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THE CONFRONTATION CLAUSE
AND THE SCOPE OF
THE UNAVAILABILITY REQUIREMENT

Jerry J. Phillips*

The confrontation clause is that language of the sixth amend-
ment to the United States Constitution which provides, "[I]n all
criminal prosecutions, the accused shall enjoy the right . . . to be
confronted with the witnesses against him."1 Despite the
seemingly absolute language of the confrontation clause, which
would suggest that no hearsay evidence may be admitted against
an accused in a criminal proceeding, its guarantee has been sub-
ject to exception. For example, when either a witness to an event
or his testimony is shown to be unavailable, others will be allowed
to testify as to the information which the declarant-witness has
related about the event in issue.2 Cross-examination at trial is the
most preferable means of satisfying the demands of the con-
frontation clause.3 Where necessary, however, less preferable evi-
dence may be introduced.4 In this example unavailability of the
testimony of the witness may provide the requisite necessity.5 In
a recent case, however, the United States Supreme Court was
willing to allow admission of less preferable evidence without a
showing of unavailability.6 As a result, the scope of the unavaila-
bility requirement with regard to the confrontation clause is
presently unclear. Further complicating the matter is the principle

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1U.S. CONST. amend. VI. Although similar provisions are found in most state con-
stitutions, C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 252, at 604 (E.
Cleary ed. 1972) [hereinafter cited as MCCORMICK], the Supreme Court has made these
provisions largely superfluous by holding the confrontation clause applicable to the states
2See Barber v. Page, 390 U.S. 719 (1968); Mattox v. United States, 156 U.S. 237
(1897); California v. Green, 399 U.S. 149 (1970). Other exceptions have also been
recognized. See MCCORMICK, supra note 1, § 252, at 606 n.10.
35 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 1397,
at 131 [hereinafter cited as WIGMORE].
4Id. §§ 1396, 1402.
5Id. § 1396.
that unavailability of a witness is often a requirement for the invocation of an exception to the hearsay rule, such as the admission of prior testimony. The scope of the unavailability requirements for the purposes of the hearsay rule and the confrontation clause, although often similar, are not necessarily coextensive. This article examines the unavailability requirement, its possible limitations, its possible expansion in various areas, and finally recommends that the requirement be broadly applied in criminal cases.

I. Barber v. Page and Dutton v. Evans: A Dilemma

In Barber v. Page the United States Supreme Court invoked the confrontation clause to prevent the introduction into evidence against the accused of the transcript of testimony taken at a preliminary hearing in the same case. Petitioner in Barber sought federal habeas corpus relief, claiming deprivation of his sixth and fourteenth amendment rights to be confronted with the witnesses against him at his trial for armed robbery. The principal evidence against him at trial was the reading to the jury of a transcript of testimony given at a preliminary hearing. Petitioner's attorney, although present at the preliminary hearing, did not cross-examine the declarant of the testimony in question, a codefendant with petitioner, who had waived his privilege against self-incrimination during the course of the hearing. At the time of trial, the witness who had testified at the preliminary hearing was incarcerated in a federal prison in Texas, approximately 225 miles from the trial court. The trial court overruled petitioner's seasonable objection to the reading of the transcript. The United States Supreme Court reversed the denial of the habeas petition by a court of appeals on the ground that the prosecution had failed to demonstrate that it had made a good-faith effort to obtain the presence at trial of the witness who had given testimony in the preliminary hearing. In other words, the prosecution had not met its burden of showing
the unavailability of the witness before it sought to introduce his prior testimony.

Two years after deciding Barber, the Court held in Dutton v. Evans11 that the out-of-court declaration of a co-conspirator could be introduced against the defendant without first showing that the co-conspirator was unavailable to testify at trial. Evans sought federal habeas corpus relief on the ground that he had been denied the constitutional right of confrontation during his trial for murder. As a result of that trial, he had been convicted and sentenced to death. One of twenty prosecution witnesses was an individual named Shaw. Shaw testified that he and an alleged co-conspirator of Evans were fellow prisoners after Evans and his co-conspirator were arraigned. During direct examination Shaw related a statement by the alleged co-conspirator which clearly implied Evans’ guilt. The trial court overruled the objection of Evans’ counsel that the statement was hearsay and thus violative of the right of confrontation. After the objection was overruled, Evans’ counsel thoroughly cross-examined the witness Shaw. The co-conspirator who made the statement in question admittedly could have been subpoenaed as a witness. The principal prosecution witness, however, was an alleged accomplice who had been granted immunity. His testimony described at length the circumstances surrounding the crime in question. The Court of Appeals for the Fifth Circuit granted Evans’ petition on the ground that the introduction of the hearsay evidence deprived Evans of his right of confrontation.12

The Supreme Court reversed this decision.

In deciding Dutton the Court distinguished Barber as follows:

In Barber the “principal evidence” against the petitioner was a transcript of preliminary hearing testimony admitted by the trial judge under an exception to the hearsay rule that, by its terms, was applicable only if the witness was “unavailable.” This hearsay exception “has been explained as arising from necessity....” 390 U.S., at 722, and we decided only that Oklahoma could not invoke that concept to use the preliminary hearing transcript in that case without showing “a good-faith effort” to obtain the witness’ presence at the trial. 

