THE NEW CONFRONTATION—HEARSAY DILEMMA

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> And when they had been there many days, Festus declared Paul's cause unto the King, saying, There is a certain man left in bonds by Felix: About whom, when I was at Jerusalem, the chief priests and the elders of the Jews informed me, desiring to have judgment against him. To whom I answered, It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him. *Acts* 25:14-16.
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> Sir Walter Raleigh: But it is strange to see how you press me still with my Lord Cobham, and yet will not produce him; it is not for gaining of time or prolonging my life that I urge this; he is in the house hard by, and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of further proof. Sir Walter Raleigh's Case (1603).[1]
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> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. U.S. CONST. amend. VI, § I.

On April 5, 1965, the Supreme Court held in *Pointer v. Texas*[2] that the sixth amendment right of an accused to confront the witnesses against him was a fundamental right made obligatory on the states by the fourteenth amendment.[3] Following his incorporation of the right of confrontation into the due process clause of the fourteenth amendment, Mr. Justice Black declared for the Court that the right of *cross-examination* is included in the right of an accused in a criminal case to confront the witnesses against him. In apparently equating confrontation with cross-examination, the Court stated an almost universally prevail-

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1. J. PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157 (1850).
2. 380 U.S. 400 (1965).
3. *Id.* at 403.

ing view that the core value protected by the confrontation clause of the sixth amendment is the right of cross-examination.

On December 15, 1970, only five years after *Pointer* sweepingly declared the right of confrontation to be a fundamental right "essential to a fair trial in a criminal prosecution,"[4] four judges speaking for the Court in *Dutton v. Evans*[5] were in full retreat from the feared consequences of *Pointer's* incorporation of the confrontation clause into the fourteenth amendment. In fact, after *Dutton v. Evans* and the decision in *California v. Green*[6] which presaged it by six months, the meaning of the confrontation clause is no longer clear. The view that the core value protected by the confrontation clause is cross-examination—a view assumed in every major Supreme Court decision from *Mattox v. United States*[7] in 1894 until *California v. Green* in 1970, and almost uniformly accepted by all commentators[8]—can no longer be considered the law.

The problem that frightened the Court in *Green*, and finally split it in *Evans* revolves around the Hearsay Rule with its progeny of exceptions. When the Court incorporated the confrontation clause into the fourteenth amendment, did it in effect constitutionalize the Hearsay Rule? As with the right of confrontation, most authorities agree that the core value protected by the Hearsay Rule is its requirement that testimony be subject to *cross-examination* to be admissible. Since both the right of confrontation and the Hearsay Rule are premised on the same fundamental value, protection of the right of cross-examination, it is easy to see why most authorities have treated confrontation and hearsay as being roughly coextensive. If the sixth amendment right of confrontation makes cross-examination a fundamental right in criminal trials, as *Pointer v. Texas* holds, and if cross-examination is really the core value protected by the Hearsay Rule, then has not the Hearsay Rule in fact been given constitutional dimensions? The *Pointer* theory inexorably leads to this conclusion, a result which is precisely what the plurality in *Evans*, with Mr. Justice Harlan concurring, desired to avoid at all costs.

4. *Id.* at 404. In light of the Court's action in Dutton v. Evans, 400 U.S. 74 (1970), discussed below, it is interesting to note that in *Pointer* Mr. Justice Black stated that the Supreme Court and other courts had been "nearly unanimous" in the view that confrontation and cross-examination were essential to a fair trial. *Id.* at 405.

5. 400 U.S. 74 (1970).

6. 399 U.S. 149 (1970).

7. 156 U.S. 237 (1894).

8. *See, e.g.*, C. MCCORMICK, EVIDENCE § 224, at 458 (1954) [hereinafter cited as MCCORMICK]; 5 WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940) [hereinafter cited as WIGMORE]. *But see* 75 YALE L.J. 1434, 1437 (1966).

If the theory of *Pointer* leads to a constitutionalization of the Hearsay Rule, which inter alia prohibits the admission of out of court statements thus giving the accused a right of confrontation at the time of trial, the practical effect upon the states may be to prevent reform of one of the areas of evidence law most in need of overhaul. In attempting to resolve this conflict, the Court now finds itself in disagreement. The four justices who formed the plurality opinion in *Evans* have taken a narrow view of the sixth amendment guarantee, which does not expressly require that the right of confrontation occur at the time of trial, and have, accordingly, refused to constitutionalize the Hearsay Rule. However, the four dissenters in *Evans* expressed a willingness to risk the possibility that their opinion will be read as requiring the constitutionalization of the Hearsay Rule in its entirety, in order to protect what they believe *is* included in the constitutional right of an accused to cross-examine the witnesses against him. Mr. Justice Harlan alone has most clearly seen the theoretic versus pragmatic dilemma that now divides the Court and has made two attempts to devise a theory of confrontation that would avoid the pragmatic problems of the *Pointer* theory. Thus, there is confusion over the meaning of a constitutional right long thought to be relatively free of ambiguity.

In order to put today's confrontation dilemma in context, the historical relationship between hearsay and confrontation will be discussed with a review of both the decisional law on confrontation prior to 1970 and the recent attempts to reform the Hearsay Rule. The opinion of each justice in *Dutton v. Evans* and *California v. Green* will be examined in detail. Finally, a critique of possible solutions to the present confrontation dilemma will be attempted.

I. GENERAL BACKGROUND: THE HEARSAY—CONFRONTATION INTERPLAY

Any attempt to understand the confrontation clause requires some familiarity with the evidentiary Hearsay Rule and its exceptions. Perhaps the most quoted definition of the Hearsay Rule is that of Professor McCormick:

> Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.[9]

9. McCORMICK, *supra* note 8, § 226, at 460.

Most authorities look to the opportunity for cross-examination by the opponent as the touchstone of the rule. Dean Wigmore did not attempt a definition of hearsay but said that the opportunity for cross-examtion is the test for its existence.[10] He presented the best available thumbnail statement of the Hearsay Rule and the theory justifying its existence:

> The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination . . . . It is . . . sufficient to note that the Hearsay rule, as accepted in our law, signifies *a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination.*[11]

To the exclusionary Hearsay Rule is appended a multiplicity of exceptions for categories of out-of-court statements thought to be generally reliable and necessary even though they fit the definition of hearsay and have not been subjected to cross-examination.[12] Therefore, in order to understand the Hearsay Rule and its exceptions, an appreciation of the importance of cross-examination in an adversary system of justice is essential.

A. Confrontation and Hearsay: the Historical Relationship

1. *Origins of Hearsay and Confrontation*

Although most scholars trace the origins of the Hearsay Rule to the 1500's, the rule was not solidified until the early 1700's.[13] In the early 1500's witnesses were rarely called to testify before juries. Rather, most juries obtained information by conducting their own out-of-court in-

10. The fundamental test [of hearsay], shown by experience to be invaluable, is the test of *Cross-examination.*" 5 Wigmore, *supra* note 8, § 1362, at 3.

11. *Id.* Dean Wigmore did go on to point out that in many instances the definition of hearsay included not only the test of cross-examination but also the test of the "oath." Wigmore stated that "it is clear beyond doubt that the oath . . . is merely an incidental feature customarily accompanying cross-examination, and that cross-examination is the essential and real test required by the rule." *Id.* at 7.

12. Depending on who is counting and how narrowly the exceptions are defined, it is generally conceded that there are over 20 exceptions to the basic rule prohibiting the introduction of hearsay statements into evidence. *See, e.g., Revised Draft of Proposed Rules of Evidence for Federal Court and Magistrates*, 91 S. Ct. 1, 105-31 (1971) [hereinafter cited as *Proposed Rules*], where 30 specific exceptions are recognized.

13. For a more complete history of the Hearsay Rule and its exceptions *see* 5 Wigmore, *supra* note 8, § 1364, at 9-27; McCormick, *supra* note 8, § 223, at 455-56; and E. Morgan, Some Problems of Proof 106-17 (1956).

vestigations. The witness, as we know him, did not begin to appear with any regularity until the early 1600's and, between the early 1500's and late 1600's, hearsay statements were generally received into evidence. However, as juries increasingly depended upon witnesses' in-court testimony, it became apparent that extensive use of hearsay was inappropriate. Apparently by the mid-1600's the notion became fixed that even an extrajudicial statement under oath should not be used if the declarant could be brought into court.[14] The crystallization of the Hearsay Rule occurred by the early 1700's when it was recognized that no statement should be received in evidence unless the persons affected by it had an opportunity to probe its trustworthiness by cross-examination. Despite its purpose of preserving the right of cross-examination, it soon became obvious that the rule's enforcement was impractical in routine litigation because of the difficulty of obtaining first-hand statements to prove every disputed fact. In meeting the challenge of constant compromise, the courts attempted to define sharp categories of hearsay evidence that would be admitted, while excluding other hearsay evidence not within an excepted category.[15] Underlying almost every exception was the feeling of courts, at least at the time the exception was first recoguized, that a particular category of out-of-court statements were generally reliable and necessary. In the nineteenth and early twentieth centuries so many exceptions to the Hearsay Rule had been recognized that there was reaction against further expansion of exceptions. The exceptions, just as the rule, became inflexible. More situations arose where reliable and necessary hearsay was excluded from evidence because of failure to fall into a recognized exception. Therefore, the Hearsay Rule with its hard-shell exceptions came under attack by reformers and major efforts have been made toward its modernization.

The history of the right of confrontation, as constitutionalized by the sixth amendment, closely parallels the early history of the establishment of the Hearsay Rule. While some authorities trace the right to

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14. Wigmore asserts that: "By 1680-1690 . . . had come the establishment of the general rule against unsworn hearsay statements." 5 WIGMORE, *supra* note 8, § 1364, at 23. In any event, most historians agree that by the early 1700's the applicability of the Hearsay Rule to sworn statements as well as unsworn statements had been established.

15. Most exceptions, as indicated by McCormick, "were struck off in the heat of trial as improvisations intended to be played by ear, but they fail of that purpose because the classes are grown so many and the boundaries so meandering that no one can carry any large part of this hearsay-exception-learning in his head." MCCORMICK, *supra* note 8, § 301, at 626.

Roman times,[16] most trace its growth to a reaction to the abuses that appeared in the trial of Sir Walter Raleigh. An accused's right to cross-examine adverse witnesses was established in the American colonies by the beginning of the early eighteenth century.[17] The exact intent of the framers of the Constitution in providing that the accused shall "have the right to confront the witnesses against him" is probably undiscoverable.[18] Nevertheless, most courts and scholars have assumed that the essential concept of confrontation is a face-to-face encounter between the accused and his accusers where the accused has the right to question his accusers and the trier of fact has the right to place the accusers under oath and observe their demeanor under questioning. Thus, the fundamental value to be preserved by the right of confrontation is cross-examination, the same value that, according to Wigmore, is the test for determining whether an item of evidence is hearsay. Therefore, it appears that the Hearsay Rule and the right of confrontation which developed in the same era were both designed to protect the same value: cross-examination.[19]

2. *The Wigmore Theory*

The idea that hearsay and confrontation are coextensive—two rules to protect the value of cross-examination—was most clearly articulated by Wigmore and has been concurred in by most commentators.[20] It is

16. Pollitt, *The Right of Confrontation: Its History in Modern Dress*, 8 J. PUB. L. 384 (1959).

17. *Id.* at 395. Pollitt asserted that the American colonies probably deemed it necessary to give the right of confrontation constitutional status because of the method of administration of English navigation law. He stated that following the French and Indian War, enforcement of custom laws designed to force the colonists to bear part of the costs of the war, was achieved by promising informers a "moiety of forfeitures." The informer naturally desired to have his name remain unknown. Under the Navigation Act or Custom Laws, many offending ships and their illegal cargo were seized. Unless the ship owner was able to combat the allegations of unknown informers, his cargo was sold and the proceeds were divided, one-half to the crown and the other half to the informers. *Id.* at 395-96.

18. For references to discussions of the possible intent of the framers of the Constitution *see, e.g.*, Dutton v. Evans, 400 U.S. at 95 (concurring opinion); California v. Green, 399 U.S. at 175-79, especially 176 n.8 (concurring opinion); Pollitt, *supra* note 16, at 397-400 n.16; 5 WIGMORE, *supra* note 8, § 1397, at 127-35; 5 SUFFOLK U.L. REV. 538, 542 (1971).

19. For a more complete treatment of the historical interrelationship between the two rules, *see* Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 747 (1965), which states: "Both the right to confrontation and the Hearsay Rule reflect the belief that some evidence which might be of probative value should not be admitted unless the declarant has actually appeared in court and has been cross-examined with regard to his sincerity, memory, perception, and ability to communicate."

20. *See, e.g.*, F. HELLER, THE SIXTH AMENDMENT 104-06 (1951), which, in a history of the

essential to follow Wigmore's logic that hearsay and confrontation are basically the same rule (both having the object of preserving the test of cross-examination) because his theories of hearsay and confrontation are now imbedded in decisional law. His theories pose the "spectre"[21] of constitutionalization of the Hearsay Rule.

Step One: Wigmore's first premise is that the fundamental test to be employed in determining *hearsay* is cross-examination.[22] He indicates that the Hearsay Rule actually has two elements which he refers to as "cross-examination proper" and "confrontation." Confrontation means the preliminary process of bringing the witness face-to-face with the accused prior to the time the accused commences cross-examination (he refers to confrontation as securing "the opportunity" for cross-examination).[23] Cross-examination, however, is the essential object of confrontation and is the one indispensable element of the Hearsay Rule.

Step Two: The second premise is that the fundamental test of the *right of confrontation* is whether there was a right of cross-examination. Wigmore states: "If there has been a Cross-examination, there has been a Confrontation. The satisfaction of the right of Cross-examination disposes of any objection based on the so-called right of Confrontation."[24] Confrontation and cross-examination are the same right under different names.[25]

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sixth amendment, disposes of the right of confrontation in two and one-half pages and asserts that the confrontation guarantee is violated by introduction of evidence given by witnesses whom the accused has not had the opportunity to cross-examine; MCCORMICK, *supra* note 8, § 231, at 484, where the author contends that the probable purpose of the confrontation clause was to guarantee maintenance of the "hard-won principle of the hearsay rule" in criminal cases; and, Henkin, *The Supreme Court 1967 Term*, 82 HARV. L. REV. 63, 236 (1968), where there was acceptance of the notion that hearsay and confrontation have been thought to be generally co-extensive. *But see* Note, *Confrontation, Cross Examination, and the Right to Prepare a Defense*, 56 GEO. L.J. 939, 953 (1968), where it is argued that because courts often refer to both confrontation and cross-examination, contrary to Wigmore's theory, they must not be the same thing; 1970 UTAH L. REV. 668, 669-70.

