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# Revealing and Thereby Tempering the Abuses of Government Created Evidence in Criminal Trials

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# Revealing and Thereby Tempering the Abuses of Government-Created Evidence in Criminal Trials

*Robert P. Mosteller*<sup>†</sup>

## INTRODUCTION

I am delighted to add my contribution to this symposium in honor of the academic achievements of Professor Margaret Berger. I do this through three points. The first is Professor Berger's commitment to providing the jury with information to do its job more effectively and her faith in that institution when properly armed with adequate information. The second is her particular remedy of requiring the recordation of evidence created by the government, and revealing that record to the jury as a way of tempering the corrupting influence of the government's hand in the evidence development process. I heartily endorse these positions and find them to have widespread and enduring applicability. Finally, I comment on an admirable characteristic that I have found constant throughout Professor Berger's work that adds to its brilliance: her reasoned judgment.

I anchor my comments in arguments Professor Berger made regarding the Confrontation Clause to the Sixth Amendment of the United States Constitution at a time when *Ohio v. Roberts*<sup>1</sup> provided the controlling paradigm, before it was replaced by *Crawford v. Washington*.<sup>2</sup> I do not wish to suggest that Professor Berger was a defender of the trustworthiness/reliability system of *Roberts*, for she was not.<sup>3</sup>

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<sup>†</sup> J. Dickson Phillips Distinguished Professor of Law, University of North Carolina School of Law. I want to thank Professors Ed Cheng and Jeff Powell for their comments on an earlier draft of this essay.

<sup>1</sup> 448 U.S. 56 (1980).

<sup>2</sup> 541 U.S. 36 (2004).

<sup>3</sup> See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 605-13 (1992) (recognizing the "illusory protection afforded to a defendant by the evidentiary version of confrontation" and arguing to give greater protection against admission of

She did, however, attempt to make that system more protective of the central principles she believed the Sixth Amendment embodied.

Some of her ideas may fit within the *Crawford* framework as its detail is fleshed out in the future by the Supreme Court and lower courts. Some of these ideas may not, but these sound arguments are still worth noting since they may be embodied in legislation or in a new generation of procedural protections.

I. AN INSIGHTFUL AND INFLUENTIAL BRIEF IN *IDAHO V. WRIGHT*: PROTECTING THE DEFENDANT'S CONFRONTATION RIGHT BY PROVIDING THE JURY WITH THE BASIS TO ASSESS THE DECLARANT'S STATEMENT

My first specific example of a contribution by Professor Berger is the amicus brief she authored for the American Civil Liberties Union in *Idaho v. Wright*.<sup>4</sup> In accord with her basic position, the Supreme Court concluded that the state had failed to demonstrate the requisite showing of reliability for a hearsay statement admitted under the catchall exception and reversed the conviction.<sup>5</sup> As I stated in an earlier article, "Precisely why the Court decided to find the hearsay in *Wright* inadmissible because not supported by particularized indicia of reliability cannot be clearly established. However, the decision may have flowed from the arguments made by Professor Margaret Berger in an amicus brief."<sup>6</sup>

Indeed, one finds many echoes of Professor Berger's arguments in the facts described in Justice O'Connor's opinion in *Wright* that apparently led to the outcome in the case. Unfortunately as discussed in later parts of this essay, one does not find in the Court's opinion all of her proposed solutions.<sup>7</sup>

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statements produced by government authorities). This article is discussed further at *infra* note 31 and accompanying text.

<sup>4</sup> 497 U.S. 805 (1990).

<sup>5</sup> *Id.* at 827.

<sup>6</sup> Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them"*, 82 IND. L.J. 917, 934 n.53 (2007) (citing Amicus Brief for American Civil Liberties Union as Amicus Curiae Supporting Respondent, *Idaho v. Wright*, 497 U.S. 805 (1990) (No. 89-260)).

<sup>7</sup> Professor Berger noted that "[i]ndicia of reliability are 'easy to come by,' [and that] . . . one part of the majority opinion in *Idaho v. Wright* reads like a handbook instructing prosecutors how to offer a child's hearsay statement with requisite 'particularized guarantees of trustworthiness.'" See Berger, *supra* note 3, at 606.