This case does not involve evidence in any sense “crucial” or “devastating,” as did [Barber]. . . . It does not involve any

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12 400 F.2d at 831–32.
suggestion of prosecutorial misconduct or even negligence, as did . . . Barber.\(^\text{13}\)

The Court considered a number of other factors as well. Elsewhere in its opinion admission of the testimony in \textit{Dutton} was found not to violate the confrontation clause because the evidence contained substantial indicia of reliability.\(^\text{14}\) While observing in a footnote that the witness who had made the out-of-court statement was in fact available and could have been subpoenaed to testify by either party,\(^\text{15}\) the Court suggested in its opinion that had he been subpoenaed the witness probably would have invoked his fifth amendment privilege not to testify.\(^\text{16}\) To this extent the witness thus was unavailable.\(^\text{17}\)

The \textit{Dutton} decision clearly raises more questions than it answers with regard to the scope of the unavailability requirement delineated in \textit{Barber}. \textit{Dutton} may imply that the holding in \textit{Barber} is restricted to its unique facts. Alternatively \textit{Dutton} can be read somewhat more generally to require proof of unavailability of the witness only where the out-of-court testimony is relatively unreliable \textit{and} is also "crucial" or "devastating" to the defendant's case. Interpreted even more broadly, \textit{Dutton} might be regarded as dispensing with this burden of proof when the witness is equally available to either side, or when it appears likely that the in-court testimony will be unavailable even if the witness is called. An examination of these possible limitations on the scope of the \textit{Barber} holding, it is submitted, shows each of them to be analytically unsatisfactory. Moreover, the purposes of the requirement that a witness be shown to be unavailable before permitting the

\begin{footnotesize}
\begin{enumerate}
\item\(^{13}\) 400 U.S. at 85, 87 (citation omitted).
\item\(^{14}\) Williams' [the declarant's] personal knowledge of the identity and role of the other participants in the triple murder is abundantly established . . . . [T]he possibility that Williams' statement was founded on faulty recollection is remote in the extreme. . . . His statement was spontaneous, and it was against his penal interest to make it.
\item\(^{15}\) Counsel for Evans informed us at oral argument that he could have subpoenaed Williams but had concluded that this course would not be in the best interests of his client.
\item\(^{16}\) Williams, the out-of-court declarant, was tried separately and convicted in connection with the same transaction, and his conviction was reversed on appeal. See 400 U.S. at 90 n.20.
\item As a practical matter, unless the out-of-court declaration can be proved by hearsay evidence, the facts it reveals are likely to remain hidden from the jury by the declarant's invocation of the privilege against self-incrimination. \textit{Id.} at 99 (Harlan, J., concurring). See also id. at 102 n.4 (Marshall, J., dissenting).
\item\(^{17}\) \textit{McCORMICK, supra} note 1, § 253, at 612: "The exercise of a privilege not to testify renders the witness unavailable to the extent of the scope of the privilege." (Footnote omitted.)
\end{enumerate}
\end{footnotesize}
introduction of a hearsay report of his declaration strongly indicate that the application of the requirement should be expanded in criminal cases.

II. POSSIBLE GROUNDS FOR LIMITING THE UNAVAILABILITY REQUIREMENT

A. The Preliminary Hearing Aspect of Barber v. Page

The simplest way to dispose of the Barber decision is to limit it to its unique facts: the case applies only when the prosecution seeks to introduce testimony taken at the preliminary hearing in the case. Support for this interpretation may be found in the language of the decision itself:

The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.\(^{18}\)

Other decisions by the Court in this area lend support to limiting Barber to its facts. In Berger v. California\(^{19}\) the Supreme Court addressed a fact situation in which a transcript of testimony obtained in a preliminary hearing of the same case was admitted at trial, the declarant being absent from the jurisdiction. In giving retroactive application to the holding of Barber, the Court stated:

[W]e held in the case of Barber v. Page . . . that the absence of a witness from the jurisdiction would not justify the use at trial of preliminary hearing testimony unless the State had made a good-faith effort to secure the witness' presence.\(^{20}\)

In addition the Berger Court stated that "Barber v. Page was clearly foreshadowed, if not preordained, by this Court's decision in Pointer v. Texas, 380 U.S. 400 (1965) . . . ."\(^{21}\)

Pointer\(^{22}\) also involved the introduction at trial of a transcript of testimony given at a preliminary hearing in the same case, at which hearing the defendant was neither represented by counsel

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\(^{18}\) 390 U.S. at 725.

\(^{19}\) 393 U.S. 314 (1969).

\(^{20}\) Id. at 315.

\(^{21}\) Id.

nor given the opportunity to cross-examine the witness. At trial, the prosecution showed that the witness was absent from the jurisdiction. In reversing his conviction, the Court commented on the inadequacies of preliminary hearing testimony for the requisites of the confrontation clause.23

Nevertheless, it does not appear that the Barber decision should be restricted solely to preliminary hearing testimony. Preliminary hearing testimony, coming within the category of prior trial testimony, is regarded as one possible exception to the hearsay rule.24 The primary defect with evidence received at a preliminary hearing is that it may not have been subjected to adequate cross-examination.25 Yet the Court clearly stated in Barber that the holding of the case was intended to apply even where there had been cross-examination at the preliminary hearing.26 Motes v.

23 E.g., id. at 407:

Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment.

See also the concurring opinion of Justice Stewart, id. at 409.

24 Preliminary hearing testimony is similar both to testimony offered during a deposition and to testimony given at trial. With regard to satisfying the hearsay rule, the commentators treat both situations as one. Although recognizing that "there is in most jurisdictions more or less inconsistency on this subject," Wigmore states:

There is on principle no distinction between a deposition and former testimony as to the conditions upon which either may be used at the trial.

So far as the circumstances make it impossible to obtain the witness' personal presence for testifying, by reason of his death, illness, absence from the jurisdiction, and the like, that impossibility exists in precisely the same degree for a deposition and for former testimony to a jury,—supposing, of course, that in each case there has been cross-examination. There is on principle not the slightest ground for failing to recognize all the dispensing circumstances as equally sufficient for both kinds of testimony. Wigmore, supra note 3, § 1401, at 146. See also McCormick, supra note 1, § 254, at 614–15.

25 Wigmore firmly asserts that an essential purpose of the requirement of confrontation is "to secure for the opponent the opportunity of cross-examination." Wigmore, supra note 3, § 1395, at 123 (emphasis in original).

26 "Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods [the witness] at the preliminary hearing." 390 U.S. at 725.

