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THE FORMER-TESTIMONY EXCEPTION IN THE PROPOSED
FEDERAL RULES OF EVIDENCE

Michael M. Martin*

According to one member of the Advisory Committee which drafted them, the proposed Rules of Evidence for the United States Courts and Magistrates were promulgated to “improve the truth-finding capacity of the courts,” as well as to provide the benefits of simplification and uniformity. In much the same way that the Federal Rules of Civil Procedure have led to modernization of procedural rules in many states, the proposed Federal Rules of Evidence may be the vehicle by which improvements unsuccessfully codified in the Model Code of Evidence and the Uniform Rules of Evidence can finally be achieved.

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The Revised Draft was returned by the Supreme Court to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in March 1971. See Fed. R. Evud. at 2. The Committee asked that comments on revisions be submitted by August 1, 1971, in order to resubmit the Rules during the October 1971 Term of the Court. There has been no published indication of when final promulgation might be expected.


4 Model Code of Evidence (1942). The Model Code apparently has not been enacted in any jurisdiction. See 7 Cal. L. Revision Com'n, Reports, Recommendations, and Studies, Recommendation Proposing an Evidence Code 29, 32 (1965) [hereinafter cited as Cal. L. Revision Com'n].

5 National Conf. of Com'rs on Uniform State Laws, Uniform Rules of Evidence (1953) [hereinafter cited as Uniform R. Evud.]. The Uniform Rules have
across the United States. Thus, the goal which for a generation has eluded American reformers of evidence law—removal of some of the common-law impediments to the judicial search for truth—may finally be within reach.

In view of this potential effect of the proposed Federal Rules, both the changes which they propose and those not made should be subjected to close scrutiny. The purpose of this article is to examine one small part of the codification effort, the provisions regarding the admissibility of former testimony taken by deposition or at a prior hearing. In undertaking this examination, particular attention will be focused upon the following three aspects of former testimony: (1) The “motive and interest” standard for ensuring trustworthiness of former testimony, and the manner in which its acceptance as a “reform” position has been adopted by the drafters without providing to the bench and bar sufficient guidance regarding its operation in practice; (2) the provisions of the proposed Federal Rules which would permit admission of prior testimony against its former proponent, another liberalization of current rules of evidence which has not heretofore been given close analysis; and (3) the retention by the Advisory Committee of the unavailability requirement, a situation in which modernization was explicitly rejected. Analysis will indicate that such rejection was perhaps the result of constitutional concerns, and the validity of these concerns will be reviewed. Constitutional aspects of related former-testimony situations also will be examined.

I. Former Testimony

Testimony given by a person on one occasion may be offered into evidence for a variety of purposes at a subsequent hearing. Former testimony may be offered, for example, to impeach a witness\(^6\) or to refresh his recollection.\(^7\) In both of these situations, the truthfulness of the content of the former testimony is disregarded. In some situations, the former testimony itself may be the fact in issue, as would be the case where such testimony serves as the basis of a perjury

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\(^{7}\) See C. McCormick, Law of Evidence § 230, at 481 (1954) [hereinafter cited as McCormick].
prosecution\textsuperscript{8} or perhaps of an action for defamation or malicious prosecution.\textsuperscript{9}\ This article, however, deals with none of the above situations, but instead pertains only to former testimony offered substantively to prove the facts asserted in the testimony. As such, former testimony must be recognized as an exception to the general bar to hearsay testimony. The scope of this analysis is further limited by excluding from discussion former testimony admissible under other hearsay exceptions such as admissions and declarations against interest.\textsuperscript{10}

A. Former Testimony as Hearsay

The general inadmissibility into evidence of former testimony has been variously explained. Some courts have used the relevancy maxim, \textit{res inter alias acta}, as a basis of exclusion.\textsuperscript{11} That doctrine does not justify exclusion, however, since such testimony does not necessarily pertain to a transaction between strangers, nor does it thereby lack probative value on material issues. It may, in fact, be highly probative if its credibility can be established. The probative value of former testimony is suggested by a second explanation sometimes given for its exclusion, namely that “the best evidence the case will admit of must always be produced” and former testimony is not the best evidence of that to which a witness could testify \textit{viva voce}.\textsuperscript{12} This latter explanation for the general inadmissibility of former testimony is also out of favor, however, now that the “best evidence” rule is deemed to be concerned only with those situations where the terms of the original document are themselves material.\textsuperscript{13} In the case of former testimony, the material fact is what the witness has said on the earlier occasion.

The principal reason for excluding former testimony from evidence is that it contravenes the rule which bars admission of hearsay. That rule, as commonly stated, excludes statements made at a time or place other than at the hearing in which they are offered into evidence to

\begin{itemize}
\item \textsuperscript{8} See State v. Bixby, 27 Wash. 2d 144, 173, 177 P.2d 689, 705 (1947).
\item \textsuperscript{9} See 5 J. Wigmore, Evidence \S 1397, at 94, \S 1416, at 137-98 (3d ed. 1940) [hereinafter cited as Wigmore].
\item \textsuperscript{10} For a brief discussion of admissions and declarations against interest, see 5 Wigmore \S 1416.
\item \textsuperscript{11} Fresh v. Gilson, 41 U.S. (16 Pet.) 327, 331-32 (1842); see S. Phinsson, Evidence \S 1423 (10th ed. 1965) [hereinafter cited as Phinsson].
\item \textsuperscript{12} See, e.g., Fresh v. Gilson, 41 U.S. (16 Pet.) 327, 332 (1842); accord, Fuentes v. Gaines, 25 La. Ann. 85, 98 (1873), rev’d on other grounds, 92 U.S. 10, 16 (1876); Phinsson \S 1424.
\end{itemize}
prove the truth of the facts asserted. Hearsay statements are usually excluded from evidence on the ground that they have not been subjected to the following three ideal conditions or tests usually assumed to be necessary in order to assure the reliability of a witness' perception, memory, sincerity, and narration: (1) The oath, which is the formal statement calculated to impress upon the witness his duty to tell the truth; (2) confrontation, or the giving of evidence in open court in the personal presence of the trier of fact and the adversary; and (3) cross-examination, which permits the adversary by his questioning of the witness to expose deficiencies in perception, memory, sincerity, and narration. Since hearsay statements are not accompanied by these assurances, they are generally inadmissible unless the particular evidence is necessary—in the sense that a failure of justice may result from loss of the testimony—or unless the evidence has other assurances of trustworthiness, or both. The proposed Federal Rules of Evidence continue the tradition of excluding hearsay evidence unless it comes within one of the stated exceptions for classes of evidence which are deemed to be of special necessity or reliability.

Because former testimony is given under conditions which theoretically assure trustworthiness, such testimony is generally classified as an exception to the hearsay rule. If the former-testimony exception is measured against other hearsay exceptions by application of the three ideal assurances of reliability noted above, it becomes apparent that this particular type of hearsay evidence is especially trustworthy. Since prior testimony has been given under oath and subject to cross-examination, the only safeguard lost in admission of such testimony

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14 See, e.g., Fed. R. Evd. 801(c); McCormick § 225; Cross, The Scope of the Rule Against Hearsay, 72 L.Q. Rev. 91, 100 (1956).
16 See Fed. R. Evd. 603; 5 Wigmore § 1362.
19 See 5 Wigmore §§ 1362, 1420–23.
21 McCormick § 230.
22 See Morgan, The Law of Evidence, 1941–1945, 59 Harv. L. Rev. 481, 552 (1946);

When the trustworthiness of testimony given in open court, under oath and subject to cross-examination, is compared with that of numerous utterances receivable as exceptions to the hearsay rule, the restrictions enforced as to its admissibility seem little short of ridiculous. Were the same strictness applied to all hearsay, evidence of reported testimony would constitute the only exception to the hearsay rule. Id.
is the demeanor evidence normally gained from the confrontation before the trier of fact.


The former-testimony exception to the hearsay rule has been incorporated into the proposed Federal Rules of Evidence, and is embodied in Rule 804. The Revised Draft of that Rule states in pertinent part:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

1. Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.\(^{23}\)

The remainder of this article will analyze the various elements of this formulation, beginning with the fundamental requirement that the former testimony be given by a witness at another hearing or in a deposition.

1. "Given as a Witness"

In order to qualify for admission into evidence under Rule 804(b)(1) of the proposed Federal Rules, the out-of-court statement must have been testimony "given as a witness." The fact that the prior testimony has been given by a person acting as a witness implies that the testimony has been given under oath, since an oath or affirmation is required of every witness\(^ {24}\) or deponent.\(^ {25}\) This implicit requirement of an oath functions as one of the major indicia of the reliability of former testimony.\(^ {26}\) As indicated above, hearsay is generally ob-

\(^{23}\) Fed. R. Evid. 804(6)(1).

\(^{24}\) Fed. R. Evid. 603.

\(^{25}\) Fed. R. Civ. P. 30(c).

\(^{26}\) An oath will not, of course, obviate the hearsay dangers to the extent of making evidence given under oath admissible without any other guarantee of reliability. See 5 W. Eskridge, § 1382, at 7. Unlike depositions, therefore, affidavits are inadmissible under the former testimony exception. See id. § 1384. It might be argued that an affidavit is admissible under Fed. R. Evid. 804(b)(1) against its procurer because he has the opportunity to develop the evidence by direct examination. However, an affidavit is not a deposition or "testimony given as a witness at [a] hearing," as required by that Rule, and should be admissible, if at all, only as an adoptive admission under Rule 801(d)(2)(ii). This difference in the means for admission is critical in the situation where an affidavit has not been offered into evidence. A deposition is admissible under the former testimony rules regardless of whether it has been previously offered into evidence because its reliability has been assured by the opportunity for cross-examination. An affidavit, on the other hand, has no such assurance (apart from the oath), unless the party attests to its reliability by offering it into evidence. See generally 6 Cal. L. Revision Com'n, Appendix 440 (1964).
jectionable, at least in part, because its reliability is unestablished. Through the process of subjecting the witness to an oath requirement, former testimony is generally thought to gain reliability, and is thus acceptable as an exception to the general rule barring hearsay testimony. Although there is a tendency to discount the importance of an oath in the present religious climate of this country, there is some experimental evidence indicating that witnesses tend to be more circumspect in their testimony if the importance of testifying truthfully is impressed upon them through the requirement of an oath.\(^2\)

2. "At Another Hearing"

Former testimony is admissible under Rule 804(b)(1) if given at "another hearing of the same or a different proceeding."\(^2\) This formulation indicates a substantial departure from purely formal common-law requirements which would admit testimony only if it were taken at a prior hearing of the same action.\(^2\) The proposed Federal Rule places emphasis on the testimony itself, with the nature of the prior hearing being unimportant except to the extent that any such prior hearing did not present an opportunity for cross-examination equivalent to cross-examination in the present proceeding.\(^2\) The proposed Rules have in effect retained the common-law minimum requirement that the former testimony be given at a prior hearing in which cross-examination could have been compelled or was in fact effected.\(^2\)

There is not, however, any requirement in the proposed Rules that the prior hearing be of the same type, civil or criminal, for example, as the present one.\(^3\)

The proposed Rule also allows admission of testimony contained in a "deposition taken in compliance with law in the course of another proceeding." Depositions taken in connection with the present


\(^{28}\) Fed. R. Evid. 804(b)(1).

\(^{29}\) See generally Ariz. R. Civ. P. 43(e); CONN. GEN. STAT. ANN. § 52-160 (1960); IOWA CODE § 622.97 (1971).

\(^{30}\) See text accompanying notes 64-62 infra.

\(^{31}\) See generally 5 WIMANS §§ 373-75. See also Armitage v. Bar Rules Comm., 223 Ark. 465, 467, 265 S.W.2d 818, 820 (1954); In re Gorsuch, 147 Kan. 459, 460, 78 P.2d 12, 13 (1938) (regarding effect of procedures at bar disciplinary proceedings on admissibility at trial of former testimony).

proceeding, however, are governed by Rule 32(a) of the Federal Rules of Civil Procedure. That rule becomes entwined with the rules of evidence because it makes a deposition admissible, in certain defined circumstances, against any party with reasonable notice of its taking “so far as [such deposition is] admissible under the rules of evidence applied as though the witness were then present and testifying.”33 Rule 32(a) thus creates a special hearsay exception for depositions taken in a current proceeding for which there need be no provision in the rules of evidence.34 A situation which is apparently not covered by either the Rules of Civil Procedure or the proposed Federal Rules of Evidence, however, can arise when a deposition is offered against a party who was joined after the taking of the deposition. Since such a party would not have received notice of the examination, the deposition would not be admissible under Rule 32(a). And because there was no “other proceeding,” the literal language of Rule 804(b) (1) would also seem to bar admission of the deposition testimony, even though the examination may have conformed to the other requirements of that Rule. It seems probable, however, that the deposition would be deemed to have been taken in “another proceeding,” since the deponent was not a party to the current proceeding at the time of the examination.35 Under this construction, Rule 804(b) (1) would allow admission of the deposition, and the dilemma would thus be avoided.