21. This term is employed in Mr. Justice Marshall's dissent in Duttou v. Evans, 400 U.S. at 110.

22. 5 WIGMORE, *supra* note 8, § 1361, at 3.

23. *Id.* § 1365, at 27. He also contends that confrontation, in addition to affording the accused "the right to the opportunity of cross-examination," also provides an incidental and subordinate advantage of allowing the tribunal to observe the demeanor of the witness. However, Wigmore contends that this secondary "demeanor" aspect of confrontation may be "dispensed with when . . . not feasible." *Id.*

24. *Id.* § 1396, at 127.

25. There never was at common law any recognized right to an indispensable thing called Confrontation *as distinguished from cross-examination*. There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confroutation; it was the same right under different names. This much is clear enough from the history of the Hearsay rule . . . , and from the

Step Three: If cross-examination is the fundamental test of the Hearsay Rule (Step One), and if the right to cross-examination is the fundamental test of the right of confrontation (Step Two), then Step Three in Wigmore's logic is clear. He asserts: "The rule sanctioned by the Constitution [referring to the sixth amendment right of an accused to confront the witnesses against him] is the Hearsay Rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein."[26]

This short synopsis of Wigmore's hearsay and confrontation theories indicates why courts have consistently treated both rules as dealing with the right of cross-examination. It is also clear why, after *Pointer v. Texas*[27] applied the confrontation clause to the states, the Supreme Court at some point had to face the issue of the constitutionalization of the Hearsay Rule.

B. Confrontation: The Decisional Law

Prior to *Pointer*, when the sixth amendment confrontation clause was only a federal standard, the Wigmore idea that the right to confront witnesses was a restatement of a right not to have hearsay evidence introduced in criminal trials appeared harmless enough. There was no prevailing fear of constitutionalizing the Hearsay Rule to retard the natural development of the meaning of the confrontation clause.[28] Of

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continuous understanding and exposition of the idea of confrontation . . . . It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution.

5 Wigmore, *supra* note 8, § 1397, at 128-30.

26. *Id.* § 1397, at 131. In reading hearsay and confrontation as the same constitutional rule, Wigmore concluded with a most important paragraph used by Justice Harlan to justify his second theory of confrontation in his concurring opinion in Dutton v. Evans, 400 U.S. 74 (1970). *Id.* at 178 *et seq.*

> The net result, then, under the constitutional rule is that, *so far as testimony is required under the Hearsay rule to be taken infra-judicially*, it shall be taken in a certain way, namely, subject to cross-examination,—not secretly or, 'ex parte' away from the accused. The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed—i.e., a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially.

Id. § 1397, at 131.

27. 380 U.S. 400 (1965).

28. Mr. Justice Harlan, concurring in California v. Green, 399 U.S. at 179-80 n.14, states, "It is not surprising that confrontation and hearsay have been considered fungible. The labels were not until recently likely to affect the result in federal trial." *But see* Stein v. New York, 346 U.S. 156, 196 (1953), which warns *prior* to *Pointer* that: "The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, [should] not be read into the Fourteenth Amendment." Wigmore did perceive the problem of constitu-

the surprisingly few cases prior to 1965 where the Supreme Court was required to deal with the meaning of the right of confrontation, the first major case was *Mattox v. United States*.[29] In a famous passage in that case, Mr. Justice Brown stated that the primary objective of the confrontation guarantee is the prevention of:

> depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[30]

As in *Mattox*, most of the early cases involved *ex parte* testimony submitted by deposition and affidavit.[31] Other fact situations which raised confrontation problems involved the use of confessions, [32] the exclusion

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tionalization and as a result, after concluding that hearsay and confrontation "are the same rule under different" names, he drafted the paragraph, cited in note 25 *supra*, that was used by Mr. Justice Harlan in his concurring opinion in *Dutton v. Evans*.

29. 156 U.S. 237 (1895). The defendant was retried for the same murder three times. In the last trial two of the government's witnesses had died, and the government introduced stenographic notes of their testimony. The Court allowed the use of the trial transcript because the witnesses had been fully cross-examined at the previous trial.

30. *Id.* at 242-43.

31. *See* Reynolds v. United States, 98 U.S. 145 (1879), where the Court held that an accused cannot complain about the introduction of prior recorded testimony when the defendant himself procured the witness's absence at the later trial; Motes v. United States, 178 U.S. 458 (1900), where a witness's statement taken at an examining trial and subject to cross-examination could not be introduced at the trial when it appeared that the Government could have produced the witness at trial; West v. Louisiana, 194 U.S. 258 (1904), *rev'd*, Pointer v. Texas, 380 U.S. 400 (1965), where deposition testimony was admitted into evidence at a state trial, deponent was a non-resident, and the Court held that the sixth amendment did not apply to the states. *Cf.* Kirby v. United States, 174 U.S. 47 (1899), which did not involve the use of deposition testimony, but did involve introduction of a prior judgment of conviction against three thieves to prove that property in Kirby's possession was stolen. Mr. Justice Harlan, concurring in Dutton v. Evans, 400 U.S. at 98, states that *Kirby* is not a confrontation case at all but a case dealing with the substantive law of judgments.

32. Stein v. New York, 346 U.S. 156, 195 (1953), *rev'd*, Jackson v. Denno, 378 U.S. 368 (1964), involved the use of written confessions of two codefendants against the accused when the latter had himself never confessed. The court held defendant's federal rights were not infringed merely "because he was unable to cross-examine accusing witnesses." The court rejected, citing West v. Louisiana, 194 U.S. 258 (1904), the contention that a "privilege of confrontation" is secured by the fourteenth amendment. Douglas v. Alabama, 380 U.S. 415 (1965), decided the same day as *Pointer*, involved separate trials for one Loyd and defendant Douglas who were both accused of the same murder. Loyd was tried first and his case was on appeal when he was called to testify at Douglas' trial; Loyd

of the accused from his own trial,[33] close association between key witnesses and the jury,[34] the absence of an accused in appellate courts where he was represented by counsel,[35] the use of prior inconsistent statements in administrative proceedings,[36] and lack of cross-examination in administrative hearings.[37] It is safe to conclude, after an examination of the cases up to and including *Pointer* in 1965,[38] that confrontation in federal trials meant that a criminal defendant had to be granted the opportunity to face and cross-examine the witnesses against him.[39] The close relationship between hearsay and confrontation is further indicated by the recognition that exceptions to the Hearsay Rule did not violate the confrontation clause if they appeared to provide adequate protection to the defendant.[40]

After *Pointer*, the possibility of constitutionalization of the Hear-

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refused to answer questions at Douglas' trial, and the prosecutor, under the guise of impeaching Douglas, purported to read from Loyd's confession which implicated Douglas. The Supreme Court held that Douglas' sixth amendment rights were violated.

33. In *In re* Oliver, 333 U.S. 257 (1948), a secret one-man grand jury took testimony from petitioner, and then, based on other testimony taken out of his presence, determined his answers had been false, and therefore he was held in contempt and sentenced. Although *In re Oliver* was treated as a due process case, it was pointed out that, among other things, the accused's right to cross-examine the witnesses against him had been denied.

34. Turner v. Louisiana, 379 U.S. 466 (1965) held that where two deputy sheriffs had close contact with the jurors over whom they had custody at the same trial where the deputies were the principal prosecution witnesses, the defendant's right to trial by an impartial jury and his right to confront the witnesses against him were denied.

35. Dowdell v. United States, 221 U.S. 325 (1911) held that certification by the judge and clerk of the trial record to an appellate court, without the accused being present, did not violate the confrontation clause.

36. Bridges v. Wixon, 326 U.S. 135 (1945) reversed a deportation order on the ground that use of such statements violated agency rules and ran counter to notions of fair play; the right of confrontation was not specifically mentioned.

37. *See* Greene v. McElroy, 360 U.S. 474 (1959), where an accused was denied a security clearance in an administrative hearing where he was not allowed to confront or cross-examine the witnesses against him; the Court held that the safeguards of confrontation and cross-examination should have been afforded.

38. In Pointer v. Texas, 380 U.S. 400 (1965), the chief witness testified at a preliminary hearing where neither of the two suspects had a lawyer; one suspect tried to cross-examine but Pointer did not. Pointer was tried, and at trial the state offered the transcript of the chief witness's testimony at the preliminary hearing. The chief witness had moved out of state, and the prosecution made no attempt to procure his return. The Supreme Court reversed his conviction and overruled West v. Louisiana, 194 U.S. 258 (1904), to hold the sixth amendment confrontation clause was a fundamental right that applied to the states.

39. *See* Note, *supra* note 19, at 745; and Note, *supra* note 20, at 960. Justice Harlan, arguing in his concurring opinion in California v. Green, 399 U.S. at 179 n.14, concedes that early decisions and recent cases are replete with dicta to the effect that confrontation is equivalent to cross-examination.

40. *See, e.g.*, Mattox v. United States, 156 U.S. 237 (1895); and Kirby v. United States, 174 U.S. 47 (1899), for approval of the dying declaration exception to the Hearsay Rule.

say Rule was present. However, that fear apparently did not occur to the Court until the 1970 confrontation cases discussed herein. The case law between 1965 and 1970, other than applying confrontation guarantees to the states as well as to the federal government, seemed to develop along its earlier lines with the Wigmore theory—confrontation "equals" cross-examination "equals" hearsay—continuing in full bloom.[41]

C. HEARSAY: THE REFORM EFFORTS

The rigidity of the common-law Hearsay Rule and its frequently arbitrary exceptions have long challenged the talents of legal reformers. Jeremy Bentham proposed a major revision of the Hearsay Rule that, although not adopted, indicates the long history of reform efforts.[42] At the urging of James Bradley Thayer, Massachusetts adopted the first major American reform of the Hearsay Rule with its Hearsay Statute of 1898.[43] While there have been several innovations in local hearsay

41. Brookhart v. Janis, 384 U.S. 1 (1966) held that alleged "waiver" of right to confront witnesses was not valid where his counsel agreed to a "prima facie" trial in lieu of actual cross-examination of witnesses; Parker v. Gladden, 385 U.S. 363 (1966) held that a bailiff's statements to the jury out of the presence of the accused were subject to confrontation objections; Barber v. Page, 390 U.S. 719 (1968) held that where the state was negligent in not procuring at trial the presence of a codefendant who had testified at a preliminary hearing, he was not "unavailable" for purposes of the confrontation clause; Smith v. Illinois, 390 U.S. 129 (1968) held that where credibility was in issue, the refusal to allow cross-examination as to an informer's name violated the confrontation clause; Bruton v. United States, 391 U.S. 123 (1968) held that an instruction to the jury to disregard an out-of-court confession of a codefendant was not sufficient to satisfy the right of confrontation; Roberts v. Russell, 392 U.S. 293 (1968) held that in a state trial where an out-of-court confession of a codefendant was admitted, *Bruton* was to be applied retroactively; Berger v. California, 393 U.S. 314 (1969) held that where the victim was out of state at the time of trial, the accused was denied his right of confrontation under *Barber v. Page* which was to be applied retroactively; Harrington v. California, 395 U.S. 250 (1969) held that even though the out-of-court confessions of codefendants were admitted, under the facts there was no reversible error. *See also* Illinois v. Allen, 397 U.S. 337 (1970), for a new development in confrontation law dealing with an accused who by his disruptive conduct waived his right to be present at his own trial.

42. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932 (1962).

43. "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the Court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." MASS. ACTS. 1898, ch. 535. This famous statute has since been amended by striking out the requirement that the declaration must have been made before the commencement of the action and in other minor ways. MASS. G.L. (Ter. Ed.) ch. 232, § 65, *as amended* 1941 and 1943. McCormick comments that judicial interpretation of the Massachusetts statute has been generally consistent with the purpose of opening the door to the trusworthy statements and asserts that the act has the support of Massachusetts practitioners. MCCORMICK, *supra* note 8, § 303, at 630.

rules,[44] the next major legislative effort was the English Evidence Act of 1938 promoted by Lord Maughan, the Lord Chancellor. Recent American reform efforts in the hearsay area can be found in new model codes attempting a codification of the entire body of evidentiary law.

1. *The Model Code, the Uniform Rules, and the McCormick Exception*

The American Law Institute (ALI) made the first effort to restructure the entire law of evidence. Out of its pioneering efforts came the famous 1942 draft of the Model Code of Evidence. After discarding the notion that evidence was an area of law that could be restated, the ALI completely revised the entire field.[45] The drafters of the Model Code were talented,[46] but lawyers found its radical departures from traditional views "too far-reaching and drastic for present day acceptance."[47] The Model Code drafters proposed a broad new hearsay exception that seemed capable of almost swallowing the rule.[48] The Model Code has not been adopted in any jurisdiction.

In 1949, the ALI referred its Model Code to the National Conference of Commissioners on Uniform State Laws for redrafting in the hope that it might yet serve as a basis for a uniform code of evidence for all jurisdictions. Out of this referral came the more positively received Uniform Rules of Evidence.[49] The Uniform Rules were formally

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44. *See* J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN & J. MANSFIELD, EVIDENCE 540 (1965) for an excellent summary of efforts to relax the Hearsay Rule.

45. "The Council of the Institute . . . felt that a Restatement of the Law of Evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law. A bad rule of law is not cured by clarification." INTRODUCTION TO MODEL CODE OF EVIDENCE viii (1942).

46. A "blue ribbon" group consisting of seven law professors and four appellate judges. *Id.* at ix.

47. Prefatory Note to Uniform Rules of Evidence. *See Symposium on the Proposed Federal Rules of Evidence: Part I* 15 WAYNE L. REV. 1061, 1063-64 (1969) [hereinafter cited as *Symposium*], for another summary of major reform efforts.

48. "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as witness, or (b) is present and subject to cross-examination." MODEL CODE OF EVIDENCE Rule 503 at 231 (1942) [hereinafter cited as MODEL CODE]. This rule was qualified by other rules which limited its application to declarations by those with personal knowledge (excluding hearsay upon hearsay) and empowered the trial judge with discretion to exclude such hearsay when its probative value was outweighed by other considerations such as prejudice or unfair surprise. In addition to this new sweeping exception, the traditional exceptions were retained and liberalized. *See* Braham, *The Uniform Rules of Evidence*, The Legal Intelligencer (Philadelphia), April 27, 1955, § 1, at 1, col. 1, for a contemporary reaction to the Model Code's hearsay exception.

