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Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska

In the recent case of Davis v. Alaska, the Supreme Court held that the confrontation clause of the sixth amendment protects the ability of a criminal defendant to cross-examine a crucial government witness for possible bias. Specifically, the Court found that a statute prohibiting the admission into evidence of juvenile records, which operated to prevent an effective cross-examination, violated the right of confrontation. Davis represents a continuation of a line of Supreme Court decisions finding violations of the right of confrontation in trial court evidentiary rulings. While it is not the first case holding that the right of confrontation guarantees more than a trial procedure allowing physical confrontation and some cross-examination, it is the first to base a determination that the right of confrontation was violated on an explicit examination of the effec-

2. U.S. Const. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him ...." Almost every state constitution has a similar provision. See 5 J. WIGMORE, EVIDENCE § 1397, at 127-30 n.1 (3d ed. 1940).

In Pointer v. Texas, 380 U.S. 400 (1965), the confrontation clause was incorporated into the due process clause of the fourteenth amendment and thus made applicable to the states. Although two members of the unanimous court in Pointer disagreed with the incorporation analysis and would have reversed the petitioner's conviction on due process grounds, see the concurring opinions of Justices Harlan, 380 U.S. 400, 408, and Stewart, 380 U.S. 400, 409, it is today well settled that the confrontation clause applies to the states. See, e.g., Berger v. California, 393 U.S. 514 (1969); Barber v. Page, 390 U.S. 719 (1968); Smith v. Illinois, 390 U.S. 129 (1968); Parker v. Gladden, 385 U.S. 363, 364 (1966); Brookhart v. Janis, 394 U.S. 1, 3-4 (1969); Douglas v. Alabama, 380 U.S. 415, 417-18 (1965).

4. See generally Chambers v. Mississippi, 410 U.S. 284 (1973) (discussed in the text at notes 90-97 infra); Bruton v. United States, 391 U.S. 123 (1968) (limiting instructions cannot cure constitutional error of admitting into evidence confession of co-defendant who does not take the stand where confession implicates defendant); Smith v. Illinois, 390 U.S. 129 (1968) (right of confrontation violated by permitting prosecution witness to conceal his true name and address where safety of witness not a factor); Pointer v. Texas, 390 U.S. 400 (1965) (right of confrontation violated by introduction into evidence of preliminary hearing testimony of prosecution witness where defendant was not represented by counsel at the preliminary hearing and did not cross-examine the witness); Barber v. Page, 390 U.S. 719 (1968) (Pointer rule extended to cases in which defendant represented by counsel at preliminary hearing: requirement imposed that even where cross-examination takes place at preliminary hearing, state must make good-faith effort to produce witness at trial).

tiveness of a line of cross-examination. The implications and possible applications of Davis are broad, for by announcing that the confrontation clause guarantees a right of effective cross-examination the decision necessarily expands appellate court (and collateral) review of the various limitations on cross-examination imposed by trial courts.

This Note, first, examines the Davis methodology for determining whether a foreclosed line of cross-examination warrants protection by the confrontation clause, and suggests a test employable by reviewing courts for making that determination. Then, the Note sketches the contours of the clash, prefigured by Davis, between the right of confrontation and the limitations on cross-examination that result from both the assertion of testimonial privileges and trial court relevance rulings.

In the early morning hours of February 16, 1970, a bar in Anchorage, Alaska, was broken into and a safe containing a substantial amount of cash and checks was removed. The safe was discovered that afternoon near the home of Jess Straight and his family. Straight's stepson, sixteen-year-old Richard Green, told police that he had seen and spoken with two men standing alongside an automobile near where the safe was subsequently discovered. Green recounted that he had observed one of the men, later identified by Green as Joshaway Davis, standing at the rear of the automobile with "something like a crowbar" in his hands. At the Anchorage police station the next day, Green made a photographic identification of Davis as one of the men he had encountered the day before, and two days later, picked Davis out of a lineup of seven black males.

Davis was subsequently convicted of grand larceny and burglary; Green was a crucial prosecution witness at the trial. Green testified concerning the events that he had observed on the afternoon following the burglary, and made an in-court identification of Davis. Both at the time of the burglary and of the trial, Green was on probation by order of a juvenile court after having been adjudicated a delinquent for participating in two burglaries. Before testimony was taken, the prosecutor moved for a protective order to prevent the defense from referring to Green's juvenile record in the course of cross-examination. In opposing the request for a protective order, Davis' counsel stated his intention to introduce Green's juvenile record to show bias rather than to call into question Green's good

6. 415 U.S. at 318.
7. Green was 16 years old on the day of the burglary, but had turned 17 by the time of Davis' trial. 415 U.S. at 311.
8. Exposing the bias of a witness is one of several ways in which the credibility of a witness can be impeached. See note 34 infra. Bias can be shown by demonstrating motives of self-interest, such as fear of criminal liability, see People v. Dillwood, 106 Cal. xvii (unreported), 39 P. 438 (1895), or desire for pecuniary gain, see Wheeler v.
character; the line of inquiry proposed by the defense was designed
to demonstrate that Green might have made a hasty and faulty
identification of the defendant in order to shift suspicion away from
himself, or that he might have been "subject to undue pressure
from the police and made his identifications under fear of possible
probation revocation." On the basis of Alaska Rule of Children's
Procedure 23 and Section 47.10.080(g) of the Alaska Statutes, the
trial court granted the motion for a protective order. The Alaska
supreme court affirmed the conviction, concluding that it did not
need to resolve the potential conflict between the defendant's right
to a meaningful confrontation with adverse witnesses and the state's
interest in protecting the anonymity of a juvenile offender because
"our reading of the trial transcript convinces us that counsel for
the defendant was able adequately to question the youth in
considerable detail concerning the possibility of bias or motive." On certiorari, the Supreme Court reversed. The Court started
from the proposition expounded in an earlier decision that "the ex­
posure of a witness' motivation in testifying is a proper and important
function of the constitutionally protected right of cross-examina­tion." The Court disputed the Alaska supreme court's finding that
"the cross-examination that was permitted defense counsel was ade­
quate to develop the issue of bias properly to the jury," because, the
Court reasoned, although Davis' counsel was permitted to ask Green
"whether" he was biased, he was not permitted to construct a record
from which to argue "why" Green might have been biased: from
the viewpoint of the jury, counsel might merely have been embark­

9. 415 U.S. at 311.
10. ALAS. R. CHILDREN'S P. 23 provides: "No adjudication, order, or disposition of a
juvenile case shall be admissible in a court not acting in the exercise of juvenile juris­
diction except for use in a presentencing procedure in a criminal case where the
superior court, in its discretion, determines that such use is appropriate."
11. ALAS. STAT. § 47.10.080(g) (1971) provides: "The commitment and placement of
a child and evidence given in the court are not admissible as evidence against the
minor in a subsequent case or proceedings in any other court . . . ."
13. 499 P.2d at 1036.
15. "On these facts it seems clear to us that to make any such inquiry effective,
defense counsel should have been permitted to expose to the jury the facts from which
jurors . . . could appropriately draw inferences relating to the reliability of the
witness. Petitioner was thus denied the right of effective cross-examination . . . ." 415
U.S. at 318 (emphasis added).
ing on a speculative “fishing” expedition. This restriction of effective cross-examination necessitated consideration whether the state’s interest in preserving the anonymity of juvenile offenders was overriding. The Court concluded that the state’s interest was “outweighed by [the] petitioner’s right to probe into the influence of possible bias in the testimony of a crucial identification witness.”

While admitting the legitimacy of the state interest involved, the Court held that the state “cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State’s interest in the secrecy of juvenile criminal records.” Justice Stewart’s concurrence emphasized that the Court’s holding was based on the importance of cross-examination directed at bias, and that “the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.” Justice White, joined by Justice Rehnquist, dissented, arguing that “there is no constitutional principle at stake here. This is nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination, followed by a typical decision of a state appellate court refusing to disturb the judgment of the trial court and itself concluding that limiting cross-examination had done no substantial harm to the defense.”

Prior to Davis, the Supreme Court had made clear that the confrontation clause not only guarantees the right to cross-examine a witness with respect to his substantive testimony, but prohibits the proscription of all avenues of impeachment. Thus, in Alford v. United States, the Court reversed the defendant’s conviction because the trial court had excluded cross-examination questions concerning the place of residence of a crucial prosecution witness that were aimed at suggesting bias by uncovering that the witness was currently in jail:

Cross-examination of a witness is a matter of right .... Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood .... that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment .... and that facts may

16. 415 U.S. at 318.
17. 415 U.S. at 319.
18. 415 U.S. at 319-20.
19. 415 U.S. at 321.
20. 415 U.S. at 321.
be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased.

