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**CONFRONTATION AND HEARSAY: A LOOK BACKWARD, A PEEK FORWARD**

*Irving Younger*

**HEARSAY** is an out-of-court declaration offered to prove the truth of the matter asserted.\(^1\) It is inadmissible because it is unexamined and hence too unreliable for the jury to consider.\(^2\) Where some substitute for cross-examination provides an alternative assurance of reliability, the rule against hearsay may give way and the out-of-court declaration be admitted under one or another of the exceptions to the rule.\(^3\) But hearsay it remains. The evidence is received despite the lack of cross-examination.

Concerning confrontation, the Sixth Amendment to the Constitution of the United States says that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Since an out-of-court declarant cannot be confronted, is hearsay ever admissible against the defendant in a criminal case?\(^4\) What, in short, is the relationship between confrontation and hearsay?\(^5\)

Several times over the past seven years, the Supreme Court has taken up this question.\(^6\) Its opinions demonstrate that the Court has yet to find a satisfactory answer.

In *Pointer v. Texas,*\(^7\) the victim of a robbery had, at the prelim-
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inary hearing, identified Pointer as the robber. There was no cross-examination, no lawyer having been appointed for Pointer. At trial, it appeared that the victim had left the state, whereupon the prosecutor put into evidence the transcript of the victim's preliminary-hearing testimony. Although the transcript was hearsay, its receipt was arguably proper under Texas' former-testimony exception to the hearsay rule.8 The Supreme Court reversed. It might have written an opinion extending Gideon v. Wainwright9 to the situation of an indigent defendant at a preliminary hearing10 or declaring the admission of hearsay on the crucial issue of identification a deprivation of due process.11 It did neither. Instead, it held that the victim's preliminary-hearing testimony could not be received because of the Confrontation Clause. Obliged now to characterize confrontation, the Court set about doing so in a way that had the immediate appeal of obviousness but, we shall see, the ultimate disadvantage of untenability.

The Court held in Pointer that the Confrontation Clause of the Sixth Amendment applies to the states through the Due Process Clause of the Fourteenth, and that12

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    \ldots \text{the Sixth Amendment’s guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him.}
\]

If the Sixth Amendment is violated by a denial of cross-examination, it follows that receipt of any hearsay, precisely because hearsay is not cross-examined, must offend the Confrontation Clause. Yet, as Pointer notes,13

\[
    \text{[t]his Court has recognized the admissibility against an accused of dying declarations . . . .}
\]

A dying declaration is hearsay, and the defendant cannot cross-
We therefore wonder why receipt of uncross-examined dying-declaration hearsay is constitutionally permissible but not uncross-examined former-testimony hearsay. Pointer does not explain. It merely says that there is a difference.15

The case before us would be quite a different one had [the victim's] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. . . . There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses. The case before us, however, does not present any situation like those mentioned above or others analogous to them.

In two subsequent cases, the Court again neglected to reconcile confrontation and hearsay, resting content with the bare assertion that lack of cross-examination makes out a violation of the Confrontation Clause.

In Douglas v. Alabama,16 the defendant was indicted for robbery together with Loyd. Loyd had confessed, implicating Douglas. The prosecutor severed Loyd's case from Douglas', and at Douglas' trial called Loyd as a state's witness. When Loyd declined to testify on the ground of self-incrimination, the prosecutor read his confession to him, ostensibly to refresh his recollection. This amounted to putting Loyd's confession in evidence, the Supreme Court held,17 and the confession had not been cross-examined when made. Nor could Loyd be cross-examined at trial, for when Douglas' counsel tried to question him, Loyd persisted in his refusal to answer. The Court reversed. Douglas' "inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause."18

In Bruton v. United States,19 a co-defendant's confession was admitted solely against the co-defendant. The trial judge instructed

14. 5 WIGMORE, EVIDENCE §§ 1430-52 (3d ed. 1940).
15. 380 U.S. at 407.
17. 380 U.S. at 419.
18. Id.
the jury to disregard the confession as to Bruton, who had not cross-examined the co-defendant. The Supreme Court quoted its opinions in Pointer and in Douglas, and concluded that, had the jury failed to follow the limiting instruction, Bruton would have been denied the right to confront his co-defendant. Because it could not regard the limiting instruction as effective, the Court reversed.

In Pointer, Douglas, and Bruton, the Court stalked the idea that confrontation means cross-examination. Those cases involved situations in which confrontation was held to have been denied. Thus they tell us that lack of cross-examination violates the Confrontation Clause without telling us what satisfies it, for none of them involved either (1) an uncross-examined out-of-court declaration by a declarant available for cross-examination at trial or (2) a cross-examined out-of-court declaration by a declarant unavailable for cross-examination at trial. In California v. Green, the Court pounced.

