreme
Court cases: Donnelly v. United States decided in 1913 and Bruton v. United
States rendered in 1968.

35. Erwin Chemerinsky, Raising Constitutional Doubts, TRIAL at 68 (Jan. 2002).
36. 228 U.S. 243 (1913).
As previously stated and until recently, although most courts recognized a hearsay exception for declarations against interest, they did not apply the exception to declarations disavowing penal interest. Donnelly is one of the leading cases following the traditional view. However, in Donnelly, Justice Holmes dissented, arguing that it is irrational to admit declarations disavowing pecuniary interest while excluding statements contrary to penal interest. Common sense suggests that a statement acknowledging criminal liability for murder—exposing the declarant to the death penalty—is at least as reliable as a statement admitting a civil debt for $100.00. However, Justice Holmes did not favor the carte blanche admission of declarations against penal interest. In one passage in his dissenting opinion in Donnelly, he indicated that as a further safeguard, the proponent should be required to demonstrate some additional “circumstances pointing to [the statement’s] truth.” That passage gave birth to the supposed requirement for corroboration of declarations against penal interest.

While Donnelly dealt with defense hearsay, in Bruton the proponent was the prosecution. At common law, there was a hearsay exception for vicarious admissions by co-conspirators—the doctrine now codified as a hearsay exemption in Federal Rule of Evidence 801(d)(2)(E). Suppose a statement by a conspirator does not satisfy the foundational requirements for the doctrine. For example, the conspirator might have made the statement after he was arrested; ordinarily a statement at that time does not promote the purposes of the conspiracy. Assume further that although a conspirator’s statement does not fall within that doctrine, the conspirator and the accused are being tried jointly. One fact is clear: The statement is not admissible as substantive evidence against the accused under the conspirator doctrine. If the judge gives the jury a limiting instruction, may the prosecutor introduce the statement at the joint trial? Originally, the Supreme Court answered that question in the affirmative. Later, reversing its position, the Court decided Bruton, holding that if the statement does not fall within a hearsay exception and the confessing conspirator does not subject himself or herself to cross-examination, it is a denial of confrontation to admit at the joint trial the statement implicating the accused. The Court realistically assessed the jury’s ability to follow the limiting instruction and concluded

38. MCCORMICK, supra note 20, §§ 318-19, at 520-22.
39. 228 U.S. at 277-78 (Holmes, J. dissenting); see also Tague, supra note 14, at 867.
40. Tague, supra note 14, at 868 (quoting Donnelly, 228 U.S. at 277 (Holmes, J., dissenting)).
41. MCCORMICK, supra note 20, § 259, at 452.
42. FED. R. EVID. 801 (d)(2)(E).
43. FED. R. EVID. 105.
46. Id. at 126.
that under these circumstances, the instruction was inadequate protection for the accused.\textsuperscript{47} In \textit{Bruton}, the conspirator's statement did not fall within the co-conspirator doctrine,\textsuperscript{48} and the prosecution evidently did not argue that the statement fell within any other hearsay exception such as declaration against penal interest. \textit{Bruton} did not rule that the Confrontation Clause precluded applying the declaration against penal interest exception to a third party's statement implicating the accused. However, as we shall soon see, some mistakenly assumed that was the case.

\textit{Bruton} was decided in the late 1960s. Early in that decade, in his capacity as head of the United States Judicial Conference, Chief Justice Warren appointed a committee to study the question of whether a uniform set of evidence rules was feasible and desirable.\textsuperscript{49} The committee answered the question in the affirmative.\textsuperscript{50} The Chief Justice then appointed an advisory committee, subject to the Standing Committee on Rules of Practice and Procedure, to draft the rules.\textsuperscript{51}

\textbf{a. The Preliminary Draft}

After several meetings and public sessions, the committee set about the drafting task. It released its Preliminary Draft in 1969.\textsuperscript{52} In drafting the provision governing the declaration against interest exception, the committee made several decisions. To begin with, the committee adopted Justice Holmes' position in \textit{Donnelly} that there ought to be a declaration against penal interest exception.\textsuperscript{53} However, the committee stopped short of adopting Holmes' suggestion that there be a corroboration requirement.\textsuperscript{54} Moreover, the committee adopted a broad reading of \textit{Bruton} and

\textsuperscript{47.} If the jurors are likely to disregard the limiting instruction and use the evidence in deciding the accused's guilt, functionally the accomplice becomes an accuser for Sixth Amendment purposes. The Sixth Amendment Confrontation Clause accords the accused a right to confront—that is, cross-examine—accusers. However, since the accomplice has elected not to testify, the introduction of the accomplice's hearsay statement will violate the accused's right to cross-examine. \textit{Id.} at 124-26; \textit{see also} Nelson v. O'Neil, 402 U.S. 622, 626 (1971).

\textsuperscript{48.} 1 \textsc{Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan & Fredric I. Lederer, Courtroom Criminal Evidence} § 1109, at 444-46 (4th ed. 2005).

\textsuperscript{49.} \textsc{Ronald L. Carlson et al., supra note 15, at 18}.

\textsuperscript{50.} \textit{Id.}

\textsuperscript{51.} \textit{Id.} at 19.

\textsuperscript{52.} \textit{Id.; see also} Tague, \textit{supra note} 14, at 853 n.1.