*Wright* involved testimony of Dr. John Jambura that contained the “statements” of a two-and-one-half-year-old child, Kathy Wright. These statements led to the conviction of Kathy’s mother for “lewd conduct with a minor” for allegedly assisting a male companion in raping both Kathy and her five and one-half year old sister.<sup>8</sup> Kathy’s statements were admitted through Dr. Jambura, and she did not testify because the trial court found that she was ““not capable of communicating to the jury.””<sup>9</sup>

Professor Berger emphasized the importance of the confrontation right to the jury being able to perform its role: “The statements made by Kathy to Dr. Jambura lie at the heart of this case. Yet, for a number of reasons, the jury could not assess their reliability with any degree of confidence.”<sup>10</sup> Chief among these reasons was that “it is not even clear from the doctor’s testimony precisely what words Kathy used.”<sup>11</sup> The statement “is not being reported in its entirety, contains too few details to confirm its consistency with the supposed event, and was elicited in response to leading questions designed to confirm the questioner’s hypothesis.”<sup>12</sup> She noted the lack of “any verbatim record of the interview,”<sup>13</sup> which she would argue in a later article should be turned into a potential requirement and remedy.

Professor Berger argued that the key role of the Confrontation Clause is to enable the jury to do its job of deciding guilt and innocence in the difficult cases where the jurors’ albeit imperfect human instincts and judgments are all that stand between a just and an unjust verdict. With a child as young as Kathy, she emphasized that the jury needed to see the child testify (or at least have her exact words) so it could assess whether Kathy had reached the developmental stage where she “underst[ood] the need to tell the truth, or could distinguish fact from fantasy.”<sup>14</sup> Additionally, the jury could not evaluate Kathy’s capacity for communicative speech.<sup>15</sup> Professor

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<sup>8</sup> See *Wright*, 497 U.S. at 808-12.

<sup>9</sup> *Id.* at 809.

<sup>10</sup> Brief for American Civil Liberties Union as Amicus Curiae Supporting Respondent at 9, *Idaho v. Wright*, 497 U.S. 805 (1990) (No. 89-260) [hereinafter *Amicus Brief in Wright*].

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.* at 16-17.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.* at 9-10.

Berger recognized that “[f]actors such as the speed and flow of a witness’ speech, as well as articulation, intonation, mannerisms of speech and use of nonverbal modes of communication, on direct and on cross examination, enter into a jury’s assessment.”<sup>16</sup> As she acknowledged, cross-examination of young children is a difficult enterprise, potentially made even more difficult by the psychological process of confabulation whereby details from imagination and earlier responses merge with the actual memory of the event to make the child erroneously believe a flawed version of the events.<sup>17</sup> But it should still be provided. She summarized a number of concerns as follows:

The jury cannot evaluate accurately whether [Kathy’s] statement recounts a past event, or is the consequence of suggestive questioning in alien surroundings, in the presence of strangers, after undergoing what must have been an extremely unpleasant physical examination. In the absence of Kathy, the jury did not have the information needed to assess the appropriate weight to be given Kathy’s statement.<sup>18</sup>

Professor Berger noted the special difficulty posed when the alleged statement of the child is presented through an expert, which gives her purported testimony through an impressive medium but without adequate testing. “Interposing the expert between the declarant and the jury deprives the jury of its right to make determinations of credibility.”<sup>19</sup> Having Dr. Jambura on the stand was not, she argued, an adequate substitute. “Cross-examining the expert is not the equivalent of cross-examining the declarant upon whose statements the expert is relying in expressing his opinion. To the contrary, the defendant may be deprived of his rights to confrontation if he has no access to the declarant upon whom the expert is relying.”<sup>20</sup>

The difficulty she notes here for statements introduced through experts reverberates into the new system created by *Crawford*. A clear challenge yet to be addressed by the Supreme Court under the “testimonial statement” approach is whether its determination that statements not “offered for the

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<sup>16</sup> *Id.* at 10.

<sup>17</sup> *Id.* at 11.

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Id.* at 18.

<sup>20</sup> *Id.*

truth” are outside Confrontation Clause protection<sup>21</sup> applies to statements admitted for the limited purpose of supporting the expert’s opinion. Although the answer under the hearsay rules is that such statements are not offered for the truth, the answer should be different under Confrontation Clause analysis for the straightforward reason that Professor Berger offers. Unfortunately, that difference appears to be eluding many lower courts presently as they use the wooden analysis of following the hearsay definition<sup>22</sup> and not the importance of confrontation to enable the jury to evaluate the accuracy of the second-hand account.

