The Confrontation Clause and the Search for Truth in Criminal Trials

Philip Halpern

University at Buffalo School of Law, phalpern@buffalo.edu

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Criminal Procedure Commons

Recommended Citation


Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol37/iss1/5

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
The Confrontation Clause and the Search for Truth in Criminal Trials

PHILIP HALPERN*

I. INTRODUCTION

The sixth amendment states: “In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.”1 Depending upon the meaning ascribed to the term “witnesses,” a literal reading of the confrontation guaranty yields bipolar interpretations of its requirements. At one pole, if the word is taken to mean persons whose statements are offered at trial to prove the defendant’s guilt, the clause would exclude all out-of-court statements of persons not appearing in court as a witness. That interpretation would abrogate in criminal cases virtually every hearsay exception in the presentation of the prosecution’s case. The Supreme Court has rejected such a reading of the clause, reasoning that the Framers did not intend to nullify the application of established common law exceptions to the hearsay rule in criminal trials, and that public necessity demands the use of some prosecution hearsay.2 At the other pole, it has been urged, most notably by Wigmore, that “witnesses” refers only to persons who actually testify on behalf of the prosecution. Consequently, the confrontation clause serves to preserve the accused’s right to cross-examine witnesses that the prosecution does produce, but does not address the use of hear-

---

*Professor, Law School, State University of New York at Buffalo. I am very grateful for the valuable comments of my colleague, Lee Albert.

1. U.S. CONST. amend. VI. The Court has held “that the Sixth Amendment’s right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.” Pointer v. Texas, 380 U.S. 400, 403 (1965).

2. See Mattox v. United States, 156 U.S. 237 (1895) (affirming the admission on retrial of the testimony of two prosecution witnesses who had died since the first trial). The Court explained:

... We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted. . . . Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected.

A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.

Id. at 243.
say as evidence against a defendant.\(^3\) This interpretation would denude the confrontation clause of independent force, rendering it subservient to domestic rules of evidence. Not surprisingly, the Court has rejected this understanding, stating that there is "little doubt ... that the Clause was intended to exclude some hearsay."\(^4\)

Defining the relationship between the rule against hearsay and the confrontation clause has been problematic for the Court.\(^5\) Not only is textual analysis unavailing, but historical analysis provides little insight into the meaning of the confrontation clause.\(^6\) Lacking these and other illuminating guides, the Court nearly twenty years ago in California v. Green\(^7\) declined to "map out a theory of the Confrontation Clause"\(^8\) that would determine its relationship to the hearsay rule. Instead, it opted to decide each case on its own facts.

However, after a decade of experience with case-by-case analysis,\(^9\)

\(^3\) Wigmore maintained:

The Constitution does not prescribe what kinds of testimonial statements ... shall be given infrajudicially,—this depends on the law of evidence for the time being,—but only what mode of procedure shall be followed,—i.e., a cross-examining procedure—in the case of such testimony as is required by the ordinary law of evidence to be given infrajudicially.


\(^4\) Ohio v. Roberts, 448 U.S. 56, 63 (1980).

\(^5\) Explicating the relationship between the rule against hearsay and the confrontation clause has generated considerable academic interest. For a collection of scholarly commentary, see C. Mc Cormick, EVIDENCE § 252, at 749 n.1 (3d ed. 1984).

\(^6\) For a discussion of the history of the hearsay rule and the confrontation clause, see F. HELLER, THE SIXTH AMENDMENT 104 (1951); 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 177-87, 214-19 (3d ed. 1944); C. McCormick, supra note 5, § 244; 5 J. WIGMORE, supra note 3, § 1364; Griswold, The Due Process Revolution and Confrontation, 119 U. PA. L. REV. 711 (1971); Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177, 179-85 (1948); Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. PUB. L. 381 (1959); Read, supra note 3. After examining most of these sources, Justice Harlan stated in California v. Green, 399 U.S. 149, 176 n.8 (1970) (concurring): "[M]y own research satisfies me that the prevailing view—that the usual primary sources and digests of the early debates contain no informative material on the confrontation right—is correct." His Evans concurrence reaffirmed that view, concluding that "the historical understanding of the clause furnishes no solid guide to adjudication." 400 U.S. at 95.

\(^7\) 399 U.S. 149 (1970).

\(^8\) Id. at 162.

the Court in Ohio v. Roberts\(^\text{10}\) formulated a two-part rule governing the admissibility of prosecution hearsay under the confrontation clause. First, the prosecution is usually, but not always, required to either produce the declarant or demonstrate her unavailability as a condition of using her statement against the defendant; second, the hearsay is admissible "only if it bears adequate 'indicia of reliability.'"\(^\text{11}\) The rule tempers a preference for face-to-face confrontation at trial with a recognition that in the work-a-day world of criminal trials, the use of some hearsay by the prosecution is necessary.

In elaborating upon Roberts's requirements of unavailability and reliability,\(^\text{12}\) the Court has moved recently toward developing a theory of the confrontation clause based on the premise that the mission of the confrontation guaranty is to promote accurate factfinding and thereby to aid the search for truth in criminal trials.\(^\text{13}\) With that purpose in mind, the Court has advanced a functional interpretation of the confrontation clause designed to produce accurate verdicts in criminal trials.

This Article discusses the origin, development, and implications of a functional approach to defining the relationship between the rule against hearsay and the confrontation clause. Part II examines the genesis of that approach in California v. Green.\(^\text{14}\) Part III traces the course of functional confrontation analysis in Supreme Court jurisprudence during the ten-year period between the decisions in Green and Roberts.

Roberts rests the admissibility of prosecution hearsay on its reliability. Evidence falling within an established exception to the rule against hearsay is automatically assumed to be reliable. Other prosecution hearsay must be evaluated by the judge for reliability. Part IV discusses this evaluation, which requires a trial judge to determine whether particular hearsay accords with her perception of past events. Such analysis, though seemingly straightforward, actually presents intractable problems both with respect to implementation and underlying theory. An alternative method of analyzing the reliability of hearsay is set forth and evaluated.

The reliability requirement in Roberts clearly is consistent with pro-

---

11. Id. at 66.
13. See, e.g., Lee v. Illinois, 476 U.S. 530, 540 (1986) (characterizing the right to confrontation as "primarily a functional right that promotes reliability in criminal trials").
moting accuracy and truth in criminal trials. However, the connection between that quest and the requirement of unavailability is less obvious. The preference for live testimony, while indirectly serving the end of substantive justice in the form of accurate verdicts, more directly manifests a commitment to maintaining procedural fairness. The principle of fairness in an adversary trial suggests that the state, where possible, should present for cross-examination persons whose utterances it seeks to use to convict an accused, regardless of the reliability of the hearsay at issue or the accuracy of the verdict likely to result from admitting that hearsay. Part V examines the unavailability requirement and the tensions inherent in the simultaneous pursuit of procedural fairness and substantive justice. In Part VI, judicial analysis of the reliability of hearsay is compared epistemologically with the other methods employed by courts to decide the admissibility of hearsay under the confrontation clause.

II. THREE ANALYTICAL APPROACHES TO FUNCTIONAL ANALYSIS OF THE CONFRONTATION CLAUSE

Unconfronted statements are not excluded because they may be inaccurate; that contingency exists with respect to all evidence offered in court, including live testimony. Rather, live testimony is preferred over hearsay because the former enables defense counsel, through cross-examination, to probe for ambiguity, insincerity, faulty perception, and erroneous memory, thereby enhancing the jury's capacity to evaluate credibility.15 According to a functional interpretation of the confrontation clause, confrontation and cross-examination constitutionally may be foregone where the underlying purpose of accurate factfinding will not suffer as a result. The burden of functional analysis, consequently, is to define conditions under which denying confrontation is not likely to detract from accurate factfinding.

A. Three Types of Functional Analysis

The Court has presented three rationales in justification for dispensing with confrontation of a person whose statement is used against an accused. They are: (1) The jury can assess the credibility of the hearsay accurately despite the absence of cross-examination; (2) Admission of the

15. "[T]he central mission of the Confrontation Clause . . . is "to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact has a satisfactory basis for evaluating the truth of the prior statement.'"" Lee, 476 U.S. at 548 (Blackmun, J. dissenting) (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion) (quoting Green, 399 U.S. at 161).
hearsay will not cause the defendant adversary harm; and (3) The hearsay is reliable.

Associated with each rationale is a different analytical method and focus. The first rationale addresses the purpose and effect of confrontation from the perspective of the jury. The relevant inquiry is whether the jury can satisfactorily assess the credibility that a hearsay statement deserves without an opportunity to hear the declarant’s statement firsthand. At least in theory, some hearsay is of such a nature that a jury can be trusted to assess its credibility correctly. If the jury can satisfactorily evaluate the hearsay in the absence of confrontation, the hearsay is admissible.

The second method focuses on the likely utility of trial confrontation from the perspective of the defendant pitted against the prosecution in an adversary contest. The decisive issue is whether the absence of confrontation is likely to disadvantage the defendant. Conversely, the issue may be framed in terms of whether confrontation and cross-examination are likely to yield any adversary advantage to the defendant, for instance, by diminishing the credibility that the jury would otherwise attach to uncross-examined hearsay. If confrontation is unlikely to benefit the accused, the hearsay statement is admissible, even though the jury may assign more credibility to the hearsay than it deserves. Such error, by hypothesis, is not correctable by confrontation.

The third method analyzes hearsay evidence outside the trial matrix, without direct regard for either its impact on the jury or the adversary process. The trial judge admits or excludes unfronted hearsay depending upon whether it accords with the judge’s assessment of past events. If the judge is satisfied that the hearsay is reliable, it is allowed on the apparent premise that admission of reliable evidence ultimately will promote an accurate verdict.