... The question was not only an appropriate preliminary to the cross-examination of the witness, but on its face was an essential step in identifying the witness with his environment.\(^22\)

The Court concluded that "[w]hile the extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court ... [here] the trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error."\(^22\) Since Alford involved a federal criminal trial, the decision rested on abuse of discretion rather than on the constitutional right to cross-examine. But, as the Supreme Court noted in Davis, "the constitutional dimension of our holding in Alford is not in doubt."\(^24\) In Smith v. Illinois,\(^26\) the Court relied on Alford to reverse on similar grounds a state criminal conviction.\(^26\)

Because Davis involved a limitation on, rather than total prohibition of, impeachment cross-examination, the decision goes beyond both Smith and Alford. The Court's inquiry into whether Davis had been precluded from engaging in effective cross-examination was essentially twofold. The Court first determined whether the excluded line of questioning warranted constitutional protection. Upon finding that it did, the Court scrutinized the trial transcript to determine whether the trial court had permitted sufficient questioning for an effective cross-examination.\(^27\) The examination of the excluded line of questioning considered three factors: the goal of the questions, their probative value, and the importance of the witness' direct testimony. In Davis these factors were highly significant; bias is an extremely effective means of impeachment.\(^28\) Green's proba-

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22. 282 U.S. at 691-93.
23. 282 U.S. at 694.
24. 415 U.S. at 318 n.6.
26. In Smith, the petitioner had been convicted of the illegal sale of narcotics. The principal witness against him was the purchaser, who admitted on cross-examination that he was testifying under an alias. When defense counsel asked the witness what his correct name and address were, the trial court ruled that the witness was not required to answer. Reversing petitioner's conviction, the Court held that "the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding ...." 390 U.S. at 133, quoting Pointer v. Texas, 380 U.S. 400, 407-08 (1965). The Court then determined that the Alford standard must be adhered to in state prosecutions.
27. See 415 U.S. at 312-14.
28. The Davis Court compared the use of criminal convictions to attack a witness' veracity with an attack of the witness by showing bias, and referred to the latter as "[a] more particular attack ... 'always relevant as discrediting the witness and affecting
tionary status strongly suggested a motive to lie, and Green was the most crucial prosecution witness. While the compelling nature of these factors in Davis makes difficult the prediction of their relative importance for future cases, there is little reason to limit the Davis result to situations where the factors are equally compelling.

Although language in Davis suggests that bias is more protected than some other forms of impeachment, it seems unwarranted to interpret the case, as some courts have, to mean that only cross-examination directed at bias is sufficiently important to require constitutional protection. First, on the facts of Davis, bias impeachment was clearly the most effective technique and the only impeachment form attempted. And second, a focus on bias to the exclusion of all other lines of impeachment does not fully protect the defendant's right to "show that [the Government's case] is untrue." As the Court noted, cross-examination involves discrediting a witness' veracity as well as testing his perceptions and memory.

the weight of his testimony." 415 U.S. at 316, quoting 3A J. Wigmore, supra note 2, § 940, at 775 (Chadbourn rev. 1970).

29. See 415 U.S. at 317-19.
30. See 415 U.S. at 317. Other courts have refrained from applying Davis where the witness involved merely gave corroboratory testimony. See United States v. Duhart, 511 F.2d 7, 9 (6th Cir. 1975); Mutschler v. State, 514 S.W.2d 905, 921 (Tex. Ct. Crim. App. 1974).
31. See, e.g., the Court's reference to "so vital a constitutional right as the effective cross-examination for bias of an adverse witness." 415 U.S. at 320. See also 415 U.S. at 321 (Stewart, J., concurring).

Both Gonzales and Burr involved attempts to use a witness' juvenile record to attack his character for truth and veracity; in neither case did the court hold that the impeachment was constitutionally required. In Gonzales the court stated:

The attempted impeachment here was of general credibility by proof of prior "convictions." The probative value of this type of evidence is considerably less than that which suggests false or distorted testimony because of bias. The need to confront a witness with such evidence is correspondingly less . . .

It is apparent then that juvenile adjudications which are . . ., directed solely at general credibility rather than bias, are generally not sufficiently probative to create a genuine conflict with the defendant's right of confrontation.

521 P.2d at 514-15.
34. See 415 U.S. at 316. The two main functions of cross-examination are the elicitation of additional facts that might qualify or explain the witness' direct testimony, and impeachment, which sheds light on the credibility of the testimony generally through the injection of matters not related to the factual issues of the case. See generally McCormick, supra note 8, § 21, at 46-49, §§ 33-49. In states following the "wide-open" rule of cross-examination, the cross-examiner may bring out matters that tend to elucidate any issue in the case, even though not dealt with on direct examination. See id. § 21, at 46-49. There are four traditional avenues of impeachment, each producing a slightly different implication. One method is to show that the witness has previously made a statement inconsistent with a statement made during the trial. The goal is not to insinuate that the testimony is false and the previous story true, but to imply that the
ment is highly valued because it protects the innocent defendant who is unable to demonstrate his innocence affirmatively and who must therefore convince the fact finder of the falsity of the prosecution's testimony. The Court spoke of the high degree of relevance and effectiveness of bias impeachment, but other impeachment techniques often provide more effective means of discrediting witnesses. For example, evidence of prior inconsistent statements is highly damaging to a witness' credibility and has been thought to produce at least as much impact on a jury as cross-examination directed at bias. In other situations a defendant's best line of attack on a witness' credibility might be to disclose a prior perjury conviction. The existence of a constitutional violation should depend not upon an evaluation of the abstract probativeness of a particular type of impeachment, but upon whether the defendant was prevented from employing a means of impeachment that would have been effective in his case.

Like the Court's discussion of bias, its discussion of Green's status as an indispensable witness need not be construed to mean that cross-examination of less important witnesses can never be constitutionally protected. Rather, the Court's emphasis on the critical nature of Green's testimony suggests only that if testimony is not necessary for conviction, its restriction will not constitute a denial of effective cross-examination.

It is of course arguable that, because the confrontation clause applies to all witnesses whose testimony is introduced against the defendant, the cross-examination of all witnesses should be constitutionally protected. Support for this proposition might be found in the Court's summary disposition of the argument that a violation of inconsistency raises doubts about the reliability of the witness in general. See id. §§ 34-39. Another method of impeachment is to show that the witness is biased (i.e., has a motive to lie), and therefore might be intentionally lying. See id. § 40, at 78-81; 3A J. Wigmore, supra note 2, §§ 948-53 (Chadbourn rev. 1970). A third method of impeachment is to demonstrate that the witness' character for truth and veracity falls short of general community standards, often accomplished by showing prior acts of misconduct thought to have a bearing on a person's character for truth and veracity. See McCormick, supra, §§ 41-44; 3A J. Wigmore, supra, §§ 977-88; note 105 infra. As the Davis Court stated: "One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony." 415 U.S. at 316. A fourth means of impeachment is to show a defect in the witness' capacity to observe, remember or recount the matters to which he testified. See McCormick, supra, § 45, at 93-97.


36. See note 105 infra.
the defendant's right of confrontation might be harmless error:87

The Court stated that the denial of "the right to effective cross-examination . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."88 However, even on a broad reading of Davis, it is clear that the Court was not proscribing all cross-examination restrictions, regardless of prejudicial effect. At one point the Court implied that if Green's testimony had provided no "link in the proof" of Davis' conviction, reversal would not have been warranted.89 Moreover, in other contexts the Court has suggested that where a denial of cross-examination constitutes a "mere minor lapse," reversal is not required,40 and in other confrontation cases the Court has applied the harmless error rule.42 Thus, the Davis Court undoubtedly refused to apply the harmless error rule not because it felt that all lines of cross-examination of all witnesses were equally protected by the confrontation clause, but because in finding a denial of effective cross-examination, the Court had already concluded that it was not clear beyond a reasonable doubt that Green's testimony was not necessary.

In addition to the determination whether an excluded line of cross-examination warrants constitutional protection, Davis also requires a careful scrutiny of the trial transcript to ascertain whether

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87. Cf. Chapman v. California, 386 U.S. 18, 24 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963) (by implication), which sanction affirmance of a conviction despite constitutional error if such error is demonstrably "harmless beyond a reasonable doubt."

88. 415 U.S. at 318.