49. There was widespread approval from bench, bar and academic community. *Symposium, supra* note 47, at 1064. *See* the commissioner's note following Rule 63 of the

approved by both the ALI and the American Bar Association in 1953, but legislative response was tepid. They were adopted only in the Panama Canal Zone, the Virgin Islands, and, with some revision, in Kansas. Nevertheless, they did have considerable impact on decisional law and have been frequently quoted as the best of the common-law rules.[50]

Perhaps the most sweeping reform proposal was Professor McCormick's suggested exception: "[A] hearsay statement will be received if the judge finds that the need for and the probative value of the statement render it a fair means of proof under the circumstances."[51] On the theory that most exceptions are at least theoretically underpinned by necessity and trustworthiness, Professor McCormick has made the ultimate proposal: to admit all probative statements that the trial judge finds are necessary.

2. *The New State Codes*

The two most important state statutory revisions have occurred in California and New Jersey. The California Law Revision Commission began a massive study in 1956 which compared the Uniform Rules with the existing California evidence law. A draft of an entirely new state evidence code, modeled on the Uniform Rules as modified by state tradition and local policies, was submitted in 1964[52] and enacted in 1965. Hearsay is defined traditionally as "[e]vidence of a statement . . . made other than by a witness while testifying at the hearing . . . that is offered to prove the truth of the matter stated."[53] Perhaps the most significant new exception to the Hearsay Rule, which provides that a prior inconsistent statement of a trial witness is admissible as substantive evidence to prove the truth of the matter stated,[54] is discussed in the 1970 confrontation case, *California v. Green.*

New Jersey's Evidence Act of 1960 adopted the Uniform Rules in part but was heavily modified to conform to New Jersey public policy. Also in 1960, the New Jersey Supreme Court established a new evidence

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UNIFORM RULES OF EVIDENCE for a candid statement of the commissioner's reasons for rejecting Rule 503 (a) of the MODEL CODE, *supra* note 48, and their return to the more traditional concept of hearsay.

50. *Symposium, supra* note 47, at 1065.

51. MCCORMICK, *supra* note 8, § 305, at 634.

52. *See* 7 CALIFORNIA LAW REVISION COMMISSION, REPORTS RECOMMENDATIONS, AND STUDIES 3, 1007-08 (1965).

53. CAL. EVID. CODE § 1200 (West 1966).

54. *See* McDonough, *The California Evidence Code: A Precis,* 18 HAST. L.J. 89, 111 (1966).

revision committee. The new commission reported in 1963, generally following the Uniform Rules but including local suggestions. After further modification, the new rules became law in 1967.[55]

The right of confrontation and its implication of possible constitutionalization of the Hearsay Rule in criminal trials has been carefully sidestepped by reformers as they grappled with revisions of traditional hearsay law.[56]

3. *The Proposed Rules of Evidence for United States Courts and Magistrates*

It now appears obvious that the Uniform Rules have no chance of being adopted in all states. The California and New Jersey experience indicates that each state will blend its own public policy into any rules adopted. Therefore, those desiring some form of uniform evidentiary rules look to the experience of the Federal Rules of Civil Procedure for the answer. In 1941, Professor Thomas Green of Harvard suggested that the Supreme Court promulgate rules of evidence for all federal courts under the same power utilized to adopt the Federal Rules of Civil Procedure.[57] In March, 1971, a Revised Draft of Proposed Rules

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55. N.J. STAT. ANN. 2A: 84A (West Supp. 1970). New Jersey's definition of hearsay is similar to that found in the new California code. *Id.* at 2A: 84A, Rule 63.

56. Rule 63(4)(c) of the UNIFORM RULES included a broad definition of "unavailability" for use in applying hearsay exceptions. The New Jersey Committee did propose to limit the broad sweep of 63(4)(c) to civil cases possibly because of worries about the right of confrontation. *See* REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE 146-53 (1963). Furthermore, CAL. EVID. CODE § 1204 states:

> A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.

Provisions dealing with the prior testimony exception under the new state codes follow the same rationale as discussed in note 60 *infra*, dealing with the Revised Draft's treatment of prior testimony. CAL. EVID. CODE § 1290-92 (West 1966); N.J. STAT. ANN. 2A: 84A, Rule 63(3) (West Supp. 1970). Unlike the Uniform Rules, New Jersey and California provide that former testimony is not admissible if confrontation is denied or if the accused was not a party in the prior hearing. This limitation arises from a caveat in the COMMENT TO UNIFORM RULE 63(3) that the use of former testimony against an accused may violate his right of confrontation. *See Proposed Rules, supra* note 12, at 128. "Professor Faulkner concluded that if a dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by cross-examination of one similarly situated does not offend against confrontation." *Id.* at 127. Although these codes discuss hearsay and confrontation, they all seem to steer a clear course away from equating the two. CAL. EVID. CODE § 1291 Comment speaks of the lack of cross-examination as the primary objection to hearsay. These codes stress cross-examination in terms of hearsay but never really define confrontation.

57. *Symposium, supra* note 47, at 1066-69. Sixteen years after Professor Green's suggestion, the Judicial Conferences of the Courts of Appeals for the Third and Sixth Cir-

of Evidence for United States Courts and Magistrates[58] was issued which reexamined hearsay and advanced some new approaches.[59] However, the Advisory Committee for the Proposed Rules of Evidence dealt only obliquely with the interplay between confrontation and the Hearsay Rule.[60]

D. Confrontation: The Several Components of the Right

The above review of the historical interaction between confrontation and hearsay indicates that the two rules are based on similar values.[61]

cuits recommended that uniform rules of evidence for federal courts be drafted, and in 1961 Chief Justice Warren appointed a special committee on evidence.

58. *Proposed Rules, supra* note 12.

59. The new Revised Draft's approach to hearsay was to adopt a general rule excluding hearsay (utilizing an interesting new definition of hearsay that removes nonassertive conduct and admissions of a party-opponent from the confines of the exclusionary Hearsay Rule) and then to group the traditional exceptions, which are somewhat liberalized, under two general headings. One heading deals with situations where the out-of-court declarant is not available and the other deals with situations where out-of-court statemeuts will be admitted, regardless of whether the declarant is available or not. After listing the specific exceptions under the two general headings, both headings conclude with an "escape valve" exception providing for admissibility of "a statement not specifically covered by any of the foregoing exceptious but having comparable circumstantial guarantees of trustworthiness." Proposed Rule 803(24) and Rule 804(6).

60. The first reference was in connection with Proposed Rule 803 exception (5). It stated that the hearsay exception for recorded recollection is generally recognized and has "long been favored by the federal and practically all of the state courts that have had occasion to decide the question." *Id.* at 111; United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965), was cited as sustaining the exception against a claimed denial of the right of confrontation.

The second mention of confrontation was in conjunction with Proposed Rule 804(b) exception (1) dealing with the former testimony exception. This exception is often present in confrontation cases as it was in California v. Green, cited *id.* at 127. The committee talked in terms of absence of demeanor evidence since oath and cross-examination had been satisfied in the former proceeding. Because of lack of demeanor evidence, this is an allowable exception ouly where the declarant is unavailable.

61. Both the right to confrontation and the hearsay rule reflect the belief that some evidence which might be of probative value should not be admitted unless the declarant has actually appeared in court and has been cross-examined with regard to his sincerity, memory, perception, and ability to communicate. When courts have admitted hearsay in criminal trials, they have generally attempted only to fit the evidence within one of the established common-law hearsay exceptions which have developed because of a certain notion of potential trustworthiness, or because of necessity. However, the purpose of the common-law exceptions appears to be to facilitate the admission of probative evidence. These exceptions have evolved from a weighing of the need to receive the evidence at trial, the unavailability of the declarant, the assumed trustworthiness of the statement, and the risk that the jury will not properly assess the weight to be given to the statement. But in a criminal trial, these considerations must be balanced in light of the requirement of the sixth amendment, which has as its prime goal the protection at trial of an accused faced with the possibility of criminal sanctions.

Note, *supra* note 19, at 747. *See also* Note, *supra* note 20, at 953, which suggests that confrontation beyond cross-examination has an additional meaning which encompasses demeanor.

Nevertheless, prior to commencing a detailed study of the 1970 confrontation cases, it is important to understand the recognized components of confrontation prior to 1970:[62] cross-examination, demeanor, and oath. While cross-examination was generally recognized as the most important component of the confrontation clause,[63] Wigmore treated demeanor as a second, and dispensable, element. Most authorities agree that the right of an accused to have the trier of fact observe the demeanor of the witness during testimony is less significant than cross-examination, but still an important part of the right of confrontation.[64] In *Mattox v. United States*,[65] the Court stated that confrontation meant not only cross-examination but also "compelling him [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Nevertheless, following Wigmore's notion of the secondary nature of the demeanor component, most courts will not protect demeanor functions absolutely.[66] Finally, although many older authorities treated the element

62. "It seems probable that the purpose of the American provisions for confrontation was to guarantee the maintenance in criminal cases of the hard-won principle of the hearsay rule . . . ." MCCORMICK, *supra* note 8, § 231, at 484. McCormick contends that production of prosecutor's witnesses at the final trial is important because it provides: (1) opportunity for cross-examination; (2) enables accused to look the witness in the eye making false accusation more difficult; and (3) judge and jury will see demeanor of witnesses on the stand and better be able to judge credibility. *Id.*

63. Since Mattox v. United States, 156 U.S. 237 (1894), the right of cross-examination has been the main focus of the Supreme Court. *See, e.g.*, Dowdell v. United States, 221 U.S. 325 (1911); Greene v. McElroy, 360 U.S. 474 (1959); Pointer v. Texas, 380 U.S. 400 (1965); and Douglas v. Alabama, 380 U.S. 415 (1965).

64. In his treatise on evidence, Wigmore has a brief section on demeanor. He states in 5 WIGMORE, *supra* note 8, § 1395, at 125-26:

> There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying*, and a certain subjective moral effect is produced upon the witness.

Wigmore then cited APPLETON, EVIDENCE 220 (1860) as follows:

> The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness, are soon detected . . . . The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control—fear, love, hate, envy, or revenge—are all open to observation, noted and weighed by the jury.

5 WIGMORE, *supra* note 8, § 1395, at 126.

65. 156 U.S. 237 (1894).

66. But, when *California v. Green* was at the California Supreme Court level, that court justified its holding by relying on the demeanor component of confrontation: "[I]t is because demeanor—attitude and manner—is a significant factor in weighing testimonial evidence that it is axiomatic the trier of fact, before whom the witness testified,

of the oath as an important part of confrontation, it is not as important today and is usually treated as a subpart of the right of cross-examination.[67]

II. THE 1970 CONFRONTATION CASES

In 1970, the assumptions about the meaning of the confrontation clause of the sixth amendment were upset by two Supreme Court decisions: *California v. Green*[68] and *Dutton v. Evans*.[69]

A. CALIFORNIA V. GREEN

John Anthony Green was convicted of furnishing marijuana to 16 year old Melvin Porter. Green's conviction was supported chiefly by the testimony and prior inconsistent statements of young Porter, who, in January, 1967, had been arrested for selling marijuana to a Los Angeles Police Department undercover officer. While in custody four days after his arrest, Porter told an interrogating officer, Barry Wade, that Green had been his drug supplier. He claimed that Green, a 24 year old acquaintance, had called him at his home earlier that month

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and was cross-examined, is the sole judge of the credibility of a witness and of the weight to be given his testimony."

67. Wigmore pointed out that while the testing required by the Hearsay Rule is spoken of as "cross-examination under oath":

> [I]t is clear beyond doubt that the oath, as thus referred to, is merely an incidental feature customarily accompanying cross-examination, and that cross-examination is the essential and real test required by the rule.
>
> That this is so is seen by the perfectly well-established rule that a statement made under oath (for example, in the shape of a deposition or an affidavit or testimony before a magistrate) is nevertheless inadmissible if it has not been subjected to cross-examination. . . . In other words, a statement made under oath is, merely as such, equally obnoxious to the Hearsay rule. [In *footnote* Wigmore quotes, Vann, J. in Lent v. Shear, 160 N.Y. 462, 55 N.E. 2 (1899), "Declarations made under oath do not differ in principle from declarations made without that sanction, and both come within the rule which excludes all hearsay evidence."] Owing to the practice of requiring an oath (or its modern substitute, an affirmation) before proceeding to examination and cross-examination, the case does not happen to arise of testimony which has been tested by cross-examination and yet lacks the oath, so that the tenor of the rule as above stated cannot be tested by that situation. But it is sufficiently and clearly demonstrated . . . by the fact that, even though an oath has been taken, the statements are still excluded if not subjected to cross-examination; as well as by the further fact that, whenever an exception to the Hearsay rule . . . is found established, i.e.: whenever statements not subjected to cross-examination are exceptionally received, it is not required that they shall have been made under oath.
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> It is thus apparent that the essence of the Hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination, and that the judicial expressions . . . coupling oath and cross-examination had in mind the oath as merely the ordinary accompaniment of testimony given on the stand, subject to the essential test of cross-examination.

5 WIGMORE, *supra* note 8, § 1362, at 7.

68. 399 U.S. 149 (1970).

69. 400 U.S. 74 (1970).

and had requested that he sell some "grass." Porter further recounted to Officer Wade that on that same afternoon Green had personally delivered to him a brown shopping bag containing 29 "baggies" of marijuana, telling him he could keep one bag for himself but must sell the rest. Based primarily on this information,[70] Green was arrested and charged with furnishing marijuana to a minor.[71]

At Green's preliminary hearing, Porter claimed Green was his supplier; however, he alleged at that hearing that instead of personally delivering the "baggies," Green had indicated to him where he could find the marijuana which had been hidden in the bushes at Green's parents' home. Porter's testimony at the preliminary hearing was subject to what the majority opinion of Mr. Justice White describes as "extensive cross-examination."[72] At the conclusion of the preliminary hearing, probable cause was found based on Porter's testimony and Green was bound over for the trial which occurred two months later.

Green was tried before a court sitting without a jury with Porter as the chief witness for the State.[73] However, to use the California Supreme Court's words, this time Porter was "markedly evasive and uncooperative on the stand."[74] He did state, however, that Green had called him and asked him for some "stuff"; he also stated that he had obtained 29 "baggies" of marijuana—some of which he sold, the rest being "stolen" from him. But after those admissions, Porter's testimony became somewhat less helpful to the prosecutor. Despite being pressed to identify Green as his supplier, Porter claimed he was uncertain about how he had obtained the drugs. He said he could not remember because he had taken "acid" (LSD) 20 minutes prior to Green's phone call and could not distinguish fact from fantasy.

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70. People v. Green, 70 Cal. 2d 654, 657, 451 P.2d 422, 423, 75 Cal. Rptr. 782, 784 (1969), *rev'd*, 399 U.S. 149 (1970). There was further corroborating information from an Officer Dominguez, another undercover agent, who had had a recent encounter with Green involving drugs.

