



1988

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Recommended Citation

Epps, JoAnne A. (1988) "Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?," *Kentucky Law Journal*: Vol. 77 : Iss. 1 , Article 3.

Available at: <https://uknowledge.uky.edu/klj/vol77/iss1/3>

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Articles

Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?

BY JOANNE A. EPPS*

INTRODUCTION

The future. A criminal courtroom. Anytown, U.S.A. The prosecution calls a witness who testifies that seconds after a murder the sole eyewitness frantically related the incident and identified the defendant as the perpetrator. At the time this testimony is introduced, the eyewitness is sitting in the courthouse lobby reading a magazine.

This is an Article about the confrontation clause,¹ the use of hearsay evidence² in a criminal case, and whether the former in any way limits the latter. In order to decide if the confrontation clause indeed limits the introduction of hearsay, it is necessary to understand the issue, the context, and the problem.

The issue, exemplified by the scenario above, is whether hearsay evidence can be introduced when the declarant is available to

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¹ The sixth amendment to the Constitution provides, *inter alia*, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him. . . .” U.S. CONST. amend. VI.

² See *infra* notes 21-41 and accompanying text.

testify but simply is not called as a witness. The context of this problem is provided by the confrontation clause and the evidentiary rules regarding hearsay. The sixth amendment to the United States Constitution gives accused persons the right to be confronted with the witnesses against them. The law of evidence allows certain out-of-court statements to be repeated in court. Where the witness on the stand is repeating his or her own prior statements, as would be the case if the eyewitness in our opening scenario had been called to repeat the statements made at the murder scene, there is no confrontation problem.³ By hypothesis, the defendant is confronting the declarant of the statement, giving both the defendant the opportunity to cross-examine the declarant concerning the prior statements and the finder of fact the opportunity to observe the declarant's demeanor while testifying. The problem arises when the hearsay declarant does not testify, but instead, another witness seeks to repeat in court the declarant's earlier statements. In these situations, the declarant cannot be cross-examined nor can the declarant's demeanor be observed. Accordingly, it is in these situations that the Supreme Court has had to decide if the confrontation clause imposes any limitation on the introduction of hearsay.

Until recently, most⁴ of the cases the Supreme Court decided involved hearsay declarants who were not available to testify.⁵ In these cases, the Court ruled that the confrontation clause permits the introduction of hearsay if its reliability is sufficient to comport with the original truth-seeking function of the confrontation clause.⁶ In contrast to those cases where the declarant was either

³ The admissibility of the out-of-court statements of a witness present and able to be cross-examined may raise an evidentiary hearsay problem, but it does not constitute a confrontation clause problem. See *California v. Green*, 399 U.S. 149, 158 (1970).

⁴ The one significant case in this area to reach the Supreme Court in which the declarant arguably was available but not produced was *Dutton v. Evans*, 400 U.S. 74 (1970). See generally *infra* notes 91-100 and accompanying text. In *California v. Green*, another arguable exception, the declarant was either present or unavailable. *Green*, 399 U.S. at 168-69.

⁵ Although some were technically produced, they did not testify and, thus, would have met prevailing definitions of unavailability. For a discussion of legal unavailability, see *infra* note 30. The cases were *Ohio v. Roberts*, 448 U.S. 56 (1980), *Bruton v. United States*, 391 U.S. 123 (1968), *Barber v. Page*, 390 U.S. 719 (1968), *Douglas v. Alabama*, 380 U.S. 415 (1965), *Pointer v. Texas*, 380 U.S. 400 (1965), and *Mattox v. United States*, 156 U.S. 237 (1958).

⁶ See *infra* notes 55-110 and accompanying text.

actually or legally unavailable to testify,⁷ recent cases have squarely raised the issue of what is constitutionally required when the declarant is not produced but is nonetheless available. Ultimately, these cases present the following questions: Where the declarant is available, does the confrontation clause require that person to be produced? Or is the issue constitutionally indistinguishable from the case where production is not possible, in which event the sole requirement is that the statement meet articulated standards of reliability?⁸

The distinction between requiring or not requiring production is important because it determines the means by which the reliability of a declarant's out-of-court statement is tested. Production of an available declarant, the essence of confrontation, allows reliability to be tested in the purest and fullest form. The witness testifies under oath and is subject to cross-examination. Moreover, the factfinder can determine from the witness' demeanor whether that person is worthy of belief. Admitting hearsay evidence of a non-produced but available declarant, on the other hand, based solely on a finding that the hearsay is of likely reliability, essentially erects an irrebuttable presumption that the statement is reliable enough to dispense with testing it through confrontation, thereby depriving the defendant of any chance to *prove* unreliability. Yet this deprivation occurs in the face of a constitutional provision, the goal of which is to augment and enhance accuracy and truth-seeking in criminal trials.⁹

In recent cases, the Court has suggested that if hearsay is sufficiently reliable, an available witness need not be produced even though that person could be produced.¹⁰ According to the Court, hearsay is sufficiently reliable if the hearsay exception is a firmly-rooted one.¹¹

The Court's approach is problematic in that not only does it open the door to results such as the one in our opening scenario, it is analytically unpersuasive. It treats as constitutionally identical the disparate situations typified by the three "places" a hearsay

⁷ See *infra* notes 30, 67 and accompanying text.

⁸ See *infra* notes 9-11 and accompanying text.

⁹ *United States v. Inadi*, 475 U.S. 387, 396 (1986).

¹⁰ *Id.* at 395.

¹¹ *Bourjaily v. United States*, ___U.S. ___, 107 S. Ct. 2775, 2783 (1987).

declarant could be at the time the prosecution seeks to use that declarant's testimony: dead (unavailable), testifying (produced), or in the courthouse lobby reading (available but not produced).¹² While this reductionist approach may have the appeal of simplicity, the considerations warranting the admission of hearsay where production of the declarant is an option differ from those where production of the declarant is not an option. Where production is not an option, the choice is between the admission of the hearsay or no evidence at all. Where, however, the declarant is available, that availability changes the stakes. The need to choose between the hearsay and no evidence no longer exists. The declarant can be produced and the hearsay can be admitted.

This Article argues that there is a constitutional distinction between those situations where the declarant is legally unavailable and those where the declarant is available but simply not produced. Where the declarant can be produced, thereby permitting the reliability of the out-of-court statement to be tested in front of the finder of fact, reliance on substitute indicia of reliability is unnecessary and therefore inappropriate. Requiring the declarant to be produced both serves and fosters the confrontation clause's goal of augmenting the accuracy of the fact-finding process. It does this by changing the test from one that admits evidence simply because the indicia surrounding its making suggest that it is reliable, to the test preferred by the Constitution: confrontation.¹³ Confrontation, in turn, provides what no alternative measures of reliability can ever supply: it forces the witness to testify under oath and to submit to cross-examination. Moreover, and perhaps most importantly, confrontation allows the trier of fact to judge from the witness' demeanor whether the testimony is actually worthy of belief.

Part I of the Article describes the fragile, and hence problematic, relationship between the confrontation clause and the evidentiary hearsay rules. In Part II, the Article traces the Court's interpretation of this relationship, analyzes how the Court has come to its most recent resolution of the conflict between the

¹² For purposes of this Article, "produced" implies that the witness is testifying and available for cross-examination, not just present in court.

¹³ See *supra* note 1.

confrontation clause and the hearsay rules, and advances a theory of why its current resolution is at odds with the confrontation clause. Specifically, Part II points out that most of the cases reaching the Court involved prior testimony. As a result, the Court increasingly overemphasized the importance of cross-examination without recognizing that the value of cross-examination in cases where confrontation is not possible is different from its value in cases where confrontation is possible. Where confrontation is not possible, prior cross-examination is a suitable but not exclusive test of reliability; where confrontation is possible, cross-examination in front of the finder of fact is an integral and required part of confrontation. Once the Court realized that the historically-unchallenged admissibility of dying declarations was doctrinally inconsistent with the notion of cross-examination as a *sine qua non* of reliability, the Court retreated. In so doing, however, the Court dispensed with a requirement of cross-examination both in cases of necessity, where alternative indicia of reliability are constitutionally permissible, as well as in cases of no necessity, where because cross-examination is possible, reliance on alternative indicia of reliability is impermissible. The inevitability of this result does not make it valid.

Part III of the Article proposes as an alternative to the Court's current resolution of the problem a requirement that available witnesses be produced. Before our hypothetical magazine reader's hearsay statements could be introduced,¹⁴ that person would have to be produced in court to testify. Far from being radical, such a rule would give due regard to precedent and, at the same time, would further the true meaning of the confrontation clause. An Epilogue to the Article suggests that the proposed change would also better serve the values of the Constitution as a whole.

I. UNDERSTANDING THE MEANINGS OF "HEARSAY" AND "THE CONFRONTATION CLAUSE"

To evaluate fairly the tension between the confrontation clause and hearsay, it is necessary first to realize that the two concepts are similar yet distinct. Only then is it possible to assess whether

¹⁴ As described, the statements could be introduced as an excited utterance pursuant to FED. R. EVID. 803(2).

in criminal cases the confrontation clause limits the use of hearsay.

A. *The Rule Against Hearsay—Older than the Confrontation Clause Itself*

Hearsay is generally defined as any out-of-court statement offered for the truth of its contents.¹⁵ For evidentiary purposes,¹⁶ hearsay includes statements that the testifying witness made before coming to court as well as statements of others that the testifying witness plans to repeat.¹⁷ The completed definition of hearsay makes explicit the implicit: in order to believe that the original declarant's statement is true, the factfinder must accordingly rely on that declarant's credibility.¹⁸ Where the original declarant does not testify, this is difficult.¹⁹ For this reason, hearsay is not

¹⁵ See, e.g., FED. R. EVID. 801(c); see also *infra* note 20. An interesting issue, though beyond the scope of this Article, involves the effect, if any, of an out-of-court statement that contains no express assertion of fact but rather relies for its value on inferences contained in the statement. See generally *Dutton v. Evans*, 400 U.S. 74, 88 (1970) (raising the possibility that this eases the tension that might otherwise exist between the confrontation clause and the admission of out-of-court statements).

¹⁶ Although the confrontation clause and the hearsay rules are generally designed to protect similar values, they are not totally congruent. See *California v. Green*, 399 U.S. 149, 155 (1970). The rule against hearsay, which predates this nation's confrontation clause, was and remains a rule of evidence, definable by Congress. *United States v. Raghianti*, 560 F.2d 1376, 1380-81 (9th Cir. 1977). The confrontation clause, of course, represents a constitutional provision, enforceable by the courts.

¹⁷ FED. R. EVID. 801(c).

¹⁸ G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 121 (2d ed. 1987). In *Ohio v. Roberts*, the Supreme Court quotes McCormick who, with the caveat, "[s]implification has a measure of falsification," defined hearsay evidence as "testimony in court, or written evidence, or a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." *Ohio v. Roberts*, 448 U.S. 56, 62 n.4 (1980) (quoting MCCORMICK ON EVIDENCE, § 246 at 724 (E. Cleary 3d ed. 1984)); see also *Hopt v. Utah*, 110 U.S. 574, 581 (1884) (Hearsay "denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself but rests, also, in part, on the veracity and competency of some other person.") (citing 1 GREENLEAF, TREATISE ON THE LAW OF EVIDENCE, § 99; 1 PHIL. EV. 169). The last phrase, most often omitted in casual references to hearsay, points out the importance of evaluating the reliability of the out-of-court statement; see also *Lee v. Illinois*, 476 U.S. 530, 543 n.4 (1986). For a history of the hearsay rule and its exceptions, see generally MCCORMICK ON EVIDENCE, *supra* § 244, at 725 (hearsay rule), §§ 254-324, at 759-912 (exceptions).

¹⁹ The credibility of a hearsay declarant may be challenged by impeaching evidence made admissible pursuant to FED. R. EVID. 806.

generally admissible as evidence.²⁰ Thus, the hearsay rule is actually a rule of exclusion, and it is only through its now numerous exceptions that hearsay evidence is admissible.²¹

Although the precise date is not known, by the late 1600s hearsay had become a recognized form of evidence.²² The general rule of exclusion developed in response to two types of practices. The first, which continues today, involved witness A who on the stand repeats statements made at an earlier time by witness B. This practice tended to be casual and the hearsay oral.²³ The second involved a practice, not in use today, of admitting at trial the transcribed earlier statements of a witness not produced at trial. Typically, these statements were made under oath, usually before a judge or other court officer sometime prior to the trial, but were made in a non-adversary setting; the testimony was not, therefore, subject to cross-examination by the party against whom it was offered.²⁴ Even though this practice was formal and written, the lack of opportunity for cross-examination made it offensive.

In response to these and other abuses inherent in admitting hearsay evidence, early Anglo-American jurisprudence established three conditions for eliciting evidence: the witness should testify under oath (or affirmation), the witness should be personally present at trial, and the witness should be subject to cross-ex-

²⁰ FED. R. EVID. 802 (Rule 802 states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court. . . .")

²¹ Rules 803 and 804 codify the federal exceptions to the general rule against hearsay. FED. R. EVID. 803-804.

²² Wigmore places the date as somewhere between 1675 and 1690. 5 J. WIGMORE, EVIDENCE, § 1364 at 18 (Chadbourn rev. 1974).

²³ This is McCormick's phrasing. MCCORMICK ON EVIDENCE *supra* note 18, § 244 at 725. Casual oral hearsay is meant to exclude those situations where a witness on the stand appears for the sole purpose of reading into the record the prior recorded testimony of some other witness. This latter occurrence, though existent, was subject to less error and was hence less troublesome than the repeating of casual oral hearsay.

²⁴ See generally 5 J. WIGMORE, *supra* note 22, § 1364, at 20-21. Perhaps the most famous example of this practice arose in the 1603 trial of Sir Walter Raleigh. Charged with high treason Sir Walter was convicted solely upon the admission into evidence of a document purporting to represent the confession of Lord Cobham, an alleged co-conspirator. Cobham, of course, was not produced. Despite efforts by Sir Walter to show that Cobham had later recanted, the confession was used against Raleigh. He was convicted and beheaded. The account of these events is taken from Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 (1972), which provides an excellent account of the case.

amination.²⁵ At first blush, these requirements appear to demand the exclusion of all hearsay. In reality, however, exceptions to the hearsay rule began evolving as soon as the rule itself was developed.²⁶ Thus, although a preference was evolving for live testimony given under oath and subject to cross-examination, there was a simultaneous acknowledgement that in certain circumstances this preference should yield to the admission of hearsay evidence.