B. California v. Green

Justice White’s plurality opinion in California v. Green interchangeably utilized all three analytical methods without acknowledging their logical distinctiveness. The trial court had admitted two prior statements by the chief prosecution witness, Porter, who claimed on the stand that he could not remember certain events crucial to establishing the defendant’s guilt. One of the statements was made by Porter at a preliminary hearing while testifying under oath before a judicial officer and was
subject to full cross-examination by the same lawyer who represented the defendant at trial. The prosecution offered the transcript of the preliminary hearing as proof of that statement. The other statement consisted of Porter’s remarks to a police officer, which were a part of the officer’s testimony at trial.

The plurality opinion observed that the purpose of confrontation is to subject a witness’s version of events to thorough adversary testing in order to assist the jury in assessing the evidence. That purpose is achieved by insuring that a witness gives her evidence under oath, subject to cross-examination, and in the presence of the jury who can observe the witness’s demeanor. Justice White explained that, in the case of a witness’s prior statement, the essential purpose of confrontation is fulfilled by subsequent cross-examination at trial—subsequent cross-examination is an adequate substitute for confrontation at the time the prior statement was made. Under this rationale, both of Porter’s prior statements were admissible, provided that his subsequent cross-examination at trial was adequate for the jury to assess the truth or falsity of those statements.

The plurality maintained that subsequent cross-examination at trial usually is adequate to insure that the jury has “a satisfactory basis for evaluating the truth of the prior statement,” even though it cannot observe the witness’s demeanor under cross-examination at the time the prior statement was made. The witness “must necessarily assume a position as to the truth value of his prior statement” under circumstances where the jury is able to observe his demeanor. However, Porter’s testimony at trial was atypical and hence problematic. He did not testify to a version of events different from that in his prior statements, but stated that he could not remember events recounted in his prior statements—specifically, how the drugs, which the defendant was accused of selling him, came into his possession. Consequently, the plurality remanded to the state courts for a determination whether the jury had an adequate opportunity to assess the truth of the prior statement to the police officer.

17. Id. at 158.
18. “[T]he inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial.” Id. at 159.
19. Id. at 161.
20. Id. at 160.
21. The Court explained:

Whether Porter’s apparent lapse of memory so affected Green’s right to cross-examine [at trial] as to make a critical difference in the application of the Confrontation
Justice White also addressed the admission of Porter's prior statements from the perspective of a defendant embroiled in an adversary contest. The defendant's interest in undermining Porter's prior statements was satisfied, according to Justice White, because "[t]he most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant." Although it concluded that the defendant's adversary interest was adequately protected, the plurality remanded with respect to the admissibility of Porter's prior oral statement to the police officer. This suggests the plurality did not view the absence of adversary harm to the defendant as an independent basis, apart from the jury's capacity for effective evaluation of the truth of Porter's prior statements, for dispensing with contemporaneous cross-examination.

In a second and independent holding, not the subject of remand since it was not conditioned upon Porter's subsequent cross-examination at trial, the plurality held that admission of his preliminary hearing testimony did not violate the confrontation clause. However, the situation in Green was an anomaly. A hearsay declarant usually is not available to testify in court, subject to cross-examination by the defense. More typically, the declarant is unavailable, and hearsay is constitutionally admitted in the complete absence of cross-examination "on the theory that the evidence possesses other indicia of 'reliability.'" According to the plurality, the circumstances in which Porter made his statement at the preliminary hearing—under oath, subject to cross-examination, and in a judicial proceeding providing an accurate record of its content—adequately assured the reliability of that statement.

---

Clause in this case is an issue which is not ripe for decision at this juncture. The state court did not focus on this precise question. Nor has either party addressed itself to the question. Its resolution depends much upon the unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses relevant to this particular issue.

Id. at 168-70 (footnote omitted). On remand, the California Supreme Court, addressing the issue reserved in Green, held that Porter's prior oral statement to the police officer was properly admitted "insofar as the Sixth Amendment is concerned." 3 Cal. 3d 981, 991, 479 P.2d 998, 1004, 92 Cal. Rptr. 494, 500 (1971).

22. 399 U.S. at 159.

23. "We also think that Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial." Id. at 165.

24. Id. at 161.

25. Id. at 165.
Although the three lines of reasoning utilized in Green are analytically distinct, they are susceptible to conflation, as illustrated by the dialogue in Green between Justice White and Justice Brennan, who dissented. Justice Brennan maintained that Porter’s preliminary hearing testimony was not admissible on the basis of its reliability, since Porter subsequently recanted that testimony at trial when he testified that he could not remember how he came to possess the marijuana that the defendant allegedly supplied him. Reliability, Justice Brennan said, should be determined, not simply on the basis of the circumstances in which the statement was made, but also taking into account subsequent events. He asserted that a declarant’s failure to testify because of physical absence is a “neutral factor” insofar as reliability is concerned, in contrast to a failure to testify because of a loss of memory, whether authentic or feigned, that casts substantial doubt on the reliability of the prior assertion.

In response, Justice White declared that the reliability of a statement is based on the circumstances under which it was given and that subsequent events at trial are irrelevant. He argued from the other two modes of analysis in support of a narrowly framed reliability inquiry:

Surely in terms of protecting the defendant’s interests, and the jury’s ability to assess the reliability of the evidence it hears, it seems most unlikely that respondent in this case would have been better off, as the dissent seems to suggest, if Porter had died, and his prior testimony were admitted, than he was in the instant case where Porter’s conduct on the stand cast substantial doubt on his prior statement.

In effect, Justice White sought to offset a seeming deficiency in the reliability of the hearsay evaluated under one method of analysis by its apparent strength when evaluated using the other two analytical methods. Intermingling the three modes of analysis and balancing the results

---

26. *Id.* at 201-02.
27. Justice Brennan explained:
Physical unavailability is generally a neutral factor; in most instances, it does not cast doubt on the witness’ earlier assertions. Inability to remember the pertinent events, on the other hand, or unwillingness to testify about them, whether because of feigned loss of memory or fear of self-incrimination, does cast such doubt. Honest inability to remember at trial raises serious question about clarity of memory at the time of the prettrial statement. The deceit inherent in feigned loss of memory lessens confidence in the probity of prior assertions. And fear of self-incrimination at trial suggests that the witness may have shaped prior testimony so as to avoid dangerous consequences for himself. Reliability cannot be assumed simply because a prior statement was made at a preliminary hearing.

*Id.* at 202.
28. *Id.* at 167 n.16.
in rudimentary fashion is not wrong in principle and on occasion may even prove beneficial in deciding a particular case. However, such intermingling is confusing to lower courts seeking to abstract a general rule from Supreme Court precedent. Until its decision in Roberts, in which the Court formulated a general rule, the Court decided the admissibility of prosecution hearsay using one or more of the three analytical techniques surveyed without explaining its choice of decisional method. Some illustrative cases decided during the period between Green and Roberts are examined next.

III. HEARSAY AND THE CONFRONTATION CLAUSE DURING THE DECADE BETWEEN GREEN AND ROBERTS

A. Dutton v. Evans

In Dutton v. Evans, decided six months after Green, the Court interwove all three rationales in upholding the introduction of an extrajudicial statement by a codefendant who had been previously tried separately from the defendant and convicted. At the defendant Evans’s state trial for murder, a witness named Shaw testified that the codefendant, named Williams, after being arraigned on murder charges and while in custody in a federal penitentiary, made the following statement: “If it hadn’t been for that dirty son-of-a-bitch Alex Evans, we wouldn’t be in this now.” Even though Williams was available to testify, he was not called as a witness by the prosecution. His hearsay statement was admitted into evidence under Georgia’s expansive coconspirator exception to the hearsay rule. The court of appeals, on habeas corpus review, overturned the conviction. The Supreme Court reversed, upholding admission...

29. The plurality opinion in Dutton v. Evans, 400 U.S. 74 (1970) mentioned all three rationales in support of the admission of prosecution hearsay consistent with the confrontation clause. As a result, at least one lower court read Evans to require three separate inquiries to determine the admissibility of hearsay: (1) Does the trier of fact have “a satisfactory basis for evaluating the truth of the prior statement?” (2) How “real” is the possibility that cross-examination “could conceivably have shown the jury that the statement, though made, might have been unreliable?” (3) What “indicia of reliability” were present to permit the testimony to be placed before the jury although there was no confrontation of the declarant? Park v. Huff, 493 F.2d 923, 931 (5th Cir. 1974), rev’d en banc, 506 F.2d 849 (5th Cir. 1975), cert. denied, 423 U.S. 824 (1975).
30. 400 U.S. 74.
31. Id. at 77.
32. Id. at 78-79. Georgia’s version of the coconspirator rule, unlike the federal and common law rules, allows the admission of declarations made after termination of the criminal enterprise, during the concealment stage.
33. 400 F.2d 826 (5th Cir. 1968), rev’d, 400 U.S. 74. The federal district court had denied the writ of habeas corpus.
sion of the hearsay, in a five-to-four decision.\textsuperscript{34}

The plurality opinion by Justice Stewart focused in part on the extent to which the introduction of Shaw's account of Williams's alleged hearsay statement harmed the defendant's case. Distinguishing earlier Supreme Court decisions in which hearsay statements elaborated in detail upon the accused's criminal complicity, Justice Stewart noted that the challenged evidence was not "in any sense 'crucial' or 'devastating,'" and that Shaw's testimony was of "peripheral significance at most."\textsuperscript{35} Moreover, he observed that the cross-examination of Shaw was so effective as to have left "serious doubt" in the mind of the jury as to "whether the conversation which Shaw related ever took place."\textsuperscript{36} Justice Blackmun, concurring, also found that adversary harm to the defendant was absent. He maintained that Shaw's testimony concerning the purported circumstances of Williams's statement was so "incredible" and "astonishing" as to defy belief by a jury; therefore, admission of his testimony relating the statement was "harmless error if it was error at all."\textsuperscript{37}

In essence, the plurality and concurrence reasoned that the defense was not harmed by its inability to cross-examine Williams, because the jury gave no weight to Shaw's account of Williams's statement. The plurality, but not Justice Blackmun, was also willing to entertain an alternative scenario—that the jury might have believed Shaw. In that event, according to the plurality, denying confrontation still did not harm the defense because "the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal."\textsuperscript{38} Essentially, under the alternative scenario, Williams's statement, if made, was deemed unimpeach-

\textsuperscript{34} 400 U.S. 74.

