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The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules

Edward J. Imwinkelried*

INTRODUCTION

England gave birth to the hearsay doctrine, "that most characteristic rule of the Anglo-American law of evidence."1 American courts promptly imported the doctrine, and every American jurisdiction currently recognizes a form of the rule against hearsay. Some jurisdictions retain the doctrine in its common law form while others have codified it.2

In England, the hearsay rule has been radically liberalized by statute.3 Leading American commentators have proposed similar reforms.4 Article VIII of the Federal Rules of Evidence relaxed the hearsay rule in many important respects,5 and several states have experimented with even more liberal provisions expanding the scope of hearsay exceptions.6

Although the bulk of hearsay doctrine remains in decisional or statutory form, the doctrine also has been "constitutionalized."7 In some cases, the Supreme Court has held that the introduction of hearsay admissible under a common law or

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2. Id. § 246, at 729.
7. See Chambers v. Mississippi, 410 U.S. 284, 308 (1973) (Rehnquist, J.,...
statutory hearsay rule is unconstitutional.\(^8\) In other cases, the Court has ruled that the exclusion of technically inadmissible hearsay is unconstitutional.\(^9\) The danger, of course, is that by constitutionalizing various aspects of hearsay doctrine, the Court will "freeze" those aspects and stultify reformist innovation.\(^{10}\)

The purpose of this Article is to define how much latitude the courts and legislatures have for experimentation. Part I discusses the extent to which the Constitution permits legislatures and courts to liberalize the hearsay doctrine in civil and criminal cases. Part II addresses the degree to which the Constitution requires courts and legislatures to relax the hearsay barrier and accept technically inadmissible hearsay in both civil and criminal actions.

I. TO WHAT EXTENT DO THE FIFTH AND SIXTH AMENDMENTS LIMIT THE LIBERALIZATION OF HEARSAY DOCTRINE?

A. CIVIL CASES

The Supreme Court has never held that the Constitution constrains the admission of hearsay testimony in civil actions. Without such constraints, American courts and legislatures would be free to follow the English lead and abolish the hearsay rule. Some individual justices, however, have advanced theories which would restrict the admission of hearsay in civil cases. In two concurring opinions written in 1970, Justice Harlan suggested that the Due Process Clauses of the Fifth and Fourteenth Amendments limit the introduction of hearsay testimony.\(^{11}\) In the first case, Justice White also acknowledged that it might be possible to derive from the Due Process Clauses constitutional restrictions on the admissibility of hearsay.\(^{12}\) In the second case, Justice Marshall pointed out that since the Due Process Clauses are not confined to criminal cases, a due process restraint would apply in civil actions as...

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\(^9\) E.g., Chambers, 410 U.S. at 297-98.
\(^{10}\) See Green, 399 U.S. at 171 (Burger, C.J., concurring); id. at 173, 185 (Harlan, J., dissenting).
\(^{11}\) Id. at 184 (Harlan, J., concurring); Dutton 400 U.S. at 97 (Harlan, J., concurring).
\(^{12}\) Green, 399 U.S. at 164 n.15.
well as criminal cases.\footnote{13}{Dutton, 400 U.S. at 110 n.11 (Marshall, J., dissenting); see also United States v. Ianniello, 740 F. Supp. 171, 193 (S.D.N.Y. 1990) ("The Sixth Amendment guaranty of confrontation . . . should not blind us to the reality that the question of the admission of hearsay statements . . ., whether in a criminal or civil case, turns . . . on due process considerations of fairness, reliability and trustworthiness."); rev'd on other grounds sub nom United States v. Salerno, 937 F.2d 797 (2d Cir. 1991); In re Charles Jason R., Jr., 572 A.2d 1080, 1081 (Me. 1990).}

Even if the Court were to embrace Justice Harlan's suggestion, a due process restraint probably would not be a formidable barrier to the liberalization of the hearsay rule. Justice Harlan indicated that the restraint would come into play only when hearsay testimony was clearly "abuse[d]."\footnote{14}{Green, 399 U.S. at 184 (Harlan, J., concurring).} Justice White opined that the admission of hearsay evidence would violate this due process constraint only if the evidence was "totally lacking" in reliability.\footnote{15}{Id at 164 n.15.}{Dutton, 400 U.S. at 110 n.11 (Marshall, J., dissenting); see also United States v. Ianniello, 740 F. Supp. 171, 193 (S.D.N.Y. 1990) ("The Sixth Amendment guaranty of confrontation . . . should not blind us to the reality that the question of the admission of hearsay statements . . ., whether in a criminal or civil case, turns . . . on due process considerations of fairness, reliability and trustworthiness."); rev'd on other grounds sub nom United States v. Salerno, 937 F.2d 797 (2d Cir. 1991); In re Charles Jason R., Jr., 572 A.2d 1080, 1081 (Me. 1990).}

B. CRIMINAL CASES: DEFENSE EVIDENCE

As a general proposition, the prosecution may not invoke the Constitution to restrict the admission of hearsay testimony offered by the defense. The preceding subsection pointed out that civil litigants might be able to look to the Fifth Amendment Due Process Clause as the source of a constitutional limitation on the introduction of hearsay. The following subsection demonstrates that the accused can sometimes succeed in citing the Sixth Amendment Confrontation Clause to restrict the admission of prosecution hearsay.\footnote{16}{Both clauses were designed to limit government power. Swader v. Virginia, 743 F. Supp. 434, 436-37 (E.D. Va. 1990).} However, the protection available under the Fifth Amendment and the remainder of the Bill of Rights was never intended to serve as an independent source of government power. Therefore, it would be wrongminded to permit the prosecution to invoke either provision.\footnote{17}{Courts refused to allow the state to invoke the Due Process Clauses in: United States v. Cardinal Mine Supply, Inc., 916 F.2d 1087 (6th Cir. 1990); South Macomb Disposal Auth. v. Township of Wash., 790 F.2d 500 (6th Cir. 1986); Delta Special Sch. Dist. No. 5 v. State Bd. of Educ., 745 F.2d 532 (8th Cir. 1984); Board of Supervisors v. Virginia Dept. of Social Servs., 731 F. Supp. 735 (W.D. Va. 1990); Louisiana ex rel. Guste v. Verity, 681 F. Supp. 1178 (E.D. La. 1988); New York State Dept. of Social Servs. v. Bowen, 661 F. Supp. 1537 (S.D.N.Y. 1987).} Thus, under the Constitution the courts or legislatures could decree the free admissibility of defense hearsay testimony.\footnote{18}{A different result is possible under a state constitution. For example,}
C. CRIMINAL CASES: PROSECUTION EVIDENCE

There seems to be no constitutional restriction on the admissibility of defense hearsay in criminal cases. In civil actions, the restraint, if any, is minimal and grounded in due process. Thus, the literature is understandably silent on these subjects. In contrast, a massive body of literature discusses the constitutional limitations on the admissibility of prosecution hearsay in criminal cases. In criminal cases, the courts look to the Confrontation Clause as the source of the limitations. The Confrontation Clause neither explicitly restricts the admissibility of hearsay nor expressly precludes a court from freely admitting hearsay.19 Indeed, Justices Thomas and Scalia have argued that even in criminal cases, the "[r]eliability [of hearsay] is more properly a due process concern."20 However, current law requires a two-pronged analysis under the Confrontation Clause when the prosecution offers hearsay testimony.21 The prosecutor may have to demonstrate the testimony's reliability and the hearsay declarant's unavailability to testify at trial.22

1. The Point of Agreement: The Need to Satisfy the Reliability Prong of Confrontation Analysis by Establishing the Trustworthiness of the Statements or the Availability of the Hearsay Declarant

All courts agree that to satisfy the dictates of the Confrontation Clause, the prosecution must comply with a reliability requirement. The prosecution may do so by demonstrating either the reliability of the hearsay statement itself or the hearsay declarant's availability at trial.23

a. The First Method of Satisfying the Reliability Prong: Showing the Trustworthiness of the Hearsay Statement Itself

When Justice Harlan initially delved into the meaning of the Confrontation Clause in 1970, he rejected any equation be-

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19 in 1990, the California electorate adopted Proposition 115, which provides that: "In a criminal case, the people of the State of California have the right to due process of law . . . ." CAL. CONST. art. I, § 29 (West 1991).
19. U.S. CONST. amend. VI.
22. Id.
23. Id.
tween the confrontation guarantee and the right to cross-examination. Later the same year, however, he reconsidered his position and adopted Wigmore's view that cross-examination is the only prescription of the Confrontation Clause. The entire Court eventually agreed with Wigmore and determined that the right to cross-examination is the primary interest secured by the Confrontation Clause.