40. See Douglas v. Alabama, 380 U.S. 415 (1965). In Douglas the prosecution read in the presence of the jury the purported confessions of the petitioner's alleged accomplice under the guise of impeaching the accomplice, who repeatedly asserted his fifth amendment privilege in response to the prosecution's questions. The Court found that the defendant's inability to cross-examine the alleged accomplice about the purported confession, which the Court noted may well have been treated by the jury as substantive evidence of the defendant's guilt, denied the defendant the right of cross-examination protected by the confrontation clause. The Court noted that "[t]his case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse . . . ." 380 U.S. at 420.

41. For example, in Harrington v. California, 395 U.S. 250 (1969), the Court held that a denial of cross-examination in violation of the rule of Bruton v. United States, 391 U.S. 123 (1968) (discussed in note 4 supra), was harmless beyond a reasonable doubt because "the case against Harrington was . . . overwhelming . . . ." 395 U.S. at 254. Other cases have also applied the harmless error rule to violations of Bruton. See Brown v. United States, 411 U.S. 223 (1973); Schneble v. Florida, 405 U.S. 427 (1972). See also United States v. Long, 449 F.2d 288, 296 (6th Cir. 1971), cert. denied, 405 U.S. 974 (1972); United States v. Duhart, 511 F.2d 7, 8-9 (6th Cir. 1975); United States v. Feldman, 136 F.2d 394, 399 (2d Cir. 1943); Best v. United States, 328 A.2d 378, 383 (D.C. App. 1974).
the permitted cross-examination was "effective." In *Davis* the Court found determinative the fact that while the defendant was permitted to inquire whether the witness was biased, the trial court's restrictions prevented him from documenting why the witness might be biased.42

Clearly, the above-discussed factors considered in *Davis* are insufficient to constitute a test by which to determine whether a trial court ruling has precluded effective cross-examination. Until further guidance is forthcoming, lower courts have the opportunity to consider the reach of the *Davis* doctrine. In this regard, the following test for the review of trial court rulings is proposed: constitutionally protected cross-examination has been precluded by a particular restriction unless it is clear beyond a reasonable doubt, (1) that the defendant would have been convicted without the witness' testimony, or (2) that the restricted line of inquiry would not have weakened the impact of the witness' testimony.43 Under this test, where a witness' testimony has provided no "link in the proof" and thus could not have contributed to the verdict, or where it is certain that the defendant's proposed line of inquiry would not have yielded the hoped-for result,44 a restriction on cross-examination would not deny the defendant effective cross-examination. On the other hand, if the witness' testimony was crucial, the defendant was unable to document fully why the witness should not be believed, and the reviewing court cannot be sure that the excluded inquiry would have been fruitless, effective cross-examination was denied. The determination that effective cross-examination was denied does not necessarily mean that the defendant's confrontation right was violated, for a court must then decide whether a countervailing state interest was "paramount to" the defendant's right to cross-examine in the particular case. While brief, the balancing of interests employed in making this determination in *Davis* is nevertheless instructive. This Note applies the Court's methodology, first, to evaluate the state interests underlying privileged communications, and second, to gauge the state interests behind relevance rulings.

The *Davis* Court treated the statute protecting the witness' juvenile record, which kept out concededly relevant information in order to "preserve the anonymity of a juvenile offender,"45 essentially as a privilege.46 The decision thus provides some guidance for

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42. See 415 U.S. at 318.
43. This test is suitable for use by an appellate court, not a trial court. To avoid reversal, a trial judge should err on the side of admitting too much evidence rather than too little. Cf. McCormick, *supra* note 8, § 29, at 59.
45. 415 U.S. at 319.
46. Although *Ala. Stat. § 47.16.080(g)* (1971) does not specifically mention a privilege, the protection it creates operates similar to a privilege. The statute frees the
those occasions when other privileges obstruct the right to confront—guidance much needed because courts so far have resolved the conflicts between a defendant's right of confrontation and a witness' assertion of a testimonial privilege with little conceptual clarity.47

Testimonial privileges are granted in various situations. For example, the fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Other privileges are granted to protect various kinds of communi-

witness from disclosing his juvenile record in court not because his juvenile record lacks probative worth with respect to his credibility, but in order to protect a state interest—the state's rehabilitative goals—which might be impaired by the disclosure. See 415 U.S. at 319. Since the operation of the statute and the operation of a privilege are so similar, it would not be incorrect to view the statute as creating a privilege protecting an individual from disclosure of his juvenile record.

47. See, e.g., People v. Mobley, 390 Mich. 51, 210 N.W.2d 327 (1973). In Mobley, when a co-defendant who was not being tried jointly with the defendant asserted his fifth amendment privilege on cross-examination, the trial court permitted the privilege to be asserted. The Michigan supreme court reversed, holding that because the witness was a co-defendant, he had waived his privilege against self-incrimination by taking the stand. Thus, the court confused the waiver of the privilege by a defendant, who waives the privilege by taking the stand, with the waiver of the privilege by a witness, who waives the privilege only by testifying about the incriminating subject matter. See also United States v. Cardillo, 316 F.2d 606 (2d Cir.), cert. denied, 375 U.S. 822 (1963), where, in deciding whether the assertion of a privilege by a government witness on cross-examination violated a defendant's right to confront, the court examined whether the inquiry merely foreclosed "collateral" matters dealing only with the credibility of witnesses. However, impeachment of witnesses is part of the constitutional right to cross-examine. See text at notes 21-27 supra. For other cases applying the Cardillo rule see United States v. Newman, 490 F.2d 159 (3d Cir. 1974); United States v. Rogers, 475 F.2d 621 (7th Cir. 1973); United States v. Birell, 447 F.2d 1168 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972); Fountain v. United States, 384 F.2d 624 (5th Cir. 1967), cert. denied, 390 U.S. 1005 (1968); United States v. Collier, 362 F.2d 125 (7th Cir. 1966); Coil v. United States, 343 F.2d 578 (8th Cir. 1965).

Prior to Davis, the Court twice, in dicta, declined to provide any guidance in this area. In Washington v. Texas, 388 U.S. 14 (1967), the Court found a violation of the defendant's constitutionally guaranteed right to compulsory process for obtaining witnesses in his favor where a statute disqualifying persons charged as principals, accomplices, or accessories in the same crime from testifying for one another prevented the defendant from calling an exculpatory witness. In a footnote to the majority opinion, the Court noted that "[n]othing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations . . . ." 388 U.S. at 25 n.21. In McCray v. Illinois, 386 U.S. 300 (1967), the defendant argued that his right of confrontation was violated by the failure of a trial judge to permit him to elicit from a police officer the name of an informant on cross-examination. Dismissing the defendant's argument, the Court noted that "it would follow from this argument that no witness on cross-examination could ever constitutionally assert a testimonial privilege . . . . We have never given the Sixth Amendment such a construction and we decline to do so now." 386 U.S. at 314. One commentator has taken the position that the right of a defendant to present exculpatory witnesses, guaranteed by the compulsory process clause of the sixth amendment, would be violated whenever the assertion of a privilege makes exculpatory testimony unavailable. See Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 73, 160-77 (1974).
cations for which confidentiality is viewed as essential. Disclosure of such privileged communications may not be made in legal proceedings without the acquiescence of the holder of the privilege. Privileges are granted to communications between an attorney and client, husband and wife, priest and penitent, physician and patient, psychotherapist and patient, journalist and source, accountant and client, and those in other confidential relationships.

48. Wigmore recognizes four fundamental conditions as necessary for the establishment of a privilege against the disclosure of communications:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered, and
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 J. WIGMORE, supra note 2, § 2285, at 527 (McNaughton rev. 1961) (emphasis original). Of course, the determination that the injury to the relation is greater than the benefit to the litigation from disclosure is made generally, not on a case-by-case basis.

Circumstances can easily be imagined in which constitutionally protected cross-examination would be obstructed by the assertion of a privilege. For example, where a witness gives incriminating testimony against a defendant, the defendant might want to show that statements were made by the witness to his wife that contradict his testimony. Such evidence would be highly damaging to the witness' credibility and thus highly useful to the defendant, yet might not be admitted because the husband could invoke his privilege against the disclosure of marital communications. Similarly, a defendant wishing to establish the bias of an adverse witness by showing that he is guilty of an outstanding criminal charge and is testifying in the hope of receiving lenient treatment might be barred by an assertion of the fifth amendment privilege. See, e.g., State v. Montanez, 215 Kan. 67, 523 P.2d 410 (1974), where the defendant tried to show the bias of a key government witness resulting from fear of prosecution for the sale of narcotics. When the witness asserted his fifth amendment privilege, the court, relying on Davis, struck his testimony.