71. CAL. HEALTH & SAFETY CODE § 11532 (West 1964).

72. 399 U.S. at 151. Mr. Justice Brennan in his dissenting opinion states that defense counsel for Green "did not engage in a searching examination." *Id.* at 191. Mr. Justice Brennan points out that neither the defense nor the prosecution asked chief witness Porter whether he was under the influence of drugs at the time of the alleged offense.

73. Porter was then out on probation after pleading guilty to his offense. For detailed summary of the facts, *see* 32 OHIO STATE L.J. 188, 189 (1971).

74. 70 Cal. 2d at 657, 451 P.2d at 423, 75 Cal. Rptr. at 783. Quoted, 399 U.S. at 151. It should be noted that both the presiding judge and the prosecutor commented on the general unreliability and worthlessness of Porter's testimony at trial. The defendant called two character witnesses at the trial who testified to Porter's poor reputation in the community. Brief for Respondent at 3, 4 n.2, California v. Green, 399 U.S. 149 (1970).

At various points in his direct examination of Porter, the prosecutor, in order to combat the witness's evasiveness, read portions of Porter's earlier preliminary hearing testimony. Particularly damaging to Green was that part of the preliminary hearing testimony wherein Porter had said that Green specifically asked him to sell marijuana and that he had obtained the marijuana from the yard of Green's parents' home at Green's instructions. This preliminary hearing testimony was used at the trial to "refresh" Porter's recollection and was admitted into evidence as a prior inconsistent statement. However, contrary to the usual restrictive use of prior inconsistent statements for impeachment purposes only, under the new California Evidence Code[75] Porter's prior inconsistent statements made at the preliminary hearing were admitted as substantive evidence to prove the truth of the matter contained in the statements. After the prosecutor's reading of the preliminary hearing transcript, Porter's memory was sufficiently "refreshed" for him to testify that his preliminary hearing statements were the truth as he then believed it to be and that he "guessed" he had obtained the drug from Green's parents' yard and had given the money from its sale to Green. On cross-examination by Green's defense counsel, Porter indicated that the preliminary hearing transcript had merely "refreshed" his memory as to what he had said at the preliminary hearing and that he had no independent recollection of the actual episode. Later in the trial, Officer Wade testified for the prosecution that four days after his arrest, Porter had told him that Green had personally delivered the marijuana to Porter's house. Wade's testimony was also admitted as a prior inconsistent statement of Porter to be used as substantive evidence of the truth of the matter contained in the statement

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75. CAL. EVID. CODE § 1235, § 770 (West 1966). "Section 1235 Inconsistent statement. Evidence of a statement made by a witness is not made inadmissible by the Hearsay Rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with § 770. (Stats. 1965, c.299, § 1235)." The *Comment* of the Law Revision Commission states that section 1235 "permits an inconsistent statement of a witness to be used as substantive evidence if the statement is otherwie admissible under the conditions specified in § 770—which do not include surprise on the part of the party calling the witness if he is the party offering the inconsistent statement."

> Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely non-existent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation.

Demeanor purposes will be satisfied and Section 1235 will protect against "the turncoat witness who changes his story on the stand and deprives the party calling him of evidence essential to his case." *Id.*

under California Evidence Code Section 1235. Porter admitted making this statement to Officer Wade but insisted that he had been telling the truth as he then believed it to be, both to Officer Wade and at the preliminary hearing. At the conclusion of the trial, Green took the stand to categorically deny that he had been involved with drugs or that he had furnished marijuana to Porter to sell for him.[76] Green was convicted by the trial court. On appeal, the California intermediate appellate court reversed, holding that the admission of Porter's prior inconsistent statements as substantive evidence of the truth of the matter asserted therein denied Green his right to confront the witnesses against him under the rationale of the California Supreme Court's decision in *People v. Johnson*.[77] The California Supreme Court, declaring its decision to be "impelled by recent cases" of the United States Supreme Court dealing with the sixth amendment right of confrontation,[78] held Section 1235 of the new California Evidence Code to be unconstitutional insofar as it permitted the substantive use of prior inconsistent statements of a witness to prove the truth of the matters asserted therein, even though the statements had been subject to cross-examination at a prior preliminary hearing. The California Supreme Court viewed the right of cross-examination as secured by the confrontation clause of the sixth amendment to be the right to cross-examine before a contemporaneous trier of fact. The United States Supreme

76. Green's testimony does reveal a possible motive for Porter to lie; Green claimed he had repossessed an automobile he had sold to Porter when Porter failed to keep up his payments. People v. Green, 71 Cal. Rptr. 100, 102 (Ct. App. 1968), *rev'd*, 399 U.S. 149 (1970).

77. 68 Cal. 2d 646, 441 P.2d 111 (1968). In *Johnson*, the California Supreme Court held that Section 1235 of the new CAL. EVID. CODE, insofar as it approves admission of prior inconsistent statements as proof of the matters stated therein, is unconstitutional when applied to testimony before a grand jury where the defendant, his counsel, and the ultimate triers of fact were not present. The complaining witnesses in *Johnson*, a mother and daughter, had testified to acts of incest by the father-defendant with the daughter. However, at trial these witnesses changed their stories, claiming they had lied out of spite in the grand jury proceedings. Nevertheless, the grand jury testimony had been admitted under Section 1235 for the truth of the matter asserted therein, and on that basis the defendant was convicted. The California Supreme Court reversed, declaring that such use of grand jury testimony violated the confrontation clause of the sixth amendment as applied to the states through the fourteenth amendment. In its opinion in *People v. Green*, the instant case, the California Supreme Court declared that "Johnson returned California law . . . to the general common law rule which prevailed prior to passage of the [new California] Evidence Code, limiting admission of prior inconsistent statements in criminal cases to impeachment purposes." 70 Cal. 2d at 659, 451 P.2d at 425.

78. 70 Cal. 2d at 785, 451 P.2d at 425. The Court cited Pointer v. Texas, 380 U.S. 400 (1965), and Barber v. Page, 390 U.S. 719 (1968), as being the U.S. Supreme Court cases that "impelled" its decision in *Green*.

Court granted the State of California's petition for certiorari[79] and, with the Chief Justice and Mr. Justice Harlan concurring separately and Mr. Justice Brennan dissenting,[80] vacated the judgment of the California Supreme Court and remanded to that court for further proceedings. Mr. Justice White, who delivered the opinion of the Court, stated that the California Supreme Court was wrong in both of its major premises: that neither the right to cross-examine Porter at the trial concerning his prior testimony nor the opportunity to cross-examine Porter at the preliminary hearing satisfied the commands of the confrontation clause. The Court stated that the confrontation clause was not a codification of the Hearsay Rule with its exceptions. Appearing anxious to preserve a state's right to experiment with reform of its hearsay rules, the Court held that the confrontation clause was not violated by admitting Porter's out-of-court statements as long as he testified as a witness at the trial in which the prior statements were offered and was subject to cross-examination. In upholding the constitutionality of Section 1235 of the California Evidence Code, the Court stated that it did not share the view that prior cross-examination can never serve as a constitutionally adequate substitute for cross-examination contemporaneous with the original statement.[81] It therefore relied[82] heavily on the fact that Porter had been cross-examined at the preliminary hearing.[83]

B. Dutton v. Evans

On the morning of April 17, 1964, the bodies of three Gwinnett County, Georgia police officers were discovered handcuffed together and lying in a pine thicket. They had been killed in the early morning hours from shots fired "into their bodies at extremely close range."[84] After

79. 396 U.S. 1001 (1970).

80. Mr. Justice Blackmun did not participate in the decision. 399 U.S. at 170.

81. 399 U.S. at 159.

82. *Id.* at 165-66.

83. *Id.* at 170. Porter's conversation with Officer Wade was, unlike the prior statements made by Porter at the preliminary hearing, taken at a time when Green's counsel was not present and Porter was not subject to cross-examination. Porter's "lapse of memory" at trial, plus the lack of cross-examination at the time the statement was made to Officer Wade, may have made him "unavailable" for *any* cross-examination in which case Green's right to confrontation would not be satisfied. However, even if Porter was unavailable for cross-examination as to the prior statements made to Officer Wade, the error of admitting Wade's testimony may fall within the harmless error category of Chapman v. California, 386 U.S. 18 (1967).

84. 400 U.S. at 77.

an intensive investigation that continued for many months, appellee Evans and two other men, Wade Truett and Venson Williams, were charged with the murders. A year and a half after the crime, Evans and Williams were indicted by a grand jury whereas Truett was granted immunity from prosecution in return for his testimony against the other two. Evans pleaded not guilty and demanded a separate trial. His demand was recognized under Georgia law; he was tried before a jury, convicted and sentenced to death.[85] Evans' conviction was affirmed by the Georgia Supreme Court,[86] after which the United States Supreme Court denied certiorari.[87] Evans then petitioned for a writ of habeas corpus in a federal district court contending, among other things, that his sixth amendment right to be confronted with the witnesses against him had been denied at his trial. His petition was denied.[88] The Court of Appeals for the Fifth Circuit, however, reversed the District Court's denial of the writ, holding that the State of Georgia had denied Evans the right of confrontation.[89] An appeal was taken to the United States Supreme Court.[90]

The facts supporting Evans' confrontation contention are not in dispute. During a lengthy trial, Shaw was called as one of the prosecution's 20 witnesses.[91] Shaw and Williams, the accomplice tried in a separate trial, had been fellow inmates at the federal penitentiary in Atlanta, Georgia, at the time Williams was returned to Gwinnett

85. The plurality opinion pointed out that Evans' death penalty could not be carried out. It was conceded by the State of Georgia at oral argument that the jury was disqualified under standards of Witherspoon v. Illinois, 391 U.S. 510 (1968). The Court of Appeals for the Fifth Circuit did set aside the conviction of Venson Williams, Evans' alleged accomplice, on *Witherspoon* grounds. *See* Williams v. Dutton, 400 F.2d 797, 804-05 (1968), which also contains a detailed statement of facts applicable to the instant case.

86. Evans v. State, 222 Ga. 392, 150 S.E.2d 240 (1966).

87. Evans v. Georgia, 385 U.S. 953 (1966).

88. U.S. Dist. Ct. for the N. Dist. of Ga., Frank A. Hooper, J.

89. 400 F.2d 826 (5th Cir. 1968).

90. The case was argued twice before the U.S. Supreme Court. 397 U.S. 1060 (1970).

91. The chief prosecution witness was the accomplice Truett, who had been granted immunity from prosecution in exchange for his testimony. Truett testified that he and Williams owned a garage in Hartsville, South Carolina, where they were engaged in rebuilding wrecked automobiles. Evidently, Williams and Truett had purchased a year-old maroon Oldsmobile that had been damaged. In the course of planning repairs they concluded they could not sell the Oldsmobile for a profit if they had to buy spare parts; therefore, with the help of appellee Evans, they went to Atlanta, Georgia, and stole a substantially identical automobile. Truett testified that while returning to Hartsville they stopped on a back road in Gwinnett County in order to put new registration plates on the stolen car. Three police officers, responding to a call reporting suspicious activity, accosted the three culprits. In the course of the questioning, Truett testified that Evans grabbed one of the officer's guns; the three officers were then bound together with

County for arraignment for the murder of the three policemen. Shaw claimed that upon Williams' return to prison from the arraignment, he had asked Williams, "How did you make out in Court?" and Williams replied, "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." Evans' defense counsel made a timely objection to the introduction of this alleged out-of-court statement of Williams on the ground that it was hearsay and therefore violated Evans' right to confront the witnesses against him. The objection was overruled, and Evans' defense counsel then cross-examined Shaw at length.[92]

Shaw's testimony about Williams' statement in the prison was admitted by the Georgia trial court, and its admission upheld by the Georgia Supreme Court,[93] under a long-standing Georgia statute[94] which treats any declaration by one of the co-conspirators during the pendency of the criminal project as an exception to the Hearsay Rule.

A majority of the Court could not reach an agreement on the rationale supporting the decision in the case. Chief Justice Burger and Justices White and Blackmun subscribed to a plurality opinion written by Justice Stewart. Justice Harlan concurred separately, and four justices dissented.[95] In his plurality opinion, Justice Stewart, although conceding that the "Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots," [96] reiterated the Court's refusal in *California v. Green* to equate the two rules. The Court held that the Georgia extension of the co-conspirator exception

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their own handcuffs, taken to a wooded spot just off the road, and Evans shot each policeman a number of times, mostly in the back of the head. The stolen Oldsmobile was then driven off the road and set afire. *See* detailed statement of facts in Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968).

92. The cross-examination of Shaw by Evans' defense counsel was most effective. Such serious doubt was cast on Shaw's credibility that a real question exists as to whether the alleged conversation took place at all. The Court of Appeals observed that Shaw's testimony was "somewhat incredible." Evans v. Dutton, 400 F.2d at 828 n.4. Shaw testified that Williams was talking to him in a normal voice though a ten-by-ten plate-glass window in a prison hospital door while Williams was lying on a bed in the room facing the wall and Shaw was outside the room in the hall. Shaw stated the window was covered only by a wire mesh. It was later brought out in Evans' trial that it was also covered by a pane of plate glass. *Id. See also* Mr. Justice Blackmun's concurring opinion in the instant case, 400 U.S. at 90.

93. Evans v. State, 222 Ga. 392, 150 S.E.2d 240 (1960).

94. "After the fact of conspiracy shall be proved, the declarations by anyone of the conspirators during the pendency of the criminal project shall be admissible against all." GA. CODE ANN. § 38-306 (1954 rev.).

95. Mr. Justice Marshall wrote a dissenting opinion in which he was joined by Justices Black, Douglas, and Brennan. 400 U.S. at 100.

96. 400 U.S. at 86. *See* historical development in text accompanying notes 9-27 *supra*.

to the Hearsay Rule to include statements made during the concealment phase of the conspiracy did not violate the sixth amendment confrontation clause. The Court explained that the narrower federal coconspirator exception, which does not extend to statements made during the concealment phase of the conspiracy but only to statements made in the course of and in furtherance of the conspiracy, was formulated by the Court in the exercise of its rule-making power in the area of the federal law of evidence and is not meant to define the limits of the confrontation clause.[97] The Court also stated that admission of Williams' alleged out-of-court statement to Shaw does not involve evidence "in any sense 'crucial' or 'devastating.' "[98] At no point in the plurality opinion does the Court, through Mr. Justice Stewart, ever claim that appellee Evans was afforded the right to cross-examine his accomplice, Williams, as to the truth of the out-of-court statement attributed to Williams by witness Shaw.