The question then became the nature of the right to cross-examination. The Court has defined the right in functional terms and views the right as a means of testing the accuracy of testimony. The central purpose of cross-examination is to augment the accuracy of the factfinding process. Cross-examination allows the questioner to probe for latent deficiencies in the witness's perception, memory, narrative ability, and sincerity. Cross-examination advances a practical concern for testimonial accuracy.

Having equated confrontation with the right to cross-examination and defined the right instrumentally, the next step in the Court's evolution of confrontation doctrine was predictable: It concluded that the prosecution may substitute a showing of the accuracy or reliability of the declarant's hearsay statements for the right to cross-examine the declarant at trial.

In , Justice Harlan even proposed rewording the clause to read: "In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him." Id. at 95.


Perhaps the clearest statement of the Court's view appears in the plurality opinion in *Dutton*. Writing for the plurality, Justice Stewart declared...
In Ohio v. Roberts, the majority stated that “[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.” When a hearsay exception has longevity and is in widespread use, the consensus on the exception suggests that the foundation for the exception includes a satisfactory circumstantial guarantee of trustworthiness. In effect, the Court presumes that testimony falling within the scope of a traditional exception is sufficiently trustworthy.

On the other hand, Roberts also teaches that when the government cannot lay the foundation for a firmly rooted hearsay exception, the prosecution must show particularized guarantees of trustworthiness to satisfy the Confrontation Clause. The current majority still adheres to that teaching. Testimony falling outside a traditional exception is presumptively unreliable. The presumption, however, is rebuttable; the prosecution may attempt to demonstrate that the testimony possesses specific indicia of reliability. For instance, the Court has ruled that because the residual hearsay exception is not a 

that the possession of “indicia of reliability [is] ... determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.” Dutton, 400 U.S. at 89. In Mancusi v. Stubbs, 408 U.S. 204, 213 (1972), a majority of the Court approved of Justice Stewart’s declaration. The Court has endorsed the position that a showing of indicia of reliability adequately “compensate[s] for the absence of the ... opportunity for cross-examination” at trial. Chambers v. Mississippi, 410 U.S. 284, 299 (1973).

35. 448 U.S. 56, 66 (1980).
36. Haddad, supra note 32, at 84. For example, the Court has held that the co-conspirator exemption from the hearsay rule is so firmly rooted that trial judges need not make any independent inquiry into the reliability of testimony qualifying under the exemption. Bourjaily v. United States, 483 U.S. 171, 183 (1987).
37. Haddad, supra note 32, at 85. The unsettled question is whether this presumption is rebuttable or conclusive; even when testimony falls within a firmly rooted exception, may the accused show that it is unreliable? As we shall see, when the testimony does not fall within a firmly rooted exception, the Court presumes the testimony to be unreliable but permits the prosecution to rebut the presumption.
38. 448 U.S. at 66.
40. E.g., Lee v. Illinois, 476 U.S. 530, 541 (1986) (“The Court has spoken with one voice in declaring presumptively unreliable accomplices’ confessions that incriminate defendants.”).
41. Id. at 543.
42. Id. at 546.
firmly rooted one, a prosecutor invoking the exception must demonstrate that the hearsay in question possesses specific indicia of reliability.

When the prosecution must make a particularized showing that its hearsay testimony is reliable, two questions arise: How rigorous a showing must the prosecution make, and what type of factors may it rely on to make the showing? In response to the first question, one respected commentator has asserted that, although the Court's Confrontation Clause decisions "seemingly" limit the admission of prosecution hearsay, the decisions "in fact" do not impose "any significant limitations." Admittedly, in Lee v. Illinois the majority referred to a "weighty presumption against the admission of . . . uncross-examined evidence." However, it would probably be a mistake to ascribe great significance to that isolated reference. Other decisions have required merely "some" likelihood of trustworthiness. As former Justice Marshall complained, indicia of reliability are "easy to come by." The Court eventually may announce a test similar to the standard governing the propriety of stops under the Fourth Amendment. In that setting, the Court has held that to justify a stop, a police officer need not have probable cause to believe that the detainee has committed a crime. The officer need be aware only of specific, articulable facts creating a reasonable, founded suspicion of criminal conduct. In the hearsay setting, reliability may be satisfied if the prosecutor can point to specific facts indicating that at the time of the statement the declarant spoke truthfully or was in a position to gain firsthand knowledge. There was a hint in Dutton v. Evans that the Court might adopt a variable reliability standard and insist upon a stronger showing of trustworthiness when the hearsay

43. Idaho v. Wright, 110 S. Ct. 3139, 3147 (1990) ("We note at the outset that Idaho's residual hearsay exception . . . is not a firmly rooted hearsay exception for Confrontation Clause purposes.").
44. Id.
45. Haddad, supra note 32, at 78, 83.
48. Id. at 110 (Marshall, J., dissenting).
49. Terry v. Ohio, 392 U.S. 1, 22 (1968).
52. In Dutton, Justice Stewart evaluated the reliability of a hearsay statement by reviewing the declarant's personal knowledge, the accuracy of his recollection, and his sincerity. Dutton v. Evans, 400 U.S. 74, 88-89 (1970).
is crucial to the prosecution's case or devastating to the defense's case. However, in recent Confrontation Clause decisions, neither the majority nor the dissenting justices have resurrected that suggestion.

The Court has also grappled with the second question: What factors may the prosecution rely on to satisfy the reliability threshold? In one case the Court implied that the prosecution could point not only to circumstances surrounding the making of the hearsay statement but also to other evidence corroborating the accuracy of the hearsay. However, when the Court squarely faced the question in *Idaho v. Wright* in 1990, a five-justice majority answered in the negative. The majority couched the issue in terms of the "inherent" trustworthiness of the hearsay. It stated that, in resolving trustworthiness, a judge may consider only the circumstances attending the making of the statement.

It remains to be seen whether the *Wright* holding will continue to enjoy the support of a majority of the justices, as the *Wright* majority included Justices Brennan and Marshall, who have since retired from the Court. Justice Kennedy dissented vigorously in *Wright*; analogizing to Fourth Amendment jurisprudence, he pointed out that the cases clearly permit a police officer, when weighing an informant's report, to determine whether it provides reasonable suspicion or probable cause and to consider other facts corroborating the report. Justice Kennedy's argument may be even stronger than he makes it out to be. As this Article explains, when the issue is whether defense hearsay is reliable enough to trigger the accused's Compulsory Process right to present evidence, the Court has consistently held that the reliability is a function of both the circumstances surrounding the statement and independent cor-

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53. *Id.* at 87 (rather than being "crucial" or "devastating," the testimony was "of peripheral significance at most").

54. Lee v. Illinois, 476 U.S. 530, 546 (1986) (writing for the majority, Justice Brennan apparently factored in the accused's confession in deciding whether a codefendant's confession could be admitted as substantive evidence against the defendant); *id.* at 554-56 (Blackmun, J., dissenting) (arguing that in making the decision, it would be proper to weigh both the accused's own confession, and physical evidence corroborating the accuracy of the codefendant's confession).


