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The Dignity of Face-to-Face Confrontations

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THE DIGNITY VALUE OF FACE-TO-FACE CONFRONTATIONS

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I. INTRODUCTION

The sixth amendment assures several protections of the criminal defendant, including the right of an accused "to be confronted with the witnesses against him."[1] This language is simple, yet its purpose and application remain obscure. This article discusses the Supreme Court's theory of the confrontation clause, critiques that theory, and suggests an alternative.

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1. U.S. CONST. amend. VI.

In most of its recent decisions,[2] as in its earlier cases,[3] the Court has interpreted the accused's right to confrontation as primarily a guarantee of the opportunity to cross-examine adverse witnesses.[4] The Court views cross-examination as a vehicle for uncovering falsehoods and for testing witness credibility. Consequently, it has identified "evidence reliability" as the central value of the confrontation clause.[5]

Extending this rationale, the Court has approved exceptions to the confrontation requirement whenever out-of-court, nonconfronted

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2. *See, e.g.*, Bourjaily v. United States, 107 S. Ct. 2775 (1987); Kentucky v. Stincer, 107 S. Ct. 2658 (1987); Cruz v. New York, 107 S. Ct. 1714 (1987); Richardson v. Marsh, 107 S. Ct. 1702 (1987); Lee v. Illinois, 476 U.S. 530 (1986); Delaware v. Van Arsdall, 475 U.S. 673 (1986); United States v. Inadi, 475 U.S. 387 (1986); *see also* Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988) (critiquing the Court's post-*Roberts* cases for misinterpreting the mission of the confrontation clause as reliability, rather than as a guarantee of an adversarial criminal proceeding).

3. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56 (1980); Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

Several commentators have canvassed and critiqued these earlier Supreme Court confrontation clause cases and have devised their own compatible, or alternative, theories about the clause and its proper application. *See, e.g.*, Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972) [hereinafter *Sir Walter Raleigh*]; Graham, *The Confrontation Clause, The Hearsay Rule and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978) [hereinafter *Forgetful Witness*]; Kirkpatrick, *Confrontation and Hearsay: Exemptions From the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665 (1986); Read, *The New Confrontation — Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 525 (1978) [hereinafter *Unified Theory*]; Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979) [hereinafter *Future of Confrontation*]; Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 31, 32 (1973); Note, *Reconciling the Conflict Between the Co-conspirator Exemption From the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1291, 1294 (1985); Comment, *Preserving the Right to Confrontation — A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965).

4. *See infra* text accompanying notes 69-70.

5. *See infra* text accompanying notes 39-43. Not all commentators agree with the Court's view. *See, e.g., Forgetful Witness, supra* note 3, at 192 (advocating a rule that only excludes hearsay when the witness is available and the prior statement was accusatory when made); *Future of Confrontation, supra* note 3, at 599-600 (eschewing reliance on "reliability" in favor of a requirement that the prosecution make a good faith effort to produce a witness, unless the out-of-court statement is such that the defendant reasonably could not be expected to wish to examine the witness in person); Comment, *Confrontation, Cross Examination, and the Right to Prepare a Defense*, 56 GEO. L.J. 939, 940 (1968) (noting that the right incorporates an element of fairness independent of reliability concerns).

evidence is sufficiently "trustworthy."[6] The justices often disagree about what kind of evidence meets their reliability standard, but until 1988 the current justices seemed to concur that evidence reliability is the touchstone to modern confrontation clause analysis. The Court has applied this standard to afford narrow confrontation clause protection for criminal defendants, which serves — not accidentally — the interests of prosecutorial efficiency and state autonomy.

The problem with this interpretation of the confrontation guarantee became apparent when the Court's theory began to be applied to modern, nontraditional uses of out-of-court testimony against a criminal defendant, such as the use of closed-circuit television testimony, or testimony given behind screens or one-way mirrors by child victims of sexual assault.[7] Under the reliability theory, neither closed-circuit testimony nor screened witness testimony offends the sixth amendment, because this testimony satisfies the Court's standards for reliability. Yet many people, including some members of the Court,[8] sense that these devices may compromise the criminal defendant's right to confront his or her accusers,[9] despite any reliability of this testimony and despite the strong societal interest in protecting children and prosecuting child molesters.

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6. *See infra* text accompanying notes 42-43.

7. *See, e.g.*, CAL. PENAL CODE § 1347 (West Supp. 1987); FLA. STAT. § 92.54 (Supp. 1987); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1986); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1988); LA. REV. STAT. ANN. § 15:283 (West Supp. 1987); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1985); N.J. STAT. ANN. 2A:84A-32.4 (West Supp. 1986); OKLA. STAT. tit. 22 § 753 (Supp. 1986); TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1986); *see also* Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984); Herbert v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981); Coy v. Iowa, 397 N.W.2d 730 (Iowa 1987), *reversed*, 108 S. Ct. 2798 (1988); Craig v. Maryland, 76 Md. App. 250, 544 A.2d 784 (1988); Wildermuth v. Maryland, 310 Md. 496, 530 A.2d 275 (1987); State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (Law Div. 1984); Pennsylvania v. Ludwig, 366 Pa. Super. 361, 531 A.2d 459 (1987); State v. Tafoya, 105 N.M. 117, 729 P.2d 1371 (Ct. App.), *cert. denied*, Tafoya v. State, 105 N.M. 94, 728 P.2d 845 (N.M. 1986), *vacated*, Tafoya v. New Mexico, 108 S. Ct. 2890, *on remand*, State v. Tafoya, No. 9004 (N.M. App. Sept. 22, 1988) (WESTLAW, NM-CS database), *cert. denied*, No. 18,034 (N.M. Nov. 18, 1988) (WESTLAW, IC database); Berryhill v. Texas, 56 U.S.L.W. 3079 (Tex. Ct. App. 3d Dist. 10-9-85), *cert. denied*, 108 S. Ct. 1012 (1988); *see generally* Cares, *Videotaped Testimony of Child Victims*, 65 MICH. B.J. 46 (1986); Note, *The Use of Closed-Circuit Television Testimony in Child Sexual Abuse Cases: A Twentieth Solution to a Twentieth Century Problem*, 23 SAN DIEGO L. REV. 919 (1986); Note, *Closed-Circuit Television Testimony for the Sexually Abused Child: The Right to Avoid Confrontation?*, 27 SANTA CLARA L. REV. 117 (1987); Comment, *Television Trials and Fundamental Fairness: The Constitutionality of Louisiana's Child Shield Law*, 61 TUL. L. REV. 141 (1986).

8. *See* Coy v. Iowa, 108 S. Ct. 2798 (1988).

9. *See infra* text accompanying notes 167-70.

The Court's reliability theory also jars some persons' sense of fairness when it is applied to traditional uses of hearsay testimony. For example, the government can introduce an incriminating out-of-court statement of a defendant's alleged co-conspirator without producing that accuser in court.[10] However, the government's failure to produce the co-conspirator, or at least to account for his or her absence, may cause people to question prosecutorial integrity and to doubt whether the defendant has been given a fair hearing.

In this article, I propose a theory of the confrontation guarantee that corresponds with common notions of fairness to the accused. The first section reviews the history and language of the confrontation clause, from which a preliminary definition of the guarantee is extracted.[11] The next section analyzes the Supreme Court's recent confrontation clause decisions. The discussion shows that the Court's past statement that reliability is the central value of confrontation has led the Court to ask the wrong questions, and, on occasion, to give the wrong answers in its confrontation clause decisions. Missing from the reliability calculus is a consideration of the value of face-to-face confrontation beyond assuring evidence reliability. As the Court's most recent confrontation clause decision shows,[12] even reliable out-of-court testimony against the accused may offend the Constitution. The right of confrontation also promotes an intrinsic, nonfunctional interest: to preserve the dignity of the criminal defendant.[13]

Borrowing from related writings about the due process clause,[14] I propose a theory of the confrontation clause that rests on principles of human dignity. This approach to the confrontation guarantee should provide a theoretical basis for the confrontation clause that accounts for both the instrumental and intrinsic values of a face-to-face encounter. Its application would not hamstring evidence law reform efforts, or unreasonably restrict prosecutorial efforts to enforce the criminal code. But the dignity theory neither begins with these concerns nor is premised on deference to these policy interests.

Finally, I apply the dignity theory to common confrontation clause problems.[15] This discussion shows that the dignity theory provides

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10. *See, e.g.*, Bourjaily v. United States, 107 S. Ct. 2775 (1987); United States v. Inadi, 475 U.S. 387 (1986).

11. *See infra* text accompanying notes 16-36.

12. *See infra* text accompanying notes 109-19.

13. *See infra* text accompanying notes 125-51.

14. *See infra* note 126.

15. *See infra* text accompanying notes 152-70.

both more and less constitutional protection for criminal defendants than the reliability theory affords. The application of the theory should conform to our intuition about proper, or fair, criminal prosecutions.

II. INTENT OF THE FRAMERS

A beginning point in analysis of a constitutional provision is its history. To the extent that the framers' intent is clear, it is the framework for modern constitutional issues. Although the history of the confrontation guarantee is sparse and ambiguous,[16] it does offer preliminary insight into the intended scope and application of the clause.

Apparently, the confrontation clause was included without debate along with the other rights guaranteed by the sixth amendment.[17] Some historians believe that abuses during the English trial of Sir Walter Raleigh were the genesis of the sixth amendment confrontation right.[18] Other writers cite older sources, including scripture[19] and Shakespeare,[20] as evidence that confrontation was perceived to be one element of a fair hearing long before Sir Raleigh's trial.[21] Most writers conclude that a main purpose of the confrontation guarantee was to give the accused an opportunity to test a witness's credibility and

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16. *See Sir Walter Raleigh*, *supra* note 3, at 103-04; Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959); Read, *supra* note 3, at 4-6.

17. *See* California v. Green, 399 U.S. 149, 176 (1970) (Harlan, J., concurring). On the basis of his reading of history, Justice Harlan concludes as follows: "If anything, the confrontation guarantee may be thought, along with the right to compulsory process, merely to constitutionalize the right to a defense as we know it." *Id.*

18. *See, e.g.*, F. HELLER, THE SIXTH AMENDMENT 104 (1951).

19. *Acts* 25:14-16.

20. W. SHAKESPEARE, RICHARD II, Act I, Scene 1. *See* Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988).

21. *See, e.g.*, Pollitt, *supra* note 16, at 384. Pollitt notes that the right of confrontation is based on an enduring assumption that confrontation is the best way to determine the truth. He observes:

> The right to confrontation comes to the fore when the protection of individual liberty is thought to clash with the demands of national security. However, this problem is not peculiar to the mid-twentieth century. The problem existed over 2,000 years ago when the Roman Emperor Trajan advised his Governor that "anonymous accusations must not be admitted in evidence" against "a new sect known as Christian." The problem existed in seventeenth-century England and resolved in favor of the religious-political heretic. The problem existed in eighteenth-century America, and those who founded our nation wrote the right to confrontation into the Bill of Rights of our Constitution.

Id. at 413.

accuracy through cross-examination.[22] The particular evil the clause is thought to protect against is "trial by affidavit,"[23] that is, trial by hearsay.

One commentator has observed that the notion that an accused should be entitled to confront his or her accusers was widely recognized in the American colonies during the early eighteenth century.[24] Nevertheless, the colonists believed it was necessary to expressly name this right in the Constitution because of their experiences with procedures in English trade and navigation cases during the 1700s. These trials often were held in England without a jury, were instituted by secret informants, and permitted adverse evidence to be presented by deposition or in private meetings with the judge.[25]

This scant history of the confrontation clause shows that the clause is satisfied by face-to-face confrontation between the accuser and defendant, testimony under oath, and an opportunity for cross-examination. However, the interpretation dilemma lies not in deciding whether these conditions satisfy the sixth amendment, but whether departures from them are constitutional, and if so, under what circumstances. That is, can hearsay accusations ever be introduced in a criminal trial?

History suggests that the colonists condoned the admission of some accusations against a defendant without confrontation. Under common

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22. *See supra* note 3. Wigmore perceived the hearsay rule and the confrontation guarantee as coextensive, because they both protect the value of cross-examination. 5 J. WIGMORE, EVIDENCE § 1397, at 158-62 (Chadbourn rev. ed. 1974). Thus, under his view, the confrontation clause merely constitutionalizes the hearsay rule and its exceptions, as they may evolve.

Morgan viewed the right to cross-examination as an "essential element of an adversary system," and linked the development of the hearsay rule and its exceptions to the development of the adversary process. Morgan, *The Jury and the Exclusion Rules of Evidence*, 4 U. CHI. L. REV. 247, 255 (1936-37). He observed that this adversary theory often is ignored in discussions about why certain exceptions to the hearsay rule exist, in favor of arguments that a circumstance offers other indicia of trustworthiness. *Id.* at 256. Morgan argues that this often "means nothing more than that an ordinary man in the situation of the declarant would have desired to tell the truth, and, sometimes, merely that he would have had no motive to falsify." *Id.* He adds that other exceptions are not based on "trustworthiness" at all, but on necessity, because "hearsay is better than no evidence." *Id.*; *see also* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 181-82 (1948); *accord* Jonakait, *supra* note 2.

Morgan's discussion of theories about the hearsay rule and its exceptions could easily be a discussion of current theories about the confrontation clause. His observations are especially pertinent to the Court's recent decision affording constitutional status to the "firmly-rooted" hearsay exceptions. *See infra* text accompanying notes 54-67.

23. *See, e.g.*, California v. Green, 399 U.S. 149, 156-57 (1970); Mattox v. United States, 156 U.S. 237, 242-43 (1895).

24. Pollitt, *supra* note 16, at 395.

25. *Id.* at 397-400.

law, certain hearsay, such as the dying declaration, was admissible against an accused.[26] This long-standing practice, which the Supreme Court has deemed constitutional,[27] suggests that the right to confrontation is qualified by the availability of the hearsay declarant for in-court testimony.[28]

Noting that exceptions to the rule against hearsay existed at common law, the Court has concluded that "firmly-rooted" exceptions to the hearsay rule do *not* offend the confrontation clause.[29] Presumably, these "firmly-rooted" exceptions at least include the exceptions that existed at common law before 1787. Thus, history remains a useful guide to the current Court's analysis of some confrontation clause problems. Less clear is whether newer exceptions to state and federal hearsay rules can be added to the original common law list without offending the sixth amendment. The incantations that confrontation was meant to "assure cross-examination" or to "prevent trial by affidavit" do little to resolve whether, for example, the prosecution today should be permitted to offer videotaped testimony of a child victim of sexual assault.[30] To answer these emerging questions about modern confrontation clause dilemmas requires more than a glance at the available history.

III. THE "PLAIN MEANING" OF THE CLAUSE

A second guide to sixth amendment interpretation is the specific wording of the provision and its surrounding text. The general language of the confrontation clause, like its history, affords only limited

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26. *Mattox*, 156 U.S. at 237.

27. *Id.*

28. *See Green*, 399 U.S. at 178 (Harlan, J., concurring); *see also*, Read, *supra* note 3, at 5. Sir William Holdsworth states that after 1640 the nature of criminal proceedings in England became more humane. 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 229-31 (1938). One of the features of this "humaner practice" was that "'the accused person had the witnesses against him produced face to face, *unless there was some special reason (such as sickness)* to justify the reading of their depositions . . . . The prisoner also was allowed, not only to cross-examine the witnesses against him if he thought fit, but also to call witnesses of his own.'" *Id.* at 230 (emphasis added) (quoting H. STEPHEN, HISTORY OF THE COMMON LAW 358 (1824)). Holdsworth further notes that "as the objections to hearsay gathered weight [throughout the sixteenth and early seventeenth centuries], it began to be thought that these depositions [which contained the main part of the prosecution's case] ought *only to be read if the witness could not be produced* — Raleigh was prepared to admit the legality of reading Cobham's deposition if he could 'not be had conveniently.'" *Id.* at 218 (emphasis added).

29. Bourjaily v. United States, 107 S. Ct. 2775 (1987); Ohio v. Roberts, 448 U.S. 56, 66 (1980).

30. *See infra* text accompanying notes 125-29.

insight into how the clause should be applied in particular circumstances. Again, however, it does assist in defining the scope of this guarantee.