From the time of the origin of the states until the middle of this century, the principles governing the admission of hearsay existed as common law. Though there were consistent themes, the several states and the federal government relied on their own perceptions of their respective common law to formulate rules of evidence.²⁷ By the mid 1900s, however, momentum had grown to codify the rules of evidence. After several drafts, Congress in 1975 enacted the Federal Rules of Evidence, followed in whole or in part by similar action in most of the states.²⁸

The Federal Rules and jurisdictions following this model continue the common law doctrine of excluding hearsay as a general principle.²⁹ Exceptions to the rule fall into two groups. In one

²⁵ Notes of Advisory Committee on Proposed Rules of Evidence.

²⁶ Perhaps the most vivid example is the dying declaration. The original justification for the admission of dying declarations has carried over for centuries. It rests both on the fact that unavailability of the declarant creates a sense of necessity as well as on the notion that the declarant's expectation of almost certain death would remove any temptation to lie. See *Mattox v. United States*, 146 U.S. 140, 152 (1892). Whether the latter justification is equally persuasive today may be questioned; when first recognized, however, generally held religious beliefs made it unlikely that anyone would choose to meet his maker with a lie on his lips. The dying declaration is believed to be the only extant exception to the hearsay rule at the time the sixth amendment was ratified. F. HELLER, *THE SIXTH AMENDMENT 22-24*, 105 n.6 (1951); see also J. WIGMORE, *supra* note 22, § 1397, at 158-59.

²⁷ Packel, *Symposium, Federal Rules of Evidence: A Decade Later* (Introduction), 30 *VILL. L. REV.* 1313, 1313 (1985).

²⁸ Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 *VILL. L. REV.* 1315, 1319-21 (1985). The following states have evidence codes or rules of court based wholly or substantially on the Federal Rules of Evidence: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. G. LILLY, *supra* note 18, at xxv.

²⁹ *FED. R. EVID.* 802. For purposes of this Article, the Federal Rules of Evidence are illustrative. The thesis of this Article applies to any jurisdiction following the model set by the Federal Rules.

group hearsay will be admitted only if the out-of-court declarant is not available;³⁰ if the declarant is available, these exceptions are inapplicable and the hearsay evidence will be excluded under the general rule.³¹ In contrast, hearsay exceptions in the other group are not affected by the availability of the declarant;³² hearsay evidence of this type will be admitted regardless of whether the declarant is dead, present and testifying, or reading in the courthouse lobby.

From a purely evidentiary standpoint, the hearsay admissible under both groups of exceptions is presumed to be reliable.³³ The distinction between the groups rests on the relative reliability of the hearsay. Hearsay admitted irrespective of the declarant's availability is assumed to be as trustworthy as testimony from the declarant, rendering irrelevant the possibility that the declarant could testify in person.³⁴ Hearsay admitted only when the declarant is unavailable continues the common law belief that this type of hearsay is not as trustworthy as live testimony.³⁵ It possesses

³⁰ In pertinent part, Rule 804 provides, "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . ." FED. R. EVID. 804. Unavailability, for purposes of this rule, includes situations where the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order from the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

FED. R. EVID. 804(a).

³¹ See *supra* note 29 and accompanying text.

³² Rule 803 states, in pertinent part, "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . ." FED. R. EVID. 803. Rule 803 proceeds upon the premise that the circumstances surrounding the making of a hearsay statement may provide circumstantial guarantees of trustworthiness of sufficient persuasiveness to justify the admission of the statement at trial without requiring the production of an available declarant. Notes of Advisory Committee on Proposed Rules of Evidence.

³³ See G. LILLY, *supra* note 18, at 283-84.

³⁴ *Id.* at 283.

³⁵ *Id.* at 284.

sufficient reliability to be admitted, but only if the declarant is unavailable as a witness.

In addition to the two groups of hearsay exceptions, the Federal Rules and jurisdictions following its lead exclude entirely some statements from the definition of hearsay.³⁶ Statements of co-conspirators made during and in furtherance of a conspiracy, and party admissions, are but two examples.³⁷ In contrast to hearsay exceptions, presumed reliability is not the basis of admitting hearsay exclusions. Hearsay exclusions are admissible because to do so is consistent with the Anglo-American adversary system's tenet of allowing a party considerable freedom in prescribing the course of litigation while enforcing the consequences of an adversary's mistakes.³⁸ Thus, although for purposes of confrontation clause analysis the Supreme Court has perceived no distinction between hearsay exclusions and exceptions,³⁹ admitting evidence under the hearsay exclusions without an opportunity for cross-

³⁶ Rule 801(d) provides:

A statement is not hearsay if —

(1) Prior statement by witness

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent

The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID. 801(d). These are often referred to as hearsay exclusions.

³⁷ *Id.*

³⁸ See G. LILLY, *supra* note 18, at 209-10.

³⁹ For purposes of comparison with the mandates of the confrontation clause, the distinction between evidentiary exclusions and exceptions to the hearsay rule is a distinction without a difference. See *United States v. Inadi*, 475 U.S. 387, 398 n.12 (1986). Accordingly, although the Article will refer to exceptions, its thesis applies equally to exclusions.

examination is especially troublesome since exclusions derived from concerns wholly unrelated to reliability.

Moreover, although hearsay exceptions may be based on rational judgments about the presumed reliability of particular kinds of hearsay evidence, all they represent are presumptions. Confrontation, of the constitutional variety, permits these presumptions to be tested in individual cases. If there is a constitutional preference that the reliability of hearsay be tested rather than presumed, that preference is not served by the Rules of Evidence.⁴⁰ Recently, the Supreme Court has ruled both that the confrontation clause requires nothing more than that hearsay be reliable, and that reliability is satisfied if the particular hearsay exception is "firmly rooted."⁴¹ It is with these conclusions that this Article takes issue.

B. *The Adoption of the Confrontation Clause*

The confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."⁴² Though of apparent plain meaning, these words are nevertheless problematic. For example, from these words one could reasonably conclude that in all criminal cases,⁴³ a defendant would have the right to meet face-to-face those persons from whose lips pass incriminating evidence. But this is not true now nor has it ever been so. For it is undisputed that at the time of the adoption of the sixth amendment,⁴⁴ there already existed at least one exception to the hearsay

⁴⁰ See *supra* notes 33-35 and accompanying text.

⁴¹ *Bourjaily v. United States*, ___ U.S. ___, 107 S. Ct. 2775, 2783 (1987); see *infra* notes 144-46 and accompanying text.

⁴² U.S. CONST. amend. VI.

⁴³ For other sixth amendment purposes, the phrase "criminal prosecutions" has been interpreted to mean that stage of the proceedings when formal judicial proceedings have commenced and, accordingly, the adversary roles have solidified. *Kirby v. Illinois*, 406 U.S. 682, 684-91 (1972). Because the focus of this Article is on the conflict generated by the introduction of hearsay testimony at trial which, of necessity, follows the *Kirby* "initiation of proceedings" test, the phrase "criminal case" will be used to denote those situations where the confrontation clause is applicable.

⁴⁴ The amendment was adopted in 1787. Nearly every state constitution has a similar provision. Those with identical provisions are Alabama (Art. I, § 6); Alaska (Art. I, § 11); Arkansas (Art. II, § 10) (1874); Connecticut (Art. I, § 8) (1965); Georgia (Art. I, § I)

rule.⁴⁵ So while empirical proof is lacking, no one has seriously advanced the proposition that the confrontation clause was meant to exclude all hearsay.⁴⁶

Much less is known about the history surrounding the adoption of the confrontation clause than is known of the codification of the hearsay rule.⁴⁷ Both scholars and courts agree, however, that at a minimum the confrontation clause was a reaction to the particularly odious practice of trial by anonymous, and hence absent, witnesses.⁴⁸ Because the confrontation clause was passed with little congressional debate, any additional "intent" has been ascribed by later courts and scholars.⁴⁹ Thus, to a much greater

(1945); Hawaii (Art. I, § 14) (1950, amended 1959 and 1968); Iowa (Art. I, § 10) (1857); Louisiana (Art. I, § 16) (1921); Maine (Art. I, § 6) (1820); Maryland (Declaration of Rights, Right 21) (1867); Michigan (Art. I, § 20) (1964); Minnesota (Art. I, § 6) (1857); Mississippi (Art. 3, § 26) (1890); New Jersey (Art. I, par. 10) (1947); New Mexico (Art. II, § 14) (1912); New York (Art. I, § 6) (1895); Oklahoma (Art. II, § 20) (1907); Rhode Island (Art. I, § 10) (1843); South Carolina (Art. I, § 18) (1895); Texas (Art. I, § 10) (1876); Utah (Art. I, § 12) (1896); Virginia (Art. I, § 8) (rev. 1971); West Virginia (Art. III, § 14) (1872); Wyoming (Art. I, § 10) (1890). Those with similar provisions are: Arizona (Art. II, § 24) (1912) ("... to meet the witness against him face to face . . ."); *accord*, Colorado (Art. II, § 16) (1876); Delaware (Art. I, § 7) (1897); Florida (Art. I, § 16) (1968); Illinois (Art. I, § 8) (1970); Indiana (Art. I, § 13) (1851); Kansas (Bill of Rights, § 10) (1861); Kentucky (Bill of Rights, § 11) (1891); Massachusetts (Art. XII, Part I) (1780); Missouri (Art. I, § 18(a)) (1945); Montana (Art. II, § 24) (1889); Nebraska (Art. I, § 11) (1875); New Hampshire (Art. 15, Part I) (1784); North Carolina (Art. I, § 11) (1868); Ohio (Art. I, § 10) (1851); Oregon (Art. I, § 11) (1859); Pennsylvania (Art. I, § 9) (1874); South Dakota (Art. VI, § 7) (1889); Tennessee (Art. I, § 9) (1870); Vermont (Ch. I, Art. 10) (1793); Washington (Art. I, § 22) (1889); Wisconsin (Art. I, § 7) (1848).

⁴⁵ See *supra* note 26.

⁴⁶ See, e.g., *Dutton v. Evans*, 400 U.S. at 80.

⁴⁷ *Green*, 399 U.S. at 176 & n.8 (Harlan, J., concurring). In all of the discussion of the various rights, there was no specific discussion of the right of confrontation. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 202-217 (1955); see also J. MAIN, *THE ANTI-FEDERALISTS, CRITICS OF THE CONSTITUTION, 1781-1788* (1961); Baker, *The Right to Confrontation, the Hearsay Rules and Due Process—A Proposal for Determining When Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529, 532 & n.15 (1974); Graham, *supra* note 24, at 104.

⁴⁸ See *Green*, 399 U.S. at 156; Arenson, *The Confrontation Clause: Where Will the Supreme Court Take Us?*, 12 S.U.L. REV. 15, 16 (1985); Baker, *supra* note 47, at 532; E. COKE, *THE SECOND PART OF THE INSTITUTES* 611 (1662) ("... [A]nd where the objection seemeth to impeach the trial at the Common Law by Jurors, we hold, and shall be able to approve it to be a farre better course for matter of fact upon the testimony of witnesses sworn viva voce, then upon the conscience of any one particular man, being guided by paper-proofs . . .").

⁴⁹ See *supra* note 47 and accompanying text. In fact, it took more than a century for the first case involving the relationship between the confrontation clause and the

extent than is true with other constitutional provisions, the confrontation clause is what the Supreme Court says it is: no more, no less.

The problematic relationship between the evidentiary hearsay exceptions and the confrontation clause is most sharply demonstrated by attempting to answer the following question: If the confrontation clause contemplates the admission of some types of hearsay, what types of hearsay may be admitted and under what circumstances? The tension between the evidentiary rules and the constitutional mandate has crystallized over the years as the Supreme Court struggled to answer this question, while at the same time trying to leave the states free to formulate their own rules of evidence.⁵⁰

II. THE MEANING IMPOSED ON THE CONFRONTATION CLAUSE

In modeling the contours of the relationship between the confrontation clause and hearsay, the Court has worked in the context of the particular cases before it. Until recently, all the significant cases but one involved either a hearsay exception which required declarant unavailability or hearsay statements of a declarant who was in fact unavailable.⁵¹ These settings produced two developments of significance, one affirmative, one an omission. The affirmative result was that the Court attached increasing importance to, and finally held constitutionally required, a defendant's opportunity for cross-examination as determinative of a hearsay statement's reliability, and hence, admissibility.⁵² This resulted in part from the declarants' unavailability to be cross-examined about their earlier statements and in part from the types

hearsay rule to reach the Supreme Court. That case was *Mattox v. United States*, 156 U.S. 237 (1895). It was not until the confrontation clause was held applicable to the states in *Pointer v. Texas*, 380 U.S. 400, 407 (1965), that confrontation and hearsay cases arrived at the Court with any regularity; see *infra* notes 62-120 and accompanying text.

⁵⁰ See *Green*, 399 U.S. at 171 (Burger, C.J., concurring). For a representative list of sources regarding the origin and development of the hearsay rules and the confrontation clause, see *id.* at 156 n.9.

⁵¹ The one exception was *Dutton v. Evans*, 400 U.S. 74 (1970). See *infra* notes 91-100 and accompanying text.

⁵² See *infra* notes 66-68 and accompanying text.

of hearsay at issue.⁵³ The omission involved the Court's failure to question whether the declarants' availability would have affected the Court's analysis, again a direct result of the fact that none of the cases presented this possibility.

Recently, the Court decided that by holding a defendant's right of cross-examination to be constitutionally required, it had overstated the rule. It then abandoned the requirement entirely, substituting in its place a general requirement of reliability,⁵⁴ of which cross-examination is a suitable, but by no means exclusive, measure. Yet, because the Court had never identified declarant availability as a matter of constitutional significance, it had overlooked the fact that the confrontation clause's preference for live testimony would render cross-examination required when the declarant is available even if cross-examination is not required when the declarant is not available. Thus, the Court switched abruptly from an absolute requirement of cross-examination to no requirement. In doing so, the Court failed to see the constitutional stop sign posted where a hearsay declarant is available to be confronted by the accused.

A. *The Evolving Misconception of the Importance of Cross-Examination*

More than a hundred years passed after the adoption of the confrontation clause before the Supreme Court was called upon to consider what the right of confrontation truly meant in relation to the admission of hearsay evidence.⁵⁵ That opportunity came in

⁵³ Typically the hearsay was the confession of a co-defendant which, unlike a statement of a co-conspirator made during and in furtherance of a conspiracy, is considered highly unreliable. "Due to his strong motivation to implicate the defendant and to exonerate himself, a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Lee v. Illinois*, 476 U.S. 530, 541 (1986) (quoting *Bruton v. United States*, 391 U.S. 123, 141 (1968) (White, J., dissenting)). Of course the Court was influenced by the prior testimony cases it had decided, where it had implicitly found the opportunity for cross-examination to be constitutionally required. See *Mattox*, 156 U.S. at 249; *Pointer*, 380 U.S. 400; *infra* notes 64-65 and accompanying text.