49. See 8 J. WIGMORE, supra note 2, § 2292, at 554 (McNaughton rev. 1961); McCORMICK, supra note 8, § 87.

50. See 8 J. WIGMORE, supra note 2, § 2292, at 642 (McNaughton rev. 1961); McCORMICK, supra note 8, § 79, at 163. It is the communicating spouse who is the holder of the privilege. Id. § 83, at 169. Even if the parties have become separated or divorced by the time of trial, the privilege survives as to communications made during the marriage. Id. § 85, at 171-72.

51. See 8 J. WIGMORE, supra note 2, § 2395, at 873 n.1 (McNaughton rev. 1961); McCORMICK, supra note 8, § 77, at 158 n.42.

52. See 8 J. WIGMORE, supra note 2, § 2280, at 819 n.5 (McNaughton rev. 1961); McCORMICK, supra note 8, § 88, at 212.

53. See 8 J. WIGMORE, supra note 2, § 2286, at 534 n.23 (McNaughton rev. 1961); McCORMICK, supra note 8, § 77, at 158 n.45.

54. See 8 J. WIGMORE, supra note 2, § 2286, at 532 n.21 (McNaughton rev. 1961); McCORMICK, supra note 8, § 77, at 159 n.44.

55. See 8 J. WIGMORE, supra note 2, § 2286, at 533 n.22 (McNaughton rev. 1961).

56. For example, statutes cover confidential clerks and stenographers, see 8 J. WIGMORE, supra note 2, § 2286, at 535 n.24 (McNaughton rev. 1961), and communications between social worker and client. See, e.g., CAL. EVID. CODE § 1010 (West 1970) (clinical social worker); N.Y. CIV. PRAC. § 4508 (McKinney Supp. 1974) (social worker-client
In addition, privileges are granted that protect primarily governmental interests, such as the privileges for information dealing with national security, for presidential communications, and for confidential government personnel files.

Although the purposes and beneficiaries of privileges vary, all privileges involve, to some degree, the protection of state interests. Clearly, governmental privileges for executive and national security communications protect state interests rather than the interests of the individuals who assert them. But state interests also underlie privileges that protect private parties. For example, privileges allowing the government to withhold the identity of informers, and permitting a witness not to reveal his address when to do so would endanger his safety, simultaneously protect the individuals involved and further governmental interests by encouraging citizen


57. See United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952).


60. The Supreme Court upheld the validity of the informer privilege in Roviaro v. United States, 353 U.S. 53 (1957). The Court rejected the approach of three courts of appeals, see Portomene v. United States, 221 F.2d 582 (5th Cir. 1955); United States v. Conforld, 200 F.2d 365 (7th Cir. 1952); Sorrentino v. United States, 163 F.2d 627 (5th Cir. 1947), which had required that the privilege yield "whenever the informer's testimony may be relevant and helpful to the accused's defense," 353 U.S. at 61-62, and substituted a test "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. at 62. Applying this test, the Court reversed Roviaro's conviction because the circumstances indicated that the informant might have been a material witness in Roviaro's defense. Although the Roviaro situation may seem analogous to Davis, there was no violation of the right of confrontation in Roviaro, since neither the informer's testimony nor his hearsay statements were introduced into evidence at Roviaro's trial. See McCray v. Illinois, 386 U.S. 300, 313-14 (1967). The constitutional error in Roviaro dealt with the accused's right to present his defense. See Westen, supra note 47, at 184-85.

61. See, e.g., United States v. LaBarbera, 463 F.2d 988 (7th Cir. 1972); United States v. Salesko, 452 F.2d 193 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972); United States v. Daddano, 432 F.2d 1119 (7th Cir. 1970), cert. denied, 402 U.S. 905 (1971); United States v. Persico, 425 F.2d 1375 (2d Cir.), cert. denied, 400 U.S. 869 (1970); United States v. Baker, 419 F.2d 83 (2d Cir. 1969), cert. denied, 397 U.S. 976 (1970); United States v. Lawler, 413 F.2d 622 (7th Cir.), cert. denied, 396 U.S. 1046 (1969); United States v. Palermo, 410 F.2d 493 (7th Cir. 1969). See also Smith v. Illinois, 399 U.S. 129, 133-34 (1969) (White, J., concurring) ("In Alford v. United States . . . the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness").
participation in the criminal process. State interests also underlie the communications privileges, which exclude possibly relevant evidence in order to protect relationships regarded as of "sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." The fifth amendment privilege, although primarily protecting the individual from the power of the state, similarly protects state interests.

Davis and earlier cases suggest the degree of scrutiny to which these various state interests should be subjected when they conflict with a defendant's right to confront. Prior to Davis, the Supreme Court noted that the "denial or significant diminution [of the right to confront and to cross-examine] calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." While not explicitly engaging in strict scrutiny, the Court in Davis clearly subjected the state interest to more than a superficial examination: rather than merely determining whether the statutory prohibition on disclosure of juvenile criminal records was rationally related to the state's interest in rehabilitation, the Court independently evaluated the state's need for that prohibition. Disagreeing with the state's argument that exposure of the witness' juvenile record might "encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily," the Court asserted that the disclosure of Green's record would only result in "temporary embarrassment ... to Green

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62. See Roviaro v. United States, 353 U.S. 53, 59 (1957): What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law . . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

63. McCORMICK, supra note 8, § 72, at 152 (footnote omitted). For example, the policy behind the attorney-client privilege is that "[i]n order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent." 8 WIGMORE, supra note 2, § 2291, at 545 (McNaughton rev. 1961).

64. The interests of the state include assuring that even guilty individuals are treated in a manner consistent with human dignity by preventing torture and other inhumane treatment, encouraging respect for and protecting the dignity of the judicial system, and contributing to a fair state-individual balance by requiring that the government leave alone an individual until good cause is shown to disturb him. See McCORMICK, supra note 8, § 118, at 252-53; 8 WIGMORE, supra note 2, § 2261, at 315-18 (McNaughton rev. 1961).


66. 415 U.S. at 319.
or his family." Without questioning the legitimacy or wisdom of
the state interest, the Court in effect examined and found constitutionally insufficient the nexus in this instance between the assertion of the privilege and the protection of the state interest.

The state policy behind most privileges, however, is more severely damaged by disclosure. For example, forced disclosure of attorney-client communications frustrates the state’s interest in encouraging candid revelations to attorneys, since decreased candor would inevitably result if clients were forced to weigh the disadvantages of incomplete disclosure against the possibility that their confidential statements would be made public. Thus, if Davis instructs to look only to how necessary the privilege is to the protection of the underlying state interest, no denial of effective cross-examination resulting from the assertion of the attorney-client privilege would ever constitute a violation of the defendant’s right of confrontation.

But there are several clear indications in Davis that a defendant’s constitutional rights are violated when any privilege is asserted to deny effective cross-examination, regardless of the strength of the nexus between that assertion and the state interest underlying the privilege. The Court found that, while legitimate, the state’s interest in protecting the juvenile could not require forfeiture of the constitutional right of confrontation, because “the State cannot, consistent with the right to confrontation, require the petitioner to bear the full burden of vindicating the State’s interest in the secrecy of juvenile criminal records.” Thus, since the burden of any privilege falls with equal weight on the defendant, and the likelihood of injury to the defendant does not vary with the importance of the privilege or the degree to which it fosters the relevant state policy, the assertion of any privilege violates the defendant’s right to confront where it deprives him of “effective cross-examination.” Moreover, the Court noted that the conflict in Davis could properly be avoided through a prosecutorial choice between the two state interests involved—the interest in the assertion of the privilege and the interest in the prosecution of the defendant. The Court apparently viewed as unfair the state’s attempt to satisfy these two interests simultaneously at the expense of the defendant’s right to confrontation, and arguably required that the state choose which interest to protect. Again, regardless of which privilege is asserted, the state

67. 415 U.S. at 319.
68. 415 U.S. at 320.
69. At least two decisions have required that the government either produce privileged information or forgo prosecution. In United States v. Andolschek, 142 F.2d 502 (2d Cir. 1944), the accused were found guilty of conspiracy. On appeal, several of the defendants, who were inspectors of the Treasury Department’s “Alcohol Tax Unit,” challenged the exclusion at trial of certain official reports of an exculpatory
has the option of protecting the interest underlying the privilege by refraining from using the witness to make out its case.