II. RELIABILITY OF FORMER TESTIMONY: MOTIVE AND INTEREST AS A STANDARD

A. Opportunity to Cross-Examine

Given the faith which the Anglo-American adversary system places in the efficacy of cross-examination, it is not surprising that the most important feature of the former-testimony exception is that which

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33 Fed. R. Civ. P. 32(a) (emphasis added). The italicized phrase was added in 1970. See 4A J. Moore, Federal Practice ¶ 32.01 (2d ed. 1971). Under Fed. R. Civ. P. 32(a) depositions are admissible (1) to impeach the testimony of the deponent as a witness; (2) for any purpose, against the deponent who is an adverse party or speaking agent therefor; and (3) for any purpose, when the deponent (a) is dead, (b) is more than 100 miles from the place of hearing or outside the United States, unless his absence was procured by the offering party, (c) is unable to testify because of age, illness, infirmity, or imprisonment, or (d) cannot be procured by subpoena from offering party, or (e) when “such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.” Id.


35 See 4A J. Moore, Federal Practice ¶ 32.02 & n.3 (2d ed. 1971).
requires such testimony to have been given in a situation where an opportunity existed to utilize that truth-testing device. The former-testimony exception to the hearsay rule is unique in this respect, as no other exception makes cross-examination a requirement for admissibility, and it is not usually discussed in connection with evidence admitted under other exceptions.\(^{36}\) It was this opportunity to cross-examine which led Wigmore to characterize former testimony as unobjectionable under the hearsay rule, rather than as admissible as one of its exceptions.\(^{37}\) In order to ensure the reliability of former testimony, the proposed Federal Rules retain the requirement that the opponent be given the opportunity to develop the testimony by cross-examination.

While the former-testimony exception has always required an opportunity for cross-examination by the opponent, the fact that some cross-examination could have occurred has never in itself satisfied that requirement.\(^{28}\) Additional safeguards have been required to ensure that hearsay evidence would not be admitted unless the testimony was given under such circumstances that it was equivalent in reliability to testimony given *viva voce.*\(^{39}\) One such safeguard which has common-


\(^{37}\) Wigmore defined the hearsay rule as "rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination." 5 Wigmore § 1362, at 3. This definition has given rise to some expressions that former testimony is admissible (at least, when the prior opponent had a motive and interest in cross-examining similar to that of the present opponent) because it does not violate the hearsay rule, rather than because it satisfies an exception to that rule. See Habig v. Bastian, 117 Fla. 864, 868, 158 So. 508, 510 (1935); Minneapolis Mill Co. v. Minneapolis & St. L. Ry., 51 Minn. 304, 315, 53 N.W. 639, 642 (1892); 5 Wigmore § 1370. The different formulations of the hearsay rule, see note 14 supra and accompanying text, make little practical difference in the present context, since most views of the former testimony exception incorporate requirements implementing the interests in cross-examination which Wigmore deemed essential. However, if the Model Code formulation, which admits hearsay whenever the declarant is unavailable, *Model Code of Evidence* rule 503(a) (1942), is used, former testimony may be admitted even when there has not been the equivalent of present opportunity to cross-examine which Wigmore requires. See McCormick §§ 230, 238; Glicksberg, Former Testimony Under the Uniform Rules of Evidence and in Florida, 10 U. Fla. L. Rev. 269, 273-74 (1957); Powers, The North Carolina Hearsay Rule and the Uniform Rules of Evidence, 34 N.C.L. Rev. 294, 301-02 (1956).

\(^{38}\) See, e.g., Cal. Evid. Code §§ 1290-92 (West 1966); N.J.R. Evm. 63(3); 5 Wigmore § 1386. The Model Code probably goes furthest toward relying on cross-examination alone. Former testimony would be admissible in any action for any purpose for which it was admissible in the action in which it was taken. The only restriction imposed is that the judge has discretion to reject the evidence if the declarant is available. *Model Code of Evidence* Rule 511 (1942).

\(^{39}\) See 5 Wigmore § 1386.
ly been required in order to ensure reliability is that there be identity of issues and parties in the prior and present proceedings. The proposed Rules adopt a more liberal approach by focusing upon the question of whether the parties in the two proceedings possess similar motives and interests.

B. "Identity of Parties and Issues"

In addition to cross-examination, the traditional formulations of the former-testimony exception, sometimes adopted in statutes, require "identity of parties and issues"40 or that present and former hearings be "between the same parties, relating to the same matter,"41 before such testimony may be held admissible. Literal compliance with these shorthand phrases was often found to be highly restrictive in view of the frequent need for the former testimony and as a result, qualifications were grafted onto the traditional requirements. However, such qualifications frequently led to errors of their own. For example, when testimony was admitted against a successor in interest, some courts noted the privity relationship and made the property-law concept of privity in blood, law, or estate the only permissible deviation from the "identity of parties" requirement.42 This primrose path was extended when a "mutuality" requirement was borrowed from the procedural preclusion area and incorporated into the former-testimony exception.43 By using formalisms to thus limit the former-testimony excep-

40 See McCormick §§ 232, 233; Pherson ¶ 1423; Annot., 70 A.L.R.2d 494 (1960).
41 See Cal. Code Civ. P. § 1870(8) (1972); 5 Wigmore §§ 1386-88. Statutes authorizing admission of former testimony are generally construed as only declarative of the common law, and not as imposing limitations upon it. See McCormick § 230; 5 Wigmore § 1387.
42 See, e.g., McCormick § 232; 5 Wigmore § 1388; Annot., 142 A.L.R. 673 (1943). Strictly applied, this restriction can work to admit testimony from the decedent's personal injury action in a subsequent survival action but not in a wrongful death action. See Axsnow v. Red Top Cab Co., 159 Wash. 137, 139-45, 292 P. 436, 437-38 (1930). See generally Morgan, supra note 22, at 550. The English courts have apparently retained the property-law concepts in this area. See Pherson ¶ 1427. Professor Vestal makes a point too frequently neglected by courts applying a privity restriction on former testimony when he says, in another context: "Privity is a term obviously of indefinite meaning and is given content only through judicial construction. When a relationship is labeled as one involving 'privity' the court is saying that certain legal results follow," Vestal, Prolusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27, 69 (1964). For a further discussion of this topic, see id. at 44-45.
43 See Metropolitan St. Ry. v. Gumby, 99 F. 192, 198-99 (2d Cir. 1900). The defect in former testimony rules based on the preclusion analogy is that preclusion deprives the litigant of his day in court if it is applied to prohibit litigation of an issue (unless the issue has already been decided), while the admission of former testimony cannot deprive a litigant of his day in court. The opponent can always rebut or impeach the former testimony admitted. See Copeland v.
tion to cases where the issues and parties or their privies were identical and the testimony would have been admissible if offered against its present proponent, the courts lost sight of the essential question regarding admissibility.\(^{44}\) That crucial question is whether, given that the opponent can not now cross-examine the witness, the examination on the prior occasion was fairly equivalent to cross-examination in the present situation.\(^{45}\) A few courts recognized the soundness of this more general inquiry quite early, and Wigmore preached this gospel at least from the time he edited the sixteenth edition of Greenleaf's *Evidence* in 1899.\(^{46}\) While old ways died hard,\(^{47}\) the courts gradually progressed away from the requirement of literal identity of parties and issues toward a consideration of the reliability of the testimony in light of the circumstances. Accordingly, increasing attention was given to two related issues: (1) Whether the opponent's interest was represented in the first hearing, rather than whether there was identity of parties or privies on both sides,\(^{48}\) and (2) whether the issues in the two hearings were similar to the extent that the opponent in the first examination had a motive and interest to develop the testimony similar to those which the present opponent would have if he were cross-examining.\(^{49}\) Despite adoption by courts of this more flexible approach, there were still many references to "privity," "representation," and "derivative


\(^{44}\) See *McCorrnx* \(\S\) 232-33.

\(^{45}\) See generally *Fed. R. Evid. 804(b)(1)*, Advisory Committee's Note at 127; 5 *Wigmore* \(\S\) 1386.


\(^{47}\) It is interesting that the argument persuasive to the court in a leading case applying the strict requirements was that Wigmore's position would permit the admission of testimony by a witness to a common-carrier accident in successive actions against the carrier. *McInturff v. Insurance Co. of N. America*, 248 Ill. 92, 98, 93 N.E. 369, 371 (1910). That is the very situation in which modern formulations are deemed to be desirable. See *6 Cal. L. Rev. Comment*, *Appendix* 448; *McCorrnx* \(\S\) 232 & r.9. The leading, and perhaps only, case carrying the Wigmore view to its full extent involved such a common-carrier action. *Bartlett v. Kansas City Pub. Serv. Co.*, 349 Mo. 13, 21, 160 S.W.2d 740, 745 (1942); see *Morgan, supra* note 22, at 551-52.


causes of action” on the one hand, and “similar issues,” rather than “motive and interest” on the other. 50

C. “Motive and Interest” in the Federal Rules

1. Basic Concepts

The formulation of the former-testimony exception in the proposed Federal Rules eliminates all the easy shorthand rules and forces consideration of the essential question of the propriety of admitting the offered former testimony rather than requiring *viva voce* testimony. In determining whether the prior examination was adequate to protect the interest of the opponent in the present case, the only question under the proposed Rules is whether the examiner had “motive and interest [for developing the testimony] similar to those of the party against whom now offered.” 51

Although the “motive and interest” concept focuses more closely on the true objective of the “identity of parties and issues” requirement—ensuring basic fairness to the opponent in admitting previously given testimony—the modern test is more difficult to apply. The difficulty arises because the terms “similar motive and interest” have heretofore acquired no significant content and, moreover, because the drafters of the Federal Rules have suggested no useful criteria in adopting the standard. 52 Undoubtedly, the Advisory Committee was concerned that it should not bind trial court discretion by inelastic standards. 53 Nevertheless, the Committee’s failure to suggest criteria to facilitate exercise of that discretion may prompt some courts to follow the standards developed under the “identity of parties and issues” concept until they are overruled. Even for the more venture-some trial judges, a search beyond the drafters’ comments is unlikely to prove very fruitful. While several authorities have dealt briefly

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51 Fed. R. Evm. 804(b)(1). That Rule requires that the “party” in the prior proceeding be the one with similar motive and interest to develop the testimony. *Id.* Therefore, participation in the former action as an attorney, for example, *see* United States v. Silliman, 6 F.R.D. 262, 264 (D.N.J. 1946), or a non-party such as an insurer in a suit by or against the insured, *cf.* A. Vestal, Res Judicata/Preclusion 291-300 (1969), would appear not to be sufficient for admissibility if none of the parties had the requisite motive and interest in his own right. *But cf.* Glicksberg, *supra* note 37, at 278-79.


with the requirements of the proposed doctrine, no significant standards have yet been devised. For example, although Wigmore first spoke in terms of interest and motive over 70 years ago, even the latest edition of his treatise does no more than indicate that in considering the admissibility of former testimony the issues must be “substantially the same,” and that property law should be a reference, though not controlling, in determining whether the interests of the respective parties are sufficiently the same. 64 Similarly, McCormick’s only contribution is that “identity of interest, in the sense of motive, rather than technical identity of cause of action or title, is the test.” 65 The New Jersey Supreme Court Committee on Evidence introduced the idea that the prior examination can be assumed adequate “if the same stakes are involved.” 66 This idea of “stakes” is adopted and elaborated upon in the Reports of the California Law Revision Commission relating to adoption of the California Evidence Code. 67 The illustration given of a situation in which the motive and interest of prior and present parties are deemed to be the same is where testimony given in one negligence action on behalf of a passenger injured in a common-carrier crash is offered against that carrier in an action by another passenger injured in the same crash. 68 On the other hand, the stakes are deemed not to be the same when testimony taken in a discovery deposition is offered at a trial. 69 There is, however, no explanation of the factors which were important in making the distinction between the situations.

Because of this lack of guiding criteria, a major purpose of this analysis will be to provide some content for the “motive and interest” test by suggesting some significant factors which should be considered in approaching this aspect of the former-testimony issue. As the Advisory Committee notes, the basic inquiry regarding the admissibility of former testimony is “whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion.” 680 Since the opponent’s argument against admission of former testimony is that he is deprived of the opportunity to bring

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64 Compare 5 Wigmore § 1387, at 83, and id. § 1388, at 101–02, with 1 S. Greenleaf, Evidence 278–79 (16th ed., J. Wigmore ed. 1899). See also Morgan, supra note 22, at 551.
65 McCormick § 232, at 489.
67 See Cal. L. Revision Comm’n, Hearsay Evidence 1250.
68 See 6 Cal. L. Revision Comm’n, Appendix 448; 7 Cal. L. Revision Comm’n, Hearsay Evidence 1249.
69 See 6 Cal. Revision Comm’n, Appendix 316–17; 7 Cal. L. Revision Comm’n, Hearsay Evidence 1249; text accompanying notes 76–78 infra.
680 Fed. R. Evid. 804(b) (1), Advisory Committee’s Note, at 127; see 5 Wigmore § 1386.
out relevant facts, the objective of the motive and interest test is to determine whether there is any significant reason why facts relevant to the present inquiry, including those reflecting on the credibility of the witness, would not have been elicited at the prior hearing. A "significant reason" for these purposes would be one which would affect the conduct of the examination by a reasonable attorney in the same circumstances. It is unfair to hold a party to the former examination if no reasonable attorney would be expected to have elicited the now-relevant facts; but if the circumstances were such that those facts could have been brought out if they were available, the present opponent can fairly be held. By focusing on this essentially factual question, the court can avoid both the rigid formalism of the "identity of parties and issues" concept and the subjective abstraction of the doctrine of "motive and interest."