The entire sixth amendment reads as follows:

> 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 compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[31]

This context reveals that confrontation of adverse witnesses is a companion right to trial by jury, notice of the accusation, compulsion of appearance by witnesses on one's behalf, legal counsel, and a speedy and public disposition. By itself, the confrontation clause does not guarantee any of these other rights. Taken together, the sixth amendment bundle of rights, along with the protections of the fifth amendment, assures the accused the right to present "a defense as we know it."[32]

The text of the confrontation clause places certain limits on its application. The phrase "to be confronted with *witnesses* against him" shows that the clause applies only to testimony by witnesses — that is, *people* — and not to all forms of evidence offered against an accused. Inclusion of the word "witnesses" implies that the confrontation clause is *not* a sweeping constitutional mandate that applies to all evidence against the criminal defendant. For example, the state may use forensic techniques that are unreliable and unfairly incriminating. Reliance on this evidence would be improper and possibly unconstitutional, but the relevant constitutional text for the accused to invoke would not be the confrontation clause.

The phrase "witnesses *against him*" arguably suggests that the clause was intended to cover only focused accusations against the

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31. U.S. CONST. amend. VI (emphasis added).

32. *See Green*, 399 U.S. at 176 (Harlan, J., concurring). Another summary of the sixth amendment also describes well its overall impact: "The Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process, rather than the *ex parte* investigation and determination by the prosecutor." Nix v. Williams, 467 U.S. 431, 453 (1984) (Stevens, J., concurring).

accused, and not all statements relevant to a crime. Only witnesses who speak *against the accused* must confront the defendant. In other words, only witnesses who make statements that are directed against the defendant and that accuse him or her of wrongdoing must confront the defendant.[33] For example, if a liquor store is robbed and a neighbor states two days later that she saw a bearded man rush out of the store, she probably is not the type of witness against the accused to which the confrontation clause refers. Her out-of-court statements may be excluded under the state's applicable hearsay rules, and her presence at trial might enable the defendant to show that she was mistaken or lying or should not be believed for other reasons. But this out-of-court statement is not the sort of focused accusation against the accused that the confrontation clause probably was intended to address. Thus, the confrontation clause is not a bar against the use of all hearsay in a criminal trial.[34]

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33. Several commentators have interpreted the phrase "witnesses against him" to mean something less than anyone who offers some information that is used against the defendant. Professor Westen defines a witness against an accused as "any person who is available to testify in person (or who, if unavailable, is unavailable through fault of the state) whose statements the prosecution introduces into evidence against the accused *and* whom the prosecution can reasonably expect the defendant to wish to cross-examine at that time." Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1206-07 (1979).

Professor Michael Graham limits a witness against the accused to persons who are available for in-court testimony and whose out-of-court statements were accusatory when made. *Forgetful Witness*, *supra* note 3, at 192-98. An "accusatory" statement, according to Graham, is one the declarant knew or reasonably could have anticipated would assist the government in arresting or prosecuting someone for a crime. *Id.* at 193-94.

Professor Baker argues that a witness against the accused is someone who is available for in-court testimony and whose statements do not embrace "routine and collateral" matters. Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process*, 6 CONN. L. REV. 529, 545 (1974).

Professor Kenneth Graham concludes that whether one is a "witness against" the accused may depend on whether the declarant's statements make that declarant a "principal witness" for the prosecution. If the hearsay is necessary for the government to survive a motion for acquittal, versus hearsay that is used merely as corroboration, then it does not violate the confrontation clause. *Sir Walter Raleigh*, *supra* note 3, at 129-31.

The limited definition of a "witness against" an accused offered in this Article is compatible with the definitions of Westen, Michael Graham, and Baker, and possibly with that of Kenneth Graham. It is based on a different theory of confrontation, however, and so it may occasionally lead to different results, of which these commentators might not approve.

34. No theory of the confrontation clause ever has required, nor likely ever will require, exclusion of all hearsay evidence. *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980) ("[I]f thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.").

A third limitation on the confrontation clause also may be drawn from the word "witnesses." The term "witness" ordinarily is associated with people who speak in a trial setting. Thus, witness statements that the prosecuting authorities rely on in the pre-trial stage, but do not use at trial, are not covered by the confrontation guarantee. Only the accusatory statements that are repeated at the criminal trial, and that may form the basis for a conviction, should trigger confrontation clause analysis.

The remaining language of the clause states that the defendant should be "confronted" by the accuser. The phrase "to be confronted" has several implications. One is that the defendant and the accuser should be brought together physically — the "face-to-face" aspect of the guarantee.[35] Unlike a written statement, a physical encounter requires an accuser to make the accusation before the fact finder, and in front of the accused. In short, the witness must look the accused in the eye, and must be present for public observation by the judge and jury. All of these conditions may chill the accuser's willingness to make condemning remarks about the defendant. They also enable the fact finder to view the witness's demeanor, which may affect its assessment of the witness's credibility.

Beyond these static qualities, the phrase "to be confronted" also suggests an opportunity for active interaction between accused and accuser. Specifically, the term probably means that the defendant should be allowed to question the accuser and to ask the witness to defend or explain the accusation. Cross-examination, of course, is the label ordinarily attached to this process of witness interrogation.

Therefore, the history and language of the confrontation clause provide a rough outline of the guarantee. It is the right to confront witnesses physically and to question those persons who accuse the defendant of a crime, and whose focused accusations the prosecution presents in the trial stage of the proceeding. Taken alone, this is not a guarantee of a fair trial, of a trial based solely on testimony by live witnesses who are present in the courtroom, or of a trial based only

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35. In its most recent confrontation decision, the Court describes the derivation of the word "confront" as follows:

> Simply as a matter of Latin . . . the word "confront" ultimately derives from the prefix "con-" (from "contra" meaning "against" or "opposed") and the noun "frons" (forehead). Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: "Then call them to our presence — face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak."

Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988).

on dependable evidence. It is merely a guarantee of one aspect of a fair trial: the right to "confront" one's human accusers. This limited definition is consistent with the historical perspective that the naming of the right occurred in response to trials by affidavit and to the gross procedural abuses during Sir Walter Raleigh's trial.[36]

Numerous questions remain unanswered by this very general definition. One question is whether the right is satisfied when the witness is evasive, forgetful, or otherwise difficult to examine. For example, a witness may appear, but refuse to testify or answer questions. If "confrontation" includes interaction between accuser and accused, then a witness's complete refusal or present inability to answer a defendant's question may render the out-of-court testimony inadmissible, even though the witness is physically present. On the other hand, the right to be confronted may only mean the right to force the witness to appear and to ask the witness questions; it may not include a right to receive answers. The fact finder can see that the witness will not, or cannot, answer the defendant, and thus may be inclined to discredit the witness.

Another question is whether the prosecution can use testimony of a witness who has died or who cannot appear for other reasons. One interpretation of the confrontation clause would be that "it means what it says" and that the prosecution never should be allowed to use testimony of an absent witness. As I have indicated, however, the common law history of admitting dying declarations shows that statements by some absent witnesses probably should be permitted. Thus, the questions become when and why these exceptions will be allowed. Neither history nor the "plain meaning" of the clause responds adequately to these questions. In these grey areas, interpreters necessarily will be guided by their theory about the core value of the confrontation guarantee, and by their estimation of the importance of that value vis-à-vis other policy concerns.

During the past twenty years, various justices have tried to devise a theory of the confrontation clause that would guide these problems of definition and application. The result is a confusing collection of cases in which the Court struggles — with limited, often short-lived,

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36. Sir Raleigh's accuser, Lord Cobham, confessed to acts of treason by himself and Raleigh. Cobham later retracted his accusations against Raleigh. Cobham's out-of-court accusation was offered in the trial against Raleigh, despite Raleigh's protest that Cobham should be brought before him. Cobham was available nearby, in prison. This demand was refused, and Raleigh was convicted and ultimately executed for his alleged treason. *See* J. PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157 (1850).

success — to develop a theory to reconcile the constitutional guarantee of the right to confront one's accusers with the justices' estimations of the demands of routine litigation.

IV. THE COURT'S THEORY OF CONFRONTATION

Significant confrontation clause case law is a recent phenomenon; the majority of the important Supreme Court decisions have been decided since 1965. In 1965, the Warren Court held in *Pointer v. Texas*[37] that the confrontation guarantee applies to the states through the fourteenth amendment. This development has increased substantially the number of cases in which the Court has encountered confrontation issues. Therefore, the Court's attempts to work out a theory of the clause are relatively new, and appear tentative.

A second recent development, which also has influenced the Court's approach to the confrontation clause, was the adoption of uniform rules of evidence for federal courts. In 1972, the Supreme Court approved uniform rules of evidence, which were enacted in 1975.[38] Many states since have adopted similar or identical rules.

These two developments have made the Court chary of construing the confrontation clause expansively, lest it undermine the uniform rules or restrict state or federal efforts at future evidence law reform. An expansive reading of the confrontation clause would force states and the federal government to modify their evidence law in criminal cases, especially with respect to hearsay, to satisfy the constitutional requirement. The Court has been reluctant to do this, and so has fashioned its constitutional theory to match the uniform rules. A broad confrontation requirement also would make prosecution of criminal cases more difficult. The Burger and Rehnquist Courts in particular have been unwilling to impose constitutional requirements that hamper prosecutorial efficiency or restrict states' autonomy. As the following discussion will show, the most recent confrontation clause cases follow this general pattern of deference to prosecutorial needs.

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37. 380 U.S. 400 (1965). *See* Comment, *Criminal Procedure - Sixth Amendment Right of Confrontation Made Obligatory in State Prosecutions*, 44 N.C.L. REV. 173, 179 (1965) (predicting that *Pointer* would shift the Court's emphasis in confrontation cases to whether the exceptions to the hearsay rules offend the sixth amendment).

38. In 1965, the Chief Justice appointed an advisory committee to draft a set of evidence rules for the federal courts. The Supreme Court approved the final draft in 1972 to take effect on July 1, 1973. Congress intervened and did not enact the rules into law until January 2, 1975. The rules became effective on July 1, 1975.

A. *The* Roberts *Two-Step Approach*

During the late 1960s and early 1970s, the Court made its first modern efforts to define the right to confrontation.[39] The cases link cross-examination and confrontation, and suggest that evidence reliability is the purpose behind both. In 1980, the Burger Court described its theory of the confrontation clause. In *Ohio v. Roberts*,[40] the Court set forth a simple, two-step approach to confrontation problems. The first step requires that the prosecution usually must either produce the witness or demonstrate his or her unavailability[41] before it may use the out-of-court statement. This step is based on the Court's conclusion that the confrontation clause establishes a preference for face-to-face accusations.

The second step is based on the Court's assumption that the preference for live testimony enhances evidence reliability. It provides that when a witness is unavailable, the witness's out-of-court statement still may be admitted if it bears adequate indicia of reliability.[42] This reliability, the Court noted, "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[43]

The Court in *Roberts* described the dual purpose of the confrontation guarantee as follows: to assure the personal presence and cross-examination of the witness. The values of personal presence and cross-examination are that the accused can test the accuracy of the witness's statement, and the fact finder can view the witness's demeanor and evaluate his or her credibility.[44] Weighed against these defendant-centered interests, the Court noted, is the state's "strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings."[45]

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39. *See, e.g.*, Parker v. Randolph, 442 U.S. 62 (1979); Nelson v. O'Neil, 402 U.S. 622 (1971); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Illinois v. Allen, 397 U.S. 337 (1970); Bruton v. United States, 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965). This Article is not designed to provide an exhaustive canvas of the pre-1980 case law on the confrontation clause. Much good scholarship already exists that performs this task, and that should adequately guide lawyers and judges who seek to understand and apply these holdings. *See, e.g.*, Read, *supra* note 3.

40. 448 U.S. 56 (1980). The significant pre-*Roberts* confrontation cases were decided in 1970. In 1972, Justices Powell, Stevens and Rehnquist replaced Black, Douglas and Harlan, respectively. This change in the Court has proven to be significant in the area of criminal procedure.

41. 448 U.S. at 65.

42. *Id.*

43. *Id.* at 66.

44. *Id.* at 63-64.

45. *Id.* at 64.

1. Unavailability of the Declarant

The *Roberts* two-step approach raised several questions. One question was whether its "unavailable-first" language meant that the prosecution always must either produce a witness or demonstrate the witness's unavailability before it may offer the out-of-court statement against the accused. Numerous exceptions to the hearsay rule that appear in federal and state evidence laws permit the government to introduce hearsay without regard to the declarant's availability. For example, excited utterances, present sense impressions, and state of mind declarations are admissible under the Federal Rules of Evidence even if the declarant could have been called into court to repeat the declaration.[46] A strict reading of *Roberts* prohibits the prosecution from using these declarations unless it produces the declarant or demonstrates that its good-faith efforts to secure the witness's presence have failed.

Given the current Court's concern about preserving both prosecutorial discretion and the uniform rules of evidence, its later "clarification" of *Roberts* seems inevitable. In 1986, the Court interpreted the "unavailable-first" language in *Roberts* to apply only to the type of hearsay before the Court in that case — testimony given in a prior court proceeding.[47] Despite the implication in *Roberts* that its two-step approach applied to all hearsay problems, the Court in *United States v. Inadi* disavowed any intention to establish a general test and commented that "*Roberts* cannot fairly be read to stand for the *radical* proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."[48]

The Court in *Inadi* limited the "unavailable-first" language of *Roberts* by stating that the prosecution need only demonstrate the witness's unavailability when the hearsay is a "weaker substitute for live testimony."[49] Prior court testimony, the justices stated, is a weaker substitute for in-court testimony because the evidence "seldom has independent evidentiary significance of its own, but is intended to replace live testimony."[50] In contrast, the evidence at issue in *Inadi*, statements of co-conspirators made in furtherance of the conspiracy,

46. *See* FED. R. EVID. 803(1)-(3).

47. United States v. Inadi, 475 U.S. 387 (1986).

48. *Id.* at 394 (emphasis added). The Court cited a footnote in *Ohio v. Roberts*, wherein the Court indicated that it intended to proceed on a case-by-case basis. *Id.* at 392 (*citing* Ohio v. Roberts, 448 U.S. 56, 66 n.9 (1980)).

49. *Id.*

50. *Id.*

did possess independent evidentiary significance because conspirators will "speak differently" to each other than they will on the witness stand.[51] These out-of-court statements therefore cannot be replicated. Indeed, they derive their value from the fact that they were made in a context different from a trial. In other words, the hearsay is "great hearsay," and so is admissible even though the co-conspirator may be available for in-court testimony.

The Court in *Inadi* also saw no benefit to an unavailability rule for co-conspirator statements. The Court explained:

> [I]f the declarant either is unavailable, or is available and produced by the prosecution, the statements can be introduced anyway. Thus, the unavailability rule cannot be defended as a constitutional "better evidence" rule, because it does not actually serve to exclude anything, unless the prosecution makes the mistake of not producing an otherwise available witness.[52]

This argument is persuasive only if the central value of confrontation is to enhance evidence reliability. If the evidence will be admitted "anyway," then the unavailability requirement does not improve evidence reliability and thus can be abandoned. The implication, however, is that the prosecution never has a constitutional obligation to demonstrate the unavailability of a witness, because the exceptions to the hearsay rules that require witness unavailability always "let the evidence in anyway" when unavailability can be established.

The Court's thinking raises at least three problems. First, the prosecution's failure to secure a witness's presence may be based in part on a sense that the absent witness would not — and perhaps

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51. *Id.* at 395.

52. *Id.* at 396. This "better evidence" rationale has some support by commentators. The Court cites Professor Kenneth Graham, who has stated that "the Sixth Amendment has overtones of a constitutional best evidence rule; *i.e.*, where confrontation is excused it expresses a preference for the use of methods of proving the extra-judicial statement that minimizes the dangers in use of unconfronted evidence." *Sir Walter Raleigh*, *supra* note 3, at 143. The Court's cite to Professor Graham, however, is somewhat misleading. Graham notes that the preference for the better evidence operates when confrontation is excused. He does not say that this means that whenever "better evidence" is available it can be used, regardless of whether the witness is available.