\textsuperscript{35} Id. at 87. There were nineteen prosecution witnesses other than Shaw, including a man named Truett, who had originally been charged with murder together with Evans and Williams, but who testified as a prosecution witness under a grant of immunity. He identified Evans as a perpetrator.

\textsuperscript{36} Id. at 87 n.18.

\textsuperscript{37} Id. at 90-91. Justice Blackmun, in his concurring opinion joined by the Chief Justice, observed: "I am at loss to understand how any normal jury, as we must assume this one to have been, could be led to believe, let alone be influenced by, this astonishing account by Shaw of his conversation with Williams in a normal voice through a closed hospital room door." Id. at 91.

\textsuperscript{38} Id. at 89. Justice Marshall, in dissent, challenged the plurality's conclusion that cross-examination of Williams would have been fruitless, stating:

A trial lawyer might well doubt, as an article of the skeptical faith of that profession, such a categorical prophecy about the likely results of careful cross-examination. Indeed, the facts of this case clearly demonstrate the necessity for fuller factual development which the corrective test of cross-examination makes possible.

Id. at 103.
ble by cross-examination.\textsuperscript{39}

In sum, the plurality and concurring opinions offered three reasons to support a finding that denying confrontation with respect to Williams's statement did not cause adversary harm to the defendant: (1) The probative value of the content of the statement was minimal; (2) It was unlikely that the jury believed that the statement was made; and (3) If the jury believed the statement was made, cross-examination of Williams would not have helped the defense.

Justice Stewart also relied upon the ability of the jury to assess the hearsay accurately, declaring that the purpose of confrontation is advancement of "the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'"\textsuperscript{40} Conceding that Williams's statement—while inferentially identifying Evans as a perpetrator—was ambiguous, that ambiguity, according to Justice Stewart, did not necessitate confrontation of Williams. Rather, the ambiguity warned the jury "against giving the statement undue weight."\textsuperscript{41} Additionally, Justice Stewart maintained that Williams's statement, if made, was reliable.\textsuperscript{42}

\begin{footnotes}
\textsuperscript{39} The plurality opinion denied the possible existence of adversary harm to the defense from admission of the hearsay based on two related assumptions: Either the jury disbelieved Shaw's account of Williams's statement entirely, in which case it gave the hearsay no weight at all, or it believed Shaw's account, in which case it accepted the hearsay statement itself as absolutely credible. This analysis implies—indeed requires—a bifurcated model of jury cognition under which the jury sequentially considers in isolation two questions: First, was the hearsay statement made; and second, if it was made, was it credible?

If one attributes a unitary cognitive model to the jury instead of a bifurcated model, one reaches a different conclusion with respect to adversary harm. Using a unitary model, one would assume that the jurors evaluated Shaw's truthfulness and the credibility of Williams's statement together in a single undifferentiated process of thought in determining how much weight to accord the hearsay. As a result, it is plausible that they would discount Williams's statement by a factor reflecting their mistrust of Shaw, and hence would give the hearsay some rather than either no or invincible weight as under the bifurcated model. Accordingly, under a unitary model, confronting Williams could have yielded some adversary benefit to the defendant. For instance, if Williams on cross-examination denied having made or retracted the statement attributed to him by Shaw, the jury would further discount Shaw's testimony, assuming its initial assessment of his credibility was positive.

The point here is not to advance one cognitive model over another, for which our knowledge is insufficient. Rather, it is to emphasize the difficulty and uncertainty involved in legal analysis that implicitly utilizes a particular cognitive model and to highlight the importance of further research related to jury cognition.

\textsuperscript{40} Id. at 89 (quoting California v. Green, 399 U.S. 149, 161 (1970)).

\textsuperscript{41} Id. at 88.

\textsuperscript{42} Justice Stewart enumerated factors in support of the statement's reliability, including: (1) Williams's personal knowledge of the identity of the perpetrators had been established beyond dispute by other evidence; (2) The possibility of faculty recollection by Williams was extremely remote;
\end{footnotes}
B. Application of the Bruton Rule:
Nelson v. O'Neil; Parker v. Randolph

The Court concentrated on the absence of adversary harm to the defense in two decisions limiting application of the rule announced in Bruton v. United States. Bruton held that a confession of a nontestifying codefendant implicating a defendant cannot be introduced at their joint trial, even with instructions to the jury to consider the confession against only the person who made it. Reasoning that a jury cannot disregard the confession when weighing the guilt of the nonconfessing defendant, the Court concluded that admission of the confession violated the defendant's rights under the confrontation clause since he could not cross-examine the nontestifying codefendant.

In Nelson v. O'Neil, the confession of O'Neil's codefendant was admitted into evidence with instructions that it could not be used against O'Neil. The codefendant took the stand, denied making the statement, and also testified that its substance was false. O'Neil did not cross-examine. O'Neil claimed a violation of his confrontation right under Bruton and Douglas v. Alabama, a pre-Bruton case in which the Court had stated that effective cross-examination of a witness concerning a prior statement requires the witness to affirm the statement on the stand. Although O'Neil's codefendant testified, he did not affirm his prior statement, enabling O'Neil to argue that he was denied effective cross-examination in violation of the confrontation clause. The Court rejected the argument on the ground that cross-examination of the codefendant was superfluous. Had the codefendant affirmed making the statement and the truth of its contents, the best that cross-examination could have yielded had already been achieved by virtue of his direct testimony. Accordingly, the absence of adversary harm resulting from the
inability to cross-examine effectively vitiated any confrontation claim.

A plurality of four justices in *Parker v. Randolph*\(^5^0\) used adversary-harm analysis less convincingly to reject a different type of *Bruton* claim. In *Parker*, each of several jointly-tried defendants confessed, each reciting essentially the same facts in his confession. At trial, none of the defendants testified, and the confession of each was introduced with instructions that it should be considered against its maker only. The plurality found no violation of the confrontation clause, interpreting *Bruton* to apply only when introduction of a codefendant's confession is "devastating" to the defendant's case. The plurality reasoned that when the defendant has himself confessed, "[his] case has already been devastated,"\(^5^1\) and successfully impeaching that confession on cross-examination "would likely yield small advantage."\(^5^2\) Thus, the plurality ruled that *Bruton* does not apply to a codefendant's confession that parallels or interlocks with the defendant's own, on the theory that their interlocking nature precludes adversary harm.\(^5^3\)

The categorical assumption that the fact of interlock precludes adversary harm constitutes a fundamental weakness in the plurality's analysis. As Justice Stevens noted in dissent: "[T]he infinite variability of inculpatory statements (whether made by defendants or co-defendants), and of their likely effect on juries, makes [that assumption] untenable."\(^5^4\)

Recently, the Court overruled *Parker*, holding that the interlocking nature of a codefendant's confession pertains to its reliability rather than its harmfulness.\(^5^5\)

---

The short of the matter is that, given a joint trial and a common defense, Runnels' testimony respecting his alleged out-of-court statement was more favorable to the [defendant] than any cross-examination by counsel could possibly have produced, had Runnels "affirmed the statement as his." It would be unrealistic in the extreme in the circumstances here presented to hold that the [defendant] was denied either the opportunity or the benefit of full and effective cross-examination of Runnels.

402 U.S. at 629.


51.  *Id.* at 75 n.7.

52.  *Id.* at 73.

53. Justice Blackmun, concurring in the judgment affirming the conviction, found that the introduction of the defendant's own interlocking confession rendered any violation of the confrontation clause harmless. *Id.* at 80-81.

54.  *Id.* at 84.

55.  *Cruz v. New York*, 107 S. Ct. 1714 (1987). The *Cruz* court explained:

[I]t seems to us that "interlocking" bears a positively inverse relationship to devastation. A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession. . . . [W]hat the "interlocking nature of the codefendant's confession pertains to is not its
After ten years of more or less ad hoc analysis, the Court was ready to adopt a general rule reconciling the confrontation clause and the rule against hearsay.

IV. Judicial Analysis of the Reliability of Hearsay

A. Ohio v. Roberts

In Ohio v. Roberts, the Supreme Court addressed once again the relationship between the confrontation clause and the hearsay rule with its exceptions. Elaborating upon the functional analysis initiated a decade earlier in Green v. California, Justice Blackmun's opinion for the Court balanced "a preference for face-to-face confrontation at trial"—for the purpose of allowing the trier of fact to judge the credibility of witnesses—with "competing interests"—that may warrant foregoing confrontation under some circumstance. The balance was reflected in a two-part rule. First, the prosecution must usually establish that the hearsay declarant is unavailable if he is not produced. Second, hearsay is admissible "only if it bears adequate 'indicia of reliability.'" Reliability is automatically assumed if the out-of-court statement falls within a "firmly rooted hearsay exception." If not, the hearsay is excluded unless it is shown to possess "particularized guarantees of trustworthiness."