Phrasing the inquiry in terms of whether the evidence is reliable on the present occasion because of the lack of any significant reason why the record should not be substantially complete means, of course, that any inquiry into the relationship between the parties-opponent is superfluous. Thus, none of the modern codifications impose any sort of requirement as to the parties involved in the prior and present proceeding, except that there must have been a party at the former hearing who had no reason not to bring out the facts which, if available, the present opponent would like to bring out now.61 Similarly precluded is any inquiry into matters of tactical choice or the examiner's ability to prepare for thorough development of the testimony, such as, for example, his access to investigative funds or the availability of discovery procedures. While there is no question but that these factors can mean relevant facts are sometimes not elicited, it is equally indisputable that no authority considers them sufficient factors for excluding former testimony; the question is always phrased in terms of "opportunity" and "motive and interest," rather than "actual examination" and "ability" to develop the testimony fully.62 The reason for such a formulation is, of course, that in the choice between holding the opponent to the prior examination and losing highly reliable evidence, fairness requires only that the circumstances were such that an attorney making every effort within reason to bring out facts on behalf of his client might have developed the testimony fully. To require that he actually have done so would threaten the process

61 See, e.g., Fed. R. Evid. 804(b)(1); Cal. Evid. Code §§ 1290-92 (West 1966); N.J.R. Evid. 63(3); Model Code of Evidence Rule 511 (1942); Uniform R. Evid. 63(3).
62 See 5 Wigmore § 1371. See generally A. Morrell, Trial Diplomacy §§ 4.16-17, at 58-59 (1971), on tactical considerations in cross-examination.
of fair decision making by making reliable evidence inaccessible to the trier of fact. 63

2. Factors Affecting Motive and Interest: Toward Criteria for Evaluating Admissibility of Former Testimony

As indicated above, an objective of this analysis is the formulation of criteria for applying the test of similar motive and interest. It must be noted that the following catalogue of reasons why relevant facts might not have been elicited at a prior examination is not and could not be complete. It may, however, provide some assistance in analyzing the proper exercise of discretion vested in the courts by the Federal Rules provisions regarding admission of former testimony.

a. Facts Not Relevant in Prior Hearing.

The first, and probably most obvious, case in which it may be said there was no similar motive and interest to develop the previously given testimony is the situation where facts which are relevant in the present hearing were possessed by the declarant in the previous proceeding, but were not relevant to any issue in that prior hearing. 64 For example, W may testify for the state when D is charged with a negligent driving offense. Such testimony as to the manner of D's driving should be inadmissible, however, in P's action against D for injuries incurred when D's negligently driven car collided with that operated by P. This result is required because contributory negligence was not an issue in the criminal action. Since P's conduct was not relevant in the criminal proceeding, D had no reason or opportunity—no motive or interest, in other words—to elicit whatever knowledge W might have had about P's conduct.

The introduction of a new issue at the present hearing does not, however, mean that the former testimony ought to be excluded automatically. For example, a new issue of damages is introduced when a wrongful death action succeeds an action for personal injuries, but that fact alone provides no basis for excluding the former testimony of a witness to the occurrence, since such a witness can presumably pro-


vide relevant evidence only on the issues common to both actions.\textsuperscript{65} In jurisdictions where “wide-open” cross-examination is permissible, an argument is occasionally made that former testimony is \textit{ipso facto} inadmissible if there is any new issue at the present hearing.\textsuperscript{66} The better view would seem to require a showing that the witness could have shed light on the new issue before accepting the opponent’s argument that he was deprived of the opportunity to develop the witness’ testimony.

\textbf{b. Facts Insignificant in Prior Hearing}

A second situation in which the opponent may argue an insufficient opportunity to develop his case is where the now-relevant facts were relevant only as to an insignificant issue in the prior proceeding. As an illustration, in \textit{Wolf v. United Air Lines, Inc.}\textsuperscript{67} the plaintiff brought an action against the airline for the wrongful death of his decedent in a plane crash allegedly caused by defendant’s negligence. Plaintiff moved to permit the use of depositions taken in other actions arising out of the crash. The court denied the motion on the ground that there had been cross-complaints by the airline against the co-defendant airplane manufacturer in the prior actions. According to the \textit{Wolf} court, the issues between the defendants had been bitterly contested and in some respects appeared to overshadow the primary issue of the plaintiff’s right to recover.\textsuperscript{68} Since the depositions were taken in that atmosphere and many questions asked of the deponents were directed toward the issues between the defendants, the court ruled that even if the “identity of parties and issues” rule were not applied,\textsuperscript{69} the depositions would be inadmissible in the action against the airline alone. The court reasoned that “under the prevailing circumstances the interest and motive of [the airline] in its . . . examination may very well not have been the same at that time as it is now . . . .”\textsuperscript{70} Although


\textsuperscript{66} See, e.g., Glicksberg, supra note 37, at 280; Powers, supra note 37, at 303; A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law, 49 Nw. U.L. Rev. 481, 493 (1954). Restrictions on the scope of cross-examination have been removed in the Federal Rules. Fed. R. Evid. 611(b) & Advisory Committee's Note, at 82-83.

\textsuperscript{67} 12 F.R.D. 1 (M.D. Pa. 1951).

\textsuperscript{68} Id. at 3.

\textsuperscript{69} The applicable Pennsylvania rule permitted the admission of former testimony only when “the parties and issues are the same . . . [and] the former testimony was given under oath and was subject to right of cross-examination by the adverse party.” Id.

\textsuperscript{70} Id. at 4.
many of the depositions contained facts relevant to the airline’s liability, the primary focus of the examinations was on issues between the defendants for which those facts were not relevant, and the depositions were therefore properly excluded.\textsuperscript{11}

c. Legal Issues Differ

Although the factual issues may be the same in the two hearings, there may be occasions on which a difference in the legal issues presented will provide the opponent with a reason for arguing that all relevant facts might not have been successfully elicited. For example, in cases involving a criminal charge, the same facts will be relevant at the preliminary hearing as at the trial. Nevertheless, the fact that the ultimate legal issue at the preliminary hearing is probable cause rather than guilt may lead the prosecution to examine its witnesses only to the extent necessary to bring out facts sufficient to meet its burden on that less-demanding issue. On the other side, the legal issue is such that it takes rather full development of weaknesses in the prosecution’s testimony in order for the defense to prevail at a preliminary hearing.\textsuperscript{12} It might be argued that this factor provides an incentive for the defense to develop testimony fully. However, when the difficulties of conducting a thorough cross-examination at that stage\textsuperscript{13} are considered along with some of the other factors discussed below,\textsuperscript{14} it is seen that the high burden placed on the defense may actually impede rather than stimulate elicitation of all the relevant facts, since it is less difficult and more effective to bring them out at another stage of the proceedings.\textsuperscript{15}

\textsuperscript{11} Id. But see 52 Colum. L. Rev. 666, 668 (1952). In Bauer v. Pullman Co., 15 Ohio App. 2d 69, 72-73, 229 N.E.2d 226, 229 (1968), the corporate defendant in a personal injury action was held to its cross-examination of plaintiff’s expert witness where certain injuries had been pleaded but no evidence on them was submitted until the retrial. See also State v. McManus, 129 Kan. 376, 378, 282 P. 588, 589 (1929).

\textsuperscript{12} See Virgin Islands v. Aquino, 378 F.2d 540, 549 (3d Cir. 1967).


\textsuperscript{14} See text accompanying notes 79-80 infra.

\textsuperscript{15} But see California v. Green, 399 U.S. 149, 165-66 (1970), and Pointer v. Texas, 380 U.S. 400, 407 (1965), which indicate that there is at least no confrontation clause violation when testimony given at a “full-fledged” preliminary hearing is offered at trial. Such decisions may by themselves provide a motive and interest in full development of the testimony. See The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 114 (1970); cf. Commonwealth v. Mustone, 353 Mass. 490, 493-94, 233 N.E.2d 1, 4 (1968) (acquitted not cross-examining at preliminary hearing for tactical reasons assumes risk of witness’ later unavailability).
d. Purpose of Examination Differs

A difference in the purposes of the examinations may also be a factor in determining the admissibility of former testimony. One such situation may arise when a deposition is taken for discovery purposes, but is later offered into evidence as former testimony. In situations where depositions are taken only as "fishing expeditions," the opponent may wish to forego thorough cross-examination at the discovery stage so as to not prematurely reveal weaknesses in either the witness' testimony or the adverse party's case. The opponent's purpose of examination would thus be substantially different from his purpose of examining at trial. However valid such reasoning might be in some jurisdictions for excluding depositions, the purpose of the examination would not appear to be an important factor in federal courts. This is a consequence of the fact that Federal Rule of Civil Procedure 32 makes no distinction between discovery and evidentiary depositions. The prudent attorney must therefore cross-examine all deponents as if their statements are to be offered as evidence.

e. Stakes Differ

Another factor influencing the decision by counsel whether to conduct examination so as to elicit every relevant fact is that suggested by the term "stakes." A substantial difference in what is at risk in the litigation affects the incentive to develop testimony fully. If, for example, it would cost 500 dollars to make the investigation necessary to cross-examine a witness thoroughly, a defendant might well forego the investigation and the thorough cross-examination in a suit involving only 2,000 dollars, while a different conclusion would be reached if he has 20,000 dollars at risk. Thus, if testimony from the former suit were offered in the latter action arising from the same facts, the opponent would have a good argument against its admissibility. There may be a countervailing factor, however. If the opponent in the first action can reasonably foresee the second action, the possible applicability of preclusion or collateral estoppel doctrines means that the true amount at risk, in terms of the incentive to develop the testimony, is not 2,000 but 22,000 dollars.


77 See text accompanying notes 33-35 supra.


The differing stakes may be of a penal, as well as a financial, nature. See Wyatt v. State, 35 Ala. App. 147, 154, 46 So. 2d 837, 843 (1950) (the court, in admitting former testimony, failed to take cognizance of the difference between the penalties for violation of a peace bond and for rape).
Evaluating the difference in stakes between criminal and civil actions poses another problem. It might be argued that any criminal sanction provides the maximum incentive to examine. An important question, however, is whether there might not be a significant difference between a traffic prosecution with a penalty of "100 dollars or 10 days" and a personal injury claim for 100,000 dollars arising out of the same facts.

**f. Tribunal Differs**

In those situations in which an action will be tried de novo in another tribunal, a party might not develop testimony as thoroughly as he would otherwise because of the "second chance" provided by the de novo hearing. While the amount or object at risk may be the same in each hearing, the risk itself will be different. This argument could be used to exclude former testimony when, for example, such testimony taken at a justice court trial is offered at a second hearing in the court of general jurisdiction, or when testimony is given at a bar association hearing and offered at the subsequent judicial proceeding for disbarment. In making the choice, however, between holding the opponent to the former examination and losing the testimony entirely, it arguably does no violence to the notion of fairness to say that the possibility of a new hearing is not by itself a significant reason for not eliciting the relevant facts.