There is a danger in describing the common features of the condoned "exceptions" to the confrontation requirement and then using those features as a basis for justifying other exceptions. This method tends to ignore that these same characteristics may appear in evidence that is *not* excepted from the requirement. It also may highlight the wrong features of the excepted evidence.

should not — be believed under oath. The government may suspect that the witness would not fare well under cross-examination and that the testimony would be more believable if the jury never saw the witness. This may be particularly true when the witness is a co-conspirator or "partner in crime." Thus, the requirement that the government must show the witness to be unavailable is potentially related to evidence reliability. The superiority of in-court testimony might be worth the attempt to compel the witness to appear. The fear that the prosecution will hide "bad" witnesses, fabricate testimony, or make no effort to produce a witness whose credibility is doubtful is what led past justices to require that prosecutors make a "good-faith effort" to produce declarants.[53]

Second, the Court's analysis is based on an unconvincing assumption — that prior court testimony has no independent evidentiary significance. The very fact that the prior testimony was given earlier suggests that it possesses independent evidentiary value. Memories fade, so that earlier statements may be more "reliable" than later testimony. Also, as a practical matter, the witness's later testimony often will represent the witness's recollection of this prior recorded testimony, rather than a recall of the underlying events. Once told, the story may congeal so that the freshest, most spontaneous account will be the first one. In any event, determinations about whether a category of out-of-court statements is "weaker" or "stronger" than in-court testimony rest primarily on conjecture. The Court offers no guidelines for lower courts to determine what hearsay, other than co-conspirators' statements, has "independent evidentiary significance."

The final and most serious problem with the theory is its premise that the sole value of the confrontation guarantee is to enhance reliability. As will be shown, confrontation has an intrinsic value, which lends force to an unavailable-first requirement even when the hearsay is "great hearsay," or would come in "anyway" if the witness were unavailable.[54]

The best explanation for the result in *Inadi* probably is that the Court was unwilling to disrupt the long-established practice of admitting hearsay that falls within certain categories without a prior showing of witness unavailability. Thus, the likely future impact of *Inadi*

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53. *See, e.g.*, Barber v. Page, 390 U.S. 719, 724-25 (1968) ("[A] witness is not 'unavailable' for purposes of the [prior testimony] exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.").

54. *See infra* text accompanying notes 130-51.

will be to give constitutional sanction to this past practice. To introduce hearsay that falls into categories for which an unavailable-first showing traditionally has been required — such as prior testimony, statement against interest, or dying declaration — the government still will be expected to use "good-faith" efforts to secure the declarant's presence. But, the rationale the Court offers in *Inadi* does not require such a limited effect. So we are left, at present, to wonder what role the declarant's availability will play in future confrontation clause applications.

2. Firmly-Rooted Equals Reliability

A second question left open after *Roberts* was whether the reliability of hearsay that falls within a firmly-rooted exception really can be inferred "without more." Some hearsay exceptions, such as the rule that treats as "nonhearsay" statements made in furtherance and during the course of a conspiracy,[55] admit very damaging out-of-court statements against an accused with no prior showing that the declarant is unavailable. Doubts about whether such a statement is truly "reliable" made some commentators wary of reading *Roberts* to sanction categorical admission of such statements without case-by-case showings of the statement's indicia of reliability.[56]

Moreover, some "firmly-rooted" exceptions to the hearsay rule are based on assumptions other than that the evidence is reliable. For example, the rule that permits certain statements by an employee to be offered against the employer is based on agency principles and the adversary system, not on the statement's reliability.[57] The co-conspirator exception also is based, at least in part, on an agency theory.[58] Even exceptions originally believed to be based on an assumption of reliability now are believed to lack that foundation. For example,

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55. *See* FED. R. EVID. 801(d)(2)(E).

56. *See, e.g.*, 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2)(E)[01], at 801-235 (1985); Note, *supra* note 3. Indeed, the Court itself has noted that every set of exceptions seems to fit an apt description offered more than 40 years ago: "'an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.'" Ohio v. Roberts, 448 U.S. 56, 62 (1980) (quoting Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)).

57. *See* FED. R. EVID. 801(d)(2), advisory committee note, *reprinted in* 56 F.R.D. 183, 298 (1972).

58. *See* Comment, *Reason and the Rules: Personal Knowledge and Coconspirator Hearsay*, 135 U. PA. L. REV. 1265, 1270-76 (1987) (noting the potential unreliability of co-conspirator statements, and suggesting that the true basis for this exception to the rule against hearsay is prosecutorial convenience).

"excited utterances" were thought to be reliable because the excitement would prevent a witness from having the time and presence of mind necessary to shape a lie. Psychological studies, however, suggest that exciting or startling events may disturb one's ability to perceive accurately and thus may impair, not enhance, the reliability of one's "excited utterances."[59]

These concerns raised doubts that the Court would interpret *Roberts* literally to "constitutionalize" *all* firmly-rooted exceptions to the hearsay rule. In a recent decision, however, the Court said that it *did* intend for this language from *Roberts* to have general application. In *Bourjaily v. United States*,[60] decided in 1987, the Court concluded that the co-conspirator exception to the hearsay rule is "steeped in our jurisprudence."[61] As such, courts need not "embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)."[62]

The current Court therefore seems inclined to accept the common law hearsay rule and its exceptions as sufficient protection of confrontation clause values. This approach differs from that of the 1970s decisions, wherein the justices emphasized that although the confrontation clause and the hearsay rule "stem from the same roots," the two are not equivalent.[63] In often quoted language, the Court in *California v. Green*[64] explained its view of the relationship between the hearsay rule and the confrontation guarantee as follows:

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59. *See, e.g.*, Hutchins & Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432 (1928). Despite these studies, however, the federal rules preserve the excited utterance exception, FED. R. EVID. 803(2), and both federal and state courts have concluded that the indicia of trustworthiness commonly thought to underlie this exception render excited utterances "reliable" enough for confrontation purposes. *See, e.g.*, Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1055-58 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984); State v. St. Jean, 469 A.2d 736, 739 (R.I. 1983).

60. 107 S. Ct. 2775 (1987).

61. *Id.* at 2783.

62. *Id. See* Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C.L. REV. 1, 9-11 (1987). The Court's approach to the confrontation clause is rather like its approach to the difficult question of whether a federal court can use a particular federal rule of civil procedure in a diversity suit when a state rule of procedure conflicts with the federal rule. In Hanna v. Plumer, 380 U.S. 460 (1965), the Court established a difficult-to-rebut presumption that the federal rules of civil procedure do not violate the principle of *Erie*. In this context, as in the context of the Federal Rules of Evidence, the Court's ruling effectively preserves the uniformity of the rules and greatly reduces the prospect of successful challenges of their constitutionality.

63. *See* Dutton v. Evans, 400 U.S. 74, 86 (1970).

64. California v. Green, 399 U.S. 149 (1970).

> [W]hile it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception . . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.[65]

The justices now appear ready to abandon the *Green* view of hearsay and confrontation as related, but independent, concepts. They apparently are warming to Wigmore's argument that whenever the hearsay rules, as they evolve, are satisfied, the confrontation clause requirements also are met.[66]

This conflation of the hearsay rules and the sixth amendment likely was prompted by the Court's frustration in attempts to develop a workable, independent theory of the clause. Having stated that reliability is the key to the confrontation guarantee, the Court was faced with unattractive consequences.[67] Basing the constitutionality of hearsay testimony on reliability could have meant that defendants could

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65. *Id.* at 155-56.

66. 5 J. WIGMORE, EVIDENCE § 1397, at 155-62 (Chadbourne rev. ed. 1974). The Court often will defer to the lower courts and state and federal legislatures on evidence issues. One reason for this is the justices' relative lack of familiarity with the rules and their practical consequences. As the Court once stated:

> This Court . . . has contributed little to this or to any phase of the law of evidence, for the reason, among others, that it has had extremely rare occasion to decide such issues . . . . It is obvious that a court which can make only infrequent sallies into the field cannot recast the body of case law on this subject in many, many years, even if it were clear what the rules should be.

Michelson v. United States, 335 U.S. 469, 486 (1948).

67. The Court outlined four characteristics of "reliable" evidence in *Dutton v. Evans*. They are:

> 1. Whether the statement contains an assertion of past fact;
> 2. Whether the declarant had personal knowledge of the facts he or she related;
> 3. Whether the government's evidence excluded the possibility that the declarant acted on a faulty recollection; and
> 4. Whether the circumstances under which the assertion was made provided any reason to believe that the declarant misrepresented the truth.

Dutton v. Evans, 400 U.S. 74, 88-89 (1970).

challenge all hearsay statements on sixth amendment grounds and force courts to evaluate the "reliability" of each hearsay statement before ruling on the objection. This prospect must have seemed daunting, and perhaps unnecessary, to a Court that already perceives the courts to be seriously overworked. Even the less formidable task of actually evaluating the reliability of statements under each *category* of extant hearsay exceptions looked uninviting. Instead, the Court in effect conferred constitutional status on the past practice of allowing certain hearsay evidence to be admitted, even in criminal trials, and simply declared the evidence within these exceptions to be "reliable without more." The only questions this approach leaves open are when an extant exception can be called "firmly-rooted," and when an exception that is not firmly-rooted nevertheless bears "indicia of reliability" sufficient for constitutional approval.[68] This preserves the prevailing

68. Of course, the Court's definition of the content of the confrontation guarantee does not resolve other questions about its application, such as when that right arises. The Court has concluded that the defendant's right to confront an adverse witness does not entitle him to be present at every stage of the criminal proceeding. Its analytical dilemma lies in deciding which stages of the criminal prosecution trigger this right, and in squaring these decisions with its confrontation clause theory. A recent attempt to clarify this aspect of the sixth amendment mustered agreement by only four justices.

In Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987), the Court considered whether a defendant charged with incest had a constitutional right to access records concerning his daughter that were maintained by the state agency charged with investigations of child abuse. *Id.* at 994. The defendant claimed that both due process and the confrontation clause entitled him to the entire confidential files of the agency. Addressing his sixth amendment claim, the Court identified two types of protection under the confrontation clause: first, it entitles the defendant to physically face his accusers; second, it entitles him to conduct cross-examination. *Id.* at 998. The defendant was not excluded from the trial, and no out-of-court statement was improperly used against him. Thus, the first type of protection was not at stake. *Id.* Rather, the defendant's only sixth amendment argument was that denial of access to the files interfered with his right to meaningful cross-examination. *Id.* The plurality rejected this argument, noting that "the right of confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Id.* at 999 (emphasis in original). It does not require pretrial disclosure of all potentially useful information that may assist counsel in cross-examination at trial. *Id.* According to four justices, the confrontation clause right to cross-examine witnesses is implicated only when there is "a specific statutory or court-imposed restriction *at trial* on the scope of questioning." *Id.* at 1000 (emphasis added). Other portions of the Constitution — specifically the due process and compulsory process clauses — may afford a defendant protection at the pretrial stage and may require disclosure of certain information; *id.*, but the confrontation clause is not the text on which to base claims of a constitutional right to discovery. *See, e.g.*, United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963).

The obvious problem with this conclusion is that meaningful cross-examination at trial may be impossible without pretrial access to exculpatory or impeaching materials. The concurring and dissenting opinions in *Ritchie* emphasize this point. *Ritchie*, 107 S. Ct. at 1009 (Brennan,

rules about hearsay, which at least are familiar and have been accepted over time. Of course, should federal or state courts decide at some future point to reject the complicated body of rules and exceptions that surround the hearsay doctrine in favor of a simplified rule, (e.g., only trustworthy out-of-court statements are admissible), then the Court would need to rethink the wisdom of anchoring the sixth amendment to this older, confounding body of principles.

J., dissenting). Given the Court's theory that the confrontation guarantee represents constitutional protection of the opportunity for "cross-examination," the *Ritchie* plurality's analysis appears wrong-headed.

Only four months later, the Court abandoned the *Ritchie* "trial only" limitation on the confrontation clause. In Kentucky v. Stincer, 107 S. Ct. 2658 (1987), the Court held that the defendant's exclusion from a hearing to determine the competency of the two key witnesses against him — young girls — did not violate his confrontation clause rights. *Id.* The defendant was accused of sexually abusing both girls. *Id.* at 2660. The competency hearing was held in the judge's chambers in the presence of the defendant's lawyer, who asked the girls questions. *Id.*

The Court determined that the confrontation analysis should not hinge on whether a competency hearing is part of the "trial" *per se*, or should be labeled a "pretrial" procedure. Rather, the appropriate question is whether the defendant's exclusion from this hearing would interfere with his opportunity for effective cross-examination of these witnesses at trial. *Id.* at 2664. The Court concluded that his exclusion did not interfere with his opportunity for cross-examination. Both girls appeared at trial and testified in open court, at which point they were subject to any questions by the defendant that might have been raised at the competency hearing. *Id.*

The rule that emerges from this line of cases is that the confrontation clause only assures an opportunity for full and effective cross-examination at *trial.* This opportunity, however, includes the defendant's right to physical presence at the trial itself, and at any other phase of the criminal prosecution at which defendant's exclusion would interfere with his ability to cross-examine a witness at *trial.*

The effect of these cases on past rulings is unclear. For example, the Court has held that exclusion of a defendant from the jury selection phase violates the confrontation clause. *See* Lewis v. United States, 146 U.S. 370, 373-74 (1892). The rationale of the case was not the functional analysis that characterizes modern confrontation cases, but that the "dictates of humanity" require a defendant be given the advantage of inclining the hearts of the jurors to listen with indulgence to his defense. *Id.* at 372. Such language, of course, sounds mawkish when compared to the stern, practical tone of recent confrontation decisions. Earlier cases also had stated that the defendant's confrontation clause right to be present extended to any stage "when anything may be done in the prosecution by which he is to be affected." *Id.* at 373.

The current Court is unlikely to read the confrontation guarantee as broadly as it has in past decisions. In fact, the Court probably already has gone farther than it intended to in suggesting that the sixth amendment imposes restrictions on pretrial procedures. Meaningful access to information at the pretrial stage already is protected by the due process and compulsory process clauses. Yet if one accepts the Court's premise that the confrontation clause assures meaningful cross-examination, then the *Ritchie* "trial-only" restriction makes little sense. The problem therefore lies in this underlying premise.

3. Adequate Opportunity for Cross-Examination

The remnants of *Roberts* suggest that unavailability of the declarant is unimportant; rather, the key is whether the declarant's out-of-court statement is reliable. If the statement falls within a firmly-rooted exception, then it is presumed to be reliable. Otherwise, the statement must have comparable indicia of trustworthiness.

The Court's conclusion that reliability is the central value of the confrontation clause stems from its assumption that the clause was intended to assure the opportunity for cross-examination of witnesses against the accused.[69] Because the Court views cross-examination as a useful vehicle for testing witness credibility and sincerity, it sees the confrontation clause as a constitutional guarantee of these underlying interests. Thus, the reliability that confrontation guarantees is the reliability that can be derived from cross-examination of the witness against the accused. However, in recent confrontation cases the Court has emphasized that the sixth amendment guarantees only the *opportunity* for cross-examination; it does not guarantee cross-examination that is "effective, in whatever way, and to whatever extent, the defense might wish."[70]

If the opportunity for cross-examination satisfies the confrontation guarantee, then courts must determine when that opportunity has been provided. These judgments have been very difficult for the Court to make, and harder still to defend. According to the Court's 1970s decisions, a belated opportunity for cross-examination can be a constitutionally sufficient substitute for the chance to cross-examine a witness contemporaneously with his or her original testimony.[71] For example, the prosecution can introduce the preliminary hearing testi-

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69. The Court repeatedly has observed that the confrontation clause serves the functional purpose of protecting the opportunity for cross-examination. *See, e.g., Stincer*, 107 S. Ct. at 2664; Ohio v. Roberts, 448 U.S. 56, 63 (1980); Davis v. Alaska, 415 U.S. 308, 315 (1974); Nelson v. O'Neil, 402 U.S. 622, 626-27 (1971); California v. Green, 399 U.S. 149, 157-58 (1970); Bruton v. United States, 391 U.S. 123, 126 (1968); Douglas v. Alabama, 380 U.S. 415, 418-19 (1965); Pointer v. Texas, 380 U.S. 400, 404-05, 407 (1965); *see also* 5 J. WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. ed. 1974) (noting that cross-examination is a "vital feature of our Law . . . beyond any doubt the greatest legal engine ever invented for the discovery of truth."). Justice Harlan, who first believed that the clause established a preference for live witnesses, *Green*, 399 U.S. 149, 186-87 (1970) (Harlan, J., concurring), later renounced that view and sided with Wigmore in concluding that the confrontation guarantee protects the defendant's right to be present and to cross-examine adverse witnesses. *Dutton*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring).

70. Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam); *see also* United States v. Owens, 108 S. Ct. 838, 843 (1988); *Stincer*, 107 S. Ct. at 2664 (1987).

71. *See Green*, 399 U.S. at 159-60.

mony of a witness if the witness appears at the trial, admits making the preliminary hearing statements, but claims he or she no longer can remember the underlying events.[72] The Court also has approved the admission of preliminary hearing testimony of a witness who did not appear at trial, when the defendant's lawyer had an opportunity to question that witness at the preliminary hearing.[73] The Court likewise has permitted a co-defendant to testify about the activities described in an out-of-court confession, even though in court he denied making the confession and claimed its substance was false.[74] In all of these situations, the Court deemed the defendant's "opportunity" for cross-examination of the declarant sufficient to satisfy the sixth amendment, regardless of whether the defendant's lawyer seized that opportunity.

In contrast, the Court believes that no adequate opportunity for cross-examination occurs when a judge prevents a defendant from inquiring into possible bias of a witness. In *Delaware v. Van Arsdall*,[75] the trial court had denied the defendant any opportunity to inquire into the state's dismissal of a pending public drunkenness charge against an adverse witness.[76] Disclosure of this possible bias in favor of the state could have given the jury a significantly different impression of the witness's credibility.[77] Consequently, the Supreme Court held that this limitation on cross-examination violated the defendant's right to "confront" the witness. The Court added that its holding did

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72. *Id.* at 152.

73. Ohio v. Roberts, 448 U.S. 56, 70 (1980). When, however, the defendant does not have a lawyer representing him or her at the preliminary hearing, the witness's prior testimony cannot be introduced against him or her if the witness does not appear at the trial. *See* Pointer v. Texas, 380 U.S. 400 (1965).

74. Nelson v. O'Neil, 402 U.S. 622 (1971). Contrast this situation with a case in which the confessing witness appears at the trial, but invokes the fifth amendment. In Douglas v. Alabama, 380 U.S. 415 (1965), the Court held that such a confession could not be introduced through the guise of "refreshing" the witness's recollection. The witness in *Douglas* never affirmed the statement as his, and refused to answer any questions on the ground that he was entitled to invoke the fifth while an appeal of his conviction was pending. *Id.* at 416.

75. 475 U.S. 673 (1986).

76. *Id.* at 676.

77. *Id.* at 680. The Court rejected the state's argument that a confrontation clause violation only occurs when the defendant can show "outcome-determinative" prejudice. *Id.* at 679-80. Unlike some other constitutional claims, "the focus of the Confrontation Clause is on individual witnesses." *Id.* at 680. The Court added, though, that this does not prevent a court from finding on appeal that such a violation is "harmless error" within the meaning of Chapman v. California, 386 U.S. 18, 24 (1967). 475 U.S. at 681.

not prevent a trial judge from imposing reasonable limits on cross-examination of an adverse witness as necessary to prevent harassment, prejudice, confusion, or a waste of time.[78]

The Court's dubious conclusions about the adequacy and effectiveness of the questioning in these cases are less surprising when one recalls that other confrontation cases allow hearsay to be offered against a defendant even when the defendant had no opportunity for cross-examination. Dying declarations,[79] documentary evidence used to establish collateral facts,[80] and letters, book entries and bank deposit slips used to link the defendant to other evidence,[81] all have been approved as constitutionally acceptable departures from the rule against hearsay. Moreover, as we have seen, the Court has approved the admission of co-conspirator statements even when the co-conspirator was not present for cross-examination by the accused.[82] These decisions make it fairly easy for the Court to conclude that the "opportunity" for cross-examination is one way — but not the exclusive way — to satisfy the "reliability" theory set forth in *Roberts*.[83]

The flaw in this reasoning should by now be apparent. Whether or not these *results* are defensible, "reliability" of the evidence is an unconvincing rationale for the Court's applications of the sixth amendment. Dying declarations, statements of co-conspirators, renounced confessions, or excited utterances that are not cross-examined simply are not "great hearsay"; however, they may be *necessary* or "fair" hearsay. The reliability theory fails to explain these results and offers no guidepost for future application other than the suggestion that "past practice" regarding hearsay will prevail. Thus, reliability cannot be the true rationale for these decisions. Other reasons likely better explain the Court's answers to the confrontation clause problems it has considered.

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78. 475 U.S. at 679; *see also* Delaware v. Fensterer, 474 U.S. 15 (1985) (per curiam). The Court in *Fensterer* held no confrontation violation occurred when the expert who testified against the defendant said she no longer could remember the basis for her opinion that the hair on the weapon was similar to the victim's and had been forcibly removed. *Id.* at 20. The inability of the defendant to re-call this expert to the stand did not so frustrate the opportunity for cross-examination that the sixth amendment was violated. *Id.* The Court noted that the defendant's own expert had testified that the state's expert relied on a baseless theory. *Id.*

79. Dowdell v. United States, 221 U.S. 325 (1911); Mattox v. United States, 156 U.S. 237 (1895).

80. *Dowdell*, 221 U.S. at 325.

81. Salinger v. United States, 272 U.S. 542 (1926).

82. *See, e.g.*, United States v. Inadi, 475 U.S. 387 (1986).

83. *See supra* text accompanying notes 42-43.

B. *Assumptions that Underlie the Reliability Theory*

1. Prosecutorial Efficiency

Several extrinsic policy concerns probably have influenced the Burger and Rehnquist Courts' approach to the confrontation guarantee. One of these concerns is prosecutorial efficiency. Both of the recent clarifications of *Roberts* have the effect of preserving the prosecutor's ability to introduce hearsay against the defendant. The tone of these recent decisions is more distinctly deferential to prosecutorial interests than the tone of past decisions.[84] Specifically, the Court has made explicit that the government's interest in effective law enforcement should counterbalance the defendant's interest in confronting the witnesses against him.[85] In *Inadi*, the Court made the remarkable statement that admitting hearsay against a defendant may further the confrontation clause's mission, which it describes as the attempt to enhance the accuracy of criminal trials.[86] In another opinion, Justice Rehnquist observes that the Court has "attempted to harmonize the goal of the Clause — placing limits on the kind of evidence that may be received against a defendant — with a *societal* interest in accurate fact-finding, which may require consideration of out-of-court statements."[87]

In earlier confrontation cases, in contrast, the Court's emphasis on reliability was based on the justices' concern for the defendant, not society. Exclusion of hearsay evidence, like exclusion of any potentially probative evidence, always poses the threat of undermining the overall truth-seeking aim of the trial. But this overall interest in accuracy — the "societal" interest — necessarily is sacrificed to the extent that the Bill of Rights imposes certain limits on the prosecution that favor the accused. One of these limits is the confrontation clause. Language in the Court's recent opinions turns such thinking on its head. Certain passages even suggest that prosecutors could argue that exclusion of "probative" hearsay offered against a defendant could thwart the *defendant's* confrontation clause right. This sounds wrong, because it is wrong.

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84. The Burger Court adhered to a crime-control model of criminal justice. One characteristic of this model is deference to the government interest in prosecutorial efficiency. As Professor Whitebread has observed, the Burger Court conducted a "counter revolution" in criminal procedure, designed in part to assist law enforcement efforts. *See* Whitebread, *The Burger Court's Counterrevolution in Criminal Procedure*, 24 WASHBURN L.J. 471 (1981). The Burger Court's confrontation cases corroborate Whitebread's observation.

85. *See, e.g.*, *Inadi*, 475 U.S. at 395; Ohio v. Roberts, 448 U.S. 56, 64 (1980).

86. *Inadi*, 475 U.S. at 396.

87. Bourjaily v. United States, 107 S. Ct. 2775, 2782 (1987) (emphasis added).

The root of the analytical problem here is the notion that "reliability" of evidence is the full and sole measure of confrontation clause protection.[88] Reliability *may* be enhanced by the confrontation requirement in some cases; but, it does not follow from this that all reliable evidence satisfies the clause, or that the only purpose of the clause is to enhance reliability. Also, any interest in reliable evidence that may be reflected in the confrontation guarantee is reserved for the defendant. Only the witnesses against the accused, not those who speak for him or her, must be present for confrontation. The confrontation guarantee is a defendant-centered right and cannot reasonably be read as a general assurance of trials based on reliable evidence.

Any acceptable theory about the confrontation guarantee must be sensitive to the practicalities of criminal litigation. No one favors constitutional procedures that make law enforcement impossible. To that extent, "prosecutorial efficiency" needs necessarily are an implicit factor in the constitutional analysis. But the Court's reliability theory does more than accommodate this practical concern; it weights the government interest as an express counterbalance to the defendant's confrontation clause right. Thus, governmental interest becomes more than a curb on an overbroad reading of the sixth amendment; it becomes part of the calculus of determining whether the right exists, and whether the right can be excused in a particular circumstance. The effect is a form of double-counting of governmental interest. One can assume that the "cost" of excluding nonconfronted testimony was considered by the colonists when they decided to give the right of confrontation constitutional status. Their decision was that the defendant's interest in confrontation trumps the government's interest in prosecutorial efficiency.

2. "Necessity"

Closely related to the Court's growing concern for prosecutorial efficiency is a "necessity" factor, which figures in all confrontation decisions. As early as 1895, the Court noted that when a declarant has died, his or her hearsay statements may be admissible "as an

88. *See, e.g.*, Kentucky v. Stincer, 107 S. Ct. 2658, 2662 (1987) ("The right to confrontation . . . is essentially a 'functional' right designed to promote reliability in the truth finding functions of a criminal trial."); Mancusi v. Stubbs, 408 U.S. 204, 213 (1972) (stating that reliability has been the focus of the Court's confrontation clause decisions); Dutton v. Evans, 400 U.S. 74, 89 (1970) ("[T]he mission . . . is . . . a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'") (quoting California v. Green, 399 U.S. 149, 161 (1970)).

exception to such rules [regarding the admission of testimony], simply from the necessities of the case, and to prevent a manifest failure of justice."[89] The Court has made the sensible observation that "[a] technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant."[90]

The problem with this sensible observation is that the Court has resolved the tension between the "letter" of the confrontation clause and the "necessities of the case" quite differently throughout history. For example, in *Bruton v. United States*, decided in 1968, the government argued that joint trials save money, and that the confrontation clause should not be interpreted in a fashion that makes joint trials infeasible.[91] The Court rejected that argument because it viewed the intangible price of sacrificing fundamental principles of constitutional liberty as far greater than the expense of ordering separate trials.[92] Evidencing a marked shift in approach, the Court in 1987 expressed concern that an expansive confrontation requirement would require separate trials of defendants,[93] and emphasized the expense of separate trials.[94]

The central issue is not whether economic concerns or other practical necessities ever should qualify our interpretation of the confrontation guarantee; people agree that occasions arise when out-of-court statements reasonably should be admitted despite the declarant's absence.[95] Rather, the controversy lies in deciding where to draw the line. Certainly, more than a "need to convict" must be shown to justify exceptions to the right to confront one's accusers. The "something more" that the Court traditionally has required are the "indicia of reliability" described above. In recent cases, however, the justices

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89. Mattox v. United States, 156 U.S. 237, 244 (1895).

90. *Id.* at 243.

91. 391 U.S. 123, 134-35 (1968).

92. *Id.*

93. Richardson v. Marsh, 107 S. Ct. 1702, 1708 (1987).

94. *Id.*

95. An appealing example of this might be a case in which a defendant is tried for the gruesome murder of an elderly, fragile woman. If the woman had stated to the police shortly before her death, "Defendant did this to me. I don't know why; I loved him like a son. Forgive him, dear God," most people probably would have difficulty accepting a rule that excluded her statement and hence entitled the defendant to an acquittal.

If, on the other hand, Lord Cobham had said on his death bed "Raleigh is a traitor. He is a treasonous soul. May the Crown forgive us," exclusion of this evidence may seem less offensive. Explaining our different reactions to these two scenarios, however, is not easy. The relative "reliability" of the two statements is only a partial clue.

have given greater weight to the "need to convict," and have revealed their ambivalence about robust confrontation clause protection.

The "necessity" factor in some of the older confrontation cases therefore poses a hidden danger for future confrontation analysis. *Inadi* suggests that hearsay should be admitted if it is "reliable," even though the declarant may be available. If the Court is inclined to cabin the confrontation clause and thereby promote the interests of federalism and prosecutorial efficiency, it could cite the hearsay evidence that it has deemed admissible in the past as a standard for constitutional reliability in the future. But these earlier rulings hinged less on the "reliability" of the hearsay than on a practical realization that face-to-face confrontation is not always possible. Thus, the reliability theory should not be applied retrospectively to justify or explain these decisions; likewise, these older cases should not be misinterpreted as benchmarks of "reliability" under confrontation clause analysis. A fair construction of past precedent must take into account whether the declarant was available, as well as other "necessity" factors that contributed to the results.

3. Competing Concerns

Although the Court has been willing to admit "great hearsay" despite the sixth amendment, the justices on occasion have expressed their fear of admitting hearsay that is devastating, or "too great." This apprehension surfaces in joint trial situations, where the jury may be instructed that certain "devastating" statements are admissible against one defendant and not his or her co-defendant.[96]

The confrontation clause requires that witnesses against the *defendant* confront him. Thus, if *A* and *B* are tried together, *A*'s confession implicating both *A* and *B* cannot be offered against *B* without raising constitutional concerns. As against *A*, the statement is admissible because it is *A*'s own statement. *A* cannot claim that she had no right to confront herself. If the government offers the confession only against *A*, it theoretically poses no confrontation clause problem vis-à-vis *B*, provided that the jury is told that the damaging confession can be used only against *A*.

The obvious difficulty with this analysis is our practical awareness that despite limiting instructions, jurors are human beings who may be unable to "unhear" *A*'s confession implicating *B*. The Court acknowledges this, and thus has concluded that the presumption of juror

96. Bruton v. United States, 391 U.S. 123, 135-36 (1968) (referring to the "powerfully incriminating" nature of the hearsay statements).

obedience should be abandoned in favor of recognizing human frailties when the evidence that the jury is asked to disregard is "devastating" to *B*.[97] The confession of a co-defendant that implicates *B* typically will satisfy this criterion.[98]

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97. *Compare* Delli Paoli v. United States, 352 U.S. 232, 242 (1957) ("Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense.") *with* Bruton v. United States, 391 U.S. 123, 124, 128 (1968) (overruling *Delli Paoli* and noting that "'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'") (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949)). The conclusion that jurors cannot "unhear" evidence despite instructions to disregard it is gaining empirical support as researchers explore the problem. *See* Marotte, *"The Jury Will Disregard . . .",* A.B.A. J., Nov. 1987, at 34.

98. In Parker v. Randolph, 442 U.S. 62 (1979), a plurality of the Court modified *Bruton* and concluded that the presumption that jurors will follow the judge's instructions will apply to allow a co-defendant's confession *if* the defendant also has made a confession that corroborates or "interlocks" with the co-defendant's confession. This is the so-called "interlocking confession" exception to the *Bruton* rule. *See generally* Note, *The Present Status of an Interlocking Confession Exception to* Bruton v. United States, 36 S.C.L. REV. 659, 688 (1985) (reviewing post-*Parker* cases and concluding that *Parker* "exaggerated what was already a serious lack of consensus in the lower courts.").