⁵⁴ *Bourjaily v. United States*, ____ U.S. ____, 107 S. Ct. 2775, 2782-83 (1987); see also *infra* notes 144-46 and accompanying text.

⁵⁵ The meaning of the confrontation clause is not restricted to its relationship with the hearsay rule, although it is to this relationship that this Article is addressed. The confrontation clause has also been interpreted as imposing a general bar against the

Mattox v. United States.⁵⁶ *Mattox* involved the retrial of a murder case, the first conviction having been set aside and an order for a new trial entered. At the retrial, the trial judge admitted transcribed copies of the testimony of two witnesses from the earlier trial, both of whom had died in the intervening time.⁵⁷ On the premise that the confrontation clause was satisfied by the full cross-examination that had occurred at the first trial, the Supreme Court upheld use of the transcript.⁵⁸

Mattox is important for what it stands for as well as for what it does not. It stands for the narrow proposition that where the declarant is unavailable, admission of a prior statement, given under oath and subject to cross-examination, does not offend the confrontation clause. What *Mattox* did not address was why this was so.

One interpretation of the decision is that the confrontation clause requires confrontation but is satisfied if the confrontation occurred at a time earlier than, or in a forum different from, the trial at issue. Real confrontation, however, has three components: the witness testifies under oath, is forced to submit to cross-

restriction of cross-examination. See generally *Davis v. Alaska*, 415 U.S. 308, 320 (1974) (right of cross-examination is a constitutional right that states may not legislatively restrict); *Delaware v. Fensterer*, 474 U.S. 15, 19-21 (1986) (per curiam); authorities collected in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

⁵⁶ 156 U.S. 237 (1895). This was not the first time that *Mattox's* case reached the Supreme Court. In an earlier opinion the Supreme Court had approved the use of dying declarations in homicide cases to prove both the fact of the homicide as well as the person by whom the homicide was committed. Because, factually, the first *Mattox* case presented the question whether a dying declaration was admissible on behalf of the defendant, which the Court answered in the affirmative, the opinion never mentioned the confrontation clause. *Mattox v. United States*, 146 U.S. 140 (1892). For a summary of the English and state cases prior to the second *Mattox* case, see *Mattox*, 156 U.S. at 240-41.

⁵⁷ *Mattox*, 156 U.S. at 238.

⁵⁸ *Id.* at 244. Although the precise question had never before arisen in the Supreme Court, the concept embodied by the court's ruling was not new. The rule, already existing in more than a dozen states, was summarized by the court. "[T]he right of cross-examination having once been exercised, it [is] no hardship upon the defendant to allow the testimony of the deceased witness to be read The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 242, 244. Defending its ruling, the Court cited, by way of example, dying declarations which are admitted because of the necessities of the case and to prevent what would otherwise be a manifest failure of justice. *Id.* at 244. The requisite reliability is found in the belief that a sense of impending death would remove all temptation to lie. *Id.*

examination, and the trier of fact possesses the opportunity to judge from witness' demeanor whether the testimony is worthy of belief.⁵⁹ Confrontation at an earlier time or in a different forum can only serve the first two of these purposes; the opportunity for the factfinder to observe the witness' demeanor is lost. Thus, confrontation that occurred in an earlier and different forum is not identical to confrontation in the current forum because one of its components, the opportunity to judge demeanor, is missing. *Mattox* left uncertain whether that last component was, in that particular context, unnecessary, or whether it was for some entirely different reason that the hearsay in that case satisfied the confrontation clause. One thing was certain, though: the hearsay in *Mattox* had been cross-examined.

A second interpretation of *Mattox* is that the confrontation clause does not require the precise components of actual confrontation, only their equivalent. By this reasoning, the evidence in *Mattox* would have been admissible not because the components of confrontation had occurred previously. Rather, the statement would have been admissible because reliability, the pre-eminent requirement, was coincidentally satisfied by the prior confrontation. By this rationale, constitutional anxiety over the admission of hearsay from a non-testifying declarant would be assuaged as long as the hearsay evidence were as reliable as if trial confrontation had occurred.

Because the evidence in *Mattox* had been subjected to a process looking very much like traditional confrontation, the possibility that the test was a generic one of reliability, rather than a specific one of confrontation, did not appear at the time likely. Moreover, because death is an undisputed form of unavailability, the *Mattox* Court did not address whether presumed reliability might satisfy the admissibility threshold of the confrontation clause in all cases or only when the declarant, as in *Mattox* itself, is unavailable to testify in person.

The next significant case did not come before the Court until *Pointer v. Texas*⁶⁰ in 1965. Best known for holding the confron-

⁵⁹ See *id.* at 242.

⁶⁰ 380 U.S. 400 (1965). In the intervening years, *Delaney v. United States*, 263 U.S. 586 (1924), had been decided. In *Delaney*, the defendant, joined for trial with a defendant

tation clause applicable to the states,⁶¹ *Pointer* involved the prosecution's introduction of the preliminary hearing transcript of a witness who had since left the jurisdiction and who, accordingly, did not appear at the defendant's trial. The Court noted first that the defendant had not been represented by an attorney at the preliminary hearing.⁶² As a result, there had been no cross-examination.⁶³ Accordingly, the statements in the preliminary hearing transcript were found not to have been taken under circumstances affording an adequate opportunity for cross-examination. Despite reaffirming the admissibility of dying declarations, the *Pointer* Court concluded that introduction of the statements in the case before it violated the confrontation clause.⁶⁴

Pointer was both like and unlike *Mattox*. Like *Mattox*, the witness in *Pointer* was unavailable. Like *Mattox*, the hearsay in *Pointer* consisted of prior testimony. Unlike *Mattox*, the hearsay had not been cross-examined. And unlike *Mattox*, the prior testimony in *Pointer* occurred at a preliminary hearing, not a trial. Why, then, was the hearsay in *Pointer* constitutionally unacceptable? Both cases involved statements made under oath, making that an impossible basis of distinction. *Mattox* had already eliminated the possibility that demeanor was critical. Left as the only possible area of constitutional distinction, then, was the lack of cross-examination in *Pointer*.

In the same way that the *Mattox* Court had been reticent about its reasoning, the *Pointer* Court never explained why the

from a separate, but related, indictment, protested on confrontation grounds the admission into evidence of yet another alleged co-conspirator's out-of-court statement. The co-conspiratorial declarant did not testify because he was dead. Ruling that the testimony fit within prior case law, the Court held its admission proper. Two items are worthy of mention. First, the court spent not one word on why the co-conspirator's statement was reliable enough to comport with confrontation clause guarantees. Secondly, whatever the Court's belief regarding reliability, factually the issue was circumscribed by the necessity caused by the declarant's death. This, then for whatever else it means, represents a case where production of the declarant was not an option.

⁶¹ *Pointer*, 380 U.S. at 403. At this time a debate raged regarding the extension of the Bill of Rights' guarantee to the States. See *id.* at 411 & n.1 (Goldberg, J., concurring) for a list and discussion of cases involving the incorporation debate.

⁶² *Pointer*, 380 U.S. at 402.

⁶³ At the preliminary hearing, *Pointer*'s co-defendant, also without benefit of counsel, attempted to cross-examine the particular witness, but *Pointer* did not. *Id.* at 401.

⁶⁴ *Id.* at 407.

lack of cross-examination rendered the *Pointer* hearsay inadmissible. Again, the potential explanations were several. One explanation was that in *Pointer* the Court considered cross-examination alone constitutionally required. This would have explained both *Mattox* and *Pointer*. Another explanation was that the confrontation clause requires some form of confrontation and that cross-examination is that part of prior confrontation necessary to substitute prior confrontation for current confrontation. This, too, would have explained *Mattox* and *Pointer*. A third explanation was that the confrontation clause requires only a showing of likely reliability, and that cross-examination is a suitable, but by no means exclusive, indicium of reliability. That, too, would have explained both cases. Although these questions were not specifically answered by the *Pointer* Court, the opinion did suggest an answer.

By reaffirming in dicta the constitutional legitimacy of dying declarations, *Pointer* dispelled the implication in *Mattox* that the confrontation clause can be satisfied only by confrontation, even if the confrontation occurred at some earlier time.⁶⁵ Acknowledgment of dying declarations implied that, at least in some circumstances, hearsay not subject to any form of prior confrontation was nevertheless constitutionally acceptable. This strengthened the possibility that the missing cross-examination in *Pointer* was important as a fungible gauge of reliability, not as a *sine qua non* of confrontation. If this were true, however, *Pointer* did not specify how, other than by cross-examination or dying declarations, constitutional reliability was to be evaluated. Most importantly, since thus far the hearsay declarants had been unavailable, *Pointer* did not address whether the availability of the declarant would change its willingness to allow introduction of hearsay only presumed reliable. If all three benefits of confrontation could be achieved, would sacrifice of any ever be justified?

On the same day that *Pointer* was announced, the Supreme Court decided *Douglas v. Alabama*.⁶⁶ Under the guise of cross-examination to refresh recollection, the prosecution at Douglas'

⁶⁵ Dying declarations are believed to be the only exception to the hearsay rule existing at the time of the adoption of the confrontation clause. See *supra* note 26.

⁶⁶ 380 U.S. 415 (1965).

trial had effectively read into the record a confession allegedly made by Douglas' previously-convicted accomplice. The accomplice, whose case was on appeal, refused to testify when called upon to do so.

Douglas presented similarities and dissimilarities to the prior cases. Factually, *Douglas*, like *Mattox* and *Pointer*, involved hearsay evidence of an unavailable declarant.⁶⁷ As in *Pointer*, the statement had not been previously cross-examined, nor could it be currently cross-examined. Unlike both *Mattox* and *Pointer*, however, *Douglas* did not involve prior testimony.

If the *Pointer* Court's reaffirmation of the admissibility of dying declarations had established cross-examination as a suitable but by no means exclusive gauge of reliability, then one would have expected the *Douglas* Court to have discussed suitable standards and to have evaluated the hearsay in that case by those standards. Instead, however, in reversing Douglas' conviction, the Court stated unequivocally that Douglas' inability to cross-examine his co-defendant as to the latter's alleged confession denied Douglas the right of cross-examination "secured by the Confrontation Clause."⁶⁸

Because of, or perhaps in spite of, the abrupt manner in which it linked a defendant's right of cross-examination to the confrontation clause, the *Douglas* Court did not fully clarify the basis of its decision. It did not specify whether, as *Pointer* had suggested, the lack of *prior* cross-examination rendered Douglas'

⁶⁷ Despite his presence at trial, the co-defendant's reliance on his fifth amendment privilege against self-incrimination constitutes legal unavailability. *Id.*; see, e.g., FED. R. EVID. 804(a)(1), *supra* note 30.

⁶⁸ *Douglas*, 380 U.S. at 419. That co-defendant confessions tend to be unreliable is well-noted. *Lee*, 476 U.S. at 539; *Bruton*, 391 U.S. at 136 (1968). In addition, the effort by the prosecutor to "refresh" the accomplice's recollection by reading the confession bordered on prosecutorial misconduct. See, e.g., *Green*, 399 U.S. at 187 n.20 (Harlan, J., concurring); Notes of Advisory Committee on Proposed Rules of Evidence; cf. Natali, *Green, Dutton and Chambers: Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43, 49 n.39 (1975) (nothing in the Court's opinion or in Justice Harlan's concurrence supports a conclusion that *Douglas* involved prosecutorial misconduct). In fact, a clue to this possibility does appear in the Court's opinion. Although the prosecutor in *Douglas* read from the document, and three law enforcement officers identified it as having been signed by the accomplice, the prosecutor never offered the document into evidence. *Douglas*, 380 U.S. at 417. In addition, the Court later characterized the prosecutor's actions as a "guise." *Bruton*, 391 U.S. at 127.

accomplice's hearsay inadmissible or whether the lack of opportunity for *current* cross-examination was the troublesome aspect of the case. In both *Mattox* and *Pointer*, the hearsay sought to be admitted was prior testimony. In that context, whether because a *sine qua non* or a fungible gauge of reliability, cross-examination appeared to be the constitutional difference between admissible and inadmissible hearsay. By elevating a defendant's right of cross-examination to a matter of constitutional significance, *Douglas* was consistent with the prior cases, but the Court did not explain the relation, if any, between the requirement of cross-examination and the jurisprudential basis for admitting dying declarations.

Ultimately, the deficiency in *Douglas* was not the absence of previous cross-examination, but the lack of opportunity for present cross-examination. Viewed with this distinction in mind, the role of cross-examination as a constitutionally required component of trial confrontation is broader and more probative than—and accordingly constitutionally distinct from—cross-examination that happens to have occurred at some earlier time in some other place. Admittedly, cross-examination is constitutionally required where the question is whether an unavailable declarant's prior testimony is admissible. To say that cross-examination is constitutionally required in order for prior testimony to be admissible is not to say, however, *either* that a defendant has a constitutional right of cross-examination in all cases *or* that cross-examination will render admissible any earlier statement. Nor does the fact that cross-examination renders prior testimony admissible where the declarant is unavailable suggest prior cross-examination should suffice where the declarant is testifying (produced) or available but not called (available). At the time, however, *Douglas* discussed none of these subtleties. By broadly linking an opportunity to cross-examine with the confrontation clause, implying that the latter is satisfied anytime the former has occurred, the Court with one quick stroke painted itself into a corner of inflexibility.

The focus changed slightly in 1968 with *Barber v. Page*.⁶⁹ At the trial, the prosecution introduced the preliminary hearing tran-

⁶⁹ 390 U.S. 719 (1968). In the intervening years, the Court had decided *Brookhart*, 384 U.S. 1. Because, without the consent of the client, the defendant's attorney had agreed

script of an uncross-examined witness absent because he was incarcerated in a federal prison in a nearby state.