III. ANALYSIS OF THE CONFRONTATION OPINIONS AND DISCUSSION OF THE POSITION OF THE INDIVIDUAL JUSTICES

A. Analysis of the 1970 Confrontation Opinions

Of the two major 1970 confrontation cases, *Dutton v. Evans* is the more important. *California v. Green*, however, cannot be ignored because it presages *Evans* and places the constitutional dilemma in bold relief.[99] While *Green* authorizes admission of hearsay testimony and specifically approves California's adoption of a liberalized exception to the Hearsay Rule, the facts of *Green* are not as compelling as those in *Evans* to the theorist who equates confrontation with cross-examination. In *Green*, while it is true that witness Porter's claimed memory lapses did make the witness unavailable under a rather expansive view of the unavailability concept, he was cross-examined under oath at length at

97. 400 U.S. at 81-82.

98. *Id.* at 87. Query whether this statement and the "harmless error" treatment of Shaw's testimony by Chief Justice Burger and Mr. Justice Blackmun in their concurring opinions affect at all the continued viability of Chapman v. California, 386 U.S. 18 (1967), where it was held that before constitutional error can be deemed to be harmless it must be shown, beyond a reasonable doubt, that the error did not contribute to the guilty verdict obtained.

99. The latest confrontation case, Nelson v. O'Neil, 402 U.S. 622 (1971) held that a defendant has not been deprived of his confrontation rights where a codefendant takes the stand in his own defense denying a prior confession implicating the defendant, and then proceeds to testify favorable to the defendant. This case does not affect the basic issues presented in *Green* and *Evans*.

the preliminary hearing. Furthermore, the state did produce him again at the trial when it introduced those prior inconsistent statements made at the preliminary hearing and to Officer Wade.[100] In short, California did all that it could to provide defendant Green with an opportunity to confront the chief witness against him. Only Justice Brennan viewed confrontation as requiring more. Seven of the eight justices in *Green* refused to adopt the view that the overlap between the Hearsay Rule and its exceptions and the right of confrontation is complete. Nevertheless, the Court stated that, "Given the similarity of the values protected [by the Hearsay Rule and the confrontation clause] . . . the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatability with the defendant's constitutional right to confrontation."[101] It is clear that *Green* did not give a definitive answer to the extent of the interplay between the common law Hearsay Rule and the constitutional right of an accused to confront the witnesses against him. In *Evans* that issue was joined, and in attempting its resolution the Court found itself evenly split, four-four.

Evans was not an easy case. The plurality opinion allowed admission of an out-of-court statement implicating Evans in a multiple murder without ever allowing him an opportunity to cross-examine the out-of-court declarant. Unlike *Green,* the out-of-court statements in *Evans* were never subjected to cross-examination when made; unlike the situation in *Green,* Georgia made no attempt to produce the declarant at trial or to provide Evans—during any stage of the criminal process against him—the right to cross-examine the alleged out-of-court declarant. While the plurality indicated that there were "indicia of reliability"[102] which supported Georgia's hearsay exception, only two justices were willing to categorize admission of the out-of-court statements in *Evans* as "harmess error."[103] Therefore, the Court in *Evans,* for the first time since *Pointer v. Texas,* approved the admission of a relevant, damaging hearsay statement against an accused without any attempt to provide the right of cross-examination. In its fear of con-

100. The Court specifically declined to pass on Officer Wade's testimony as to Porter's prior statements during interrogation. It noted that there was a substantial question concerning that testimony because it was not subjected to cross-examination when made, and because of Porter's memory lapse at trial, it could be considered to have never been subjected to the test of cross-examination. 399 U.S. at 169 n.18.

101. 399 U.S. at 156.

102. 400 U.S. at 89.

103. *See* Mr. Justice Blackmun's concurring opinion, joined by Chief Justice Burger. 400 U.S. at 90.

stitutionalizing the Hearsay Rule, the Court balanced away the mandatory language of the Constitution guaranteeing a criminal defendant the "right to be confronted with the witnesses against him."[104] Four "pragmatists,"[105] fearful of the results of constitutionalization of the Hearsay Rule, diluted the sixth amendment without constitutional justification. Four constitutional "purists,"[106] while not willing to say there can never be exceptions to the Hearsay Rule which will satisfy the confrontation clause, nevertheless held that the clear constitutional mandate was not carried out in *Evans*. The purists pointed out that every member of the Court has agreed that cross-examination is at least an element of confrontation. They further insisted that no semblance of the right of confrontation was present in *Evans*,[107] and asserted that there was no justification for its absence. Justice Harlan, in both *Green* and *Evans*, saw the constitutional dilemma faced by the Court and attempted twice to articulate a constitutional meaning for confrontation that met the demands of the pragmatists for decisions which would not stifle state hearsay reforms and also met the demands of the purists that a basic constitutional right not be read out of existence. It is essential to examine in some detail the view of the members of the Supreme Court who decided the 1970 confrontation cases in order to appreciate the constitutional dilemma facing the Court.

B. Opinions of the Individual Justices

1. *The Pragmatists*

Mr. Justice White: Mr. Justice White wrote the majority opinion in *California v. Green* and subscribed to the plurality opinion in *Dutton v. Evans*. He attempted to confine his opinion in *Green* to the narrow question of whether a defendant's constitutional right to be confronted with the witnesses against him is necessarily inconsistent with the position taken in Section 1235 of the California Evidence Code.[108] He

104. U.S. Const. amend. VI, § 1.

105. The writer has adopted the terms "pragmatist" and "purist" to identify the two groups of justices represented in the plurality and dissenting opinions in *Evans*. These terms are adopted only for purposes of convenience and easy reader identification and are not intended to import to any justice any particular judicial philosophy.

106. *Id.*

107. Not one of the values which the confrontation clause was intended to protect was present in *Evans*. The out-of-court declarant, Williams, was never at any time put under oath; he was never placed "face-to-face" with Evans; no trier of fact ever observed his demeanor; and he was not cross-examined. Furthermore, at no time did Georgia ever excuse his absence under any definition of "unavailability."

108. *See* note 75 *supra*.

conceded "that hearsay rules and the Confrontation Clause are generally designed to protect similar values . . . ."[109] and, from his discussion of the cross-examination of Porter at the preliminary hearing, it seems clear that Justice White would agree that cross-examination is one of those "similar values" protected by both the Hearsay Rule and the sixth amendment. However, he contended that the overlap between the confrontation clause and the Hearsay Rule is not complete. He pointed out that violations of confrontation have been found even though the statements in question were admitted under an "arguably recognized hearsay exception,"[110] and he asserted that the converse can also be true. In quoting the famous paragraph in *Mattox v. United States*[111] as to the primary object of confrontation, Mr. Justice White asserted that "it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."[112] Therefore, he found no objection to the California procedure where Porter was cross-examined at the preliminary hearing and was presented at the trial by the State for questioning about his prior inconsistent statements. In White's view, Porter was literally confronted by defendant Green. While he claimed that the literal right to face an accuser is the core value of confrontation, Mr. Justice White did set up three of its other purposes: (1) it insures that the witness will give his statement under oath; (2) it forces the witness to submit to cross-examination;[113] and (3) it permits the trier of fact to observe the demeanor of the witness as he makes his statement.[114] After examining the facts of *Green* in light of the above listed purposes of confrontation, Mr. Justice White concluded that Green was not denied the right to confront Porter in any constitutional sense. He made it clear that the Court was not mapping out a theory of the confrontation clause that would determine the validity of all hearsay exceptions, that hearsay and confrontation are not the same, and that the confrontation clause does not constitutionalize the Hearsay Rule. Justice White accepted the existence of exceptions to the Hearsay Rule which will allow admission of hearsay evidence.[115] His flexibility in regard to exceptions to

109. 399 U.S. at 155.

110. *Id.* at 156.

111. 156 U.S. 237 (1895).

112. 399 U.S. at 157.

113. Here Mr. Justice White quotes Wigmore's statement that cross-examination is the "greatest legal engine ever invented for the discovery of truth." 399 U.S. at 158. *See* 5 WIGMORE, *supra* note 8, § 1367, at 29 for original source material.

114. While he does not list presence as one of the values of confrontation, Mr. Justice White joined the opinion of the Court in Illinois v. Allen, 397 U.S. 337 (1970).

115. He cites favorably Mattox v. United States, 156 U.S. 237 (1895), which approves

the Hearsay Rule is emphasized by his concurrence in the plurality opinion in *Evans* which approved the broad Georgia co-conspirator exception despite the absence of the alleged purposes of confrontation listed in *Green*. Mr. Justice White can be considered a member of the pragmatist group who desires to avoid constitutionalization of the Hearsay Rule.

Chief Justice Burger: The Chief Justice concurred in the majority opinion in *Green* and in the plurality opinion in *Evans*. It is apparent that he is a leading pragmatist on the Court as far as the right of confrontation is concerned. His concurring opinion in *Green* emphasized the importance of "allowing the States to experiment and innovate, especially in the area of criminal justice."[116] He further asserted that federal authority should never be used as a "ramrod" to compel conformity. The Chief Justice joined Justice Blackmun's concurring opinion in *Evans*. Thus, these two justices viewed Shaw's testimony about the accomplice Williams as "harmless error" under *Chapman v. California*.[117] It seems likely that the Chief Justice would be hesitant to find any rational hearsay exception of any state to be in violation of the confrontation clause.

Mr. Justice Blackmun: Mr. Justice Blackmun, as the newest member of the Court, did not participate in the decision in *Green*. However, he subscribed to the plurality opinion in *Evans* and added a concurring opinion finding harmless error in the admission of accomplice Williams' out-of-court statement.[118] It must be assumed that he, along with the Chief Justice, would be one of the most unwilling members of the Court to find constitutional problems with any recognized state hearsay exception.

Mr. Justice Stewart: Mr. Justice Stewart wrote the plurality opinion for the Court in *Evans* and subscribed to the majority opinion in *Green*. The opinion in *Evans* began by citing *Pointer v. Texas*[119] and purported to agree with its holding that the right of an accused to

the prior testimony exception to the Hearsay Rule where a witness had died between the first and second trial. 399 U.S. at 165.

116. 399 U.S. at 171.

117. 386 U.S. 18 (1967).

118. His "theory" seemed to be that it was so unlikely that witness Shaw was telling the truth about Williams ever uttering the statement attributed to him that no "normal jury" could have believed Shaw and therefore cross-examination was unnecessary as the testimony could not have affected the jury's decision. 400 U.S. at 91. *But see* Mr. Justice Marshall's disposal of this "harmless error" theory in his dissenting opinion in *Evans*, 400 U.S. at 108-09; *See also* Mr. Justice Harlan's concurring opinion, *id.* at 93-94.

119. 380 U.S. 400 (1965).

confront witnesses against him is a fundamental right made obligatory on the states by the fourteenth amendment. However, Justice Stewart then stated that no one could argue that the confrontation clause prohibits the introduction of all hearsay evidence.[120] He noted that the appellee's argument was not to prohibit admission of all hearsay, but rather to require the Court to reappraise every exception to the Hearsay Rule, no matter how long established, unless it was supported by "salient and cogent reasons."[121] However, Justice Stewart declined to conduct what he termed a "constitutional reassessment" of all established state and federal hearsay exceptions. Instead, he attempted to restrict the plurality opinion to the issue of the constitutionality of Georgia's broad co-conspirator exception. He dealt extensively with the proposition that the narrower federal co-conspirator exception was adopted by the Court under its rule-making power in the area of the federal law of evidence. He asserted that the sixth amendment does not require the states to follow the narrower federal exception. He then discussed previous confrontation decisions of the Court and concluded that:

> It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now. We confine ourselves, instead, to deciding the case before us.[122]

After attempting to distinguish the previous confrontation decisions of the Court,[123] he concluded that the Georgia hearsay exception involved could have many applications consistent with the confrontation clause and that its application in *Evans* did not violate the Constitution. While he discussed the ability of the defendant to cross-examine the witness Shaw, at no time did he claim that there was any confron-

120. Mr. Justice Stewart cited Mattox v. United States, 156 U.S. 237 (1895), which recognized the admissibility of dying declarations and prior testimony where a witness at an earlier trial had died, to support his position that there are occasions where the admission of hearsay evidence does not violate the sixth amendment.

121. 400 F.2d 826, 830 (5th Cir. 1968).

122. 400 U.S. at 86.

123. This case does not involve evidence in any sense "crucial" or "devastating," as did all the cases just discussed. It does not involve the use, or misuse, of a confession made in the coercive atmosphere of official interrogation, as did *Douglas*, *Brookhart*, *Bruton*, and *Roberts*. It does not involve any suggestion of prosecutorial misconduct or even negligence, as did *Pointer*, *Douglas*, and *Barber*. It does not involve the use by the prosecution of a paper transcript, as did *Pointer*, *Brookhart*, and *Barber*. It does not involve a joint trial, as did *Bruton* and *Roberts*. And it certainly does not involve the wholesale denial of cross-examination, as did *Brookhart*.

400 U.S. at 87.

tation of the out-of-court declarant Williams or that the state had any reason for not producing him. His opinion asserted that Williams' statement "was spontaneous" and "against his penal interest."[124] These "indicia of reliability" were determinative for Justice Stewart as to whether a statement may be placed before a jury "though there [was] no confrontation of the declarant."[125] Justice Stewart concluded by defining confrontation in such a way as to make it difficult to ever find a hearsay exception, no matter how broad, that violates the confrontation clause as long as there are "indicia of reliability." It is essential to look at the words used by Justice Stewart in *Evans* to describe the right of confrontation, a right referred to at the beginning of his opinion as fundamental.

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance 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."[126]

Thus, in order to achieve a desired result, Justice Stewart interpreted the constitutional command that "[i]n *all* criminal prosecutions, the accused *shall* enjoy the right . . . to be confronted with the witnesses against him,"[127] as nothing more than a "practical concern" that the trier of fact has a "satisfactory" basis for evaluating the truth of an out-of-court statement. Not one of the purposes of the confrontation clause enumerated by the Court in *Green* was met in *Evans*: (1) no oath was administered to Williams; (2) his demeanor was not observed; (3) he was not cross-examined; and, (4) the "literal right to 'confront' the witness at the time of trial [that] forms the *core* of the values furthered by the Confrontation Clause,"[128] was not afforded the defendant. Finally, there was no showing that declarant Williams was unavailable. It is submitted that the test of "indicia of reliability" used in Justice Stewart's plurality opinion to test the constitutionality of a state's hearsay exceptions is imprecise and will result in a balancing away of the confrontation clause in favor of a state's evidentiary rulings in almost every close case in which it is applied.