Professor Berger’s arguments are simple, powerful, and correct. As part of an overall pattern of rights within the Sixth Amendment, a major role of the Confrontation Clause is to empower jurors to do their task properly and accurately. The goal is the testing of the witness’ version of events in front of the lay factfinders, part of our inherited overall system of live witnesses presenting their evidence at a public trial. Her specific vision, which I believe is sound, is not of a Confrontation Clause that provides a “get out of jail free” right but rather a guarantee that seeks to maximize the actual “confrontation” of the jury with the grist from which its members can reach their own judgments. That involves both the declarant’s direct testimony and the testing through cross-examination by counsel for the accused in front of those jurors.<sup>23</sup>

In support of the Idaho Supreme Court,<sup>24</sup> Professor Berger argued that the Court should require the recording of children’s statements when elicited by prosecutorial authorities in adversarial situations.<sup>25</sup> Although her proposal was out of sync with both the *Wright* Court and today’s Court, the suggestion of using “prophylactic rules as the instrumental

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<sup>21</sup> See *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985) in which a clearly testimonial statement and confession by a co-defendant that differed substantially from the defendant’s version of the events was used to refute the defendant’s claim that he was coerced into a confession that tracked the co-defendant’s statements).

<sup>22</sup> See Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 *GEO. L.J.* 827, 846-48, 854-57 (2008) (noting lower court rulings that such statements are exempted from confrontation scrutiny and the fallacy of the reasoning).

<sup>23</sup> See Amicus Brief in *Wright*, *supra* note 10, at 7.

<sup>24</sup> See *State v. Wright*, 775 P.2d 1224, 1230 (1989) (concluding that because there was no audio or videotape of the interview, the dangers of unreliability could “never be fully assessed”).

<sup>25</sup> See Amicus Brief in *Wright*, *supra* note 10, at 20-27.

means to further constitutional objectives<sup>26</sup> stands in excellent company with Sixth Amendment precedent and with good judgment that is being utilized today in many sectors as we recognize the need to protect the innocent.<sup>27</sup>

Finally, she argued that corroboration of the statement's truth by external evidence could not be a basis for declaring the statement trustworthy and in turn could not justify its receipt under the *Roberts'* trustworthiness/reliability system.<sup>28</sup> The Court reached this same conclusion largely applying hearsay theory.<sup>29</sup> Professor Berger argued for it on a different and more enduring basis. It was part of her broader view that the purpose of the Confrontation Clause is to enable the jury to assess the declarant's statement, which was part of a theoretical vision that became clear in the article to which I turn next. Her vision is that the Confrontation Clause has a particular role in protecting the accused from government developed evidence. In her brief, she articulated one ramification of that view:

If confrontation is to be excused when corroborating evidence exists, the constitutional right . . . will become meaningless. Prosecutors would be encouraged to rely on weak witnesses whom they would be able to bolster by hearsay evidence that would not violate the Confrontation Clause because it was corroborated. Such bootstrapping would spell an end to the constitutional right embodied in the clause . . . .<sup>30</sup>

## II. FORMULATING THE FUNDAMENTAL ARGUMENT TO CONTROL MUCH GOVERNMENT-CREATED HEARSAY BY REQUIRING THE RECORDING OF THE PROCESS OF CREATION

My second specific point of reference is Professor Berger's article, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint*

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<sup>26</sup> *Id.* at 20.

<sup>27</sup> See Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 772-73 (2005) (recognizing a broad public campaign to record as a means of protecting the innocent and noting that three states through judicial decision and three others through legislative action have mandated recording interrogations).

<sup>28</sup> See Amicus Brief in *Wright*, *supra* note 10, at 19-20.

<sup>29</sup> See *Idaho v. Wright*, 497 U.S. 805, 819-21 (1990). The Court did recognize the danger of "bootstrapping" weak evidence into the case, *see id.* at 823, but it did not give the prominence to this danger of prosecution created evidence that Professor Berger's prosecutorial restraint model would justify.

<sup>30</sup> Amicus Brief in *Wright*, *supra* note 10, at 20.

*Model*.<sup>31</sup> In this article, she argues for special scrutiny for hearsay statements made by declarants to government agents. Although the Court did not cite her article as influencing its determination to adopt a new paradigm in *Crawford*, Justice Breyer did cite it as one of three academic articles suggesting a new approach in his statement of personal dissatisfaction with the *Roberts* approach prior to the *Crawford* decision.<sup>32</sup>

Professor Berger's position that special attention should be paid to statements elicited by government agents is largely consistent with the Court's new testimonial statement approach. In *Crawford*, the Court stated that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."<sup>33</sup> While her remedies do not fully appear to fit the new paradigm, my point is not directed towards the mismatch. It is instead about the correctness of the central insight and the importance of her basic approach and remedy.