As the whereabouts of the declarant were known, *Barber* was the first case that might have required that available witnesses be produced. This never happened, however. In its opinion, the *Barber* Court acknowledged the recognized exception to trial confrontation where the declarant is unavailable but at a previous judicial proceeding had given testimony subject to cross-examination by the defendant against whom the testimony is now being offered.⁷⁰ The Court, however, described this exception as "arising from necessity"⁷¹ and concluded that where the prosecution has not demonstrated a good faith effort to secure the attendance of the witness, an exception to the right of confrontation is not justified.⁷² On this basis, the Court found that admission of the transcript violated the defendant's confrontation rights. Moreover, defining confrontation as basically a trial right, including both the opportunity to cross-examine and the occasion for the trier of fact to weigh the demeanor of the witness, the Court concluded that it would have reached the same result even if the witness had been cross-examined.⁷³

to a form of proceeding which, instead of a full trial, resulted in the defendant's offering no evidence and foregoing the opportunity to cross-examine the prosecution's witnesses, the Court, primarily on the issue of waiver, found a violation of the defendant's confrontation clause right of cross-examination. *Id.* at 5. The Court further observed that without a knowing and intelligent waiver of the right to be confronted with and to cross-examine the prosecution's witnesses, the defendant's confrontation clause rights would also be violated by the introduction of an alleged confession of a co-defendant "who did not testify in court, [where] petitioner was therefore denied any opportunity whatever to confront and cross-examine the witness who made the very damaging statement." *Id.* at 4. Because of the very unusual nature of the proceedings and the Court's reliance on waiver as a basis for its decision, little consideration was given to the reference regarding the failure of the co-defendant to testify nor to whether his availability or lack thereof would have affected the outcome.

⁷⁰ *Barber*, 390 U.S. at 722.

⁷¹ *Id.*

⁷² *See id.* at 724-25. In fact, the absent witness had not been cross-examined by Barber's attorney at the preliminary hearing. *Id.* at 720. The Court, however, found this insignificant. *See id.* at 725. In *Berger v. California*, 393 U.S. 314, 315 (1966), *Barber* was given retroactive application despite cross-examination of the witness at the preliminary hearing, giving further support to the idea that even the existence of prior cross-examination could not overcome a rule of necessity. Admittedly, the case involved former testimony, which traditionally was admissible only where the declarant was unavailable, but the *Barber* Court never used this as a ground of reliance. *Barber*, 390 U.S. at 725.

⁷³ *Barber*, 390 U.S. at 725. In reality, Barber's attorney could not have cross-

The clear message of *Barber* is that where the declarant is available, the benefits of trial confrontation so outweigh the substitute benefits of even previously cross-examined testimony, the Constitution requires the former. Instead of transforming that recognition into a rule requiring that available witnesses be produced, the Court in *Barber* spoke from the opposite perspective: since trial confrontation is preferable, the declarant must be unavailable in order for prior testimony to be admitted.⁷⁴ Framing the requirement as one excluding evidence if the witness is produced rather than as one requiring production of available witnesses makes no difference where evidentiary rules, or, as the Court held in *Barber*, constitutional dictates, require unavailability. The hearsay will not be admitted irrespective of whether the declarant is produced or is available but not produced. Where, however, evidentiary rules do not require that the declarant be unavailable,⁷⁵ the Constitution must impose such a requirement; otherwise, the failure of the *Barber* Court to speak in the affirmative would mean that the hearsay statement of our hypothetical magazine reader is admissible despite his availability. This is because where the evidentiary rules do not require unavailability, the confrontation clause preference for face-to-face confrontation provides the only motivation for "available" witnesses to become "produced" witnesses. Thus, although the difference in the two phrases meant nothing in the context of an unavailable witness, it would have great impact when later the Court would consider the admissibility of hearsay from an available declarant.

Later that same year, the court decided *Bruton v. United States*.⁷⁶ *Bruton*, a case of some continuing renown, involved the admission in their joint trial of Bruton's co-defendant's pre-trial

examined the witness at the preliminary hearing because he had represented the witness at the same time and on the same matter as he had represented Barber. To have cross-examined a former client about a matter that had been the subject of representation is an obvious conflict of interest. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-10 (1980).

⁷⁴ *Barber*, 390 U.S. at 724-25.

⁷⁵ There are 24 exceptions in FED. R. EVID. 803, none requiring unavailability of the declarant. There are eight exclusions from the definition of hearsay in FED. R. EVID. 801, none requiring unavailability of the declarant. Together these constitute the majority of exceptions to the hearsay rule. In contrast, FED. R. EVID. 804, requiring the declarant's unavailability, contains only five exceptions. See also *supra* notes 30, 31 and 36.

⁷⁶ 391 U.S. 123 (1968).

confession. That confession implicated Bruton, but he did not have an opportunity to test it through cross-examination because his co-defendant did not testify.⁷⁷

Though *Bruton* and *Douglas* appear distinguishable, the two cases are quite similar.⁷⁸ Each involved the introduction of un-cross-examined hearsay from an unavailable declarant.⁷⁹ Each presented the Court with the necessity of admitting the evidence or doing without it. And in each the Court held constitutionally impermissible the introduction of an out-of-court statement not previously cross-examined, not then able to be cross-examined, and not bearing other (unspecified) indicia of reliability, even though the declarant was unavailable.⁸⁰ The only difference between the cases is that by the time of *Bruton*, the link between the confrontation clause and the opportunity for cross-examination was no longer in question: "Despite the concededly clear instructions to the jury to disregard [the co-defendant's] inadmissible hearsay evidence inculpat[ing] petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination."⁸¹ Thus, by 1968, the Court had apparently concluded that

⁷⁷ The trial court specifically instructed the jury that it should consider the confession against Bruton's co-defendant only. For the relevant portion of the Court's instructions, see *Bruton*, 391 U.S. at 125 n.2. In overruling *Delli Paoli v. United States*, 352 U.S. 232 (1957), the *Bruton* Court held that because of the powerful impact of the confession, even the trial court's limiting instructions were insufficient to protect Bruton's confrontation rights. *Bruton*, 391 U.S. at 126. *Bruton* was given retroactive effect in *Roberts v. Russell*, 392 U.S. 293 (1968).

⁷⁸ In *Douglas* the prosecutor sought to use the accomplice's confession against Douglas in his individual trial. *Douglas*, 380 U.S. at 416-17. Although it was a joint trial, the prosecutor in *Bruton*, on the other hand, mindful of *Douglas*, sought to use the co-defendant's confession solely against the confessor. *Bruton*, 391 U.S. at 124.

⁷⁹ Just as was the case in *Douglas*, the declarant in *Bruton*, though physically present, was legally unavailable by virtue of his privilege not to incriminate himself. See *supra* note 67.

⁸⁰ *Douglas*, 380 U.S. at 420; *Bruton*, 391 U.S. at 137.

⁸¹ *Bruton*, 391 U.S. at 136-37. Of course, a fundamental tenet of this country's jurisprudence is that defendants cannot be forced to incriminate themselves. See *infra* note 123. At trial, this has the practical effect of preventing any party from forcing a defendant to appear as a witness. Accordingly, the potential for Bruton to force his co-defendant to testify was nil. Following *Bruton*, prosecutors who sought joint trials were able to admit the confession of one co-defendant by employing a procedure called redaction, by which references to non-confessing co-defendants are purged from the confession. See generally *Bruton*, 391 U.S. at 134 n.10. Over the years, this evolved into a rule that the interlocking

the confrontation clause imposed a constitutional right of cross-examination and a requirement, at least for prior testimony, that in order for hearsay to be admissible, a non-testifying declarant must be unavailable.

B. *The Search for the Relationship Between Unavailability and Required Reliability*

The importance of declarant unavailability surfaced again in *California v. Green*,⁸² decided in 1970. *Green* involved a California statute that permitted the substantive use of prior inconsistent statements.⁸³ Relying on the statute, the prosecutor in *Green* sought to introduce both the cross-examined preliminary hearing testimony and the uncross-examined oral pre-trial statements of sixteen-year-old Melvin Porter, a witness in *Green's* trial for distribution of narcotics. Porter was not unavailable in the traditional sense. Quite the contrary, he appeared as a prosecution witness in *Green's* trial. Resort to Porter's out-of-court statements was needed because he claimed during the trial that the use of a mind-altering drug (LSD) shortly before the events in question prevented him from remembering those events at trial, rendering him immune to effective direct or cross-examination at trial. Porter did admit, however, that he believed his earlier oral statement and preliminary hearing testimony were probably true, despite his present inability to verify the truth of those statements.⁸⁴

In what was then a landmark decision, the *Green* Court answered questions left open by its earlier opinions. The Court

nature of a defendant's confession may bear on the reliability of a co-defendant's statement, making the latter admissible upon a showing of unavailability or, alternatively, making introduction a harmless error. *Cruz v. New York*, ___U.S. ___, 107 S. Ct. 1714, 1717-18 (1987). See generally *Richardson v. Marsh*, ___U.S. ___, 107 S. Ct. 1702, 1708 (1987).

⁸² 399 U.S. 149 (1970).

⁸³ California's Evidence Code provided that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." CALIF. EVID. CODE § 1235 (1966) (effective Jan. 1, 1967), quoted in *Green*, 399 U.S. at 150. Section 770 required that the witness be given an opportunity to explain or deny the prior statement at some point in the trial. CALIF. EVID. CODE § 770 (1966) (effective Jan. 1, 1967), quoted in *Green*, 399 U.S. at 150 n.1.

⁸⁴ *Green*, 399 U.S. at 152.

ruled first that the confrontation clause is not violated by the introduction of a declarant's out-of-court statements as long as the declarant is produced as a witness and thereby subject to full and effective cross-examination.⁸⁵ In terms of the pending facts, this meant that Porter's presence at Green's trial with the accompanying opportunity for cross-examination satisfied the constitutional requirement of confrontation, even as to prior statements not cross-examined when made. Thus, the *Green* Court said, had the witnesses in *Douglas* and *Bruton* been able to be cross-examined, there would have been no constitutional bar to the admission of the out-of-court statements.⁸⁶ In terms of jurisprudence, this meant that if the witness was produced and was able to be cross-examined, for confrontation clause purposes, any prior out-of-court statement could be admitted.⁸⁷

Secondly, the Court held that even if Porter's professed lack of memory rendered him immune to cross-examination, and hence legally unavailable, his preliminary hearing statements would be admissible because the preliminary hearing had been conducted under circumstances very similar to those of a trial.⁸⁸ According to the *Green* Court, because the right of cross-examination at the preliminary hearing provides substantial compliance with the purposes behind the confrontation clause requirement, it was sufficient to satisfy the confrontation clause. The only issue left open, to be settled on remand, was whether Porter's lack of memory rendered him sufficiently unavailable for present cross-examination, such that the reliability of the uncross-examined oral statements could not be presently tested.⁸⁹ If no present opportunity

⁸⁵ *Id.* at 158.

⁸⁶ *Id.* at 163.

⁸⁷ The constitutional implications of *Green* are to be distinguished from the traditional evidentiary rules that include in the definition of hearsay the out-of-court statements of the testifying witness. Because these statements are defined as hearsay, they will be inadmissible for evidentiary purposes unless they qualify as an exception. This is true despite the fact that the statements might be constitutionally admissible.

⁸⁸ Years earlier, the Court had held that where the declarant was unavailable, recorded testimony from an earlier trial was admissible. *Mattox*, 156 U.S. at 244. For the *Green* Court, the similarities between a preliminary hearing and a trial, including testimony under oath, representation by counsel, and cross-examination, sufficed to bring the case within the *Mattox* rule. *Green*, 399 U.S. at 165 (citing *Mattox*, 156 U.S. 237).

⁸⁹ *Green*, 399 U.S. at 168-70. The result made sense, since *Douglas*, *Pointer*, and *Bruton* had already established that even if the witness is unavailable, the confrontation

for cross-examination existed, the uncross-examined oral statements would be an affront to the confrontation clause because they would be unreliable.⁹⁰

clause imposes a requirement of reliability that arguably Porter's uncross-examined oral statement did not possess. On remand, the California Supreme Court held that since the witness had been cross-examined at trial, and, accordingly, was required to take a position regarding the truthfulness of his statements, adequate confrontation had occurred. *People v. Green*, 479 P.2d 998, 1003-1004, 92 Cal. Rptr. 494, 499-500 (1971). In *United States v. Owens*, 484 U.S. —, 108 S. Ct. 838 (1988), the Supreme Court addressed the issue it had remanded in *Green*, namely whether a testifying witness' memory loss might so restrict cross-examination as to render introduction of that witness' out-of-court statement a violation of the confrontation clause. *Owens* was charged with assault with intent to commit murder in connection with an assault on a correctional officer at the federal prison where *Owens* was incarcerated. Although as a result of the attack his memory was severely impaired, the victim was permitted to testify at trial that while hospitalized he had identified *Owens* as his attacker to an F.B.I. agent, despite the victim's admission at trial that he could no longer remember seeing his attacker. *Id.* at 841. Citing the California Supreme Court's decision in *People v. Green*, and relying on *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam), the Court concluded that when a hearsay declarant is present and subject to unrestricted cross-examination, introduction of an earlier out-of-court statement does not offend the confrontation clause. *Owens*, 108 S. Ct. at 843. Superficially, *Owens* appears consonant with the California Supreme Court's decision in *Green* and with the thesis of this article: trial cross-examination of a produced witness satisfies the confrontation clause. *Owens* differs from *Green*, however, because although the declarant in *Green* had a memory loss regarding the underlying events, that memory loss did not extend to the circumstances surrounding the making of the out-of-court statement. *Green*, 399 U.S. at 152. Thus, while Porter, the declarant in *Green*, could not be challenged regarding the underlying events, he could be challenged regarding the making of the statement. The memory loss suffered by the victim in *Owens*, on the other hand, prevented him from being questioned about the circumstances surrounding the making of the statement, including whether or not any visitors to the hospital had suggested that *Owens* was the attacker. *Owens*, 108 S. Ct. at 846 (Brennan, J., dissenting). Interestingly, an argument can be made that an inability to be cross-examined might render the victim in *Owens* legally unavailable. FED. R. EVID. 804(a)(3); see *supra* note 30. Constitutionally, though, admission of the out-of-court statement because of the unavailability of the declarant would then require a demonstration of the statement's reliability. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). The general recognition that hearsay exclusions do not derive from guarantees of reliability, see *supra* text accompanying note 38, confirmed by the requirement of FED. R. EVID. 801(d)(1)(C) that excludes prior identifications from the category of hearsay *only if* the declarant testifies as a witness, see *supra* note 36, suggest that the out-of-court statement of the victim in *Owens* would meet neither constitutional nor evidentiary requirements of reliability. As decided, however, *Owens* represents yet one more step by the Court in the direction of admitting hearsay while simultaneously restricting a defendant's ability to challenge its reliability.

⁹⁰ That this was the thinking of the Court is borne out by its acknowledgement that since its holding approved the admission of Porter's preliminary hearing statements, admission of his oral statements, if unable to be cross-examined at trial, might constitute harmless error. *Green*, 399 U.S. at 170.