56. *Id.*


58. *Wright*, 110 S. Ct. at 3156 (Kennedy, J., dissenting).

59. See infra part II.B.
roboration. Newly appointed Justices Souter and Thomas may favor employing the same approach for determining reliability under the Confrontation and Compulsory Process Clauses. If so, the Wright holding will be short-lived.60

b. The Second Method of Satisfying the Reliability Prong: Producing the Hearsay Declarant at Trial

At common law, several distinguished jurists, most notably Judges Hand61 and Friendly,62 argued for relatively free admissibility of hearsay testimony when the hearsay declarant is available at trial. They believed that the foremost rationale for the hearsay rule is the suspect reliability of statements which have not been subjected to cross-examination. When the declarant is available at trial, the cross-examiner can question the declarant about both the declarant’s in-court testimony and the declarant’s earlier statements. They reasoned that the opportunity for cross-examination largely satisfies the primary purpose of the hearsay rule and therefore justifies removing the declarant’s earlier statements from the definition of hearsay.63

As previously stated, the Court has essentially equated the confrontation guarantee with a right to cross-examine. Thus, it starts at the same point as would Judges Hand and Friendly. Consequently, the Court’s decisions support the view that when the prosecution cannot establish the reliability of a declarant’s hearsay statement, the prosecution may still satisfy the guarantee by producing the declarant at trial.

Justices White and Harlan advanced this view in their opinions in California v. Green.64 In the lead opinion in Green, Justice White approvingly cited the pertinent opinions by Judges Hand and Friendly and urged adoption of their position.65 It seemed clear to Justice White that when the declarant is willing to answer questions and submit to meaningful


63. This reasoning persuaded Kansas to exempt available declarants’ pretrial statements from its definition of hearsay. KAN. CIV. PROC. CODE ANN. § 60-460(a) (Ensley 1983).

64. 399 U.S. 149 (1970).

65. Id. at 154 n.5.
cross-examination, "for all practical purposes" the accused "re-gains most of the . . . protections" lost by the lack of an opportunity to question the declarant at the time of the making of the statement. In that event, "the admission of his out-of-court statements does not create a confrontation problem."

Justice Harlan expressed the same view in his concurrence. He noted that in Green the prosecution had produced the hearsay declarant at trial. He then stated: "That . . . perforce satisfies" the Confrontation Clause. When the declarant has been produced, the declarant's earlier statements are "hearsay only in a technical sense." The declarant's production gives the cross-examiner the opportunity to probe "the circumstances of memory, opportunity to observe, meaning, and veracity." In one respect, Justice Harlan took an even more extreme position than Justice White. The language in Justice White's opinion about "full and effective cross-examination" intimates that he would find a confrontation violation if a physically present declarant refused to answer all or most of the questions posed at trial. However, Justice Harlan stated that it would be immaterial if "the witness [was], in a practical sense, unavailable."

The core of Green's reasoning is sensible. As the Court noted in Green and in later cases, the question of satisfying the reliability prong turns on whether the record "afford[s] the trier of fact a satisfactory basis for evaluating the truth of the

66. *Id.* at 158. It is true that Justice White's description of his position was somewhat unclear. In one passage, he asserted that the Confrontation Clause is satisfied "so long as the witness [is] present at trial." *Id.* at 157. In another passage, he stated that the declarant must be "present and testifying at trial." *Id.* at 158. In still another passage, he indicated that the declarant must be physically present, "testifying," and "subject to full and effective cross-examination." *Id.*

67. *Id.* at 162.
68. *Id.* at 188 (Harlan, J., concurring).
69. *Id.*
70. *Id.*
71. *Id.* at 159.
72. *Id.* at 188 (Harlan, J., concurring). Justice Harlan stated:

The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation . . .

73. *Id.* at 161.
When the declarant testifies at trial, the trier of fact can study the declarant's demeanor while the declarant fields questions about the prior statement. The cross-examiner, of course, would prefer to question the declarant at the very time the statement is made. Nevertheless, subsequent cross-examination at trial gives the trier a sense of the acuteness of the declarant's perception, memory, narrative ability, and sincerity. Armed with that sense, the trier is in a much better position to determine whether the hearsay statement is reliable.

The Court has not had an occasion since *Green* to rest a holding squarely on the theory that the hearsay declarant's production at trial automatically satisfies the Confrontation Clause guarantee. All of the Court's recent citations to *Green* have been approving. Consequently, there is no reason to believe that a majority of the Court is ready to abandon the *Green* theory. Therefore, the prosecution may continue to comply with the reliability prong of confrontation analysis either by establishing the reliability of the hearsay statement or by producing the hearsay declarant for interrogation at trial.

2. The Point of Disagreement: The Necessity of Showing the Declarant's Unavailability at Trial

In the preceding section, this Article noted that the prosecution may satisfy the reliability prong by producing the hearsay declarant at trial. When the declarant testifies at trial, the trier of fact has the opportunity to listen to the declarant's answers and observe the declarant's demeanor. This helps the trier decide whether the declarant's earlier statement is reliable—that is, whether the trier may confidently rely on the statement as a basis for factfinding. Although the courts seem to agree that the declarant's production satisfies the reliability prong, the courts are still divided on a related set of questions.

Assume that the prosecution opts to satisfy the reliability prong by showing the trustworthiness of the statement itself rather than by producing the declarant. Is the trier's opportunity to assess the declarant personally so critical that the prose-

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75. *Green*, 399 U.S. at 161.
76. *Id.* at 160-61.
cution must show both the trustworthiness of the statement itself and the declarant’s unavailability at trial? In other words, must the prosecution establish a necessity for resorting to hearsay testimony rather than the declarant’s live testimony?

The Court’s treatment of this question has a checkered history, beginning with its 1970 decision in *California v. Green.* Justice White’s opinion for the Court suggested that the declarant’s unavailability at trial is a pertinent factor in Confrontation Clause analysis. He pointed out that the Court had historically required “careful scrutiny” of hearsay testimony predicated on foundational proof of the declarant’s unavailability. Nevertheless, he disclaimed any intention to “map out” a comprehensive theory to decide when the Confrontation Clause allows the introduction of an absent declarant’s statements.

In his concurrence, however, Justice Harlan did attempt to map out such a theory. His reading of the precedents convinced him that proof of the declarant’s unavailability was a “thread” running through the earlier cases. In his judgment, when it is feasible for the prosecution to produce the declarant, “fairness” demands that the prosecution do so. He therefore urged the Court to announce a general rule “requir[ing] the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial.”

The ink was hardly dry on the opinions in *Green* when the Court rendered its decision in *Dutton v. Evans.* Once again, Justice Harlan filed a concurrence. In *Dutton,* Justice Harlan retreated from the position he had taken in his concurring opinion in *Green.* Citing the examples of business records, official statements, learned treatises, and trade reports, he argued that requiring the declarant’s production would often be “unduly inconvenient and of small utility.”

Justice Harlan’s concurrence in *Dutton* laid the issue to rest for a decade. The controversy resurfaced in 1980 when the

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80. *Id.* at 162.
81. *Id.*
82. *Id.* at 183 (Harlan, J., concurring).
83. *Id.* at 187.
84. *Id.* at 174; see also *id.* at 182, 186 (reiterating).
86. *Id.* at 95.
87. *Id.* at 96.
Court handed down its decision in *Ohio v. Roberts.* In the majority opinion, Justice Blackmun cited *Green* in asserting that:

([In conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.] 89

Concededly, Justice Blackmun cited *Dutton* in a footnote, treating it as limited authority that "[a] demonstration of unavailability . . . is not always required."

In text, he insisted that the Confrontation Clause "normally" requires that the prosecution establish the declarant's unavailability. Although he dissented, Justice Brennan agreed with Justice Blackmun on the proposition that there is a general rule obliging the prosecution to prove the declarant's unavailability; he styled it a "threshold requirement."