There, one Porter testified against Green at a preliminary hearing and was cross-examined by Green's lawyer. At trial, the prosecutor called Porter as a state's witness. When his answers proved disappointing, the prosecutor read into evidence the transcript of Porter's preliminary-hearing testimony. This was authorized by section 1235 of the California Evidence Code:

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing. . . .

On appeal, the California Supreme Court vacated Green's conviction. It held section 1235 unconstitutional on the ground that neither (1) the right to cross-examine Porter at trial nor (2) the opportunity to cross-examine Porter at the preliminary hearing satisfied the Confrontation Clause. The Supreme Court reversed on both grounds.

As to (1), cross-examination at trial, the Court held that where a witness testifies at trial and is subject to full cross-examination, the Confrontation Clause permits receipt of the witness' out-of-court declarations, even though not cross-examined when made:

20. 391 U.S. at 126-27.
22. 399 U.S. at 153.
23. Id. at 164.
the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories.

As to (2), cross-examination at the preliminary hearing, the Court held that where a witness is unavailable to testify at trial, the Confrontation Clause permits receipt of the witness' out-of-court declarations if they were cross-examined when made. A fortiori, the rule is the same where, as in Green, the out-of-court declarant is available for cross-examination at trial:

If Porter had died or was [sic] otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing—the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give his live testimony is in no way the fault of the State. . . . But nothing . . . indicates that a different result must follow where the State produces the declarant and swears him as a witness at the trial.

The essential idea of Green is that confrontation is the guardian of cross-examination. The hearsay rule has a different ward. It nurtures reliability. Cross-examination is one means of assuring reliability, but the hearsay rule contemplates alternative assurances. It acknowledges the possibility of substitutes for cross-examination. Where such a substitute for cross-examination is present, the out-of-court declaration, albeit uncross-examined, may be admitted under an exception to the hearsay rule. Yet it is just this lack of cross-examination which, say Pointer, Douglas, and Bruton, violates the Confrontation Clause. Then consistency required the Court in Green to conclude that the Confrontation Clause does not codify the hearsay rule. So it did:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the

24. Id. at 166.
25. See text at note 3 supra.
26. 399 U.S. at 155.
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overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.

And it was correct. The reasons are textual, aesthetic, and pragmatic.

The textual reason: the hearsay rule carries with it a host of exceptions about which the text of the Confrontation Clause says nothing. Thus we should not read the latter to include the former. The aesthetic reason: lawyers want the Constitution to be elegant. Taking the lapidary phrases of the Sixth Amendment as a shorthand expression of the law of hearsay is inelegant. The pragmatic reason: the hearsay rule needs reforming. Then how foolish to insulate it against the possibility of reform by raising it, with all its imperfections on its head, to the eminence of constitutional command.

Granted that the Confrontation Clause does not codify the hearsay rule. What of the formula embodied in Green, that confrontation equals cross-examination? We said earlier that it is obvious but untenable, and here is why.

There are no less than twenty-eight exceptions to the hearsay rule. For twenty-seven of them, because some alternative assurance of reliability is present, the declarant need not have been cross-examined at the time he made the out-of-court declaration. Under Green, however, every one of these twenty-seven exceptions would be invalid if the declarant is absent, for Green has it that the Confrontation Clause permits receipt of hearsay by an unavailable declarant only where the hearsay was subject to cross-examination when uttered.

The Court could not have intended this blanket declaration of the unconstitutionality of nearly the entire body of hearsay law. It is, rather, the unforeseen consequence of the Court's casual reading of the Confrontation Clause as a guarantee of cross-examination. What is more, that reading was unnecessary. Assuming the Court's desire to dispose of the cases from Pointer to Green on confrontation grounds, it might have read the Sixth Amendment, not as a guarantee

27. See text following note 11 supra.
29. Id. Rules 803 and 804.
30. It should be remembered, however, that the Supreme Court has mentioned in passing that a handful of exceptions to the hearsay rule are also exceptions to the right of confrontation. E.g., Pointer v. Texas, 380 U.S. 400 (1965) (dying declarations and former testimony); Snyder v. Massachusetts, 291 U.S. 97 (1934) (dying declarations and documentary evidence); Robertson v. Baldwin, 165 U.S. 275 (1897) (dying declarations and depositions).
of cross-examination, but as a guarantee of the presence of witnesses. Along the way, it had supplied itself with a precedent.