It seems to follow from the Barber opinion that preliminary hearing testimony of a witness who has been cross-examined by the defendant will be admissible in a subsequent trial of the defendant if the prosecution can show good-faith inability to produce the witness. Subsequent cases have generally so held. See King v. Fitzharris, 311 F. Supp. 400 (C.D. Cal. 1970); State v. Dixon, 107 Ariz. 415, 489 P.2d 255 (1971); People v. Bynum, 4 Cal. 3d 589, 483 P.2d 1193, 94 Cal. Rptr. 241 (1971); State v. Washington, 206 Kan. 336, 479 P.2d 833 (1971); People v. McIntosh, 34 Mich. App. 578, 191 N.W.2d 749 (1971). But see State v. Villarreal, 94 Idaho 246, 486 P.2d 257 (1971).

It is unclear, however, whether there may be a waiver of the right to cross-examine at the preliminary hearing. At one point in the opinion the Barber Court indicated there can be no such waiver. 390 U.S. at 725. In the next paragraph, however, the possibility of waiver is implied. Id. at 625–26. Cf. United States v. Allen, 409 F.2d 611 (10th Cir.
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United States,\(^{27}\) which was cited by the Barber Court in support of this latter proposition, involved a situation in which preliminary hearing testimony, which had been the subject of cross-examination by the defense, was held to have been erroneously admitted in violation of the confrontation clause because of the negligence of the prosecution in failing to make the witness available at trial.

This issue has been laid to rest, however, by Mancusi v. Stubbs.\(^{28}\) There the Court expressly applied the Barber rule to prior testimony given in court before it considered whether the requirements of Dutton had been met. The significance of the Stubbs holding may be weakened by the fact that the defendant had claimed that because of the late appointment of counsel, he had had an inadequate opportunity to cross-examine the witness at the prior trial. Yet the Court nowhere indicated that the applicability of the Barber rule turned on this fact. There is, however, a division of authority as to whether the Barber rule must be satisfied as a precondition to the admission of evidence under hearsay exceptions other than prior testimony.\(^{29}\)

Furthermore, no post-Dutton case which applies the Barber rule to either preliminary hearing or prior court testimony has made the applicability of that rule turn on considerations such as whether the evidence is sufficiently reliable or whether it was "crucial" or "devastating" to the case. Either these considerations should form a part of the Barber standard of admissibility, or they should be irrelevant to the Dutton determination.

Thus, because of the similarities between preliminary hearing testimony and all prior testimony taken under oath and subject to

\(^{27}\) 178 U.S. 458 (1900).

\(^{28}\) 408 U.S. 204 (1972). This case relaxes the Barber requirement of good-faith effort by holding that the prosecution need not ask a witness residing outside the country to attend voluntarily and testify at trial where the prosecution lacks any statutory method of compelling attendance through cooperation with the government of the country in which the witness resides.

cross-examination, there is no reason to restrict the *Barber* rule to preliminary hearing testimony. Furthermore, there is no reason to restrict the *Barber* rule even to all prior testimony. It is true that a general distinction could perhaps be made between the prior testimony exceptions and other exceptions to the hearsay rule on the ground that prior testimony is less reliable than the other exceptions because it makes more time for reflection available to the testifying witness. This difference is, however, only one of degree and seems clearly counterbalanced by the advantages of cross-examination under oath, an assurance of reliability that applies to prior testimony and not to other hearsay exceptions. This analysis supports the conclusion that the rule announced in *Barber* applies in situations other than the precise facts of that case.

**B. The Common-Law Requirement of Unavailability**

Another possibility is to read *Barber* as applying only to situations in which proof of unavailability would be required at common law as a condition to the admission of hearsay evidence. Some support for this conclusion may be found in the statement in *Dutton* that the disputed evidence in *Barber* was admissible "under an exception to the hearsay rule that, by its terms, was applicable only if the witness was 'unavailable.' "

This analysis is subject to the same infirmity inherent in restricting *Barber* to the prior testimony exception. This view must reasonably assume that common-law exceptions applying the requirement of unavailability do so for some special, rational reason; but there is no support for such a conclusion. On the contrary, common-law applicability of the unavailability requirement seems to have developed more or less arbitrarily with no fixed

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30 While declarations of present sensory impressions and excited utterances generally allow little time for reflection, declarations of state of mind or physical condition, or business entries and public records may allow a significant length of time for reflection after the occurrence of the events to which the declarations refer. At common law, however, none of these hearsay exceptions requires proof of unavailability. On the other hand, dying declarations and statements of recent perception, which also allow little time for reflection, generally do require proof of unavailability. See Rules 803–804 of the proposed Federal Rules of Evidence [hereinafter cited as Fed. R. Ev.].

The comment to Fed. R. Ev. 804 (which rule requires a showing of unavailability for exceptions included within it) notes that the former testimony exception embodied in Rule 804 may permit "the strongest hearsay" to come in and should perhaps be included under Rule 803, which does not require proof of unavailability. The drafters nevertheless included the exception under Rule 804, which does require proof of unavailability. The only reason given for this decision is that "tradition, founded in experience, uniformly favors production of the witness" where this exception is applicable.

31 See generally Wigmore, supra note 3, §§ 1401–1418.

32 400 U.S. at 85 (emphasis added).
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Thus, while it has been suggested that the unavailability requirement applies to the less reliable exceptions to the hearsay rule, one cannot argue that the requirement has actually been applied in this manner.

It is even difficult to decide whether the statement involved in Dutton should be classed as a common-law exception that requires proof of unavailability, or as one that does not require such proof. In Dutton, the defendant’s alleged co-conspirator, while in prison awaiting trial, allegedly stated, “If it hadn’t been for... Alex Evans, we wouldn’t be in this now.” If the statement were viewed as one against the declarant’s interest, proof of unavailability would normally be required at common law. If, on the other hand, it were viewed as an admission by a co-conspirator, such proof would not be required at common law. The statement does not fit within the usual common-law co-conspirator exception, because it was made after completion of the conspiracy. In any event, the Court in Dutton—except for its cryptic reference to the Barber exception as one that “by its terms” required proof of unavailability—apparently gave no weight to the role of the common-law requirement of unavailability in reaching its decision on the facts of the case before it.