These indications support reading Davis for the proposition that where the assertion of a privilege by a witness would foreclose the defendant from continuing a constitutionally protected line of inquiry, the privilege must yield.

Of course, a state need not exert its power to withdraw the privilege in every case of conflict. Often a less restrictive alternative will be available that will allow the defendant to cross-examine without forcing the state to forgo the benefits from the assertion of the privilege. The most obvious instance in which a less restrictive alternative is available is when the fifth amendment privilege is asserted. A grant of use immunity both enables the government

nature that they had prepared for their supervisors while in the employ of the government. The clearly relevant reports were excluded pursuant to Article 80 of Regulation 12 of the Treasury Department: “Whenever a subpoena shall have been served upon them, they will, unless otherwise expressly directed, appear in Court and answer thereto and respectfully decline to produce the records or give testimony called for on the ground of being prohibited therefrom, from the regulations of the Treasury Department. Officers disobeying these instructions will be dismissed from the service and may incur criminal liability.” In requiring that the government choose between keeping the documents secret and going forward with the prosecution, the court, per Judge Learned Hand, stated: “[T]he prosecution necessarily ends any confidential character the [privileged] documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transaction in the obscurity from which a trial will draw them, or it must expose them fully.” 142 F.2d at 506. In United States v. Coplon, 185 F.2d 659 (2d Cir. 1950), also decided by Judge Hand, the defendant was convicted of crimes relating to espionage. The government admitted having made wiretaps of the accused, but asserted that neither information derived from the wiretaps nor its fruits had been used in the prosecution of the defendant. In support of this assertion the government submitted the wiretap records in camera to the trial judge, but the records were not disclosed to the defense. Reversing the conviction, the court of appeals held that it was error to deny the defendant an opportunity to demonstrate that the wiretaps had led to evidence used against her. The court cited Andolschek as mandating that “the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such ‘state secrets’ as might be relevant to the defence [sic].” 185 F.2d at 638.

70. See Note, The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, And Some Criteria, 27 VAND. L. REV. 971, 972 (1974) ("the doctrine requires that a state not employ a specific means to accomplish an admittedly legitimate purpose if it has available alternative means that are less restrictive upon some individual interest").

71. Two types of immunity may be granted: transactional immunity and use immunity. Transactional immunity accords full immunity from prosecution for the offense to which the compelled testimony relates. Use immunity merely prevents the government from employing against the witness the compelled testimony and evidence derived directly therefrom; the government remains free to prosecute the witness on the basis of independently obtained evidence. See 18 U.S.C. §§ 6002-03 (1970). In Kastigar v. United States, 406 U.S. 441 (1972), the Supreme Court held that the compulsion of testimony following a grant of use immunity does not violate the fifth amendment. The Court found that use immunity guarantees adequate safeguards to the witness because in order to prosecute the witness, the government must show that the evidence used is not tainted but is instead derived from an independent
to force the witness to testify and protects the witness from being compelled to incriminate himself, without preventing the government from subsequently prosecuting the witness.\(^7\)

A less restrictive alternative that will not run afoul of Davis may also satisfy the state interests underlying other privileges. Where the purpose of a confidential communications privilege is to encourage disclosures relating to the civil or criminal liability of the communicant, a court could require that the recipient of the communication answer the inquiry into the privileged area if it is possible to ensure simultaneously that the communicant retains the advantages of the privilege.\(^7\) Such accommodation is possible with respect to the attorney-client privilege when disclosures concerning the guilt or innocence of the client are involved. The court could compel disclosure from the attorney, thus satisfying the defendant's right of confrontation, while immunizing the disclosures from use in criminal and civil proceedings to which the client is a party.\(^7\)

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72. See Kastigar v. United States, 406 U.S. 441, 453 (1972), discussed in note 71 supra. Although in order to prosecute the witness subsequently the government must affirmatively show that its evidence was gathered from sources independent of the compelled testimony, any inconvenience resulting from this burden may be minimized by granting a continuance to gather evidence against the witness before compelling him to testify. See Westen, supra note 47, at 169-70. Because of the availability of use immunity, the state's interest in the assertion of the fifth amendment privilege by a witness presumably is no greater than its interest in withholding use immunity. The latter interest is not compelling, since after a grant of use immunity the prosecution is in no worse position with respect to the prosecution of the witness than it was prior to the grant. See id. at 169.

73. See Westen, supra note 47, at 172-73.

74. See id. at 172-73, arguing in favor of the above limitation in connection with the clash between a testimonial privilege and the compulsory process clause of the sixth amendment: "The state's interest in encouraging candor can be substantially served by guaranteeing the client that his communications, if disclosed, will never be used against him in civil or criminal proceedings. The added benefits to the client of complete secrecy are insufficient to justify a burden on the defendant's constitutional right . . . . To apply the privilege that broadly is unnecessary and, therefore, unconstitutional." The ability of this modification of the attorney-client privilege to protect the client fully against the use of his confidential disclosures in a subsequent civil case is unclear. Although potential plaintiffs may still bring civil suits against the client, full protection to the client would require that the plaintiff show, before introducing evidence related to the disclosures, that the evidence offered came from sources independent of the compelled disclosure. But this showing may be difficult or impossible in some situations, especially since the plaintiff may have had no knowledge of the compelled disclosure and thus no reason to record the sources from which his evidence was derived. To the extent that it deprives third parties of a cause of action, the proposed modification may be invalid as a deprivation of property without due process of law under the fourteenth amend-
Similar analysis can be applied to the physician-patient\textsuperscript{75} and marital communications privileges, although a use immunity alternative may be ineffective where a privilege, such as the priest-penitent privilege, protects disclosures that are socially embarrassing rather than legally incriminating.

Not all privileges are amenable to a less restrictive alternative. In these instances, \textit{Davis} dictates that the privilege cannot be asserted if the effect would be to curtail effective cross-examination. While the state may decide to have its witness testify without the privilege, in many situations the state may conclude that its interests are better served in the long run by forgoing a particular witness' testimony than by frustrating the interest protected by the privilege.

The importance of the state interest, the degree to which the privilege serves this interest and the importance of the witness to the prosecution's case may properly be taken into account in making this determination; all that the confrontation clause requires is that the privilege not be asserted at the expense of the right to confront.

An example of a "difficult" case, in which there is a strong nexus between the assertion of the privilege and the protection of the state interest and in which there is available no less restrictive alternative, is the situation where a witness refuses to divulge her address on cross-examination on the ground that to do so would endanger her safety. The state's interest in encouraging witnesses to testify in criminal cases is seriously impaired by disclosure of the witness' address: the witness may suffer recriminations and future witnesses may refrain from cooperating with law-enforcement officials. On the other hand, permitting nondisclosure of the witness' address seriously undercuts the defendant's right to learn the identity of the witness.\textsuperscript{76} While no court has forced a witness to reveal her address when the government could show danger to her safety, the relevant decisions generally proceed to great lengths to demonstrate that the defendant, although ignorant of the witness' current address, was able.

\footnote{The violation of due process may be avoided by placing the burden of proof on the defendant to show that the plaintiff's evidence was derived from the forced disclosure. But this burden would be extremely difficult if not impossible to satisfy in most instances. Arguably, then, this modification should not be considered a less restrictive alternative. However, even if a less restrictive alternative is not available, the attorney-client privilege would nevertheless have to yield to the right of confrontation. \textit{See} text at notes 68-69 \textit{supra}.}

\textsuperscript{75} It has been argued, however, that the assertion of the physician-patient privilege during cross-examination in criminal cases occurs so seldom that its application does nothing to advance the goal of encouraging disclosures to physicians. \textit{See} \textit{Westen, supra} note \textit{47}, at \textit{171}.

\textsuperscript{76} \textit{See} United States v. Alford, 282 U.S. 687, 693 (1931) (ignorance of the witness' address may deny the defendant access to "an essential step in identifying the witness with his environment").
to attack the witness' credibility adequately. These decisions imply that if the withholding of a current address truly foreclosed the defendant from making a meaningful attack on a witness' credibility, a court might find a violation of the right to confront—a result that accords with the foregoing analysis of Davis.