At this juncture, history repeated itself. In 1986, the Court decided *United States v. Inadi,* involving the admissibility of vicarious admissions by co-conspirators. Just as *Dutton* retreated from the powerful unavailability language in *Green,* the *Inadi* majority attempted to distance itself from the strong unavailability language in *Roberts.* The majority refused to interpret *Roberts* as announcing a hard-and-fast unavailability requirement.

It pointed out that in the pertinent passage in *Roberts,* all the cited cases related to the former testimony hearsay exception which, both at common law and under contemporary statute, requires foundational proof of unavailability. The majority asserted that "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."

While the majority expressly repudiated a universal requirement of proof of the declarant's unavailability, it stopped short of disavowing the suggestion in *Roberts* that proof of unavailability is normally or usually necessary. Writing for the

88. 448 U.S. 56 (1980).
89. Id. at 65.
90. Id. at 65 n.7.
91. Id. at 66.
92. Id. at 77 (Brennan, J., dissenting).
94. Id. at 391.
95. Id. at 393; see FED. R. EVID. 804(b)(1).
96. Inadi, 475 U.S. at 394.
majority, Justice Powell argued that it is peculiarly unsound to condition the admissibility of co-conspirators' statements on a showing of unavailability. Justice Powell wrote that the accomplices' trial testimony is unlikely to "recapture the evidentiary significance of statements made when the conspiracy was operating." In contrast, he noted, in the case of former testimony—the hearsay exception employed in Roberts—the prerecorded testimony is a "weaker substitute for live testimony." In Inadi, Justice Powell believed that under the former testimony exception it makes more sense to admit "the weaker version" of the evidence only when the declarant is unavailable. Hence, the general unavailability rule mentioned in Roberts and the outcome in Inadi can be reconciled by interpreting Inadi as holding only that there are exceptional reasons for dispensing with proof of unavailability under the co-conspirator doctrine.

Until recently, the Court's post-Inadi pronouncements on the unavailability question permitted the defense bar generally to continue demanding proof of the declarant's unavailability. Shortly after deciding Inadi, the Court handed down its decision in Lee v. Illinois. Chief Justice Burger, with Justices Blackmun, Powell, and Rehnquist, dissented, reiterating that in the "usual" case the prosecution must generally prove the declarant's unavailability. The following year, Chief Justice Rehnquist wrote in a majority opinion that "as a general matter" the prosecution must demonstrate the declarant's unavailability at trial. In Idaho v. Wright, the Court alluded to "the general requirement of unavailability." The majority approvingly quoted the Roberts language to the effect that proof of the

97. Id.
98. Id. at 395.
99. Id.
100. Id. at 394.
101. Id.
103. Id. at 549 (Blackmun, J., dissenting) (quoting Ohio v. Roberts, 448 U.S. 56, 65 (1980)).
105. 110 S. Ct. 3139, 3146-47 (1990); see State v. Gregg, 464 N.W.2d 431, 432-33 (Iowa 1990); see also Donald A. Dripps, The Confrontation Clause and the Sexual Abuse of Children, Trial, May 1991, at 11, 11 ("While the Court has
declarant’s unavailability is mandatory in the usual case.106

Many commentators believed that the current conservative majority of the Court would eventually hold that a showing of unavailability is not constitutionally required for most hearsay exceptions.107 These commentators predicted that the majority would ultimately embrace the position that proof of unavailability is necessary only in the case of hearsay exceptions, such as former testimony, which have historically required such proof as part of their foundation.108 In spite of the decisions cited in the preceding paragraph, the markedly pro-government sentiments of the current majority lent credence to that prediction.

Perhaps more importantly, the Inadi rationale cannot be confined to the co-conspirator doctrine.109 In Inadi, the majority rationalized dispensing with proof of unavailability on the ground that an accomplice’s in-court testimony might not be as sincere as pretrial statements made to co-conspirators during the progress of the conspiracy.110 A similar argument can be made to justify the admission of testimony falling within many hearsay exceptions which presently do not require proof of the declarant’s unavailability. For example, an excited declarant’s trial testimony is unlikely to replicate the sincerity of the startled utterance. In the same vein, a prosecutor might contend that an employee’s in-court testimony probably cannot duplicate the quality of the employee’s memory at the time she prepared a business entry years before.111 More broadly, a prosecutor can plausibly argue that there should be an exemption from any need to prove the declarant’s unavailability whenever, at the time of its making, the hearsay statement possessed an indicium of reliability which would be difficult to recreate at trial. The Inadi majority’s argument sweeps so widely

106. Wright, 110 S. Ct. at 3146.
107. See, e.g., Haddad, supra note 32, at 61.
108. Id.
111. For a discussion of the importance of memory in evaluating the trustworthiness of hearsay, see Edward J. Imwinkelried, The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt—and Quickly Forgotten, 41 Fla. L. Rev. 215 (1989).
that the commentators’ prediction of the deterioration of the Roberts doctrine seemed well-founded.\textsuperscript{112}

The Supreme Court’s decision in \textit{White v. Illinois}\textsuperscript{113} in early 1992 confirmed the prediction. Chief Justice Rehnquist acknowledged in the lead opinion that Roberts contained broad language “that might suggest that the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence.”\textsuperscript{114} However, the Chief Justice asserted that the Court’s subsequent decision in \textit{Inadi} “negated” that suggestion.\textsuperscript{115} The \textit{White} majority announced that “unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.”\textsuperscript{116}

D. \textbf{SUMMARY}

Although the applicable constitutional jurisprudence is unsettled in some areas, the Fifth and Sixth Amendments permit the courts and legislatures to go quite far in liberalizing the

\textsuperscript{112} If the prosecution must prove the hearsay declarant’s unavailability at trial, the next question which arises is what types of factual showings suffice to establish the unavailability. The Court has addressed this question in several cases. \textit{E.g.}, Ohio v. Roberts, 448 U.S. 56 (1980) (prosecution issued five separate subpoenas to witness at her parents’ residence, there were indications that witness had left the state, and witness’s mother testified that she knew of no way to reach witness); Mancusi v. Stubbs, 408 U.S. 204 (1972) (witness was an American citizen, but a permanent resident of Sweden; at the time the applicable federal statute did not authorize a federal court to require an American citizen to return to the United States for a state court proceeding); California v. Green, 399 U.S. 149 (1970) (witness claimed to be unable to remember); Berger v. California, 393 U.S. 314 (1969) (no attempt made by prosecution to subpoena out-of-state witness); Barber v. Page, 390 U.S. 719 (1968) (witness was incarcerated in federal prison in another state, but prosecution neither sought a federal writ of habeas corpus ad testificandum nor requested the cooperation of the United States Bureau of Prisons). The leading precedent, however, is certainly \textit{Barber v. Page}. \textit{Barber} enunciated the general principle that the prosecution must make a good faith effort to bring the declarant to the site of trial. 390 U.S. at 724-25. As a constitutional minimum, the prosecution must either exhaust all available means of compulsory process or make a persuasive, case-specific showing that it would be futile to resort to the process. \textit{Imwinkelried et al.}, \textit{supra} note 51, § 1303, at 329 (1987).

\textsuperscript{113} 112 S. Ct. 736 (1992).