Regarding the issue of availability, the facts in *Green* did not present, and the Court did not address, the question of whether the constitutional analysis would differ if Porter had been available but simply not produced. Regarding the constitutional role of cross-examination, *Green*, like *Pointer*, implied that the cross-examination of prior testimony rendered that testimony admissible. Also like *Pointer*, *Green* did not specify whether cross-examination was a dividing line applicable only to cases involving prior testimony or whether the existence of cross-examination simply rendered prior testimony constitutionally reliable in one of several fungible ways. More importantly, what remained hidden below the surface, and hence overlooked, was the elusive question still not presented factually by any Supreme Court case: Does the confrontation clause impose an obligation to produce an available declarant in the situation where the out-of-court evidence was not cross-examined but seems otherwise reliable?

The question appeared to be raised by the next significant confrontation clause case to reach the Court. *Dutton v. Evans*⁹¹ involved the admission of a statement made during the concealment phase of a conspiracy by a non-testifying but arguably available co-conspirator.⁹² In answering the framed question—must the conviction be set aside because of the admission of the co-conspirator's testimony—a plurality of the Court concluded that the conviction could stand despite the confrontation clause challenge.⁹³ Admittedly, one could read *Evans* as sanctioning the

⁹¹ 400 U.S. 74 (1970). For an excellent analysis of the *Evans* opinion, see *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 188-99 (1971).

⁹² The Georgia statute provided that "[a]fter the fact of conspiracy shall be proved, the declarations by any one of the co-conspirators during the pendency of the criminal project shall be admissible against all." GA. CODE ANN. § 38-306 (1954). The co-conspirator's statement in *Evans* should be distinguished from a co-defendant's confession, made after arrest, which was at issue in *Douglas and Bruton*.

⁹³ As posed, the question begs a harmless error analysis. In a concurring opinion, Justice Harlan provided the fifth and decisive vote on the merits of the case. Justice Harlan's concurrence is particularly noteworthy because in it he repudiates the position he adopted in his concurrence in *Green*. *Evans*, 400 U.S. at 94 (Harlan, J., concurring). In *Green*, Justice Harlan had argued that the primary reach of the confrontation clause was to require the prosecution to produce any available witness whose out-of-court declarations the prosecution wants to introduce. *Green*, 399 U.S. at 174. In *Evans*, Justice Harlan announced a preference for a fifth and fourteenth amendment due process approach. *Evans*, 400 U.S. at 96-97. His explanation for the shift in thinking hearkens back to

admission of hearsay where the hearsay, though not previously nor then cross-examined, was believed reliable.⁹⁴ In actuality, however, Justice Powell's plurality opinion reads much more like a harmless error analysis than an analysis finding no error in the first place.⁹⁵ Moreover, although the case implicitly raised the question of witness availability,⁹⁶ the defendant never complained of the prosecution's failure to produce the declarant. Rather, Evans' complaint went solely to the breadth of the Georgia statute.⁹⁷ Evans did not challenge, and accordingly the Court *did not question*, the validity of the co-conspirator exception applied in the federal courts.⁹⁸ The Court ruled, "We cannot say that the evidentiary rule applied by Georgia violates the Constitution merely because it does not exactly coincide with the hearsay exception applicable in . . . a federal prosecution" This ruling nei-

Wigmore. See *infra* note 150. Essentially, Justice Harlan became convinced that the confrontation clause was not initially designed to address the use of hearsay and that it is particularly unsuited to the task. *Evans*, 400 U.S. at 94-96 (Harlan, J., concurring).

⁹⁴ In defending his opinion, Justice Powell provided four reasons why admission of the co-conspirator's statement does not offend the confrontation clause: first, the statement contained no express assertion of fact and hence broadcast its doubtful validity; second, the establishment of the declarant's personal knowledge by abundant evidence precluded the ability of cross-examination to establish the contrary; third, the possibility that the statement was the product of the declarant's faulty memory was extremely remote; and fourth, the circumstances surrounding the making of the statement made it unlikely the declarant misrepresented the defendant's involvement. *Evans*, 400 U.S. at 88-89. The reasons read like a conclusion that the statement was reliable, but nowhere did the Court state that that was the ground of admissibility.

⁹⁵ Specifically, Justice Powell placed emphasis on the fact that the evidence was neither crucial nor devastating, as had been the case in *Pointer*, *Douglas*, *Brookhart*, and *Barber*. *Evans*, 400 U.S. at 87. See also Natali, *supra* note 68, at 50-51 (*Evans* was really a case of harmless error). Harmless error is what its name implies. It combines an acknowledgement that error has occurred with a conclusion that the error is not sufficiently grave to warrant reversal. See generally *Chapman v. California*, 386 U.S. 18, 21-26 (1967). In *Chapman*, the Court ruled for the first time that in addition to evidentiary errors, errors of constitutional magnitude could be harmless. *Id.* at 22.

⁹⁶ The Court apparently concluded that the co-defendant theoretically was available. *Evans*, 400 U.S. at 88 n.19.

⁹⁷ The sole thrust of Evan's argument was that the Georgia hearsay exception was constitutionally invalid because it was broader than the hearsay exception applicable to conspiracy trials in federal courts. *Evans*, 400 U.S. at 80.

⁹⁸ *Id.*

⁹⁹ *Id.* at 83. Nor is it clear that the statement at issue, "If it hadn't been for that dirty son-of-a-bitch Alex Evans [the defendant], we wouldn't be in this now," *id.* at 77, is truly an assertion at all, since it is only through implication that the defendant is inculpated. This was the plurality's first reason for finding that admission of the statement did not offend the confrontation clause. See *supra* note 94.

ther addressed nor decided whether, had the evidence not been as peripheral as Justice Powell found it to be,¹⁰⁰ the defendant's confrontation clause rights would have yielded to the admission of the evidence *as well as* required production of the declarant for cross-examination.

Thus, the elusive question of whether the confrontation clause required the production of available witnesses was still not clearly answered. Ironically, although the precise question was not raised by the Court's next case, *Ohio v. Roberts*,¹⁰¹ the answer was provided in the Court's opinion.

Roberts involved the prosecution's effort to introduce, as rebuttal evidence, the transcript of a witness who had testified at Roberts' preliminary hearing but who had failed to respond to subpoenas to appear at the accused's trial. Specifically, at Roberts' preliminary hearing on charges of forging a check and possession of stolen credit cards, his attorney called as the defense's only witness the daughter of the alleged owner of the check and credit cards. On direct examination, the daughter testified that she knew Roberts and had let him use her apartment for several days while she was away. Despite repeated questioning, however, she denied that she had given him her parents' checks and credit cards without telling him that she had no permission to use them. Roberts' attorney, who had called the daughter on direct, did not request that she be declared hostile, nor did he ask to examine her as if on cross-examination. The prosecutor asked her no questions.¹⁰²

¹⁰⁰ *Evans*, 400 U.S. at 87.

¹⁰¹ 448 U.S. 56 (1980). In the years between *Evans* and *Roberts* the Court decided *Mancusi v. Stubbs*, 408 U.S. 204 (1972). *Stubbs* raised the issue of second-offender sentencing where the predicate offense was alleged to have been obtained in violation of the defendant's confrontation rights. Specifically, the defendant complained that the reading of a transcript of a witness' testimony from a former trial was improper because the *Barber* requirement of unavailability had not been met. *Id.*; see *Barber*, 390 U.S. at 72-25 and *supra* text accompanying notes 69-72. Finding no constitutional error in the reading of the transcript, the *Stubbs* Court reaffirmed *Barber's* constitutional requirement of unavailability prior to the admission of former testimony, *Stubbs*, 408 U.S. at 216; reaffirmed the *Evans* requirement that even though a witness may be unavailable, the confrontation clause requires a showing that the out-of-court statement be reliable, *id.* at 213; and reaffirmed the *Green* holding that prior constitutionally adequate cross-examination establishes the requisite test of reliability, *id.* at 216.

¹⁰² *Roberts*, 448 U.S. at 58.

Between the time of Roberts' preliminary hearing and his trial, the prosecution issued five subpoenas to the daughter, none of which was personally served or prompted her appearance. At the trial, after hearing testimony from the mother that the daughter's whereabouts were unknown, the Court admitted the daughter's transcript, having concluded that, despite some "leads," sufficient evidence was shown to establish that the daughter was in fact unavailable.¹⁰³

The Supreme Court perceived the controversy as once again requiring consideration of the relationship between the confrontation clause and the hearsay exceptions.¹⁰⁴ Reminding readers of what it considered a settled issue, the Court stressed that the confrontation clause reflects a preference for face-to-face confrontation at trial.¹⁰⁵ It also re-emphasized that a primary interest secured by the clause is the right of cross-examination but acknowledged that in some instances necessity may require that confrontation at trial be dispensed with.¹⁰⁶ Nevertheless, the *Roberts* Court concluded that its proper response was not to provide a sweeping answer to the dilemma but rather to proceed in a case-by-case fashion. In so doing, however, the Court did detail what it perceived to be some emerging guidelines.

In the view of the *Roberts* Court, the confrontation clause places two restrictions on the admission of hearsay.

First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecutor must either produce,

¹⁰³ *Id.* at 77.

¹⁰⁴ *Id.* at 62.

¹⁰⁵ *Id.* at 63.

¹⁰⁶ *Id.* at 63, 64. By way of example, the Court referred to the holding in *Mattox v. United States* that prior cross-examined testimony may be admissible when the necessities of the case so require. *See Mattox*, 156 U.S. 237; *see also supra* notes 56-58 and accompanying text. The court then referred to *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934), which involved that aspect of the confrontation clause pertaining to the presence of the defendant at his trial. Finally, the Court referred to Chief Justice Burger's concurring opinion in *California v. Green*, 399 U.S. at 171, where the Chief Justice emphasized that innovation and experimentation by the states in formulating criminal justice rules, so long as consistent with the Constitution, should be encouraged. Obviously, none of the Court's references involve the sanctioning of the use of hearsay when the declarant is available but not produced.

or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.¹⁰⁷

The second restriction, operable only after a witness is shown to be unavailable, is intended to augment accuracy by “ensuring the defendant an effective means to test adverse evidence. . . .”¹⁰⁸ In this latter situation, when witness unavailability leaves no alternative but the use of hearsay, the confrontation clause will countenance hearsay only of such trustworthiness as to accord with the reason of the general rule.¹⁰⁹

If the Court had stopped there, some clarity might have evolved regarding the elusive relationship between the confrontation clause and the use of hearsay. Unfortunately, however, the Court had to resolve the particular controversy before it, and in so doing made the following observation: “In sum, when a hearsay declarant is not present for cross-examination at trial, the confrontation clause normally requires a showing that he is unavailable.”¹¹⁰ Even if the Court believed it to be of no substantive difference, this subtle change, from an affirmative requirement that the witness be produced or be unavailable to a contingent requirement that if not present the person must be unavailable, was significant.¹¹¹

There are three “places” a hearsay declarant can be when the prosecution seeks to introduce that person’s out-of-court statement. The declarant can be on the stand subject to cross-examination (produced), dead (unavailable) or reading a magazine in the courthouse lobby (available but not produced). A rule affirmatively requiring the prosecution to produce or demonstrate the unavailability of a witness whose hearsay statement it wishes to introduce not only acknowledges all three “places” but also forces the prosecution, where that witness is not produced but is nonetheless available, to produce that person. A rule that requires a non-*testifying* witness to be unavailable implies that there are only two places that a witness could be: testifying (produced) or un-

¹⁰⁷ *Roberts*, 448 U.S. at 65.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 66.

¹¹¹ This is the same type of word change the Court had employed earlier in *Barber*. See *supra* note 74 and accompanying text.

available, by thus implying that a person would only be non-testifying because unavailable. This overlooks the possibility that the person is non-testifying because no one asked the person, though available, to appear. Accordingly, the Court's statement that when a hearsay declarant is not present for cross-examination at trial, the confrontation clause normally requires a showing that the witness is unavailable, the statement differed from its earlier version by omitting the possibility that the witness could be produced, a possibility that is significant where unavailability is not required.

The reason for the *Roberts* court's subtle word change, however, is easily understood. Independent of the constitutional issue, *Roberts*, like *Green* and *Barber*, and even *Mattox*, involved evidentiary hearsay exceptions to the hearsay rule traditionally applicable only when the declarant was unavailable. For example, *Mattox* involved prior trial testimony and whether it can be admitted where the declarant had since died. *Barber*, too, involved prior testimony and the level of showing necessary to establish legal unavailability. *Green* concerned whether loss of memory established requisite legal unavailability, as well as whether present cross-examination can substitute for a lost opportunity for earlier cross-examination, where prior formal testimony is involved. *Roberts*, like *Barber*, took this evidentiary predicate and analyzed it in constitutional terms. Accordingly, *Roberts'* conception of unavailability occurred in a situation where production of the declarant would never arise because both the evidentiary and constitutional rules require unavailability.¹¹²

Thus, from *Mattox* to *Roberts* the Court forged some general principles regarding the relationship between hearsay and the confrontation clause, but primarily in situations where production

¹¹² *Barber*, 390 U.S. at 724-25; see also *supra* note 30 and FED. R. EVID. 804(b)(1), which excludes the following from the hearsay rule if the declarant is unavailable as a witness:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

FED. R. EVID. 804(b)(1).

either was not factually possible or was prohibited by governing evidentiary requirements. By the end of these cases it was clear, for instance, that where the declarant is unavailable, the confrontation clause is not offended by the use of certain hearsay.¹¹³ We knew that where hearsay is admitted in the absence of the declarant, the confrontation clause requires that it possess some indicia of reliability. Cross-examination, although not the only test of reliability,¹¹⁴ is by far the indicia of choice.¹¹⁵ It was clear that where a statement not subject to cross-examination bears no other indicia of reliability, it is inadmissible unless the declarant is produced at trial for present cross-examination.¹¹⁶ We knew that where the witness is produced at trial, the opportunity for cross-examination at trial regarding a statement previously made is a sufficient test of that statement's reliability to allow it to be admitted.¹¹⁷ And we suspected that trial confrontation is preferable to hearsay denoted reliable because of the circumstances surrounding its making.¹¹⁸

What we did not know for certain after *Roberts* was whether in a situation where evidentiary rules do not require unavailability, the Constitution barred the admission of hearsay from a declarant who was *not* unavailable but was merely not produced. The question did not come up in *Mattox* because the declarant was dead. It did not arise in *Pointer* because again the declarant was unavailable. *Douglas* did not address the question because in that case the declarant, although produced, was unavailable. *Bruton* did not raise the question because, again, the declarant was unavailable. *Green* did not require an answer because Porter was either produced, subject to cross-examination at trial, or unavailable if (despite his appearance) he could not be cross-examined.

¹¹³ *Mattox*, 156 U.S. 237, see *supra* notes 56-58 and accompanying text; *Pointer*, 380 U.S. 400, see *supra* notes 60-64 and accompanying text; *Green*, 399 U.S. 149 (1970), see *supra* notes 82-90 and accompanying text; *Roberts*, 448 U.S. 56 (1980), see *supra* notes 101-10 and accompanying text.