\textsuperscript{53.} Tague, \textit{supra note} 14, at 866-67. The Preliminary Draft provision read:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or social disapproval, that a reasonable man in his position would not have made the statement unless he believed it to be true. This example does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. \textit{Id.} at 866.

\textsuperscript{54.} \textit{Id.} at 867-68.
concluded the draft provision with the following sentence: "This example does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused—which became known as the "Bruton sentence." The Justice Department immediately attacked the draft provision and sent the committee three letters. In the letters, the Department urged the committee to delete any declaration against penal interest exception. The Department expressed its fear that it would be too easy for an accused to obtain fabricated testimony that a third party had confessed to the alleged crime. In the alternative, the Department contended that if the committee retained a declaration against penal interest exception, the committee should add the condition that the defense offer "other substantial evidence which tends to show clearly that the declarant, and not the defendant, is in fact the person guilty of the crime for which the defendant is on trial." At this point, the committee was unpersuaded.

b. The Revised Draft

The committee released its Revised Draft in March 1971. The committee did not make any substantive changes from its Preliminary Draft of the declaration against interest provision. The Revised Draft omitted a corroboration requirement for defense hearsay but included the Bruton sentence restricting prosecution hearsay. The Justice Department renewed its objections to the provision, but the department's advocacy did not convince the committee to change its position. However, at this point in the chronology, Senator John McClellan, the Chair of the Senate Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, took an interest in the draft rules. He favored the imposition of a corroboration requirement for defense hearsay offered under the declaration against penal interest exception. He analogized to the corroboration requirement enforced
when the prosecution attempts to introduce an accused's confession. Further, he took issue with the Bruton sentence and demanded its deletion.

The committee sat up and took notice of McClellan's criticisms. As previously stated, he chaired an important Senate subcommittee. Moreover, he threatened to introduce legislation reducing the Supreme Court's rulemaking power. Then Chief Justice Burger indicated that he thought Senator McClellan's threat was credible and, in that light, it was advisable to modify the Revised Draft to placate the Senator. In order to do so, the committee modified its draft in two respects. First, the committee voted to add a corroboration requirement: "Statements tending to expose the declarant to criminal liability and offered to exculpate the accused must, in addition, be corroborated in order to be admissible." Second, the committee dropped the Bruton sentence from its draft. The Standing Committee, which the advisory committee was subordinate to, unanimously approved these modifications.

c. The Revised Definitive and Supreme Court Drafts

Later in 1971 the advisory committee released a Revised Definitive Draft, including the modifications requiring corroboration but deleting the Bruton sentence. For his part, Senator McClellan appeared satisfied with the modified provision. In contrast, the Justice Department once again called on the committee to entirely abandon a declaration against penal interest exception. As on previous occasions, the department persuaded neither the advisory committee nor the Standing Committee. Eventually, the Standing Committee submitted its draft, including the modified declaration against penal interest exception, to the Supreme Court. In late 1972, the Court promulgated the Supreme Court Draft based on the Revised Definitive Draft, and on February 5, 1973, the Court transmitted the draft to Congress.

68. Id. at 875.
69. Id. at 878.
70. Id. at 873.
71. Id. at 874.
72. Id. at 877.
73. Id. at 878-79.
74. Id. at 880.
75. Id. at 853 n.1, 881-82.
76. Id. at 882.
77. Id. at 882-83.
78. Id. at 883-84.
79. Id. at 884.
80. Id.
81. Id.
d. The House of Representatives

The first Congressional body to review the draft was the Special Subcommittee on Reform of Federal Criminal Laws of the House Judiciary Committee.\textsuperscript{82} During its hearings, one of the key witnesses was Judge Henry J. Friendly.\textsuperscript{83} In his testimony, Judge Friendly essentially repeated the Justice Department’s argument that there was a grave risk the accused would abuse the declaration against penal interest exception as a vehicle for introducing fabricated testimony about third-party confessions to the crime for which the accused was standing trial.\textsuperscript{84} He contended the draft’s corroboration requirement was worded too weakly.\textsuperscript{85} In a June 12, 1973 markup session, staff counsel tightened the wording of the corroboration provision\textsuperscript{86}—the language that eventually was enacted by Congress.\textsuperscript{87} As rewritten, the sentence reads: “A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.”\textsuperscript{88} Both the advisory committee and the Standing Committee opposed the insertion of the adverb “clearly,”\textsuperscript{89} but their opposition was unavailing. The subcommittee’s final draft included the toughened corroboration requirement for defense hearsay.

At the same time, though, the subcommittee reinstated the \textit{Bruton} sentence.\textsuperscript{90} Thus, the House subcommittee made one change benefitting the prosecution and another helping the defense. The subcommittee’s draft of the provision passed the House without any floor discussion.\textsuperscript{91}

e. The Senate and the Conference Committee

The next stop for the draft was the Senate Judiciary Committee.\textsuperscript{92} That committee partially agreed with the House. The committee approved the reworded corroboration provision.\textsuperscript{93} However, the committee jettisoned the \textit{Bruton} sentence.\textsuperscript{94} The full Senate passed the version of the draft revised by the Senate Judiciary
Since there were several differences between the House and Senate versions, a conference committee convened. The Senate position on the declaration against interest provision prevailed in that committee. Congress then enacted the version approved by the conference committee.