Three recent post-*Parker* cases alter the *Bruton-Parker* approach to interlocking and noninterlocking co-defendant confessions. In Lee v. Illinois, 476 U.S. 530 (1986), the Court held that the defendant's confrontation right was violated when her co-defendant's confession was admitted in their joint trial. Writing for five members of the Court, Justice Brennan applied the *Roberts* two-part test and concluded that confessions are presumptively unreliable and hence inadmissible unless the evidence is supported by a showing of trustworthiness. *Id.* at 2064. When, as in *Lee*, the co-defendant confesses after the "jig is up," such trustworthiness is missing. Likewise, when the two confessions only interlock in some respects, the co-defendant's confession is only *selectively* reliable, and thus violates *Roberts*. *Id.* In 1987, the Court's newest member, Justice Scalia, authored two decisions that expand on *Lee* and undermine *Parker*. In Cruz v. New York, 107 S. Ct. 1714 (1987), the Court rejected the *Parker* view that interlocking confessions are a categorical exception to the *Bruton* rule that jury instructions are inadequate protection against "devastating" hearsay. Justice Scalia observed that the more "interlocking" a co-defendant's confession is, the more "devastating" it will be to a defendant's claim of innocence. *Id.* at 1718. The interlocking nature of a confession pertains not to its harmfulness, but to its reliability. *Id.* This interlock therefore is relevant to the *Roberts* reliability step in confrontation analysis, but not to the *Bruton* inquiry into whether a jury is likely to obey its instructions to disregard the evidence. *Id.* at 1718-19.

Read together, *Lee* and *Cruz* suggest that a majority of the Court believes that an interlocking confession can interlock enough to satisfy *Roberts*, and hence be constitutionally admissible. This requires more than the partial interlock present in *Lee*. If, however, the confession is *not* "reliable" or "interlocking" enough to satisfy *Roberts*, then *Bruton* requires a court to ask whether jury instructions will provide adequate protection of the confrontation guarantee. A co-defendant's noninterlocking confession is presumptively too "devastating" for jurors to ignore it. Even an "interlocking" confession ordinarily will be deemed too devastating for jurors to

The "devastating" nature of nonconfronted evidence therefore has played a role in the Court's confrontation analysis; but, the Court restricts that role to the issue of whether jury instructions to disregard the evidence as to the accused will provide adequate protection of his or her confrontation rights.[99] It is not a factor that the Court explicitly cites as relevant to a decision about whether the nonconfronted evidence is admissible against an accused. Nevertheless, the "devastating" or central character of the nonconfronted evidence probably plays a subliminal role in determinations about whether admission of the evidence is constitutional.[100] It competes, though, with the justices' concerns about prosecutorial efficiency. After all, if the hearsay is "devastating," its admission probably is as important (or "necessary") to the prosecution's case as its exclusion is to the defendant's freedom. The justices may want to admit this "really great hearsay," especially when it offers probative and essential proof that the defendant is

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"unhear" it and obey their instructions. The interlocking nature of the confession, however, still may have a bearing on whether the confrontation clause violation is ruled "harmless error" on appeal.

In Richardson v. Marsh, 107 S. Ct. 1702 (1987), the Court concluded that jury instructions were adequate protection for a defendant when the co-defendant's confession was redacted to omit the defendant's name and any reference to her existence. *Id.* at 1709.

The collective message for prosecutors in these recent cases is to proceed with joint trials, and to pursue one of two avenues when introducing a co-defendant's confession. The first option is to argue that the confession meets some exception to the applicable hearsay rule — possibly, the residual exception to the hearsay rules — and also that it is sufficiently reliable to satisfy *Roberts*. Under this approach the confession would be admissible against the nonconfessing defendant. Reliability of this kind of evidence, however, will be difficult to prove without compelling corroboration, despite the Court's suggestion that a sufficiently "interlocking" confession might have this corroboration. The second route the prosecutor would follow would be to introduce the confession only against its maker, with proper instructions to the jury to disregard it as to the nondeclarant defendant, and to redact that confession to omit any reference to the nondeclarant defendant. This method was approved in *Richardson*.

99. One decision that may suggest otherwise is Dutton v. Evans, 400 U.S. 74 (1970), in which the Court noted that the hearsay statement was not crucial or devastating and concluded that no confrontation violation occurred. *Id.* at 87. A better interpretation of this holding, however, is that offered by Justice Blackmun in his concurring opinion. Justice Blackmun viewed the admission of the statement in *Dutton* as harmless error, in light of the other overwhelming evidence against the accused. *Id.* at 90 (Blackmun, J., concurring).

100. *See infra* text accompanying note 152. At least one commentator agrees that the centrality of the hearsay statement has a bearing on whether it violates the confrontation clause, and views the "devastating" nature of the hearsay as relevant to its centrality. *See* Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 682-83, 687 (1986). His theory, however, essentially comports with the Court's functional approach to the confrontation guarantee.

guilty, but must overcome a nagging sense that even terrific hearsay violates some fundamental principle of fairness — a principle they trace to the confrontation guarantee.

These three factors — prosecutorial efficiency, "necessity," and the "devastating" or central nature of the hearsay — surely play a role in the Court's confrontation clause applications. The reliability theory, as it currently is stated, masks their importance by attaching a single "reliable" label to outcomes that turn on multiple factors. The Court's desire for a clear and simply-stated principle is understandable, particularly when it must be applied in the brisk-paced context of a criminal trial. But the reliability theory is not the answer. The Court in its most recent confrontation clause cases seems finally to recognize this problem, and turns its attention to other values of face-to-face confrontation.

C. *The Departure from Reliability:* Coy v. Iowa

The Court's past interpretations of the confrontation guarantee imply that the central value of a face-to-face encounter between defendant and accuser is to enhance the reliability of the accuser's testimony. They also suggest that the confrontation clause sets a reliability threshold for out-of-court declarations offered by the government in criminal cases. This imaginary, and perhaps illusory, "reliability" threshold is overcome whenever an out-of-court statement falls within an historically recognized exception to the hearsay rule. The statement also will be admissible when the defendant has had some "opportunity" to cross-examine the declarant, regardless of whether the defendant actually seized that opportunity. The Court has approved the admission of this "reliable" hearsay against a defendant even though the declarant is available and could have appeared before the tribunal.

The Court's reliability theory, however, ignores relevant constitutional interests. Limiting the confrontation clause to functional ends, and linking it to the rule against hearsay may promote the goals of certainty and efficiency, but it also could render constitutional trial by telephone,[101] trial by closed-circuit television,[102] or even trial by affidavit, provided that these types of out-of-court testimony are deemed sufficiently "reliable." Also, much evidence that falls within "firmly-rooted exceptions" to the common law hearsay rules may be of doubtful reliability.[103]

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101. *See* Lawrence, *Phone Appeals Won't Replace Interviews*, Gainesville Sun, Oct. 8, 1987, at 4A, Col.3.

102. *See infra* text accompanying notes 120-25.

103. *See* Goldman, *supra* note 62, at 16-26.

The poverty of the reliability theory of confrontation appears when one uses that interpretation to justify departures from the confrontation guarantee, rather than to describe some of the benefits that may flow from the guarantee. Some of the values of face-to-face confrontation may be intangible, and not susceptible to functional analysis. Also, confrontation may promote certain functional values that the reliability theory omits, such as the preservation of the appearance of a fair proceeding, which may enhance the acceptability of the outcome to the defendant and society. Thus, when the Court devises alternatives to the right that supply only the tangible benefit that the Court names in its reliability theory, the alternatives can prove to be inadequate substitutes for the whole value of the confrontation right. That is, "reliable" evidence is *not* always a satisfactory substitute for confrontation.[104]

In a 1987 dissenting opinion, Justice Marshall acknowledged this other value of confrontation when he observed that the confrontation clause serves certain "symbolic goals" in addition to its functional purpose of assuring evidence reliability.[105] Quoting *Lee v. Illinois*,[106] he noted that the defendant's right to confront and cross-examine witnesses preserves the "appearance of fairness" of the proceeding. This appearance of fairness means that accused and accuser should engage in an "open and even contest in a public trial," and that "convictions will not be based on the charges of unseen and unknown—hence unchallengeable individuals."[107]

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104. *See infra* text accompanying notes 130-51. The Court's theory may collide with commonly-held expectations about criminal procedure. For example, assume that two people are arrested for treason and questioned separately. Each of them confesses to the crime in terms that corroborate the other's confession. In the separate trial of one of them, the confession of the other, which implicates the defendant, is read to the jury. The state never calls the confessing witness to the stand.

Such out-of-court confessions historically have *not* been admissible against a defendant. *See supra* note 98. Yet, the detail of the confession and its interlocking character, as well as the fact that it incriminates the speaker, suggests that this is "reliable" hearsay. The Court's thinking suggests that a prosecutor could argue that exclusion of this evidence would thwart the confrontation clause's truth-seeking mission. Moreover, this thinking would appeal to people who believe that modern constitutional criminal procedure unduly hampers prosecutorial efforts. The government also can argue that the "societal" interest in prosecutorial efficiency favors admission of interlocking confessions. But admission of this confession would be a dramatic departure from past attitudes toward confrontation and confessions of co-conspirators. Yet, the Court's recent cases set the stage for prosecutors to advance this very argument.

105. Kentucky v. Stincer, 107 S. Ct. 2658, 2670 (1987) (Marshall, J., dissenting).

106. 476 U.S. 530, 540 (1986).

107. *Id.*

Other people likewise have acknowledged this "fairness" aspect of the right to confrontation. For example, Professor Kenneth Graham has referred to the element of "folk justice, gut fairness, or adversary sportsmanship"[108] inherent in the confrontation guarantee.

In *Coy v. Iowa*,[109] decided in 1988, a "fairness" theory of the confrontation clause appeared for the first time in a majority opinion. The Court concluded that the sixth amendment was violated when a screen was placed between child witnesses and a defendant accused of sexual assault.

Justice Scalia, writing for six members of the Court, stated that confrontation "serves ends related both to appearances and to reality"[110] and that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' "[111] Both the physical, face-to-face confrontation, and the right to cross-examine the accuser serve the function of ensuring the integrity of the proceeding.[112] In Justice Scalia's words, "[I]t is always more difficult to tell a lie about a person 'to his face' than behind his back. In the former context, even if the lie is told, it will often be told less convincingly."[113] Despite the potential trauma to the truthful child witness, the Court concluded face-to-face presence should be required. A courtroom screen prevents the type of face-to-face encounter that the sixth amendment guarantees.[114]

Justice Blackmun and Chief Justice Rehnquist dissented in *Coy*.[115] Justice Blackmun authored the dissent in which he disagreed both with the majority's analysis of the confrontation clause and with its specific result. He noted that under the common law definition of confrontation, the right primarily was intended to allow for cross-examination, and secondarily to require the witness to appear before the *tribunal*. Nothing in the Court's prior decisions suggested that confrontation also requires that the *witness* be able to view the *defen-*

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108. *Sir Walter Raleigh*, *supra* note 3, at 132-33.
109. 108 S. Ct. 2798 (1988).
110. *Id.* at 2801.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 2801-02.
115. *Id.* Justice Kennedy did not participate in the decision. Justices O'Connor and White concurred in the majority opinion for the limited reason of emphasizing their view that the confrontation right is not absolute, and may on occasion give way to other interests. They cited other state statutes that permit child witnesses to testify via closed-circuit television and noted that such procedures may not violate the sixth amendment. *Id.*

dant throughout his or her testimony.[116] He criticized the majority for relying on "literature, anecdote and dicta" for its definition of confrontation.[117] Justice Blackmun acknowledged the constitutional preference for face-to-face confrontation, but believed that the preference must give way on occasion to other policy interests. He found compelling the state interest behind the Iowa statute that allowed the child witness to testify with the use of a screening device.[118] Finally, he noted that although the evidence in question did not fall into a "firmly rooted hearsay exception," it had sufficient indicia of reliability, given that the witnesses testified under oath, in full view of the jury, and were subject to full cross-examination.[119]

A fair reading of the Court's pre-*Coy* decisions indicates that Justice Blackmun is correct in his conclusion that the confrontation clause, under past Supreme Court analysis, does not bar the use of a one-way screen. Unavailability of the child witness is not — it seems — a constitutional prerequisite to admission of hearsay after *Inadi.*[120] Even if it were, the child is certainly more "available" for cross-examination than a witness who pleads the fifth,[121] has died,[122] or has moved to Sweden.[123] If indicia of reliability is the constitutional criterion, then the child witness's testimony behind the screen likewise passes muster. It is probably just as "strong" as testimony permitted under other recognized exceptions to the hearsay rule, such as dying declarations or excited utterances. Moreover, the tool that the Court regards as the most significant check on unreliability, cross-examination, is allowed under this procedure, although not in the customary way. The defendant's lawyer can ask the child questions in the physical presence of the defendant. Indeed, testimony given via a one-way mirror or behind a screen is not hearsay at all. The child is testifying "live" and subject to contemporaneous cross-examination to probe memory, perception, ambiguity, and sincerity.[124]

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116. *Id.* at 2803.

117. *Id.*

118. *Id.* at 2804.

119. *Id.*

120. *See supra* text accompanying notes 45-50.

121. Bourjaily v. United States, 107 S. Ct. 2775, 2782 (1987) (noting that the declarant "exercised his right not to testify").

122. Mattox v. United States, 156 U.S. 237 (1895).

123. Mancusi v. Stubbs, 408 U.S. 204, 209 (1972).

124. Under the Court's approach, when an out-of-court statement is not offered for a hearsay purpose — for the truth of the matter asserted — then no confrontation problem arises. *See* Tennessee v. Street, 471 U.S. 407 (1985).

Yet despite these safeguards for reliability, testimony from behind a one-way mirror or screen disturbs many people's sense of "fairness," *and* the specific constitutional text that they sense it offends is the confrontation clause.[125] As *Coy* suggests, the reason for this reaction is that "confrontation" connotes a human, face-to-face contact. The most important implication of *Coy* is that it shows that we value this contact for purposes beyond reliability or efficiency.

The weakness of *Coy* therefore lies not in its result, but in its loose reasoning and reliance on unconventional authority. This weakness stems from the Court's consistent failure, in both past and modern procedure decisions, to identify the noninstrumental values of "fair procedure" and to develop a theory of procedural justice that can account for these values. Cases like *Coy* make manifest that an "accurate" outcome is *not* the sole measure of procedural fairness, and that reliability is *not* the sole measure of confrontation clause values. But, as Justice Blackmun suggests, the constitutional theory in support of this claim requires a more developed analysis of "fairness" than Justice Scalia supplied in *Coy*. Moreover, this theory should be rooted in American constitutional history and developing constitutional values. The remainder of this article attempts to develop this rationale. It rejects a reliability theory in favor of a human dignity theory of procedural fairness, and attempts to apply that general theory to the specific problem of the confrontation clause in criminal proceedings.

V. An Individual Dignity Approach to Confrontation

Pre-*Coy* confrontation analysis held that if a criminal proceeding is based on reliable hearsay evidence, then it would be perceived as fair. This analysis assumed that an accurate outcome is sufficient procedural protection of the criminal defendant. Many writers, however, have challenged the assumption that an accurate outcome is the sole measure of fair treatment of a defendant.[126] The essence of these

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125. *See, e.g.*, State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986) (reviewing the defendant's arguments that use of video cameras to present victim's testimony violated his right to confront the witnesses against him); Hochheiser v. Superior Court, 161 Cal. App. 3d 177, 208 Cal. Rptr. 273 (1984) (refusing to allow videotaped testimony absent legislative authority). *See supra* note 4.

126. *See, e.g.*, Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28 (1976); Michelman, *Formal and Associational Aims in Procedural Due Process*, in Due Process Nomos XVIII, at 126 (J. Pennock & J. Chapman eds. 1977); Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, in Due Process Nomos XVIII, at 172 (J. Pennock & J. Chapman eds. 1977); Saphire, *Specifying Due Process Values: Toward a More*

writers' claims is that the procedural provisions of the Constitution, such as the due process clause and the right to confrontation, "prevent the government from treating individuals in the criminal process as though they were objects."[127] To them, the appearance of fairness in a criminal proceeding hinges not only on outcome accuracy, but also requires that the procedures respect individual dignity. Process is not merely a means to some other end, but itself is intrinsically valuable.[128] Thus, for example, a criminal defendant is entitled to a hearing even if a conviction is the certain result. Moreover, if for some reason the jurors refuse to convict despite overwhelming evidence against the accused, then the judge cannot override their acquittal.[129]

These writers' theory about the values of constitutional procedures responds to the deficiencies of the Court's functional theory and provides a sound analytical basis for *Coy v. Iowa*. The argument in support of this claim begins with a return to the history of the confrontation guarantee.