\textsuperscript{114} \textit{Id.} at 741.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.}
current rules governing the admissibility of hearsay.\textsuperscript{117} Even if the Court ultimately recognizes a due process restraint in civil cases, it will probably be minimally restrictive. In criminal cases, no constitutional impediments prevent the routine admission of defense hearsay. Additionally, even the standards controlling the admissibility of prosecution hearsay could be substantially relaxed. If the prosecution can invoke a firmly rooted hearsay exception, there is no need for a particularized showing of reliability. But even when such a showing is mandatory, indicia of reliability may be "easy to come by." Further, in most cases the prosecution will not be required to

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{The extent of the constitutional permissibility of hearsay liberalization}
\end{figure}

\textsuperscript{117} Figure I depicts the extent of constitutionally permissible liberalization:

\begin{itemize}
\item \textbf{A1} Defense evidence in criminal cases.
\item \textbf{B1} Evidence in civil actions on the assumption that the due process clause constrains the admission of totally unreliable hearsay.
\item \textbf{C1} Prosecution evidence in criminal cases. This diagram assumes arbitrarily that only 50\% of the universe of hearsay possesses adequate indicia of reliability. The diagram further assumes that at least in some cases the prosecution will have to demonstrate the declarant's unavailability as well as the reliability of the statement.
\end{itemize}
establish the declarant’s unavailability at trial. In White, the majority severely reduced the scope of the unavailability requirement. In short, the Fifth and Sixth Amendments would permit American jurisdictions to follow the English lead and significantly liberalize the admissibility of hearsay.

II. TO WHAT EXTENT DO THE FIFTH AND SIXTH AMENDMENTS REQUIRE THE LIBERALIZATION OF HEARSAY DOCTRINE?

Part I dealt with the question of whether the Constitution would permit the relaxation of American hearsay rules. The more interesting question is whether the Fifth and Sixth Amendments mandate liberalization.

A. CRIMINAL CASES: PROSECUTION EVIDENCE

An accused may invoke well-established constitutional theories to override hearsay rules blocking the admission of exculpatory testimony. Prosecutors have occasionally appealed to the same theories to justify overcoming hearsay rules barring the admission of inculpatory testimony.118 These appeals are spurious. The theories in question rest on the Bill of Rights, most notably the Fifth Amendment Due Process Clause and the Sixth Amendment compulsory process guarantee. This Article has observed that the Bill of Rights was never intended to serve as a source of government power.119 Rather, its raison d’etre is to function as a limitation on that power. Thus, although the Court’s Confrontation Clause decisions would permit a significant relaxation of the standards for admitting prosecution hearsay, no tenable constitutional theory necessitates the relaxation.

B. CRIMINAL CASES: DEFENSE EVIDENCE

1. The Accused’s Constitutional Right to Present Favorable Evidence

Because the prosecution cannot claim protection under the Bill of Rights, routine admissibility of defense hearsay is consti-

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119. See supra part I.B.
LIBERALIZING HEARSAY

The Constitution requires the liberalization of the standards governing the introduction of defense hearsay.

The accused, unlike the prosecutor, can avail herself of an established body of doctrine to override common law and statutory hearsay rules. This doctrine originated in the 1967 Supreme Court decision, Washington v. Texas. Washington, charged with homicide, attempted to call Fuller as a defense witness. Fuller would have given exculpatory testimony, but he had already been convicted for his involvement in the same incident. Two state statutes provided that persons charged with or convicted of the same offense as the accused were incompetent as defense witnesses. The trial judge relied on these statutes in refusing to permit Washington to call Fuller to the stand.

On appeal, the Supreme Court reversed Washington’s conviction. Chief Justice Warren, writing the majority opinion, stated that the accused has a constitutional right “to put on the stand a witness who [is] physically and mentally capable of testifying to events that he ha[s] personally observed, and whose testimony [is] relevant and material to the defense.” The Court held that the Fourteenth Amendment Due Process Clause incorporates Sixth Amendment compulsory process and thereby renders the latter guarantee directly enforceable against the states. The State contended that it had not violated Washington’s compulsory process rights. Although the State was willing to subpoena Fuller and produce him at trial, it merely objected to Fuller testifying. Chief Justice Warren stated that it was absurd to think the Framers intended to confer on an accused the hollow right to produce witnesses at trial from whom he or she could not elicit testimony. The Court held that the express compulsory process right includes an implied right to present defense testimony.

120. 388 U.S. 14 (1967).
121. Id. at 16.
122. Id. at 16 n.4.
123. Id. at 17.
124. Id. at 23.
125. Id. at 18-19.
126. Id. at 19.
127. Id. at 23. The Chief Justice stated that he refused to believe that “[t]he Framers . . . intend[ed] to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.” Id.
128. Id.
therefore ran afoul of the Compulsory Process Clause because they completely barred a defense witness from taking the stand, thus impeding the presentation of defense testimony.

In Washington, the Court dealt with an incompetency rule which barred altogether a defense witness from testifying. Washington did not define the scope of this new constitutional right allowing the defense to put its witness on the stand. It did not, moreover, address whether the state may freely impose regulations on the content of the witness’s testimony, or whether the accused may also invoke Washington to strike down such regulations. Some lower courts limited Washington merely to invalidating broad incompetency rules that bar defense witnesses from the stand and held that state hearsay rules were immune from attack.

The Supreme Court’s decision in Chambers v. Mississippi proved these lower courts wrong. Chambers stood trial for homicide. The defense asserted that the real killer was a man named McDonald. McDonald had told several acquaintances that he was the killer; furthermore, he had made a sworn confession to Chambers’ attorneys stating that he shot the victim. Both immediately before and at trial, McDonald denied his guilt. When the defense attempted to introduce testimony about McDonald’s out-of-court statements, the prosecutor objected that the unsworn statements were hearsay. The defense rejoined that the statements fell within the declaration-against-interest hearsay exception, but the prosecution argued that state law limited that exception to declarations against pecuniary interest. These declarations were contrary to McDonald’s penal interest; the trial judge therefore excluded the testimony regarding his unsworn statements.

On appeal, the Court reversed. Speaking for the majority, Justice Powell stressed that the statements in question “bore persuasive assurance of trustworthiness” because they were made and later offered at trial “under circumstances that pro-

132. Id. at 287, 292-93.
133. Id. at 288.
134. Id. at 299.
135. Id.
vided considerable assurance of their reliability." Justice Powell reasoned that the basic purpose of the hearsay rule is to shield the jury from untrustworthy evidence. The statements in question, however, were both reliable and critical to the defense. The Court noted that a "mechanistic[ ]" application of the hearsay rule such as that made by the trial judge threatened "to defeat the ends of justice." Citing Washington, Justice Powell held that the trial court ruling was unconstitutional.

136. Id. at 300, 302. McDonald spontaneously made three separate statements to three acquaintances. These statements, powerfully adverse to his interests, were each "corroborated by some other evidence in the case." Id. at 300. The corroborating evidence included, according to the Court, "McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a 22-caliber revolver and subsequent purchase of a new weapon." Id. Justice Powell noted that "if there was any question about the truthfulness of the . . . statements, McDonald was present in the courtroom . . . . He could have been cross-examined . . . ." Id. at 301.

137. Id. at 298.

138. Id. at 302.

139. Id. at 302-03. While Chambers unquestionably helped clarify the scope of the accused's constitutional right to present evidence, uncertainty still remained. A second ruling by the trial judge, which the Court found to be constitutionally flawed, complicated the analysis in Chambers. At trial, the prosecution did not call McDonald as a witness, thus, the defense was forced to do so. Both before and at trial, the defense requested permission to treat McDonald as an adverse witness and therefore lead on direct examination. Id. at 291. The trial judge denied the request, ruling that under the state's "voucher" rule, the defense had no right to lead because it had elected to place McDonald on the stand. Id. at 295. Justice Powell held this ruling to be constitutionally erroneous. Given the content of McDonald's testimony, he was functionally one of Chambers' accusers under the Sixth Amendment Confrontation Clause. Id. at 297. The Confrontation Clause therefore gave Chambers the right to conduct the direct examination as if it were a cross-examination, including the right to lead.