Since Roberts, the Court has only once, in Lee v. Illinois, undertaken a particularized analysis of the reliability of hearsay not falling within an established hearsay exception. Lee, which involved a confession of a nontestifying codefendant, merits attention because it provides the only guidance available to lower courts undertaking a particularized analysis of reliability.

B. Lee v. Illinois

Following a bench trial in which the prosecution introduced confessions made by two codefendants, the trial judge found Millie Lee and her boyfriend, Thomas, each guilty of two counts of murder. In rejecting her counsel's claim that Lee had no part in one of the killings and that her

---

harmfulness but rather its reliability: If it confirms essentially the same facts as the defendant's own confession it is more likely to be true.

Id. at 1718.

56. 448 U.S. 56 (1980).
58. 448 U.S. at 63-64.
59. Id. at 66.
60. 476 U.S. 530 (1986).
involvement in the other constituted manslaughter at most, the trial judge explicitly relied upon portions of Thomas's confession suggesting that he and she had planned and premeditated the killings together.\footnote{Id. at 531, 538.} On appeal Lee argued that using Thomas's confession against her violated her rights under the confrontation clause as interpreted in \textit{Bruton v. United States},
\footnote{391 U.S. 123 (1968).} since Thomas, who did not testify, could not be cross-examined on his confession. The state appellate courts rejected Lee's confrontation claim on the ground that Thomas's confession tracked or interlocked with Lee's own.\footnote{129 Ill. App. 3d 1167, 491 N.E.2d 1391 (1984), rev'd, 476 U.S. 530.} The Supreme Court reversed.\footnote{476 U.S. 530.}

A plurality of the Court had previously upheld introduction of a confession of a nontestifying codefendant that interlocked with the defendant's own confession on the ground that adversary harm to the defendant was lacking.\footnote{See Parker v. Randolph, 442 U.S. 62 (1979); see also supra notes 50-55 and accompanying text.} In \textit{Lee}, however, the focus of analysis shifted to reliability. The pivotal issue became the reliability of the codefendant's confession, with the interlocking nature of the two confessions treated as one pertinent factor among others. The justices all agreed that Thomas's confession was admissible against Lee provided it bore sufficient "indicia of reliability."\footnote{Id. at 543-47.} However, they disagreed five-to-four on whether Thomas's confession was sufficiently reliable.

Justice Brennan, writing for the majority, started from the premise that portions of a codefendant's confession implicating the defendant are "presumptively unreliable" given the codefendant's reasons to overstate the defendant's culpability.\footnote{Id. at 543.} To overcome that presumption in the present case, the state relied upon the underlying circumstances of Thomas's confession, including findings below that it had been voluntarily made and was a statement against penal interest, and also upon the fact that Thomas and Lee's confessions interlocked on many key points.\footnote{Id. at 544-47.}

These factors, however, were not enough in the majority's view, to countervail the initial presumption of unreliability. Because Thomas confessed only after being told that Lee had already implicated him, Justice Brennan reasoned that Thomas had a motive to reduce his own culpability by spreading the blame to Lee or to overstate her involvement in re-
taliation for her having implicated him. The voluntariness of his confession did not, in Justice Brennan's view, dispel Thomas's motive to exaggerate Lee's culpability. Additionally, according to the majority, the state's categorization of the confession as a declaration against penal interest was unhelpful as it constituted "too large a class for meaningful Confrontation Clause analysis." Finally, although the two confessions coincided at many points, they diverged on other matters crucial to disputed issues at trial, and therefore did not constitute interlocking confessions under the test announced by the majority. For "confessions to interlock, any discrepancies between them must be insignificant." "Those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime [must be] thoroughly substantiated by the defendant's own confession . . . ."

Justice Blackmun, speaking for the four dissenters, maintained that the indicia of reliability were sufficient to warrant admitting Thomas's confession in the absence of confrontation. He pointed out that Thomas's statements implicating himself in a double murder were thoroughly and "unambiguously adverse to his penal interest," more damaging to him than Lee's confession, voluntarily made, and corroborated by physical evidence and Lee's confession.

Notwithstanding their disagreement on specifics, the principal difference between the majority and dissent is analytical. The dissent analyzes the reliability of Thomas's confession by examining and weighing the surrounding circumstances in their totality. For example, while conceding that accomplice confessions are normally suspect because an accomplice typically seeks to shift blame from himself onto others, Justice

---

69. Id. at 544.
70. Id.
71. Id. at 544 n.5.
72. Id. at 545. Justice Brennan explained the need for a stringent test for interlocking confessions as follows:

The true danger inherent in this type of hearsay is, in fact, its selective reliability. . . . [A] codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment.

73. Id. at 551-56.
Blackmun correctly observes that Thomas's behavior did not follow the usual pattern of seeking to minimize his own criminal liability by shifting blame to Lee.\textsuperscript{74}

On the other hand, the majority's principal analytical technique is to announce categorical rules and then to apply them mechanically to the facts.\textsuperscript{75} By declaring accomplice confessions presumptively suspect and dismissing declarations against penal interest as too unwieldy for use, Justice Brennan avoids dealing with the fact that Thomas's statement was atypical. It directly and unambiguously implicated him in first degree murder and did not seek to shift blame from himself to Lee.\textsuperscript{76} The treatment of the overlap between the two confessions is similar. Since the two confessions do not satisfy the interlocking confession test framed by the majority, their substantial overlap is disregarded, as though that were not a factor militating in favor of the reliability of Thomas's confession. A corresponding approach is utilized to counteract the finding below that Thomas's confession was voluntary. After correctly observing that voluntariness is neither equivalent to, nor by itself a guarantee of, reliability, the majority proceeds as though voluntariness is wholly irrelevant to reliability.\textsuperscript{77}

Because of its mechanical method of categorical analysis, the majority opinion is not especially persuasive. While the dissent may have the better of the argument regarding the reliability of Thomas's confession, there were other compelling reasons, overlooked by the majority and the dissent, to reverse Lee's conviction.\textsuperscript{78}

\textsuperscript{74} Id. at 553.

\textsuperscript{75} The dissent criticized the Court's tendency "to be overly concerned with theory and pronounced principles for their own sake, and to disregard the significant realities that so often characterize a criminal case." Id. at 547-48.

\textsuperscript{76} Id. at 553 (Blackmun, J., dissenting).

\textsuperscript{77} Id. at 544.

\textsuperscript{78} On the day of trial, Lee's counsel withdrew motions for severance from Thomas and for trial by jury, based on the trial judge's assurance that he would not consider Thomas's confession as evidence against Lee. Id. at 536. The principal remaining evidence against Lee consisted of her confession. Consequently, Lee's counsel argued that under applicable state substantive law, Lee's statement did not incriminate her in the killing of one of the victims and showed manslaughter at most with respect to the other. Id. at 536-37. The strategy miscarried, however, when the judge, contrary to the earlier assurance, relied upon statements in Thomas's confession as proof of Lee's involvement in the plan to kill one victim and her intention to kill the other. Id. at 538.

Lee's conviction should have been reversed, because by reneging on his promise not to consider Thomas's confession against Lee, the trial judge denied her lawyer the ability to render effective assistance of counsel guaranteed by the sixth amendment. Counsel's strategy to waive a jury trial and forgo a reasonably strong severance motion misfired because counsel justifiably relied upon a judicial assurance which was not kept. If Lee's lawyer had known that the judge might consider Thomas's statement against Lee, it is unlikely that counsel would have consented to a bench trial and with-
The Court's analysis in *Lee* leaves much to be desired in terms of deciding a specific case. Additionally, the Court there and elsewhere has failed to address fundamental issues raised by substituting a judicial determination of hearsay reliability for confrontation at trial.

C. *Determining the Reliability of Hearsay Based on a Judicial Assessment of Past Events*

Despite their other differences, all the justices in *Lee* agreed that a trial judge evaluating the reliability of hearsay under the *Roberts* test must determine whether the hearsay accords with actual fact. The resulting inquiry requires the judge to decide whether the proffered hearsay coincides with *her perception* of the probable course of past events, since certainty in recreating the past is not possible. This approach usurps the jury's factfinding role and raises unanswered and vexing questions about the appropriate scope of the judicial inquiry into reliability and the standard of proof required to establish reliability.

1. *Judicial usurpation of the jury's factfinding role.* Typically, a trial judge's assessment of the credibility of a witness's testimony does not affect its admissibility. It is assumed that the jury, having the benefit of observing direct and cross-examination of the witness, is competent to evaluate that testimony and weigh it appropriately. The possibility always exists that a witness in court may testify inaccurately. However, even if the judge is convinced that a witness's testimony is inaccurate, such testimony generally is not excludable. It is an article of faith in the

---

drawn the severance motion. Moreover, even if counsel would have consented to a joint bench trial knowing the possible use of Thomas's confession against Lee, counsel in closing argument would have taken that contingency into account. There, Lee's attorney surely would have emphasized that accomplice confessions are inherently suspect and called attention to any specific reasons for not crediting Thomas's confession against Lee. Instead, relying upon the judge's assurance that he would not consider Thomas's confession against Lee, counsel did neither.

The Supreme Court has held that denying both the prosecutor and defense counsel the opportunity to give closing statements in a bench trial violates the defendant's right to counsel. *Herring v. New York*, 422 U.S. 853 (1975). Had summation been allowed, according to the Herring court, there were arguments that defense counsel could have made, and "[t]here is no way to know whether [they] . . . might have affected the ultimate judgment in this case." *Id.* at 864.