**g. Burden of Proof Differs**

Another factor which might affect the development of testimony is placement of the burden of proof in the respective hearings. The argument for barring former testimony on this ground is based upon the consideration that the party upon whom is placed the risk of non-persuasion has a greater incentive both to develop his case on direct examination and to weaken the opponent's case on cross-examination. Conversely, the opponent need not be so thorough in bringing forth relevant evidence because he has less to prove in order to prevail. Therefore, the opponent with the onus in the present hearing should not be held to the examination by one without that burden in the prior hearing. Such an argument, however, is based upon the unverified assumption that the burden of proof is in fact a consideration of the

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79 See IOWA CODE § 601.91 (1971); WASH. REV. CODE § 12.36.050 (1956).
80 See Louisiana State Bar Ass'n v. Sackett, 231 La. 655, 662, 92 So. 2d 571, 573 (1957). The strict former testimony rules are sometimes relaxed in bar disciplinary proceedings on the theory that grievance committee hearings are not usual adversary actions, but part of process by which "minor professional deviations are disposed of justly without public embarrassment." Id. at 662, 92 So. 2d at 573; Armitage v. Bar Rules Comm., 223 Ark. 465, 467, 266 S.W. 2d 818, 820 (1954).
reasonable attorney in conducting his examination. It is probable that only in a very rare instance would that consideration be a major factor—the "stakes" involved in the proceeding is likely to be a substantially greater influence on the tactical judgment. Because of the minor importance of this factor in the conduct of a cross-examination, then, the burden-of-proof argument should not be accepted as a sufficient reason for failure to elicit the relevant facts. Such a result would be in accord with that reached in the leading case of Travelers Fire Insurance Company v. Wright.81 There, X and Y testified for the State in an arson prosecution against A. Later, when A and his partner, B, sued the fire insurer on the insurance contract for losses incurred in the destruction of the premises, X and Y claimed their self-incrimination privilege and refused to testify. Their former testimony was then offered into evidence by the insurer, but was excluded by the trial court. The Oklahoma Supreme Court held that it was error to exclude the testimony, pointing out that A had the same motive and opportunity in the cross-examination at the criminal action. Furthermore, and more important to this analysis, the court failed to mention the differing burdens in the two actions.82

III. Former Testimony Offered Against Its Proponent

The former testimony exception in the proposed Federal Rules of Evidence permits the admission of testimony given "at the instance of...a party with an opportunity to develop the testimony by direct...or redirect examination, with motive and interest similar to those of the party against whom now offered."83 Thus, if A directly examines W in A's suit against B, C may introduce W's testimony in an action against A, assuming W is unavailable and A had motive and interest in conducting the examination on the former occasion similar to that

82 Id. at 421-22.
83 Fed. R. Evid. 804(b)(1). The import of the language "or redirect" in this provision is not clear since a party would rarely be entitled to redirect examination without having participated in the direct examination. If, as the Notes to the Rule would seem to imply, the admissibility of former testimony against its proponent is based on the theory that "direct and redirect examination of one's own witness is the equivalent of cross-examination..." Fed. R. Evid. 804(b)(1), Advisory Committee's Note, at 127, it would seem that the Rule should provide, in pertinent part, "direct and redirect examination, or cross-examination..." The inclusion of the requirement of the opportunity to develop testimony by direct and redirect would appear to be of some significance under the proposed rules; redirect examination is almost always limited to new matters brought out on cross-examination, see McCormick § 32, but the proposed Rules allow cross-examination "on any matter relevant to any issue in the case..." Fed. R. Evid. 611(b).
he would have in the present hearing. Establishing the rationale for admission of the former testimony is somewhat more difficult when the present opponent was formerly the proponent of the testimony than when he has been opponent both times. In the latter situation the opponent at least has had the opportunity to test the declarant's story by cross-examination, but in the former case there has never been any cross-examination by the opponent.

One model for holding the testimony admissible against the former proponent would be that of treating such former testimony as an adoptive admission. Under this concept a party is precluded from objecting to his lack of opportunity to cross-examine the witness' statement because he has "manifested his adoption or belief in its truth." Statements deemed to be within this doctrine are admissible under the Federal Rules as a result of the nature of the adversary system rather than because they satisfy the usual necessity or trustworthiness conditions for exceptions to the hearsay rule. It is, however, illogical to admit former testimony under the adoptive-admissions theory. Since, in practice, parties frequently have little choice in selecting their witnesses, it is unrealistic to say that the party has manifested his belief in the witness' veracity. The concept that a party makes a witness his own and vouches for his credibility has been discarded in other areas and certainly should have no place here.

The alternative to the adoptive-admission concept is, as the drafters of the Federal Rules state, "simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness." The theory that direct and redirect examination could be equivalent to cross-examination would, however, certainly be fallacious under the common law in most jurisdictions. Under common law, two primary techniques which have been permitted on cross-examination but not generally on direct are leading questions and impeachment. The availability of these techniques can be a significant advantage to the cross-examiner. A recently published study suggests that, contrary to the conventional wisdom, leading questions can produce testimony equally as accurate as and substantially

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84 Fed. R. Evm. 801(d) (2) (ii); see Fed. R. Evm. 804(b) (1), Advisory Committee's Note, at 127.
85 Fed. R. Evm. 801(d) (2), Advisory Committee's Note, at 103.
87 Fed. R. Evm. 804(b) (1), Advisory Committee's Note, at 127. See also Feldstein v. Harrington, 4 Wis. 2d 380, 387, 90 N.W. 2d 566, 570 (1953); Powers, supra note 37, at 303-04.
88 See McCormick § 6.
89 See McCormick § 33.
more complete than that produced by nonleading questions.\textsuperscript{90} In addition, the ability to attack the witness' credibility may also be an advantage when facing an opponent who is limited to contradiction by contrary evidence.

Such differences as to techniques available to the cross-examiner and those which may be utilized by the direct examinee have been minimized under the proposed Federal Rules. The advantages to the cross-examiner accruing under common-law rules against leading questions and impeaching one's own witness have in fact been fairly well obviated in the proposed Rules. Since the notion that a party selects and vouches for his own witnesses has been rejected, the credibility of a witness may be attacked by any party, including the party calling him.\textsuperscript{91} As a result, the direct examiner is no longer at the mercy of a witness whose testimony at trial is different from his pre-trial account. Although the Rules still advise against the use of leading questions on direct examination, such questions are permitted when necessary to develop the testimony.\textsuperscript{92} By this proviso, the direct examiner is put on an equal footing with the cross-examiner when faced with a hostile, forgetful, or mentally deficient witness. On their face, then, the Rules appear to make direct examination the equivalent of cross-examination,\textsuperscript{93} so that a party permitted the former at a prior hearing cannot complain that the denial of the right to cross-examination should result in the admissibility of the former testimony.

This equivalence is illustrated in Dwyer v. State,\textsuperscript{94} a case in which the petitioner sought a writ of error coram nobis on the ground that his 1937 guilty plea and conviction of murder were the result of duress and intimidation by one Carroll. In 1938, Carroll had been tried and convicted of the same murder. The petitioner’s counsel in the 1937 proceeding, Abbott, testified for the State in the Carroll trial. Abbott had died prior to the coram nobis proceeding in 1957, so the petitioner sought to introduce his testimony from the Carroll trial, since it was relevant to the charges in the writ of error. The testimony was excluded by the trial court on the ground that neither the parties nor the issues were the same in the Carroll trial as in the present proceeding. Exceptions to this ruling were sustained by the Supreme Judicial Court of Maine, which found that the record of the Carroll trial conclusively demonstrated that the State had assumed the dual burden

\textsuperscript{91} Fed. R. Evid. 607.
\textsuperscript{92} Fed. R. Evid. 611(c).
\textsuperscript{93} See Fed. R. Evid. 804(b) (1), Advisory Committee's Note, at 127. See generally Fed. R. Evid. 607, 611(c), 801(d) (1).
\textsuperscript{94} 154 Me. 179, 145 A.2d 100 (1958).
of exculpating the petitioner while convicting Carroll, and that "the former effort was logically and correlatively necessary to the latter because of the extraordinary nature of the trial."\footnote{Id. at 182, 145 A.2d at 102.} Abbot's testimony upon direct examination by the State in the Carroll trial on the same issues as those raised in the coram nobis proceeding was held to preclude the State from complaining of a lack of opportunity to cross-examine.

In a case such as Dwyer it would appear proper to equate the direct examination with an opportunity for cross-examination. Where the witness is helping the direct examiner build his case, the testimony is being developed as the examiner wishes and there is no problem of the examiner's having to protect himself. While the analogy to admissions is not perfect, the same policy considerations would seem to militate against the examiner's efforts to exclude the testimony later.

There can be circumstances, however, in which this common interest between the direct examiner and his witness may have been absent at the prior trial. In such cases it becomes pertinent, in deciding whether to hold the opponent to his former direct examination, to consider if he is as well able to protect himself by direct as by cross-examination. Consider, for example, this situation: A sues B for injuries incurred in an auto accident. W and X are occurrence witnesses, so A must produce both if the jury is not to make unfavorable inferences about his case.\footnote{A. Morrell, supra note 62, § 3.35, at 50.} A knows X will not make a good witness, so the case is developed mainly through W. When X is examined he gives damaging testimony, as was expected. The usual technique for a direct examiner is to conclude his direct examination of the unfavorable witness as soon as possible, before his whole case is brought down in the eyes of the jury.\footnote{See id. §§ 3.7, 3.34, at 34-36, 49-50. The argument made above does not, of course, apply to direct examination in a deposition, since the jury is not present. In addition, the emphasis on pretrial discovery promotes probing by the direct examiner. Regardless of the former testimony rules, a deposition previously offered in evidence is admissible against its proponent as an adoptive admission. See Fed. R. Evid. 801(d) (2) (ii); McCormick § 246, at 526-27.} If, however, X were being cross-examined and were to give testimony favorable to the opponent, the cross-examiner could continue to probe for weaknesses and look for facts favorable to his case without much fear that he was losing his whole case by an unsuccessful cross-examination.\footnote{Circumstances promoting full development of even unfavorable cross-examination include: (1) the jury expects the witness to begin answering unfavorably to the cross-examiner; (2) it is sometimes advantageous to build up unfavorable testimony, so as to make impeachment (e.g., by prior inconsistent statements) more effective, see id. §§ 4.23-30, at 64-68; (3) even if cross-examination goes badly on the facts of the case, attempts to impeach will not create the negative} In other words, given the motive and
interest to bring out the same facts, the tactics of direct and cross-examiners may be very different when they are faced with a damaging witness, as is the case when testimony is offered against its former proponent; the latter may instead develop the testimony, while the former would make the tactical decision not to do so. Thus, the Advisory Committee's Note that "[a]n even less appealing argument [than the lack of equal techniques] is presented when failure to develop fully was the result of a deliberate choice" fails to take into account the fact that in reality a proponent cannot attack or develop the testimony of his own damaging witness in the same way as would be the case if the witness were the opponent's. Unless the "motive and interest" concept is intended to include consideration of these tactical points—a conclusion contrary to the implication of the Note—direct examination cannot be fully equated with cross-examination in these circumstances.

Nevertheless, such a conclusion cannot end the inquiry because it may be, as indicated by the Note, that "fairness allows imposing, upon the party against whom now offered, the handling of the witness in the earlier occasion." It appears that, at least in the situation where the present opponent was direct examiner of the witness, fairness is satisfied when the prior testimony is admitted. The direct examination may not be the full equivalent of cross-examination, but it does provide an equal opportunity to develop the facts. The practical consideration that this opportunity will not be utilized in many cases should only go to the weight of the evidence in the second hearing; the opponent can always argue this point to the trier. Even if the direct examination is not the full equivalent of the cross-examination, the evidence elicited is still far superior in terms of reliability to that admitted under other hearsay exceptions.

One further consideration in the analysis of former testimony offered against its proponent is that although the Advisory Committee's

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See also id. § 3.36(2), at 51.

See generally Editorial Note, Some Hearsay Exceptions in the Uniform Rules of Evidence and New Jersey Evidence Law, 9 Rutgers L. Rev. 555, 558-59 (1955). If a witness is favorable to the direct examiner, as the leading-question rule posits, it may be argued that unfavorable testimony provides its own circumstancial probability of truthworthiness. However, this argument again involves an assumption that parties have power to select their own witnesses, when actually they have little choice among favoring, disfavoring, and indifferent witnesses. The one element likely to be in the direct examiner's favor is his opportunity to prepare his case and, perhaps, develop rapport with his witnesses. This should minimize the occasions on which he has to cut his direct examination short—and it might be argued that the circumstance in which he must make that tactical decision is almost entirely attributable to his faulty preparation.
Note indicates that the part of the former testimony exception here under consideration applies only to such testimony offered against a party by whom it was originally procured,102 the terms of the Rule are not so limited. Specifically, the Rule permits admission of the testimony against any party—whether or not that party originally offered the testimony—so long as such testimony was originally offered on behalf of a party with motive and interest to develop it by direct and redirect examination similar to that which the present opponent would have in cross-examining.103 For example, assume that A and B were injured in an accident involving C’s bus. A first brings his negligence action against C and calls W as a witness to the circumstances of the crash. W gives testimony which is favorable to C. When B later alleges the same negligence in a suit against C, C wants to use the testimony of W, who is by then unavailable. Rule 804(b) (1) indicates that the testimony is admissible against B, since his interest in cross-examining was the same as A’s upon direct examination. However, this seems unfair to B, and the Note would appear to preclude such an occurrence. The practical restrictions on attacking one’s own witness mean that W’s testimony was never really subject to any adversarial testing; A was not about to ruin his case in the jury’s eyes by attacking his own witness, and since C was entirely happy with the result on direct, he did not choose to cross-examine. When the proponent in the first action is the opponent in the second, it seems fair to charge him with faulty preparation of his case, but a new opponent like B should not have to pay for his predecessor’s mistakes. The situation is distinguishable from the case where the testimony is offered in the second hearing against a party with motive and interest similar to the opponent in the first, since the circumstances of cross-examination are such as to promote full development of even unfavorable testimony, while direct examination by its nature inhibits deep exploration of unproductive evidence.