The upshot is that, in two important respects, the final version of the provision is a mirror image of the initial version in the advisory committee's Preliminary Draft. While that draft omitted a corroboration requirement for defense hearsay, the final version included a requirement with teeth. In addition, although the Preliminary Draft included the *Bruton* sentence, restricting the prosecution's ability to invoke the declaration against penal interest provision, the final version omitted the sentence.

2. A Recurring Theme

The above paragraphs chronicle the various steps in the process culminating in the enactment of the current version of Rule 804(b)(3). One recurring theme throughout this process is worth highlighting. In an August 12, 1971 letter to the Chair of the Standing Committee, Senator McClellan voiced his opposition to the *Bruton* sentence. The senator stated that he favored the Advisory Committee's basic approach eschewing "wr[iting] the Rules in terms of their constitutional implications."

Likewise, when the Senate Judiciary Committee explained its decision to delete the sentence, it asserted that "[c]odification of a constitutional principle [such as the Confrontation Clause] is unnecessary and, where the principle is under development, often unwise." The same theme surfaced during the conference committee deliberations over the provision. That committee concurred with the Senate Judiciary Committee because the conference committee also believed that it was advisable to "avoid codifying constitutional evidentiary principles . . . "

B. The Criticism of the Final, Enacted Version of Rule 804(b)(3)

In 1981, Professor Peter Tague published a lengthy article attacking the final, enacted version of Rule 804(b)(3). He mounted several challenges to the statute. Some of the challenges were general policy arguments that the final version of the

95. *Id.*
96. *Id.* at 891-92.
97. *Id.* at 892.
98. *Id.*
99. *Id.* at 893.
100. *Id.*
101. *Id.* at 896; see also United States v. Palumbo, 639 F.2d 123, 130 (3d Cir. 1981); United States v. Alvarez, 584 F.2d 694, 700 (5th Cir. 1978).
102. United States v. Oliver, 626 F.2d 254, 261 n.9 (2d Cir. 1980).
statute was unsound. However, he added a number of constitutional challenges. One constitutional argument was that the differential treatment of prosecution and defense hearsay—the inclusion of a corroboration requirement applicable only to defense evidence—violated the Equal Protection guarantee. Another criticism was that the failure to require corroboration of prosecution hearsay offended the Confrontation Clause. Professor Tague pointed specifically to the reliability requirement under Ohio v. Roberts. In short order, these arguments and Professor Tague's article garnered the courts' attention. Indeed, the Court of Appeals for the Eighth Circuit cited the article in 1981, the very year it was released.

C. The Judicial Response to the Criticism: The Addition of the Gloss to the Text of Rule 804(b)(3)

Some courts not only refused to reach the merits of the constitutional claims, they also declined to decide the statutory construction issue of whether Rule 804(b)(3) could be interpreted to moot the claims. The Supreme Court did so in 1994, and a Ninth Circuit panel did likewise in 1993. For that matter, reaching the statutory construction issue, one dissenting Eighth Circuit judge firmly rejected the argument that 804(b)(3) ought to be interpreted as including a corroboration requirement for prosecution hearsay. However, the vast majority of the cases have taken a very different, two-fold approach: While the courts balk at reaching the constitutional question, they attempt to moot that question by adding a judicial gloss on the statute, requiring corroboration for both prosecution and defense hearsay. In fact, in the cases reaching the statutory interpretation issue, the “universal[]” holding is that the legislation should be construed as requiring prosecution hearsay to be corroborated in order to qualify for admission under Rule 804(b)(3). To date, the Courts of Appeals for the Second, at 978-1011.

at 989-98.

at 993-1000.

at 994-95.


United States v. Williams, 989 F.2d 1061, 1068 (9th Cir. 1993).

Riley, 657 F.2d at 1390 (Ross, J., dissenting).


Maugeri v. State, 460 So.2d 975, 977 n.3 (Fla. Dist. Ct. App.); GRAHAM, supra note 112, at 579 n.37.

United States v. Casamento, 887 F.2d 1141, 1170 (2d Cir. 1989); United States v.
Third, Fifth, Seventh, Eighth, and Ninth Circuits all have embraced this view. The courts' reasoning is sometimes inexplicit. However, in the final analysis, it is clear these courts have at least implicitly invoked the interpretive maxim of constitutional avoidance; they have interpreted Rule 804(b)(3) in this manner in order to eliminate any doubt about the legislation's validity under such constitutional guarantees as the Confrontation Clause.

D. Subsequent Efforts to Expressly Amend Rule 804(b)(3) to Include a Corroboration Requirement for Prosecution Hearsay

Although the uniform ruling has added a corroboration requirement for prosecution hearsay as a judicial gloss onto the text of 804(b)(3), there is evidently some uneasiness with that method of resolving the issue. In 2002, the newly constituted Advisory Committee for the Federal Rules of Evidence took up a proposal to amend 804(b)(3) to explicitly extend the corroboration requirement to prosecution testimony. The Administrative Office of the United States Courts formally submitted that proposal to the Supreme Court in late 2003. However, in 2004, the Court handed down its landmark Crawford decision on the Confrontation Clause. That development put the proposal on hold—at least temporarily. In
May 2008, the Advisory Committee revisited the issue and proposed extending the corroboration requirement to prosecution hearsay.\(^{126}\)

II. A CRITICAL EVALUATION OF THE PROPRIETY OF RELYING ON THE CONSTITUTIONAL AVOIDANCE MAXIM AS A JUSTIFICATION FOR READING A CORROBORATION REQUIREMENT FOR PROSECUTION HEARSAY INTO RULE 804(B)(3)

