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THE FUTURE OF CONFRONTATION

Peter Westen*

The Supreme Court seems to be setting the stage for a long-awaited examination of the confrontation clause. It has been ten years since the Court endeavored in Dutton v. Evans¹ to reconcile the evidentiary rules of hearsay with the constitutional commands of confrontation. Dutton came at the tail end of a string of confrontation cases that the Court had resolved without apparent difficulty.² Not surprisingly, the Court approached Dutton in the evident belief that it could resolve the constitutional problems of hearsay once and for all.³ Instead, after oral argument in 1969 and a rehearing in 1970, the Court found itself hopelessly divided, able to produce only an inconclusive plurality opinion.⁴

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² 2. The line of cases began in 1965 with the decision in Pointer v. Texas, 380 U.S. 400 (1965), holding the confrontation clause applicable to the states through the fourteenth amendment, and ended in 1970 with California v. Green, 399 U.S. 149 (1970).
³ 3. Shortly after granting certiorari in Dutton, the Court in California v. Green, 399 U.S. 149 (1970), emphasized that it had no occasion "in the present case" to formulate a general theory of confrontation: "We have no occasion in the present case to map out a theory of the Confrontation Clause that would determine the validity of all such hearsay 'exceptions' permitting the introduction of an absent declarant's statements." 399 U.S. at 162. In emphasizing that Green was not the proper "occasion" in which "to map out a [general] theory," the Court may have had Dutton in mind, because it had already heard original argument in Dutton and set the case for reargument the following Term. Indeed, Justice Harlan made a special point of suggesting in Green that the then-pending Dutton case would be an "inappropria[te]" setting to consider the "broad problem" of the relationship between hearsay and confrontation. 399 U.S. at 172 n.2 (Harlan, J., concurring).
⁴ 4. Dutton produced four separate opinions. Justice Stewart, writing for himself and three others, wrote a plurality opinion; Justice Harlan and Justice Blackmun wrote separate concurring opinions; and Justice Marshall wrote a dissenting opinion for himself and three others. As Erwin Griswold put it, "[I]t may fairly be said that although the result [in Dutton] was 5 to 4, the decision was about 4.6 to 4.4." Griswold, The Due Process Revolution and Confrontation, 119 U. Pa. L. Rev. 711, 724 (1971).

The plurality opinion in Dutton has been roundly criticized, in no small part because it did not provide the kind of "clear and consistent guidelines" that commentators believe are needed. Note, The Confrontation Test for Hearsay Exceptions: An Uncertain Standard, 59 Cal. L. Rev. 580, 586 (1971) [hereinafter cited as Uncertain Standard]. In addition, see Baker, The Right to Confrontation, the Hearsay Rules, and Due Process, 6 Conn. L. Rev. 929, 932, 948, 952, 956 (1974); Davenport, The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Haw. L. Rev. 1378, 1382 (1972); Graham, The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness, 56 Texas L. Rev. 151, 187-89 (1978) (plurality opinion is "excep-
Since then, the Court has conspicuously avoided this central problem of the relationship between hearsay and confrontation.6

For the first time in nearly a decade, the Court appears ready to consider the problem again, in Ohio v. Roberts.6 Roberts comes to the Court at a propitious time: four of the Justices — nearly a working majority — have not yet committed themselves to particular theories of confrontation, thus enabling the Court to make a relatively fresh start.7 Roberts also comes to the Court in a proportionally unclear and provides inadequate guidance) [hereinafter cited as Forgetful Witness]; Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 CRIM. L. BULL. 99, 122-23 (1972); Liacos, The Right of Confrontation and the Hearsay Rule: Another Look, 34 AM. THAL LAW. J. 153, 160-66 (1972); Natali, Green, Dutton and Chambers: Three Cases in Search of a Theory, 7 RUT.-CAM. L. REV. 43, 49-52, 63-73 (1976); Read, The New Confrontation-Hearsay Dilemma, 45 S. CAL. L. REV. 1, 2 (1972) (“after Dutton v. Evans...the meaning of the confrontation clause is no longer clear”); Seidelson, Hearsay Exceptions and the Sixth Amendment, 40 GEO. WASH. L. REV. 76, 81-85 (1971); Note, Hearsay and the Confrontation Guaranty, 38 LA. L. REV. 858, 862 (1978) (“Dutton raised more questions than it answered”) [hereinafter cited as Confrontation Guaranty]; The Supreme Court, 1970 Term, 85 HARV. L. REV. 38, 188, 191 (1971); Comment, The Uncertain Relationship Between the Hearsay Rule and the Confrontation Clause, 52 TEXAS L. REV. 1167, 1171 (1974).


7. Justices Powell, Rehnquist, and Stevens joined the Court after Dutton was decided. Justice Blackmun was on the Court at the time California v. Green and Dutton were decided; but he did not participate in Green, and he wrote a separate concurring opinion in Dutton based not exclusively on a theory of confrontation, but also on a finding of harmless error.
tious form: the facts of the case dramatize the usefulness and beauty of a solution to the hearsay problem that Justice Harlan proposed in his concurring opinion in California v. Green. Although Justice Harlan later repudiated his “ingenious” proposal, there is good reason to believe that he was right the first time, and that the future of confrontation lies in the direction he pointed.

I. JUSTICE HARLAN’S THEORY

The beauty of Justice Harlan’s solution can best be appreciated by reference to the problem it addresses. The problem is to define the relationship between hearsay exceptions, which allow the prosecution to introduce incriminating out-of-court statements to prove the truth of the matter asserted and the right of confrontation, which entitles a defendant to be “confronted with the witnesses against him.” All previous solutions had been unsatisfactory, finding no tenable “middle ground” between the

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8. 399 U.S. 149, 172-89 (1970). Justice Harlan himself believed that the central problems of hearsay are best examined in a case like Roberts, where the declarant is not available to testify in person. See 399 U.S. at 172 n.2.
9. Read, supra note 4, at 43.
10. U.S. Const., amend. VI.
11. Younger, Confrontation and Hearsay: A Look Backward, a Peek Forward, 1 Hofstra L. Rev. 32, 40 (1973). It was hoped that Dutton would provide such a standard, but it is generally conceded that the plurality opinion “sets out no standards to test the constitutionality of a hearsay exception.” United States v. Clayton, 450 F.2d 16, 20 (1st Cir. 1971) (emphasis added). In addition, see Uncertain Standard, supra note 4, at 595 (“the plurality opinion in Evans utterly fails to explain the standard by which it decides to uphold the constitutionality of the evidence rule there at issue”); Dutton v. Evans, 400 U.S. 74, 96 (1970) (Harlan, J., concurring).

Some venturesome commentators have tried to fill the void by articulating a standard of reliability that falls somewhere between the extremes of either admitting or excluding all hearsay statements. Unfortunately, except for those commentators who essentially adopt Justice Harlan’s view, see note 72 infra, those proposed standards of reliability turn out to be either illusory or idiosyncratic. Thus, Davenport suggests that hearsay statements are admissible if (and only if) they possess such “indicia of reliability” as to be substantially equivalent in reliability to a cross-examined statement. Davenport, supra note 4, at 1390. Yet he either ignores the obvious fact that every hearsay statement is “at best a partial substitute for cross-examination,” Comment, Confrontation and the Hearsay Rule, 75 Yale L.J. 1434, 1435 (1966) [hereinafter cited as Hearsay Rule]; or he believes that only substantial equivalence in reliability is required, without explaining, however, why a substantial equivalence should be sufficient or how one goes about measuring it. In contrast, Natali takes the 18 words of the confrontation clause and restates them as a 241-word, two-page statement of how he, personally, would codify the jurisprudence of confrontation. Natali, supra note 4, at 62-63.

The most interesting and original solution for resolving the “dilemma” is Professor Kenneth Graham’s. See Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim. L. Bull. 99 (1972). Graham’s proposal de-
“extreme[s]” of either allowing every hearsay statement to be admitted or requiring every hearsay statement to be excluded. Justice Harlan solved the “dilemma” by finding a way to unite the two extremes without compromising their underlying policies. The key to the solution is to recognize what the sixth amendment means by “witnesses against” a defendant: A “witness against” a defendant, he concluded, is a person who is

serves serious consideration, because he writes from rich and seasoned experience in the law of criminal evidence. He argues that a person is a “witness against” the accused if his statements are necessary to enable the prosecution to survive a motion for judgment of acquittal. If a person is such a witness, the prosecution must produce him in person and tender him for effective cross-examination (absent, apparently, some narrow “excusing conditions”); if, on the other hand, a person is not such a witness, the prosecution may rely on his hearsay statements without producing him, leaving it presumably to the defendant to produce the declarant by means of compulsory process.