IV. THE UNAVAILABILITY REQUIREMENT: 
A CONSTITUTIONAL ANALYSIS

In Wigmore’s view, hearsay must not only possess some indicia of reliability to come within an exception to the exclusionary rule, but

102 Fed. R. Evid. 804(b) (1), Advisory Committee’s Note, at 127.

103 Fed. R. Evid. 804(b) (1). Professor Falknor’s formulation would admit former testimony only when

(i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the testimony is offered against a party against whom, or against whose predecessor in interest, it was offered on the former occasion. Falknor, The Hearsay Rule and Its Exceptions, 2 U.C.L.A.L. Rev. 43, 58 (1954) (emphasis added).

must also be shown to be necessary, in that unless the evidence is accepted untested by present cross-examination, its benefit will be lost entirely.\(^{104}\) The necessity element of the former-testimony exception is traditionally supplied by the requirement that the declarant be unavailable at the present hearing. Such unavailability can generally be established by showing the declarant’s death,\(^{105}\) absence from the jurisdiction,\(^{106}\) or physical\(^{107}\) or mental incapacity\(^{108}\) to testify. Failure of memory,\(^{109}\) supervening incompetency,\(^{110}\) and exercise of privilege\(^{111}\) have also been accepted as establishing sufficient unavailability.\(^{112}\)

Unlike the common law, Federal Rule 804(a) states the same unavailability criteria for all hearsay exceptions having the necessity requirement.\(^{113}\) Such criteria include all of the situations mentioned above, as well as that involving a declarant who persists in a refusal, for any reason, to testify.\(^{114}\) The curious matter in the present context is not the particular listing of situations constituting unavailability, but the fact that the requirement was imposed at all in the case of the former-testimony exception.\(^{115}\) The Advisory Committee’s Note does recognize that former testimony may be the most reliable type of

\(^{104}\) See Wimore § 1421.

\(^{105}\) See Fed. R. Evmd. 804(a) (4), Advisory Committee’s Note, at 126; 5 Wimore § 1403. This reason is deemed sufficient in almost all jurisdictions. See 5 Wimore § 1403.

\(^{106}\) See Fed. R. Evmd. 804(a) (5), Advisory Committee’s Note, at 126; 5 Wimore § 1404(a). This reason is based on the impossibility of compelling the witness’ attendance. Sometimes permanent or indefinite absence is required, but the better view imposes no such limitation. Fed. R. Evmd. 804(a) (5); see 5 Wimore § 1404(a). Some courts have required that the absent witness’ deposition be taken by commission. See 5 Wimore § 1404(c). Such a rule requires evidence which is no more than equal (if that) to former testimony. See Glicksberg, supra note 37, at 281; A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law, 49 NW. U. L. Rev. 481, 495 (1954).

\(^{107}\) See Fed. R. Evmd. 804(a) (4), Advisory Committee’s Note, at 126; 5 Wimore § 1405.

\(^{108}\) See Fed. R. Evmd. 804(a) (4), Advisory Committee’s Note, at 126; 5 Wimore § 1406.

\(^{109}\) See McCormick § 20, at 494-95; Annot., 129 A.L.R. 843, 845 (1940).

\(^{110}\) See Fed. R. Evmd. 804(a) (3), Advisory Committee’s Note, at 126; McCormick § 234, at 494-95.


\(^{112}\) See McCormick § 234; Wimore §§ 1401-10.

\(^{113}\) See Fed. R. Evmd. 804(a) & Advisory Committee’s Note, at 125.

\(^{114}\) See generally Falknor, Hearsay, 1969 L. & Social Order 591, 609-10.

\(^{115}\) Compare Fed. R. Evmd. 804(b) with Fed. R. Evmd. 803, for the types of hearsay exceptions in which unavailability is, and is not, required.
hearsay in view of the fact that of the three reliability factors previously discussed, both the oath and cross-examination functions are satisfied, and it lacks only the demeanor element, a deficiency common to all the hearsay exceptions.116 Nevertheless, the drafters classified the exception with other exceptions requiring a showing of necessity on the grounds that the "opportunity to observe demeanor is what in large measure confers depth and meaning upon oath and cross-examination," and "[i]n any event, the tradition, founded in experience, uniformly favors production of the witness if he is available."117

The first basis given for the treatment of the exception in the Federal Rules, that it is demeanor which gives depth and meaning to oath and cross-examination, seems to be an overstatement of the case. The primary value of demeanor evidence is as an indication of the witness' sincerity,118 while cross-examination serves to expose the more frequent problems of weaknesses in perception and memory as well.119 Even to the extent that demeanor is a factor bearing upon these latter aspects of testimonial reliability, its own trustworthiness is open to question. The experimental evidence is at best inconclusive;120 the fact that witnesses are frequently "coached" on their demeanor121 should lead to a skepticism of its reliability. On the whole, the Committee has not made a persuasive case to support the conclusions that former testimony is clearly "not equal in quality to testimony of the declarant on the stand"122 or that it has more in common with dying declarations than with excited utterances.123 Rather than belabor the point, however—for the case against the tradition has been made fully elsewhere124—the major concern of this analysis is an inquiry into whether the drafters would have been free to remove the requirement in criminal cases had they chosen to do so. Specifically, the question is whether the unavailability requirement is constitutionally compelled. It is possible that the Committee's decision to retain the unavailability requirement was made, at least in part, because of recent expressions by the Supreme Court: which can be read to require such a result.

110 Fed. R. Evid. 804(b) (1), Advisory Committee's Note, at 126.
117 Id.
119 See Morgan, supra note 15, at 188.
121 See A. MOIR, supra note 62, §§ 3.5-13, at 33-39.
122 See Fed. R. Evid. 804(b) (1), Advisory Committee's Note, at 126.
123 See Fed. R. Evid. 804(b) (1), Advisory Committee's Note, at 126.
124 See McCormick § 238.
Whether such a reading is correct is the issue to which this analysis now turns.

A. The Constitutional Issue

In *Mattox v. United States* the United States Supreme Court recognized that former testimony admissible under the common-law exception did not violate the sixth amendment right of a criminal defendant to be "confronted with the witnesses against him." In spite of this imprimatur, former testimony depends for its credibility on an out-of-court declarant, so any changes in the common-law application of the former-testimony exception must be tested against the confrontation clause. The relatively few Supreme Court decisions interpreting the confrontation clause have been most frequently concerned with the former-testimony exception but, unfortunately for present purposes, no clearly consistent statement of confrontation principles has emerged, and the scope of the discussions seems usually to be circumscribed by the particular common-law hearsay exception under review. Thus, it is very difficult to predict Court reaction to proposed changes in the common-law hearsay rules, such as the removal of the unavailability requirement from the former-testimony exception. The analysis which follows will attempt to provide a basis for interpreting proposed changes in hearsay rules by first considering the confrontation right in general and as applied in particular to former testimony, and then by suggesting manageable constitutional standards for testing new exceptions to the exclusionary rule. Since the historical evidence of the intentions of the Framers in this area is inconclusive, the

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125 156 U.S. 237 (1895).
126 156 U.S. at 240-44 (1895). The sixth amendment confrontation right was held to apply to the states in *Pointer v. Texas*, 380 U.S. 400, 406 (1965).
analysis will depend largely upon an examination of the few decisions in the area and upon considerations of general policy.

1. Constitutional Confrontation

Literal compliance with the confrontation clause would, of course, exclude all hearsay evidence. In Mattox the Court noted,

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

However, the Court indicated that such a rule is not absolute, stating that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." The former testimony involved in the case was an example of such an occasion: "[T]he rights of the public shall not be wholly sacrificed" by letting a criminal, already convicted once, "go scot free simply because death had closed the mouth" of a witness. Similarly, dying declarations are admissible "not in conformity with any general rule regarding the admission of testimony," but simply "to prevent a manifest failure of justice" where the circumstances surrounding the making of the statement ensure its reliability. Mattox thus makes it clear that the confrontation right is subject to at least some exceptions, but it does not specify all such exceptions.

One immediately appealing hypothesis is that the confrontation clause incorporates the common-law hearsay rule and its exceptions. This hypothesis is based upon Wigmore's view that the primary purpose of confrontation is to guarantee the opponent the right of cross-examination, and that the secondary purpose of physical confrontation is not categorically required. Since both the hearsay rule and the confrontation clause have the same primary purpose of ensuring the


131 Id. at 243.

132 Id.

133 Id. at 243–44.


135 See 5 Wigmore § 1395.
right of cross-examination, it is argued that they have the same boundaries. However, recent decisions of the Supreme Court explicitly deny this equivalence. As the Court stated in California v. Green:

Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception . . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.128

2. Unavailability and the Recent Confrontation Cases

If the common-law hearsay rule and its exceptions are not constitutionally required by the confrontation clause, the former testimony exception is not ipso facto immutable. The Supreme Court


Some other confrontation theories which have been argued to be applicable in hearsay evidence situations include: (1) The confrontation clause guarantees only the right to face all witnesses present in court. See California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring); Note, Preserving the Right to Confrontation, supra note 128, at 742-43. However, the out-of-court declarant is equally a “witness” against the accused and the same protection is necessary. (2) The confrontation clause guarantees a right to cross-examine the witness at some stage of the proceedings. See Note, Constitutional Law—The Confrontation Test for Hearsay Exceptions: An Uncertain Standard, supra note 127, at 591; 32 Ohio St. L. J. 188, 193 (1971). This theory is premised on the Court’s suggestion in California v. Green, that full and effective cross-examination is at the core of the confrontation right. 399 U.S. at 157-58. Further support for this theory is found in the emphasis on cross-examination in several recent hearsay-confrontation decisions, see California v. Green, 399 U.S. at 157-58; Barber v. Page, 390 U.S. 719, 721 (1968); Pointer v. Texas, 380 U.S. 400, 404-06 (1965); Douglas v. Alabama, 380 U.S. 415, 418 (1965), but such emphasis is probably a function of the fact that the cases, with the exception of the Douglas case, involved the former testimony exception in which prior cross-examination is always a consideration. (3) The Douglas exception involved a situation where the prosecutor, under the guise of examining the accused’s alleged accomplice, read a confession by the accomplice which implicated the accused. The Supreme Court held that since the accomplice persisted in claiming his privilege against self-incrimination, the prosecutor’s act violated the accused’s right to confrontation. 380 U.S. at 418-20. Douglas thus suggests that the confrontation clause is designed to enforce certain standards of prosecutorial conduct. Cf. 19 Kans. L. Rev. 333, 334-35 (1971); 49 N.C.L. Rev. 788, 795 (1971). This prosecutorial standard is also suggested in cases requiring a good-faith effort to produce the declarant of former testimony. See California v. Green, supra at 150; Barber v. Page, supra at 724-25. In Dutton v. Evans, 400 U.S. 74, 87 (1970), the Court mentioned the lack of prosecutorial misconduct as a reason for distinguishing that case from Barber. However, such a standard seems to be more a component of due process than of the fairly explicit confrontation clause. cf. Note, Constitutional Law—The Confrontation Test for Hearsay Exceptions: An Uncertain Standard, supra note 127, at 582.
decision in Barber v. Page\textsuperscript{137} suggests the existence of a confrontation question if the unavailability requirement is waived. The petitioner in that case had been jointly indicted along with one Woods and another for armed robbery. At the preliminary hearing Woods waived his privilege against self-incrimination and gave testimony implicating the petitioner. At the time the petitioner was brought to trial, Woods was in a federal penitentiary 225 miles away in a neighboring state. The Supreme Court held that Woods' preliminary hearing testimony had been admitted in violation of the petitioner's confrontation right because there was no showing that the State had made any attempt to secure Woods' presence at the trial. The Court ruled that

\begin{quote}
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a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here . . . . The right of confrontation may not be dispensed with so lightly.\textsuperscript{138}
\end{quote}}
\end{quote}

In spite of this explicit language in a decision less than 5 years old, it can be argued that the opinions in two more recent cases have left the door open to the abandonment of the unavailability requirement for former testimony. The more recent of the two cases, Dutton v. Evans,\textsuperscript{139} infererably indicates that unavailability is not a confrontation requirement for hearsay exceptions generally, and the discussion of confrontation policy in California v. Green\textsuperscript{140} permits a like conclusion regarding former testimony specifically.