Three passages in Justice Powell's opinion at least faintly suggest that the Chambers holding was limited to its facts and that neither error alone would have amounted to constitutional error necessitating reversal. Id. at 298 ("We need not decide . . . whether this error alone would occasion reversal . . . ."); id. at 302 ("[T]he exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process."); id. at 303 ("[W]e hold simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial."). However, the Court withdrew that suggestion when it decided Green v. Georgia, 442 U.S. 95 (1979) (per curiam). As in Chambers, a trial judge strictly applied state hearsay rules and excluded evidently trustworthy, critical hearsay. Unlike in Chambers, however, in Green the exclusion of the defense hearsay was the only error. Nevertheless, the Court cited Chambers as controlling authority. Id. at 97. As one state court later remarked, "In Chambers, the Supreme Court expressly stated that it was not deciding whether the application of a single rule of evi-
2. The Impact of the Accused's Constitutional Right on the Admissibility of Defense Hearsay Testimony

With rare exceptions, the common law and statutory hearsay rules in the United States treat the prosecution and defense in the same fashion; regardless of who the proponent of the hearsay is, the foundational requirements are the same. Thus, defense counsel must establish the reliability of the hearsay and, in some cases, the declarant's unavailability at trial.

The pertinent questions for the defense counsel parallel the inquiries relevant to the prosecution under the Confrontation Clause: How persuasive a showing of reliability must the defense make, and what types of factors may the defense rely on to satisfy the reliability threshold?

Turning first to the issue of reliability, the showing required of the defense, like that required of the prosecution, is uncertain. If Chambers v. Mississippi furnishes the benchmark, the standard for trustworthiness appears high. The defense made a strong showing of reliability in Chambers: McDonald four times acknowledged his guilt; he made the statements to persons to whom he had no motive to lie; and there was independent corroboration of McDonald's involvement in the shooting. Justice Powell emphasized that the record contained "considerable assurance" of the reliability of McDonald's statements. As one commentator has noted, if Chambers sets the standard for trustworthiness, the defense will rarely be able to satisfy it because courts can simply distinguish Chambers by finding insufficient guarantees of trustworthiness in the cases before them.

A number of lower courts have interpreted this standard as being quite high. That view, however, is mistaken. In the
course of his discussion, Justice Powell illustrated the type of showing that the defense must make to invoke the accused's constitutional right to present evidence by citing decisions in which the Court held the prosecution adequately complied with the Confrontation Clause.145 Chambers indicates that at most, the defense must pass the standard for prosecution hearsay.

The standard applicable to defense hearsay arguably is even lower than that governing prosecution hearsay. With some support in the lower court case law,146 Professor Westen has contended that "[t]here is only one point at which the jury should not be allowed to consider the evidence—where the evidence is so inherently unreliable that it cannot rationally be evaluated."147 In Westen's judgment, the accused has a constitutional right to present evidence critical to his defense "unless the court concludes that the evidence is so inherently unreliable that reasonable people, properly cautioned, could not rationally rely on it."148 If the defense hearsay satisfies that minimal standard and bears significantly on a crucial issue in the case, the hearsay is capable of generating reasonable doubt and thus should be admitted.

The Supreme Court's 1987 decision in Rock v. Arkansas149 supports Westen's argument. The issue in Rock was whether the accused could testify to certain facts which she remembered only after hypnotic induction. The lower courts precluded her from testifying to those facts; they held that hypnotically enhanced testimony is so unreliable that it is per se inadmissible.150 On appeal, the Court vacated the accused's conviction.151

The Court found that the State had not demonstrated that hypnotically enhanced testimony is always so untrustworthy that a per se rule of inadmissibility is justified.152 The Court's

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146. Rivera v. Director, Dep't of Corrections, 915 F.2d 280, 282-83 (7th Cir. 1990); People v. Sanders, 271 Cal. Rptr. 534, 567 (Cal. Ct. App. 1990) (Johnson, J., dissenting); IMWINKELRIED, supra note 144, at 388-95 (collecting cases).
150. Id. at 48-49.
151. Id. at 62.
152. Id. at 61. Justice Blackmun, writing for the majority, candidly admit-
opinion thus suggests that the prosecution may have the burden on the issue of the reliability of the defense evidence. Justice Blackmun, writing for the majority, noted that "the State in Chambers did not demonstrate that the hearsay testimony, which bore 'assurances of trustworthiness,' including corroboration by other evidence, would be unreliable." Justice Blackmun not only referred back to Chambers, he also expressly cited Professor Westen's writings. Thus, Rock may signal a lowering of the standard for evaluating the reliability of defense hearsay.

The second issue relating to the reliability of defense hearsay evidence concerns the factors the defense may rely on to satisfy its burden. This Article discussed the case law governing the prosecution's burden to satisfy the reliability prong under the Confrontation Clause. It noted that in Idaho v. Wright, a bare majority of the Court ruled that, in assessing the reliability of prosecution hearsay, the trial judge may consider only the circumstances surrounding the making of the statement; the judge may not factor corroborating evidence into the assessment. Under California v. Green, the prosecution has an alternative method of complying with the reliability prong. Absent a showing of the accuracy of the declarant's hearsay statements, the prosecution can produce the declarant for questioning at trial. How do the rules under the Compulsory Process Clause compare with these Confrontation Clause rules?

In one respect, the compulsory process rules are more lenient than those under the Confrontation Clause. Unlike the prosecutor, defense counsel may employ independent corroborating evidence as part of the basis for inferring that the defense hearsay is reliable. In Chambers v. Mississippi, Justice Powell cited several independent factors assuring the reliability

\[\text{Id. at 55.}\]
\[\text{Id. at 52.}\]
\[\text{Id. at 59.}\]
\[\text{Id. at 60-61.}\]
\[\text{Id. at 60-61.}\]
of McDonald's hearsay statements.\textsuperscript{157} Similarly, the Court in \textit{Rock v. Arkansas} faulted the state courts for excluding the accused's hypnotically enhanced testimony "without regard to . . . any independent verification of the information" recalled under hypnosis.\textsuperscript{158} At this juncture, the two bodies of law are asymmetrical: \textit{Chambers} and \textit{Rock} permit the defense to do what \textit{Wright} explicitly forbids the prosecution from doing. As this Article has suggested, once the conservative majority of the Court fully appreciates the asymmetry, the majority may decide to eliminate it by overruling \textit{Wright}. At the moment, however, \textit{Wright}, \textit{Chambers}, and \textit{Rock} all are good law.

In another respect, however, the prosecution faces an easier task in meeting its reliability requirement than does the defense under the Compulsory Process Clause. \textit{California v. Green} recognizes two distinct methods by which the prosecution can satisfy the reliability prong of the confrontation guarantee: The prosecution may either show the trustworthiness of the hearsay statement itself or produce the declarant, thereby enabling the trier to evaluate the declarant while deciding whether to rely on the declarant as a source of information.\textsuperscript{159} In \textit{Chambers}, as in \textit{Green}, the Court noted that the hearsay declarant was available at trial.\textsuperscript{160} However, the \textit{Chambers} opinion and the \textit{Green} opinion treated that fact differently. Justice Harlan, concurring in \textit{Green}, reasoned that the declarant's production automatically satisfied the reliability prong.\textsuperscript{161} In contrast, the declarant's availability in \textit{Chambers} was simply one factor favorable to a finding that his hearsay statements were reliable. Therefore, the declarant's availability is a more significant factor for the prosecution, sufficient in itself to satisfy the reliability requirement.

The Court may eventually eliminate this asymmetry by ex-

\textsuperscript{157} 410 U.S. 284, 300 (1973). One factor was that each of McDonald's statements was corroborated by some other evidence in the case—McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. \textit{Id.}

\textsuperscript{158} 483 U.S. 44, 56 (1987).

\textsuperscript{159} 399 U.S. 149 (1970).

\textsuperscript{160} \textit{Chambers v. Mississippi}, 410 U.S. 284, 301 (1973); \textit{Green}, 399 U.S. at 161.