As Part I explained, in adding the judicial gloss of a corroboration requirement for inculpatory declarations, the courts have relied on the interpretive maxim of constitutional avoidance. As Part I.D pointed out, in May 2008 the Advisory Committee formally proposed that the rule be amended to expressly extend the corroboration requirement to such hearsay. Initially, Part II describes the courts' past use of that interpretive maxim. In general terms, Part II then considers the impact of the textualist approach to statutory construction on the maxim. Part II argues that in the textualist era, the courts ought to be more insistent that the alternative interpretation, supposedly mooting the constitutional doubts, is footed in the text of the statute being construed. Finally, Part II addresses the specific question of whether, in the modern textualist era, it is defensible for the courts to add the judicial gloss to Rule 804(b)(3).

A. The Interpretive Maxim of Constitutional Avoidance

The courts repeatedly state that they will not reach the merits of a constitutional question when there is an independent, non-constitutional ground for disposing of the case.\(^{127}\) As a corollary, they have developed the interpretive maxim of constitutional avoidance.\(^{128}\) The lower courts often invoke this maxim.\(^{129}\) The Supreme Court

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128. Singer et al., supra note 1, § 45:11, at 83-84.

itself has endorsed the maxim, and in recent years the Court has cited the maxim in a growing number of cases.

By way of example, the Court relied on the maxim in its 1989 Green decision, construing Federal Rules of Evidence 403 and 609. Rule 403 is the statute generally permitting a judge to exclude an otherwise admissible item of evidence when the attendant probative dangers, such as unfair prejudice, outweigh the probative worth of the item. In essence, the judge balances the probative value against the probative dangers. Rule 609 governs conviction impeachment and includes its own balancing provision. Green presented the question of whether, under the statutes, a judge could employ balancing-reasoning in a civil case to exclude the otherwise admissible conviction of a plaintiff. At the time, the balancing test codified in Rule 609 referred to prejudice only "to the defendant." The lower court had held that under Rule 609, the trial judge cannot exclude a plaintiff's conviction based on a balancing rationale. The lower court reasoned that since the statute mentioned only "the defendant," the plaintiff could not base an objection on balance-reasoning; if the plaintiff's conviction otherwise qualified as evidence, the conviction was automatically admissible.

On appeal, the Supreme Court reversed. Writing for the Court, Justice Stevens asserted that such differential treatment of civil plaintiffs and defendants would be "an odd result." While criminal defendants enjoy rights denied the prosecution, "civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause." Further, "[d]enomination as a civil defendant or plaintiff... is often happenstance based on which party filed first or on the nature of the suit." In Justice Stevens' mind, it was "unfathomable" that Congress would deny a civil plaintiff the balancing protection granted civil defendants. Between the lines, the

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131. See Chemerinsky, supra note 35, at 68.
133. FED. R. EVID. 403.
134. FED. R. EVID. 609.
135. 490 U.S. at 506-10.
136. Id. at 509 (quoting the former version of Federal Rule 609).
137. Id. at 506.
138. Id. at 506-08.
139. Id. at 509.
140. See supra note 5.
141. 490 U.S. at 510.
142. Id.
143. Id. at 510-11.
Court invoked the constitutional avoidance maxim. The proposed distinction between civil plaintiffs and defendants was so irrational that it was probably unconstitutional under the Equal Protection guarantee. The Court opted for a narrowing construction, limiting Rule 609's balancing provision only to criminal defendants in order to moot the constitutional issue. Under the Court's narrowing interpretation, however, Rule 609 treated civil plaintiffs and defendants in the same fashion.

Although the existence of the constitutional avoidance maxim is well settled, there are two conditions which must occur to trigger the maxim, and the courts differ over the contours of those conditions. One condition is that the literal interpretation of the statute must give rise to a doubt about the constitutionality of the legislation. The courts vary in the their phrasing of this requirement. Some courts seem to say the maxim comes into play whenever there is "any" doubt about the constitutionality of a statute when literally construed. Other courts—probably the majority—apply the maxim more cautiously. They do not demand that the litigant, urging the alternative interpretation, demonstrate that a plain meaning interpretation would definitely render the statute unconstitutional; they quite sensibly assume the legislature would probably be loathe to venture close to the precipice of unconstitutionality. However, they require the litigant to convince the court that a contrary interpretation would raise "grave," "serious," or, in the Supreme Court's opinion, "serious doubt" about the constitutionality of the legislation.

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145. Id. at 758.
146. Id. at 759.
147. Since the consensus was that both parties should be able to object on balancing grounds, in 1990 Rule 609 was amended to permit either side in a civil case to object on that ground. FED. R. EVID. 609.
148. See generally Chemerinsky, supra note 35, at 68 ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").
149. Id.
151. Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1106 n.17 (9th Cir. 2001) ("a party cannot force us to ignore the usual canons of statutory construction by raising a frivolous, insubstantial, or patently incorrect constitutional argument"); United States v. Steele, 933 F.2d 1313, 1321 (6th Cir. 1991).
154. Qualcomm, Inc. v. F.C.C., 181 F.3d 1370, 1379 (D.C. Cir. 1999); United States v. Stone,
Court's words, "substantial" questions about the constitutional validity of the legislation. As previously explained, the Supreme Court's shift from Roberts' reliability standard to Crawford's "testimonial" test greatly weakens the argument that a literal interpretation of Rule 804(b)(3)—omitting a corroboration requirement for prosecution hearsay—violates the Confrontation Clause. That development certainly should prompt a reconsideration of the judicial gloss on 804(b)(3).