\textbf{a. Dutton v. Evans}

In Evans the defendant was tried for the murder of a policeman. Part of the evidence offered by the State was a statement allegedly made by a co-conspirator after his arraignment which implicated the

\textsuperscript{137}390 U.S. 719 (1968).
\textsuperscript{138}Id. at 724–25. The State's argument of unavailability was based solely on the fact the declarant was outside the jurisdiction. \textit{Id.} at 722. See also 5 Wigmore \S\ 1404. The Court indicated that through increased inter-jurisdictional cooperation that theory had been largely deprived of any validity which it might previously have had. 390 U.S. at 723. Specific reference was made to the authority of federal courts to issue writs of habeas corpus \textit{ad testificandum} and to the policy of the Federal Bureau of Prisons to permit federal prisoners to testify pursuant to such writs issued by state courts. \textit{Id.} at 723–24. For witnesses not in prison, the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings is in effect in at least forty-five states. \textit{Uniform Act to Secure the Attendance of Witness from Without a State in Criminal Proceedings}, 9 Uniform Laws Ann. 50 (Supp. 1967); see Barber v. Page, 390 U.S. 719, 723 n.4 (1968); Note, \textit{Confrontation and the Hearsay Rule}, 75 Yale L.J. 1434, 1440 (1966).
\textsuperscript{139}400 U.S. 74 (1970).
\textsuperscript{140}399 U.S. 149 (1970).
defendant. Under the Georgia rule the "admissions of a co-conspirator" exception to the hearsay rule includes statements made not only in furtherance of the principal objects of the conspiracy, but also statements made in an attempt to conceal the existence of the crime or the identity of its perpetrators.\(^{141}\) The Court held that the Georgia rule, although broader than the common-law exception,\(^{142}\) did not violate the confrontation clause.\(^{143}\) In reaching that conclusion, no attention was given in the plurality or concurring opinions to the fact that the State had made no showing of any attempt to secure the declarant-co-conspirator's presence.\(^{144}\) Thus, the availability of the declarant might not, by itself, be a ground for constitutional objection.

b. California v. Green

The majority opinion in California v. Green\(^{145}\) provides the primary basis for the conclusion here advanced that the unavailability requirement is not constitutionally compelled. In that case the State's principal witness had testified at a preliminary hearing that the accused had supplied him with narcotics by showing him where to pick up some bags of marijuana to sell. However, at the trial the witness was markedly evasive and uncooperative, claiming he was uncertain as to how he received the marijuana because he had been under the influence of LSD and was unable to distinguish fact from fantasy.\(^{146}\) His preliminary hearing testimony was then offered and admitted\(^{147}\) pursuant to a California statute which made prior inconsistent statements admissible as substantive evidence.\(^{148}\) The conviction was reversed by

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\(^{144}\) Compare Note, Constitutional Law—The Confrontation Test for Hearsay Exceptions: An Uncertain Standard, supra note 127, at 590-91, and 400 U.S. at 102 (Marshall, Black, Douglas & Brennan, JJ., dissenting). The plurality opinion in Evans was written by Mr. Justice Stewart, for the Chief Justice and Justices White and Blackmun, id. at 76; Chief Justice Burger also joined in a concurring opinion by Mr. Justice Blackmun, id. at 90; Mr. Justice Harlan concurred in the result, id. at 93.


\(^{146}\) Id. at 152.

\(^{147}\) Id.


As the Federal Rules were first drafted, former testimony given under oath at a trial, hearing, or grand jury proceeding by a declarant present and testifying
the California District Court of Appeal on the ground that substantive admission of the prior inconsistent statement denied the accused his right of confrontation, and that latter decision was affirmed by the California Supreme Court. The United States Supreme Court reversed, holding the preliminary hearing testimony admissible on either of two grounds. First, the Court held that since the witness making the prior inconsistent statement was subject to in-court cross-examination, the requirements of the confrontation clause was satisfied. The witness was forced to take a position confirming or denying his previous statement and, therefore, the trier had an opportunity to observe the cross-examination and the witness' demeanor. This opportunity was thought to “afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.” The second basis for the decision was that the out-of-court statement was “given under circumstances closely approximating those that surround the typical trial” since the witness was under oath, the accused was represented by counsel and had every opportunity to cross-examine the witness, and the proceedings were conducted before a judicial tribunal which could provide a record of the proceeding. If the witness had actually been unavailable, prior decisions would appear to make it clear that testimony given in such circumstances would be admissible. Therefore, the Court believed it untenable to construe the Confrontation Clause to permit the use of prior testimony to prove the State's case where the declarant never appears, but to bar testimony where the declarant is present at trial, exposed to the defendant and the trier of fact, and subject to cross-examination.

The Court then continued with language which may be read as permitting abandonment of the unavailability requirement, although there is admittedly no direct indication that it considered such a possibility. Pointing out that the State had made every effort to introduce its

would be admissible, since it was excluded from the definition of hearsay. Fed. R. Evid. 8-01(c)(2)(iv) (Prelim. Draft 1963). This provision was criticized, see Symposium on the Proposed Federal Rules of Evidence, supra note 52, at 1094-95, and deleted from the Revised Draft. See Fed. R. Evid. 801(d)(1).


399 U.S. at 165.

Id. at 166-67.
evidence through the testimony of a live witness by producing him for trial, swearing him, and tendering him for cross-examination, the Court stated:

Whether [the witness] then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination, or simply refused to answer, nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case against [the accused].

In terms of confrontation interests, there thus seems to be no significant difference between the declarant who has given former testimony and is now present in court but claims loss of memory or just refuses to testify, and the one who is available but not present in court. In each case the prior testimony has been given under oath and the witness has been subject to cross-examination. The remaining aspect of the confrontation interest which gives the accused the right to meet his accuser face-to-face, in order that the witness' conscience be pricked, is satisfied in each case at the time of the prior testimony. The only aspect of confrontation possibly different is the opportunity of the trier of fact to observe the demeanor of the witness while he is testifying. As the Court suggested in Green, when the in-court witness subsequently affirms or denies a prior inconsistent statement, his demeanor in taking a position may be of assistance to the trier of fact in evaluating the weight to be given the prior statement.

However, when the witness claims a loss of memory or refuses to answer, his demeanor can be of little, if any, assistance in evaluating his former testimony. Thus, when the Court says the former testimony is admissible even though the witness cannot be effectively examined as to that testimony in the presence of the trier of fact, it is saying that the reliability of former testimony is such that demeanor evidence is not necessary to evaluate the reliability and that "the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement."
Since the Court has thus said in Green that the former testimony will be admissible when the witness is present, regardless of whether any confrontation interest will be promoted by his presence, it would appear to serve no useful purpose to require the prosecution to make any effort to secure that presence. The situation would be different, for confrontation purposes, if the rule were that former testimony of an available witness was admissible only when the trier had a meaningful opportunity to observe the witness' demeanor. However, such is not the rule, and the Court in Green has gone even beyond the Wigmorean notion that the demeanor aspect of confrontation is secondary to the cross-examination aspect, in that the former will not be insisted upon when the witness is unavailable. The inference to be drawn from Green is that opportunity to observe demeanor will not be required even when the witness is available. It may thus be concluded that as far as former testimony is concerned, the demeanor aspect of confrontation has no importance at all when the other aspects are satisfied.

The opinion in Green does not, of course, explicitly hold that unavailability is not a constitutional requisite for the admissibility of former testimony. The Court's conclusion that prior testimony is admissible when the declarant is present was based upon its admissibility in a situation where the witness is shown to be actually unavailable. The opinion also speaks of the State's "need to introduce relevant testimony that through no fault of its own cannot be introduced in any other way." As the opinion makes clear, the need for the out-of-court testimony has no effect on its reliability; it can only be a requirement to promote other confrontation interests. However, as is noted above, the Court does not appear to require satisfaction of any confrontation interest which may be advanced by the unavailability requirement.

The only other factor mentioned in Green which might justify retention of the unavailability requirement is the notion of the prosecutor's "fault." This notion is supported by the opinion in Motes v. United States, where former testimony was held inadmissible when the witness, who had been in custody, was unavailable only because government officers had negligently allowed him to escape. In its analysis, the Court in Motes referred to Reynolds v. United States, where former testimony was admitted when the accused procured the

\[153 \text{ 399 U.S. at 165-66.} \\
160 \text{Id. at 167 n.16 (emphasis added).} \\
161 \text{Id.} \\
162 \text{See id. at 165-67.} \\
163 \text{178 U.S. 458, 471 (1900).} \\
164 \text{98 U.S. 145 (1878).} \]
witness' absence, and relied upon the maxim cited in Reynolds that "no one shall be permitted to take advantage of his own wrong."\(^{162}\) On the basis of this maxim, the government was not permitted to introduce the testimony of the fugitive witness in Motes. However, there are at least two reasons why Motes is not a helpful precedent regarding the unavailability requirement. First, the Motes decision can be justified on the basis that the government failed to prove the witness was "permanently beyond the jurisdiction of the court" at the time the testimony was admitted, without even considering the cause of his absence.\(^{166}\) Second, as the discussion above indicates, no confrontation interest is served by an unavailability requirement. Therefore, any notion of fault is inappropriate when compliance with the requirement would serve no purpose.

The arguments thus far presented for constitutionally permitting admission of former testimony without showing either the unavailability or presence of the declarant have been based upon explicit statements that the hearsay-rule and confrontation-clause requirements are not necessarily congruent, and upon inferences implicit in the language and policy considerations of the Court in California v. Green. There remains to be considered, however, the rather explicit language in Barber v. Page which, as discussed above, seems to call for the retention of the unavailability requirement.\(^{167}\)

c. Barber v. Page

The Barber decision was essentially based upon the following three points: (1) "'[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,'"\(^{168}\) (2) "'[t]he right to confrontation is basically a trial right,'"\(^{169}\) and (3) "'[t]here may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable," but "this is not . . . such a case."\(^{170}\)

None of these points, however, compels the Court's apparent conclusion that the confrontation clause is violated by the admission of former testimony unless the prosecution has made a good-faith effort to obtain the declarant's presence.\(^{171}\) The Court's reference to an ex-

\(^{162}\) Id. at 158-59; 178 U.S. at 472.

\(^{166}\) Id. at 474; see McConaughy § 234 at 492-93.

\(^{167}\) 390 U.S. 719, 724-25 (1968); see text accompanying notes 137-38 supra.

\(^{168}\) 390 U.S. at 722.

\(^{169}\) Id. at 725.

\(^{170}\) Id. at 725-26.

\(^{171}\) Id. at 724-25. See text accompanying notes 137-38 supra.
ception to the confrontation requirement and its failure to mention the hearsay exception suggest that the Court never considered the possibility that the two rules might be different. Certainly the Mattox decision upholding the hearsay exception against constitutional attack,172 to which the Barber Court referred, was made without benefit of the Green and Evans analysis permitting hearsay exceptions beyond those recognized at common law.173 In addition, the issue of whether the unavailability requirement is constitutionally compelled was never directly raised in Barber; the State conceded that a showing of unavailability was required, and therefore the only issue in dispute was whether a sufficient showing of unavailability had been made.174 The State never argued that it had satisfied a standard less stringent than that imposed by the common law. Thus, the confrontation violation in Barber may have consisted only of the State's failure to provide the accused with the opportunity to cross-examine the adverse witness when the State's own rule required such an opportunity.

The Barber Court accurately stated that the right of confrontation is basically a trial right, since confrontation secures the interests promoted by opportunities for observation of the demeanor of the witness (which can be effectively provided only at trial), as well as interests promoted by opportunities for cross-examination (which may be provided out of the presence of the trier of fact).175 However, the Court's general statement about "trial right" does not give any indication as to what exceptions to the principle are acceptable. Furthermore, in the case of former testimony specifically, the Green Court implied that the opportunity to observe the witness' demeanor is not constitutionally relevant.176 The language in Barber compelling the retention of the unavailability requirement must, therefore, be read in light of this revised assessment of the necessity of an opportunity to view demeanor as an element of the right to confrontation when former testimony is being offered.

172 156 U.S. 237 (1895).
173 See text accompanying notes 134-36 supra.
175 See 390 U.S. 719, 725 (1968); 47 Tex. L. Rev. 331, 335 (1969). These authorities also mention the practical differences between the preliminary examination and trial as providing a reason for requiring confrontation on the latter occasion. The "trial right" language in conjunction with the reference to the less searching nature of preliminary hearings was seized upon by a sometime majority (but only concurring in the final rehearing) of the Texas Court of Criminal Appeals in distinguishing from Barber a case involving testimony taken at a former trial. See Whitehead v. State, 450 S.W.2d 72, 76-77, 81 (Tex. Crim. App. 1969), noted in 23 BAYLOR L. REV. 153 (1971).
176 See 399 U.S. at 157-58; text accompanying notes 154-61 supra.
The third point made in Barber, that there may be justification for admitting former testimony of an unavailable witness, even though not in the case of one who is available, is of little help in determining whether the unavailability requirement is actually constitutionally compelled. First, the Court never explained what relevant difference exists in the two situations. It is clear from the above discussion that the opportunity to observe the witness' demeanor is not an important difference. The only possibly significant difference between the situations inferable from Barber may lie in the fact that where the state does not make a bona fide effort to produce the witness it may be said to be failing to conform to its own rules. However, any distinction so based must fail when the common-law rule is changed. Furthermore, the two cases cited by the Court in Barber as authority for drawing the distinction are not illuminating. In both, the determinative issue was whether the declarant was actually unavailable; in neither case was mention of a constitutional requirement of unavailability supported by either direct authority or policy considerations.

In summary, the language in Barber cannot be considered as binding in view of the facts that the issue was never squarely presented, the only policy discussion contained therein has been made obsolete by succeeding cases, and the Court presented no persuasive authorities for its view. Thus, that case, when considered in conjunction with other cases discussed, appears to present a basis for allowing admission of former testimony without the requirement that the witness be available.

B. Toward Constitutional Standards for Hearsay Exceptions

Although the Court in California v. Green disclaimed any desire to set forth the general requirements of the confrontation clause, Mr. Justice Harlan availed himself of the opportunity to do so in a concurring opinion. However, the elucidation proved to be only a false start in the process—which was later completed in a concurring opinion in Evans—of establishing an analytical framework for determining the constitutional limits of hearsay exceptions. The Green concurring opinion resulted in a shift in the focus of the principal inquiry from the confrontation clause to the due process clause, a step which permits more orderly development of hearsay law than might otherwise be possible.