¹¹⁴ See, e.g., *Mattox*, 146 U.S. 140 (dying declarations).

¹¹⁵ See *supra* note 113; *Douglas*, 380 U.S. 415, see *supra* notes 66-68 and accompanying text; *Bruton*, 391 U.S. 123, see *supra* notes 76-81 and accompanying text.

¹¹⁶ See *supra* note 115; see also *Green*, 399 U.S. 149 and *supra* notes 82-90 and accompanying text.

¹¹⁷ *Green*, 399 U.S. 149, see *supra* notes 82-90 and accompanying text.

¹¹⁸ *Barber*, 390 U.S. 719, see *supra* notes 69-74 and accompanying text; *Roberts*, 448 U.S. 56, see *supra* notes 101-10 and accompanying text.

And *Roberts* did not ask the question because, yet again, the declarant was unavailable.

Six years after *Roberts*, the question whether an available hearsay declarant must be produced was finally answered in *United States v. Inadi*.¹¹⁹ A year later the Court addressed what satisfies the confrontation clause's requirement of reliability in cases where there is no cross-examination.¹²⁰ By this time, however, the pronouncements of the earlier cases had predetermined the answers.

C. *The Court's Solution*

*United States v. Inadi*¹²¹ involved a situation where the applicable exception to the hearsay rule did not condition admissibility on the unavailability of the declarant.¹²² The case thus provided the opportunity for the Court to consider whether, when the declarant is available but coincidentally is not produced, the confrontation clause tempers the otherwise unrestrictive approach of the evidentiary rules by requiring that available declarants be produced.

Inadi was tried for several narcotics violations, including conspiracy to manufacture and distribute methamphetamine. At his trial, the government sought to introduce tape recorded conversations of four other members of the conspiracy. Two of the four co-conspirators appeared and testified at *Inadi's* trial. The third co-conspirator was declared unavailable based on his reliance on his fifth amendment privilege.¹²³ *Inadi* raised both evidentiary and confrontation objections to the admission of the tapes. His strongest argument, and the one ultimately at issue before the Supreme Court, involved the fourth co-conspirator, Lazaro, who after having been subpoenaed to appear by the government, failed to

¹¹⁹ 475 U.S. 387 (1986).

¹²⁰ *Bourjaily v. United States*, ____ U.S. ____, 107 S. Ct. 2775 (1987).

¹²¹ 475 U.S. 387 (1986).

¹²² The applicable exception, referred to generally as the co-conspirator exception, is codified in FED. R. EVID. 801(d)(2)(e). See *supra* note 36. In *Inadi*, the district court relied on this exception to admit the statements of *Inadi's* co-conspirators, concluding as required by the exception, that the statements were made during and in furtherance of a conspiracy. *Inadi*, 475 U.S. at 390.

¹²³ In pertinent part, the fifth amendment provides, "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

appear, claiming car trouble. Inadi claimed that absent a showing of unavailability, admission of Lazaro's statements violated his confrontation rights. The trial court admitted the statements because they satisfied the co-conspirator rule that excludes such statements from treatment as hearsay.¹²⁴

The Third Circuit reversed. Relying on language in *Roberts*,¹²⁵ the court of appeals concluded that as a prerequisite to the admission of any out-of-court statement, the confrontation clause required a non-testifying declarant to be unavailable.¹²⁶ Since car trouble did not establish unavailability, the court of appeals found admission of the tape recordings erroneous.¹²⁷ The Third Circuit's reliance on this portion of *Roberts*, however, invited the Supreme Court to respond as it did.

The Supreme Court considered the question to be whether the confrontation clause requires a showing of unavailability as a condition to admissibility of the out-of-court statements of a non-testifying co-conspirator. To that question, the Court responded that the confrontation clause imposes no such requirement. Had the answer stopped here, neither it nor the decision it compelled would have been inaccurate, for *California v. Green*¹²⁸ had already approved the admission of hearsay when the declarant was produced for cross-examination. The defect in the *Inadi* opinion is that instead of merely stating that the Third Circuit was wrong in its reason for overturning the trial court, the Court implied that the trial court was right in allowing an available declarant's hearsay statement to be admitted without requiring that the declarant be produced.¹²⁹

¹²⁴ *Inadi*, 475 U.S. at 390. In *Lee*, 476 U.S. at 543, the Court suggested that the confrontation clause was designed to prevent conviction of a defendant based on presumptively unreliable evidence. This is different from an affirmative requirement that evidence be proved reliable whenever possible, that is, in all cases except where necessity prevents such proof. In the former case *presumptively* reliable evidence is always admissible; in the latter case, it would not be admissible, except where necessity required.

¹²⁵ *Roberts*, 448 U.S. at 65. Concluding that the confrontation clause imposes a preference for a face-to-face accusation, the *Roberts* Court stated that in the usual case, hearsay declarants must be produced to be unavailable before their out-of-court statements can be admitted. *Id.* at 65.

¹²⁶ *Inadi*, 748 F.2d 812, 818 (3d Cir. 1985), *rev'd*, 475 U.S. 387 (1986).

¹²⁷ *Id.* at 819.

¹²⁸ 399 U.S. at 158.

¹²⁹ *Inadi*, 475 U.S. at 396-400.

In rendering its opinion, the *Inadi* Court acknowledged that *Roberts* had seemingly established a rule of necessity, requiring "in the usual case" that the prosecution either produce or demonstrate the unavailability of a declarant whose statement it wishes to use against a defendant.¹³⁰ The *Inadi* Court, however, rejected this as a rule of general applicability and instead limited *Roberts* to cases involving prior testimony.¹³¹ On the one hand, as the Court explained in its opinion, this limitation was appealing since it is burdensome for the prosecution to have to keep track of potential witnesses. Analytically, however, *Inadi*'s limitation of *Roberts* could never have been intended by the *Roberts* Court itself. When *Roberts* was decided, introduction of prior testimony was limited by evidentiary rules as well as by the Constitution to situations where the declarant was neither produced nor available to be produced.¹³² In view of this, the *Roberts* Court could not have intended to limit to prior testimony cases a statement that defined as options *producing* or demonstrating the unavailability of a declarant whose statement the prosecution wanted to introduce. Notwithstanding this, *Inadi* limited *Roberts*, and in turn freed itself to consider as persuasive only that part of *Roberts* pertinent to cases involving prior testimony: the unavailability requirement. Beyond its inclusion in the quoted passage, *Inadi* ignored *Roberts*' production requirement entirely.¹³³

Having thus limited *Roberts*, but acknowledging that it was still good authority for cases involving prior testimony, the Court then had only to explain why unavailability was required in cases involving prior testimony but not in co-conspirator cases. In resolving this issue, the *Inadi* Court ignored both *Barber*'s and *Roberts*' preference for face-to-face confrontation as well as the

¹³⁰ *Id.* at 392.

¹³¹ *Id.* at 393.

"*Roberts* should not be read as an abstract answer to questions not presented in that case, but rather as a resolution of the issue the court said it was examining: 'the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial.'"

Id. at 392-93 (quoting *Roberts*, 448 U.S. at 58).

¹³² *Barber v. Page* had established the constitutional rule to this effect. *Barber*, 390 U.S. at 722. FED. R. EVID. 804(b)(1) typified a similar evidentiary requirement. See *supra* notes 30 and 112.

¹³³ See *supra* note 131.

recognition by those cases that confrontation clause requirements in cases of unavailable witnesses arose only *because of* the necessity created by the declarant's unavailability. Instead the Court reasoned that unavailability is required in the case of prior testimony, not as a constitutionally approved substitute when production is not possible, but rather because prior testimony is only a weaker substitute for live testimony.

If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.¹³⁴

Elevating "better" evidence to constitutionally preferred status, the *Inadi* Court thus concluded that co-conspirator evidence, captured as it is during the pendency of the illegal enterprise, is better evidence than in-court testimony by the declarant. Accordingly, in the Court's opinion admission of this "better" evidence actually furthers the confrontation clause's goal of enhancing the search for truth.¹³⁵

¹³⁴ *Inadi*, 475 U.S. at 394. Whether the Court is correct in its assessment of what evidence is "better" is debatable. The question need not be answered, though, because the co-conspirator exception, FED. R. EVID. 801(d)(2)(e), unlike the prior testimony exception, FED. R. EVID. 804(b)(1), would not have required exclusion of Lazaro's testimony if he had appeared. For the text of Rules 801(d)(2)(e) and 804(b)(1), see *supra* notes 36 and 30, respectively.

¹³⁵ *Inadi*, 475 U.S. at 396. The Court also placed reliance on FED. R. EVID. 806, which in pertinent part provides:

When a hearsay statement, or a statement defined in rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness

If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

It was the Court's belief that if the defendant had truly wanted to examine Lazaro, the defendant could have called him himself, using as support the sixth amendment's compulsory process clause, which provides, "in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S.

If the choice were solely between admitting or excluding the evidence, *Inadi's* logic might be persuasive. Having found worth in co-conspirator evidence, however, the *Inadi* Court made only passing reference to the fact that production of Lazaro would have had no impact upon the value of the tape-recorded evidence. The problem was not an "either/or" proposition. The tapes could have been admitted *and* Lazaro could have been produced.

Although *Inadi* had finally provided the Court with the opportunity to decide whether the confrontation clause required the production of available witnesses, the Court's negative answer to that question left uncertain the other prong of confrontation clause analysis: the standards for measuring reliability. *Douglas* and *Bruton* had given defendants a constitutional right of cross-examination.¹³⁶ Where the out-of-court statement had not been cross-examined when made, *Inadi* rendered improbable, because not constitutionally required, any cross-examination at trial. Not

CONST. amend. VI. The compulsory process clause was held applicable to the states in *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). The *Inadi* Court's assumption, however, presumes that the government's compliance with the compulsory process clause satisfies the confrontation clause. See generally Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 588 (1978) (arguing that the obligation of the state is the same in both clauses). Cf. Baker, *supra* note 47, at 534 (confrontation clause must mean more than the right to call witnesses because that right is already provided by the compulsory process clause). The better answer is that the confrontation clause and the compulsory process clause are different. The former gives the defendant a right to be confronted with the witnesses against him. The latter provides assistance in securing the presence of those witnesses the defendant wants to present. See *Inadi*, 475 U.S. at 408 (Marshall, J., dissenting). The possibility that the confrontation clause's provisions differ from those of the compulsory process clause is particularly evident because under FED. R. EVID. 806 any rebuttal by a defendant must await the conclusion of the prosecution's case, a time lapse that can be quite substantial. In addition, by being forced to call the witness himself, the defendant risks appearing as though he is bolstering the very allegations he wishes to refute. The fact that Rule 806 permits questioning as if on cross-examination does not mean that the purpose will be achieved or the adverse relationship appreciated by the jury. "[O]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure." *Inadi*, 475 U.S. at 410 (Marshall, J., dissenting) (quoting *New York Life Insurance Co. v. Taylor*, 147 F.2d 297, 305 (D.C. Cir. 1945)). Moreover, Rule 806 pertains only to hearsay. Statements under Rule 801 are not hearsay. FED. R. EVID. 801(d). For a discussion of the problems this creates, see generally S. Saltzburg and K. Redden, *FEDERAL RULES OF EVIDENCE MANUAL* 994-95 (4th ed. 1986).

¹³⁶ See *supra* notes 68, 81 and accompanying text.

surprisingly, the strain created by these competing principles did not take long for the Court to resolve.

*Lee v. Illinois*¹³⁷ involved the admission of and reliance by the court on a co-defendant's uncross-examined confession against the defendant in their joint murder trial.¹³⁸ Neither defendant testified at trial. The Supreme Court found that the trial judge's reliance on the co-defendant's confession as evidence against the defendant violated the defendant's confrontation clause rights, though for reasons different from those advanced in the earlier *Bruton* case.¹³⁹ Moreover, characterizing the right of confrontation as primarily a functional right, designed to promote reliability in criminal trials, the *Lee* Court laid the groundwork for the destruction of *Douglas* by stating that even hearsay not falling under a traditional exception, and thus presumptively unreliable, can be sufficiently reliable to satisfy the confrontation clause if it possesses particularized guarantees of trustworthiness.¹⁴⁰ Though it declined to enumerate what guarantees of trustworthiness might or might not suffice, the Court by example referred to cross-examination "or its equivalent,"¹⁴¹ implying for the first time that cross-examination might no longer be an exclusive measure of reliability.

Three weeks after *Lee*, the Court escaped from the corner into which it had painted itself. Remanding a case for reconsideration in light of its recently announced opinion in *Lee*, the Court in *New Mexico v. Earnest*¹⁴² made clear what *Inadi* had required and *Lee* had set in motion: "[T]o the extent that *Douglas v. Alabama* interpreted the confrontation clause as requiring an opportunity for cross-examination prior to the admission of a co-defendant's out-of-court statement, the case is no longer good law."¹⁴³ If, then, the confrontation clause does not require an available declarant to be produced, and a defendant has no

¹³⁷ *Lee*, 476 U.S. 530.

¹³⁸ *Id.* at 531.

¹³⁹ The Court ruled in *Lee* that the confessions were insufficiently interlocking. *Id.* at 546. For an explanation of the concept of interlocking confessions, see *supra* note 81.

¹⁴⁰ *Lee*, 476 U.S. at 543.

¹⁴¹ *Id.*

¹⁴² 477 U.S. 648 (1986) (per curiam), *on remand*, 744 P.2d 539 (N.M. 1987), *cert. denied*, 108 S. Ct. 284 (1987).

¹⁴³ *Id.* at 649.

constitutional right of cross-examination, what constraints does the confrontation clause impose on the introduction of hearsay?

Just short of a year after *New Mexico v. Earnest*, the Court decided *Bourjaily v. United States*.¹⁴⁴ Like *Inadi*, *Bourjaily* involved the admission of a non-testifying co-conspirator's statements. Concluding that the particular statements were constitutionally admitted, the Court summarized its perceptions of the confrontation clause's requirements. According to the *Bourjaily* Court, the confrontation clause requirement that hearsay be conditioned on both the unavailability of the declarant and the indicia of reliability surrounding the out-of-court statement is a general requirement only.¹⁴⁵ Referring to *Inadi*, the Court then continued: "[W]e held [in *Inadi*] that the first of these two generalized inquiries, unavailability, was not required when the hearsay statement is the out-of-court declaration of a co-conspirator. Today, we conclude that the second inquiry, independent indicia of reliability, is also not mandated by the Constitution."¹⁴⁶

D. *The Difficulty with the Court's Solution*

At one level, the Court's recent approach and what it might bode for the future are appealing. Indeed, "[a] defendant is entitled to a fair trial but not a perfect one."¹⁴⁷ Admitting hearsay that is valuable in its own right so long as its evidentiary reliability is firmly rooted, irrespective of the availability of the declarant, is an attractive approach in that it appears to accomplish the goals underlying the confrontation clause. In other words, if the purpose of the confrontation clause was to prevent convictions based on untested, and therefore unreliable, out-of-court evidence, admission of valuable and presumptively reliable evidence would seem consistent with this purpose. Moreover, this approach has practical appeal. If availability is immaterial, the prosecutor is free from the burden of identifying, locating, and ensuring the continuing availability of declarants for trial. In addition, because the statements would be admissible regardless of whether the

¹⁴⁴ ____ U.S. ____, 107 S. Ct. 2775 (1987).