However, quite apart from the impact of the recent Crawford decision, there is a powerful case that from the very outset, the judicial gloss was unjustifiable. The crux of that case is the second condition for invoking the constitutional avoidance maxim, that is, the requirement that the competing interpretation be a plausible one. Positing Roberts' reliability standard, it was at least arguable that prior to Crawford, a failure to require corroboration of prosecution hearsay offered under 804(b)(3) would have raised a sufficiently strong constitutional argument that the first condition was satisfied. However, it is submitted that since the ascendance of the textualist school of statutory interpretation, it has been clear that the advocates of the judicial gloss on 804(b)(3) cannot satisfy the second condition.

B. The General Impact of Textualism on the Second Condition for Invoking the Constitutional Avoidance Maxim

Some courts profess, under the guise of applying the maxim, that they cannot adopt a disingenuous or strained construction. The text chosen by the legislature


158. See supra notes 25-32 and accompanying text.

159. Chemerinsky, supra note 35, at 68, 70; see also Dwinells, 508 F.3d at 70; Rios-Valenzuela v. Dep't of Homeland Sec., 506 F.3d 393, 400 (5th Cir. 2007) ("the doctrine of constitutional avoidance is not without limits. The doctrine does not permit courts to impose upon a statute an interpretation that does violence to its plain language: 'It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it'") (emphasis included) (quoting Clark v. Martinez, 543 U.S. 371, 381-82 (2005)).

160. Initiative & Referendum Inst. v. U.S. Postal Serv., 417 F.3d 1299, 1317 (D.C. Cir. 2005);
imposes bounds on the permissible limits of interpretation. Since the courts must respect the separation of powers principle, they may neither ignore nor twist the statute's words. They lack the legislative power to rewrite the statute. Even the presence of an ambiguity in the statutory language does not authorize the courts to amend the statute; only the legislature possesses that prerogative. Rather, the courts must seek an interpretation that the statutory text is fairly, reasonably susceptible to.

However, other courts have taken a radically different approach to the second condition. These courts are willing to resort to especially "liberal" interpretations to moot constitutional doubts. For example, there is a good deal of authority that when a "strained" interpretation is the only interpretation capable of saving a statute from unconstitutionality, the court not only may but must embrace that interpretation. As the quotation at the beginning of this article indicates, some courts have gone as far as frankly admitting that they are "torturing" the statutory language in order to avoid reaching a constitutional issue.

As shocking as that attitude might appear, it is understandable that the attitude once enjoyed some popularity. The attitude emerged while the traditional, legal process approach to statutory construction was still dominant. Professors Hart and
Sacks were the champions of that school of statutory interpretation. They presumed that every piece of legislation is both rational and purposive and posited that legislators are reasonable persons pursuing social purposes in good faith. That supposition led them to depreciate the importance of the statutory text of legislation and assign greater relative importance to extrinsic legislative history material:

if legislative drafters benignly endeavor to achieve rational purposes, they will presumably attempt to produce extrinsic legislative history materials shedding valuable light on the meaning of legislation; there is therefore little risk that the courts will be misled by resorting to the materials.

They echoed the arguments of Realists such as Max Radin that statutory language is almost always indeterminate, necessitating judicial policy choice. However, law-and-economics scholars sharply criticized the legal process school. They accused the proponents of that school of political naiveté and argued that political science research had demonstrated that it is more realistic to conceive of legislation as a political compromise shaped by expediency. In passing a statute, the legislature is often striking a deal with special interest groups.

This line of law-and-economics scholarship contributed importantly to the development of the now ascendant textualist school of statutory construction. While the legal process school devalued the statutory text, textualists depreciate the trustworthiness and importance of extrinsic legislative history material. Textualists caution that the courts must read such material skeptically. Such material may not accurately reflect a collective, rational purpose shared by the majority of the legislators; quite to the contrary, it may represent attempted manipulation by a special interest group or a legislator allied with the group. The most frequently used type

175. ESKRIDGE ET AL., supra note 152, at 571, 575-76.
176. Id. at 575-76.
177. Imwinkelried, supra note 33, at 229.
179. See ESKRIDGE ET AL., supra note 152, at 710.
180. Id. at 703-05.
181. William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621, 670 (1989); see Violette v. P.A. Days, Inc., 427 F.3d 1015, 1017 (6th Cir. 2005) ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances."); In re Grand Jury Investigation, 748 F. Supp. 1188, 1199 n. 16 (E.D. Mich. 1990) ("reliance on legislative history as a means of divining Congressional intent is a dubious enterprise, one to be taken cautiously . . . ").
182. MICHAEL SINCLAIR, A GUIDE TO STATUTORY INTERPRETATION 92 (2000).
183. See ESKRIDGE ET AL., supra note 152, at 710, 715-17.
of extrinsic legislative history material is a committee report. Yet, neither the legislature as a whole nor even the committee members vote on the report. Interest groups frequently lobby committee staffers to insert language in the report in the hope of misleading a court into giving the group, by way of interpretation, what the legislature refused to grant in the statutory text.