The trial judge's conduct in *Lee* infringed upon the right to counsel as much or more than the judicial action in *Herring*. Indeed, *Lee* was worse off than if closing argument by both sides had been entirely foreclosed, as occurred in *Herring*. Instead, Lee's counsel was denied a meaningful opportunity to make a closing argument while the prosecutor's summation was not impeded by the judge in the slightest. On the contrary, the prosecutor's summation exceeded permissible bounds by erroneously attributing statements from Thomas's confession to Lee without judicial correction. Consequently, *Herring* amply supports the conclusion that Lee's right to counsel was violated.
system of jury trials that a jury, assisted by cross-examination, is equally or more able than a judge to discern ambiguity, mendacity, faulty perception, and erroneous memory, and thereby to give testimony the weight that it deserves.

However, limited judicial intervention into the jury's factfinding function does occur in the form of rulings excluding relevant evidence that would confuse, mislead, or otherwise impermissibly influence a jury. For instance, vivid photographs of a crime or accident scene may provoke such strong emotion in a jury that their probative value is outweighed by their prejudicial effect. Additionally, in criminal cases a judge is constitutionally required to exclude unreliable eyewitness identification evidence. Fear has been expressed that juries frequently fail to appreciate the infirmities of eyewitness identification evidence, generating concern that juries will mistakenly credit such evidence and erroneously convict. In these situations, judicial exclusion of relevant evidence may be viewed as aiding rather than usurping jury factfinding by excluding evidence which a jury cannot assess rationally. Hearsay, similarly, is excluded because the jury in general has difficulty assessing it.

The admission of hearsay on the ground that a judge is convinced of its reliability creates a relationship between judge and jury that differs fundamentally from that in which a judge selectively intervenes in narrowly defined circumstances to exclude relevant evidence in order to enhance the rationality of jury factfinding. Judicial analysis of the reliability of hearsay is a poor substitute for cross-examination, which is a more subtle method to assess the credibility of hearsay. Cross-examination of a prosecution witness, from the defense perspective, is usually neither a complete success nor a total failure, seldom convincing the jury completely to disregard the witness's testimony on direct, but frequently convincing the jury to give it less weight than it would otherwise. In comparison, a judicial determination of reliability is much cruder, since the result is either to admit or exclude the evidence. On the one hand, if the hearsay comes in, the jury will probably give it more weight than had it been cross-examined, based on the reasonable assumption that the jury cannot anticipate the counteractive force of cross-examination. On the other, if the hearsay is kept from the jury, the panel will usually accord it

79. See Fed. R. Evid. 403.
81. See Stovall, 388 U.S. at 293.
less weight than cross-examined testimony. However the reliability determination turns out, it cannot replicate the effect of cross-examination.

Of course, if the hearsay declarant is not available to testify, cross-examination is not an option. The choice is either to admit or exclude certain hearsay, and the issue is whether there are better or worse methods of making that choice than having a judge determine whether the hearsay accords with his or her view of the probable course of past events. This Article suggests and critically evaluates an alternative method of reliability analysis, but first examines certain difficulties of conventional reliability analysis.

2. The scope of the inquiry into reliability. The Court has not defined the compass of facts relevant to a judicial inquiry into reliability. It has not specified whether the inquiry is limited to the circumstances surrounding the creation of the hearsay, or whether other facts bearing more generally upon the truth or falsity of the hearsay are encompassed as well.

A well-known civil case, *Dallas County v. Commercial Union Assurance Company*, 82 illustrates the nature of the problem. A critical issue there was the cause of a clocktower's collapse: Was it the result of being struck by lightning, as the plaintiff claimed, or due to age and faulty construction, as the defendant insurance company maintained? In support of the lightning theory, the plaintiff offered into evidence a charred timber said to have been taken from the tower. The insurance company, while conceding the presence of charred timbers in the tower, claimed that the burnt timbers were the result of a fire at the time of construction, some fifty years before. In support of that theory, it offered into evidence an unsigned article from the local newspaper, written at the time of construction, reporting a fire at the construction site. Although the court of appeals concluded that the article fell within none of the established hearsay exceptions, the court nevertheless affirmed its admission into evidence on the basis of its reliability. 83

The newspaper article's reliability could be assessed from at least two different perspectives. One could concentrate on the circumstances surrounding the writing and publication of the article, the strategy em-

---

82. 286 F.2d 388 (5th Cir. 1961).
83. Id. at 397-98. The court also analyzed the necessity of admitting the hearsay in question, noting it was unlikely that the proponent of the newspaper article could have found the article's author or an eyewitness with an accurate recollection of the fire, which occurred fifty-eight years previously. Id. at 396.
ployed by the appellate court, which emphasized that the author had substantial reason to report local events accurately since an inaccurate report would have been discoverable by a significant portion of the newspaper's readership with adverse consequences for the newspaper and the article's author.\(^8^4\) Alternatively, one could expand the inquiry to include analysis of other facts relevant to explaining the burnt timbers, such as the nature of the burn marks and evidence concerning the presence or absence of lightning in the vicinity of the tower, to determine whether the more likely cause of the burnt timbers was lightning or a fire during construction.

The Supreme Court has not explicitly addressed which is the appropriate inquiry. The issue arose tangentially in *California v. Green*,\(^8^5\) where the dissent asserted that the witness Porter's preliminary hearing testimony inculpating the accused was presumptively unreliable because he subsequently recanted that testimony at trial. The plurality responded by maintaining that the circumstances surrounding the making of a statement governed its reliability and that subsequent events were irrelevant.\(^8^6\) More recently, in *Lee v. Illinois*,\(^8^7\) the Court implicitly endorsed a broader inquiry into reliability. The Court held that a codefendant's confession is constitutionally admissible against the defendant if it is reliable. One factor bearing on reliability is that the confession tracks or interlocks with the defendant's own confession.\(^8^8\) Clearly, such correspondence broadens the scope of inquiry beyond the circumstance under which the codefendant's confession was given.

In favor of an expanded inquiry, it can be said that considering more rather than fewer facts reasonably should increase the overall accuracy of reliability determinations. In opposition, it can be said that an expanded inquiry would be difficult and would lengthen litigation by inviting protracted evidentiary hearings. However, the problems of an expanded inquiry go deeper than that. In a narrow inquiry, a judge asks whether the circumstances surrounding the utterance of the hearsay are conducive to reliability; in an expanded inquiry, a judge looks at all relevant evidence in order to decide what actually happened—was it lightning or a construction fire that caused the burnt timbers? The judge then rules to admit or exclude the contested hearsay, depending upon which ruling

\(^{84}\) Id. at 397.
\(^{86}\) See supra notes 26-28 and accompanying text.
\(^{87}\) 476 U.S. 530 (1986).
\(^{88}\) For discussion of the Court's analysis of reliability in *Lee*, see supra notes 60-78 and accompanying text.
better conforms the evidence presented to the jury to the judge's perception of a disputed historical fact. Where the hearsay is crucial to the outcome of the case and admission or exclusion is likely to shift the verdict in favor of one party or the other, the evidentiary ruling effectively decides the litigation and the jury's verdict is a rubber stamp. This is so regardless of whether the reliability inquiry is narrow or broad. However, in the latter case, judicial usurpation of jury factfinding is both intentional and blatant. The ruling on admissibility is calculated to manipulate the verdict to coincide with the judge's view of the merits.

3. The standard of proof by which to evaluate reliability. A rule requiring judicial assessment of reliability raises a question concerning the degree of proof necessary to establish reliability. The choices range across the spectrum of traditional standards of proof: from the minimum of rational basis to the maximum of beyond a reasonable doubt. The court has not specified a choice.

After Ohio v. Roberts,89 the reliability of particular hearsay is a preliminary question of fact conditioning its admissibility. Lego v. Twomey90 is the leading constitutional case regarding standards of proof for deciding preliminary facts in criminal cases.91 Lego and its progeny hold that preponderance of the evidence is the presumptively appropriate standard by which to decide questions of preliminary fact. However, if application of that standard threatens the reliability of the jury's verdict, Lego implies that the preliminary fact must be proved beyond a reasonable doubt.92

It is noteworthy that the Court has not imposed the stricter standard in any litigated case.93 Lego, which dealt with the standard by

89. 448 U.S. 56 (1980).
90. 404 U.S. 477 (1972).
92. In rejecting the argument that In re Winship, 397 U.S. 358 (1970), requires that the voluntariness of a confession be proved beyond a reasonable doubt, the Court stated:

Since the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of In re Winship. . . . A guilty verdict is not rendered less reliable or less consonant with Winship simply because the admissibility of a confession is determined by a less stringent standard.