¹⁴⁵ *Id.* at 2782.

¹⁴⁶ *Id.*

¹⁴⁷ *Bruton*, 391 U.S. at 135 (quoting *Lutwak*, 344 U.S. 604, 619 (1953)).

declarants were produced or unavailable, these decisions in no way compromise, through the exclusion of evidence, the truth-seeking function of the confrontation clause.¹⁴⁸

On the other hand, if the purpose of the confrontation clause is to promote confrontation because confrontation is the constitutionally preferred vehicle by which to demonstrate a witness' credibility and thereby ultimately to test the reliability of all that person's assertions (those seen or done as well as those said or heard), then the Court's recent approach leaves a portion of the clause unfulfilled. Moreover, the possibility that these decisions can be expanded is great. The logic that led the *Inadi* Court to conclude that co-conspirator statements constitute valuable evidence is the logic underlying most, if not all, of the exclusions and exceptions to the federal hearsay rule.¹⁴⁹ This is particularly troublesome given the fact that exclusions, unlike exceptions, are not rooted in reliability. Moreover, since *Bourjaily* considers con-

¹⁴⁸ This aspect of the confrontation clause was discussed in *Evans*, 400 U.S. at 89, and re-emphasized in *Inadi*, 475 U.S. at 396.

¹⁴⁹ The exclusions and exceptions in Rules 801 and 803 now number 32. See FED. R. EVID. 801 and 803. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Roberts*, 448 U.S. at 66. This means that if all hearsay exceptions possess circumstantial guarantees of trustworthiness, then *Inadi* applies to all hearsay exceptions. On the other hand, if hearsay exceptions must be evaluated to see if they possess sufficient indicia of trustworthiness to pass constitutional muster, then uncertainty will surely prevail as lower courts, and particularly state courts, attempt to decide which exceptions are reliable enough to satisfy what are only vague constitutional standards; see, e.g., *Inadi*, 475 U.S. at 401 n.1 (Marshall, J., dissenting). The notion that particularized guarantees of trustworthiness can provide sufficient indicia of reliability to satisfy the confrontation clause was reaffirmed in *Lee*, 476 U.S. at 543 (sufficiently interlocking co-defendant confession may be admitted despite lack of opportunity for cross-examination); see also *Earnest*, 477 U.S. 648; cf. J. WIGMORE, *supra* note 22, § 1422, at 253-54 (emerging hearsay exceptions do not reflect uniformity in the degree of trustworthiness the circumstances presuppose). Interestingly, Justice Blackman, who wrote the opinion in *Roberts* and who joined the opinion in *Inadi*, argued in dissent in *Lee* that the case was controlled by *Roberts* and that the co-defendant confession was constitutionally admissible only if the confessor were unavailable and the confession bore a sufficient indicia of reliability. *Lee*, 476 U.S. at 548 (Blackmun, J., dissenting). The only distinction between *Lee* and *Inadi* is that *Inadi* involved a recognized hearsay exception of presumptive reliability while *Lee* involved a co-defendant confession, not presumptively reliable. This, however, allows the constitutional provision to rise and fall on the presumptive quality of evidence, not on the availability of the declarant to submit to cross-examination, a procedure that would prove whether or not the statement was reliable. The Court in *Lee*, however, specifically declined to address the issue of the confessor's availability. *Lee*, 476 U.S. at 539.

stitutionally admissible any statement that falls within a firmly-rooted exception, which according to the court essentially means an "old" exception, the Court has effectively foreclosed from consideration any evidence that a particular statement is untrustworthy by depriving the defendant of the opportunity to cross-examine the declarant.

Because the Court's approach fails to hold true to the full meaning of confrontation, because it disregards the wisdom of the Court's earlier opinions, and because it has the potential of eventually rendering constitutional any hearsay exception of sufficient age to be "firmly rooted," an alternative approach to harmonizing the confrontation clause and the hearsay exceptions is necessary.

III. AN ALTERNATIVE APPROACH

Relying as it does on evidentiary presumptions of reliability rather than on reliability proven, or indeed disproven, through confrontation, the Court's current approach should be abandoned. In its place, the Court should adopt a definition of the confrontation clause that at a minimum requires the production of hearsay declarants when they are available.¹⁵⁰ Such a rule has

¹⁵⁰ This idea is not new. It was suggested by Justice Harlan in his concurring opinion in *California v. Green*, 399 U.S. 149, 174 (1970), though repudiated the next term in his concurring opinion in *Dutton v. Evans*, 400 U.S. 74, 95-96 (1970). This specific issue, as well as that of the relationship between the confrontation clause and the hearsay rule in general has also sparked a great deal of comment by legal scholars. For a representative sample, see the list of authorities collected in *Ohio v. Roberts*, 448 U.S. 56, 66-67 n.9 (1980) and in *Natali*, *supra* note 68, at 47 n.25. See generally *Arenson*, *supra* note 48; *Kirkpatrick*, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 669 n.21 (1986); *Mauet*, *Prior Identifications in Criminal Cases: Hearsay and Confrontation Issues*, 24 ARIZ. L. REV. 29 (1982); *Note*, *The Confrontation Clause and the Hearsay Rule: A Problematic Relationship in Need of a Practical Analysis*, 14 FLA. ST. U.L. REV. 949 (1987); *Note*, *Confrontation and the Unavailable Witness: Searching for a Standard*, 18 VAL. U.L. REV. 193 (1983). The suggested approach, that available hearsay declarants be produced, is meant in no way to impact upon the Court's earlier rulings that where witnesses are unavailable the out-of-court statement must meet a constitutional standard of reliability. In fact, the proposed approach follows directly from that jurisprudence, by elevating to a constitutional rule of preference in cases of no necessity the very measures the Court repeatedly employed in cases where there was necessity. See, e.g., *Roberts*, 448 U.S. at 70; *Green*, 399 U.S. at 165; *Bruton v. United States*, 391 U.S. 123, 136 (1968); *Pointer v. Texas*, 380 U.S. 400, 407 (1965); *Mattox v. United States*, 156 U.S. 237, 244 (1985). *But cf.* *Natali*, *supra* note

several benefits. The change would better reflect the true meaning of the confrontation clause; it would give due respect to precedent; and finally, the change appropriately respects the overarching purpose of the sixth amendment.

A. *The Change Better Reflects the True Meaning of the Confrontation Clause*

The core of the confrontation clause is its grant to defendants of a literal right to "confront" the witnesses against them.¹⁵¹ The framers preferred face-to-face confrontation to ensure: 1) that the witness will give his statement under oath; 2) that the witness will be forced to submit to cross-examination; and 3) that the trier of fact will be permitted to observe the witness' demeanor while testifying.¹⁵² Confrontation can occur, however, only when a witness is available and is produced. Exceptions should only be considered when necessity makes confrontation impossible.

68, at 64 (the ability to cross-examine does nothing to prevent the jury from hearing an unreliable statement in the first instance); J. WIGMORE, *supra* note 22 § 1397, at 158-59. Wigmore argued that because there was no common law right to an indispensable thing called confrontation as distinguished from cross-examination, the right of confrontation is really a right of cross-examination. The right of cross-examination, in turn, is the right to have the hearsay rule enforced. Because the hearsay rule already had several exceptions, *contra* F. HELLER, *supra* note 26, at 22-24, Wigmore's position was that "[t]he rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed or created therein." J. WIGMORE, *supra* note 22, at 158-59. Accordingly, the confrontation clause restricts only the form of proceedings, not their content. For a criticism of Wigmore's position, see Graham, *supra* note 24, at 104 n.24. For the proposition that the tension between the confrontation clause and the hearsay rule should be resolved through a due process analysis instead of a confrontation clause analysis, see *Green*, 399 U.S. at 174 (Harlan, J., concurring); *Pointer*, 380 U.S. at 410 (Stewart, J., concurring). See generally Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1199 (1978-79).

¹⁵¹ *Roberts*, 448 U.S. at 62-63; *Green*, 399 U.S. at 157 (the literal right to confront the witness forms the core of the values of the confrontation clause).

¹⁵² *Green*, 399 U.S. at 158. The benefit of an oath impresses the witness with the seriousness of the process and guards against falsehoods by the penalty for perjury. The benefit of cross-examination lies in the court's acceptance of its role as the "greatest legal engine ever invented for the discovery of truth." *Id.* (quoting J. WIGMORE, *supra* note 22, § 1367, at 32). And the benefit of allowing the jury to observe the witness' demeanor lies in assisting the factfinder in the evaluation of the witness' credibility. *Green*, 399 U.S. at 158. But *cf.* Stewart, *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 8-22 (1970) (demeanor evidence may in fact lead astray the finder of fact).

The pre-eminence of confrontation over alternative indicia of reliability is obvious yet elusive. Admittedly, the goal of confrontation is reliability. Equally clear is the fact that the right of cross-examination furthers confrontation clause values because of its ability to test reliability.¹⁵³ Although the history surrounding the adoption of the confrontation clause is sparse, a strong argument exists that the framers wanted face-to-face confrontation *because* it promoted reliability, not merely as an incidental measure of reliability. Courts and scholars agree that

[t]he primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.¹⁵⁴

This description acknowledges that confrontation is more than simply cross-examination. Yet, because cross-examination is such an effective way to test reliability¹⁵⁵ and because many of the

¹⁵³ "No one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer*, 380 U.S. at 404; *see also* *Pennsylvania v. Ritchie*, 480 U.S. —, 107 S. Ct. 989 (1987); *Roberts*, 448 U.S. at 63; *Green*, 399 U.S. at 157-58; *Bruton*, 391 U.S. at 126; *Barber v. Page*, 390 U.S. 719, 725 (1968).

¹⁵⁴ *Mattox*, 156 U.S. at 242, *cited with approval in Barber*, 390 U.S. at 721; *Arenson*, *supra* note 48, at 16 n.5; *Baker*, *supra* note 47, at 541.

¹⁵⁵ "[C]onfrontation and cross-examination of the declarant in open court are the most trusted guarantors of the reliability that is the primary concern of the Confrontation Clause." *United States v. Inadi*, 475 U.S. 387, 403 (1986) (Marshall, J., dissenting). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer*, 380 U.S. at 405. Cross-examination is "one of the safeguards essential to a fair trial." *Alford v. United States*, 282 U.S. 687, 692 (1931). "A lawyer can do anything with a cross-examination—if he is skillful enough not to impale his own cause upon it." J. WIGMORE, *supra* note 22, § 1367, at 32. The importance of cross-examination is also underscored by the Court's recognition that even pre-trial events can impermissibly restrict cross-examination at trial. *See, e.g., Wade v. United States*, 388 U.S. 218, 227 (1967) (sixth amendment right to counsel applicable to

early cases involved prior testimony which by definition includes cross-examination, the Court's perception of cross-examination as coextensive with confrontation is easy to understand.¹⁵⁶ Eventually, however, and for good reason, the Court reconsidered this perception. Cross-examination was not, after all, the chosen language of the framers. Moreover, the admissibility of dying declarations remained inconsistent with a constitutional right of cross-examination. And, a general constitutional right of cross-examination would have rendered unconstitutional many of the traditional exceptions to the hearsay rule.

Constitutional distress flowed from the changes wrought by the Court's reconsideration of the role of cross-examination. The Court's reconsideration did not distinguish between the role, and hence value, of cross-examination at trial and its role and value when done at the time of the making of the statement. Nor did the Court distinguish between the role and value of cross-examination where confrontation was possible and its role and value where confrontation was not possible.

In *New Mexico v. Earnest*¹⁵⁷ the Court ruled that cross-examination is not constitutionally required in all cases. That case involved a declarant specifically found unavailable by the court because of the declarant's refusal to testify based on the fifth amendment.¹⁵⁸ The Court's recognition that cross-examination is not required in that circumstance represented a return to the *Roberts* rule of necessity. Where the declarant is not available, necessity may permit the admission of hearsay so long as there is some manner for the defendant to evaluate the adverse evidence.¹⁵⁹ As for years had been the case with dying declarations, that evaluation may be satisfied by the circumstances surrounding the

pretrial lineup procedure in order to give meaning to the confrontation clause right of cross-examination at trial); *see also* *Davis v. Alaska*, 415 U.S. 308 (1974) (statute restricting access to prosecution witness' juvenile criminal record effectively denied defendant the opportunity for cross-examination guaranteed by the sixth amendment).

¹⁵⁶ *See, e.g., Green*, 399 U.S. at 172 (Harlan, J., concurring); *see also Bruton*, 391 U.S. at 126; *Douglas v. Alabama*, 380 U.S. 415, 419 (1965); *Natali, supra* note 68, at 50.

¹⁵⁷ 477 U.S. 648 (1986) (per curiam), *on remand*, 744 P.2d 539 (N.M. 1987), *cert. denied*, 108 S. Ct. 284 (1987).

¹⁵⁸ *State v. Earnest*, 703 P.2d 872, 875 (N.M. 1985), *cert. granted*, 474 U.S. 918 (1985).

¹⁵⁹ *Roberts*, 448 U.S. at 65.

making of the statement, providing "indicia of," or presumptive, reliability.

Where, however, the declarant is available, making trial confrontation and cross-examination possible, the value of cross-examination is greater. Gone is the necessity of determining alternative means to evaluate adverse evidence. By the simple expedient of requiring possible confrontation to be actual confrontation, the original purpose of both the confrontation clause and its progeny, the rule of necessity, can be achieved. The Court's decisions, however, appear oblivious to the distinction between cross-examination as a suitable but not exclusive gauge of reliability in cases of unavailability and cross-examination as an integral part of confrontation in cases where availability of the witness makes confrontation possible. Accordingly, once the Court devalued cross-examination in cases of unavailability, the step to a similar devaluation in cases of availability was inevitable.