That approach is to give special scrutiny to the situations where government agents and the prosecution are involved during the formation of evidence and have the ability to affect its development and content. In those situations, her remedy is to require additional safeguards that would enable the jury to assess the reliability of the process and the impact of the government's role in it.<sup>34</sup>

If the declarant is produced by the prosecution as a witness at trial, ordinarily no special protection is required even though the government had a role in securing the statement. However, additional protections are needed if the declarant is particularly vulnerable. For vulnerable witnesses, such as mentally unstable witnesses, children, or someone like

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<sup>31</sup> Berger, *supra* note 3, at 605-13.

<sup>32</sup> See *Lilly v. Virginia*, 527 U.S. 116, 140 (1999) (Breyer, J., concurring).

Justice Breyer cited Professor Berger's article and two others, one by Professor Richard Friedman and a book by Akhil Amar. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* (1997); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998). The majority in *Crawford* cited the other two but omitted Professor Berger's article. Perhaps the reason is that she was critical of what appears to be the majority's narrow, formalistic approach and its argument to exempt all other hearsay rather than to give greater protection to statements secured by government agents. See Berger, *supra* note 3, at 563-64.

<sup>33</sup> *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004).

<sup>34</sup> Berger, *supra* note 3 at 561-62.



the victim in *United States v. Owens*<sup>35</sup> who was suffering from a head injury, the prosecution would be required to produce either a tape of the interview or transcript of the hearing where the statement was produced.<sup>36</sup> For coconspirator statements, she draws a distinction between those made to true conspirators who are private citizens involved in crime and acting independent of the government, and those made to undercover agents and recognized informants. Because of the paramount concern of government-shaped statements, she would require exclusion of statements made to government agents and informants who, at the time of the statements, were already cooperating with the government, unless either the declarant was produced as a witness at trial or the conversation with the government agent or informant was recorded.<sup>37</sup> She argues the same approach—the required recording of statements—should be used with children when the person conducting the interview is doing so at the behest of the police.<sup>38</sup>

Under the testimonial statement approach, significant protection will be provided in a number of the situations

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<sup>35</sup> 484 U.S. 55 (1988) (involving brain damaged victim of an assault who identified the defendant as the perpetrator during a pre-trial identification procedure).

<sup>36</sup> See Berger, *supra* note 3, at 607-08 & n.207.

<sup>37</sup> See *id.* at 608-09.

<sup>38</sup> See *id.* at 611-12.

I have been of two minds regarding Professor Berger's approach to videotaping children's statements. On the one hand, I took issue with what I understood to be her approach of permitting the statements to be introduced without confrontation, even if accusatory, as long as the interview was videotaped. See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 752 n.293 (1993) (noting substantial agreement with Professor Berger's approach but disagreeing that documenting the conversation would provide an adequate alternative). On the other, I recognized that there are very good reasons for videotaping early statements by children and that it would be unfortunate if *Crawford* caused the practice to be discontinued. See Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 539-40 n.144 (2005) (noting specifically the reduction of trauma from multiple interviews).

In the end, I am a firm believer in realistic solutions, and the documentation of the interview through mechanical recording is a very sound second-best solution that would provide the jury with a far better look into the circumstances and accuracy of the incriminating statements than does recital of its contents from the perspective of the government agent who obtained the statement. My preferred solution is not exclusion of the statement but both the recorded conversation and the actual appearance of the child on the stand for cross-examination, despite the difficulties in such cross-examinations. Clearly, a mechanical recording of the statement is better for the jury determining the truth than the necessarily selective testimony of a likely biased human observer, and since the law may be heading toward entirely exempting these interviews in most situations from Confrontation Clause scrutiny, recording may be the only realistic protection remaining.

considered above where the statement is elicited by a publicly disclosed investigative agent with the purpose of establishing facts about past events potentially relevant to later criminal prosecution.<sup>39</sup> By contrast, coconspirator statements are apparently entirely exempt from scrutiny under the Confrontation Clause, whether made to true conspirators or to those who are government agents if their status as agents are unknown.<sup>40</sup> Statements by children to non-law enforcement professionals who question the child with both investigative and non-law-enforcement interests in mind—what I term mixed purpose interviews—are in an uncertain category.<sup>41</sup>

Moreover, Professor Berger's approach of skepticism toward government generated hearsay and enabling the jury to make a better decision by the required creation and disclosure of mechanical recordings of the interviews remains sound even if not part of the testimonial statement approach of Sixth Amendment confrontation right. As the right matures through further rulings by the Court, perhaps a flexibility and nuance will be developed to supplement the right of confrontation, and ancillary protections of the type she suggests may be embraced.