Graham’s proposal raises a number of questions. (1) It appears to relegate the right of confrontation to a minor role, because the prosecution almost always possesses enough “direct” testimony to survive a motion for acquittal. See, e.g., Jackson v. Virginia, 99 S. Ct. 2781 (1979). (2) With persons who are not “witnesses against” the accused, but whom the prosecution voluntarily chooses to produce, it leaves the defendant in the peculiar position of having no constitutional right to cross-examine them. (3) With a person who is a “witness against” the accused (and whose out-of-court statements are, therefore, inadmissible without him), it subjects such evidence to a more rigorous standard of admissibility than is ordinarily applicable under the due process clause to the state’s other kinds of evidence (such as testimonial and real evidence) without explaining, however, why hearsay evidence should be tested by a higher standard. See Hearsay Rule, supra, at 1438. (4) It means that the prosecution bears a greater risk of unavailability for some witnesses whom the defendant wishes to examine (e.g., witnesses whose out-of-court statements are indispensable to the state’s case) than for other witnesses whom the defendant wishes to examine (e.g., putative defense witnesses who appear to be in a position to negate or rebut the state’s evidence), without explaining why the state should be a guarantor of the former when it is not of the latter. See United States v. Hart, 546 F.2d 798, 799 (9th Cir. 1976) (en banc) (prosecution is not a guarantor of the presence at trial of a government informer whom the defendant wishes to examine as a witness), cert. denied, 429 U.S. 1120 (1977). (5) It means that the defendant cannot assert his right of confrontation until the close of the state’s case, because only then can the trial court determine whether the hearsay evidence is necessary to forestall a motion for acquittal.

12. Davenport, supra note 4, at 1381.
13. John Wigmore asserted that the confrontation clause has nothing to say about the admissibility of hearsay evidence. See 5 J. WIGMORE, EVIDENCE § 1387, at 131 (3d ed. 1940). Justice John Harlan eventually embraced this view, but conceded that it is not “consistent” with the Court’s controlling decisions. See Dutton v. Evans, 400 U.S. 74, 97 (1970) (Harlan, J., concurring). Some commentators, too, have embraced that extreme position. See, e.g., Uncertain Standard, supra note 4, at 932-96.
available to give his incriminating evidence in the form of live testimony in open court, under oath, and subject to cross-examination. Regarding "witnesses against" a defendant, the requirements of the confrontation clause are "extreme": the prosecution is required (a) to produce the witness at trial, (b) to place him under oath, (c) to elicit his incriminating evidence in the form of direct testimony, and (d) to tender him for cross-examination. In contrast, if the declarant is not available to be produced in person (and if the state is not at fault for his unavailability), the declarant is not a "witness against" the defendant within the meaning of the confrontation clause. In that event, the sixth amendment has nothing at all to say about the admissibility of his out-of-court statements, and the prosecution is free to use the declarant's hearsay statements, provided, of course, that the statements are sufficiently reliable to satisfy the residual and minimal standards of due process.17

In Justice Harlan's words, this solution makes the confrontation clause a "preferential rule." 18 It imposes a preference for live testimony in open court, under oath, and subject to cross-examination. Barber v. Page 19 is a good illustration. The Supreme Court in Barber prohibited the prosecution from introducing incriminating, prior recorded testimony, because the prosecution had not shown the witness to be unavailable to present the evidence in the better form of live testimony at trial. Absent a showing that a particular witness is unavailable, the confrontation clause obligates the prosecution to present its evidence in the preferred form of live testimony under oath and subject to cross-examination.

By the same token, however, the confrontation clause has nothing at all to say about the admissibility of hearsay statements if hearsay is the best form in which the evidence still exists. That is so because it makes no sense to discuss a preference for something that no longer exists. Since the confrontation clause operates as a preference for live testimony, the clause drops away as soon as the prosecution can show that live testimony is not available and that the state is not responsible for its absence.

This does not mean that there are no constitutional limits on

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17. The due process clause requires, first, that the hearsay statement be sufficiently reliable to be rationally evaluated by the trier of fact and, second, that the hearsay statement together with the state's other incriminating evidence be sufficient to sustain a finding of guilt beyond a reasonable doubt. See 389 U.S. at 189 (Harlan, J., concurring).


a prosecutor’s authority to use the hearsay statements of unavailable witnesses. A prosecutor cannot obtain a valid conviction unless his evidence as a whole is sufficient to support a finding of guilt beyond a reasonable doubt. Nor can he introduce any individual item of incriminating evidence that is too unreliable to satisfy the residual standard of the due process clause. The latter standard, however, is a minimal one: only the most tendentious and inherently dubious items of evidence are deemed to run afoul of the due process clause. In the Supreme Court’s language, the due process clause bars evidence only if there is “a very substantial likelihood” that it is false.

In sum, Justice Harlan found the confrontation clause to be both stricter and narrower than previously thought. It is stricter, because with respect to “witnesses against” a defendant — witnesses who are available to testify in person — the clause is never satisfied with anything less than live testimony under oath and subject to cross-examination. Yet it is also narrower, because witnesses who are not available to testify against a defendant are not “witnesses against” him within the meaning of the sixth amendment. The confrontation clause does not purport to prohibit the prosecution from using the hearsay statements of unavailable witnesses. If such a prohibition exists, it emanates from the general and more lenient commands of the due process clause.

II. AN ILLUSTRATION: CALIFORNIA V. GREEN

Justice Harlan’s approach separates all hearsay cases into two constitutional categories, depending upon the availability of the declarant to testify in person. When witnesses are available, the state’s obligations are defined by the strict requirements of confrontation: The confrontation clause requires the prosecution to produce the available witnesses whose incriminating statements it wishes to introduce against the accused. On the other hand, when witnesses are unavailable, the state’s obligations are defined by the more relaxed standards of due process: The due process clause permits the prosecution to introduce any item of incriminating evidence it wishes, unless the evidence is too unreliable for a jury to evaluate rationally.

This distinction between available witnesses and unavailable ones — between confrontation and due process — can be illustrated by the facts of California v. Green. The prosecution in Green called a witness named Porter who had previously given incriminating evidence against the accused. When examined at trial, however, Porter proved to be uncooperative and claimed that he had forgotten the events he had discussed in his earlier out-of-court statements. Having failed to elicit the incriminating testimony from Porter at trial, the prosecution then introduced Porter's earlier statements. The statements came in two forms — (a) a transcript of Porter's recorded and cross-examined testimony at a preliminary hearing; and (b) a police officer's testimony of oral statements that Porter had made shortly after his arrest. The defendant could not cross-examine Porter about either of the statements at trial, because Porter continued to profess a loss of memory.

Green, in Justice Harlan's view, presented two separate constitutional questions. The first was whether the prosecution violated the defendant's right of confrontation by introducing Porter's prior statements for their truth. The answer was "no." The confrontation clause did not bar the hearsay, because that was the only form in which the evidence still existed. The prosecution first called Porter as a witness and sought to elicit the statements from him directly; only later, when that effort failed, did the prosecution turn to Porter's earlier hearsay statements. Thus, the prosecution satisfied its obligation to attempt to introduce its evidence in the preferred form of live testimony. It resorted to hearsay only when the evidence turned out not to be available in any better form.

For Justice Harlan, the second question in Green was whether the prosecution violated the defendant's right of due process by introducing the hearsay statement. Although the Green majority spoke in the language of confrontation, it used the same standards that Justice Harlan would have applied under the due process clause: The Court noted that hearsay statements are constitutionally admissible if introduced under circumstances that "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."24

Having identified the controlling standard, the Court then applied it to three sorts of prior statements, characterized by

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24. 399 U.S. at 161.
decreasing reliability: (1) recorded statements that are subjected to effective cross-examination when they are given; (2) out-of-court statements that are not subjected to contemporaneous cross-examination but about which the declarant can be effectively examined at trial; and (3) out-of-court statements that are neither subjected to contemporaneous cross-examination nor capable of being effectively examined at trial due to the declarant's loss of memory. The Court held that the statements of type (1) are admissible because, even though pretrial cross-examination is ordinarily "a less searching exploration into the merits of the case," it "closely approximat[es]" the truth-testing that would occur at trial. Similarly, statements of type (2) are admissible because, although contemporaneous cross-examination would place the jury in a "better position to evaluate the truth of [a] statement," cross-examination at trial provides the jury with "a satisfactory basis for evaluating the truth of the prior statements." For type (3), the Court remanded to the lower courts to determine whether a declarant's loss of memory deprives the trier of fact of "a satisfactory basis" for rationally "evaluating the truth of the prior statement," a question that has since been answered in favor of admitting the statements.

The significance of Green is not so much how it resolved the three questions of admissibility, but how it approached them. It did not ask whether the hearsay statements were exactly as reliable as live statements given in open court under oath and subject to cross-examination. Instead, having noted that the state's evidence was not available in any "better" form, and that the absence of evidence in better form was "in no way the fault of the state," the Court simply asked whether the hearsay statements were "adequate" for rational evaluation by the trier of fact. The latter is precisely the sort of question courts ask under the due process clause.

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25. 399 U.S. at 166.
26. 399 U.S. at 165.
27. 399 U.S. at 160, 161.
28. 399 U.S. at 161.
29. On remand in Green, the California Supreme Court held the hearsay testimony of the police officer to be admissible despite the declarant's loss of memory. People v. Green, 3 Cal. 3d 981, 991, 479 P.2d 998, 1004, 92 Cal. Rptr. 494, 500, cert. dismissed, 404 U.S. 801 (1971). That is also the prevailing rule. See People v. Pepper, 568 P.2d 446, 448-49 (Colo. 1977); Graham, Forgetful Witness, supra note 4, at 179-83.
30. 399 U.S. at 160.
31. 399 U.S. at 166.
32. 399 U.S. at 168.
33. In Manson v. Brathwaite, 432 U.S. 98 (1977), for example, in deciding whether
III. The Supporting Authority

Justice Harlan's distinction between confrontation and due process is more than one man's view of the law. It finds multiple support in a variety of sources: (A) It corresponds to the practical distinction between excluding evidence when better evidence is available, and excluding evidence when nothing better exists; (B) its description of the confrontation clause as a preferential rule is supported by the jurisprudence of confrontation; (C) its definition of confrontation also corresponds to the standard that governs the state's parallel obligation under the compulsory process clause to produce "witnesses" in the defendant's "favor"; (D) its treatment of hearsay reliability as an issue for the due process clause is consistent with the jurisprudence of due process.