The colonists chose to give the right to confront one's accusers privileged — that is, constitutional — status. This decision implies that they regarded face-to-face encounters as somehow "better" than affidavits or deposition testimony. Their preference for face-to-face encounters presumably stemmed from a notion that physical presence of a witness before the fact finder and the accused, and oath and cross-examination produced "better" testimony. The colonists may have regarded this testimony as better than hearsay because (1) they assumed that live testimony is more reliable than hearsay; (2) it would otherwise help preserve the "fairness" of the criminal proceeding; or (3) because of a combination of enhanced reliability and other "fairness" values.

Responsive Approach to Procedural Protection, 127 U. PA. L. REV. 111 (1978); Scanlon, *Due Process*, in DUE PROCESS NOMOS XVIII, at 93 (J. Pennock & J. Chapman eds. 1977).

These writers and their disagreement with the Court's utilitarian approach to due process reflect two different normative models of procedure. In the criminal context, the two models have been described as the "due process" and "crime control" models. *See* Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

127. L. TRIBE, CONSTITUTIONAL CHOICES 13 (1985).

128. *Id.*

129. The jury's power to nullify statutory law and to acquit a defendant it deems not blameworthy is controversial. *See, e.g.*, Bonnie, *Morality, Equality and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law*, 12 BULL. AM. ACAD. PSYCHIATRY L. 5, 10-12 (1984); Scheflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS. 51, 71-74 (Autumn 1980); Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); Simpson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 512-20 (1976).

The first assumption, that face-to-face confrontation is valuable only because it enhances reliability, reflects a belief that physical presence of a witness actually assists fact finders in assessing credibility, that an oath may enhance sincerity, and that cross-examination is an effective tool for uncovering falsehoods. In fact, human experience — then and now — both supports *and* contradicts these assumptions. For example, the physical presence of a witness may mislead or distract the fact finders as often as it may assist them. Personal attractiveness, wardrobe, mannerisms, unusual speech patterns, or other visible characteristics of a witness that may be unrelated to truthfulness may influence whether the jurors or judge will credit a witness's testimony.[130]

Likewise, an oath will impress on a witness the need to tell the truth only if that witness respects the oath[131] or fears punishment for perjury. If the witness is unmoved by the oath or the consequences of lying to the court, then the oath is an empty ritual.[132] Also, an oath or affirmation to tell the "truth" does not protect the fact finder from mistaken impressions. Out-and-out lies in court probably are unusual.

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130. *See, e.g.*, Fontes & Bundens, *Persuasion During the Trial Process*, in PERSUASION: NEW DIRECTIONS IN THEORY AND RESEARCH 259 (M. Roloff & G. Miller eds. 1980). One commentator concludes that people generally do no better at detecting whether someone is lying than they would if they chose randomly. *See* P. EKMAN, TELLING LIES 162 (1985).

Jurors may also misinterpret demeanor evidence, to the extent that emotional expression varies among people and cultures. *See* S. ASCH, SOCIAL PSYCHOLOGY 195-203 (1952). A quiet, controlled, and impassive witness may be seen by some jurors as more credible than one who is emotional or demonstrative. This difference in emotional expression, however, may have little or nothing to do with the witness's veracity.

131. *See* Comment, *supra* note 3, at 749. For a comprehensive review of the historical evolution of the oath and its essentially irrational basis, see Silving, *The Oath: I*, 68 YALE L.J. 1329 (1959).

132. The shift from an emphasis on presence to a reliability interpretation of the value of confrontation might be explained, at least in part, by an eroding lack of confidence in oaths. In more religious (or superstitious) times, the oath was perceived to be a weighty influence against false testimony. *See* Silving, *supra* note 131. If it became clear after the trial that the witness had lied, then the liar might be outcast from the community. In a rural, agrarian society, this type of excommunication would be a grave, even life-threatening penalty. In an urban industrialized society, however, the threat of being known as a "liar" or being excommunicated from a particular "community" may be far less serious a penalty. Moreover, a defendant who was a true believer in the oath might find a certain satisfaction in the faith that the liar would be punished by God, if not by man.

The loss of faith in the magical or religious power of the oath thus may have led us to rely more heavily on "reason" or science. A "reliability" theory thus may be a substitute for lost faith, and may allay fears that the law is arbitrary. This theory appears "scientific," and so appeals to our modern, "rational" minds.

More common causes of testimonial inaccuracy are witness uncertainty or mistaken recollection due to imperfect perception, faulty memory, or the distortion of testimony caused by repeated or slanted questioning by authorities or attorneys.[133] Indeed, some testimonial inaccuracy may be produced by the very nature of witness examination at trial.[134] None of these reliability problems is cured by an oath or by physical presence of the witness.

The effectiveness of cross-examination in uncovering falsehood probably is limited. First, a lawyer cannot conduct meaningful cross-examination without adequate preparation. In the case of many indigent criminal defendants, the preparation of overworked public defenders or unmotivated court-appointed counsel may be weak or nonexistent.[135] Also, witness cross-examination is most effective when a witness is clearly wrong or lying, and other evidence, such as a prior inconsistent statement, is available that proves this. The dramatic contradiction or revelation of mistake or bias established through cross-examination occurs far less often in real life than cinema or television depictions of the courtroom suggest. Moreover, lawyers can manipulate cross-examination to discredit a truthful witness[136] by confusing the witness, by prejudicing the fact finder against him through disclosure of criminal convictions that may have little or no bearing on the witness's veracity,[137] or by other methods. Even cross-examination that discloses possible bias of a witness with a history of dishonesty[138] may be misleading if the witness on this occasion, despite such a history, happens to be telling the truth.

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133. *See* Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547, 555-56 (1984).

134. Note the following advice offered in a leading text on trial tactics about how to conduct cross-examination:

> d. *Don't let the witness explain.*
> Open-ended questions are disastrous on cross-examinations.
> e. *Keep control over the witness.*
> Control comes in large part by asking precisely phrased leading questions that never give the witness an opening to hurt you.

T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 216 (2d ed. 1988).

135. *See generally* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Carlin & Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381 (1965).

136. *See, e.g.*, Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 833-34 (1985).

137. *See* FED. R. EVID. 609(a)(1); *see also* Mendez, *California's New Law on Character Evidence: Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1006-09 (1984).

138. *See* FED. R. EVID. 609(a)(2).

The assumption that face-to-face encounters are more honest because they chill any inclination to lie about another person also may be inaccurate. Experience inside the courtroom indicates that many people find it more difficult to convey honestly an opinion to a person's face, than to say it behind the person's back.[139] For example, witnesses who "sing" in organized crime cases may risk physical injury or death,[140] and witnesses who "turn state's evidence" in exchange for lenient treatment may be willing to speak against an accused in order to please the authorities. In these cases, a witness's out-of-court statements might well be reliable, whereas the in-court statements may be self-serving lies. Experience outside the courtroom likewise suggests that face-to-face exchanges may be less frank and honest than discussions outside the presence of the person being discussed. For example, the law expressly acknowledges this when it maintains the confidentiality of deliberations about the promotion and tenure of faculty members so that colleagues will speak freely about a candidate's merits.[141]

Furthermore, if the constitutional preference for face-to-face encounters represents only the functional value of improving evidence reliability, then we must ask why other, legitimate policy interests should not be considered in the confrontation calculus. For example, confrontation of the victim and defendant may be traumatic for the victim in some instances, perhaps especially in cases of sexual assault or battery. The right to cross-examine can offend other interests as well, such as the interest in protecting the anonymity of juvenile offenders.[142] The confrontation requirement also may be inefficient.

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139. Professor Michael Graham may disagree. He believes that "[p]eople are more careful and sincere when they accuse someone face to face rather than when they are spreading a rumor." Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 74 (1985).

Although people may be more "careful" in face-to-face encounters, this does not necessarily mean they are more sincere. The word "rumor" connotes baseless, unsubstantiated talk. Not all talk behind a person's back, however, is "rumor." A child who alleges that a person has sexually assaulted him or her may not be spreading a rumor. A co-conspirator who confesses to details of a crime but later refuses to testify against a defendant may well have been more sincere when talking behind the scenes than when confronted by the defendant. Unwillingness to accuse someone face-to-face therefore on occasion may reflect fear or self interest rather than sincerity.

140. *See, e.g.*, *Witness Admits His Recantation Was a Lie*, Gainesville Sun, Oct. 3, 1987, at 7A, col. 1 (reporting that a mob hit man had falsely recanted his court testimony against a Mafia boss because of death threats to his family).

141. *See, e.g.*, Keyes v. Lenoir Rhyme College, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977) (noting the College's argument that confidentiality was essential "to receive honest and candid appraisals of the abilities of faculty members by their peers").

142. *See* Davis v. Alaska, 415 U.S. 308, 319 (1974).

Live testimony may be more time-consuming than other forms of testimony, such as affidavits or depositions, and court appearances may inconvenience witnesses who need to travel or miss work in order to testify. A more significant cost of the confrontation requirement, one that directly undermines the claim that the requirement enhances reliability, is that it may operate to exclude probative evidence.

The confrontation guarantee cannot be explained solely by the claim that face-to-face encounters may enhance the reliability of the witness's testimony. It might be partially explained by a belief — rational or irrational — that it might enhance the reliability of evidence against the *accused* in some cases. Even when the evidence is less "reliable" because the witness is afraid or otherwise unwilling to speak against the accused, this lesser reliability benefits the defendant. But, this interest in evidence reliability seems to be an insufficient basis for the confrontation right to have been given separate constitutional status. The due process clause may be read to assure reasonably rational or accurate justice,[143] and so is an adequate guarantee of "fair evidence" in this sense. The second assumption, that face-to-face encounters promote an aspect of a "fair" proceeding that goes beyond evidence reliability, therefore is a more compelling and complete explanation for the colonists' decision to give the right to confrontation separate constitutional status.

But what do we mean by "fair" procedure, and what part should confrontation play in assuring this goal? The Constitution suggests that "fairness" means both rationality and respect for the participants. The "bundle of rights" in the fifth and sixth amendments assures procedure that promotes, at the least, five values. First, similarly situated defendants should receive equal treatment. Second, adjudication should be nonarbitrary, and performed by an impartial decisionmaker. Third, the procedures should be predictable and intelligible to those affected by them. Fourth, the procedure should entitle participants to discover the reasons for government's actions. Fifth, the procedure should allow those affected to participate meaningfully, personally, and on equal footing with their adversary. Procedure therefore not only should promote rationality through unbiased and accurate decisionmaking, but also should show respect for persons by allowing equal, active participation in decisions affecting their interest. Confrontation is a specific type of procedure that helps to promote *both* ends. It promotes the instrumental goal of reducing the potential arbitrariness of the criminal proceeding, *and* it grants the defendant the intrinsic value of an opportunity to participate in the outcome.

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143. *See In re* Winship, 397 U.S. 358 (1970).

The confrontation guarantee reflects a belief that criminal trials of human beings should look human to do "justice,"[144] and should treat the defendant — even an alleged child molester — as an equal, dignified participant in the proceedings against him. These qualities are compromised when government prosecutors use affidavits, depositions, videotaped testimony, one-way mirrors, or closed-circuit television testimony to prove their central accusations against the criminal defendant, no matter how "accurate" those accusations may be. Procedure that is based on these forms of evidence no longer is an even contest in which the defendant plays an active, equal, and dignified role.

If, for example, the accuser's testimony is given in a video presentation, then the testimony will gain whatever enhanced value that "television" affords a speaker. The defendant, of course, is not presented on video. Consequently, the jury is forced to evaluate the credibility of two very different figures: the live, courtroom figure of the defendant and the taped, out-of-court figure of the declarant. If the medium of video enhances, even slightly, the power or persuasiveness of a "telegenic" speaker, then the defendant is placed at an invisible and unmonitored disadvantage. The symmetry of the trial is disturbed, because the defendant's status in the proceeding is reduced.

Likewise, if the court allows the bailiff to place a one-way mirror or screen between defendant and accuser, the defendant becomes a reduced, almost inhuman figure. The jurors may see the mirror or screen as a court-authorized means of segregating the defendant from the victim and, on a broader level, from the community. The defendant is "tainted," or stigmatized by the presence of this shield. A person who must be cordoned off, particularly from a small child, is not someone a juror will be likely to believe, empathize with, or want to protect. If the defendant appears to be too alien, too contagious, or too dangerous to be confronted face-to-face, then the jury may be less inclined to acquit that defendant.

Indeed, the screen may operate as a mask that shields the faces of some of the courtroom actors. Although metaphors and other linguistic masks are pervasive in the law,[145] and costumes are worn by some participants, these devices are not benign in all cases. In any event, a screen or a one-way mirror is not a mere metaphorical device; it is a tangible, literal barrier placed between accuser and accused. That

144. *See* Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 113 (1975).

145. Weyrauch, *Law as Mask — Legal Ritual and Relevance*, 66 CALIF. L. REV. 699, 713-22 (1978).

physical barrier not only may change the behavior of the accuser, to the possible prejudice of the defendant, it may alter the appearance of the trial in unanticipated, negative ways.[146] The interaction of the witness and the defendant in a courtroom setting is already an unnatural, ritualistic exchange. To add screens, television monitors, mirrors, or other mechanical devices may compromise further the "humanness" and equality of this exchange. The defendant cannot participate equally in his or her own defense. Indeed, the defendant may need to hire technicians or other media experts to assist in the cross-examination of these "video witnesses." The result may be a procedure that is far removed from the original notion of human accuser and human accused pitted in a face-to-face, live, and human exchange. The defendant will appear less a person than an object — and an unattractive object at that — and may be treated in the impersonal way that one treats an object.

Several noncourtroom illustrations offer intuitive support to the claim that face-to-face encounters promote dignity, and not merely reliability ends. Commonly-held notions about "fair play" and "decent treatment" of others in social and business relationships indicate that most people accord intrinsic value to face-to-face encounters. For example, the indignity of receiving a "Dear John" letter lies in the impersonal delivery of the bad news. The recipient may feel a strong need to confront the sender *not* because he believes that her letter is based on false assumptions or even that he can change her mind, but because he needs to hear it face-to-face, to at least have an *opportunity* to incline her heart toward him, perhaps because he wants her to see — face-to-face — what her decision has meant to him.[147] Recovery from this personal, face-to-face encounter still may be painful, but the disappointed party is less likely to feel he has been treated like a stranger, or as a mere object in which his lover suddenly has lost interest. His dignity and self-respect will be better preserved.

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146. Some researchers are exploring the nature of face-to-face interaction, and are attempting to define the differences between such interaction and interaction through other channels, such as telephone or writing. The significance of this research to this article is that *we do not yet know precisely what those differences are*; we therefore may compromise qualities through use of the alternative channels, without understanding what those qualities might be. *See Comment*, 43 *Int'l J. Soc. Lang.* 77 (1983) (authored by Regna Darnell) (commenting on a paper by Madeleine Mathiot, which proposes a theory of face-to-face interaction).

147. This may explain the outrage of the victims of World War II concentration camps when Klaus Barbie refused to make further appearances at his trial for crimes against humanity. As one spokesperson for the Jews of Lyons stated, "We will not have the opportunity to see Barbie face to face with his accusers, having to answer to the very people who will point their fingers at him and say, 'You tortured me, you put me on the train for deportation.'" Bernstein, *Barbie, Accusing Court, Leaves Trial*, N.Y. Times, May 14, 1987, at A8, col.1.

The United States military acknowledges this intrinsic value of face-to-face encounters by its practice of delivering the news of the death of a serviceman or woman in person. Likewise, in the business world it is "indecent" to terminate an employee with a letter, instead of in a face-to-face exchange. To use a letter demonstrates a lack of respect for the affected person, and implies he or she is of low status.