Given this view of the legislative process, textualists stress the overarching importance of the statutory text. "The [legislative] body as a whole... has only outcomes"—the statute which the legislature formally approved and which alone has the force of law. After all, the text is "all that [the legislature] enacts into 'law.'" Most moderate textualists will consult extrinsic legislative history, but they recognize a strong, rebuttable presumption that the statute ought to be interpreted according to the plain meaning of the text. That interpretation can yield to a contrary reading suggested by extrinsic material but only in extraordinary cases when the contrary intention is very clearly expressed in the extrinsic material. The text "enjoys preeminence."
This renewed, textualists' emphasis on the importance of statutory language has an obvious impact on the application of the constitutional avoidance maxim. Even when the plain-meaning interpretation of the statutory text creates a serious doubt about the constitutionality of the legislation, the court may adopt an alternative interpretation to moot that doubt only if the latter interpretation is "plausible." To be plausible under textualism, an interpretation must either be squarely based on the statutory language selected by the legislature or, at the very least, clearly manifested in the extrinsic legislative history material. It is no longer acceptable for a court to cavalierly strain or torture the text even for the commendable purpose of avoiding a constitutional issue.

C. The Specific Impact of Textualism on the Judicial Gloss of a Corroboration Requirement for Prosecution Hearsay Offered Under Rule 804(b)(3)

Can the judicial gloss to Rule 804(b)(3) withstand scrutiny in the textualist era? It is submitted that the answer is no.

1. The Statutory Text

The statutory language of 804(b)(3) itself cannot support the interpretation that has been added by way of judicial gloss. The statute reads:


Rios-Valenzuela v. Dep't of Homeland Sec., 506 F.3d 393, 400 (5th Cir. 2007) (quoting Clark v. Martinez, 543 U.S. 371, 381-82 (2005)).
The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: [a] statement which was at the time of its making so far... tended to subject the declarant to... criminal liability... that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. 195

The first sentence does not contain any reference to a corroboration requirement, much less an ambiguous reference. In contrast, the second sentence includes such a reference, but by its terms, that reference is confined to “[a] statement... offered to exculpate the accused....”196 Expressio unius est exclusio alterius197—Congress’ express reference to exculpatory statements in 804(b)(3) manifests its intent that the corroboration requirement does not extend to inculpatory statements.

Federal Rule of Evidence 402 strengthens the case against the judicial gloss. The judicial gloss adds a new exclusionary rule to the Federal Rules, barring otherwise admissible inculpatory statements that satisfy Rule 804(b)(3)’s express requirements. Under Rule 402, the courts must admit logically relevant evidence unless the exclusion can be based on “the Constitution of the United States, Act of Congress, these rules, or other rules prescribed by the Supreme Court pursuant to statutory authority”198 such as the Federal Rules of Civil and Criminal Procedure.

There is no mention of case law in Rule 402 and the legislative history proves that this omission was purposeful.199

[C]onsider when Congress intervened. Congress considered the draft rules against the backdrop of the Watergate controversy. That controversy made Congress acutely “jealous of its prerogative vis-a-vis both the Executive and the Judiciary.” [The same] Congress [that blocked the promulgation of the Federal

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

196.  Id.


198.  FED. R. EVID. 402.

Rules by the Supreme Court] was battling in federal court over evidentiary doctrines, namely, President Nixon's privilege claims. On two occasions, the Supreme Court has approvingly quoted the assertion by the late Professor Edward Cleary, the Reporter for the Advisory Committee, that "[i]n principle, under the Federal Rules no common law of evidence remains." Rule 402 embodies a strong bias in favor of the admission of logically relevant evidence. Since Rules 402 and 804 are part of the same statutory scheme, Rule 402 serves as part of the context for construing Rule 804. Even if there was any ambiguity in the text of Rule 804, Rule 402 cuts powerfully in favor of resolving that ambiguity against any judicial gloss imposing a further restriction on the introduction of logically relevant evidence.

It might be countered that the Supreme Court's 1989 *Green* decision cuts in the opposite direction. As Part II.A observed, in *Green* the Court construed Rule 609's balancing provision. It is true that, similar to the courts adding the judicial gloss to Rule 804, the *Green* Court invoked the constitutional avoidance maxim. However, *Green* is readily distinguishable. In *Green*, the statutory text explicitly included the word, "defendant." The issue was the interpretation of that word: Did it apply to civil defendants as well as criminal defendants? The *Green* Court struggled with the ambiguity of a term which Congress has voted to include in the text of the statute. In contrast, courts imposing the judicial gloss, have, in effect, added words to the statutory text. The constitutional principle of separation of powers ordinarily


201. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993); *United States v. Abel*, 469 U.S. 45, 51 (1984). It is important to understand what this language means as well as what it does not denote. First, if a statute uses a term that became a common-law term of art, it is certainly permissible for the court construing the statute to look to the prior common law to inform the interpretation of the statute. Walker v. USAA Cas. Ins. Co., 474 F. Supp. 2d 1168, 1172 (E.D. Cal. 2007). Secondly, if a statute such as Rule 403 confers discretion on the trial judge, the judge may consider common-law policies in deciding how to exercise the discretion. FED. R. EVID. 403. What the judge may not do, however, is to enforce categorical, unmodified exclusionary rules of evidence. See generally Imwinkelried, *supra* note 199.