A. A Practical Distinction

Courts typically take a unitary approach to all hearsay problems, regardless of the prosecution's justification for resorting to hearsay. Justice Harlan's test divides hearsay cases into two separate categories, each governed by a distinct constitutional standard: cases in which the declarant is available, which are governed by a strict preference for live testimony; and cases in which the declarant is not available, which are governed by a more relaxed standard of exclusion.

This distinction corresponds to the obvious difference between excluding evidence because it exists in a more reliable form, and excluding evidence even where it cannot be obtained in any other form. We are all willing to exclude even quite reliable information if we believe that still more reliable testimony can be had on the issue. Yet, at the same time, we are naturally willing to admit such evidence if nothing better exists. This differential testimony concerning a single-photograph identification satisfied the due process clause, the Court did not ask whether a photographic array or line-up would have been "better," 432 U.S. at 117, but rather whether the identification based on a single-photograph display possessed sufficient "aspects of reliability" to be admitted into evidence, 432 U.S. at 112. See also text at notes 67-64 infra.

34. The best evidence principle takes many forms, most notably the ancient principle that "a man must produce the best evidence that is available — second best will not do." See C. McCormick, Evidence §§ 229-30, at 559-60 (2d ed. 1972). Thus, McCormick quotes William Blackstone as stating that "the best evidence the nature of the case will admit of shall always be required, if possible to be had." Id. § 229, at 559.

35. "[W]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without." Advisory Committee's Introductory Note on the Hearsay Problem, quoted in 4 J. Weinstein & M. Berger, Weinstein's Evidence 800-2 (1978). See also C. McCormick, supra note 34, at 559.
in evidentiary standards is reflected as a nonconstitutional standard in the best evidence rule\textsuperscript{36} and in other rules that condition the admissibility of hearsay on the declarant's availability.\textsuperscript{37} It should be no surprise that this same intuitive differential also operates on a constitutional level.

Assume, for example, that a prosecutor offers rather reliable evidence consisting of recorded and cross-examined testimony from a previous hearing. If the declarant is available to testify at trial, one is intuitively inclined to reject the recorded hearsay in favor of live testimony.\textsuperscript{38} If, on the other hand, the declarant is out of the jurisdiction and unavailable as a witness, one is naturally disposed to admit the earlier, fully cross-examined testimony.\textsuperscript{39}

This differential in constitutional standards — Justice Harlan's distinction between confrontation and due process — is appropriate because it reflects a shift in balances between the interests of the state and the interests of the defendant. The prosecution has an interest in trying the defendant with every bit of incriminating evidence at hand; the defendant, on the other hand, has an interest in excluding all but the most reliable incriminating evidence. Where a declarant is available to testify, the Court uses a strict preference that excludes his hearsay statements. That protects the defendant without unduly prejudicing the prosecution, because the prosecution may still secure the very same evidence in the more reliable form of live testimony. Where a declarant is unavailable to testify, the Court uses a less demanding standard of exclusion. That still provides basic protection for the defendant, because it keeps out evidence that is too unreliable to be evaluated rationally by the trier of fact; yet it does not prevent the prosecution from using evidence at hand — even if it is less reliable than live testimony — if it is the best evidence the prosecution can obtain.\textsuperscript{40}

\textsuperscript{36} See C. McCormick, \textit{supra} note 34, at 559-60.

\textsuperscript{37} See id. § 253, at 608-13.

\textsuperscript{38} See, \textit{e.g.}, Berger v. California, 393 U.S. 314 (1969) (prior recorded and cross-examined testimony from a preliminary hearing is inadmissible so long as the declarant is available to testify in person).

\textsuperscript{39} See, \textit{e.g.}, California v. Green, 399 U.S. 149, 165-68 (1970) (prior recorded and cross-examined testimony from a preliminary hearing is admissible, given the declarant's loss of memory).

\textsuperscript{40} To be sure, a defendant cannot be convicted \textit{solely} upon such evidence. Rather, in addition to such evidence, the state must present such additional evidence as is sufficient, when combined with the other items, to support a finding of guilt beyond a reasonable doubt. \textit{See In re Winship}, 397 U.S. 358 (1970).
B. The Jurisprudence of Confrontation

Justice Harlan’s concurring opinion in Green is remarkable in two respects. First, it reflects a profound analytical insight — namely, that the state’s use of hearsay evidence is subject to two different constitutional standards, depending upon the declarant’s availability to testify in person. Second, it recognizes that this analytical difference neatly coincides with the existing conceptual distinction between confrontation and due process. In other words, the established law of confrontation corresponds to Justice Harlan’s stricter standard of preference, while the law of due process corresponds to the residual and more relaxed test of reliability.

This view of the confrontation clause — that witnesses against a defendant are those witnesses who are available to testify in person — finds support in the Supreme Court’s confrontation decisions. In cases where the Court has held hearsay evidence to violate the confrontation clause, the state either had not shown the declarants to be unavailable, or was itself at fault for their being unavailable. Thus, in Motes v. United States,\(^{41}\) the prosecution was prohibited from using the hearsay statements of a witness who had disappeared, where it appeared that the state was responsible for his disappearance. In Pointer v. Texas,\(^{42}\) Douglas v. Alabama,\(^{43}\) Barber v. Page,\(^{44}\) Bruton v. United States,\(^{45}\) and Russell v. Roberts,\(^{46}\) the Court rejected the hearsay statements of persons who, for all that appeared from the record, were available to give their evidence in the better form of live testimony under oath and subject to cross-examination. Accordingly, these violations of confrontation can all be seen as resting on the prosecution’s failure to introduce the “best evidence.”\(^{47}\)

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41. 178 U.S. 458, 471 (1900).
42. 380 U.S. 400 (1965). The Court in Pointer simply states that the declarant “had moved [to California] and did not intend to return to Texas” (380 U.S. at 401), without indicating whether his whereabouts were known or whether the state had used due diligence to secure his attendance. It appears from the opinion of the state court below that the prosecution did know where the declarant was located in California and could have produced him if necessary. See Pointer v. State, 375 S.W.2d 293, 294 (Tex. 1964). Justice Harlan so interpreted the case. See California v. Green, 399 U.S. 149, 186-87 n.20 (1970) (Harlan, J., concurring).
44. 390 U.S. 719 (1968).
46. 392 U.S. 293 (1968).
47. It has been noted before that the confrontation clause has “overtones” of a “constitutional best evidence rule.” Graham, supra note 11, at 143. Nonetheless, Justice
Similarly, where the Court has upheld hearsay evidence under the confrontation clause, the hearsay statements were not available in the better form of live testimony. Thus, in *Mattox v. United States*, the Court upheld the use of a dying declaration made by a person who had since died. Similarly, the Court has permitted the use of prior recorded testimony where the defendant had caused the declarant to leave the jurisdiction, where the declarant had suffered a loss of memory by the time of trial, and where the declarant had permanently emigrated from the United States. In each case, the distinguishing element was

Harlan's approach advocates a limited version of the best evidence principle: The confrontation clause, he says, requires the "best" evidence whenever the choice is between live testimony under oath and subject to cross-examination on the one hand, and other less reliable forms of evidence on the other. That is very different, and more limited, than saying that the confrontation clause always requires the "best" evidence, regardless of the various forms in which evidence is presented. It remains to be decided, for example, whether the confrontation clause continues to require the "best" evidence when live testimony under oath and subject to cross-examination is not available, and when the choice, instead, is between two differing forms of hearsay evidence. The latter question was latent in *California v. Green*, 389 U.S. 149 (1970), where the witness, Porter, was unable to testify to the events in question and where his hearsay statements were introduced in two different forms — in the more reliable form of prior recorded testimony, and in the less reliable form of an oral statement to the police; however, having decided that Porter's hearsay statements could be introduced in some form under the confrontation clause, the Court did not have to decide whether the confrontation clause contained a preference for the evidence in the form of prior recorded testimony, because it remanded the case to the California Supreme Court to determine whether the oral statement was admissible. *But see* People v. Green, 3 Cal. 3d 981, 991, 479 P.2d 998, 1004, 92 Cal. Rptr. 494, 500 (holding the oral statement to be admissible although the same evidence had already been admitted in the more reliable form of prior recorded testimony), *cert. dismissed*, 404 U.S. 801 (1971). The confrontation clause can arguably be regarded as either a limited or a general version of the best evidence principle. Some courts take the latter view, holding that the state has a constitutional obligation to present real evidence at trial — and, therefore, to take steps to insure that it is available for trial — whenever its presence would enhance the reliability of direct testimony. *See* Blue v. State, 558 P.2d 636 (Alaska 1977); Lauderdale v. State, 548 P.2d 376 (Alaska 1976). *But see* People v. Triplett, 68 Mich. App. 531, 243 N.W.2d 665 (1976). The Supreme Court appears to lean the other way, holding that as between two forms of obtaining and preserving live testimony, the state has no constitutional obligation to preserve — and, thus, to present — the testimony in the form that would make it more reliable. *See* Manson v. Brathwaite, 432 U.S. 98 (1977), *discussed in* note 33 *supra*.