People in our culture thus regard the delivery of significant bad news through a letter, a telephone call, or other impersonal devices as the choice of a messenger who is cowardly, or who lacks respect for the equality, humanity, and dignity of the recipient. There is deep and abiding emotional content to the expression, "Tell me to my face," which the reliability theory of confrontation ignores.[148] The acceptability of a legal decision to the participants and to the community may hinge on whether this emotion is acknowledged.

The philosophy that likely undergirds our preference for face-to-face confrontation is a belief that a person does, or should, have some affinity for another person, simply because they are a human being. If people viewed each other as total aliens, then an eye-to-eye encounter would be unlikely to evoke any tenderness, or to quicken the instinct to be honest or fair or compassionate. The greater the distance, physical, social or otherwise, between an accuser and accused, the less discomforting it may be for the accuser to say harsh or untrue things about the accused.[149] Physical proximity, in the form of a face-to-

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148. *See* Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988). Interaction between human beings differs from interactions of humans with objects in ways that suggest that to deny physical confrontation between defendant and accused is to treat the defendant more like an object than a human being. Asch describes the quality of this difference as follows:

> What then is distinctive about interactions between person and person? First, unlike objects, persons alone respond to *us*. Objects do not greet us, they do not blame or praise us, they do not love or hate us. They respond to our actions, not to us; they are not aware of our presence. The mirror reflects but it does not see us; only another person can be a true mirror for a human. For it is only persons who can answer us with feeling and understanding, with irritation or admiration, with assistance or competition . . . .

S. ASCH, SOCIAL PSYCHOLOGY 141 (1952).

149. Studies show that distance between individuals makes it easier for a person to inflict harm on another. Westen describes this research as follows:

> A number of experimental studies have shown that instructing subjects to view a victim in a detached way reduces empathic distress (Stotland, Sherman, and Shaver, 1971; Aderman, Brehm, and Rosenthal, 1974). Researchers interested in the social psychology of war (e.g., Kelman and Lawrence, 1972) have discussed dehumanization of the enemy as a way of making killing psychologically tolerable, and Bandura and Rosenthal (1966) observed that some individuals avoid empathic distress through various cognitive mechanisms (i.e., internal "behaviors") such as thinking

face encounter, may remind an accuser that his or her accusation is directed at, and may cause pain to another human being. An accused who is confronted by his or her accuser thus will gain whatever advantage this physical proximity may provide.

The accused also will gain the intrinsic benefit of the chance to respond. If the witness lies, the accused may respond with a snort of indignation, a glare, laughter, a cry of dismay, a curse, tears, or stony silence. This opportunity to look the witness in the eye and to respond may not change the witness's testimony. The opportunity to be seen and heard by one's accusers nevertheless is of value — intrinsic value — to the accused. This might be called the "shame on you" value of confrontation. "Tell me to my face" therefore implies not only that you must accuse me in person, but that you must remain to witness my reaction.

This discussion should not be read to suggest that courtroom confrontation is not also instrumentally valuable. It may improve the reliability of testimony against the accused on occasion, which undoubtedly is a critical goal in a criminal proceeding. But it is better described as a right instrumental to the achievement of a larger purpose: the purpose of treating a defendant as an equal, active, and dignified participant in the proceeding[150] despite the potential cost to efficiency

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> about something else. Quite similar is the commonplace experience of avoiding crying during a touching scene in a movie or play by staring at the exit sign or some other neutral stimulus, or avoiding discomfort during an injection or minor medical intervention by looking the other way or thinking of something pleasant.

D. WESTEN, SELF AND SOCIETY: NARCISSISM, COLLECTIVISM, AND THE DEVELOPMENT OF MORALS 35 (1985). The experience of observing the distress of another person has been shown to trigger an empathic distress-response in the observer, which may lead to helping behavior. *See, e.g.*, Hoffman, *The Development of Empathy*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY, AND DEVELOPMENTAL PERSPECTIVES 45-47 (J. Rushton & R. Sorrentino eds. 1981).

150. *Cf.* Pincoffs, *supra* note 126, at 172, 178-79. Pincoffs argues that the procedural values of revelation and participation rest on "recognizable and solid moral ground." *Id.* at 172. He locates the root of his moral ground in the second formulation of the Kantian imperative that we never treat anyone, including ourselves, as a mere means. *Id.* at 176. He elaborates as follows, in language that is relevant to this discussion of confrontation clause values:

> Participation may be instrumentally valuable, but instrumental to the achievement of a moral purpose that is itself impossible to describe in instrumental terms, the purpose of treating a man not as a mere means but as an end in himself. This is not to say that there is not intrinsic value in participation. I would prefer to say that there may be, but that participation turns on its relation to a moral end . . . . . We might say that participation is an instrument by which the valuation of persons as ends in themselves is expressed. It is as if the Kantian principle were determinable in any number of ways, but participation is one of the ways in which

and outcome accuracy. Procedure that respects the individual, in turn, may improve the appearance of the ultimate outcome to the community.[151]

A. *Developing the Dignity Value Premise*

The acceptability of this "fairness" or "dignity" interpretation of confrontation probably will lie less in whether it accurately identifies the whole value of confrontation than in whether it can solve practical

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> it may become determinate. It does not follow that mere participation is of value (though it may have value), but rather follows that participation is morally valuable to the degree that it makes determinate the moral principle that we should never treat a man as a mere means.

Id. at 178-79. As Pincoffs says, procedure should be decent. He points out that "[d]ecency requires that men who have a great deal to lose from an official decision be given an opportunity to contest it." *Id.* at 180. But, as he further notes, this is not a mere matter of courtesy. "It is, rather, the decency that prevails when a community is so governed that no man need fear that he will be treated as a mere means." *Id.* at 181.

The point of this Article is to demonstrate that the confrontation clause is one element of this "decency," and that it is designed to promote ends beyond the commonly-cited goal of enhancing evidence reliability. To that extent, I disagree with Grey who argues that the rules of fair procedure in criminal trials are designed solely to prevent mistaken convictions of innocent defendants. Grey, *Procedural Fairness and Substantive Rights*, in DUE PROCESS NOMOS XVIII 182, 184 (J. Pennock & J. Chapman eds. 1977).

151. *See* L. TRIBE, *supra* note 127, at 13; Scanlon, *supra* note 126, at 94 ("requirement of due process is one of the conditions of the moral acceptability of those institutions that give some people power to control or intervene in the rights of others"); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 124 (1978) ("[E]ven when outcomes of decisions are viewed as unfair or unjust, the decisions may be accepted as legitimate if the processes through which they are reached respond to basic principles of self-respect and autonomy.").

Professor Ball has compared courtroom procedures to theater, and concludes that "the action of the courtroom, as a type of theater, is an image of the manner in which citizens are to have parts of importance and dignity, to be taken seriously and with ceremonious, protective deference, and to have their rights and duties fairly recognized." Ball, *supra* note 144, at 113. He claims that live performances are an important aspect of the effectiveness of judicial procedure, *id.* at 115, a claim that cautions against adoption of alternatives to a live performance despite their lower cost or other benefit to the prosecution. The "humanizing dimension" of judicial theater may be essential to the court's capacity for justice. *Id.*

The right of confrontation also may increase the defendant's perceived control over the procedure, which may affect his or her confidence in the outcome. Psychological studies indicate that the ability to exercise some control over a procedure can improve the participant's confidence about the outcome — even in circumstances to which *only* luck or chance is relevant. For example, subjects who were given a chance to choose their own lottery ticket from several were more confident in their chances of winning than participants who simply were handed a ticket. *See* R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 135-36 (1980).

problems of defining the right of confrontation and when it is excused. That is, can we derive usable standards from a claim that the confrontation guarantee rests on a principle of human dignity? The Court's functional approach has been criticized because it asks unanswerable, and possibly irrelevant, questions such as whether a co-conspirator's statement in furtherance of a conspiracy is "reliable." The dignity approach may ask the relevant question, that is, when does the use of hearsay by the prosecution encroach unduly on individual dignity, but is this question likewise unanswerable?

I conclude that this question is not unanswerable, and that it is a less difficult one than the questions raised by other provisions of the Constitution that preserve fundamental rights of the accused. Unlike the general and open-ended due process clause, for example, the confrontation clause speaks directly to the specific type of procedure that the colonists envisioned, and when it would be triggered. The confrontation guarantee states that the *criminal* defendant shall be confronted by his or her accusers. We therefore need not ask whether a "property right" is at stake, as we must in a procedural due process analysis. We also are told, in more certain terms than the due process clause provides, what process is "due." As has been shown above, the language of the clause offers a preliminary definition of the guarantee: it is the right to confront physically and to question those persons who accuse the defendant of a crime, and whose focused accusations are relied on by the prosecution in a criminal proceeding. We still must decide, however, what kinds of accusations fall within the guarantee. It is at this point that our theory about the clause becomes relevant. Again, the appropriate question under the individual dignity approach is this: when will admission of an out-of-court statement deny the defendant his or her individual dignity?

First, the dignity theory implies that the clause should be construed most liberally when the risk to the defendant's individual liberty is greatest. Indeed, the confrontation guarantee applies only to criminal proceedings and not to civil proceedings, because the threat to the individual's liberty — his or her status as an equal, dignified, and free person — is perceived to be greatest when the possible outcome is classification of the person as a criminal.[152] It follows that the threat to individual liberty is likewise more significant — and hence of greater constitutional concern — when the hearsay in question is *central* to the government's charge against the accused. This suggests that wit-

152. *See* Mashaw, *Dignity Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433 (1987).

nesses who make "devastating" or crucial accusations should confront the accused. Therefore, Lord Cobham's out-of-court accusation against Sir Walter Raleigh excites confrontation clause concern, whereas the neighbor who claims she saw a bearded man rush out of the liquor store does not. That is, the "devastating" nature of the out-of-court statement should play a role in deciding whether the hearsay poses a sixth amendment problem. Hearsay on a collateral matter does not assume constitutional proportion.

The dignity theory, as I have defined it, further implies that the confrontation guarantee, like all procedure, should protect against the threat of official arbitrariness. An unavailable-first requirement therefore does make sense — even if the evidence "would come in anyway" — because it safeguards against arbitrary prosecutorial conduct. It requires the government to account for the absence of the declarant of a central accusation against the defendant, and allays fears that the reason for the witness's absence is arbitrariness or discrimination against the accused. It also means that the government must take all reasonable steps to procure the witness's presence and thereby preserve both the intrinsic and functional values of confrontation.

The dignity theory also suggests that the individual is entitled to reasonably predictable procedures. Therefore, traditional methods of handling hearsay are relevant under the individual dignity model but only to the extent that past practice affects the individual's procedure expectations, and his or her ability to anticipate what procedures the court will follow. Tradition may determine what a given culture perceives as fair treatment of the individual. An individual within that culture likely will share this perception and expect to be treated accordingly. Indeed, the individual may feel deprived of equal status if this expectation is not realized.

Finally, "decent procedure" entitles the individual to an explanation and justification of official acts.[153] The right to confront one's accusers is one aspect of a procedure that offers such reasons, or at least provides the accused with the opportunity to explore the basis of accusations through cross-examination. It takes seriously the defendant's objections to such official acts and places them "on a par with the claims of authority."[154] Also, as Justice Marshall has stated, confrontation helps to assure an "open and even contest."[155] Thus, only hearsay statements that compromise the appearance of an open and equal contest are of constitutional concern.

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153. *See* Scanlon, *supra* note 126, at 93.
154. *Id.*
155. *See* Kentucky v. Stincer, 107 S. Ct. 2658, 2670 (1987) (Marshall, J., dissenting).

The quintessential confrontation violation would arise if the government relied on anonymous informers as the key evidence in the prosecution of a defendant. Trials based on anonymous accusations reduce the defendant to the role of just another witness — and a disadvantaged one — in his or her own trial, rather than someone entitled to be present throughout the whole proceeding and to participate fully in the trial. In fact, absent disclosure of the identity of the accusers and an opportunity to confront and challenge them, the proceeding no longer is an adversarial one.[156] A likely consequence will be that American observers, who are enculturated to expect and to respect an adversary model, will doubt the fairness of the proceeding. Moreover, any criminal process, whether adversarial or not, that bases convictions on the testimony of anonymous "snitches" will make people fear that their government acts arbitrarily, does not treat all citizens equally, and may deny them a fair opportunity to defend themselves against charges of wrongdoing.[157] This risk of arbitrariness would be

156. Provocative work by Thibaut and his collaborators suggests that Americans perceive an adversary system of decisionmaking as more just than an inquisitorial one. *See* Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1287-88 (1974). The adversary system, they observe, "introduces a systematic evidentiary bias in favor of the party disadvantaged by the discovered facts," [*e.g.* the defendant in a criminal case). *Id.* at 1289. It also tends to assure both parties equal access to information and to control of the proceeding. An implication of their study is that these two features are important aspects of "fairness" in procedure. Government reliance on accusations of anonymous or absent accusers would compromise both features, as it would disadvantage the accused and would afford the government superior access to information.

In another work, Thibaut and Walker conclude that affording participants control over the proceeding — an adversary system characteristic — improves their sense of justice, even though greater decisionmaker control — an inquisitorial system characteristic — may enhance the accuracy of the outcome. *See* Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 556-57, 565-66 (1978). "Truth" and "justice" therefore are not synonymous. Moreover, they conclude, discovery of truth is not the main objective of the legal process. *Id.* at 556. If they are correct, then the Court's insistence that the primary goal of the confrontation guarantee is to enhance evidence reliability, i.e., "truth," rather than to enhance the defendant's opportunity for participation and control of the proceeding, i.e., "justice," misses the true goal of criminal procedure.

157. *See, e.g.*, F. KAFKA, THE TRIAL 3 (21st printing 1978). This is the theme of THE TRIAL. In Kafka's haunting novel, "the law" is the exercise of government power to support arbitrary decisions. The well-known first sentence of the book reads: "Someone must have traduced Josef K., for without having done anything wrong he was arrested one morning." *Id.* There is no stated charge, no visible accuser, no opportunity to be heard, and no chance to defend. Josef K. is accused, condemned, and executed by faceless beings for unstated reasons.

THE TRIAL remains a deeply disturbing book because Kafka's scenario seems possible and contemporary. Fear that innocent citizens might meet a fate like that of Josef K. probably underlies the "bundle of rights" afforded criminal defendants through the fifth and sixth amendments.

greatest with political crimes, such as treason or conspiracy against the government. In these cases, the government would have a clear motive to accuse wrongly and convict its political enemy, and the only evidence of the alleged crime may be the anonymous accuser's words.

If a hearsay declarant is not available because of death, serious illness, location beyond the subpoena power of the court, or location unknown despite a diligent search, and if the declarant's identity and the reasons for his or her absence are made known to the fact finders, then the issue becomes whether the confrontation guarantee is satisfied by this showing of unavailability. Assume, for example, that Lord Cobham had died. Should the government then have been permitted to introduce his out-of-court statement against Sir Walter Raleigh?

The answer suggested by the individual dignity approach is that the confrontation clause does *not* require exclusion of a genuinely unavailable declarant's hearsay. The reason is that all concerned (the defendant, the jury, and the courtroom observers) can be told why the declarant is not present for examination. If the defendant believes that the government has fabricated this out-of-court testimony, he or she must question the police officer who offers the testimony, or otherwise attempt to establish that the statement was not made by the declarant. If the defendant believes that the declarant made the statement, but is a liar, then the defendant must attempt to discredit the declarant by introducing evidence about his or her credibility, perception, or motive to lie. This may be a formidable task, of course.[158] Doubts about the reliability of the testimony and about whether defendants should be convicted on the basis of this type of uncross-examined testimony remain a serious concern. But these doubts are due process concerns, not confrontation clause concerns.[159] The due process problem

158. The government may have a natural advantage in a criminal case, despite the "beyond a reasonable doubt" standard of proof. Some studies indicate that 60% of prospective jurors do not accept the principle that a defendant is presumed innocent. *See, e.g.*, NATIONAL JURY PROJECT & NATIONAL LAWYERS' GUILD, THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE 2 (1975).