202. See generally Imwinkelried, *supra* note 199.


precludes the courts from inserting words into the statute.\textsuperscript{205} There are instances in which courts read language into the text, but they do so only in extreme cases\textsuperscript{206} where, as a matter of law, the legislative history establishes a scrivener's drafting error.\textsuperscript{207} Absent such extraordinary circumstances, the insertion of a word or words into the legislative text amounts to a statutory amendment, and the courts lack the power to amend legislation.\textsuperscript{208} The courts adding the judicial gloss to Rule 804(b)(3) have attempted to exercise that power.

2. The Extrinsic Legislative History Materials

A strict textualist might take the position that if the statutory text itself cannot support an interpretation other than a "plain meaning" reading, the court cannot adopt an alternative reading even for the benign purpose of mooting a doubt about the constitutionality of the statute. However, as we have seen, most moderate textualists at least consult legislative history material before making a definitive interpretive decision.\textsuperscript{209} In the typical case, though, they permit such material to trump the text only when those materials very clearly demonstrate a contrary legislative intention.\textsuperscript{210} Of course, these cases are atypical because they also implicate constitutional concerns, that is, the doubt about the constitutionality of a literal interpretation of the text. In such an atypical case, a textualist might conceivably permit the adoption of an interpretation mooting the constitutional doubt so long as the interpretation has some support in the extrinsic materials. Absent even that, the interpretation would be a wholly judicial creation. Textualism dictates that separation of powers precludes a court from attributing that type of interpretation to the statute.

Can the proponents of the judicial gloss justify the gloss on the basis that the legislative history of Rule 804(b)(3) evidences an intention that, in enforcing the statute, the trial judge must require a prosecutor offering an inculpatory statement to present corroboration of the statement? On occasion, the courts imposing the gloss have seemed to rely on that argument.\textsuperscript{211} However, that argument rests on a superficial reading of the legislative history. A close reading of the legislative history material exposes the error.

\begin{itemize}
\item \textsuperscript{206} People v. Buena Vista Mines, Inc., 56 Cal. Rptr. 2d 21, 23 (1996).
\item \textsuperscript{207} Tax Analysts v. Internal Revenue Serv., 214 F.3d 179, 183 (D.C. Cir. 2000); Barnett v. Brook Road, Inc., 429 F. Supp. 2d 741, 749 (E.D.Va. 2006).
\item \textsuperscript{208} Imwinkelried, supra note 166, at 963-64.
\item \textsuperscript{209} Imwinkelried, supra note 190, at 269-71.
\item \textsuperscript{210} See supra notes 191-192 and accompanying text.
\item \textsuperscript{211} E.g., United States v. Alvarez, 584 F.2d 694, 700-01 (5th Cir. 1978).
\end{itemize}
As Part I.A pointed out after reviewing the chronology culminating in Congress’ enactment of Rule 804(b)(3), a theme surfaced during that chronology. In his letter to the Advisory Committee, Senator McClellan urged the committee to continue to follow its basic approach not “writ[ing] the Rules in terms of their constitutional implications.”\textsuperscript{212} Later in the chronology, when the Senate Judiciary Committee elaborated on its decision to delete the so-called Bruton sentence, the committee stated that “Codification of a constitutional principle [such as the Confrontation Clause] is unnecessary and, where the principle is under development, often unwise.”\textsuperscript{213} Near the end of the timeline, the conference committee expressed its view that it was advisable to “avoid codifying [evolving] constitutional evidentiary principles . . . .”\textsuperscript{214}

On close examination, these passages from 804(b)(3)’s history materials do not demonstrate a legislative intent to “freeze” the 1975 understanding of Confrontation Clause jurisprudence into the statute. Nor do they establish that the trial judge is authorized to read into the statute whatever additional requirements he or she thinks the Constitution then mandates. Instead, the materials manifest a legislative intent that after applying the express statutory requirements, the judge will then undertake a separate “wholly constitutional” analysis.\textsuperscript{215} Both the Senate and Conference Committees recognized that constitutional constraints such as the Confrontation Clause were both pertinent and evolving. Hence, even if the courts should consider the extrinsic history materials as well as the text of Rule 804(b)(3), those materials also undermine the validity of the judicial gloss. The materials are devoid of any evidence that Congress tasked judges to address the constitutional principles indirectly by a judicial gloss mooting constitutional concerns. Rather, the materials clarify Congress’ intent that after applying the statutory requirements it had prescribed, the judge would conduct a further, straightforward analysis of the requirements mandated by the Constitution.\textsuperscript{216}

III. CONCLUSION

It would be a mistake to overstate the importance of the narrow question of the corroboration requirement for prosecution hearsay under Rule 804(b)(3). As Part I.D pointed out, the Advisory Committee has formally proposed that the rule be amended to expressly extend the corroboration requirement to such hearsay.

However, it would be a much greater mistake to understate the importance of the larger issue raised by this case study. The case study poses the broader question of

\begin{itemize}
\item \textsuperscript{212} Tague, supra note 14, at 893.
\item \textsuperscript{214} United States v. Oliver, 626 F.2d 254, 261 n.9 (2d Cir. 1980).
\item \textsuperscript{215} MUELLER ET AL., supra note 23, § 8:130, at 196-200.
\item \textsuperscript{216} See supra notes 212-215 and accompanying text.
\end{itemize}
the limits of the interpretive maxim of constitutional avoidance. That maxim is in widespread use, and, if anything, the courts appear to invoke the maxim with increasing frequency.\footnote{217}

Textualism changes the concept of a "plausible" alternative interpretation. In the past, some courts have taken great liberties with the statutory text in announcing strained, tortured interpretations in order to eliminate doubts about the constitutionality of the statute.\footnote{218} Textualism demands an alternative interpretation that is either squarely grounded in the statutory text or at least has some solid support in the extrinsic legislation materials.