Evans was tried for the brutal murder of three police officers and,

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124. *Id.* at 89.
125. *Id.*
126. *Id.* (emphasis added).
127. U.S. CONST. amend. VI, § 1 (emphasis added).
128. 399 U.S. at 157 (emphasis added).

in the context of the facts, Mr. Justice Stewart concluded his opinion by citing Justice Cardozo's famous statement in *Snyder v. Massachusetts*[129] that discredit will be visited on the great fourteenth amendment immunities if "gossamer possibilities of prejudice" are used to "set the guilty free."[130] Evans was not granted his constitutional right to confront Williams, no reason was advanced by Georgia for failing to call Williams, seven members of the Court could not conclude that the out-of-court statement was of such low value that its admission would amount to "harmless error," yet that state's broad hearsay exception was held not to violate the constitution. To obtain a practical result, a basic constitutional right was not enforced. Thus, the issue between the pragmatists and the purists was joined.

2. *The Constitutional Purists*

Mr. Justice Brennan: Mr. Justice Brennan wrote the only dissenting opinion in *Green* and joined the dissent in *Evans*. He is the justice who would seem most likely to carry out the literal commands of the confrontation clause. In *Green* he indicated that both of Porter's prior inconsistent statements were unconstitutionally admitted into testimony, placing great emphasis on the demeanor and cross-examination purposes of confrontation. He vigorously defended the proposition advanced in *Barber v. Page* that "[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and . . . for the jury to weigh the demeanor of the witness."[131] Justice Brennan was particularly critical of the majority's notion that cross-examination at the preliminary hearing can be considered an effective substitute for cross-examination at trial. He pointed out that the preliminary hearing is normally "a rather perfunctory uncontested proceeding," citing the California appellate court opinion,[132] and that the confrontation clause cannot be satisfied by a face-to-face encounter at that time.[133] Justice Brennan asserted that acceptance of

129. 291 U.S. 97, 122 (1934).

130. 400 U.S. at 89-90.

131. 390 U.S. 719, 725 (1968).

132. 399 U.S. at 196, citing People v. Gibbs, 255 Cal. App. 2d 739, 743-44, 63 Cal. Rptr. 471, 475 (1967).

133. He contended that: (1) the preliminary hearing is to establish probable cause, not guilt, and therefore defense counsel's motive for serious cross-examination is diminished; (2) defense counsel is not eager to disclose his case in advance by serious cross-examination; (3) trial calendars do not easily accommodate long preliminary hearings; (4) there had been inadequate time to prepare; and (5) the fact finder sees the cross-examination from a sterile record and has not observed the demeanor of the witnesses. 399 U.S. at 196-97.

cross-examination at the preliminary hearing as an adequate substitute for cross-examination at trial is to negate the demeanor purpose of the confrontation clause. Furthermore, he felt that the Court's ruling in *Green* would have "unsettling effects" on the nature and conduct of future preliminary hearings because it would: (1) invite lengthy cross-examinations; (2) tend to develop preliminary hearings into full-scale trials; and (3) invite requests for delay to add preparation time. Justice Brennan finally discussed the unavailability concept in light of witness Porter's memory lapse and concluded that there was no meaningful confrontation of that witness.[134]

A final dimension can be added to Mr. Justice Brennan's view of confrontation. He concurred separately in *Illinois v. Allen*,[135] after joining the majority opinion which held that a defendant could be barred from his own trial if he continued his disruptive behavior after a warning. He urged that special steps should be taken even in the extreme *Allen* situation to allow a defendant to communicate with his counsel. Thus, Mr. Justice Brennan disagrees with those pragmatists who would narrowly interpret the right of confrontation in order to allow state experimentation. Never once in his dissent did Mr. Justice Brennan mention the spectre of constitutionalization of the Hearsay Rule that disturbed the pragmatists in the 1970 confrontation cases. He joined the dissent of Mr. Justice Marshall in *Evans* where it was agreed that some exceptions to the Hearsay Rule might satisfy the confrontation clause; but, the thrust of his dissent in *Green* indicated that the constitutionalization argument is not persuasive for him.

Mr. Justice Black: While Mr. Justice Black joined the majority in *Green* and the dissent in *Evans*, his views as to the right of confrontation can be seen in his earlier confrontation opinions. In *In re Oliver*,[136] long before *Pointer v. Texas* incorporated the confrontation clause into the fourteenth amendment, he said that the due process clause of the fourteenth amendment was violated by a trial dispensing with basic confrontation rights. Justice Black wrote the majority opinion in *Pointer* which followed the theory he first set out in *Adamson v. California*,[137] that the Bill of Rights guarantees are incorporated into the fourteenth amendment by the due process clause and applied

134. *Id.* at 198-99, 202-03.

135. 397 U.S. 337 (1970).

136. 333 U.S. 257 (1948) (reversed a summary contempt conviction based on secret testimony before a one-man grand jury, where the accused had never heard any of the testimony against him).

137. 332 U.S. 46 (1947).

to the states.[138] Justice Black is unlikely to agree that "practical" considerations based on "indicia of reliability" can void a basic constitutional command. However, dicta in *Pointer* also established that his decision might have been different if defendant Pointer had had a right of cross-examination at a full-fledged preliminary hearing. Cross-examination at such a hearing was present in *Green* and Justice Black concurred in the result.[139] Mr. Justice Black's strong beliefs about the right of confrontation are seen in *Brookhart v. Janis*,[140] where he asserted that denial of the right of cross-examination "is constitutional error of the first magnitude."[141] He equates confrontation with cross-examination and views cross-examination as the fundamental value preserved by the confrontation clause.

Mr. Justice Douglas: Mr. Justice Douglas subscribed to the majority opinion in *Green* but, with Justice Black, joined the dissenters in *Evans*. He would apparently preserve a defendant's right to confrontation in close cases where conflict arises with any state hearsay exception. While he has not written as extensively as Justice Black in the confrontation area, Justice Douglas has to be placed in the camp of the constitutional purists. Although he held in *Harrington v. California*[142] that confessions introduced in seeming violation of the *Bruton* doctrine will not necessarily be cause for reversal where there is "overwhelming" support for conviction, his actual view of the right to confrontation must be determined from several cases: he joined the majority in *Bruton*,[143] which held that the admission of evidence categorized by the trial judge as inadmissible in his charge to the jury nevertheless violated Bruton's right of cross-examination secured by the confrontation clause; he concurred in *Barber v. Page*,[144] which held that because the state was negligent in procuring a codefendant's pres-

138. *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1950); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965); *see, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963); Malloy v. Hogan, 378 U.S. 1 (1964).

139. However, it should be noted that Mr. Justice Black did concur in Mr. Justice Marshall's dissent in *Dutton v. Evans* where it is asserted that even a preliminary hearing cross-examination will not satisfy the confrontation clause where the witness who testified at the preliminary hearing is available to be called at trial and is not so called. 400 U.S. at 101.

140. 384 U.S. 1 (1966) (a "waiver" of constitutional rights was voided as not being intelligently made).

141. *Id.* at 3.

142. 395 U.S. 250 (1969).

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

144. 390 U.S. 719 (1968).

ence he was *not* "unavailable" for purposes of the confrontation clause and that there was no waiver of the right to confrontation; he concurred in both *Pointer v. Texas*[145] and *Douglas v. Alabama*;[146] and finally, he subscribed to the dissent in *Evans*.

Mr. Justice Marshall: Mr. Justice Marshall wrote the dissent in *Evans* and, while joining the majority in *Green*, he should be viewed in light of *Evans* as a constitutional purist.

The dissenting views of Justice Marshall in *Evans*, when compared with those in the plurality opinion, point up the division on the Court as to the meaning of confrontation. For Justice Marshall, the right to confrontation means that incriminatory extrajudicial statements of an alleged accomplice (which he asserted are inherently prejudicial) must not be introduced without an opportunity to cross-examine the declarant. Justice Marshall, unlike Justice Stewart, believed that cross-examination of the declarant Williams in *Evans* could affect the jury's view of the situation as presented by witness Shaw. He saw in *Evans* the unanswered questions which the cross-examination of witnesses is meant to answer: what did the declarant say, what did he mean, and was it the truth?

He saw the plurality opinion as wrong in limiting the right to confrontation to certain circumstances and wrong in stating that "differences" between *Evans* and prior cases (the declarant's alleged statement was not made during an official interrogation; it was not in transcript form; it was not introduced at a joint trial) are dispositive for confrontation purposes.

For Justice Marshall, the Georgia co-conspirator exception had to give way to a defendant's right to confrontation. He asserted that prior decisions recognize at least that cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him, and that a defendant is denied his constitutional rights when a state comes forward with no satisfactory justification for the denial of cross-examination. Viewing the statement of the declarant Williams to be suspect and highly damaging, Marshall saw its admission as one of the threats to a fair trial against which the right to confrontation was directed. He claimed that the plurality justices, in seeking "indicia of reliability," have "sunk"[147] the confrontation clause. Justice Marshall felt that under the plurality's test, the confrontation clause would

145. 380 U.S. 400 (1965).
146. 380 U.S. 415 (1965).
147. 400 U.S. at 110.

have no independent vitality in protecting a criminal defendant against the use of extrajudicial statements not subject to cross-examination and not exposed to a jury assessment of the declarant's demeanor at trial. In emphasizing the right of cross-examination, Justice Marshall denied that his conception of the right of confrontation poses the spectre of a rampaging confrontation clause trampling all flexibility and innovation in a state's law of evidence.[148] But on the other hand, Justice Marshall believed that the confrontation clause prohibits use of an incriminatory extrajudicial statement of an alleged accomplice unless there has been an opportunity to cross-examine the declarant regardless of the existence of a recognized hearsay exception.

3. *Mr. Justice Harlan—The Troubled Theorist*

Justice Harlan was impelled toward the results achieved by the pragmatists (he concurred separately in both *California v. Green* and *Dutton v. Evans*) but was dismayed by their apparent lack of any cohesive theory of confrontation to support such results. He granted the logic of the purists' position but feared the results achieved by pursuit of that logic.[149] He attempted in both *Green* and *Evans* to construct a definition of hearsay that would support practical results and yet deal fairly with a constitutional mandate. While his views as to the core meaning of confrontation changed markedly in the six month period between the two cases, he pursued his goal of a workable constitutional theory.

a. *The availability interpretation*: Justice Harlan's concurring opinion in *Green* exhorted the Court to confront squarely the confrontation clause. He stated that the holding of the California Supreme Court is a direct result of an "understandable misconception" of numerous decisions of the Supreme Court and that the narrow holding in *Green* is not the best way to correct this misinterpretation. The misinterpretation consists of an indiscriminate equation of confrontation with cross-examination.[150] Justice Harlan asserted that the confrontation-cross-examination equation left ambiguous the extent to which "the Sixth Amendment 'constitutionalizes' the hearsay rule of the common law."[151]

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148. He termed that as "a prospect more frightening than real." 400 U.S. at 105-06 n.7; and he later stated "[t]hat spectre is only a spectre." *Id.* at 110.

149. He claimed the dissent of Mr. Justice Marshall in *Dutton v. Evans* is pushng the dissenters to a prohibition on the use of all hearsay, even if the dissenters are not willing to embrace that position at this time. 400 U.S. at 95.

150. 399 U.S. at 172.

151. *Id.* at 173.

He therefore proposed to take a "fresh look at the constitutional concept of 'confrontation,' " without letting *stare decisis* "stand in the way."[152] In proposing his fresh look, Justice Harlan found that history gave little insight into the intended scope of the confrontation clause.[153] Nevertheless, for Justice Harlan, a believer in the "federal approach," the stakes are so high that the effort of reformulation of confrontation to avoid the cross-examination equation is necessary. He feared "perpetuation of an unworkable rule."[154] After taking his fresh look in *Green*, Mr. Justice Harlan concluded that the confrontation clause should be confined to an "availability rule," one that requires production of a witness when he is available to testify.[155] In *Green*, he criticized Wigmore's view of confrontation[156] and claimed historical support for the proposition that availability, not cross-examination, underlies the confrontation right.[157] His interpretation of availability as confrontation suggests simply that a state should produce a witness and afford the accused an opportunity to cross-examine him "when the declarant is available."[158] Under his availability interpretation, it is easy in *Green* for Justice Harlan to find for California: the prosecution did produce its chief witness Porter and did make him available for trial confrontation. He treated the demeanor and oath purposes of the traditional view of confrontation as minor considerations.

b. *The cross-examining procedure—due process interpretation*: It took just six months for Mr. Justice Harlan to eschew his own "availability" interpretation of confrontation and conclude in *Evans* that, absent impelling linguistic or historical evidence, his availability test

152. *Id.*

153. *See* text accompanying notes 9-27 *supra* for historical development of confrontation and hearsay.

154. 399 U.S. at 173 n.4, citing Swift & Company v. Wickham, 382 U.S. 111, 116 (1965). He stated: "This is not merely a case of prior decisions that may have been incorrectly decided or rationalized. The unworkability of constitutionalizing any aspect of the conventional hearsay rule means what is at stake is the future of sound constitutional development in this area." *Id.*

155. If his "availability" conception of confrontation is not tenable under the sixth amendment law, Mr. Justice Harlan asserts that it should be agreeable under the fourteenth amendment due process clause—which is where he insists, state cases of this kind should be judged anyway. *Id.* at 174.

156. Wigmore equated confrontation with cross-examination, then equated the Hearsay Rule with the test of cross-examination and concluded that the confrontation clause was intended to constitutionalize the Hearsay Rule and all its exceptions at common law. *See* text accompanying notes 20-27 *supra* for an extensive critique of the Wigmore theories of hearsay, cross-examination, and confrontation.

157. Justice Harlan reiterated his theme that Justice Black's "incorporation" doctrine, which has been gaining favor, is at the botton of the present dilemma which threatens constitutionalization of the Hearsay Rule and its exceptions. *Id.* at 184.

158. *Id.* at 186.

is not a happy one to attribute to the framers of the Constitution. The trouble he saw with availability as the core doctrine of confrontation is founded in his firm commitment to federalism. He believed that any rule requiring production of witnesses would curtail new developments in the law of evidence which might eliminate production of unnecessary witnesses and thus streamline the trial process. He cited as examples of such developments the exception to the Hearsay Rule for official statements, learned treatises, trade reports, and business records.[159]

Nevertheless, despite unhappiness with his own availability theory, Justice Harlan was equally disturbed in *Evans* and *Green* with the assumption that the confrontation clause is intended to prevent overly broad exceptions to the Hearsay Rule. However, in his second fresh look at the problem, Justice Harlan saw merit in Wigmore's theory, and cited Wigmore as direct authority for his new theory of confrontation—that the sixth amendment confrontation clause requires only that a certain mode of procedure, *i.e.* a cross-examining procedure, should be utilized in evaluating testimony that the ordinary law of evidence has determined is admissible.[160] Confrontation, claimed Justice Harlan, should not be confused with the kinds of statements, such as dying declarations, which the law of evidence permits into court. Therefore, in *Evans*, Justice Harlan to a limited degree embraced Wigmore's previously criticized equation of cross-examination with confrontation. Unlike the Hearsay Rule which is used to pass on the admissibility of evidence, Justice Harlan's new confrontation theory only requires that evidence be subjected to a cross-examining procedure once it is admitted.[161] Mr. Justice Harlan's new theory helped avoid the weakness he saw in present confrontation interpretation. He felt that the confrontation clause as traditionally construed by the Court is simply inappropriate "for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence."[162] He viewed the due process clause of the fifth and fourteenth amendments as far more appropriate for judging standards re-

159. 400 U.S. at 95-96.