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378 399 U.S. at 162.
380 Id. at 172–74.
Mr. Justice Harlan, in his opinion in *Green*, viewed the confrontation guarantee as one limited to requiring the production of a witness when he is available to testify.\(^{182}\) The principle was one grounded upon the objective of fundamental fairness, as recognized by both precedent and those hearsay-rule exceptions which permit greater flexibility for receiving evidence when the witness is unavailable. The approach thus proposed was seen as accommodating the state’s interest in making its case to the accused’s interest in having full opportunity to make his best defense. Even when the state satisfies the confrontation clause by showing the witness to be unavailable, however, the accused would still be protected by due process requirements against unreliable evidence admitted under whatever hearsay-rule exceptions that may exist in the jurisdiction.\(^{183}\)

This characterization of the confrontation right in *Green* was rejected in *Dutton v. Evans*,\(^{184}\) implicitly by the plurality opinion and explicitly by Mr. Justice Harlan himself in his concurrence.\(^{185}\) The plurality opinion gave no consideration to the availability of the witness in upholding the Georgia co-conspirator’s admission exception; the decision seems to have been based, rather, on an inquiry into whether the evidence thus admitted was “crucial” or “devastating.”\(^{186}\) According to the plurality, there was no suggestion of prosecutorial misconduct or wholesale denial of cross-examination, and the hearsay statement was deemed to have been made in circumstances which provided “indicia of reliability” necessary to assure “the trier of fact a satisfactory basis for evaluating the truth of the prior statement.”\(^{187}\) In terms of establishing general principles regarding the confrontation guarantee, the opinion is much less than illuminating, except in its adherence to the view that the confrontation and hearsay rules are not congruent.\(^{188}\)

Mr. Justice Harlan, on the other hand, stated his position quite clearly:

The difficulty of this case arises from the assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule. I believe this assumption to be wrong.\(^{189}\)

\(^{182}\) 399 U.S. at 182.

\(^{183}\) See id. at 186 n.20, 187.

\(^{184}\) 400 U.S. 74 (1970).

\(^{185}\) Id. at 94.

\(^{186}\) Id. at 87; see id. at 107 (dissenting opinion); Note, Constitutional Law—The Confrontation Test for Hearsay Exceptions: An Uncertain Standard, supra note 127, at 591; 19 Kan. L. Rev. 533, 538 (1971).


\(^{188}\) Id. at 86; see id. at 96-97 (Harlan, J., concurring), 104-05 (Marshall, J., dissenting).

\(^{189}\) Id. at 94.
Instead, he accepted the Wigmorean view that the confrontation clause is designed only to ensure that the proper procedure—the opportunity for cross-examination—is followed whenever the law of evidence then applicable requires that the testimonial statements be given infra-judicially. The protection given the accused through evidence rules barring hearsay is thus afforded not by the confrontation clause, but only by due process. Mr. Justice Harlan rejected his position in Green on the ground that it would prevent reforms of evidence law which would eliminate "the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant." To illustrate, although a rule requiring production of the declarant would have no purpose in many situations involving the introduction into evidence of business records, the rule formulated in the Green concurrence would preclude elimination of the unavailability requirement for the business-records exception.

The Wigmorean view would hold that the confrontation clause has direct application in two types of cases. First, under this view the state is compelled to permit cross-examination if the witness is produced. Thus, in Douglas v. Alabama, where the witness claimed his privilege against self-incrimination but the prosecutor read aloud his confession implicating the accused, it was held that the accused was denied cross-examination on the confession and, thereby, his right of confrontation. Second, the confrontation clause so read means that the state must follow its own hearsay rules. For example, when

190 Id. at 94-95; 5 Wigmore § 1397, at 131. Wigmore also suggests that the confrontation clause might have been enacted only to prevent total legislative abolition of hearsay rule. Id. at 127; see Note, Preserving the Right to Confrontation, supra note 128, at 747.
Mr. Justice Harlan recognized that his approach is not necessarily consistent with the Court's prior pronouncements, but he saw it as a way of rationalizing the results in the earlier cases. 400 U.S. at 97.

191 400 U.S. at 95-96 (Harland J., concurring). The opinion goes on to suggest that production of the declarant can properly be dispensed with under any reasonable [as an evidentiary matter?] hearsay exception: "If the hearsay exception involved in a given case is such as to commend itself to reasonable men, production of the declarant is likely to be difficult, unavailing, or pointless." Id. at 95. In the unusual situation where production of the witness would nevertheless be advantageous, the accused may use his right of compulsory process. Id.

192 Compare McCormick §§ 283-88 (common-law business records exception) with Fed. R. Evid. 803(6)-(7) and Uniform Business Records As Evidence Act.


195 Id. at 419.

196 Id. at 422.
the applicable rules require as a prerequisite to the admission of former testimony the opportunity to cross-examine on the same issues or unavailability of the witness, the state must comply if it is not to be held in violation of the confrontation right. Other than in these two situations—specifically, when considering the constitutional acceptability of a hearsay rule or exception generally—the standard is provided by due process.

Unquestionably, due process notions are imprecise and subject to change, but the policies behind the confrontation guarantee have been explored so little as to make standards virtually non-existent. Given the universal rejection of a literal reading of the guarantee, and the minute historical and judicial gloss that has been given to the provision, the confrontation- clause questions have come down to a search for requirements to assure fairness in the government’s prosecution of

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199 See 5 Wigmore § 1397, at 131.
200 See Dutton v. Evans, 400 U.S. 74, 96-97 (1971) (Harlan, J., concurring). This residual application of due process standards was apparently overlooked in Motes v. United States, 178 U.S. 453 (1900), when the Court said:

[The] question cannot be made to depend upon the rules of criminal evidence prevailing in the courts of the State in which the crime was committed. It must be determined with reference to the rights of the accused as secured by the Constitution of the United States . . . . We are unwilling to hold it to be consistent with the constitutional requirement that an accused shall be confronted with the witnesses against him . . . . [to permit introduction of former testimony of a witness unavailable because of prosecutorial negligence] . . . . Id. at 474.

See also Matthews v. United States, 217 F.2d 409, 418 (5th Cir. 1954):

While the Sixth Amendment does not prevent creation of new exceptions to the hearsay rule based upon real necessity and adequate guarantees of trustworthiness, it does embody those requirements as essential to all exceptions to the rule, present or future. To hold otherwise would be to hold that Congress could abolish the right of confrontation by making unlimited exceptions to the hearsay rule.

Mr. Justice Harlan reached the same conclusion in his opinion in Green. 339 U.S. at 179; see Seidelson, Hearsay Exceptions and the Sixth Amendment, 40 Geo. Wash. L. Rev. 76, 85-88 (1971).

One practical advantage of this due process analysis is that it can relieve the Court of much of the burden of reviewing specific evidentiary rulings which would be assumed if the confrontation clause were used to incorporate the hearsay rule. See Note, Confrontation and the Hearsay Rule, 75 Yale L.J. 1434, 1438 (1966); 19 Kan. L. Rev. 533, 534-35 (1971). Under this analysis the repetitive confrontation cases can be handled fairly easily by the lower courts; only due process questions involving entire exceptions need come before the Court.

an accused.\textsuperscript{202} Therefore, arguments regarding the admissibility of particular hearsay exceptions are better addressed to the issue of whether they preserve fundamental fairness “implicit in the concept of ordered liberty.”\textsuperscript{203} Under such an analysis the confrontation clause would retain its viability in cases where the state denies cross-examination of an available witness or fails to comply with its own rules, yet it would not petrify the hearsay rules. As a consequence, the fairness inquiry is made directly rather than obliquely.\textsuperscript{204}

C. Due Process: An Analytical Framework

1. Evidentiary Trustworthiness

The due process standard which Mr. Justice Harlan would have applied when judging the admissibility of hearsay evidence is not entirely clear from his opinions in \textit{Green} and \textit{Evans}. However, it appears that his view would require no more than the trustworthiness and necessity which justify admission of hearsay testimony under the traditional exceptions. For example, in \textit{Evans} he tested the proffered hearsay by whether it had “some likelihood of trustworthiness” and whether “unless the out-of-court declaration can be proved by hearsay evidence, the facts it reveals are likely to remain hidden from the jury . . .”\textsuperscript{205} The only additional consideration mentioned is that the necessity for the evidence should be weighed “against the danger that a jury will give it undue credit.”\textsuperscript{206} Mr. Justice Harlan’s due process inquiry in \textit{Green} made the evidentiary test even more critical. The preliminary hearing testimony in that case was not “obtained under circumstances . . . so unreliable that its admission requires reversal as a matter of due process . . .”\textsuperscript{207} Apparently, in order for the admission of hearsay evidence to be held unconstitutional, it would have to be “on evidence so unreliable and untrustworthy that it may be said the accused had been tried by a kangaroo court,” or “so infected . . .

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\item \textsuperscript{202}This is reflected in the criteria applied in both \textit{Green} and \textit{Evans}. The \textit{Green} test of whether the presentation of the evidence “will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,” 399 U.S. at 161, is essentially an inquiry into the fairness of the procedure followed. Similar considerations are behind the \textit{Evans} inquiries into whether the evidence was “crucial” or “devastating,” 400 U.S. at 87, and into the “indicia of reliability” of the evidence. \textit{Id.} at 89.
\item \textsuperscript{203}Palko v. Connecticut, 302 U.S. 319, 325 (1937).
\item \textsuperscript{205}400 U.S. at 99 (Harlan, J., concurring).
\item \textsuperscript{206}Id.
\item \textsuperscript{207}399 U.S. at 189.
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as to give rise to an irreparable likelihood of [error] . . . .

This notion that due process requires only evidentiary reasonableness, when taken in connection with the interpretation that the confrontation clause requires only cross-examination of in-court witnesses and compliance with the applicable hearsay rules, lends support to Mr. Justice Marshall’s opinion that the constitutional protection for criminal defendants against hearsay evidence is very close to nugatory. However, it is his acceptance of Mr. Justice Harlan’s standard which deprives the due process provision of value in these cases and makes the Green and Evans decisions appear less solicitous of defendants’ rights than they have the potential to be. Realization of that potential requires weighing the interests discussed in the next section.

2. An Interest Analysis

In a criminal trial, due process requires those procedures which are essential to ensure “the reliability of the truth-determining process” and “respect for the dignity of the individual.” The evidentiary rules of admissibility are generally directed primarily toward ensuring the reliability of the process, although they may on occasion be utilized to protect an individual’s dignity. In the particular case of the hearsay exceptions, individual dignity is seldom an issue, since admission of evidence does not by itself involve the dignitary injuries of privacy intrusion, harassment, or brutality by overweening officials.

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208 See text accompanying notes 189–200 supra.

209 Dutton v. Evans, 400 U.S. 74, 110 & n.11 (1970) (Marshall, J., dissenting); see Seidelson, supra note 200, at 85. The issue is further confused by a footnote from which it may be inferred Mr. Justice Harlan believes the same constitutional standard of admissibility applies to both civil and criminal actions. 400 U.S. at 97 (Harlan, J., concurring); id. at 110 n.11 (Marshall, J., dissenting).


211 The concern here is with avoiding governmental over-reaching regardless of its effect on evidentiary trustworthiness. See generally Kadish, supra note 204, at 347; Ratner, supra note 212, at 1068. The Supreme Court has essentially adopted this distinction in deciding whether to give retroactive effect to new constitutional standards of criminal procedure. See Williams v. United States, 401 U.S. 646, 653–55 & n.7 (1971) (plurality opinion).


213 See generally Knowlton, The Supreme Court, Mapp v. Ohio and Due Process of Law, 49 IOWA L. REV. 14, 17–18 (1963); Ratner, supra note 212, at 1068.
A major factor in the reliability of the truth-determining process is that to which Mr. Justice Harlan gave most of his attention, evidentiary trustworthiness. The state and the accused each have an interest in making certain that the outcome of trial is based on trustworthy evidence so that only "deserving" deprivations of life, liberty, or property will be effected.\(^{216}\) However, the reliability of the system does not and, as a practical matter, could not depend upon absolute evidentiary trustworthiness. The problem is thus to identify the competing interests which determine the margin of error tolerable in our jurisprudential system.\(^{217}\) One such interest is that of the public in avoiding the maintenance of a truth-determination process which is excessively inefficient or expensive.\(^{218}\) Specifically, due process does not require procedures whose benefits, in terms of protecting the reliability of the process or the dignity of the individual, are outweighed by their costs in time or money to the public as prosecutor and truth-determiner. Against the practical "ills of too much procedure," however, must be weighed the accused's interest in having the fullest practicable opportunity to present his best defense.\(^{219}\) Satisfaction of this interest requires opportunities for the defendant both to discredit the prosecutor's evidence\(^{220}\) (which clearly reflects upon the trustworthiness of that evidence) and to develop favorable testimony (which ensures completeness, rather than just accuracy). The reliability of an adversary system of criminal justice depends upon implementation of this dual interest of the accused.

In weighing these three interest factors in connection with a hearsay declaration, first consideration should be given to evidentiary trustworthiness, since the circumstances in which the statement was made may alone ensure that the possible error would not be intolerable.