Indeed, the impact of textualism is not confined to the constitutional avoidance maxim. The textualist approach should affect the application of many popular maxims. One of the most frequently invoked maxims in civil cases originated in \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}\footnote{219} \textit{Chevron} announced the maxim that if an administrative agency adopts an interpretation of an ambiguous statute that the agency has responsibility for administering, the courts should prefer that interpretation even when it is not the reading the court would otherwise adopt.\footnote{220} However, in the textualist era:

The agency's interpretation must be defensible linguistically. Even if a statutory provision is ambiguous, the provision can bear only a certain range of possible meanings. What potential meanings do the statutory words permit? If the agency's interpretation exceeds the bounds of that range, the court will not grant the interpretation \textit{Chevron} deference, much less ultimately adopt that interpretation.\footnote{221}

In criminal cases, one of the commonly invoked maxims is lenity, counseling that ambiguities in penal statutes ought to be resolved in the accused's favor.\footnote{222}

\footnote{217. Chemerinsky, \textit{supra} note 35, at 68.}
\footnote{218. SINGER ET AL., \textit{supra} note 1, § 45:11 at 81-84, 89-90.}
\footnote{219. 467 U.S. 837 (1984).}
\footnote{221. Imwinkelried, \textit{supra} note 220, at 83; \textit{see also} Agro Dutch Indus. Ltd. v. United States, 508 F.3d 1024, 1030 (Fed. Cir. 2007) ("As the Supreme Court has made clear, . . . an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.").}
However, that maxim does not justify distorting the statutory text. A court may treat the maxim as a tie breaker and rely on it as a basis for adopting an interpretation favorable to the accused only if the latter interpretation is a reasonable reading of the legislative text. The lenity maxim does not authorize a court to strain the statutory language. Maxims such as these are intended as aids in bona fide efforts to interpret statutes, not pretexts for usurping legislative authority and amending the statutes.

In the final analysis, this article is a call for judicial honesty and courage. First, the article calls for judicial honesty in the interpretation of statutory text. There are limits to the legitimate interpretation of statutory language.

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225. People v. Cole, 135 P.3d 669, 682 (Cal. 2006) (quoting People v. Avery, 38 P.3d 1, 6 (Cal. 2002)).


228. Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 533 (1947) ("no one will gainsay that the function in construing a statute is to ascertain the meaning of the words used by the legislature. To go beyond is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge..."
the force of law is the statutory text enacted by the legislature. The judge’s task is to “ascertain the meaning of [the] words used by the legislature. To go beyond is to usurp a power which our democracy has lodged in its elected legislature.”

In the case of Federal Rule of Evidence 804(b)(3), the statute does not contain any language that, by any stretch of the imagination, supports the existence of a corroboration requirement for inculpatory hearsay. In some circumstances a moderate textualist could conceivably be willing to rest an interpretation on extrinsic legislative history material evidencing an intent to extend the corroboration requirement. However, a close reading of the legislative history of 804(b)(3) discloses no such intention.

Of course, greater judicial honesty in statutory interpretation will necessitate greater judicial courage. If the court cannot stretch the constitutional avoidance maxim to evade a constitutional question, the court will have to face that question. If Rule 804(b)(3) is not amended, the courts might well eventually rule that the statute is unconstitutional. As we have seen, the Supreme Court’s recent Crawford and Davis decisions largely eliminate the argument that the statute violates the Confrontation Clause. However, the Equal Protection issue remains. In some cases, the Supreme Court has strongly suggested that an evidentiary classification can violate the Equal Protection Guarantee. Seizing on those suggestions, commentators have urged that certain evidentiary rules run afoul of Equal Protection. In particular, Professor Tague argued that the differential treatment of inculpatory and exculpatory hearsay in the text of Rule 804(b)(3) is unconstitutional on that ground. Nevertheless, to date the lower courts have, rather summarily, rejected Equal Protection challenges to evidentiary rules. Thus, there is a distinct possibility that the courts will rule that the disparity passes constitutional muster—the

nor to contract it”); Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 HARV. L. REV. 417, 419-20 (1898-99) (“We do not inquire what the legislature meant; we ask only what the statute means . . . a meaning which . . . the words did not bear”; see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 38 (1982). However, Judge Calabresi believes that when later historical developments overtake a statute and it is clear to the judiciary that the legislature lacks the political consensus to amend or adapt the statute, that responsibility falls to the judiciary. His Honor acknowledges that the adoption of his view would require a reconceptualization of separation of powers. Id. at 79-80.

229. Felix Frankfurter, supra note 228, at 533.
233. See supra note 14.
234. Tague, supra note 14, at 989-1000.
merits of that question, of course, are worthy to be the subject of a separate article. In any event, if the courts honestly construe Rule 804(3), they will have to directly and courageously address that constitutional issue. The irony is that, in a well-intentioned effort to avoid that constitutional question, the courts imposing the corroboration requirement on inculpatory hearsay have acted unconstitutionally, wielding a legislative power to amend the statutory text in violation of separation of powers.