\textsuperscript{161} 399 U.S. at 188 (Harlan, J., concurring) ("[N]otwithstanding the conventional characterization of an available witness' prior out-of-court statements as hearsay when offered affirmatively for the truth of the matter asserted . . . .").
tending Justice Harlan's reasoning to defense hearsay. The Court could announce that whenever the declarant is available at trial, the defense need not demonstrate the reliability of the hearsay statement. *Chambers* lends some support to this argument. Immediately after noting McDonald's availability, Justice Powell, citing *California v. Green*, stated that McDonald "could have been cross-examined by the State, and his demeanor and responses weighed by the jury." To date, the defense bar has not even urged this argument on the Court. The Court's decision in *Rock v. Arkansas* makes it unlikely that the Court will embrace this argument in the near future. *Rock* involved testimony from the defendant, who was unquestionably available at trial. Although the majority found that the exclusion of the defendant's hypnotically-enhanced testimony was constitutional error, it felt compelled to discuss the reliability of this testimony. Thus, the majority assumed *sub silentio* that her availability at trial did not relieve the defense of the burden of making at least a minimal showing of the trustworthiness of her proposed testimony.


This Article has addressed whether the prosecutor must establish the declarant's unavailability as well as the reliability of the declarant's statement in order to satisfy the Confrontation Clause. A parallel issue under the Compulsory Process Clause is whether the accused must demonstrate a need for the hearsay.

The issue of necessity takes the form of two questions. First, must the defense prove necessity by establishing that the declarant is unavailable at trial? *Chambers* strongly suggests that the answer is no. In *Chambers*, the accused offered the declarant's statements under the declaration-against-interest exception. Under both common law and the Federal Rules of Evidence, the foundation for that exception includes proof of the declarant's unavailability at trial. In *Chambers*, however, McDonald was available. He was not only physically present at

162. *Chambers*, 410 U.S. at 301.
The Federal Rules of Evidence define unavailability broadly, but even under that definition, McDonald was not unavailable. Nevertheless, the Court ruled that excluding the hearsay violated Chambers's constitutional right to due process.

The second question is whether the accused must establish necessity in the sense that the hearsay is vital to the defense theory of the case. This question highlights one of the most marked differences between the standards applicable under the Compulsory Process Clause and those under the Confrontation Clause. In the latter setting, the prosecutor certainly does not need to establish that the hearsay is vital to her case. On the contrary, when prosecutorial hearsay is "crucial" to the government's case or "devastating" to the defense case, it may be more difficult for the prosecution to surmount the Confrontation Clause hurdle. The prosecution may have to make a stronger showing of reliability. Prosecution hearsay is more readily admissible under the Confrontation Clause when it is "of peripheral significance" to the case. However, the reverse is true under the Compulsory Process Clause. To successfully invoke the constitutional right to present evidence, the accused must persuade the judge that the testimony in question is crucial to the defense. In Washington, the Court described the excluded evidence as "vital."

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166. Chambers, 410 U.S. at 291.
167. Fed. R. Evid. 804(a); Carlson et al., supra note 30, at 684-85.
168. In another case involving testimony offered under the declaration-against-interest exception, the North Carolina Supreme Court interpreted Chambers as impliedly eliminating the requirement that the accused prove the declarant's unavailability. State v. Barts, 362 S.E.2d 235, 240-41 (N.C. 1987).
169. In another case involving testimony offered under the declaration-against-interest exception, the North Carolina Supreme Court interpreted Chambers as impliedly eliminating the requirement that the accused prove the declarant's unavailability. State v. Barts, 362 S.E.2d 235, 240-41 (N.C. 1987).
171. Id.
ferred to McDonald's hearsay statements as "critical." The Washington line of cases leaves some uncertainty as to how material the excluded evidence must be. The better view seems to be that on its face the excluded evidence must be probative enough to potentially affect the outcome of the trial. Of course, defense evidence can affect the outcome of a trial merely by generating a reasonable doubt. However, evidence of marginal or peripheral relevance falls short of creating such doubt and is therefore inadequate to trigger the accused's constitutional right. As a practical matter, the requirement that the accused show the materiality of the defense hearsay is probably the single most significant limitation on the scope of the accused's constitutional right.

C. CIVIL CASES

Although a large body of Supreme Court cases expounds on the constitutional right to present evidence in criminal cases, neither the Supreme Court nor any lower court has ever invoked a constitutional right to present evidence to overcome the hearsay rule, or any other evidentiary rule, in a civil action. Nevertheless, there is a strong argument that the Court should recognize a right to present evidence in civil cases under the procedural due process guarantee. The gist of the due process guarantee is a prohibition forbidding the government from depriving a person of property without due process of law. A civil judicial proceeding is certainly government action. Civil judgments can result in a deprivation of property rights. A plaintiff's cause of action is a species of property cognizable under the due process guarantee. Hence, the one remaining question is whether the right

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173. IMWINKELRIED, supra note 144, § 2-4b.
174. Id.
175. Id.
178. U.S. CONST. amends. V, XIV.
180. Opdyke Inv. Co. v. City of Detroit, 883 F.2d 1265, 1274 (6th Cir. 1988). The category of property unquestionably encompasses the money, personality,
to present evidence is one of the procedures constitutionally “due” in a civil action.

Just as the justices of the Court disagree over the scope of the Confrontation Clause, there is controversy over the boundaries of procedural due process protection. The majority of justices on the current Court subscribe to an instrumental conception of procedural due process. They believe the guarantee is a means to an end, a goal identified as the enhancement of the accuracy of factfinding. Through its legislatures and courts, society makes policy choices embodied in substantive rules of law. The incidents of procedural due process help ensure that those choices are accurately enforced.

A minority of the justices adhere to an intrinsic conception of procedural due process. They believe that the active participation of citizens in civil proceedings is more than a mere means to an end; they believe that participation itself has intrinsic value. In a democratic society, citizens should actively participate in civil proceedings that affect their interests. Citizen participation affirms an individual's dignity as a human being and enables individuals to assert their rights personally.

Under either approach, the right to present evidence ought to be an essential element of procedural due process in civil actions. From the instrumental perspective, the pivotal question is whether recognition of this right will materially advance the accuracy of factfinding. The answer is yes. The opportunity to present evidence is the most fundamental means available to a party to prevent factual error. If a party fears that the trier-of-fact will make an erroneous finding, the party presents evidence contradicting that finding. Further, one party's right to present evidence creates a disincentive for the other party to offer misleading evidence. The other party realizes that even if the judge admits the misleading evidence, the former party can introduce contradictory testimony that will not only rebut

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or reality which the defendant may have to part with as a consequence of an adverse judgment.

182. Id. § 10-13, at 718.
183. Id. § 10-12, at 711.
184. Id. § 10-7, at 675.
185. Id. § 10-7, at 666.
187. Id. at 3.
the misleading evidence, but will generally lower the other party's credibility in the trier's mind.

The right to present evidence similarly qualifies as an essential element of procedural due process under the intrinsic approach. It is an axiom of procedural due process that a litigant has a right to be heard before being deprived of a property interest by a governmental tribunal. That right is meaningless unless the litigant has a right to speak actively to the tribunal. If a litigant is to have a meaningful right to speak actively to the tribunal and to participate in the evidentiary hearing, that right must subsume the opportunity to present evidence.