To be sure, cases supporting the power of a trial court to exclude hearsay evidence indicate that the right of confrontation must at times yield to paramount state interests. But these decisions do not

77. See, e.g., United States v. Saletko, 452 F.2d 193, 196 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972) ("It is noteworthy, though not dispositive . . . that the restriction did not prevent the defendant from extensively exploring the character of witness Schang . . . . Schang's sordid background was exposed to the jury in substantial detail, and while we cannot say that the full extent of his disreputability was revealed, we believe that whatever prejudice to the defendant resulted from the limitations imposed by the trial judge was outweighed by the necessity of protecting the witness"); United States v. Persico, 425 F.2d 1376, 1384 (2d Cir.), cert. denied, 400 U.S. 869 (1970) ("[T]he limitation is further justified by the fact that [the witness] was well known to all defendants and their counsel, having testified at the four previous trials. His background was explored in great detail on cross-examination and the defense was informed of the nature of [his] recent activities"); United States v. Daddano, 432 F.2d 1119, 1128 (7th Cir. 1970), cert. denied, 402 U.S. 905 (1971) ("In each case defense counsel brought out many facts which might damage credibility: convictions of crimes, pending of outstanding charges, perjury in other trials, exposure to long sentences, hope for leniency from the government . . . . Under the circumstances the trial judge did not abuse his discretion,"); United States v. Baker, 419 F.2d 83, 87 (2d Cir. 1969), cert. denied, 397 U.S. 971 (1970) ("Since the defense had become fully acquainted with Warren's background from materials provided . . . . they were able to cross-examine him extensively and effectively").

78. Apparently, this is also the view of Justice White. See Smith v. Illinois, 390 U.S. 129, 135-34 (1968) (White, J., concurring): In Alford v. United States, . . . the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling.

(Emphasis added.) Of course, the withholding of this information would only violate the right to confront if effective cross-examination was denied. See United States v. Alston, 460 F.2d 48, 50-53 (5th Cir.), cert. denied, 409 U.S. 871 (1972): The substance of Smith and Alford is to assure the admission of background that is "an essential step in identifying the witness with his environment." Alford v. United States . . . . The crucial underpinning of that substance is the likelihood of prejudice to the defendant . . . .

. . . . The critical question is not simply whether or not the witness has divulged his home address . . . . but whether or not the defendant has been given sufficient "opportunity to place the witness in his proper setting." Alford v. United States [citation omitted]. Thus, while a witness would normally be required to answer all questions regarding his or her background, there are exceptions to that requirement. The witness should have the opportunity to demonstrate to the trial judge that his or her home address does not constitute information necessary to "place the witness in his proper setting." Put another way, the witness should have the opportunity to demonstrate to the trial judge that the defendant's solicitation of his or her home address constitutes only an attempt to "harass, annoy or humiliate.

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detract from the conclusion that testimonial privileges cannot constitutionally impinge on effective cross-examination. While the Supreme Court's handling of the hearsay cases is subject to some uncertainty, it is clear that at least two conditions must be met before a state may introduce testimony not subject to cross-examination at trial. First, the state must be unable to produce the witness for cross-examination. Thus, where the witness has died prior to

80. The principal uncertainty surrounds the requirement that a witness be unavailable before his hearsay statements may be admitted. Although earlier cases such as Pointer v. Texas, 380 U.S. 400 (1965), and Barber v. Page, 390 U.S. 719 (1968), prevented the state from introducing hearsay testimony in the absence of a showing that the witness was unavailable, the Court arguably stepped back from this requirement in Dutton v. Evans, 400 U.S. 74 (1970) (plurality decision). In Dutton, the Court permitted the admission into evidence of a declaration against penal interest made by one of the defendant's co-conspirators, which also incriminates the defendant, without discussion of the issue of the co-conspirator's availability. The Court may have considered the co-conspirator unavailable in the sense that he would presumably have asserted his fifth amendment privilege if called as a witness. Such an assumption, although perhaps warranted when Dutton was decided, might be incorrect today in light of the availability of use immunity. See text at notes 71-72 supra. Even assuming that the Court considered the co-conspirator available, it would be unwarranted to construe Dutton as authoritatively rejecting the unavailability requirement. See Comment, The Uncertain Relationship Between the Hearsay Rule and the Confrontation Clause, 52 TEXAS L. REV. 1167, 1204-06 (1974). There was no majority opinion in Dutton, and even two members of the plurality indicated that they would decide the case on the theory of harmless error, reasoning that the admitted statements were so unreliable that the jury could not have considered them seriously. 400 U.S. at 90 (Blackmun, J., concurring). In the subsequent case of Mancusi v. Stubbs, 408 U.S. 204 (1972), the Court inquired into the unavailability of the declarant before finding that the use of the hearsay statement did not violate the defendant's right of confrontation. 408 U.S. at 216.

81. In Barber v. Page, 390 U.S. 719, 724-25 (1968), the Court held that "a witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." In Mancusi v. Stubbs, 408 U.S. 204 (1972), the Court permitted the introduction of a transcript of testimony given at a previous trial by a crucial witness who was living in Sweden at the time of trial. The Court found that the rule of Barber, which rested on the availability of means to secure the attendance of witnesses from other states, for example, the Uniform Act To Secure the Attendance of Witnesses from without a State, federal writs of habeas corpus ad testificandum, and the established practice of the United States Bureau of Prisons to honor state writs of habeas corpus ad testificandum, see 408 U.S. at 212, was satisfied by a showing that the state was unable to compel the attendance of a United States citizen living abroad. The dissent in Mancusi argued that the majority ignored the requirement of Barber that the state make a good-faith effort to secure the presence of the witness at trial because the state had made no attempt whatsoever to secure the witness' presence, either by requesting the witness to attend voluntarily or by seeking federal assistance in invoking the cooperation of Swedish authorities: "I cannot agree . . . that if neither state nor federal authorities had the power to compel Holm's appearance, that fact relieved the State of its obligation to make a good-faith effort to secure his presence. It simply reduced the likelihood that any effort would succeed. The State's obligation would hardly be framed in terms of 'good-faith effort' if that effort were required only in circumstances where success was guaranteed." 408 U.S. at 223 (Marshall, J., dissenting). Thus, although there is doubt as to the vitality of the "good-faith effort" requirement of Barber, the state must at least be unable to compel the witness' attendance.
the trial,\textsuperscript{82} or is outside the country and hence not subject to process,\textsuperscript{83} the witnesses' prior statements may be introduced even though he is not presently subject to cross-examination. Second, the out-of-court testimony must bear some "indicia of reliability,"\textsuperscript{84} For example, the testimony of a witness from an earlier hearing is considered reliable because the testimony was given under oath and subject to cross-examination.\textsuperscript{85} Similarly, a declaration against interest may be considered reliable because of its spontaneous nature and because the speaker generally lacks a motive to lie.\textsuperscript{86} Both of these conditions are unsatisfied when a privilege obstructs cross-examination. When a state-authorized privilege is asserted, the state causes the witness to be unavailable for cross-examination. The fact that the Davis court considered this action unfair parallels the hearsay cases, where the introduction of out-of-court testimony is considered "unfair" if the state "creates" the unavailability of a witness by failing to compel his presence. Additionally, there are no indicia of reliability to protect the defendant when cross-examination is obstructed by a privilege. No inference of reliability arises from the fact that the direct testimony is given under oath.\textsuperscript{87} Even where the testimony consists of statements that might be considered reliable if made out of court, such statements lack any inherent spontaneity when made on the witness stand. For example, even though declarations against penal interest are considered highly reliable when spontaneously made out of court,\textsuperscript{88} perjury is always a possibility when a witness admits criminal liability under oath.\textsuperscript{89} Thus, the situations in which hearsay statements are admitted despite the lack of cross-examination provide no basis for concluding that testimonial privileges can justify infringements on the right of cross-examination.

The foregoing analysis has suggested that cross-examination may not be restricted where a denial of effective cross-examination would

\textsuperscript{82} See, e.g., Mattox v. United States, 156 U.S. 237, 240-44 (1895).
\textsuperscript{83} See Mancusi v. Stubbs, 408 U.S. 204 (1972).
\textsuperscript{84} See, e.g., Mancusi v. Stubbs, 408 U.S. 204, 218 (1972). Such indicia of reliability are present in the traditional hearsay exceptions, such as dying declarations, see Mattox v. United States, 146 U.S. 140 (1892), prior recorded testimony, see Mattox v. United States, 156 U.S. 237 (1895), and declarations against penal interest. See Chambers v. Mississippi, 410 U.S. 284 (1973).
\textsuperscript{85} See Mancusi v. Stubbs, 408 U.S. 204, 216 (1972).
\textsuperscript{86} See Dutton v. Evans, 400 U.S. 74, 89 (1970).
\textsuperscript{87} Cf., e.g., United States v. Jones, 403 F.2d 831 (2d Cir. 1968); Young v. United States, 406 F.2d 960 (D.C. Cir. 1968) (grand jury testimony of a witness not admissible against the accused); Fender v. Ramsey, 131 Ga. 440, 62 S.E. 527 (1908) (ex parte affidavit not admissible against the accused at trial).
\textsuperscript{89} Where a witness admits criminal liability under oath, it is not unlikely that his testimony has been exchanged for immunity or leniency. Where such an exchange has been made, the possibility suggests itself that the testimony exchanged might have been fabricated for the purpose of obtaining favorable treatment.
result, and that where the assertion of a privilege prevents a defendant from achieving full and effective cross-examination, the defendant's right of confrontation must prevail. In addition to testimonial privileges, hearsay rules and narrow standards of relevance can prevent effective cross-examination. In the term prior to the Davis decision, the Supreme Court dealt with the hearsay problem in Chambers v. Mississippi and, in so doing, shed light on the related problem of relevance rulings.