In Barber v. Page,\(^{31}\) Barber’s lawyer was present at the preliminary hearing but did not cross-examine the witness. At trial, the prosecutor stated that the witness was an inmate of a federal prison and, without more, put in evidence the transcript of the witness’ preliminary-hearing testimony. The Supreme Court reversed:\(^{32}\)

[T]here has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant. . . . This exception has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement.

The Court held that, because the state had made no showing of good faith effort to secure the witness’ attendance, the witness was not genuinely unavailable and, regardless of whether or not Barber’s lawyer had cross-examined him at the preliminary hearing,\(^{33}\) that Barber’s right of confrontation was violated by receipt at trial of the witness’ preliminary-hearing testimony.

Had the Court in Green turned Barber into a full-blown theory of the Confrontation Clause, it might have avoided the unworkable equation of confrontation and cross-examination. Only Justice Harlan saw the possibility. Concurring in Green,\(^{34}\) he argued that the Confrontation Clause simply imposed upon the prosecutor the duty to secure the presence in court of every available witness. That done, out-of-court declarations would be admitted or excluded solely in accordance with the jurisdiction’s hearsay rule, subject to a due-process requirement that grossly unreliable hearsay not be received in evidence.

That is not the end. In Dutton v. Evans,\(^{35}\) the Supreme Court

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31. 390 U.S. 719 (1968). The Court’s opinion is by Justice Marshall, joined by Chief Justice Warren and Justices Black, Douglas, Harlan, Brennan, Stewart, White, and Fortas. Justice Harlan’s concurrence rests on his view that the state’s failure to attempt to obtain the witness’ presence denied Barber due process.
32. 390 U.S. at 722.
33. Id. at 725.
34. 399 U.S. at 172.
35. 400 U.S. 74 (1970). The plurality opinion is by Justice Stewart, joined by Chief Justice Burger and Justices White and Blackmun. Chief Justice Burger and Justice Blackmun concurred on the additional ground of harmless error. Justice Harlan con-
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again examined a confrontation issue. Since no opinion commanded a majority, the case has slight precedential value. There is, however, a plurality opinion which deserves comment.

Dutton grew out of the murder of three Georgia policemen by Evans and two accomplices, one of whom was Williams. Williams had been convicted in a separate trial. At Evans’ trial, the prosecutor called one Shaw, a cell-mate of Williams, who described an occasion when Williams had said, “If it hadn’t been for that dirty son-of-a-bitch Alex Evans, we wouldn’t be in this now.”

Evans’ counsel objected on hearsay and confrontation grounds. His objection was overruled. Williams never testified.

On direct appeal, the Georgia Supreme Court affirmed, holding that Williams’ out-of-court declaration was admissible under Georgia’s version of the conspiratorial-admission exception to the hearsay rule. Evans thereupon sought federal habeas corpus on the ground that, whether or not Williams’ out-of-court declaration was admissible under Georgia evidence law, it was inadmissible under the Confrontation Clause. The District Court decided against him. The Court of Appeals reversed and the case came to the Supreme Court, where we might have expected the problem to be analyzed something as follows:

The prosecutor’s failure either to call Williams as a witness or to explain why he did not falls afoul of Barber v. Page. Further, in Pointer, Douglas, and Bruton the Supreme Court had held that denial of cross-examination violates the Sixth Amendment. Then stare decisis requires a holding that Evans’ lack of opportunity to cross-examine Williams deprived him of his right of confrontation.

This reasoning seems “strict” enough to please any taste, yet it did not persuade the plurality. With respect to the prosecutor’s failure to call Williams as a witness or to explain why he did not, their opinion remarks only that Evans did not procure Williams’ attendance by subpoena. If the opinion had suggested that Barber v. Page be overruled, we might disagree but would understand. Given the opinion as written, we are hard put to recognize what it is the plurality has in mind.

With respect to Evans’ lack of opportunity to cross-examine Williams, the plurality opinion adds up to this: that it makes no differ-

36. 400 U.S. at 77.
37. See 4 Wigmore, EVIDENCE § 1079 (3d ed. 1940).
38. 400 U.S. at 88 n.19.
ence. Not that Pointer, Douglas, and Bruton were wrongly decided, but that three circumstances present here lead to the conclusion that, despite the lack of cross-examination, Evans' right of confrontation was not violated.