Furthermore, the Supreme Court has made it amply clear that common-law definitions of admissibility based on exceptions to the hearsay rule do not determine whether confrontation requirements have been met. This position seems eminently sound, for

33 See, e.g., People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964), holding that proof of unavailability was not required as a condition to introduction of an out-of-court statement against penal interest. See also note 64 and accompanying text infra.

34 Thus the group of hearsay exceptions where unavailability is required are in a sense second class in comparison with the far larger number of exceptions where availability or unavailability is not a factor.

McCormick’s catalogue of recurring fact situations which may satisfy a requirement of unavailability includes death, absence from the jurisdiction, physical inability to testify, mental incapacity to testify, failure of memory, exercise of privilege, refusal to testify, supervening disqualifications, and depositions. Compare Fed. R. Ev. 804(a).

35 Quoted in 400 U.S. at 77.

36 The issue before us is the considerably narrower one of whether a defendant’s constitutional right “to be confronted with the witnesses against him” is necessarily inconsistent with a State’s decision to change its hearsay rules to reflect the minority view described above. While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a
the reason that constitutional policy should be measured by independent standards of reasonableness. A state is permitted to determine what types of out-of-court statements it regards as falling within exceptions to the hearsay rule. Once such an exception is established as a matter of state law, only the United States Supreme Court should be able to determine finally whether the exception meets those requirements of unavailability which satisfy the confrontation clause.

C. The Balancing Approach

Another approach to Barber is to balance the unavailability requirement against considerations of reliability and importance of the out-of-court testimony. This approach is suggested by Dutton, for the Court there found that the incriminatory statement allegedly made by Evans' co-conspirator had several elements of reliability, including spontaneity, declaration against penal interest, and knowledge on the part of the declarant. The Court also noted that the evidence admitted was neither "crucial" nor "devastating" to the defendant's case.

A balancing approach toward the issue of reliability commends itself as more rational than merely attempting to pigeonhole evidence as either within or without exceptions to the hearsay rule and confrontation requirements. An assessment of the reliability of the evidence involves determinations of whether the declarant may have had a motive to prevaricate or may have been mistaken, as well as whether an in-court examination would add significantly to or detract from its presumed reliability.

The emphasis in Dutton on crucialness of the testimony suggests an approach analogous to the harmless-error rule, although it is clear from the plurality opinion of the decision that admission of the testimony in issue was not considered erroneous. It is difficult, however, to conceive that an inquiry into the crucial or devastating nature of evidence does not imply the possible exis-
tence of error, since if there is no error this inquiry is irrelevant. The standard of harmlessness “beyond a reasonable doubt,” derived from the harmless-error doctrine, seems more restrictive than the Dutton doctrine of noncrucialness, and presumably the former places a heavier burden on the prosecution to show absence of harm.

One commentator has emphasized the need for readily applied rules of thumb to determine admissibility of evidence at the trial level, because these determinations must be made during the heat of trial when the judge has little opportunity for reflection. This argument fails to take into account the large measure of discretion presently vested in trial judges in determining the admissibility of hearsay. In any event, a reasoned approach to the admissibility of evidence seems preferable to a mechanical one.

The primary difficulty with the balancing approach implied by Dutton lies not in justifying the use of discretion, but in determining the proper relationships among the indicated discretionary elements. If out-of-court testimony is crucial but nonreliable, it should be excluded without regard to the issue of unavailability. Similarly, evidence which is not crucial and is unreliable should also be excluded, although its admission might constitute harmless error. The treatment of reliable evidence poses a somewhat more difficult question. If it is not crucial, there is little reason to admit reliable evidence at all unless the prosecution can show necessity based on unavailability. Presumably proof of unavailability is required where reliable evidence is also crucial, but it is not clear whether the burden of proof varies as a function of how reliable or crucial the evidence is.

A fixed rule which uniformly requires proof of unavailability has the advantage of circumventing the more troublesome issues of reliability and crucialness in those cases where the witness can be produced because these other issues will never be faced in such cases. Although it is not always easy to determine whether the prosecution has in good faith established the requisite unavailability, this determination is far easier to make than are

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45 Comment, supra note 8, at 1437.
46 Wigmore argues, for example, that rulings on the time limitation applicable to spontaneous declarations should be left “absolutely to the determination of the trial Court.” Wigmore, supra note 3, § 1750, at 154 (emphasis in original). Trial judges also exercise a great deal of discretion in determining the relative presence of elements such as contemporaneity, spontaneity, lack of interest, and general trustworthiness in deciding whether to admit evidence asserted to fall within an exception to the hearsay rule.
findings of reliability and crucialness. The *Dutton* balancing approach, on the other hand, encourages prosecutors to seek the admission of evidence on other bases, rather than making a good-faith effort to obtain the personal testimony of witnesses.

The most important argument, however, for requiring proof of unavailability as a condition to introducing out-of-court testimony is that the confrontation clause in effect asserts a judgment that in-court testimony is always preferable to out-of-court testimony. In *Barber* the Supreme Court recognized that confrontation includes the right to observe demeanor and that this right should not be dispensed with lightly.\(^4\) \(^8\) \(^4\) No matter how reliable an out-of-court statement may seem, in-court examination is always preferable because it will aid either in confirming or refuting such reliability.

The constitutional argument for a showing of unavailability is buttressed by the holding of *Motes v. United States* that the prosecution may not use out-of-court testimony where it has negligently permitted in-court testimony to become unavailable.\(^4\) \(^9\) The rule in *Motes* surely applies regardless of whether the evidence is reliable or crucial and regardless of what hearsay exception within which the evidence may fit.\(^5\) \(^0\) It is submitted that the distinction between negligent failure to produce a witness and lack of good-faith effort to do so simply requires the drawing of too thin a line where constitutional rights are involved.