404 U.S. at 486-87 (citation omitted). The Court suggests by negative implication that, where the admissibility of evidence threatens the reliability of the jury's verdict, the more stringent standard of proof—beyond a reasonable doubt—mandated by Winship must be used.
93. See, e.g., Bourjaily v. United States, 107 S. Ct. 2775, 2779 (1987) (the existence of a conspir-
which the prosecution must prove the voluntariness of a confession, seemed an appealing case for requiring proof beyond a reasonable doubt, since the voluntariness of a confession introduced at trial appears to affect the reliability of the ensuing verdict.\(^9\) However, the *Lego* court disagreed. It asserted that the purpose of having a judge determine the voluntariness of a confession before it is considered by a jury, "has nothing whatever to do with improving the reliability of jury verdicts"; rather, the object is to determine the presence of any police coercion.\(^9\)

Although conceding the probability of a connection between coerced and unreliable confessions, *Lego* maintained that juries are fully able to assess the truth or falsity of confessions, including those that may have been coerced. *Lego* explained that a judicial determination of voluntariness is required in advance of a jury's receiving a confession, not because a jury will mistakenly credit coerced confessions but because of concern that the reliability of a confession would impermissibly influence a jury's judgment as to its voluntariness.\(^9\)

The primary purpose of the right of confrontation, according to the Court, is to assist juries in assessing the testimony of prosecution witnesses and thereby to promote accurate verdicts. A determination that hearsay is reliable and therefore admissible in effect substitutes the judge's evaluation of the hearsay for the jury's evaluation of live testimony subject to cross-examination. Since juries by hypothesis cannot assess hearsay as accurately as they can live testimony, an error in preliminary factfinding resulting in admission of unreliable hearsay necessarily must impair the reliability of the verdict. The degree of impairment will vary depending upon the importance of the evidence to proving the case against the defendant. The more dispositive the hearsay is on the issue of guilt, the greater the risk that an erroneous admission of prosecution hearsay will spawn an inaccurate verdict against the accused. Consequently, *Lego*'s reasoning appears to mandate proof of reliability beyond a reasonable doubt in at least some, if not all, cases where a particular-

\(^9\) Coerced confessions are excluded from evidence at least in part because of their "probable unreliability." *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964).

\(^9\) *Lego*, 404 U.S. at 484-86.

\(^9\) *Id.*
ized showing of reliability is required by Roberts.97

Notwithstanding the implications of Lego's reasoning, it is doubtful that the Court will adopt the reasonable doubt standard to govern admission of hearsay not falling within a firmly rooted exception. That the reliability requirement is automatically satisfied with respect to hearsay falling within an established exception to the hearsay rule, even one carrying such a dubious guarantee of trustworthiness as the coconspirator exception,98 strongly suggests an unwillingness on the part of the Court to impose a standard more demanding than preponderance of the evidence.

However, using the preponderance of the evidence standard is troublesome, particularly if one believes that cross-examination is essential to enable juries to evaluate testimony accurately and that juries tend to overestimate the evidentiary value of hearsay. Suppose a judge admits prosecution hearsay believing it to possess a statistical probability of reliability somewhat greater than .50. It is likely that a jury may attach more credibility to the hearsay than the judge did. Indeed, the hearsay may bridge the gap in the jury's mind between reasonably strong proof of guilt and proof of guilt beyond a reasonable doubt. As a result, admission of the hearsay may lead to the conviction of a defendant whom the judge, sitting as trier of fact, would have acquitted, and whom the jury, had they assessed reliability as the judge did, would have acquitted as well.

These difficulties involved in basing the admissibility of prosecution hearsay on a judicial assessment of probable reality are unavoidable. They suggest the desirability of exploring an alternative method of analyzing reliability.

D. An Alternative Method of Analyzing the Reliability of Hearsay

Whether a judge rules to admit or to exclude prosecution hearsay, the adversary posture of the case usually will be irretrievably altered

97. The relationship between the standard of proof required to demonstrate the reliability of prosecution hearsay and the hearsay's decisional importance raises complications. Perhaps a single standard of proof should govern the admissibility of all prosecution hearsay regardless of its likely impact on the outcome of the litigation. Or, alternatively, the quantum of proof required to demonstrate reliability may vary in accordance with the decisional importance of the hearsay, increasing as the dispositive impact of the hearsay increases, and decreasing as it decreases. Additionally, assuming reliability is measured on a sliding scale, there may be a threshold level of reliability that even minimally probative hearsay must satisfy. These may not exhaust the possibilities, but further refinement of the relationship between the required degree of proof of reliability and hearsay's decisional importance must await resolution of the more fundamental question of the standard of proof that presumptively governs judicial determination of the reliability of prosecution hearsay.

CONFR ONTA TION CLA USE

from what it would have been, had the hearsay declarant testified in
court subject to cross-examination. One method of choosing between ad-
mission and exclusion is to pursue the course which will replicate more
closely the effect on the jury, had the declarant been a witness in court.
The object is to minimize, to the extent possible, deviation from what the
jury's assessment of the contested evidence would have been under ideal
adversary conditions. After observing an individual testify on direct and
cross-examination, the jury typically evaluates that testimony and ac-
cords it some degree of evidentiary weight. Hearsay evidence, if ex-
cluded, receives zero evidentiary weight; if admitted, it presumably
receives greater evidentiary weight than if the declarant had testified sub-
ject to cross-examination. The underlying assumption is that cross-exam-
imination would have negatively influenced the jury's evaluation of the
evidence.

Under the proposed analytical model, the first step is for the judge
to estimate the evidentiary weight that the jury would give the hearsay
declarant's evidence if she testified on direct and cross-examination. The
next step is to estimate the weight the jury would attach to the hearsay if
admitted without cross-examination—presumably greater weight than
had the declarant testified in court, since the jury cannot anticipate the
counteractive force of cross-examination. If the hearsay is excluded, it is
assumed that the hearsay would receive zero evidentiary weight. The es-
timated error resulting from excluding the evidence, that is, the weight
the jury would have attached to live testimony, is then compared with
the estimated error resulting from admitting the hearsay, that is, the
amount by which the jury would value the hearsay over live testimony.
The hearsay is then admitted or excluded depending upon which ruling
will minimize deviation from the adversary ideal.99

An example using the concept of mathematical probability will illus-
trate. Suppose the prosecutor proffers hearsay evidence which the judge
concludes the jury members would accord a .30 probability of credibility

99. The proposed analytical model is similar to that employed in Note, The Theoretical Foundation
of the Hearsay Rules, 93 HARV. L. REV. 1786 (1980). However, the two models differ in one
important respect. As a baseline for measuring error the Note utilizes "the credibility that would be
assigned to the evidence by 'experts'—judges, attorneys, and academicians." 93 HARV. L. REV. at
1787. The model set forth in the text measures error against the credibility that the jury would have
assigned the hearsay under ideal adversary conditions. Both standards are substitutes for the
"truth," which cannot be ascertained in the context of a trial. Given the constitutional right to a jury
trial in criminal cases, the baseline standard employed in the text is preferable, at least in criminal
cases, because it involves less judicial usurpation of the jury's factfinding role. See supra notes 79-81
and accompanying text.
had they observed the declarant testify on direct and cross-examination. Further assume that the judge determines that if the uncross-examined hearsay is admitted, the jury members would accord it a .50 probability of credibility; and, if excluded, that they will accord it zero weight. Since admission will produce a deviation from the hypothetical ideal of .20 and exclusion a deviation of .30, the proper course under the proposed alternative is to admit the hearsay.

An advantage the above method enjoys over judicial assessment of probable reality is that, by mirroring to the extent possible the jury's hypothetical evaluation of contested hearsay under ideal conditions, it seeks to minimize judicial usurpation of the jury's role as factfinder. Additionally, the comparative method of analyzing the effect of admission and exclusion of hearsay avoids the question bedeviling conventional reliability analysis respecting the standard of proof to be employed in deciding the reliability of hearsay. However, aside from the considerable practical difficulties involved in making the required probability estimates, especially estimating the weight that a jury hypothetically would attach to the contested evidence were the declarant to testify subject to cross-examination, a fundamental conceptual impediment precludes using such comparative analysis in criminal cases.

In civil and criminal cases, the proof needed for the plaintiff to prevail clearly is quantitatively different—the preponderance of the evidence as opposed to proof beyond a reasonable doubt. Moreover, proof in a civil case is comparative in a way that proof in a criminal case is not. In a civil case, the trier of fact is asked to compare the proof presented by either side and to decide which preponderates. The proof is comparative in the sense that the quantum of proof required for one side to prevail varies in relation to the quantum of proof presented by the other. For example, in two similar law suits where the plaintiffs' cases are equally persuasive on the facts, one plaintiff can win and the other lose because the first defendant presented a weak case and the second a strong case.

On the other hand, the jury in a criminal case is not asked to weigh one side's evidence against the other, nor does the level of proof that the prosecution must present in order to prevail vary with the level of proof presented by the defense. Whether the defense presents ample proof or none at all, the prosecution is obliged to prove to the trier's satisfaction beyond a reasonable doubt that the defendant committed the crime charged. Proof in a criminal case is in theory qualitatively different from
proof in a civil case.\textsuperscript{100}

That qualitative difference affects whether a judge properly may admit prosecution hearsay on the basis that admission will harm the defense less than exclusion will harm the prosecution. In a civil case, since proof is comparative, error benefiting either party is equally disfavored. Consequently, in civil cases it may be appropriate to rule on admissibility of hearsay with a view toward minimizing deviation from the jury's hypothetical assessment of hearsay evidence under ideal adversary conditions. In criminal cases, however, error favoring the defense and error favoring the prosecution are not weighted equally. It is considered preferable to acquit a guilty person than to convict an innocent one. Therefore, a comparative method of reliability analysis, which weighs error equally regardless of which side it benefits or harms, is not appropriate for use in criminal cases.

In sum, reliability analysis, of either the conventional or comparative variety, is ill suited to resolve the admissibility of prosecution hearsay under the confrontation clause.

V. UNAVAILABILITY OF THE HEARSAY DECLARANT

Roberts, in addition to requiring a showing of reliability, requires the prosecution in the "usual" or "normal" case to establish that a person whose out-of-court statement it wishes to use against the accused is unavailable to testify as a witness.\textsuperscript{101} In United States v. Inadi,\textsuperscript{102} the Supreme Court recently elaborated upon the unavailability component of Roberts.