First. Although it does not find receipt of Williams' hearsay to be harmless error, the plurality opinion observes, as a reason for the decision, that the hearsay was not "in any sense 'crucial' or 'devastating' . . . ." Let us see. Error was committed or error was not committed. If error was not committed, that is an end of the case. If error was committed, it was harmless or it was not harmless. If it was harmless, that is an end of the case. If it was not harmless, Evans should have his habeas corpus. To make sense at all, the plurality opinion must be taken as treading a middle ground, that there was error, not harmless, but of insufficient magnitude to warrant disturbing the conviction of so guilty a man. This is a due-process argument. The difficulty with it is that the plurality opinion purports to decide the case under the Confrontation Clause, not the Due Process Clause.

Second. The opinion states that

... the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . . .

Can the plurality mean by this that violations of constitutional right signify nothing so long as the trial results in the conviction of a guilty man? We had thought that the rule of law meant something else.

Third. The plurality opinion makes much of the reliability of Williams' hearsay and concludes that

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39. Although Chief Justice Burger and Justice Blackmun joined the plurality opinion, they wrote a separate concurring opinion urging that the error was indeed harmless, 400 U.S. at 90.

40. Id. at 87.

41. Id. at 89. Unelided, the sentence reads as follows: "The decisions of this Court make it clear that the 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.' California v. Green, 399 U.S. at 161."

42. The opinion sets forth four considerations supporting the credibility of Williams' out-of-court declaration. (1) It contained no express assertion of Evans' guilt, thereby alerting the jury not to give it "undue weight." (2) It was obvious that Williams knew at first hand whereof he spoke. (3) Williams' recollection could not have been faulty. (4) The statement was spontaneous and contrary to Williams' penal interest. 400 U.S. at 88-89.

43. Id. at 89.
... 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.

Where there are other assurances of reliability, the opinion says, lack of cross-examination is excused and the Confrontation Clause does not bar receipt of the hearsay. So reliability is what confrontation guarantees. We have seen that it is also what the hearsay rule guarantees. If the receipt of reliable hearsay does not offend the Confrontation Clause, then the right of confrontation is nothing more than the hearsay rule. Things that are equal to the same thing are themselves equal.

The Dutton plurality's equation of confrontation and reliability has four weaknesses. It is unwise. It is contrary to the Court's reluctance, expressed in Green, to read the Confrontation Clause as an exactment of the hearsay rule. It is contrary to the Dutton plurality's own idea of what it was doing:

It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now.

And it compels judges to scrutinize every piece of hearsay offered under any exception to the hearsay rule to determine whether it is sufficiently reliable to be admissible under the Confrontation Clause. This is a time-consuming and unpredictable process which runs counter to the ideal of swift, certain, and efficient criminal justice.

To sum up: the Supreme Court has thus far failed to work out a coherent theory of the relationship between confrontation and hearsay. This is bad judicial craftsmanship, for unilluminated by such a theory the Court decides in the dark, heedless of consistency with the past and implications for the future. If that kind of willy-nilly decision-making were enough, we might as well do it by tossing

44. See text following note 24 supra.
45. See text following note 26 supra.
46. 399 U.S. at 155.
47. 400 U.S. at 86.
49. Something of this can be sensed in Justice Stewart's rather peculiar remark in Dutton, immediately following his statement that the plurality declines to equate confrontation and hearsay, that "we confine ourselves, instead, to deciding the case before us." 400 U.S. at 86.
a coin. A coherent theory of the relationship between confrontation and hearsay should afford the accused adequate protection against the possibility of conviction by affidavit or gossip and simultaneously preserve whatever logic and flexibility have been achieved over the centuries of development of the hearsay rule. With due diffidence, one suggests that Justice Harlan's concurring opinion in Green\textsuperscript{50} is the place to begin.\textsuperscript{51}

\textsuperscript{50} 399 U.S. at 172. To close on a note of irony, we observe that Justice Harlan wrote a concurring opinion in Dutton, 400 U.S. at 93, explaining that his concurring opinion in Green was all wrong.

\textsuperscript{51} As this Article went to press, the Supreme Court decided Chambers v. Mississippi, 41 U.S.L.W. 4266 (U.S. Feb. 21, 1978), holding that on the particular facts there presented, the defendant had been denied "a trial in accord with traditional and fundamental standards of due process." \textit{Id.} at 4271. Among other things, he had not been permitted to cross-examine one McDonald, who had confessed to the murder of which Chambers was accused, had been called as a defense witness, and had repudiated his confession. This, said the Court, "interfered with Chambers' right to defend against the State's charges," \textit{id.} at 4270, because "the right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation..." \textit{Id.} at 4269. It might be thought, then, that the Court is back where it started. See text \textit{supra} at 38.