**D. The Excuse of Equal Availability**

A final possibility for assessing the *Dutton* limitations on *Barber* is based on the fact that in *Dutton* the witness was equally available to both sides. The Court noted that Evans' counsel "informed us at oral argument that he could have subpoenaed Williams but had concluded that this course would not be in the best interests of his client."\(^5\) \(^1\) In *Barber*, on the other hand, the

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\(^4\) 390 U.S. at 721, 725. See also *Wigmore*, supra note 3, § 1395, at 125–26.

\(^8\) 178 U.S. 458 (1900).

\(^9\) It is generally recognized at common law that the requirement of unavailability is not met where the proponent procures a witness's absence in order to prevent him from testifying in court. See *Reynolds* v. United States, 98 U.S. 145, 158 (1878); *Fed. R. Ev.* 804(a)(5).

\(^5\) 400 U.S. at 88 n.19; *id.* at 96 n.3 (Harlan, J., concurring).
witness was incarcerated in a federal penitentiary of another state, and his presence in court as a witness could have been compelled only by means of habeas corpus ad testificandum.

The fault with this distinction is that it turns only on the degree of relative burden in producing witnesses and fails to answer the question of who has that burden. Either party could have produced the witness in *Barber* because the habeas corpus remedy was equally available to both.\(^5\) Cases applying the *Barber* rule have made no distinction based on the degree of availability of the witness.\(^5\) Where the requirement of unavailability of the witness is deemed applicable, it will be applied at common law to exclude out-of-court declarations even if the declarant is present in court at the time when the evidence is offered.\(^4\) Because there is ample reason to require the proponent to use the better evidence where it is easily available, and because his failure to do so raises suspicions regarding his motives for such failure, this result seems sensible. Nor is the doctrine of waiver applicable. The defendant in *Barber* undoubtedly waived his right to call the witness, but he did not waive the right to require the prosecution either to call the witness or to demonstrate the unavailability of the witness before introducing his out-of-court testimony.

A variant of the argument of equal availability would be to say that the *Dutton* Court concluded that the witness would have been equally unavailable to both sides even if called because he probably would have invoked his fifth amendment privilege not to testify. The individual who originated the statement in issue had been separately charged in the same transaction for which Evans was on trial,\(^5\) and, in view of the pendency of those proceedings, it is quite possible that he would have invoked his privilege. As a result, his statement might then have been admissible because the witness himself was unavailable.\(^5\) Yet it was also possible, of

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\(^5\) The remedy of habeas corpus ad testificandum, 28 U.S.C. § 2241(c)(5) (1970), may be invoked by any party to a case, as may the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 9 U.L.A. 91–101 (1957). *But see Curran v. United States, 332 F. Supp. 259 (D. Del. 1971).*

\(^5\) *See, e.g.,* Mason v. United States, 408 F.2d 903 (10th Cir. 1969); United States v. Mobley, 421 F.2d 345 (5th Cir. 1970).

\(^4\) *See Sartin v. Stinecipher, 209 Tenn. 20, 348 S.W.2d 492 (1961).*

\(^5\) 400 U.S. at 90 n.20.

\(^5\) A witness’s invocation of his fifth amendment privilege not to testify is recognized as satisfying the unavailability requirement. *McCormick, supra* note 1, § 253, at 612. The Supreme Court has noted its willingness to follow this principle in dictum in *California v. Green, 399 U.S. 149, 167–68 (1970); accord, People v. Hill, 19 Cal. App. 3d 306, 314–15, 96 Cal. Rptr. 813, 818 (1971).* Justice Harlan’s concurring opinion and the dissenting opinion in *Dutton* both recognize the possibility that Williams (the witness) might well have invoked his fifth amendment privilege if called to testify, 400 U.S. at 99, 102 n.4.

In an 8–7 en banc decision reversing the appellate panel, the court in *Hoover v. Beto,*
course, that he would not have invoked the privilege, and it seems inappropriate to restrict constitutional rights on the basis of mere speculation. The defendant may have been injured to a greater extent in the eyes of the jury if the witness had been called and had invoked his fifth amendment protection, but if he wished to avoid this possible damage he could have waived his right of confrontation. Because he did not do so, the trial court had no authority to waive the right for him.

If the Dutton Court intended to base its distinction of Barber on the issue of equal availability then discussion of the other distinctions concerning reliability and lack of crucialness of the testimony were unnecessary. A fair reading of the Dutton decision indicates, however, that these other distinctions actually provide the main bases of the Court's holding on the Barber issue. The factor of equal availability seems hardly more than an afterthought presented for whatever support it might offer to the Court's principal reasoning.

Although one may reasonably assume that the Dutton distinction of Barber is not based on an idea of equal availability, one should nevertheless ask whether there is any merit to such an idea. What, in other words, are the disadvantages to be realized from removing from the prosecution the burden of proving unavailability in a situation in which either side can call the witness? If there are no disadvantages, then the requirement of proving unavailability can reasonably be dispensed with in all such cases.

If the prosecution does not have the burden of proving unavailability, then it may become more difficult to impeach the damaging testimony of a given witness. For if the prosecution can freely introduce the prior testimony of an unavailable witness,

467 F.2d 516 (5th Cir. 1972), held that the prosecution could not be required to produce the defendant's cohort, Sellars, at trial before introducing the latter's confession incriminating the defendant, since the cohort had not yet been tried for an offense with which he was charged arising out of the same transaction for which the defendant was on trial. The court apparently assumed that the cohort, if called, would have invoked his fifth amendment privilege, so that such calling would have "been vain and fruitless, possibly demanding disciplinary action against the prosecutor." Id. at 540. The dissent pointed out that it is "not our role as appellate judges to conclude as an absolute fact" that Sellars would have invoked the fifth amendment; if the prosecutor feared this result, "the short answer would have been to try Sellars first." With regard to possible misconduct of the prosecutor in calling the witness, the dissent stated: "Never have I heard of any such rule of law." Id. at 549 n.16.

57 This possibility seems implicit in the defense attorney's candid admission at oral argument that he had not called Williams as a witness because he "had concluded that this would not be in the best interests of his client," 400 U.S. at 88 n.19. The attorney had presumably concluded that the same harm would not accrue if Williams invoked his privilege as a witness for the prosecution, or, in any event, he was willing to run this risk in order to force the prosecution to call Williams as a witness.