A caveat is in order here. Assume arguendo that the Court eventually extends the constitutional right to present evidence to civil actions. Even if it does so, the Court will undoubtedly require that the evidence in question be important or material enough to affect the outcome of the case. All other factors being equal, a civil litigant will have more difficulty demonstrating the requisite materiality than would a criminal defendant. A criminal defendant must show only that the introduction of the evidence could create reasonable doubt in the trier's mind. In Judge Weinstein's famous survey of judges in the Eastern District of New York, most responding judges equated proof be-

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190. There is some support in the Court's precedents for the existence of a constitutional right to present evidence in civil actions. In one Depression era decision the Court stated in dicta that the "fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" include "the right to present evidence." Morgan v. United States, 304 U.S. 1, 18-19 (1938). An opinion written by Justice Holmes, Saunders v. Shaw, 244 U.S. 317 (1917), is even stronger authority. As a result of a convoluted procedural setting, a drainage district was effectively denied the opportunity to offer relevant evidence in the court below. Writing for a unanimous Court, Justice Holmes ruled that the proceeding violated the district's right to due process by denying the district "a chance to put [its] evidence in." Id. at 319. However, the Court has twice rejected the "bitter with the sweet" argument in procedural due process cases. Arnett v. Kennedy, 416 U.S. 134, 165-67 (1974) (Powell, J., concurring, joined by Blackmun, J.); id. at 177-78, 185 (White, J., concurring in part, dissenting in part); id. at 211 (Marshall, J., dissenting, joined by Douglas & Brennan, JJ.); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540-41 (1985). The rejection is well-taken. "If the courts have any special competence at all, it is to be found in the area of fair dispute resolution." TRIBE, supra note 181, § 10-12, at 708, 711-12. The government does not satisfy procedural due process merely by affording citizens a hearing with some opportunity for the presentation of evidence.
beyond a reasonable doubt with a probability of guilt of at least eighty-five percent. These judges believed that if there is roughly a fifteen percent probability of innocence, the accused must be acquitted.

In a homicide prosecution such as Chambers, defense hearsay creating a twenty percent probability of innocence would satisfy this standard and would bring the accused's constitutional right to present evidence into play. Suppose, however, that the same testimony was offered by a civil defendant rather than a criminal defendant. Assume also that the civil suit is a wrongful death action in which the factual issues are virtually identical to those in a homicide prosecution. The trial court could consistently exclude the hearsay in the civil action while admitting it in the criminal case. A criminal defendant can perhaps gain an acquittal by establishing a mere fifteen percent probability of innocence. In civil actions, however, the most common burden of proof for the plaintiff is a preponderance of the evidence—which converts roughly into a probability of liability exceeding fifty percent. Realistically, a civil defendant must strive to establish a probability of non-liability approaching fifty percent. The hearsay testimony in the wrongful death action above falls far short of that mark.

D. SUMMARY

At the end of Part I, this Article concluded that the Fifth and Sixth Amendments would permit legislatures and courts to go far in reducing the barriers to the admission of hearsay. The doctrines discussed in this section may compel decision makers

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192. McCORMICK, supra note 1, § 339, at 957.
to move in the general direction of liberalization. The most powerful constitutional force compelling liberalization is the accused's implied right under the compulsory process guarantee. The right is likely to have an especially important impact on the common law and statutory hearsay exceptions which require foundational proof of the declarant's unavailability at trial. These include exceptions for former testimony and declarations against interest. Chambers indicates that when the accused makes a strong showing of the hearsay statement's reliability, that showing obviates the need for proof of the declarant's unavailability.

Figure II depicts the extent of the constitutional compulsion of hearsay liberalization:

**FIGURE II**

THE EXTENT OF THE CONSTITUTIONAL COMPULSION OF HEARSAY LIBERALIZATION

<table>
<thead>
<tr>
<th>NO COMPULSION TO ADMIT</th>
<th>COMPULSION TO ADMIT</th>
</tr>
</thead>
<tbody>
<tr>
<td>RELEVANT HEARSAY</td>
<td>ALL RELEVANT HEARSAY</td>
</tr>
</tbody>
</table>

* Defense evidence in criminal cases. This diagram assumes arbitrarily that only 50% of the universe of hearsay possesses adequate indicia of reliability. The diagram further assumes that only half of the reliable hearsay will be material enough under the proof beyond a reasonable doubt standard.

** Evidence in civil actions. This diagram assumes arbitrarily that only 50% of the universe of hearsay possesses adequate indicia of reliability. The diagram further assumes that much less than half of the reliable hearsay will be material enough under the preponderance standard.

*** Prosecution evidence in criminal cases.

194. See Fed. R. Evid. 804.
ant's unavailability. In the past, courts and commentators have often noted that hearsay evidence falling within these exceptions is reliable. The California Supreme Court once championed the view that declarations against interest are so trustworthy that there is no need for a showing of declarant unavailability.\textsuperscript{195} Professor Morgan remarked that the foundational requirements for former testimony are so extensive that "[w]ere the same strictness applied to all hearsay, evidence of reported testimony would constitute the only exception to the hearsay rule."\textsuperscript{196} Thus, in the long term, the accused's constitutional right may have a major impact on the hearsay exceptions set out in Federal Rule of Evidence 804.

However, the scope of the accused's constitutional right is severely limited; it reaches only evidence important enough to change the outcome of the trial. The vast majority of defense evidence lacks that degree of materiality. The Court should recognize a parallel right in civil actions under the Due Process Clause, but it will be even more difficult for civil litigants to establish the necessary materiality. For its part, the government cannot point to any constitutional theory compelling the admission of prosecution hearsay. No matter how material the hearsay is to the government's theory of the case, the prosecution cannot surmount common law and statutory hearsay rules.

CONCLUSION

There are a number of troublesome, unsettled questions about the extent of the constitutionalization of hearsay doctrine. The greatest uncertainty is in civil cases. Will the Court ever adopt Justice Harlan's theory that the procedural due process guarantee can be used to police the reliability of hearsay in civil suits? Will the Court posit the existence of the right to present evidence, which Justice Holmes found to be an element of procedural due process in \textit{Saunders v. Shaw},\textsuperscript{197} and in turn permit civil litigants to rely on that right to override hearsay barriers?

Although the body of case law on constitutionalization is much more extensive in criminal cases, there are unanswered questions there as well. Under the Confrontation Clause, will

\textsuperscript{196} Edmund M. Morgan, \textit{The Law of Evidence, 1941-45}, 59 H\textsc{arv. L. Rev.} 481, 552 (1946).
\textsuperscript{197} 244 U.S. 317, 320 (1917).
the Court adhere to the *Wright*\(^{198}\) rule excluding corroborating evidence from the evaluation of the reliability of prosecution hearsay? Under the Compulsory Process Clause, will the Court embrace the suggestion in *Rock*\(^{199}\) that the reliability threshold for the defense is lower than the standard the prosecution must satisfy?

Despite these unsettled questions, some generalizations can be made with a fair measure of confidence. The extent of the constitutional compulsion of hearsay liberalization is much less than the extent of the constitutional permissibility of liberalization.\(^{200}\) In every type of hearsay, the extent of the constitutional permissibility of reform far exceeds the extent of the constitutional compulsion; the latter does not even approach the outer limit of the former. The gap between the two repre-

\[\begin{array}{|c|c|c|}
\hline
\text{EXCLUSION OF} & \text{ADMISSION OF} \\
\text{ALL RELEVANT} & \text{ALL RELEVANT} \\
\text{HEARSAY} & \text{HEARSAY} \\
\hline
\end{array}\]

**FIGURE III**

THE EXTENT OF THE CONSTITUTIONAL PERMISSIBILITY OF HEARSAY LIBERALIZATION

- Defense evidence in criminal cases.
- Evidence in civil actions.
- Prosecution evidence in criminal cases.
sents the constitutional latitude which legislatures and courts have to determine the future of hearsay law.

In a sense, this topic merely defines the parameters of the debate for the other conference participants. The Fifth and Sixth Amendments would permit government decision makers to go to great lengths in relaxing the hearsay barriers, but the amendments compel the decision makers to do so only to a limited degree. The analysis of this topic is relatively easy, consisting largely of description and prediction. In contrast, the analysis of the other topics at this conference demands policy evaluation—struggling with the question of whether and how the decision makers should choose to exercise the discretion conferred by their constitutional latitude. As the poet George Moore remarked long ago, "[t]he difficulty" typically lies in "the choice."\textsuperscript{201}

\textsuperscript{201} GEORGE MOORE, THE BENDING OF THE BOUGH 152 (1900).