160. *Id.* at 94.

161. As discussed in note 26 *supra* Wigmore's paragraph relied on by Mr. Justice Harlan to support his "cross-examination procedure theory" does not seem consistent with the primary Wigmore theory which stated that both hearsay and confrontation are premised on cross-examination and that the confrontation clause constitutionalizes the Hearsay Rule and its exceptions.

162. 400 U.S. at 96. He criticized the plurality opinion for failing to explain the standard by which it judged witness Shaw's statement, or for failing to show how the standard can be squared with the "absolute command" of the confrontation clause. *Id.*

lating to the constitutionality of federal and state rules of evidence. By interpreting confrontation as requiring only a cross-examining procedure after admissibility has been determined by evidentiary rules, Mr. Justice Harlan has simplified the Court's task. It now must merely judge evidence rules by familiar due process standards. He obviously felt that his solution more nearly comports with the traditional role of the Court in relation to state procedural rules and preserves to the states a right to experiment and innovate in their evidentiary law.[103] Using this new cross-examining procedure-due process interpretation, Mr. Justice Harlan could reach the same result as the plurality opinion reached in *Evans* in, what was for him, a far more comfortable constitutional framework. He also pointed out that his theory of reliance on the due process clause has the virtue of subjecting a state's rules of evidence to the same constitutional scrutiny regardless of whether those evidentiary rules are employed in civil or criminal cases.[104] In applying his new test in *Evans*, Mr. Justice Harlan found that although Georgia's broad co-conspirator exception to the Hearsay Rule does not necessarily appeal to him (he seemed to prefer the more narrow federal exception), the narrower federal rule cannot be said to be essential to a fair trial. This takes care of the admission problem of declarant Williams' out-of-court statement. Once admitted through witness Shaw, the out-of-court statement was subjected to a cross-examining procedure by the extensive cross-examination conducted of witness Shaw.

In summary, there is a four-four split on the Court between those who would restrict the meaning of confrontation to achieve practical results and those who would adhere to the constitutional mandate regardless of the impact on a state's evidentiary law. Only Mr. Justice Harlan attempted to bridge theory with practicality by advancing two new alternative interpretations of confrontation. It is hoped that the chart below will aid the reader in better understanding the individual opinions.[105]

IV. A CRITIQUE: POSSIBLE SOLUTIONS TO THE *DUTTON V. EVANS* DILEMMA

There are at least six possible approaches in determining to what extent, if any, the confrontation clause constitutionalizes the Hearsay

163. He again candidly recognized that his new theory is not "consistent" with many of the things said in the Court's prior cases. *Id.* at 97.

164. *Id.* at 97 n.4.

165. *See* following page.

1970 CONFRONTATION CASES

	Burger	*Black*	*Douglas*	*Harlan*
I. *California v. Green*				
Opinion (White)				
Holding: The confrontation clause does not preclude the use of prior testimony taken at a preliminary hearing where the witness was under oath and subject to cross-examination and where the declarant is available to testify at trial.	Agrees. Emphasizes that the states must not become hampered in their experimentation and innovation efforts.	Agrees	Agrees	Concurs separately
Test: It is the literal right to 'confront' the witness at the time of trial which forms the core of the values furthered by the confrontation clause.	Agrees	Agrees	Agrees	Interprets confrontation to mean only availability of witnesses.
II. *Dutton v. Evans*				
Plurality Opinion (Stewart)	*Burger*	*Black*	*Douglas*	*Harlan*
Holding: The state may consistently with the confrontation clause allow the out of court declaration by any one of a group of conspirators during the pendency of a criminal project to be admissible against all.	Agrees but also subscribes to Blackmun concurrence.	Subscribes to Dissent of Marshall	Subscribes to Dissent of Marshall	Concurs separately
Test: The mission of the confrontation clause is to advance 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, and, in the instant case there was sufficient indicia of reliability to allow admission.	Agrees	Subscribes to Dissent of Marshall	Subscribes to Dissent of Marshall	The confrontation clause prescribes only what mode of procedure shall be followed—a cross-examining procedure—and does not relate to admissibility of evidence (Harlan here disavows his own availability interpretation of *California v. Green*).

I. *California v. Green*

Opinion (White)	*Brennan*	*Stewart*	*Marshall*	*Blackmun*
Holding: The confrontation clause does not preclude the use of prior testimony taken at a preliminary hearing where the witness was under oath and subject to cross-examination and where the declarant is available to testify at trial.	Dissents. The confrontation clause cannot be satisfied by face-to-face encounters at a preliminary hearing.	Agrees	Agrees	Did not participate in this decision
Test: It is the literal right to 'confront' the witness at the time of trial which forms the core of the values furthered by the confrontation clause.	The core value is cross-examination *at trial* plus demeanor.	Agrees	Agrees	—

II. *Dutton v. Evans*

Plurality Opinion (Stewart)	*Brennan*	*White*	*Marshall*	*Blackmun*
Holding: The state may consistently with the confrontation clause allow the out of court declaration by any one of a group of conspirators during the pendency of a criminal project to be admissible against all.	Subscribes to Dissent	Agrees	Dissents. Absent the opportunity of cross-examination, testimony about the implicating out-of-court statement was unconstitutionally admitted at trial.	Agrees, but in concurring opinion sees admission as harmless error beyond a reasonable doubt.
Test: The mission of the confrontation clause is to advance 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, and, in the instant case there was sufficient indicia of reliability to allow admission.	Subscribes to Dissent	Agrees	Dissents. The confrontation clause guarantees the right to cross-examine the declarant about damaging out-of-court statements.	Agrees

I. *Comments*: In *California v. Green* the Court held that there was a core value in the confrontation clause that had to be preserved and state evidentiary rules would be tested by this core value. That decision drew one dissenter who viewed confrontation as a trial right demanding contemporaneous cross-examination and one concurring opinion seeking a new interpretation of confrontation. However, in *Dutton v. Evans* there was no attempt to define confrontation and none of the traditional values that clause was thought to protect were afforded the accused. The vague "indicia of reliability test" advanced by the plurality drew ouly four members of the Court. Four dissented, basing their view of confrontation on the idea that it guaranteed the right of cross-examination. One justice sought a new interpretation of confrontation.

Rule.[166] The advantages and disadvantages of each approach to the *Dutton v. Evans* dilemma will be discussed and a preferred solution will be suggested.

A. The Federalist Approach

The federalist is willing to define narrowly the confrontation clause and, where any question arises between an accused's claim of denial of confrontation rights and a rational exception to a state's Hearsay Rule, will favor the state rule. It appears that the pragmatic approach of the plurality opinion in *Evans* offers a federalist-oriented test. The constitutional mandate was interpreted as only a "practical" concern for the accuracy of the truth-determining process; in carrying out that "concern" the Court need only assure itself that the trier of fact had a "satisfactory basis" for determining the accuracy of the challenged evidence.[167] The obvious advantage of this approach is that it comports with the concept of federalism that claims for the states that which is not specifically delegated to the federal government. To the federalist, the Constitution allows each state to adopt its own body of evidentiary law and, unless there are compelling reasons, forbids the federal courts from imposing their own views of hearsay on the states. The major disadvantage is that a federalist would be inclined to erase a constitutional command that in "*all* criminal prosecutions, the accused *shall* enjoy the right . . . to *confront* the witnesses against him."[168] The test employed in *Evans* would balance away a basic constitutional right as long as any state hearsay exception is supported by some "indicia of reliability."[169]

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166. E. Cleary & J. Strong, Evidence 523 (1969) in a perceptive note written prior to the 1970 confrontation cases, listed three conclusions to the question of how far the confrontation clause goes in constitutionalizing the Hearsay Rule: (1) The present exceptions to the Hearsay Rule are constitutional but the confrontation clause bars further exceptions; (2) Traditional hearsay exceptions are not necessarily exempt from the confrontation clause; (3) Further rulings are uncertain because the ultimate purpose of the Hearsay Rule is to insure reliability of evidence and the ultimate purpose of the confrontation clause is to insure a certain standard of prosecutorial behavior.

167. *See* detailed discussion of the *Evans* plurality test, text accompanying notes 127-35 *supra* where views of Mr. Justice Stewart are reviewed in detail. In concluding by citing Mr. Justice Cardozo's fear that the criminal law and fourteenth amendment rights will be brought into contempt if guilty men are set free under gossamer possibilities of prejudice, the plurality opinion seems to be assuring that the sixth amendment confrontation clause will be protected from disrepute by the simple expedient of not applying it in difficult cases.

168. U.S. Const. amend. VI, § 1 (emphasis added).

169. Surprisingly enough, in the first state confrontation case decided after *Evans*, the New Mexico Court of Appeals in applying the ambiguous "indicia of reliability" test

B. The Constitutional Purist Approach

This approach is perhaps best illustrated by Mr. Justice Brennan's dissent in *California v. Green* and the California Supreme Court's unanimous opinion in the same case. The purist accepts Wigmore's broad equation of confrontation with cross-examination and the notion that the confrontation clause really did constitutionalize a prohibition on hearsay evidence in criminal trials unless tested by cross-examination.[170] The purist approach has the advantage of giving full vigor to the confrontation clause. Following established constitutional doctrine, any state hearsay exception that allows admission of evidence in a criminal trial that does not meet the test of contemporaneous cross-examination would have to fall. The direct equation made by the purist between confrontation and cross-examination is supported by decisional law and commentators. However, the disadvantage of this approach is that, as feared by the plurality justices and Mr. Justice Harlan in *Evans*, it leads inexorably to constitutionalization of the Hearsay Rule.[171] Considering the efforts expended in reforming the Hearsay Rule and its exceptions, the purist approach seems to be one that will not be accepted gracefully. Of course, even the purist would have to recognize some exceptions to the Hearsay Rule. The refusal to accept any hearsay evidence in criminal trials would make ordinary trial procedure, as we know it, impossible.

C. The Availability Approach

This approach to the interpretation of the confrontation clause, designed to avoid the polar interpretations advocated by the pragmatists and purists, was advanced by Mr. Justice Harlan in his concurring

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found that under the facts of the case before them the *res gestae* remarks of child witnesses in a murder trial did violate the confrontation rights of the defendant. State v. Lunn, — N. Mex. —, 484 P.2d 368 (N.M. Ct. App. 1971). The court found that the "indicia of reliability" holding in *Evans* was based on four indicia: (1) Williams' statement was spontaneous and against his penal interest; (2) the statement contained no assertions about past fact; (3) Williams' knowledge of the other participants was established by other facts; (4) the possibility that the statement was found on faulty recollection is remote. In the New Mexico case, the court stated that three of the four types of "indicia of reliability" found in *Dutton v. Evans* were missing in the *res gestae* remarks before it.

170. While willing to accept this part of the Wigmore thesis, adherents to this approach would not be willing to accept Wigmore's conclusion that the Hearsay Rule, *with all its present exceptions and all the exceptions yet to be adopted*, is constitutionalized. 5 Wigmore, *supra* note 8 § 1397, at 130-31. This purist approach would exclude almost all hearsay unless there has been contemporaneous cross-examination before the ultimate trier of fact.

171. Without necessarily accepting present exceptions to that rule.

opinion in *Green*. This interpretation of confrontation adopts the position advocated in a Yale Law Journal Comment written after *Pointer v. Texas*.[172] It would convert the confrontation clause into "a canon of prosecutorial behavior"[173] and, as such, is ingenious.[174] Its adoption would mean that a constitutional theory of confrontation would be available that did not threaten to constitutionalize the entire Hearsay Rule—thus satisfying the pragmatists on the Court. Furthermore, a theory of confrontation would exist that would prevent the clause from being erased by a federalist approach that would balance away individual rights in favor of a state's interest in its own evidentiary rules. It would let states know of their burden to produce all available witnesses and would be easy to apply. Its disadvantage is that it ignores centuries of history and decisional law equating confrontation with the protection of the right of cross-examination. Also, as Mr. Justice Harlan himself points out in his concurring opinion in *Evans*, a rule requiring production of available witnesses would in some ways curtail the federalist approach that encourages a state's ability to change its evidentiary rules. Such a rule would hamper exceptions that excuse witnesses when their presence would be inconvenient or of small utility to the defendant.[175]

The important contribution of this Harlan approach is to elevate the notion of availability from an unarticulated concept underlying

172. 75 YALE L.J. 1434 (1966).

173. *Id.* at 1439.

174. While availability is first seen in full bloom in Justice Harlan's concurring opinion in *Green*, in *Barber v. Page* the Court wrote a confrontation opinion stressing the component of availability. Mr. Justice Marshall held for the Court in *Barber* that Oklahoma was negligent in *not* procuring Woods' presence at trial, thus the witness was *not* "unavailable" for purposes of the confrontation clause, and Barber did not waive his right to confrontation. Justice Marshall specifically stated that the state made no effort to obtain Woods' presence at trial and that he was not unavailable for purposes of any exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial. He was willing to state that there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, "but this is not such a case." In *California v. Green*, Justice Harlan analyzed many past cases, trying to fit them into his availability mould. Especially important is Harlan's approach to West v. Louisiana, 194 U.S. 258 (1904). Harlan believed the availability focus of the Court was seen in *West's* discussion of the common law rule that admitted deposition testimony "upon proof being made to the satisfaction of the Court that the witness was, at the time of the trial, dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant." 399 U.S. at 183.

175. Mr. Justice Harlan cites growth of business records exceptions as one area of innovation that would be retarded. 400 U.S. at 96.

some confrontation cases to its rightful place as one of the important components of confrontation.