58 Washington v. Texas, 388 U.S. 14 (1967), held the compulsory process provision of the sixth amendment binding on the states.
then the defendant would have the burden of calling that witness should he hope to impair the credibility of the prior testimony. In those states in which a party is deemed to vouch for the credibility of any witness whom he calls, the defendant may be seriously curtailed in his ability to impeach his own witness. The proposed Federal Rules of Evidence, however, abolish this doctrine of voucher and permit free impeachment by any party to the case. A greater difficulty lies in the element of surprise attendant on the prosecution’s offering out-of-court statements at trial, at a time when it may be too late for the defendant to call the declarant as a witness in order to impeach him. Unless the usual criminal rules of pretrial discovery are significantly changed, this element of surprise would be unavoidable in many cases.

Even if one assumes full rights of impeachment for both sides and adequate pretrial notice of all out-of-court declarations that the prosecution intends to use at trial, substantial objections still exist to placing on the defendant the burden of calling these witnesses for purposes of impeachment. As one commentator has noted, such a procedural burden handicaps the defendant in at least three ways: (1) there is a time lapse between introduction of the statement by the prosecution and examination of the witness by the defendant; (2) the harmful evidence is heard twice, once in the state’s case and once when the witness testifies for the defendant; and (3) the defendant is psychologically disadvantaged in the eyes of the jury by having to call a witness who testifies adversely to the defendant’s interests. In *Hoover v. Beto* the Court of Appeals for the Fifth Circuit summarized these objections with regard to the testimony of a witness named Sellars in that case:

That Sellars was available to be called as a witness does not mitigate the prosecution’s misconduct here. The State sought to shift to the defendant the risk of calling Sellars to the stand. To accept the State’s argument that the availability of Sellars is the equivalent of putting him on the stand and subjecting him to cross-examination would severely alter the presumptions of innocence and the burdens of proof which protect the accused. Hoover’s undoubted right to call Sellars as a witness in his behalf cannot be substituted for his Sixth

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60 Fed. R. Ev. 607.

61 E.g., only limited situations for obtaining depositions and discovery are provided for in Fed. R. Crim. P. 15, 16.

Amendment right to confront Sellars as a witness against him.63

In view of these significant disadvantages, the criterion of either equal availability or presumed equal unavailability does not appear to be an adequate replacement for the requirement that the prosecution prove unavailability.

III. POSSIBLE EXPANSION OF THE UNAVAILABILITY REQUIREMENT

Once it is concluded that Barber's treatment of the unavailability exception to the hearsay rule is not, or should not be, restricted to prior testimony, and that Dutton furnishes no analytically satisfactory limitations on Barber, then the extent to which the unavailability requirement should reasonably extend is yet to be determined. That is, to which of the several exceptions to the hearsay rule is the unavailability requirement applicable by force of the confrontation clause?

There are certain hearsay exceptions recognized at common law which do not require proof of unavailability.64 It may be, however, that these exceptions allow the introduction of evidence which is no more reliable than those exceptions subject to the standards of the unavailability requirement. Can it be asserted that recorded recollection, for example, is more reliable than prior testimony? Are statements of a co-conspirator more reliable than statements against penal interest? Are excited utterances more reliable than dying declarations? Even if it could be shown that one set of exceptions is generally more reliable than another, such a showing does not meet the argument deriving from the confrontation clause that whenever possible the defendant should be permitted to demonstrate through confrontation that this apparent reliability does not in fact exist. Therefore this constitutional consideration would appear to be met by the expanded use of the unavailability requirement rather than by any measure of relative reliability.

63 439 F.2d 913, 924 (5th Cir. 1971), rev'd, 467 F.2d 516 (5th Cir. en banc 1972). See also note 56 supra.
64 FED. R. EV. 804 lists former testimony, statements of recent perception, dying declarations, statements against interest, statements of personal or family history, and other exceptions having comparable guarantees of trustworthiness as hearsay exceptions requiring proof of unavailability. The exceptions that do not require proof of unavailability of the witness are listed in Rule 803. The comment to Rule 804(b) states that the "exceptions evolved at common law . . . furnish the basis" for determining whether proof of unavailability is required. No other attempt is made to justify this dichotomy.
The expansion of the unavailability requirement need not be as broad as the range of all hearsay exceptions. There may be peculiar hearsay exceptions where proof of unavailability should not be required. Such exceptions might include those dealing with party admissions, prior statements of a witness, business entries, public records, and reputation. Nevertheless, in certain situations the unavailability requirement may be appropriate even for these exceptions.

A. Admissions

Admissions of a party have traditionally been admissible into evidence against that party, not because they are necessarily deemed reliable, but because of the adversary nature of our system of litigation. Except where vicarious admissions are involved, there is no serious problem of determining unavailability, for the defendant either takes the stand and is available for cross-examination or refuses to do so and is therefore unavailable.

Difficult questions do arise, however, regarding the propriety of waiving the unavailability requirement where the alleged admission is that of a co-conspirator or other person deemed to be an agent of the defendant. The defendant in these situations usually denies the agency relationship, and he almost always denies that he authorized the alleged agent to make incriminatory remarks on his behalf. The against-interest nature of such testimony, which purportedly lends it an element of reliability, is not necessarily present when the statement incriminates someone other than the

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65 Fed. R. Ev. 801(d)(2) excludes admissions altogether from the hearsay rule. The comment to Rule 801(d)(2) states:

Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

(Emphasis added.)

66 Fed. R. Ev. 801(d)(2), in accord with common-law development, treats as admissions not only statements of a party-opponent (including adoptive and authorized admissions), but also statements of an agent "concerning a matter within the scope of his agency . . . made during the existence of the relationship," and statements by a co-conspirator made "during the course and in furtherance of the conspiracy." The agency exception is broader than that allowed in many states, where agency admissions are restricted to statements made while the agent is acting within the scope of his employment. See Marshall v. Thomason, 241 S.C. 84, 127 S.E.2d 177 (1962). The co-conspirator exception, on the other hand, is narrower than that allowed by the Georgia court in Dutton and by a few other jurisdictions which admit such statements when made during the "concealment" phase of the conspiracy after its furtherance has ended.
declarant. The concept of agency here is fictional at best, and it should not be unnecessarily extended at the expense of the defendant to cases in which the declarant is available for cross-examination.