In truth, however, presumptively reliable hearsay can never duplicate the trier of fact's response to an individual witness' demeanor. It cannot accommodate the infinite circumstances surrounding the making of any particular statement.¹⁶⁰ Nor can it ever hope to substitute for the motivation and possible ammunition of a defendant in cross-examining a witness as to the veracity of that witness' assertions.¹⁶¹ For this reason a rule requiring the

¹⁶⁰ J. WIGMORE, *supra* note 22, § 1368, at 37 (The first utility of cross-examination is the extraction of circumstances surrounding the making of the statement which are known to the witness but were not disclosed on direct examination); *accord Green*, 399 U.S. at 201-02 (Brennan, J., dissenting) (the reliability of a statement can be influenced by the circumstances surrounding its making as well as by subsequent events). For example, suppose that just as in *Inadi* the prosecution had a tape recording of a conversation between alleged robbery co-conspirators. Suppose further, that unlike *Inadi*, one of the co-conspirators was heard to say, "Why don't you take a car?" The fact that that statement was not an order to a co-conspirator to steal a car, but rather was directed to some unheard third person setting out to walk somewhere, could never be demonstrated by listening to the tape alone. Nor is Rule 806, which permits a hearsay declarant to be examined as an adverse witness, a satisfactory response. See *supra* note 135.

¹⁶¹ Cross-examination not only casts doubt on whether the statement was made, *Douglas*, 380 U.S. at 420, and, if made, what was meant by the statement under the circumstances, but can also reveal bias, motive, and other inclination to falsify.

Conspirators' declarations are good to prove that some conspiracy exists but less trustworthy to show its aims and membership. The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it

production of available witnesses would better reflect the true meaning of the confrontation clause.

B. *The Change Better Respects the Court's Precedent*

Despite the fact that the years have witnessed the Court struggle to define the constitutional significance of cross-examination, the Court's emphasis on cross-examination has been misplaced. From *Mattox* to *Roberts*, the Court repeated the fact that the confrontation clause reflects a preference for face-to-face confrontation. As such, confrontation is greater than cross-examination. Confrontation affords the sole opportunity not just for the witness to testify under oath, not just to require the witness to submit to cross-examination, but perhaps most importantly, to permit the finder of fact to determine, by looking into the face of the accuser, whether that person is, ultimately, worthy of belief. The Court's current approach severely restricts that preference. A rule requiring the production of available witnesses, requiring only a return to *Roberts*, would more meaningfully defer to the Court's own precedent.

EPILOGUE: THE CHANGE RESPECTS THE OVERARCHING PURPOSE OF THE SIXTH AMENDMENT

Thus far, this Article has argued that a rule conditioning hearsay on the production of available witnesses would give better meaning to the confrontation clause. Distinct yet additional justification exists in the recognition that such a rule would advance the goals of the sixth amendment as a whole. In other areas of criminal jurisprudence, either explicitly or implicitly, the Supreme Court has identified values that compel a result in a particular case even though the chosen values may not promote reliability. In defense of these values, a factually accurate result is often

has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law.

Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1165-66 (1954), *quoted in Inadi*, 475 U.S. at 404-05 (Marshall, J., dissenting).

sacrificed.¹⁶² Just as the Court has respected the values encompassed by other constitutional provisions, so too should it respect the purpose of the sixth amendment. A rule requiring the production of available witnesses, with its added benefit of promoting instead of defeating reliability, would ensure this respect.

A. *The Court's Approach in Other Areas*

Decisions regarding unconstitutional searches and seizures are prime examples of situations where the Court discounted reliability in favor of an approach designed to vindicate other values. In the landmark decision of *Mapp v. Ohio*,¹⁶³ the Court ruled that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."¹⁶⁴ By ex-

¹⁶² For purposes of this article, a factually accurate result is one that flows from the facts, as, for example, when a person who committed a crime is convicted of that crime.

For a discussion of these terms and "process values" in general, see generally Summers, *Evaluating and Improving Legal Processes—A Plea For "Process Values,"* 60 CORNELL L. REV. 1, 27-29 (1974).

¹⁶³ 367 U.S. 643 (1961).

¹⁶⁴ *Id.* at 655. In *Weeks v. United States*, 232 U.S. 383 (1914), the Court held that in a *federal* prosecution the fourth amendment barred the use of evidence secured through an illegal search and seizure. *Id.* at 392. Thirty-five years later the Court was confronted with the question of whether illegally obtained evidence was inadmissible in a state trial as well. There, in *Wolf v. People of Colorado*, 338 U.S. 25 (1949), the Court refused to extend the exclusionary rule to a state court. It held that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." *Id.* at 33. Accordingly, the Court would not apply the exclusionary rule to the states. Since "most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, . . . [the Court] . . . hesitate[d] to treat this remedy as an essential ingredient of the right . . .," leaving the states to develop their own remedy. *Id.* at 29. Noting one fault of the exclusionary rule, and adding ammunition to the argument of those justices who would later advocate eradicating the rule almost entirely, the Court stated, that "[i]ndeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found." *Id.* at 30-31. The Court thus hinted at the rule's cost to reliability, since, as was later argued, physical evidence is typically reliable. *Stone v. Powell*, 428 U.S. 465, 497 (1976) (Burger, J., dissenting). The exclusion of such reliable evidence not only obviously detracts from reliability, but forces a seemingly erroneous result, acquittal. The exclusionary rule, therefore, must exist for reasons other than reliability, and, indeed, in *Mapp v. Ohio*, the rationale crystallizes.

Mapp explicitly overruled *Wolf*. In *Mapp*, the defendant was convicted of knowingly having in her possession obscene material. Relying on a tip, the police went to defendant's house to question her concerning a suspect wanted for questioning concerning a recent

tending the exclusionary rule¹⁶⁵ to the states, *Mapp* emphasized the importance of individuals' rights to privacy.¹⁶⁶ The practical effect of the exclusion doctrine on results makes apparent the importance of the values behind it: convictions are sacrificed¹⁶⁷ in the interests of individual security and deterrence of future abuses. Notwithstanding the Court's recent retreat in this area,¹⁶⁸ the

bombing. When the police demanded entry, on advice of counsel the defendant refused, unless a warrant was produced. Using force, the police gained entry to the house, handcuffed Ms. Mapp and searched all floors, eventually finding the obscene material. *Mapp*, 367 U.S. at 643-46. Overruling *Wolf*, the Supreme Court held that the evidence obtained through an unreasonable search and seizure was inadmissible, stating that "all evidence obtained by searches and seizures in violation of the Constitution is, . . . inadmissible in a state court." *Mapp*, 367 U.S. at 655.

¹⁶⁵ The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV. The exclusionary rule, which makes evidence obtained in violation of the amendment inadmissible against a defendant in court, is a judicially-created remedy for violation of the amendment. See *Mapp*, 367 U.S. at 648-56; *Weeks*, 232 U.S. 383.

¹⁶⁶ "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . ." *Mapp*, 367 U.S. at 646-47 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). The Court elaborated by stating that freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." *Id.* at 657. The Court reasoned that if the police knew that evidence obtained in violation of the fourth amendment was inadmissible, they would desist from its violation, and the Court concluded that the purpose of the rule was deterrence. *Id.* at 656. Deterrence is, therefore, a purpose of the rule; it is not a value in itself. Maintaining judicial integrity, ostensibly a value (like privacy), though initially a purpose of the rule, is no longer thought to justify the rule.

¹⁶⁷ In the Court's words, it is a sacrifice of a "shortcut to conviction." *Id.* at 660. "Shortcut" obviously refers to the ease with which evidence can be obtained when gathered in violation of the fourth amendment to convict an individual, as opposed to the difficulty that would be encountered by obtaining a search warrant from a judge.

¹⁶⁸ Admittedly, the rule has been narrowed over the years. See, e.g., *Linkletter v. Walker*, 381 U.S. 618 (1965) (denying retroactive effect); *Alderman v. United States*, 394 U.S. 165 (1969) (limiting standing to those whose rights were violated by the search itself not those who are aggrieved by the introduction of damaging evidence); *United States v. Calandra*, 414 U.S. 338 (1974) (precluding refusal to answer questions of grand jury on ground that evidence was obtained illegally); *United States v. Janis*, 428 U.S. 433 (1976) (exclusionary rule is not extended to exclude from civil tax proceeding evidence obtained illegally by a criminal law enforcement agent); *United States v. Leon*, 468 U.S. 897 (1984) (creating a good faith exception to the applicability of the rule).

exclusionary rule decisions confirm that the values underlying the rule remain more important than convicting even the factually guilty.

Similarly, cases involving involuntary confessions represent instances where the Court has been willing to sacrifice factually-based results for the sake of an important value, in this situation represented as "due process fairness."¹⁶⁹ Although coerced confessions are distrusted on the theory that coercion renders the resulting confession inherently untrustworthy,¹⁷⁰

[t]he abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.¹⁷¹

Thus, despite the recognition that coerced confessions frequently lack trustworthiness, it is apparent that the constitutional prohibition against their use seeks also to fulfill a "complex of values."¹⁷²

¹⁶⁹ See, e.g., *Rochin v. California*, 342 U.S. 165, 173 (1952) ("Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'").

¹⁷⁰ *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).

¹⁷¹ *Spano v. New York*, 360 U.S. 315, 320-21 (1959). In fact, an essential factor in overruling an earlier case, *Stein v. New York*, 346 U.S. 156 (1953), was its sole reliance on the lack of reliability as a basis for excluding involuntary confessions. See *Jackson v. Denno*, 378 U.S. 368, 384-87 (1964). As the Court stated in *Blackburn*, "[T]here are considerations which transcend the question of guilt or innocence . . . [I]mportant human values are sacrificed . . . where an agency . . . wrings a confession out of the accused against his will." *Blackburn*, 361 U.S. at 206.

¹⁷² *Blackburn*, 361 U.S. at 207. Determining that the New York procedure which allowed the jury to determine both voluntariness of a confession and guilt did not adequately protect the defendant's right to be free from conviction based upon a coerced confession, the Court, in *Jackson*, 378 U.S. 368, re-emphasized important values. Interestingly, the jury which decides guilt is prohibited from determining voluntariness because of the risk that it will find the defendant guilty because it believes that the confession was truthful even though involuntary due to the "infection of impermissible considerations." *Id.* at 392-94. Thus, the Court was explicitly willing to sacrifice truthfulness and reliability—results—for the sake of a "complex of values" threatened by the use of a coerced confession. In fact, Madison himself said that part of the overall purpose of the Bill of

In effectuating the right to a speedy trial,¹⁷³ the Court has identified the values in that constitutional provision and has been willing to sacrifice factually-based results to serve those values. According to the Court, the speedy trial guarantee "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of the accused to defend himself."¹⁷⁴ In view of this, the Court has acknowledged that where the guarantee has been violated, dismissal of the case is required even though it means that a defendant who may be guilty of a serious crime will go free without ever having had a trial.¹⁷⁵

B. *The Values of the Sixth Amendment*

Where the Court has identified values inherent in certain constitutional provisions, it has defended those values even despite some cost. As is true of specific constitutional provisions, the sixth amendment as a whole has a value. That value is balance.¹⁷⁶

In providing rights to criminal defendants, the framers prescribed the process to be followed before government could deprive a citizen of that person's liberty. That process was not defined descriptively. Rather, the sixth amendment recites a list of specific rights belonging to criminal defendants.¹⁷⁷ As such, the

Rights was to offer "tranquility of the public mind." R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 202 (1955). For the proposition that the confrontation clause serves a similar "complex of values," see *Lee v. Illinois*, 476 U.S. 530, 539 (1986).

¹⁷³ U.S. CONST. amend. VI. See *infra* note 177 for the text of the sixth amendment.

¹⁷⁴ *United States v. Ewell*, 383 U.S. 116, 120 (1966).

¹⁷⁵ *Barker v. Wingo*, 407 U.S. 514, 522 (1972). "Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the *only possible remedy*." *Id.* at 522 (emphasis added).

¹⁷⁶ "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

¹⁷⁷ In its entirety, the sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have com-

amendment symbolizes a shield between the accuser and the accused. And as a shield, the amendment represents a considered balance, the disturbance of which undermines the aim of the amendment.

In contemplating the meaning of the confrontation clause, the Court should be as conscientious about guarding the sixth amendment's goal of balance as it has been about preserving the values underlying other constitutional provisions. The right of confrontation is an explicit part of the sixth amendment equation. Effectuating that provision should both reflect and respect that equation. Instead, the Court has recently ruled that admitting hearsay evidence of merely presumptive reliability offends neither the confrontation clause nor the amendment as a whole. Taken literally, this excuses confrontation where it would otherwise be possible, effectively consigning a defendant's right to be confronted with adverse witnesses to a privilege dependent upon prosecutorial beneficence.

Permitting hearsay of an available but not produced declarant prevents the defendant from testing the reliability of that evidence. This, in turn, allows the prosecution to admit and represent as reliable evidence only presumed reliable. Freedom to rely on evidence of presumed reliability is easier for the prosecution than would be either keeping track of hearsay declarants or risking proof that the declarant's hearsay statement was not, in fact, reliable. This makes the prosecutor's job easier. By creating what is a clear evidentiary advantage for the prosecution, the Court has realigned the respective positions of the parties. The result is that the equipoise of the sixth amendment is disturbed, inappropriately and intolerably.

CONCLUSION

Participating in the building of the form and process that would become America, our forebears chose to give an accused the right to be confronted with the witnesses against him. In contrast to other rights that created a more revolutionary change

pulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].

U.S. CONST. amend. VI.

on the relationship between the people and their government, the confrontation clause was the focus of little debate and even less attention. As a result, its true meaning continues to be refined.

The Court has recently decided that a defendant's right to confront adverse witnesses does not require the production of available witnesses nor that the witness' out-of-court statement be required to be any more reliable than within the bounds of a "firmly-rooted" evidentiary hearsay exception. This Article has suggested that though inevitable, and perhaps even understandable, the Court's recent decisions in this area have not been wise. They have not been true to the Court's precedent. They have not fulfilled the preference of the framers. And the decisions can be easily extended to virtually all of the hearsay exceptions given a sufficient passage of time.¹⁷⁸

In contrast, this Article has offered an explanation of how the Court has come to its recent position as a means of defending a return to its earlier jurisprudence. *Ohio v. Roberts*¹⁷⁹ stands as the Court's own confrontation clause stop sign. Unlike the speeding motorist, the Court can undo its transgression. A rule requiring the production of available witnesses would represent a return to and respect for the law. It would give better meaning to the sixth amendment, would better serve the preferences of the framers, and would restore equipoise to the sixth amendment. It should be adopted.

¹⁷⁸ See *supra* note 149.

¹⁷⁹ 448 U.S. 56 (1980).