In Chambers, the accused was charged with shooting and killing a police officer. By way of defense, Chambers asserted that the shooting was committed by one Gable McDonald. Chambers presented witnesses who testified that McDonald had shot the officer, but Chambers' evidence that McDonald had admitted his guilt to these witnesses on four separate occasions was excluded as hearsay. The prosecution failed to call McDonald to testify and the trial court refused to allow Chambers to declare McDonald an adverse witness; consequently, Chambers was forced to call McDonald as his own witness. McDonald repudiated his confessions and gave damaging testimony, however. Because of the "voucher" rule, which prohibits a party from discrediting his own witness, Chambers was prevented from attacking that testimony.

The Supreme Court reversed Chambers' conviction, finding constitutional error in the application of the voucher rule to prevent cross-examination of McDonald, and in the exclusion on hearsay grounds of the evidence of McDonald's admissions of guilt. In so

91. At the time of Chambers' trial, Mississippi did not admit declarations against penal interest as exceptions to the hearsay rule. See 410 U.S. at 299.
92. On direct examination, McDonald admitted having made a sworn confession to the defendant's attorney, but upon cross-examination by the state, McDonald repudiated his confession, asserting that he had not shot the officer and that he had been persuaded to confess by one Reverend Stokes, apparently a friend of Chambers', who promised McDonald that he would not go to jail. McDonald then asserted that he had not been at the scene of the shooting when it occurred, and gave an alibi.
94. Because McDonald's testimony on the state's cross-examination had been adverse to the accused, the Court found that Chambers had been "denied an opportunity to subject McDonald's damning reputation and alibi to cross-examination." 410 U.S. at 299.
95. Although the Court grounded its reversal jointly on the denial of cross-examination and the exclusion of McDonald's admissions, there are indications that either ground alone would have been sufficient to compel reversal. After discussing the denial of cross-examination of McDonald, the Court concluded that "the 'voucher' rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges." 410 U.S. at 298. After discussing the exclusion of the hearsay statements, the Court concluded that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. Lower courts relying on Chambers have concluded that either violation alone justifies reversal. See, e.g., United States v. Torres, 477 F.2d 922 (9th Cir. 1973) (conviction reversed where
doing, the Court provided a test explaining when the admission of hearsay statements favorable to the defendant is constitutionally required:

The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony was also critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

We conclude that the exclusion of this critical evidence . . . denied him a trial in accord with traditional and fundamental standards of due process.96

Chambers is significant because the Court independently assessed the reliability of evidence critical to Chambers' defense, rather than accepting the state's evaluation of the reliability of the evidence. While the decision dealt with the exclusion of evidence on hearsay grounds, the reach of the Court's methodology seems clearly to include other cross-examination restrictions, such as relevance rulings, that may deny the defendant the opportunity to present a defense. The Chambers Court found error in the "mechanistic application" of the hearsay rule to exclude relevant, trustworthy evidence that would have had significant impact on the jury. If, instead, McDonald's declarations against penal interest had been excluded on the ground that they lacked probative worth concerning McDonald's veracity, the Court's analysis would still have applied. That the evidence was excluded specifically by the hearsay rule is irrelevant from the defendant's point of view; his right "to present witnesses in his own defense"97 is compromised whenever relevant, trustworthy evidence is excluded.

The state interests underlying rules of relevance, however, are often greater than the rather minimal state interests underlying hearsay rules. In fact, when hearsay rules keep out reliable probative evidence, as in Chambers, there arguably is no state interest at stake. Thus, while Chambers is influential, it is by no means dispositive of the situation where relevance rulings inhibit the presentation of an effective defense. With regard to the weight that should be given
defendant was not permitted to impeach his own witness); Kreisher v. State, 303 A.2d 651, 652 (Del. 1973) ("The hearsay rule may not be applied 'mechanistically' to defeat a right and the ends of justice"); Commonwealth v. Nash, 457 Pa. 296, 324 A.2d 344 (1974) (Chambers requires admission of hearsay statements where circumstances provide assurance of reliability).

96. 410 U.S. at 302-03.

countervailing state interests, however, *Davis* is clearly instructive; when read with *Chambers*, *Davis* mandates that the state interests behind relevance rulings, no matter how strong, cannot justify the exclusion of cross-examination testimony constitutionally protected under the test set forth above. The fact that *Chambers* and *Davis* considered different aspects of the defendant's constitutional rights should not detract from this analysis: Although *Davis* was grounded on the sixth amendment right of confrontation, and *Chambers* on the defendant's right to prepare a defense, the two guarantees are indistinguishable in purpose. While the right to produce exculpatory testimony guarantees the defendant a chance to prove his innocence affirmatively and the right of confrontation ensures the defendant an opportunity to attack the proof of guilt adduced by the prosecution, the essence of each is the guarantee that the criminal trial process will not be one-sided.

Rulings on relevance involve a balancing of the probative worth of evidence against considerations such as potential for confusion, delay, prejudice, or surprise. Where such factors outweigh probative worth, evidence is excluded. These rulings erroneously exclude probative evidence under two circumstances. First, relevance rulings, particularly those based on legislative determinations of probativeness, often incorrectly assess probative worth. For example, some legislatures have limited the types of prior convictions that may be used for impeachment to those involving *crimen falsi*, and have placed time limits on the use of convictions to restrict the use of those that are "stale." Although such statutes are generally motivated out of concern for the defendant who is reluctant to

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98. See Westen, supra note 47, at 156.

99. Relevant evidence is defined by McCormick as evidence that "render[s] the desired inference more probable than it would be without the evidence." *McCormick*, supra note 8, § 185, at 437 (emphasis original; footnotes omitted). Traditionally, not all relevant evidence is admissible; a trial court must balance the probative worth of evidence against several counterbalancing factors. See text at notes 111-14 infra. See also *Fed. R. Evid.* 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

100. See, e.g., *Alas. R. Crim. P.* 26(f) ("For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime involved dishonesty or false statement"); *Fed. R. Evid.* 609(a) (evidence of criminal convictions may be admitted to attack the credibility of a witness, but only if the crime "... was punishable by death or imprisonment in excess of one year... and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant").

testify for fear of disclosure of his criminal record, they usually apply to all witnesses.

Davis clearly indicates that these statutes violate a defendant’s right of confrontation when they preclude inquiry into a witness’ bias. But statutes limiting the admission of prior convictions may also raise constitutional questions in so far as they exclude evidence not going to bias that is nevertheless probative of a witness’ character for truth and veracity. Justice Stewart addressed this question in his concurrence in Davis by emphasizing that the Court did not find a constitutional requirement that, in all instances, evidence of criminal convictions be admissible to impeach. This reading of

102. The rule permitting the impeachment of a witness with all prior felony convictions has the undesirable effect of preventing criminal defendants with criminal records from testifying in their own behalf for fear that whatever potential benefits may arise from testifying will be outweighed by the prejudicial effect of disclosure of their criminal record. See Luck v. United States, 348 F.2d 763, 768 (D.C. Cir. 1965); Gordon v. United States, 333 F.2d 936, 939 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968). But see D.C. CODE ANN. § 14-305 (Supp. 1970), in which Congress legislatively overruled the holdings of Luck and Gordon.

103. See, e.g., ALA. R. CRIM. P. 26(f); FED. R. EVID. 609(a).

104. A defendant might wish to show, for example, that a witness who had recently been convicted of murder and was awaiting sentencing was testifying and aiding the prosecution in hope of lenient treatment. A statute prohibiting this line of cross-examination should violate the confrontation clause. The new Federal Rules of Evidence are weak in this regard in that they do not provide specifically for the admissibility of evidence tending to show the bias of a witness. See Schmertz & Czaplinski, Bias Impeachment and the Proposed Federal Rules of Evidence, 61 Geo. L.J. 257 (1972).