B. Prior Statements of a Witness

Rule 801(d)(1) of the Federal Rules of Evidence treats a prior statement of an in-court witness as nonhearsay and thus admissible where this statement: (1) is inconsistent with the witness's present testimony; (2) is offered to rebut an inference of recent fabrication or improper influence or motive; or (3) is a statement identifying a person after perceiving him. Hence unavailability would seem not to be relevant here.

In cases where a witness who is not the defendant denies making a former statement, or asserts lapse of memory, the issue is not whether proof of unavailability should be required but rather whether unavailability should necessarily be found to exist. Nelson v. O'Neil seems to have settled the point that where the issue is one of denial, the witness is deemed available. The confusing rationale of the decision—which ignores Dutton's questions of reliability and crucialness of the alleged former statement—is that the defendant is better off than he would be if the witness affirmed the prior statement. Whatever may be the merits of this

67 While a confession is admissible against the person making the same as a declaration against interest, what he says therein about others may be based on spite, on fear, pique, malice, or other motives not leading to the truth. Schepps v. Slate, 432 S.W.2d 926, 942 (Tex. Crim. App. 1968).

68 The common law traditionally allows into evidence prior inconsistent statements of a witness only for purposes of impeachment. Prior statements of a witness offered to rebut an inference of recent fabrication or of improper influence or motive are generally admissible only for purposes of rebutting such an inference. Prior statements of a witness's identification of a person may generally be introduced either to impeach or to support credibility, depending on the circumstances of the case. See comment to Fed. R. Ev. 801(d); United States v. Forzano, 190 F.2d 687 (2d Cir. 1951). The federal rule, which admits such evidence as substantive proof of guilt or innocence, constitutes a radical departure from the common-law practice, although the proposal is probably more in line with what actually occurs in jury deliberations when such evidence is introduced.


70 The question presented in Nelson was whether cross-examination can be full and effective where an out-of-court statement has been introduced into evidence and where the alleged declarant of the statement, while testifying at trial, denies having made the statement. The Court found no deprivation of sixth and fourteenth amendment rights, for the testimony of the declarant had actually acted in the accused's favor:

    Had Runnels [the declarant] in this case "affirmed the statement as his," the respondent [the accused] would certainly have been in far worse straits than those in which he found himself when Runnels testified as he did... For once Runnels had testified that the statement was false, it could hardly have profited the respondent for his counsel through cross-examination to try to shake that testimony. If the jury were to believe that the statement was
rationale, it should not be extended to situations in which the
witness asserts a lapse of memory. In that situation his silence
adds no evidential weight to either side, and he is clearly una-
vailable for cross-examination as to the out-of-court statement
and should be so treated for purposes of determining whether his
statement meets the confrontation requirements of reliability and
crucialness to the case.\textsuperscript{71}

\textbf{C. State of Mind}

Statements offered to prove the declarant’s state of mind are,
strictly speaking, not hearsay where they are offered not to prove
the truth of the matter asserted therein but rather to prove a fact
or state of mind reasonably inferable therefrom.\textsuperscript{72} The require-
ment of proof of unavailability of the witness should not be
dispensed with on this technical ground, however, because these
inferential “statements” are subject to the same risks of fabrica-
tion and mistake as are direct assertions.\textsuperscript{73}

\textbf{D. Business Entries}

As noted by McCormick, “After an uneasy history, unavaila-

\textsuperscript{71} In California v. Green, 399 U.S. 149 (1970), where a witness asserted lapse of
memory, the Court held that the witness’s preliminary hearing testimony could be admitted
either on the theory that the witness was in court and subject to confrontation, or
alternatively on the theory that he was unavailable so that the evidence could come in as
prior testimony. These rationales are contradictory, and the former should be treated as
dictum because lapse of memory is generally regarded as satisfying the unavailability
requirement. \textit{See Fed. R. Ev. 804(a)(3).} The Court did not decide whether other
out-of-court statements of the witness allegedly made to a police officer were admissible
under the requirements of confrontation.

\textsuperscript{72} Hearsay is generally defined as an out-of-court assertion of a declarant offered in
evidence to prove the truth of the matter asserted. \textit{See Fed. R. Ev. 801(a)–(c).} An
assertion not offered to prove the truth of the matter asserted therefore does not fall within
this definition. \textit{Fed. R. Ev. 803(3)} nevertheless includes state-of-mind assertions within
the exceptions to the hearsay rule.

One of the reasons offered by the \textit{Dutton} court for finding that the defendant’s right of
confrontation had not been violated by admission of the witness Williams’ out-of-court
statement (“If it hadn’t been for that dirty . . . Alex Evans, we wouldn’t be in this now.”)
was that “the statement contained no express assertion about past fact, and consequently
it carried on its face a warning to the jury against giving the statement undue weight.” 400
U.S. at 88. The justification suggested by the Court for admitting this evidence is less than
clear.

\textsuperscript{73} The \textit{Dutton} dissent forcefully argued that Williams’ alleged out-of-court statement
was so ambiguous as to be inherently unreliable. 400 U.S. at 104.
bility has virtually disappeared as a requirement of entries in the regular course of business.”

The reason for this relaxation is that an unfair burden would be imposed by requiring that the proponent of the evidence either produce or show the unavailability of first-hand participants in a multi-party enterprise of the sort that often forms the basis of business entries. As a result, all that is normally required at common law is verification by the supervising officer that the record has been regularly kept in the course of business.