D. The Due Process-Cross-Examining Procedure Approach

This is the second interpretation of the confrontation clause advanced by Mr. Justice Harlan. Justice Harlan rejected the availability concept he proposed in *California v. Green*. Citing a paragraph from Wigmore,[176] he proposed that the confrontation clause be considered nothing more than a rule requiring a cross-examining procedure to test evidence after traditional evidentiary rules have determined that the item of evidence is admissible. Justice Harlan asserted that the confrontation clause, so limited, would no longer threaten evidentiary reformers and would be a constitutional right easily applied. He contended that the admissibility of an item of evidence should depend solely on a state's evidentiary rules without regard to the confrontation clause. For example, a hearsay exception is a state evidentiary rule dealing with admissibility and once it has been determined that under the hearsay exception an item of evidence is admissible, only then would the confrontation clause come into play. Its function would be to determine that an item of evidence after being admitted was subjected to a cross-examining procedure. This would leave a state's evidentiary rules dealing with admissibility of evidence to be judged by familiar fourteenth amendment due process standards.[177]

However, this suggested approach is based on a faulty premise. While Wigmore's paragraph seems to support Justice Harlan's position, close attention to the entire Wigmore theory of the confrontation clause's constitutionalization of the Hearsay Rule does not bear out Justice Harlan's thesis that confrontation requires only a cross-examining procedure and is not to be used to test admissibility.[178] Whether or

176. *See* note 26 *supra* setting out verbatim the Wigmore paragraph relied on.

177. One commentator asserts that ". . . to suggest that the accused is sufficiently protected by the due process clause would be to regard the confrontation clause merely as a constitutional anachronism." Note, *supra* note 19, at 741, 743.

178. *See* detailed analysis of Wigmore's theory, text accompanying notes 22-26 *supra*. It should be noted that Dean Wigmore defines confrontation as guaranteeing the opportunity of cross-examination; he defines the Hearsay Rule's essential element as the *test* of cross-examination. Then he concludes that the confrontation clause "constitutionalizes" the Hearsay Rule and that the two rules are therefore the same rule by a different name. If both rules are equated with cross-examination and are in reality one rule with two names, then how can the Hearsay Rule be a rule testing admissibility of evidence while confrontation is a rule dealing only with a cross-examining procedure after admission of evidence and having nothing to do with testing admissibility? Courts for years have followed the Wigmore theory equating the two rules; they do not follow this obscure paragraph on cross-examining procedure.

not Wigmore's paragraph supports the cross-examining procedure thesis, it has been clear for centuries that confrontation does deal with admissibility. If an accused cannot confront the witnesses against him, their testimony cannot be admitted. That kind of decisional authority cannot be wiped out by an obscure paragraph in Wigmore's treatise that may or may not support the cross-examining procedure thesis.

Even if the confrontation clause were interpreted only as dealing with a cross-examining procedure after admissibility, Justice Harlan's use of the due process clause to test state evidentiary rules may not be the solution it first seems. It is possible, in light of *Pointer v. Texas*, that the right of cross-examination is a fundamental right applicable to the states through that same due process clause. Therefore, the due process clause itself will test the fundamental fairness of a state's evidentiary rules by the same test of cross-examination now imposed by the confrontation clause. Such constitutionalization is what Justice Harlan sought to avoid.

E. The McCormick Exception Approach

This approach calls for recognition that the confrontation clause does indeed constitutionalize the Hearsay Rule. However, in order to avoid stifling state reform efforts, it also calls for constitutionalization of the whole hearsay concept with all the exceptions that are now recognized *and which may be recognized* in the future. In his theory constitutionalizing the Hearsay Rule, Wigmore called for recognition that any constitutionalization should carry the exceptions to the rule along with it because the framers of the Constitution did not exclude hearsay exceptions (such as the dying declaration exception) already existing or being formed.[179]

To the basic Wigmore thesis of constitutionalization of the rule and its present and future exceptions can be appended Professor McCormick's suggestion of the creation of a broad new exception under which all hearsay, if found to be (1) necessary and (2) probative, is admissible:

179. Moreover, this right of cross-examination thus secured was *not a right devoid of exceptions*. The right to subject opposing testimony to cross-examination is the right to have the Hearsay rule enforced; for the Hearsay rule is the rule requiring cross-examination. . . . Now the Hearsay rule is not a rule without exceptions; there never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest constitutions, and others might be expected to be developed in the future. The rule had always involved the idea of exceptions, and the constitution-makers indorsed the general principle merely as such . . . . The rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein.

5 Wigmore *supra* note 8, § 1397 at 130-31.

> If the present hearsay system of exclusion subject to exceptions continues in jury trials, a new exception, wider still than the Model Code Rule or the Uniform Rule, will need to be formulated so that the judge may use the greatest resource we have for justice in these matters of evidence—his responsible judgment. I suggest this: *a hearsay statement will be received if the judge finds that the need for and the probative value of the statement render it a fair means of proof under the circumstances.*[180]

It can be argued that the Wigmore thesis with the broad McCormick exception appended thereto would, in theory, satisfy the constitutional purists who equate confrontation with cross-examination (although the practical result may be offensive) is consistent with precedent, and would not frustrate the federalists in their desire to encourage state reform in evidence. However, such a constitutionalization of the Hearsay Rule with the McCormick exception would be to fashion an exception that could conceivably swallow the rule.[181] This approach, while more circumspect in constitutional theory, would achieve the same results as the straightforward federalist approach set forth above. Certainly the incorporation into the confrontation clause of an agent, such as the McCormick suggestion, that could erode the basic rule would not be a happy prospect for constitutional purists.

F. The Traditionalist Approach

This is the approach typified by the position taken in the *Green* majority opinion of Mr. Justice White and also, by reading it narrowly, the dissenting opinion of Mr. Justice Marshall in *Evans*.[182] The dis-

180. McCormick, *supra* note 8, § 305, at 634 (emphasis added).

181. The right to confrontation and the rule against hearsay are both designed to ensure the reliability of evidence upon which a verdict is returned. . . . [i]n apparent conflict with the right to confrontation, numerous exceptions to the hearsay rule were created which permitted an unexamined witness to testify against the defendant. Underlying this development was an awareness that some hearsay declarations are no less reliable than cross-examined testimony. Confrontation, however, is more than a direct guarantee of reliability; it incorporates an element of fairness, of affording the defendant an opportunity to test evidence against him, no matter how reliable that evidence may seem. For this reasou, an expansion of the right to confrontation is inconsistent with a simultaneous expansion of the exceptions to the hearsay rule. While hearsay may not violate the rule's simple reliability guarantee, it does violate the fairness element of confrontation. In a criminal system whose reliability guarantees are imperfect, this fairness notion is necessary to ensure that any mistakes tend to favor the defendant. While courts have either avoided the issue or equated an exception to the hearsay rule with an exception to the right of confrontation, it is submitted that the orthodox principles supporting the admission of certain types of hearsay evidence do not satisfy the policies underlying the right of confrontation.

Note, *supra* note 20, at 939-41.

182. It should be noted that three of the four dissenters in *Dutton v. Evans*, Justices Black, Douglas and the opinion writer, Justice Marshall, all joined the Court's majority

tinctive feature of this approach is the traditional concept of judicial restraint. The approach calls for recognition of the fact that there is a core value in the confrontation clause that must be preserved[183] and that all evidentiary hearsay exceptions must be measured against that core value. Under such a test, some hearsay exceptions may be incompatible with the confrontation clause and, on the other hand, some hearsay evidence, while it may not fit into an existing exception, might nevertheless not violate the confrontation clause if admitted.[184] However, in enforcing the confrontation clause, the traditionalist would believe the Court should proceed cautiously in the traditional common-law method of reviewing each hearsay exception through the facts of the case and determining whether that exception, under those facts, does or does not violate that individual defendant's right. The Court was invited to "map out a theory of the Confrontation Clause that would determine the validity of all such hearsay exceptions"[185] but declined to do so. It conceded that confrontation and hearsay were designed to protect the same values, but held that the overlap is not complete and that there are still two distinct rules. The *Green* majority limited itself to the case before the Court to decide if the California exception before it did or did not violate the core value of the confrontation clause. Such an approach, marked as it is by judicial restraint, is not as interesting as the other approaches discussed above. It is not as innovative as the theories of confrontation advocated in the availability, cross-examining procedure—due process, or McCormick exception approaches. It is not as decisive as the purist approach; and, it does not appease the state's interests as greatly as the federalists advocate. Nevertheless, it is perhaps the only approach that can command majority support on the Court. It does preserve meaning for a constitutional mandate and it does not unduly fetter state experimentation in the area of hearsay reform. It should be recognized that in the clash between federalists and purists there is a conflict of motives. The federalists, here typified by hearsay rule reformers, point out that the trial process is ultimately a search for truth and that exclusionary rules, such as the Hearsay Rule, frequently deprive the trier of fact of relevant evidence

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opinion in *California v. Green*; for them the approaches in the *Green* majority opinion and the *Evans* dissent must have been somewhat similar.

183. ". . . it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." 399 U.S. at 157.

184. 399 U.S. at 156. For a review of the major hearsay exceptions and a discussion of how each one should be viewed under the confrontation clause, *see* Note, *supra* note 19, at 749-68.

185. 399 U.S. at 162 [concurring opinions].

that is needed if truth is to be found. Therefore, any rule such as the confrontation clause which threatens to make it more difficult to reform exclusionary rules is viewed with alarm. On the other hand, the constitutional purists are motivated by a concern for fair treatment for those subjected to the criminal process. They view the confrontation clause as guaranteeing the fundamentally important right of cross-examination; and they view with equal alarm any reformer who would, by changing the Hearsay Rule, weaken that basic right of cross-examination. Perhaps, therefore, the traditional approach of judicial restraint, with its recognition of a core constitutional value to be preserved, but with its reluctance to make sweeping declarations as to the meaning of that right in the absence of concrete fact situations, is the best possible compromise between the two different approaches advocated by the federalists and the constitutional purists.

A SUMMARY AND A SUGGESTION

After analyzing the six possible solutions to the present confrontation—hearsay dilemma, it is clear that each has advantages and disadvantages. None is without defect. On balance, the traditionalist approach is the most acceptable alternative available. It comports with the tradition of judicial restraint, rejecting sweeping definitional solutions in preference to the hard road of case by case adjudication. It preserves a meaning for the confrontation clause and is unwilling to balance away a fundamental right in deference to any state sponsored reform notion that might come along. Nevertheless, the slow process of adjudication based on the concept that hearsay and confrontation are different does not pose the spectre of a rampaging confrontation clause so feared by the federalists on the Court. Furthermore, because of the traditional pattern of its approach—examining each hearsay exception only when that exception arises in a concrete factual setting in an actual criminal case—it has the best chance of acceptance by both purists and federalists on the Court because it brings them back to a common starting point and relieves the fears caused by either the federalist or constitutional purist approaches to confrontation.

This writer would, nevertheless, suggest that a further refinement of the traditionalist approach typified by the majority opinion in *Green* is possible. The core value of confrontation that is to be preserved by the case by case testing of hearsay exceptions seems somewhat limited in *Green* and does not fully recognize and rank-order the various com-

ponent parts of the confrontation clause. Furthermore, it is possible to preserve some of the advantages of the other approaches by taking a more composite view of the confrontation clause. It does seem that the weight of precedent and logic support the view that the most indispensable right protected by the confrontation clause is cross-examination. The *Green* idea that the core value is only the literal right to confront face-to-face is not a complete reading of the clause. There are other distinct components of the right to confrontation—the idea of availability, demeanor, presence of the accused at his own trial, and oath—that should be evaluated by the Court in each case.

After determining that cross-examination is the core component to be preserved—because it is essential to our adversary system—this writer would then list availability as a separate component and next in importance. The availability component is actually the touchstone that the Court should use to determine that cross-examination was not afforded the accused. Did the state do all it could? Could the prosecutor have produced the witness? Can the unavailability of the witness, under the facts, be excused because the inconvenience caused by producing him (as in business-records-exception cases), outweighs any possible benefit his presence could afford the accused? Is the witness a minor witness called to supply a technical, basically uncontested detail as opposed to a key prosecution witness? The availability concept, as articulated by Justice Harlan in *Green*, should not be lost simply because it does not provide the definitive test of confrontation that avoids hearsay constitutionalization problems as Justice Harlan hoped it would. Instead, it should be treated as a separate component of the clause giving it new meaning not present in the Hearsay Rule. The availability component of the confrontation clause is really utilizing the clause to maintain a minimal level of prosecutorial behavior in the production of evidence and confirms the *Green* idea that while confrontation and hearsay protect similar values, they are not congruent. In the operation of the Hearsay Rule, if a statement falls into certain exceptions it is admissible regardless of availability. Under the confrontation clause, if a key witness can be produced he should be produced even if his out-of-court statements do fall into some recognized hearsay exception.

While all agree that the demeanor, and particularly, the oath elements of the confrontation right are perhaps, as Wigmore says, not essential to the rule, these elements should not be forgotten. It is

entirely possible that in certain fact situations demeanor evidence can be critical despite the availability of cross-examination at an earlier hearing.[186]

The last element of confrontation, and the final proof that it is different from the Hearsay Rule and not a restatement of hearsay concepts, is the presence of the accused at his own trial. This right has nothing to do with the Hearsay Rule or with its exceptions. Nevertheless, *Illinois v. Allen*[187] makes it clear that presence is an essential component of the confrontation clause that can only be waived under certain conditions.[188]

This composite approach is not as easy to apply as a restrictive definition such as the cross-examining procedure approach. Furthermore, its application in individual fact situations and its unfolding in case by case litigation offers no immediate solution to the pragmatist-purist dilemma the Court created in *Evans*. Nevertheless, it is a more realistic approach. It does preserve a constitutional meaning for the confrontation clause, and its slow operation as a separate rule does not threaten to constitutionalize the Hearsay Rule. It is the solution to the constitutional dilemma the Court now faces that should have the best chance of adoption.

186. The dissent of Mr. Justice Brennan in *Green* and the California Supreme Court's opinion in that case on the importance of contemporaneous cross-examination to preserve demeanor evidence cannot be dismissed lightly. The value of the demeanor component to the right of confrontation should not be lost but should be reviewed each time a fact situation arising under a hearsay exception is challenged under the confrontation clause. *See* Note, *supra* note 20, at 950-51 suggesting that if defects in preliminary hearings are common, there perhaps should be a presumption against the adequacy of cross-examination at such hearings.

187. 397 U.S. 337 (1970). In response to the *Allen* decision, the American Bar Association has just released a tentative draft entitled THE JUDGE'S ROLE IN DEALING WITH TRIAL DISRUPTIONS, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE (1971).

188. Research indicates that as a matter of separate focus, *Illinois v. Allen* is the only time the Court has distinguished precisely the presence aspect of the right to confrontation. Justice Black held that this aspect of confrontation must not "so handicap a trial judge" as to prevent the judge from protecting orderly and dignified proceedings in the courtroom.