48. 146 U.S. 140, 151 (1892). *Mattox* was not actually decided on confrontation grounds at all, because it was the defendant, rather than the prosecution, who offered the dying declaration; but the Court has since treated *Mattox* in dictum as authority under the confrontation clause for the prosecution to use dying statements against the defendant. *See* Dutton v. Evans, 400 U.S. 74, 89 (1970); Pointer v. Texas, 380 U.S. 400, 407 (1965); Dowdell v. United States, 221 U.S. 325, 330 (1911); Robertson v. Baldwin, 165 U.S. 275, 282 (1897); *Mattox* v. United States, 156 U.S. 237, 243-44 (1895).


whether the hearsay statement was available in the better form of live testimony under oath.\textsuperscript{52}

\section*{C. The Analogy to Compulsory Process}

The confrontation clause is one of two provisions in the sixth amendment that deal with the production of witnesses. Its companion, the compulsory process clause, provides a defendant the right to have “compulsory process for producing witnesses in his favor.” The two clauses are conceptual twins. They both assist the accused in presenting a defense by enabling him to produce and examine witnesses on his behalf.\textsuperscript{53}

Significantly, the compulsory process clause does \textit{not} require a state to subpoena unavailable witnesses. Thus, a defendant has no right under the compulsory process clause to subpoena witnesses who are dead, or undiscoverable, or beyond the territorial reach of the subpoena power.\textsuperscript{54} The state is not a “guarantor”\textsuperscript{55} of their presence at trial. Rather, the most a defendant can demand is that the state use the subpoena power to produce such defense witnesses as are still available to testify at the time of trial.

The parallel here is obvious: Just as the state has no obligation under the compulsory process clause to produce witnesses who are unavailable to testify in person, so, too, it has no obligation under the confrontation clause to produce witnesses who are no longer available to give live testimony under oath.\textsuperscript{56}

\textsuperscript{52} The only exception to this rule is Dutton v. Evans, 400 U.S. 74 (1970), where a hearsay statement was held \textit{not} to violate the confrontation clause, even though the declarant was apparently available to testify in person. For the argument that Dutton is nonetheless consistent with Justice Harlan’s basic rule, see text accompanying notes 89-95 infra.

\textsuperscript{53} See generally Westen, supra note 5.

\textsuperscript{54} See Westen, supra note 5, at 536; Westen, supra note 51, at 228 n.129.

\textsuperscript{55} United States v. Hart, 546 F.2d 798, 799 (9th Cir. 1976) (en banc), cert. denied, 429 U.S. 1120 (1977). Admittedly, the absence of evidence, though no fault of the state, could conceivably be so crushing to a defendant that a fair trial would be impossible. If the evidence is indeed unavailable for production at trial, and if the state is indeed not responsible for its unavailability, the defendant has no constitutional claims against the state under the “witness” clauses of the sixth amendment. Nonetheless, if the absence of the evidence truly precludes a fair trial, the defendant may have a residual claim under the due process clause. See Lauderdale v. State, 548 P.2d 376, 381 (Alaska 1976) (absence of evidence, though not the fault of the state, denied the defendant a “fair trial” as a matter of “due process”); State v. Lewis, 137 N.J. Super. 167, 348 A.2d 225 (Law Div. 1975) (the absence of “vital” evidence, though not due to the bad faith or negligence of the state, denied the defendant a fair trial under due process).

\textsuperscript{56} There are, admittedly, some significant differences between the right of confrontation and the right of compulsory process, but they are differences that affect \textit{who} has
D. Jurisprudence of Due Process

This brings us to the second of the two constitutional standards governing the admissibility of the state’s evidence in criminal cases. One of the advantages of Justice Harlan’s theory is that just as the stricter standard coincides with the existing law of confrontation, so, too, the residual standard of reliability coincides with well-developed notions of due process. The best example is the line of cases on the admissibility of identification evidence. Beginning with *Stovall v. Denno* and culminating most recently in *Manson v. Brathwaite*, these cases all arise under the due process clause, and all involve the reliability of incriminating identification testimony. The problems of identification testimony are remarkably similar to the problems of hearsay testimony. Identification testimony is problematic because, while a witness can be effectively examined about whom he remembers seeing, the tenuous nature of his original observation (or the suggestive nature of a subsequent identification) makes it difficult to assess the truth of what he remembers. Hearsay testimony is problematic because, while a witness can be effectively examined about the words he heard, the absence of the declarant makes it impossible to assess the truth of what he heard.

The *Stovall-Manson* line of cases is significant for two reasons. First, it considers the same question as the hearsay cases: In both cases, the trial court must decide whether certain incriminating statements, which are not available in any more trustwor-

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57. 388 U.S. 293 (1967).
58. 432 U.S. 98 (1977). The cases fall into three categories: (1) cases in which the reliability of identification testimony is drawn into question because of the circumstances of the witness’s original observation, *e.g.*, Neil v. Biggers, 409 U.S. 188 (1972); (2) cases in which the reliability of identification testimony is drawn into question because of the supposedly suggestive nature of a prior identification, *e.g.*, Simmons v. United States, 390 U.S. 377 (1968); (3) cases in which the reliability of prior identification is drawn into question because of the suggestive nature of that very prior identification, *e.g.*, Stovall v. Denno, 388 U.S. 293 (1967).
thy form, are nonetheless sufficiently reliable to be admitted into
evidence. Second, this line of cases confirms that the constitu­
tional standard of admissibility is a minimal one. Thus, in
Simmons v. United States, the Court did not ask whether a
photo identification is as reliable as a line-up conducted in the
presence of a lawyer; rather, it simply asked whether the use of
photos was "so impermissibly suggestive as to give rise to a very
substantial likelihood of irreparable misidentification." The
same approach is followed in subsequent cases up to and includ­
ing Manson v. Brathwaite, all of which reflect a constitutional
presumption in favor of admitting incriminating evidence and
leaving its weight and credibility to the jury except in the most
egregious cases.

What does this mean for hearsay cases? It means that once
a declarant has been shown to be unavailable, the inquiry no
longer proceeds under the sixth amendment, but rather under the
due process clause. And the due process standard is a minimal
one. The question is not whether hearsay is as reliable as live
testimony under oath, but rather whether it possesses (in the
words of Dutton) sufficient "indicia of reliability" to justify
"placing" it "before the jury." The question (in the words of

60. 390 U.S. at 384.
61. In the decade since Stovall was decided, the Court has only once reversed a
conviction on the ground that identification testimony was too unreliable to satisfy the
minimum standards of the due process clause, and then by a sharply divided court. Foster
v. California, 394 U.S. 440, 443 (1969) (holding 5 to 4 that a pretrial identification "so
undermined the reliability of the eye witness identification as to violate due process"). A
study of Stovall as applied in the lower courts has led one commentator to conclude that
identification testimony will not be deemed to violate due process "except in outrageous
situations." Note, Pretrial Identification Procedures — Wade to Gilbert to Stovall: Lower
Courts Bobble the Ball, 55 MINN. L. REV. 779, 818 (1971). In its most recent statement on
the issue, the Court emphasized the wisdom of resolving doubts in favor of leaving evi­
dence to "the jury to weigh":
Surely, we cannot say that under all the circumstances of this case there is "a
very substantial likelihood of irreparable misidentification." Short of that point,
such evidence is for the jury to weigh. We are content to rely upon the good sense
and judgment of American juries, for evidence with some element of untrustwor­
theness is customary grist for the jury mill. Juries are not so susceptible that they
cannot measure intelligently the weight of identification testimony that has some
questionable feature.
62. Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion). Significantly, this is
the identical language the Court uses to describe the due process standards governing the
nan, J., concurring and dissenting) ("indicia of reliability"). See also Manson v. Brath­
waite, 432 U.S. 98, 106, 112 (1977) ("aspects of reliability").
63. Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion). Commentators have
Green) is whether the hearsay statement is such as to "afford the trier of fact a satisfactory basis for evaluating [its] truth." Moreover, in making that determination, one proceeds under a presumption in favor of admitting evidence, trusting the jury to evaluate evidence for its appropriate weight and credibility, except regarding the most tendentious and inherently dubious evidence.

E. Summary

Under Justice Harlan's theory, the due process clause provides a baseline of minimum protection against unreliable evidence: It prohibits the prosecution from introducing evidence that is too unreliable to be rationally evaluated by the trier of fact. Above and beyond that, the confrontation clause provides additional protection when evidence exists in several forms of varying reliability, by requiring that the prosecution resort to the more reliable form wherever possible. Together, the two clauses ensure that a defendant will never be convicted on the basis of evidence that lacks minimum indicia of reliability, and that where evidence exists in both written and oral form, the prosecution will present it in the better form of live testimony under oath and subject to cross-examination.