A. United States v. Inadi

Joseph Inadi was convicted of conspiring to manufacture drugs and other related offenses after a trial in which recordings of telephone conversations between various coconspirators were played for the jury. Of the four coconspirator declarants whose conversations were recorded, two testified at trial, a third asserted his fifth amendment privilege outside the presence of the jury, and the fourth, John Lazaro, failed to appear in court in response to a government subpoena. The Third Circuit Court of Appeals reversed Inadi's conviction, holding that the prosecu-

\textsuperscript{100} The discussion of the qualitative difference between proof in civil and criminal cases in the text is adopted from J.L. COHEN, THE PROBABLE AND THE PROVABLE 49-57, 245-256 (1977).

\textsuperscript{101} 448 U.S. 56, 65 (1980).

\textsuperscript{102} 475 U.S. 387 (1986).
tion had not established that Lazaro was unavailable to testify.103

The court of appeals based its ruling on language in Roberts: "'In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.'"104 The Supreme Court, in a seven-member majority opinion authored by Justice Powell, reversed,105 rejecting the lower court's reading of Roberts's unavailability requirement on the ground that the language concerning unavailability must be read in light of the particular type of hearsay in question. In Roberts, the hearsay consisted of prior testimony which the Court explained is a "weaker substitute" for live testimony and hence should be used only when the "better" evidence is not available. In contrast, coconspirators' statements are not a substitute for live testimony, but rather possess "independent evidentiary significance" of their own. Having been made in the context of furthering the illegal enterprise, their evidentiary significance cannot be replicated by live testimony as shown by their admissibility even if the declarant testifies in court.106

After distinguishing Roberts, the Court subjected the Third Circuit's unavailability rule to a cost-benefit analysis. It found the benefits either minimal or nonexistent. Under the rule's operation, a coconspirator's statement is admissible if the declarant is either unavailable or available and produced; the statement is excluded only where an available declarant is not produced. Given these alternatives, the Court concluded that the rule "is not likely to produce much testimony that adds anything to the 'truth-determining process' over and above what would be produced without such a rule."107 The Court reasoned that the government will subpoena declarants whose testimony it believes will be helpful to its side of the case, while the defense will subpoena declarants whom it believes will assist in undermining the prosecution's case or in presenting a defense.108

On the other side of the ledger, Justice Powell found that the rule would impose significant costs on prosecutors and courts. Prosecutors would be required to identify, locate, and keep available any coconspirator whose statement they proposed to introduce or run the risk of

104. 748 F.2d at 818 (quoting Roberts, 448 U.S. at 65).
105. 475 U.S. at 387.
106. Id. at 394-96.
107. Id. at 396.
108. Id. at 397.
CONFRONTATION CLAUSE

exclusion of that statement if a court found their efforts to produce the declarant wanting. Additionally, the rule would burden appellate courts with yet another claim to review in already complex conspiracy cases.

The Court repeated a familiar refrain: The purpose of criminal trials is to discover truth; the right to confrontation should be interpreted to achieve that purpose. The government did not pursue Lazaro’s testimony after he failed to respond to subpoena and was content to make its presentation using his voice on the tapes, and the defense had not originally subpoenaed him even though it was aware that his voice was on the tapes. Therefore, Justice Powell asserted, neither side believed Lazaro’s testimony would be helpful to the presentation of its case. Since the lower court’s unavailability rule would require the government to produce a witness whose testimony neither side wants to present, he concluded that the rule would not further the goal of truth and thus lacks support under the confrontation clause.

The majority’s reasoning portrays prosecuting and defense attorneys as impartial investigators and the criminal trial as a mutual quest for truth by both sides. That characterization distorts the adversary reality of criminal trials and ignores the partisanship of counsel. Criminal trials are not disinterested inquiries into truth but rather ritualized presentations, usually performed for a passive audience of laypersons. The attorneys are not neutral investigators but partisan advocates, advancing positions that they may or may not personally believe. That the government was willing to proceed without Lazaro and that the defense did not subpoena him do not necessarily mean that his testimony would not have advanced the search for truth. Rather, those decisions reflect a tactical judgment by each side that calling Lazaro as a witness was not in its interest.

The government apparently believed that an effective case could be made against the defendant using Lazaro’s voice on the tapes, without his live testimony. Perhaps the prosecution feared that if Lazaro had testified, he might have tried to lessen the inculpatory force of his recorded statements.

Similarly, the defense apparently decided that calling Lazaro to testify as part of the defense case was not worth the gamble. Even though defense counsel would have been entitled to cross-examine Lazaro,

109. Id. at 399.
110. Id. at 398.
111. FED. R. EVID. 806 provides that if a party against whom a coconspirator statement has
counsel surely recognized that such cross-examination would not be equivalent in adversary terms to cross-examination of a witness presented by the prosecution. For example, the jury might expect a witness called by the defense to testify favorably to the defendant, and if the witness does not do so, weigh such testimony all the more heavily against the defendant. Additionally, if Lazaro had testified unfavorably to the defense, the jury would have heard substantially the same damning evidence twice—once in hearsay form during the prosecution's case and again in live testimony during the defense case. Defense counsel might reasonably conclude that such evidence heard late in the trial could disproportionately affect the jury's deliberations. On the other hand, had Lazaro been presented as a prosecution witness, counsel might have concluded that the risk of cross-examination, being less, was worth the gamble.

Tactical decisions of this kind are commonly made by trial attorneys. Such decisions are based on a rough risk-benefit calculus that depends more on the rules of adversary presentation than counsels' notions of where truth might lie. The idea that the defense's failure to subpoena Lazaro meant that the defendant's attorney believed that his testimony would not have assisted in the pursuit of truth rests on an idealized, unrealistic view of criminal trials and criminal trial attorneys. If truth is to be the criterion for defining the content of the confrontation guaranty, it cannot be gleaned from lawyers' trial tactics.

Based on Inadi's conceptualization of the unavailability requirement as a truth-seeking device, it follows logically that a court should admit prosecution hearsay even though the declarant is available to testify, provided that the court is convinced that the hearsay is reliable. Even if that conclusion is mistaken, the mistake is not irreparable since under Inadi's reasoning the defense will call the declarant as a witness and expose any unreliability. Accordingly, imposition of the unavailability requirement should be reserved for less reliable hearsay, about which the judge entertains some doubt, but which is sufficiently reliable to warrant admission, were the declarant unavailable to testify.

been admitted calls the declarant as a witness, "the party is entitled to examine him on the statement as if under cross-examination."

112. 475 U.S. at 409-10 (Marshall, J., dissenting).

B. The Unavailability Requirement Reconsidered

Although qualifying the unavailability requirement, Roberts did not elaborate upon when or why a demonstration of unavailability is dispensable. The qualification is briefly discussed in a footnote containing the statement that in Dutton v. Evans, the "Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness."\(^{114}\)

However, the Roberts court did not specify the circumstances rendering the "utility" of confrontation "remote," leaving one to speculate what was meant. At least two interpretations are plausible. The statement may refer to the finding in Evans that the hearsay at issue there was neither "crucial" nor "devastating" in the sense that its introduction caused the defendant little, if any, adversary harm.\(^ {115}\) As previously discussed, the absence of adversary harm to the defense has meant no infringement of the confrontation guaranty, so it reasonably follows that a showing of unavailability is not required in that circumstance. Alternatively, the statement in the footnote may refer to the view advanced by the Evans plurality that, assuming the jury believed the witness Shaw's testimony relating the declarant Williams's statement, cross-examination of Williams would not influence a jury since his statement, if made, was obviously reliable.\(^ {116}\) Although introduction of the hearsay statement might have hurt the defense, the absence of the ability to confront and cross-examine the declarant did not adversely affect the defense on the assumption that the statement was invulnerable to cross-examination. Again, the requirement of unavailability is logically dispensable because, by hypothesis, there is no violation of the confrontation guaranty.

Accordingly, the language in Roberts quoted from Evans suggests that the prosecution need not call an available hearsay declarant as a witness, provided that using hearsay in lieu of live testimony will not detract from the defendant's adversary presentation. Prosecutors should be required to present the testimony of an available hearsay declarant unless it reasonably appears that confrontation and cross-examination would not serve any adversary purpose to the defense. If the declarant is available and not produced, hearsay should be admissible only if a competent defense attorney would perceive no adversary benefit from confrontation and cross-examination of the declarant. This interpretation

\(^{114}\) 448 U.S. 56, 65 n.7 (1980).
\(^{115}\) See supra note 35 and accompanying text.
\(^{116}\) See supra notes 36-39 and accompanying text.
carves out a narrowly circumscribed but workable exception to the unavailability requirement, one that protects the legitimate interests of prosecutors and defendants alike. Prosecutors, without demonstrating the declarant's unavailability, could introduce hearsay that reasonably appears invulnerable to cross-examination.\textsuperscript{117} That condition, for example, is frequently satisfied in the case of business records and learned treatises.