It does not follow, however, that a similar relaxation should occur where confrontation rights are involved. It is inconvenient for the prosecution to be required to produce an out-of-state witness, and the common law generally imposed no such requirement. Nevertheless, this requirement was imposed by Barber as a condition of confrontation. It would seem therefore that the state should be able to introduce evidence of a business entry only where the first-hand participants to the transaction are unavailable.

E. Public Records and Judgments

The same rationale applicable to business entries can be used for introducing evidence by means of public records. If a public officer were required to appear in court every time public records

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74 McCormick, supra note 1, § 253, at 608 n.20.
75 Id. §§ 306, 312.
77 In his concurring opinion in Dutton Justice Harlan argued that business entries, official statements, learned treatises, and trade reports should not be subject to the requirement of proof of unavailability since production of declarants in these situations “would be unduly inconvenient and of small utility to the defendant.” 400 U.S. at 95–96. It should be apparent that this inconvenience argument is directly at odds with the Barber rationale. If evidence is useful to the prosecution, it is difficult to understand why the defendant should be required to consider confrontation unuseful.
78 Tennessee permits the introduction against the defendant in criminal proceedings of a medical certificate showing the results of an official blood test used to determine whether an automobile driver is inebriated “if the person taking or causing to be taken the blood sample and the person performing the test to such sample or both are available to testify at the trial of the accused.” Tenn. Code Ann. § 59–1049 (1968). This requirement apparently does not apply to breath or urine tests. See Tenn. Code Ann. § 59–1044 (1968). It is unclear whether the person who takes the blood sample or performs the test must actually be called as a witness by the prosecution. See note 54 and accompanying text supra.
were sought to be put into evidence, a great amount of his time would be consumed in testifying. In the many instances where the officer has no first-hand knowledge of matters appearing in the record, a showing of unavailability would not be appropriate.

Where information contained in public records has been supplied by persons other than public officials, these declarants should be called if they are available. If, however, the record is based solely on matters observed, or factual findings made, by the public official, then the official himself should be required to testify in person if available.79

Many courts exclude a record of a relevant prior judgment as hearsay when it is offered to prove a fact essential to sustain the judgment.80 The Federal Rules also exclude such evidence in criminal cases, except where there is a final judgment against the defendant in another criminal case involving a possible penalty of death or imprisonment in excess of one year.81 If a prior judgment is entered on a plea of guilty the judgment arguably should come in as a party admission.82 Where the conviction results from a contested trial, it seems unnecessary to require proof of unavailability of the convicting judge or jury because even if they were available their opinion of guilt would be based on hearsay.83 The

79 Fed. R. Ev. 803(8) allows, as an exception to the hearsay rule, the introduction of public records and reports against the defendant in criminal proceedings where these records set forth "activities of the office or agency" or "matters observed pursuant to duty imposed by law." The rule permits such records to be introduced in civil cases, and against the government in criminal cases, only where they set forth "factual findings resulting from an investigation made pursuant to authority granted by law." The limitation on use of investigatory findings, according to the comment, is made "in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case." It is not at all clear why the drafters concluded that there would be no collision with confrontation rights where public records of "activities" or "matters observed" are involved.


81 Fed. R. Ev. 803(22).

82 Fed. R. Ev. 801(d)(2), which permits evidence of admissions of a party-opponent to be admitted in evidence, should be read as limited by Fed. R. Ev. 803(22), which allows into evidence only judgments of conviction punishable by death or imprisonment in excess of one year regardless of whether the judgment is "entered after a trial or upon a plea of guilty."

Arguably a civil judgment entered against a party by agreement could be introduced under the Federal Rules against that party as an admission in a subsequent criminal action to prove any fact essential to sustain the civil judgment. Courts might refuse to admit such judgments, however, because there is a difference in burden of proof between civil and criminal actions, and because this procedure would tend to discourage the out-of-court settlement of civil actions.

83 See State v. Paiz, 34 N.M. 108, 277 P. 966 (1929). In Paiz the prosecution called a justice of the peace who had bound the defendant over for trial in the case to testify regarding the defendant's confession and to state that he found the defendant guilty of the crime charged beyond a reasonable doubt. The appellate court held this procedure to be prejudicial error because the testimony constituted a legal conclusion that was solely within the province of the jury to decide.
admissibility of a relevant prior judgment as proof of a fact essential to sustain that judgment clearly involves questions of the reliability and crucialness of the evidence. Production of the fact-finder would not, however, add appreciably to the defendant’s confrontation protection.

F. Reputation Evidence

Reputation evidence offered against the accused is generally highly suspect because it may be based on groundless rumor about which the witness has no actual first-hand knowledge. The Federal Rules of Evidence provide that character reputation may be proved by evidence of personal opinion. This type of evidence seems more reliable than evidence of hearsay reputation, and if available it should probably be required whenever reputation evidence is offered against the accused. Where the witness has no personal knowledge of the reputation in issue, proof of unavailability of the person or persons who caused the witness to form his opinion should also be required.

IV. Conclusion

Dutton v. Evans offers no ascertainable and manageable criteria for limiting the scope of the Barber v. Page unavailability requirement. Moreover, the thrust of Barber indicates that its applicability is not limited only to prior testimony. While courts may be able to assess the reliability and crucialness of out-of-court statements with some rough degree of accuracy, it is difficult to understand how these factors can be balanced meaningfully in determining whether to dispense with the unavailability requirement. The concept of unavailability furnishes a relatively certain and easily applied standard whose application in many instances will enable courts to avoid delving into far more complex issues of reliability and crucialness. Moreover, requiring production of the

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84 The general rule is that a reputation witness “is not allowed to base his testimony on anything but hearsay.” This testimony at its best opens a tricky line of inquiry as to a shapeless and elusive subject matter. At its worst it opens a veritable Pandora’s box of irresponsible gossip, innuendo and smear.

Michelson v. United States, 335 U.S. 469, 477, 480 (1948) (emphasis added).

85 FED. R. EV. 405(a):
In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
witness whenever possible assures the defendant the maximum available protection offered by cross-examination under oath and by jury observation of the witness's demeanor. There is no satisfactory substitute for this protection.