If not, the fundamental idea is no less sound. It simply must get its support from another source and find its command in legislation or a different constitutional right, such as due process. My recent interests have prompted me to examine the role of the innocence movement in motivating and shaping criminal procedure reforms.<sup>42</sup> One area of overlap that relates

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<sup>39</sup> See *Davis v. Washington*, 547 U.S. 813, 822 (2006).

<sup>40</sup> In *Giles v. California*, 128 S. Ct. 2678, 2691 n.6 (2008), the Court stated that coconspirators statements "would probably never be . . . testimonial" because they must be made "in furtherance of the conspiracy." This statement suggests an exclusive focus on the purpose or intention of the declarant in making the statement and suggests no different treatment when it is a government agent who elicits the coconspirator's statement.

<sup>41</sup> See Mosteller, *supra* note 6, at 968-75 (recognizing the uneven treatment of statements, including videotaped statements, made for multiple purposes and the capacity of those formulating the process to give the questioning an apparently non-investigate primary purpose); Robert P. Mosteller, *Giles v. California: Avoiding Serious Damage to Crawford's Limited Revolution*, 13 LEWIS & CLARK L. REV. 675, 682 (2009) (noting an apparent or likely trend toward courts finding mixed purpose statements nontestimonial).

<sup>42</sup> See Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1 (2010); Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519 (2009) [hereinafter *Producing Informant's "First Drafts"*]; Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008);

to Professor Berger's insight is the control of informants who have played a role in the conviction of a number of innocent individuals for crimes they did not commit. My particular focus is on the danger of false informant testimony to those who are innocent of the specific crime charged but who are not strangers to crime.<sup>43</sup>

The evidence that I find critical and subject to remedy is the testimony of informants who change or refine their version of events after contact with the police. Like the hearsay that is of concern to Professor Berger under the Confrontation Clause, this testimony sometimes bears the imprint of governmental agents who "turn" a criminal suspect into a cooperating witness by eliciting statements that incriminate the ultimate target of the prosecution. One of my remedies is based on an argument that the constitutional right under the Due Process Clause to have exculpatory information, including impeaching information, should have practical protection. Like Professor Berger, I argue that the police-citizen encounter should be recorded.<sup>44</sup> Because of their exposure to punishment and their strong desire to please the police and the prosecution, many of these informants are arguably vulnerable witnesses under her terminology.<sup>45</sup>

There is no "magic bullet" to cure the dangers of informant testimony, particularly when defendants with past criminal involvement are concerned. Many of those defendants are clearly guilty and many of them are also threats to the insiders who might be able to offer incriminating testimony. Moreover, because of their general involvement in crime, investigative authorities will be receptive to the story the informants are offering, and informants will often have the raw material to fashion convincing false testimony from real or imagined past activities of the target or from the conduct of those who actually were responsible for the crime. Informants may be important to the justice system, but their testimony, which is sometimes false, is also dangerous to it.

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Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1337 (2007).

<sup>43</sup> See Mosteller, *Producing Informant's "First Drafts"*, *supra* note 42, at 522.

<sup>44</sup> *Id.*

<sup>45</sup> Professor Bennett Gershman explicitly categorizes cooperating witnesses as vulnerable to suggestive questions along with children and eyewitnesses. See Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 844 (2002).

Likely the only realistic protection for those who are innocent that is not too costly from a law enforcement perspective is to provide a more complete picture of the process to the jury. My proposal is, with Professor Berger, to require the recording of what I term the “first drafts” of informant testimony when such statements are produced after contact with criminal investigators.<sup>46</sup>

If significantly inconsistent with the informant’s testimony, the production of those statements is already constitutionally required by the *Brady* doctrine.<sup>47</sup> If consistent with the informant’s testimony, production should only benefit the government. Thus, there might seem little theoretical reason why the statements are not produced. However, practicality, adversarial incentives, and the fear that the process of “turning” the informant cannot withstand disclosure stand in the way.