The typical response to Justice Harlan's theory is that it does not sufficiently protect defendants, and that it departs too much from the "literal" requirements of the confrontation clause. The sixth amendment, so the argument goes, is strict and uncompro-lined.
mising: it requires that the "accused" shall be "confronted" with the "witnesses against him." Taken literally, this means that the prosecution must produce every declarant whose statements are introduced against the accused, regardless of whether the declarant can be produced in person. Admittedly, it may be difficult to comply with the "literal" meaning of the clause; but, the argument continues, the courts should strive as much as possible to do so and should limit their departures from the strict requirement of confrontation to cases of "necessity." 66

The foregoing argument is fundamentally misconceived. It begs the very question at issue: It makes a threshold assumption about the meaning of the phrase "witnesses against him." It assumes that by "witnesses against" the accused, the sixth amendment means all persons — whether available or not — who make statements that incriminate the accused. Yet that assumption not only begs the very question in dispute, it is textually implausible. It gives the term "witnesses" an entirely different meaning in the confrontation clause than it has in the compulsory process clause. Remember, the confrontation clause is only one of two "witness" clauses in the sixth amendment. Just as the defendant has a right to be confronted with the "witnesses" against him, he has a correlative right to produce "witnesses" in his favor. Yet by "witnesses" in his favor, the sixth amendment does not mean all persons — whether available or not — who have made statements exculpating the accused, it means only those exculpatory witnesses who are available to be produced in person, or who, if unavailable, are unavailable through fault of the state. 67

What does all of this mean for the argument for a "literal" construction of the confrontation clause? It means that the argument has everything backwards. The argument makes the unstated and unjustified assumption that "witnesses" against the accused includes persons who, through no fault of the state, are entirely unavailable to testify in person. Having made that assumption, the argument then concludes that it is not practicable — and perhaps not even desirable — to give confrontation its literal meaning, though it remains something toward which to strive. In fact, it is much more reasonable to assume that "witnesses" against the accused means the same thing as "witnesses" in his favor: persons who are still available to be produced in person. If that is what "witnesses" against the accused literally

67. See text at note 54 supra.
means, it then becomes both possible and natural to give the confrontation clause its "literal" meaning. In short, if the words of the confrontation clause cannot be taken literally, it is only because the words have been given an untenable meaning; if the words are sensibly understood, they can and should be taken literally.

The standard riposte is also based on a second misconception. It assumes that although the due process standard — the "indicia-of-reliability" test — is adequate for some kinds of prosecutorial evidence, it is inadequate for hearsay evidence. The due process test is inadequate, so the argument goes, because it is insufficiently rigorous; it will admit evidence that, though perhaps sufficiently "trustworthy" to be evaluated, rationally is not sufficiently reliable to protect defendants against false conviction. To give defendants the evidentiary protection they need, a more rigorous test is required.68

The trouble with that argument is its failure to explain why hearsay evidence is categorically different from other kinds of prosecutorial evidence. Hearsay, after all, is not the only kind of evidence that can be challenged for lack of trustworthiness.69 The same can occur with real evidence, eyewitness identification, and other kinds of testimonial evidence. Yet no one contends that the due process standard is inadequate for those kinds of evidence; rather, such evidence is considered acceptable if it possesses sufficient "indicia of reliability" to be evaluated rationally by a jury for its appropriate weight.

True, hearsay evidence has its own distinctive reasons for being problematic. But that is no justification for holding it to a different test of admissibility; at best it is an argument for taking its distinctive features into account in applying the test. The same is also true of eyewitness testimony. Eyewitness testimony


69. This is not to say that there is no room in the Constitution for a requirement of some measure of evidentiary reliability. But this requirement should be enforced through the due process clause, not the confrontation clause. . . . [H]earsay problems are not the only ones that arise in connection with criminal trial evidence. The potential for admitting worthless evidence is as broad as the range of facts that may be presented in a courtroom, either through testimonial or real proof. The confrontation clause, even if given the widest interpretation possible under Pointer, protects only against weaknesses in testimony that arise for want of cross-examination. Moreover, if there exists this basic and extensive concern with minimal reliability, it should not be confined to criminal cases as it would be under the confrontation clause. Only due process is pervasive enough to reach the evil. Hearsay Rule, supra note 11, at 1498.
is problematic for reasons of its own; but that is an argument not for rejecting the due process test of Stovall, but for applying it with discrimination. In short, if a particular item of hearsay evidence possesses sufficient "indicia of reliability" to be evaluated rationally — that is, if it satisfies the test that governs every other kind of evidence — it should not be kept from the jury simply because it is hearsay.

The best analogy here is to the constitutional standard governing the use of hearsay evidence in other stages of the criminal trial. The prosecution is not the only party who possesses an interest in offering hearsay evidence; the defendant, too, may wish to offer such evidence. When a defendant seeks to introduce hearsay evidence in the face of a state rule to the contrary, he must show that the evidence is sufficiently reliable by constitutional standards to justify overriding state rules of evidence. Not surprisingly, in articulating the applicable tests, the Supreme Court speaks in the language of due process: the defendant, it says, must show that the evidence is introduced under circumstances that provide "considerable assurance of [its] reliability." The analogy here is obvious: if the indicia-of-reliability standard is an adequate test of hearsay evidence when offered by the defendant in conflict with state rules of evidence, it should be adequate to test hearsay evidence when offered by the prosecution in accord with state rules of evidence.

IV. JUSTICE HARLAN'S SUBSEQUENT DOUBTS

One stumbling block remains, one that has thus far prevented Justice Harlan's opinion in Green from receiving the attention it deserves. The principal obstacle to a wider acceptance of Justice Harlan's approach is that he personally repudiated

70. Chambers v. Mississippi, 410 U.S. 284, 300 (1973). See also 410 U.S. at 302 (the evidence must possess "persuasive assurances of trustworthiness"). While the declarant in Chambers was available to be cross-examined about the truth of his out-of-court statement, the Court has since applied the Chambers rationale when the declarant was not available to be cross-examined. See Green v. Georgia, 99 S. Ct. 2130 (1979) (per curiam).

71. The Court has implied that there is a reciprocal relationship between hearsay evidence that is sufficiently "reliable" to be offered in evidence against the accused and hearsay evidence that is sufficiently reliable to be constitutionally made admissible in his favor. See Green v. Georgia, 99 S. Ct. 2150, 2152 (1979) (per curiam) ("Perhaps most important, the State considered the [hearsay evidence] sufficiently reliable to use it against [a co-defendant], and to base a sentence of death upon it"). See Westen, supra note 5, at 627 n.167.

72. Remarkably, many courts and commentators have adopted Justice Harlan's theory in Green despite his Dutton recantation. See, e.g., United States ex rel. Thomas
the theory shortly after announcing it. As he candidly confessed in *Dutton v. Evans*, he became "convinced" that "the position" he took in *Green* was "wrong" because it would attribute to the confrontation clause "a task for which it is not suited." Before applying Justice Harlan's theory to *Ohio v. Roberts*, therefore, we must decide whether the theory can survive retraction by its author.

Justice Harlan's specific objection to his position in *Green* was that it would impose an excessive burden of production on the state: That is, if the confrontation clause requires the state to produce all "witnesses against" a defendant, and if "witnesses against" a defendant include all available witnesses, then the confrontation clause would require the state to produce every hearsay declarant in person, even where producing the declarant would be "difficult, unavailing, or pointless." Yet "reasonable men" would have to agree that producing a declarant is so "inconvenient" to the state and such "small utility to a defendant" that the prosecution should be allowed to use his out-of-court statements without producing him. The examples that "come to mind" are business records and the common excep-

v. Cuyler, 548 F.2d 460, 463 (3d Cir. 1977) ("We are constrained to adopt the view enunciated by Justice Harlan in his concurring opinion in *California v. Green*"); United States v. Payne, 492 F.2d 449, 454 (4th Cir.), cert. denied, 419 U.S. 876 (1974); People v. Pepper, 568 P.2d 446, 448-49 (Colo. 1977) ("Several courts have followed Justice Harlan's lead. . . . We adopt this view"). Also, a number of commentators have adopted Justice Harlan's view, either by wholly adopting it as their own or by making minor variations to it. See, e.g., Baker, supra note 4, at 554; Graham, *Forgetful Witness*, supra note 4, at 183, 195-96; Note, supra note 15, at 795; Comment, supra note 4, at 1206-07. Professor Irving Younger makes an explicit plea for the adoption of Justice Harlan's view:

[T]he Supreme Court has thus far failed to work out a coherent theory of the relationship between confrontation and hearsay. . . . A coherent theory . . . should afford the accused adequate protection against the possibility of conviction by affidavit or gossip and simultaneously preserve whatever logic and flexibility have been achieved over the centuries of development of the hearsay rule. With due diffidence, one suggests that Justice Harlan's concurring opinion in *Green* is the place to begin.

Younger, supra note 11, at 41-42 (emphasis added). For an original and penetrating precursor to Justice Harlan's theory, see *Hearsay Rule*, supra note 11. For the modifications that Baker and Michael Graham make to Justice Harlan's theory, see note 88 infra.

73. 400 U.S. 74 (1970).
74. 400 U.S. at 94, 95 (Harlan, J., concurring).
75. 400 U.S. at 96.
76. 400 U.S. at 96.
77. 400 U.S. at 96.
78. 400 U.S. at 96.
79. 400 U.S. at 96.
80. 400 U.S. at 96.
tions to the hearsay rule for "official statements, learned treatises, and trade reports." According to Justice Harlan, unless the confrontation clause is to stand in the way of "enlightened development in the law of evidence," it cannot truly be a strict rule of preference.