Contrary to the logic of \textit{Inadi}, the requirement of unavailability, properly conceived, reflects the principle that prosecution hearsay should not be used unless necessary. The principle of necessity, in its strongest form, holds that the prosecution may not introduce hearsay at trial without producing the declarant and offering the accused an opportunity to cross-examine, unless the prosecution first establishes that the declarant is unavailable to testify at trial. The necessity principle embodies a commitment to maintaining procedural fairness in criminal trials by endeavoring to preserve, to the extent possible, any adversary advantage that the defense might derive from contemporaneous cross-examination of a prosecution witness before the jury. There is "no reason in fairness why a state should not, as long as it retains a traditional adversarial trial, produce a witness and afford the accused an opportunity to cross-examine him when he can be made available."\textsuperscript{118}

The \textit{Roberts} court did not envision the necessity principle as uncompromising, by virtue of its qualified formulation of the unavailability requirement. However, a qualified unavailability rule is not necessarily inconsistent with preserving fairness in criminal trials, provided that care is taken to insure that the balance of adversary advantage between the prosecution and defense remains intact. The exception to the unavailability rule specified above—that a demonstration of unavailability is not required where the hearsay reasonably appears unimpeachable by cross-examination—fulfills that condition. An exception based on the reliability of hearsay does not. Even assuming that reliability is determinable, that the truth can be known, it does not follow that the defendant could not benefit from cross-examining the hearsay declarant. It is a truism of our adversary tradition that counsel, by skillful cross-examination, can sometimes discredit in the eyes of the jury testimony that judge and counsel know to be true.


VI. AN EPISTEMOLOGICAL COMPARISON OF THE THREE METHODS OF FUNCTIONAL ANALYSIS

Three rationales have been presented by the Court to justify dispensing with confrontation of a person whose statement is used against an accused. They are: (1) The hearsay is reliable; (2) Admission of the hearsay will not cause the defendant adversary harm since cross-examination would not affect the jury's evaluation of the hearsay; and (3) The jury can assess the evidentiary value of the hearsay accurately despite the absence of cross-examination.

Each rationale and its correlative method of analysis varies in the degree of deference shown to the tradition of using adversary presentation of proof through live witnesses before a lay factfinder to resolve factual disputes in criminal cases. Each also suggests a different relationship between the trial process and disputed past events, in particular the manner in which the former can assist in obtaining knowledge about the latter.

Of the three approaches, calling upon judges to determine whether proffered hearsay accords with their perception of disputed past events defers least to the adversary tradition of relying upon juries to resolve contested facts. Authorizing judges to admit or exclude hearsay not falling within an established exception to the hearsay rule based on judicial evaluation of the hearsay's reliability in the individual case assumes that judges are capable of knowing the truth concerning disputed past events. The adversary tradition, however, assumes the contrary. Knowing the truth about particularized past events is in general not possible; frequently, all we can do is to adhere to an intricate system of rules of evidence and procedure for resolving factual disputes.

Within the adversary tradition, two strands of epistemological thought are discernible. In both, the formulation of and adherence to procedural rules for recreating the past and resolving factual disputes about it are central. However, in one, procedural regularity is an end in itself. The goal is a verdict that is procedurally correct. Results of the litigation process are acceptable because they flow from strict adherence to rules, well defined in advance, that govern case presentation. Accordingly, once a rule of evidence or procedure is defined, it is not subject to modification on the ground that its application in particular circumstances is not essential to discover historical truth. Additionally, if such a rule is unintentionally violated, the litigation process must be repeated unless it can be shown that the error was harmless, that the violation probably did not affect the verdict.
The adversary-harm approach to confrontation analysis exemplifies this type of procedural orientation. It measures the need to confront particular prosecution hearsay by the likely impact of confrontation on the jury and allows departure from the norm of confrontation if, but only if, the jury's assessment of the evidence is not likely to be affected as a consequence. The adversary-harm approach is built on a procedural conception of justice: a true and just verdict is one arrived at by following prescribed rules. One does not look beyond the trial process to determine whether or not the verdict reflects one's sense of actual fact. Procedural truth, defined as a result achieved by following prescribed rules of proof and procedure, is what matters. Conversely, the confrontation requirement is understood and interpreted with a view toward its operational effect. The defendant is entitled to confront prosecution hearsay unless confrontation would not alter the jury's evaluation of that evidence.

There is an epistemological alternative lying between direct judicial acquisition of knowledge respecting past events in issue, on the one hand, and the substitution of procedurally correct results for that knowledge, on the other. The intermediate view holds that knowledge of contested facts is attainable, but only by employing intricate rules of proof and procedure carefully designed to promote such knowledge. While attentive to the importance of procedural regularity, the middle position presupposes that reliable knowledge about the external world is attainable through intelligent application of nonrigid rules.

The approach to confrontation which focuses on the jury's capacity to assess particular hearsay despite the absence of cross-examination is compatible with the intermediate epistemological position. The rule requiring confrontation is flexible and depends on whether confrontation of a given witness is necessary for accurate factfinding by the jury. Unlike adversary-harm analysis, the adequate assessment approach acknowledges an external world outside the trial process, while stressing the importance of evidentiary rules to obtain knowledge of that world. Unlike judicial reliability analysis, it does not rest on direct knowledge of the past, but instead endorses modification of the rules of adversary presentation in ways compatible with acquiring accurate knowledge about past events.

Focusing on the need for confrontation from the jury's perspective—inquiring whether the jury is able to assess particular unconfronted evidence adequately—has much to recommend it. Hearsay evidence is suspect principally because it is thought that juries lack the capacity to assess its weight appropriately, the assumption being that juries normally
overvalue hearsay. However, if circumstances with respect to particular hearsay are such that the generalization regarding jury incapacity does not hold, the ban on admission may be unjustified.

In *California v. Green*, the plurality took the position that a witness’s prior statements are admissible under the confrontation clause, provided the witness is subject to full and effective cross-examination before the jury concerning the earlier statements. Subsequent cross-examination was accepted as a generally adequate substitute for cross-examination at the time the prior statement was made on the theory that the witness would either affirm or deny, in whole or in part, his prior statement.

Subsequent cross-examination, however, may not be the only effective substitute for contemporaneous cross-examination. Other corrective devices, such as judicial comment and cautionary instructions regarding hearsay evidence, also may serve to counteract the tendency of juries to overvalue hearsay. However, except in *Dutton v. Evans*, where the nature of the hearsay statement was said to warn the jury “against giving the statement undue weight,” the Court has not relied on the ability of juries to assess particular hearsay satisfactorily as a reason for dispensing with confrontation. Instead, the principal analytical focus has been on judicial analysis of the reliability of hearsay proffered by the prosecution.

Judicial analysis of reliability raises difficulties related to the division of factfinding responsibility between judge and jury, as well as unanswered questions concerning the appropriate scope of inquiry into reliability and the standard of proof for determining reliability. These problems stem in part from having judges determine disputed facts directly, without intercession of the adversary process. In view of the seriousness and intractability of these problems, it is advisable to rely on the other methods of analysis. In analyzing the admissibility of hearsay under the confrontation clause, courts should focus on adversary harm to the defendant, or the ability of the jury to assess the particular hearsay at issue without the benefit of confrontation, or both methods in tandem.

119. *Id.*
120. 400 U.S. 74 (1970).
121. The *Evans* plurality noted that Williams’s statement blaming Evans for his predicament did not expressly identify Evans as the perpetrator of the crime but rather invited the jury to infer that Williams had implicitly identified Evans as the perpetrator. The plurality reasoned that since “the statement contained no express assertion about past fact, . . . it carried on its face a warning to the jury against giving the statement undue weight.” *Id.* at 88.
VII. CONCLUSION

As a result of the two-part test announced in Roberts, the use of prosecution hearsay is informed by two principles: reliability and necessity. Those principles reflect the underlying values of substantive justice and procedural fairness. Those values are not necessarily harmonious, but can and sometimes do conflict. The challenge for the Court has been to interpret the confrontation clause in a manner true to both values.

In recent decisions, the Court has tried to achieve harmony by rendering the preservation of procedural fairness subservient to the pursuit of substantive justice in the form of accurate verdicts. A majority of the Court seems to view the right to confrontation as a cumbersome, time-consuming, and expensive trapping of the adversary process that should be interpreted so as not to impede the admission of reliable evidence, even if that evidence is hearsay. However, having made reliability the touchstone for admitting prosecution hearsay, the Court has failed to specify either the degree of reliability required or the method of its assessment.

Additionally and more importantly, the emphasis on reliability marks a dangerous trend in criminal adjudication. Unqualified truth concerning facts disputed in litigation cannot consistently, if ever, be attained. Our system of adversary presentation of proof to lay factfinders has proved a tolerable way of coping with unavoidable uncertainty. In criminal cases, the right of the accused to confront and cross-examine her accusers in open court is a key component of our method of proof. It forms part of the bedrock of the factfinding preeminence of juries and is essential to their successfully fulfilling that role. Resting the admissibility of prosecution hearsay on a judicial assessment of its reliability shifts factfinding responsibility from juries to judges, a troublesome shift since judges are not endowed by either nature or tradition with special ability to divine truth.

The focus on reliability disturbs for yet another reason. Justice Brennan, on behalf of the Court in Lee v. Illinois,122 wrote: "[T]he right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails."123 It is the "perception . . . of fairness" that fosters public acceptance of guilty verdicts returned in the vast majority of criminal trials in this country. Members of the public are not

123. Id. at 540.
normally aware of, and therefore do not and cannot independently assess, the evidence presented in any but the most celebrated criminal trials. Rather, their acceptance of a guilty verdict as correct derives from a belief that, despite the apparent adversary advantages that the defense enjoys over the prosecution, including the right to confront and cross-examine prosecution witnesses, the jury voted to convict. A reliability-based interpretation of the confrontation clause alters the balance of adversary advantage against the defense and in favor of the prosecution. As people become aware of that change, their faith in the fairness of the criminal justice system, and hence their confidence in the absence of erroneous convictions, will suffer as a result. For a legal culture that relies heavily on appearances to gain and retain public respect for its criminal justice system, that would be regrettable.