Critically, most early statements are not recorded, and the fact that they are inconsistent remains unknown or undisclosed to the defense. It is the defense that is motivated to carefully examine the process and point out the changes in the story. Those on the police and prosecution side in many marginal situations do not have the mindset to notice and disclose inconvenient facts, which may be assumed to be innocuous under the sincerely held view that the defendant is guilty. More recording and disclosure should have a rightful role.

### III. CONCLUSION: A CAREER CHARACTERIZED BY REASONED JUDGMENT

I close by observing that Professor Berger’s ideas are not only creative, but also have impact because wrapped into them are the intensity of her serious consideration and her attention to her craft as a practitioner, critic, and life-long student of the

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<sup>46</sup> So as not to inhibit police-suspect conversations and to provide a recognizable “trigger point,” I would impose the requirement of recording at the point the issue of a benefit to the informant is broached. See Mosteller, *Producing Informant’s “First Drafts,”* *supra* note 42, at 568-69.

<sup>47</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963) (finding the failure of the prosecution to provide potentially exculpatory evidence to the defense to be a due process violation). In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court characterized its ruling in *United States v. Giglio*, 405 U.S. 150 (1972), to be that “[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule,” and rejected a distinction between exculpatory evidence and impeachment evidence. See *Bagley*, 473 U.S. at 676.

law. For that set of characteristics I can find no better term, nor higher praise, than reasoned judgment.<sup>48</sup> It is present in all that Professor Berger has done.<sup>49</sup> It is a characteristic that is at the heart of what I believe all of us who devoted our careers to the law aspire.

In her long and exceptional career, Professor Margaret Berger has contributed so much to the law, and particularly to the development of the law of evidence, that any effort to mark her many contributions will be inadequate.<sup>50</sup> I have tried to illustrate these contributions through her fundamental insights that we must rely on the imperfect institution of the jury to sort through our most difficult problems of proof, and for the jury to have a chance to do its task properly, it needs detailed and accurate information.

When the government is involved in creating evidence, particularly hearsay, the dangers of abuse are substantial. Declarants should be required to testify and be subject to cross-examination. In addition, one of our best and most realistic remedies for that abuse is to require that modern technology be employed to record in a verbatim fashion the transactions involved in that creation. By presenting that information, we

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<sup>48</sup> The writings of the constitutional scholar and my former colleague Jeff Powell inspire this accolade. In examining constitutional interpretation, he has coined the term “constitutional virtues,” which consist of (good) faith, integrity, humility, and candor. H. Jefferson Powell, *Constitutional Virtues*, 9 GREEN BAG 379, 389 (2006). In his recent book, *Constitutional Conscience*, Jeff expands on these fundamental concepts. See H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL* Decision 100-01 (2008) (expanding the discussion and adding the virtue of acquiescence). A central example of what he believes should be the goal of everyone who attempts constitutional interpretation is the Attorney General in President Ulysses S. Grant’s administration who was asked to render an opinion on a constitutional issue, which Powell believes was rendered in full adherence to his craft as a lawyer and his public duties. See *id.* ch. 3.

In a similar vein, I mean the characterization of “reasoned judgment” as truly a high compliment. As one who cares deeply about the practice of law and the intellectual exploration of ideas, Professor Berger has both mastered and been true to her craft.

<sup>49</sup> Even before I entered law teaching, I held Professor Berger in high regard, first encountering her work in the masterful treatise on the Federal Rules of Evidence that she co-authored with Judge Jack Weinstein. See JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S EVIDENCE* (1975). I found that in almost all situations the treatise set forth with great precision, even in the early days of the operation of the rules, what the law was. Occasionally, it would deviate and state what the authors thought the law should be. These deviations were always creative, and they contained a remarkable measure of reasoned judgment. The courts may not have universally adopted their suggestions, but when they did not, it was most often a matter of judicial misjudgment.

<sup>50</sup> For example, I have not even referred to her exceptional contribution to the analysis of the admission of scientific evidence and her service on multiple committees of the National Academy of Sciences.

better equip the jury to assess the value of the evidence and the value of the words of sometimes absent witnesses. Whether formally part of a confrontation right or recognized and guaranteed through other legal mechanisms, the insight is sound and manageable. It clearly shows the reasoned judgment of an insightful and committed legal scholar, who practiced her craft in ways that all in the field of evidence would hope to emulate.