Justice Harlan should be praised for his willingness to reexamine his previous opinions and for his candor in confessing error, qualities that distinguished his remarkable judicial craft. In this case, however, his retraction was precipitous and resulted, I believe, from an understandable failure to recognize the interlocking relationship between the confrontation clause and its sixth amendment companion, the compulsory process clause. At the time of Dutton and Green, the law of compulsory process was largely undeveloped, and its relationship to confrontation was virtually unexplored. In that light, Justice Harlan could understandably assume that the state's obligation (if any) to produce witnesses was entirely a matter of confrontation. Since then it has become more obvious that the confrontation and compulsory process clauses both operate to enable the accused to produce witnesses in his defense, and that the scope of the confrontation clause is largely defined by its relationship to compulsory process.

The key to the relationship between confrontation and compulsory process is the recognition that both enable a defendant to produce and examine witnesses in his defense. This point can be illustrated by example. Assume that as part of its case against an accused, the prosecution wishes to use the hearsay statement of a witness who is available to testify in person. The defendant in that event has two constitutional mechanisms by which he can examine the declarant about the truth of the hearsay statement. On the one hand, he can assert his right of confrontation by insisting that the prosecution (a) produce the declarant as part of its case, (b) elicit the statement from him directly, and (c) tender the witness for cross-examination. Alternatively, the de-

81. 400 U.S. at 95.
82. 400 U.S. at 95.
83. This was not the first time that Justice Harlan repudiated an earlier position. See Reid v. Covert, 354 U.S. 1, 65 (1957) (Harlan, J., concurring), in which Justice Harlan repudiated an earlier position he had taken in the same case (Reid v. Covert, 351 U.S. 487 (1956)) that he "now" considered "not sound." This candor of Justice Harlan's in confessing an error impresses judges and scholars alike. See D. Shapiro, The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan 253 (1969); Friendly, Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court, 85 Harv. L. Rev. 362, 384 n.9 (1971).
fendant can invoke his right of compulsory process, demanding
that the government produce the declarant and make him avail­
able for direct examination as part of the defendant's case-in­
chief. In either event, each of the two "witness" clauses suffices
by itself to enable the defendant to produce and examine the
declarant for evidence in his defense. 84

To determine whether a particular declarant is someone
whom the prosecution must produce as part of its case (confronta­
tion), or someone whom the accused is left to produce as part of
his defense (compulsory process), one must understand why it
makes a difference. One difference is that when the prosecution
confronts a defendant with a witness, it relieves the defendant of
the burden of identifying the witness and initiating his produc­
tion. Another more important difference is that when the prose­
cution confronts the defendant with a witness, it alters the order
of proof by giving the defendant a right to cross-examine the
declarant about the hearsay statement at a time when the state­
ment is fresh in the jury's mind (rather than forcing the defen­
dant to wait until he can call and examine the declarant as a
witness for the defense). 85 Significantly, however, both policies
presuppose that the declarant is someone whom the defendant
actually wishes to examine: both policies are entirely irrelevant
otherwise.

Now that we have identified the policies that determine
whether a hearsay declarant should be produced by the mecha­
nism of confrontation (as opposed to that of compulsory process),
we are in a position to formulate the distinction between a witness
against a defendant and a witness in his favor, and thus the
relationship between confrontation and compulsory process:

(i) Witnesses Against Him: A witness "against" a defendant
is any person who is available to testify in person (or who, if una­
vailable, is unavailable through fault of the state) whose state­
ments the prosecution introduces into evidence against the ac­

84. Although it is sometimes mistakenly assumed that the right of "compulsory
process" is merely the right to enlist the aid of the state in securing the attendance
of witnesses for the defense, the Supreme Court has made it clear that it also includes
the right of a defendant to place witnesses on the witness stand and examine them for

85. See Westen, Order of Proof: An Accused's Right to Control the Timing and
Sequence of Evidence in His Defense, 66 CALIF. L. REV. 935, 980-85 (1978). See also The
Supreme Court, 1970 Term, supra note 4, at 196.
cused and whom the prosecution can reasonably expect the defendant to wish to cross-examine at that time.\textsuperscript{86}

(ii) Witnesses In His Favor: A witness in a defendant's "favor" is any remaining person who is available to testify in person (or who, if unavailable, is unavailable through fault of the state) whose statements the defendant wishes to introduce into evidence, including persons whom the defendant is not reasonably expected to wish to cross-examine at the time the prosecution presents its evidence.\textsuperscript{87}

This distinction is consistent with Justice Harlan's perception in \textit{Green} that the confrontation clause is a rule of preference; yet, at the same time, it also limits the preference in a way that is consistent with his subsequent misgivings in \textit{Dutton} and with the policies underlying the distinction between confrontation and compulsory process.\textsuperscript{88}

\textsuperscript{86} The key word in this proposed rule is "reasonably," because it defines when the burden of producing evidence shifts from the prosecution (\textit{i.e.}, confrontation) to the defense (\textit{i.e.}, compulsory process). This bears emphasis, because it is a useful reminder that confrontation and compulsory process — both being obligations of the state to produce witnesses for the defense — are distinguished from one another solely by the party bearing the burden of initiating production of witnesses. The key to the distinction between them, therefore, as well as to the scope of each right, is the point at which the burden of producing witnesses shifts from the prosecution to the defendant. Absent more case law in this area, it is fair to assume that the burden shifts from the prosecution to the defendant when a witness is no longer one whom the prosecution \textit{reasonably} expects the defendant to wish to examine. Theoretically, of course, one could alter the standard and, thus, either increase or decrease the scope of confrontation. Thus, one could require the prosecution to produce all available witnesses whose statements it uses against the accused, unless it is certain that the defendant \textit{does not} wish to examine the witness. Alternatively, one could relieve the prosecution of the burden of producing such witnesses, unless it is certain that the defendant \textit{does} wish to examine them. These variations shift the burden of coming forward with evidence; the purpose of adopting one variation or another depends upon the relative value of placing the burden on the prosecution (confrontation) as opposed to the defense (compulsory process).

\textsuperscript{87} Assume that a declarant is not someone whom the defendant is reasonably expected to wish to examine and, therefore, is not a witness "against" the defendant within the meaning of the sixth amendment. The defendant nonetheless retains the right to produce and examine the declarant by the mechanism of compulsory process, provided, of course, that the witness is either available or, if unavailable, is unavailable through fault of the state. In most cases, however, it will be difficult (if not impossible) for a defendant to demonstrate that an unavailable witness whom the defendant could not have reasonably been expected to examine is unavailable through the fault of the state. The reason for this is that the very factors that would make it unreasonable for the prosecutor to believe that the defendant would wish to examine the declarant are in most cases factors that relieve the prosecutor of any responsibility under the compulsory process clause to guarantee the availability of the declarant.

\textsuperscript{88} Michael Graham and Baker each accept Justice Harlan's theory, while making minor adjustments to accommodate Justice Harlan's subsequent misgivings in \textit{Dutton}. Baker agrees that a "witness against" the accused means a person who is available to be produced in open court, but adds that the prosecution has no obligation to produce such
This distinction is also consistent with the Court’s decision in Dutton. The trial court in Dutton admitted the incriminating statement of a declarant who had not been shown to be unavailable. Significantly, however, the plurality based its affirmance on the finding that it was “remote,”98 perhaps even “inconceivable,”99 that the defendant would benefit from being able to cross-examine the declarant about the truth of his statement. If the plurality was correct in this finding, the prosecution’s use of the hearsay statement in Dutton was similar to the “enlightened” practice of introducing business records and learned treatises without producing the declarant in person.91 Neither practice violates the confrontation clause, because if, in fact, the defendant does not wish to examine the declarant about the

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90. 400 U.S. at 88 (plurality opinion).
91. 400 U.S. at 95, 96 (Harlan, J., concurring).
truth of his statements, no sixth amendment purpose is served by compelling the prosecution to produce the declarant; if, on the other hand, the defendant unexpectedly does wish to examine the declarant, he can always produce and examine the declarant by the mechanism of compulsory process.\footnote{92}

\textit{Dutton}, then, was not a confrontation case after all. True, the declarant in \textit{Dutton} was apparently available to give his evidence in the form of live testimony under oath, and the prosecution ordinarily does have an obligation to produce the available witnesses whose statements it uses against the accused. But the prosecution has that obligation only because it is ordinarily assumed that the defendant \textit{would wish} to examine the declarant about his out-of-court statement. If a defendant cannot reasonably be expected to wish to examine the declarant — if it would be pointless to require the prosecution to produce the declarant on its own initiative — the prosecution has no obligation to do so. Instead, the burden of initiating the production of the witness shifts to the defendant, who retains the right to produce and examine the witness by the correlative mechanism of compulsory process. The defendant in \textit{Dutton} could have exercised the latter option, but chose not to.\footnote{93}

\footnote{92. For a further elaboration of this thesis, see Westen, \textit{supra} note 5, at 613-24. This explains why the prosecution need not produce the declarant in nonhearsay cases, where out-of-court statements are not being introduced for their truth. Since the prosecutor is not introducing such statements for their truth, he can reasonably conclude that the defendant would not wish to examine the declarant about them. See, \textit{e.g.}, \textit{Anderson v. United States}, 417 U.S. 211, 219-20 (1974); \textit{Salinger v. United States}, 272 U.S. 542, 547 (1926). If, unexpectedly, the defendant \textit{does} wish to examine the declarant about his out-of-court statement, the defendant is free to produce the declarant and the witness for the defense.