105. The character of a witness for truth and veracity is relevant circumstantial evidence of the truthfulness of his testimony. A party may attack a witness’ character by showing evidence of specific misconduct that bears on truth and veracity, by proving a low reputation within the community, or by showing that the witness has been convicted of a crime. See McCormick, supra note 8, §§ 41-44; § J. Wigmore, supra note 2, §§ 977-88 (Chadbourn rev. 1970). One of the largely unresolved questions in the law of evidence concerns the determination of which prior criminal convictions may be used to impeach a witness' credibility. Some jurisdictions provide that all convictions involving “moral turpitude” should be permitted because knowledge of a witness’ misconduct will aid the jury in determining the weight it should give his testimony. See Sims v. Calihan, 264 Ala. 216, 112 S.2d 776 (1959); State v. Jenness, 143 Me. 395, 76 A.2d 607 (1949); Smith v. State, 346 S.W.2d 611 (Tex. Ct. Crim. App. 1961); McCormick, supra note 8, § 43, at 86. See also ME. REV. STAT. ANN. tit. 16, § 56 (Supp. 1973). Some jurisdictions provide that conviction of all felonies may be used to attack character for truth and veracity. See, e.g., CAL. EVID. CODE § 788 (West 1966). Other jurisdictions permit the use of all felonies and also convictions of misdemeanors involving deceit (crimen falsi). See Commonwealth v. Kostan, 349 Pa. 560, 37 A.2d 606 (1944); Fed. R. Evid. 609(a). Another view is that only convictions of crimes involving deceit or false statement are helpful in evaluating the likelihood that the witness is being truthful, and that the commission of, for example, a crime of violence is not in any way inconsistent with a character of truth-telling. See UNIFORM RULE OF EVIDENCE 21. See also Spector, Impeachment Through Past Convictions: A Time for Reform, 18 DePaul L. Rev. 1, 4-6 (1968); Note, supra note 101; Note, Impeaching the Accused by His Prior Crimes—A New Approach to an Old Problem, 19 Hastings L.J. 919, 927-28 (1968).

106. See text at note 19 supra.
the majority opinion seems accurate if it means merely that the Constitution does not require the admission of irrelevant evidence. But, in light of Chambers, it is inaccurate to the extent it suggests that probative evidence not going to bias is outside the scope of constitutional protection. Therefore, where a conviction does provide relevant evidence of a witness' truth and veracity, constitutional error should result from exclusion. For example, a statute forbidding the use of perjury convictions would involve an inaccurate assessment of the probativeness of prior lying under oath and, applied to a criminal case, should be unconstitutional. To consider a more realistic example, the Federal Rules of Evidence, as originally proposed, prohibited impeachment with convictions more than ten years old. Since, arguably, a conviction of perjury always has significant probative worth with regard to a witness' credibility, this provision as applied to a greater than ten-year-old perjury conviction might have been unconstitutional. The potential constitutional problems present in such an absolute rule were avoided by the rule as enacted, which provides the trial judge with discretion to admit convictions greater than ten years old if their probative worth exceeds their prejudicial effect.

107. Cf. Westen, supra note 47, at 150 n.382 ("State (and federal) standards of materiality and relevance could conflict with compulsory process if redefined so narrowly as to prevent the defendant from introducing probative evidence 'in his favor' that might influence the outcome of the trial.").

108. The Supreme Court has suggested that the exposure of prior perjury convictions is constitutionally protected. See, e.g., Greene v. McElroy, 360 U.S. 474 (1959): "Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact-finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue . . . . [I]t is even more important where the evidence consists of the testimony of individuals . . . who, in fact, might be perjurers . . . .

We have formalized these protections in the requirements of confrontation and cross-examination.

360 U.S. at 496 (emphasis added). Cf. Snyder v. Coiner, 510 F.2d 224 (4th Cir. 1975), where the petitioner challenged his state criminal conviction on the ground that the trial judge had prevented him from attacking the testimony of a prosecution witness by establishing that the witness had previously testified falsely at a deposition. The court found that it was "an abuse of discretion and a violation of constitutional rights to deny to a defendant the right to cross-examine a witness at all on 'a subject matter relevant to the witness's credibility,' such as an instance of prior false swearing." 510 F.2d at 225, quoting Davis v. Alaska, 415 U.S. 308, 318.

109. FED. R. EVID. 609(b) provided: "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date." This proposal was withdrawn in 1974.

110. FED. R. EVID. 609(b) provides:

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.
The second instance in which rules of relevance may erroneously exclude probative evidence is when evidence is excluded because it may confuse or unfairly prejudice the jury; consume an undue amount of time; or work an unfair surprise on an opponent.

Where the exclusion of such probative evidence results in a denial of effective cross-examination, however, the state interests supporting exclusion conflict with the defendant's right of confrontation.

The clause permitting the admission of some convictions more than ten years old represents a change made by the Senate. See S. REP. No. 93-1277, 93d Cong., 2d Sess. 15 (1974).

Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit any convictions over 10 years old, but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

Arguably the statute's standard for admission is too narrow to pass constitutional muster; it does not permit the admission in evidence of convictions greater than ten years old unless probative worth substantially outweighs prejudicial effect. The requirement of substantiality represents a protection for a defendant when he takes the stand, but as applied to other witnesses, may impermissibly restrict a defendant's right to impeach a prosecution witness. See also Glick, Impeachment by Prior Convictions: A Critique of Rule 669 of the Proposed Rules of Evidence for U.S. District Courts, 6 CRIM. L. Bull. 330, 339 (1970), where the author points out that the rule admitting only convictions of crimen falsi may work an injustice on a defendant in some situations, and states that "[o]ne solution to this problem would be to have a residual clause in the rule to allow for the introduction of crimes other than those involving dishonesty that, in the opinion of the trial judge, should be permitted to avoid a miscarriage of justice." Id. at 339.

A further example of statutes that may be drawn too narrowly are the recently enacted provisions restricting the cross-examination of complaining witnesses in prosecutions for rape. See, e.g., MICH. COMP. LAWS ANN. § 750.520j (Supp. 1975). One of the many problems in the successful prosecution of rape cases is the unwillingness of victims to bring criminal charges for fear of the searching cross-examination into their past sexual behavior traditionally permitted either to attack the complaining witness' credibility or to serve as the basis for a defense of consent. MICH. COMP. LAWS ANN. § 750.520j (Supp. 1975) attempts to remedy this situation by providing in part:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

While such restrictions encourage the prosecution of rape cases, thus serving a legitimate legislative purpose, where relevant evidence is excluded thereby, a defendant's right of confrontation is violated in a manner similar to Davis.

111. See MCCORMICK, supra note 8, § 185, at 489.

112. See id.; PROB. FEM. R. EVID. 403, Advisory Committee's Note ("'Unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one'").

113. See MCCORMICK, supra note 8, § 185, at 489-490.

114. Id.
in the situation involving a clash between a privilege and the right to confront, these state interests should not outweigh the defendant's constitutional rights. Many of these interests can be satisfied by a less restrictive alternative, 115 such as limiting instructions by the judge. 116 The effect of evidence working an unfair surprise on the prosecution, for example, could be mitigated by granting a continuance. 117 But even if no alternative can be found, evidence that possesses a significant amount of probative worth should be admitted notwithstanding its potential for confusing or prejudicing the jury against the prosecution's case. If a state must choose between admission and exclusion in a situation where exclusion would prevent the defendant from introducing testimony with a significant exculpatory effect, while admission would make it less likely that the jury would be able to evaluate the issues in a rational manner, the confrontation clause should be seen as mandating admission.

This treatment of relevance rulings accords with the above reading ofDavis. That case indicates that the Court is aware of the crucial importance of cross-examination to a criminal defendant, and is willing to strike down obstacles that a state puts in the path of effective cross-examination. Only when the defendant is permitted to bring out all possible probative evidence on cross-examination that may rebut or qualify the testimony of prosecution witnesses will a criminal trial be consistent with the constitutional requirement that the defendant "shall enjoy the right to . . . be confronted with the witnesses against him . . . ." 118

115. See text at note 70 supra.
116. See PROF. FED. R. EVID. 403, Advisory Committee's Note ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness of a limiting instruction.")
117. Relying on the preferable alternative of a continuance, the Federal Rules of Evidence eliminated unfair surprise as a ground for the exclusion of probative evidence. See FED. R. EVID. 403.
118. U.S. CONST. amend. VI.