159. *See* Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966). If evidence reliability were the touchstone to the confrontation guarantee, then one might ask why the colonists restricted it to criminal cases. Presumably, reliability of evidence also is a significant concern in civil cases. The restriction to criminal cases suggests that the guarantee was based on a concern about arbitrary assertion of government authority in cases in which the individual is pitted directly against the government and when the potential loss to the individual is most grave.

Also, if the confrontation clause were only concerned with reliability, it would be redundant, insofar as the due process clause should protect against convictions based on unreliable testimony. *See, e.g.*, California v. Green, 399 U.S. 149, 184 (1970) (Harlan, J., concurring) (noting that there should be a distinction between the due process right of a reliable and trustworthy

is whether the government should be able to satisfy its "beyond a reasonable doubt" burden with this out-of-court accusation alone. This burden of proof problem is not solved by reference to the confrontation guarantee. As stated earlier, the confrontation clause *by itself* does not assure fair trials or trials based solely on dependable evidence.[160]

The confrontation guarantee simply requires that people who accuse a criminal defendant must confront the defendant. Because the confrontation guarantee is restricted to human witnesses,[161] it should take into account that humans die, move, hide, become afraid, forget,[162] refuse to cooperate, or act in other ways that make it impossible for the government to secure their presence at trial or assure that if present, they will respond to defendant's questions on cross-examination. If "confrontation" connotes human, face-to-face encounters, as is suggested herein, then it also must anticipate that these encounters are not always feasible.

Of course, human beings also lie, misperceive, misstate, or otherwise mischaracterize facts, so that reliance on their central accusations without the opportunity for face-to-face confrontation can produce serious errors. These concerns about an arbitrary result are important and may assume constitutional proportions;[163] but the appropriate re-

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conviction and the confrontation right); *cf.* Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1372-75 (1985) (arguing that the confrontation clause and the rule against hearsay improve the stability of judgments by preventing jurors from relying on statements of declarants who later recant; in-court testimony is harder to recant, and any later contradictory statement is less likely to be believed).

160. *See supra* text accompanying note 32.

161. *See supra* text accompanying notes 32-34.

162. *See* United States v. Owens, 108 S. Ct. 838 (1988) (approving admission of prior identification when declarant had no present recollection of the identification).

163. The potential unfairness would be greatest if the absent declarant were the only witness against the accused, and the alleged crime were grave. In such a case, an acquittal might be appropriate. This is an ancient concept, as the following Biblical passages show: "If any one kills a person, the murderer shall be put to death on the evidence of witnesses; but no person shall be put to death on the testimony of one witness." *Numbers* 35:30; "On the evidence of two witnesses or of three witnesses he that is to die shall be put to death; a person shall not be put to death on the evidence of one witness." *Deuteronomy* 17:6.

These ancient passages suggest that people have long believed that the testimony of one person not be used as the sole basis for conviction in cases in which the potential penalty is grave — even if that one person is available for confrontation.

Sir William Holdsworth observed that during the sixteenth and seventeenth centuries, English law required evidence of two witnesses for a conviction of some offenses. 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 205-06 (1938). This rule of "testis unus testis nullus," however, had a relatively small effect on modern English law. The result was an emphasis on the proper weight of the evidence rather than the number of witnesses who swore to a fact. *Id.* at 209-11.

sponse to these concerns is the due process clause. The dignity value of the confrontation guarantee, as it has been defined herein, is preserved when the government exhausts all feasible alternatives to the use of out-of-court accusations, and explains to the court why the accuser is not available for cross-examination by the accused.

If the declarant does appear, then the court must allow the defendant to be present during the witness's examination and must permit the defendant to question and challenge the witness in a face-to-face encounter.[164] The witness may be uncooperative or may have no memory of the prior statement. Nevertheless, according to the theory developed herein, this would *not* be a denial of the right to confrontation.

B. *Applications of the Dignity Value Theory*

Returning to the Court's recent confrontation cases, we therefore find that the dignity theory offers both more and less protection for criminal defendants than the reliability theory. First, it would render obsolete the reliability step of the *Roberts* test, including the presumption that firmly-rooted exceptions to the hearsay rule are "reliable." Case law that attempts to define the adequacy of various prior opportunities for cross-examination likewise would become a footnote in confrontation clause history. Evaluations of the relative adequacy of the defendant's "opportunity" for cross-examination of testimony at a preliminary hearing, a grand jury proceeding, or at trial when the witness is uncooperative, forgetful, or hostile, no longer would be necessary. Similarly, courts would not need to compare categories of hearsay on the basis of their purported "independent evidentiary significance," as *Inadi* now requires them to do. Therefore, the dignity theory provides *less* confrontation clause protection to defendants, to the extent that an unavailable declarant's statement would be admissible regardless of its apparent or actual "reliability."

When, however, a declarant is "available," the government *must* produce him or her. Thus, *Inadi* would be rejected to the extent that it abandons the "unavailable-first" requirement of *Roberts*. The confrontation decisions that define "unavailability" would remain impor-

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One American remnant of this history may be found in Article III section 3 of the Constitution, which provides that "No person shall be convicted of Treason unless on the testimony of two witnesses to the same overt Act, or on Confession in open Court." U.S. CONST. art. III, § 3.

164. This approach is consistent with that advocated by Justice Harlan in California v. Green, 399 U.S. 149, 186-87 (1970). *See also* Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32, 41-42 (1973); Note, *Confrontation and the Hearsay Rule* 75 YALE L.J. 1434 (1966).

tant precedent, though that term may require closer scrutiny than it has received in the past. The Federal Rules of Evidence offer workable examples of unavailability,[165] which may be an appropriate framework for constitutional standards. The dignity approach also would require courts to define a "central accusation" against a defendant. One guideline for these determinations would be whether the defendant reasonably would be expected to cross-examine the witness about the statement.[166] In addition, the statement must be a "focused" accusation before the confrontation clause will apply. Thus, for example, a laboratory drug analysis report offered against a defendant in a drug case presents no confrontation clause problem under the proposed theory. This statement may be "central" or "devastating," but it is not the type of focused accusation that excites sixth amendment concern.[167] In contrast, an out-of-court statement by a declarant that names the defendant as a drug supplier would fall within the confrontation clause.

Statements that currently are admissible regardless of the declarant's availability no longer would be admissible in a criminal proceeding unless the government produced the declarant or accounted for his or her absence. If, for example, the victim of an assault made an "excited utterance" to a police officer in which she identified the defendant as her assailant, the out-of-court statement would not be admissible against the defendant unless the victim were unavailable. Her statement would be a clear example of a "central" accusation, and no necessity factor would support its admission in lieu of her appearance in

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165. *See* FED. R. EVID. 804(a), which defines unavailability as including situations in which the declarant:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of his 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 his statement has been unable to procure his attendance.

Id.

166. *See, e.g., Unified Theory, supra* note 3, at 617-18.

167. This means that lower court cases, such as United States v. Houser, 746 F.2d 55 (D.C. Cir. 1984), might be decided differently. In *Houser*, the Court of Appeals suggested that a "business record" — a Bureau of Alcohol, Tobacco and Firearms (BATF) tracer form offered to show the movement of a firearm in or connection with interstate commerce — posed a confrontation problem. *Id.* at 62. Movement in interstate commerce was a statutory element of the offense with which the defendant was charged. *Id.* at 56. The tracer form was prepared by an unidentified BATF clerk. An agent of the BATF did appear at the trial who described the tracing procedure, as part of the foundation for the record. *Id.* at 57.

court. If she did appear but failed to respond to questions about the statement, whether due to fear, hostility, loss of memory, or any other reason, her prior out-of-court statement would be admissible because the government would have accounted for its failure to use her live, face-to-face testimony.

Another example is use of videotaped or closed-circuit testimony of a child witness in sexual assault cases, which would not be admissible unless the child were shown to be unavailable for in-court examination. First, the child would have to appear before the defendant. If the child refused to speak, then the government could introduce the prior, out-of-court statement of the child against the accused.

This last suggestion may appear insensitive to the potential trauma that a child witness may suffer in making even such a limited court appearance.[168] One may argue that the dignity of the defendant should not trump the dignity of the victim.[169] The response, which will be

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168. Studies indicate that not all child victims suffer trauma in testifying; some find the experience cathartic and vindicating. *See. e.g.*, Terr, *The Child Psychiatrist and the Child Witness: Traveling Companions by Necessity, If Not by Design*, 25 J. AM. ACAD. OF CHILD PSYCHIATRY 462, 469 (1986); Yates, *Should Young Children Testify in Cases of Sexual Abuse?*. 144 AM. J. PSYCHIATRY 476, 478 (1987). Moreover, the stress experience is not caused exclusively by testifying in court. The repeated questioning by authorities and the effect on the family of legal prosecution in incest cases can cause stress as well. *See* Claman, Harris, Bernstein & Lovitt, *The Adolescent as a Witness in a Case of Incest: Assessment and Outcome*, 25 J. AM. ACAD. OF CHILD PSYCHIATRY 457, 458 (1986); Melton, *Psycholegal Issues in Child Victims' Interaction With the Legal System*, 5 VICTIMOLOGY 274, 275-76 (1980).

169. As Justice Cardozo once wrote, "[J]ustice, though due to the accused, is due to the accuser also." Snyder v. Massachusetts, 291 U.S. 97, 122 (1934); *see also* Dutton v. Evans, 400 U.S. 74 (1970); Hagins v. Warden, 715 F.2d 1050, 1058-59 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984). To say that the criminal justice system should be sensitive to the "rights" of victims, however, does not mean that the defendant's right to be confronted with adverse witnesses must be limited or eliminated to accommodate these rights. The insensitive treatment of adult rape victims by law enforcement personnel and by society has concerned many writers, including this author. *See* Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implication for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985). Appropriate responses to this problem, however, need not defeat the defendant's right to a fair trial, as we have known it. Certainly, it would be less traumatic for an adult rape victim to give her testimony through videotaped or closed-circuit television testimony. If we only offer this protection to child witnesses, then we need to defend that distinction. It is difficult to imagine how that argument could be made without claiming that the trauma of a child is somehow greater, or more important than the trauma of an adult. Even if such comparisons among victims were made, however, they likely only would be a matter of the degree of trauma suffered.

Another point is that the advent of closed-circuit or videotaped testimony for child victims of sexual assault may have been prompted less by a concern that the re-telling will traumatize the child than by the concern that the child will *not* re-tell the story when confronted with the adult abuser. A desire to secure convictions in child abuse cases thus may be as much of an

unsatisfactory to some people, is that the victim's difficulty in making a face-to-face accusation is worthy of our attention, but it should not defeat the defendant's constitutional right. If this type of "balancing" of extrinsic interests intrudes into confrontation analysis, then the clause may be sapped of its fundamental vitality. Moreover, there is an obvious danger in redefining constitutional rights of the accused to accommodate the sensitivities and characteristics of certain classes of victims. If "confrontation" is redefined in child abuse cases, then it may be redefined in other categories of cases as well, depending on a judge's or legislature's inclination to weigh the victim's trauma in those cases more heavily than the trauma of victims in other cases. One-way mirrors may appear not only in child abuse cases, but also in adult rape cases, attempted murder cases, kidnapping cases, and any other cases in which the victim has suffered physical and psychological trauma that may be aggravated by facing the defendant. The government could offer other equally compelling reasons for "excusing" confrontation, such as fear for the safety of witnesses who testify against defendants in drug cases, or in trials of terrorists or members of other violent organizations.

One may argue that my proposed alternative requires the prosecution to engage in a futile and meaningless exercise by compelling it to produce witnesses who it knows will not testify. I believe, however, that the potential "futility" of this ritual does not render it meaningless. The attempt to offer live testimony offers visible and concrete proof that the government has made every reasonable effort to preserve the defendant's opportunity for a face-to-face confrontation.[170] The de-

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explanation for the development of alternatives to in-court testimony by the children as is any demonstrated psychological trauma to the child caused by courtroom testimony.

Other problems noted by commentators are that interrogation may be repeated several times in the prosecution process, and that the interviewers may not be sensitive to the child's level of understanding. *See, e.g.*, Cares, *supra* note 7, at 46-47; Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U.L. REV. 437, 442-43; Comment, *Criminal Procedure: Closed-Circuit Testimony of Child Victims*, 40 OKLA. L. REV. 69, 72-73 (1987). These important problems of how criminal procedure should treat victims, however, are not solved or eased by denying the defendant the opportunity to confront the child at the hearing that will determine his or her guilt. Education of law enforcement personnel about child development and about sexual abuse, judicial regulation of the tone, content, and extent of child-victim interviews, modification of direct and cross-examination of the children, and restricted access to court proceedings may be more appropriate responses to these concerns. *See generally* Jones, *Judicial Questioning of Children in Custody and Visitation Proceedings*, 18 FAM. L.Q. 43 (1984).

170. Even rituals with less obvious benefits have a proper role in the law. As Smith, McWilliams and Bloomfield have observed:

> [A]ll social rituals and some in particular (like religious rites) have a special shape and drama, but in few areas of life is this so obvious and important as in the law.

fendant can look the noncomplying accusers in the eye and ask why they remain silent now, though they were willing to make accusations before. Therefore, the defendant will receive as much of an opportunity for "confrontation" as the limits of human behavior allow. No one — neither the defendant nor the community observers — reasonably can expect more. The ultimate outcome may be "wrong" on occasion, but it will not be "unfair" in the narrow, but important, sense that the confrontation clause intends.

VI. CONCLUSION

The confrontation clause guarantee represents one aspect of a criminal procedure that preserves the dignity of the defendant. The clause anticipates the opportunity for a particular type of interaction between the accused and his or her human accusers. The history, wording, and purpose of the sixth amendment suggest that the value of the confrontation clause is preserved when the defendant and accuser are brought face-to-face, in open court, and the defendant is allowed to cross-examine the accuser. However, when a face-to-face encounter is impossible, due to death of the accuser or other circumstances not attributable to the government, then the out-of-court accusation nevertheless can be admitted without offending the individual dignity value of the confrontation guarantee. The prosecution must make every reasonable attempt to secure the presence of the witnesses against the accused. In no event may it rely on out-of-court accusations by anonymous witnesses, or by witnesses who could have been brought before the tribunal.

The Court's reliability theory of the confrontation guarantee is both overbroad and underbroad. Applied strictly, it probably permits videotaped testimony of witnesses, and out-of-court statements of available co-conspirators, but disallows "unreliable" testimony of de-

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> Society wants trials to follow their special structure not only for practical reasons of hearing cases but also because that structure is satisfying in some profound way. This suggests that the standards of legal order and aesthetic order are related, and that the individual's and the community's conception of justice is based not only on principles but also on a sense of what is the most emotionally and intellectually pleasing relation of actions.

C. SMITH, J. MCWILLIAMS & M. BLOOMFIELD, LAW AND AMERICAN LITERATURE 15 (1983). This passage suggests an essentially irrational basis for the confrontation guarantee: it contributes to an "emotionally and pleasing relation of actions." The ritual of bringing the accuser and accused brow-to-brow may satisfy us for reasons we cannot articulate or justify. Nor may we need to, for as long as that ritual continues to "please" us it will serve a valid purpose.

clarants who are not available for questioning. This article argues that these results do not comport with common expectations about fair criminal proceedings.

The shortcomings of the Court's theory are that the theory does not adequately explain the Court's own holdings, and it fails to consider the intrinsic value of confrontation. The proposed individual dignity theory responds to the theoretical deficiencies in the Court's confrontation analysis, and fairly accommodates both the rights of the defendant and the practicalities of routine litigation. It also corresponds with enduring American cultural assumptions about "fairness" in criminal procedure.[171] Although these cultural assumptions may be inefficient, the law nevertheless should respect them. Legal procedures that shunt our higher expectations about individual dignity in favor of short-term, efficiency-based claims will compromise the humanity of the participants, as well as the long-term acceptability of legal results.

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171. One may argue that if other cultures do not place similar value on face-to-face confrontations, then the encounter is not a matter of fundamental human dignity. I would respond with this quote from Cahn: "Concepts may be real without being universal." E. CAHN, THE SENSE OF INJUSTICE 23 (1949).