This principle also explains the business-records cases. \textit{Cf. Dowdell v. United States}, 221 U.S. 326 (1911) (an appellate court, consistently with the confrontation clause, may take evidence consisting of a certified record of trial-court proceedings without producing the clerk of the court in person). The prosecution is not required to produce the author of business records, because ordinarily the prosecutor can reasonably assume that the defendant would not wish to examine the author of the records in person. See \textit{Griswold}, \textit{supra} note 4, at 726 (the business-records rule can be defended on the ground that it only shifts from the prosecution to the defense “the burden of going forward”). To be sure, some business records contain evaluative statements that the defendant can reasonably be expected to wish to examine; in that event, the confrontation clause would require the prosecution to produce the maker of the records in person. See \textit{State v. Monroe}, 345 So. 2d 1185 (La. 1977), \textit{noted in Confrontation Guaranty}, \textit{supra} note 4; \textit{Note}, 43 Mo. L. Rev. 763 (1978). In each case, when a court passes upon the validity of a hearsay exception which allows the prosecutor to introduce a hearsay statement without regard to the availability of the declarant, it is not enough to ask whether the exception is generally valid on its face; rather, the court must determine whether the exception is valid as \textit{applied} in the instant case.

\footnote{93. 400 U.S. at 88 n.19 (plurality opinion). Arguably, the declarant in \textit{Dutton} was
In sum, *Dutton* was not a sixth amendment case at all, because it did not involve either of the state’s two obligations under the sixth amendment to produce witnesses for the defense. The prosecution had no obligation under the confrontation clause to produce the declarant as part of its own case-in-chief, because the declarant was not someone whom the defendant could reasonably be expected to wish to examine; similarly, the state had no obligation under the compulsory process clause to produce the declarant for use in the defendant’s case, because the defendant did not request that he be produced. Once the sixth amendment drops away, the only remaining question is whether the hearsay statement in *Dutton* was too unreliable to satisfy the minimum standards of due process. The plurality implicitly answered the question by finding that the statement possessed sufficient “indicia of reliability” to justify “plac[ing]” it “before the jury.” Ultimately, therefore, *Dutton* was purely a due process case, one that the Court implicitly resolved in accord with the presumption for admitting evidence and leaving its weight and credibility to the jury.

V. THE THEORY APPLIED: OHIO v. ROBERTS

*Ohio v. Roberts* is a perfect illustration of why Justice Harlan’s approach is so useful. *Roberts* presents a question that is difficult and perplexing under conventional confrontation theory, but becomes easy under Justice Harlan’s approach.

The facts in *Roberts* are simple. The defendant was charged with having received credit cards and other objects stolen from Bernard Isaacs. At his preliminary hearing, the defendant called Anita Isaacs, Bernard’s daughter, as a witness in his behalf. She

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94. 400 U.S. at 89 (plurality opinion).
95. See note 63 *supra*. 

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actually unavailable, because he was someone who could reasonably have been expected to assert his privilege against self-incrimination if called as a witness for the prosecution. See 400 U.S. at 102 n.4 (Marshall, J., dissenting). But see 400 U.S. at 101 n.2 (Marshall, J., dissenting). On the question whether the state has an obligation to make such witnesses “available” by granting them use immunity, see Comment, *supra* note 4, at 1193-206. See also Note, *The Sixth Amendment Right To Have Use Immunity Granted To Defense Witnesses*, 91 HARV. L. REV. 1266 (1978); Note, “The Public Has a Claim to Every Man’s Evidence”: The Defendant’s Constitutional Right to Witness Immunity, 30 STAN. L. REV. 1211 (1978). If the declarant in *Dutton* was not available, *Dutton* could never have been a sixth amendment case, because the prosecution has no obligation to confront a defendant with unavailable witnesses and a defendant has no right to demand compulsory process for such witnesses. In that event, *Dutton* could have been identified as a due process case from the outset, whether or not the declarant was someone whom the defendant could reasonably have been expected to wish to examine.
testified that she had allowed the defendant and his girlfriend to use her apartment while she was away, but she denied ever having given the defendant her father's credit cards. The defendant did not seek to cross-examine Anita Isaacs about the damaging portions of her testimony. As the trial approached, the prosecution discovered that she had disappeared from the state and that despite its repeated efforts, she could not be located. Unable to produce her in person, the prosecution offered a transcript of her prior recorded testimony. The trial court admitted the hearsay evidence over the defendant's objection, and he was convicted. Subsequently he appealed, arguing that use of the prior recorded testimony violated his sixth amendment right of confrontation.

It is not surprising that the state courts were divided in *Roberts.* The case is truly difficult to resolve under conventional theories of confrontation. It is generally assumed that prior testimony from a preliminary hearing that has been recorded and cross-examined may be used at trial without violating a defendant's right of confrontation, presumably on the theory that the earlier cross-examination is substantially equivalent to cross-examination at trial. Yet even that rule is difficult to square with conventional theory, because cross-examination at a preliminary hearing is not as "searching" as cross-examination at trial, and, even if it were, it comes to the trial jury in a form that precludes the jury from evaluating the witness's demeanor. The problem becomes still more difficult when, as in *Roberts,* the defendant has an opportunity to cross-examine at the preliminary hearing, but does not exercise it. One must then decide whether the opportunity for cross-examination should be considered substantially equivalent to actual cross-examination. Unfortunately, conventional theory provides no easy answer to that question, nor does it even identify the standard by which an answer may be had.

Justice Harlan cuts through these problems by making it unnecessary to answer them. The confrontation clause is not a "guarantor" of cross-examination (or of its substantial equiva-
lent); it is a “preferential rule,” requiring the prosecution to make a “good-faith effort” to produce the witnesses whose statements it uses against the accused. The prosecution fully satisfied that obligation in Roberts. It made a “good-faith effort” to produce Anita Isaacs in person, and was not responsible for her being unavailable. When the prosecution then resorted to her prior recorded testimony, it did so because her statements were not available in any more reliable form. The prosecution had no obligation to produce her because, being unavailable to testify in person, she was not a “witness against” the defendant within the meaning of the confrontation clause.

The real question in Roberts, therefore, is whether the prior recorded testimony was so inherently unreliable as to violate the due process clause. In the words of the plurality in Dutton, the question is whether the prior recorded testimony possessed sufficient “indicia of reliability” to justify “plac[ing] it “before the jury.” The answer involves two steps. The first step is to identify the “indicia” in Roberts that render the statement reliable. They are several: (1) The witness, Anita Isaacs, testified under oath; (2) she testified in the presence of a judge; (3) she testified in an open courtroom under the eyes of the public; (4) she testified in the defendant’s presence; (5) she testified as a witness for the defense; (6) her testimony was transcribed verbatim so no mistake in transmission could occur; (7) she testified under circumstances in which she could have expected to have been cross-examined; and (8) the defendant allowed her testimony to go largely unchallenged.

The second step is to recognize the presumption in favor of admitting testimony and of leaving its weight and credibility to the jury. This is particularly important here, because the issues

102. The Ohio Supreme Court held that the prosecution had sustained its burden of showing that Anita Isaacs was unavailable to testify in person. She had left the state of Ohio, and her whereabouts were unknown; between November 1975 and February 1976, the trial court issued five subpoenas to Anita Isaacs at her parents’ address; the last three subpoenas instructed her to “’call before appearing’”; she never responded or gave notice of her whereabouts; her parents had not heard from her for over a year before the trial commenced. This should all be sufficient to satisfy the “good-faith” requirement of Barber. For an analysis of that standard, see Westen, supra note 51, at 276-88.
103. Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion). As previously noted, this is the same standard the Court uses when it decides cases explicitly under the due process clause. See note 63 supra.
104. 400 U.S. at 89.
105. For a description of this presumption, see note 61 supra.
the defendant wishes to raise regarding Anita Isaacs's testimony are ones that he could bring to the jury's attention at trial, and that the judge could comment upon in instructing the jury. Thus, consider the defendant's failure to challenge Anita Isaac's testimony at the preliminary examination. His silence can be interpreted in two different ways — either that he could not challenge her testimony successfully, or that he chose not to challenge it for tactical reasons. If the former is true, the defendant suffers no detriment from his inability to cross-examine Anita Isaacs at trial. If the latter is the case, he remains free at trial to bring that consideration to the jury's attention so that it does not give the evidence undue weight. In other words, the problematic nature of evidence is not by itself sufficient reason for keeping it from the jury, because the very fact that it is problematic is something that a jury can take into account.106

Everything considered, the hearsay statements in Roberts were more than reliable enough to satisfy the minimum standards of due process. Perhaps the closest analogy is to the willingness of the courts to receive prior grand jury testimony into evidence when the witness is no longer available to testify at trial. Although some courts disagree, the prevailing rule seems to be that grand jury testimony is admissible.107 In allowing such evidence, the courts emphasize that statements are delivered under oath, are recorded, and are given in the presence of disinterested persons. Obviously, if grand jury testimony is admissible, the testimony in Roberts must be admissible, too, because the evidence in Roberts was given not in the secrecy of a grand jury chamber but in an open courtroom, in the presence of the defendant, and under circumstances in which the witness could have expected to have been cross-examined about them.

A still better analogy is the line of Supreme Court cases that arose before the confrontation clause was made applicable to the states. These cases are directly on point because, having held the confrontation clause to be inapplicable, the Court was left to decide whether the hearsay statements were so "inherently untrustworthy"108 as to violate minimum standards of due process. The identical question arises in Roberts because once it appears

106. See Dutton v. Evans, 400 U.S. 74, 88 (1970) (plurality opinion) ("the statement . . . carried on its face a warning to the jury against giving the statement undue weight").
that the rule of preference was complied with and the confrontation clause thus satisfied, the Court will be left to decide whether the hearsay statements are sufficiently reliable to pass muster under the due process clause. Significantly, in its entire history, the Supreme Court has never once encountered a hearsay statement that was so “inherently untrustworthy” as to violate due process. Perhaps it came the closest in Stein v. New York. 109 The defendant in Stein was convicted on the basis of a hearsay statement which his alleged accomplice had given the police after twelve hours of intensive custodial interrogation, interrogation that three members of the Court considered unconstitutionally coercive. Yet the Court found even that hearsay statement to be trustworthy. 110 If the questionable evidence in Stein was reliable enough to clear the hurdle of due process, the evidence in Roberts clears it by a mile. 111

VI. CONCLUSION

The Supreme Court cannot easily be rushed. If it feels it is still not ready to clarify the relationship between hearsay and confrontation, it will find a way to dispose of Roberts narrowly, perhaps on the ground that the defendant’s direct examination of Anita Isaacs was comparable to the cross-examination in Green. 112 If it takes that route, however, it will have added noth-

110. 346 U.S. at 194-96.
111. See, e.g., Poe v. Turner, 490 F.2d 329 (10th Cir. 1974) (prior recorded testimony that the defendant could have but did not cross-examine at the earlier trial is admissible against him at a subsequent trial if the declarant is unavailable to testify in person); Howard v. Sigler, 454 F.2d 115 (8th Cir. 1972) (same), cert. denied, 409 U.S. 854 (1972); People v. Allen, 56 Ill. 2d 536, 309 N.E.2d 544 (1974) (same), cert. denied, 419 U.S. 865 (1974).
112. The record shows that the defendant challenged Anita Issacs on only two of her responses — (1) that she did not give her father’s credit cards to the defendant, and (2) that she did not want to purchase the defendant’s television set (her motive, presumably, for giving him the credit cards). App. at 21. The challenges consisted altogether of three impeaching questions, questions which could not have required any more than 60 seconds to be asked and answered. When one considers that the defendant’s entire defense at trial depended on his being able to discredit Anita Issacs’s testimony, and on his being able to show that she did give him her parent’s credit cards and that she did it in payment for his color television set, one can hardly believe that his tender prodding at the preliminary hearing replaced the kind of cross-examination he would have conducted at trial. It did not serve the defendant’s interest to explore the issue of motive in any detail at the preliminary hearing, because he could not make his version of Anita Issacs’s motive believable without himself taking the witness stand and testifying at the preliminary hearing, something he did not wish to do until trial.

Nevertheless, even if the Court concludes that the direct examination at the prelimi-
ing to the existing jurisprudence of confrontation, and will have decided the case on idiosyncratic facts that are unlikely ever to recur. It also will have bypassed a valuable opportunity to break its ten-year silence and to resolve the “uncertainty,” “anarchy,” and “confusion” that plagues this area of the law.

These problems warrant the Court’s attention, for they go to the core of the way criminal cases are tried. What are the prosecution’s constitutional obligations regarding a witness who is available to give live testimony? Does the prosecution have an obligation to produce him in person before using his out-of-court statements against the accused? What if a witness is not available and the state is not at fault for his being unavailable? Does the prosecution then have a right to resort to his out-of-court statements?

nary hearing in Roberts was substantially equivalent to cross-examination at trial, the Court is still free to decide the case on the broader grounds of Justice Harlan’s opinion in Green. The Court ordinarily decides constitutional cases on the narrowest ground possible because, ordinarily, the Court serves the judicial function best by deciding only what it must. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1935) (Brandeis, J., concurring). There are cases, however, in which proper performance of the Court’s judicial function requires that it provide guidance through the pronouncement of a general rule; in that event, the Court is justified — even advised — to depart from the Ashwander maxim, because the policies underlying the maxim are outweighed by the policy of providing general superintendence. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963), discussed in Kaminar, Book Review, 78 Harv. L. Rev., 478, 481-82 (1964); Erie R.R. v. Tompkins, 304 U.S. 64 (1938), discussed in Friendly, In Praise of Erie — and the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 384-91 (1964); Marbury v. Madison, 5 U.S. (1 Cranch) 153 (1803), discussed in Van Alstyne, A Critical Guide to Marbury v. Madison, 69 Duke L.J. 1 (1969). The most recent example of this practice of deciding a case on a broader ground than absolutely necessary is Arkansas v. Sanders, 99 S. Ct. 2586 (1979). Compare 99 S. Ct. at 2589 with 99 S. Ct. at 2594-95 (Burger, C.J., concurring). A more striking example from the area of confrontation is California v. Green, 399 U.S. 149, 153-64 (1970), where the Court announced a general rule governing the use of prior statements of witnesses who are willing and able to testify about it at trial, even though the general issue was not presented by the particular facts of Green. See 399 U.S. at 192 n.5 (Brennan, J., dissenting).

113. Only in the rarest case does a venturesome defendant call his own witnesses at a preliminary hearing. Indeed, trial tacticians advise defendants never to do so: “Counsel should never present defense testimony at a preliminary examination unless there is the strongest likelihood that the defendant will be discharged after it is presented. This is a very rare case.” A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 142, at 1-12 (3d ed. 1977) (emphasis added) (citation omitted). If a defendant does call witnesses of his own, he will “ordinarily” be limited to asking “non-leading questions,” because presiding magistrates allow defendants to cross-examine their own witnesses “only very infrequently.” Id. § 141, at 1-131 to 1-132.

114. Comment, supra note 4, at 1189. For criticism of the plurality opinion in Dutton and its confusing effect upon the law, see the authorities cited in note 4 supra.

115. Davenport, supra note 4, at 1281.

What if a hearsay statement is admitted in the absence of a declarant? What is the constitutional standard for evaluating its admissibility? These questions are potentially present in every major criminal case. They have been simmering for over a decade, and will persist until the Court provides the kind of constitutional “guidance” it alone can supply.

Sometimes, to be sure, the Court is able to bide its time in a neutral manner. In this case, however, its continued silence has a biased effect. Prosecutors, being reluctant to jeopardize valid convictions by making risky offers of proof, refrain from introducing even quite reliable hearsay evidence; trial judges, being unable to obtain interlocutory rulings on such offers of proof (and being risk-averse), exclude such evidence when offered, for fear of being reversed on appeal. Thus, the Court’s continued silence engenders “uncertainty,” and uncertainty has the practical effect of skewing the law against the prosecution. The Court may choose to “avoid” the issues presented in Roberts, but avoid-

117. “[T]he Court has as yet evolved no consistent theory which explains the result of its decisions and offers guidance to lower courts encountering fresh problems.” Graham, supra note 11, at 125 (emphasis added). Thus, some commentators have been saying for years that “[t]he time has come for the Court to articulate a theory which will provide clear and consistent guidelines for state courts and legislatures.” Uncertain Standard, supra note 4, at 599 (emphasis added). Justices Marshall and Stewart have criticized the Court for leaving the lower courts to “struggle[e] with the problem of the admissibility of hearsay evidence not falling within one of the traditional exceptions to inadmissibility.” McKethan v. United States, 439 U.S. 936, 939 (1978) (Stewart & Marshall, J.J., dissenting from denial of certiorari) (emphasis added). See also Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014, 1019-20 (1978) (White & Blackmun, J.J., dissenting from denial of certiorari).

118. In contrast to civil cases where trial rulings are often final, prosecutors realize that criminal defendants, if convicted, have easy and inexpensive access to courts where they may attack their convictions both on appeal and collaterally, and where evidentiary errors are unlikely to go undetected.

119. Trial judges surely realize that if they err in favor of the defendant and he is acquitted by the trier of fact, the error will go unreviewed because the double jeopardy clause prohibits the prosecution from taking an appeal from an acquittal, while if they err in favor of the prosecution and he is convicted, an appeal will almost certainly follow.

120. A good example is United States v. Bailey, 581 F.2d 341 (3d Cir. 1978). After noting that “at present” the law of confrontation is “unsettled,” and that its “future path” is uncertain, the court of appeals reversed the trial court for admitting hearsay evidence, holding that in making its evidentiary rulings the trial court should have exercised its “discretion” in order “to avoid potential conflicts” with the right of “confrontation.” 581 F.2d at 350-51. Bailey illustrates the truth of the observation that this is an area in which “a precise rule is necessary,” Natoli, supra note 4, at 75, and where “the absence of clear standards [will] lead to relative anarchy” at the trial stage of the criminal process. Davenport, supra note 4, at 1381.

121. See notes 4 & 114 supra.

122. A. BICKEL, THE LEAST DANGEROUS BRANCH 169 (1962). For a criticism of the Court’s policy of “conscious avoidance” in the area of confrontation, see Comment, supra note 4, at 1181.
ance takes its toll virtually every day a major criminal case is tried.