\(^{216}\) See Newman, supra note 212, at 228; cf. California v. Green, 399 U.S. 149, 186 n.20, 189 (Harlan, J., concurring).

\(^{217}\) See Kadish, supra note 204, at 348-49; Newman, supra note 212, at 228.

\(^{218}\) See Newman, supra note 212, at 227-29.


\(^{220}\) See Gordon v. United States, 344 U.S. 414, 422-23 (1953).
The norm for tolerable error should be that possible when evidence is given in court, under oath, and subject to cross-examination, so that the trier may observe the witness' demeanor. Therefore, hearsay which is highly trustworthy and the equivalent of infra-judicial testimony, such as would be the case with some business records, should be admissible without consideration of either the cost to the state of examining the declarant in court or the effect on the accused's opportunity to present his best defense. To the extent that the evidence is less trustworthy, further consideration must be given to comparison of the extent to which the opportunity to present a full defense is impaired by the hearsay and the costs to the public of requiring in-court testimony.

3. Due Process and the Unavailability Requirement

When this due process analysis is applied to abandonment of the former-testimony unavailability requirement, it is seen that (1) the evidence would still essentially meet the reliability norms which are in the interest of both the state and the accused. (2) However, the burden of providing available witnesses under the present requirement presumably has minimal effect upon the state's interest in efficient and inexpensive procedures. (3) Nevertheless, the infringement upon the accused's interest in presenting his best defense, which would result from abandoning the requirement, is also likely to be only minimal. Within the "motive and interest" standard whereby testimonial reliability is normally judged, only the demeanor afforded by confrontation is lacking when former testimony is offered. Since cross-examination is a far more important condition and is satisfied when such testimony is offered, the opportunity for the trier of fact to evaluate the truth of former testimony closely approaches the prescribed norm. This opportunity given the declarant to explain contradictions or clarify ambiguities in his statement contributes to the reliability of both at-trial statements and former testimony; under the other hearsay exceptions, such explanations are possible, if at all, only sometime after making the statement. A final factor enhancing the reliability of former testimony may be its closer proximity in time to the observations recounted. However, against these positive trustworthiness aspects must be weighed the fact that in certain circumstances, such as in the case of testimony taken from a preliminary hearing, the incentives to develop the testimony fully may be less than in the case involving former testimony given at a trial. Thus, it might be proper to reach differing conclusions on the constitutionality of

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221 See Fed. R. Evid., Introductory Note: The Hearsay Problem 95; The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 109 n.6 (1970).
removing the unavailability requirement depending on, for example, the tribunal or legal issues.\footnote{223}{See Whitehead v. State, 450 S.W.2d 72, 76-77, 81 (Tex. Crim. App. 1969).}

Regarding the state's interest raised in the second point above, for purposes of argument it seems reasonable to assume that obtaining the presence of the declarant who is amenable to process or otherwise available has not required excessive effort or expenditure and that there is, therefore, little justification for abandoning the unavailability requirement. To the extent, of course, that this assumption is untrue, there is a better argument for abrogating the requirement.

Turning to the third point, however, by hypothesis stated earlier, infra-judicial testimony would be only marginally more trustworthy than the prior testimony. Therefore, it may be argued that the injury to the accused's interest in having the fullest opportunity to present his best defense is also only minimal. In weighing this deprivation against the injury to the suggested state interest, it may be helpful to consider that in modern practice there is no "best evidence rule" aside from that applied when the contents of a document are in issue.\footnote{224}{See McCormick §§ 195-96.}

Taking as an example a situation which may arise, former testimony may generally be proved by oral testimony even if a certified transcript of the prior declaration is available.\footnote{225}{See, e.g., State v. Bixby, 27 Wash. 2d 144, 165-66, 177 P.2d 689, 701 (1947); Meyers v. United States, 171 F.2d 700, 815-16 (D.C. Cir. 1948); Graham, California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco, 4 Loyola U. (L.A.) L. Rev. 279, 297 (1971).}

To the extent that the oral testimony is less trustworthy than the transcript, the accused is deprived of his best defense, yet no due process argument has been sustained against the procedure. A second factor to consider in this connection is that the accused has a right to compulsory process.\footnote{226}{Washington v. Texas, 388 U.S. 14, 17-19 (1967); see Dutton v. Evans, 400 U.S. 74, 96 (1970) (Harlan, J., concurring).}

Thus, admission of the former testimony of the available declarant does not work a deprivation of the opportunity to present his case. If the accused believes that the infra-judicial examination of the declarant would be valuable in that it might increase the reliability of the process, he is free to call the declarant. This argument may, however, neglect two important factual considerations. First, as is discussed above, there is a question whether the opportunity to make a case by direct examination of an unsympathetic witness is as good as developing the same case by the same witness on cross-examination.\footnote{227}{See text accompanying notes 97-99 supra.} Even if the accused is not limited in his direct examination by the rules against leading questions and impeachment of one's own witness, the tactical situation does not favor the direct examiner's attacking what
the jury perceives as his witness.\textsuperscript{228} The second difficulty with saying that compulsory process keeps the accused from being deprived of the opportunity to make his best defense is that there may be substantial expense or inconvenience in utilizing compulsory process. Particularly in the case of the indigent defendant, there may be some deprivation of the best defense if the prosecution does not pay for the production of such witnesses.\textsuperscript{229}

As an original proposition, there appears to be a very strong argument that admission of former testimony of an available declarant does not violate due process. The margin of error possible when the original evidence is relatively trustworthy—because of its submission to cross-examination and the opportunity available to the accused to bring out favorable evidence at both the prior and present hearings\textsuperscript{230}—does not seem to be intolerable in a free society. It is true that in \textit{Berger v. California}\textsuperscript{231} the Supreme Court indicated that when the prosecutorial authorities had not made a good-faith effort to secure the

\textsuperscript{228} But see Fed. R. Evid. 876, which permits the adverse party to examine the declarant of a hearsay statement as if under cross-examination. The problem is, of course, whether the jury will perceive the examination in that fashion. Cf. Seidelson, supra note 200, at 94.


\textsuperscript{230} A further factor affecting the opportunity for a full defense is the admissibility of impeaching evidence. In \textit{Mattox v. United States}, over a strong dissent, see 156 U.S. at 251–61 (Shiras, Gray & White, J.J., dissenting), the Court held that inconsistent statements made subsequent to the prior hearing were inadmissible to impeach the former testimony of a deceased witness because the foundation questions could not be asked of the witness and because the temptation to fabricate testimony would be almost irresistible if the rule were otherwise. 156 U.S. at 249–50; cf. Coppedge v. United States, 311 F.2d 128, 130 (D.C. Cir. 1962) (2–1 decision) (signed statement recanting former testimony excluded because insufficiently authenticated). The \textit{Mattox} holding was distinguished in \textit{Carver v. United States}, 164 U.S. 694 (1897), involving a dying declaration impeached by subsequent evidence, on the ground that the declarant in \textit{Mattox} had been previously cross-examined. \textit{Id.} at 697–98; see Note, \textit{Confrontation, Cross-Examination, and the Right to Prepare a Defense}, 56 Geo. L.J. 939, 952 (1968). However, the better view would seem to be that in any case in which cross-examination is denied, the accused should be permitted to present impeaching evidence as if the witness were present. See Note, \textit{Preserving the Right to Confrontation}, supra note 128, at 757–58. Fed. R. Evid. 806 permits the credibility of a hearsay declarant to be attacked (and supported) by any evidence admissible if he had testified. In such impeachment there is no requirement that the declarant be afforded an opportunity to deny or explain inconsistent statements or conduct. \textit{Id.} This foundation requirement is relaxed regardless of whether the inconsistency was prior or subsequent to the hearsay statement. See \textit{id.}, Advisory Committee’s Note, at 132–33.

\textsuperscript{231} 393 U.S. 314 (1969) (per curiam).
declarant’s presence, the accused’s “inability to cross-examine [the declarant] at the trial may have had a significant effect on ‘the integrity of the fact-finding process.’”

This language might be read to mean that admission of former testimony in such a case violates due process. Nevertheless, such a conclusion need not be reached if consideration is given to the setting in which Berger was decided. The precise question in the case was whether the confrontation-right holding of Barber v. Page should be given retroactive effect. Under current standards one of the principal considerations in deciding that issue is whether the newly announced constitutional doctrine is related to “the very integrity of the fact-finding process.” The Berger Court properly found that denial of the confrontation right guaranteed in Barber did raise serious questions about the accuracy of guilty verdicts in pre-Barber trials, since the defendant’s inability to cross-examine had an effect on whether the fact-finder had an adequate opportunity to assess the credibility of witnesses. However, since the question in Berger was retroactivity and not due process, if Barber is read as requiring only that the state conform to its own hearsay rules, the reference in Berger to “the integrity of the fact-finding process” will be irrelevant when the applicable rule permits admission of former testimony by an available declarant. In other words, a distinction should be drawn between the effect on the criminal process when applying new constitutional doctrine retroactively, on the one hand, and the effect when testing a procedure against due process as an original question, on the other.

V. CONSTITUTIONAL ASPECTS OF OTHER FORMER-TESTIMONY SITUATIONS

The Advisory Committee noted three situations involving former testimony, in addition to the issue concerning the availability of the declarant, which raise confrontation questions: (1) Testimony offered against its former proponent, (2) testimony given in another proceed-

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232 Id. at 315, quoting Linkletter v. Walker, 331 U.S. 618, 639 (1965).
235 “Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.” Williams v. United States, 401 U.S. 646, 653 (1971).
236 See 393 U.S. at 315.
237 See text accompanying notes 168–78 supra.
ing, and (3) testimony given when only a person similarly situated, and not the accused, was a party.\textsuperscript{238} In none of the three situations was any special limitation placed on the use of former testimony in criminal trials,\textsuperscript{239} since the drafters would appear to have assumed that if a dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by the examination of even a person only similarly situated, the most extreme of the above situations, should not "offend against confrontation."\textsuperscript{240}

The premise on which the Advisory Committee relied is, however, open to question. While recent Supreme Court decisions have in dicta referred to the admissibility of dying declarations,\textsuperscript{241} the exception has never been upheld against specific constitutional challenge.\textsuperscript{242} Thus, no precedent stands in the way of its reconsideration in light of the due process analysis formulated above. In fact, a strong case can be made that the exception would be unable to withstand such analysis. First, the trustworthiness of a statement made in belief of impending death is highly suspect. Such evidence is not, of course, amenable to the in-court reliability factors of oath, demeanor, or cross-examination. Neither do the circumstances of its making provide a circumstantial guarantee of reliability. The declarant's sincerity might well respond to the situation with veracity—although this is increasingly questionable in the modern religious climate—but the effect of his condition in extremis on his perception and memory should make the court highly dubious as to the trustworthiness of the evidence.\textsuperscript{243} Furthermore, this exception may involve neither a likelihood that faulty statements will be corrected when made\textsuperscript{244} nor an opportunity to challenge the evidence by some means.

\textsuperscript{238} See Fed. R. Evid. 804(b) (1), Advisory Committee's Note, at 127-28.
\textsuperscript{239} See Fed. R. Evid. 804(b) (1).
\textsuperscript{240} Fed. R. Evid. 804(b) (1), Advisory Committee’s Note, at 128; see Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U.L. Rev. 651, 659-60 (1963).
\textsuperscript{242} See Seldelson, supra note 200, at 89-90. Mattox v. United States, 146 U.S. 140 (1892), is the case usually cited for the proposition that the sixth amendment is not a bar to admissibility. See Dutton v. Evans, 400 U.S. 74, 80 (1970); Pointer v. Texas, 380 U.S. 400, 407 (1965). Mattox presented no confrontation issue, however, as it involved a declaration offered on behalf of the accused, not against him. See 146 U.S. at 151. "[D]ictum [has begotten] dictum, and, through a process of accretion, there is recognition and reaffirmation of a 'holding' never reached in a case which neither involved nor considered the sixth amendment." Seldelson supra note 200, at 89-90.
\textsuperscript{244} See, e.g., Houston Oxygen Co., Inc. v. Davis, 139 Tex. 1, 6-7, 161 S.W.2d 474, 477 (1942) (statement of present sense impression); 5 Wigmore § 1522 (regular entries).
other than cross-examination of the actual declarant.\textsuperscript{246} The second factor indicating constitutional vulnerability of the dying declaration exception, and one which must be weighed against the lack of reliability, is the state's need for relevant evidence. Since by definition the declarant is unavailable, there is no other way for the court to obtain the declarant's testimony. A third interest of concern is that of the accused in having a full opportunity to present his best defense. In the case of a dying declaration the accused has no opportunity at all to cross-examine the declarant, although there may be some opportunity to attack the statements collaterally by cross-examining the witness regarding the circumstances in which the statements were given.\textsuperscript{246} Nevertheless, such collateral cross-examination can neither provide an effective check on the declarant's preception, memory, or sincerity, nor bring out evidence favorable to the defendant. Given the questionable trustworthiness of a dying declaration, therefore, it appears that the accused could make a strong argument that admission of a dying declaration violates his right to due process. In consequence, any resolution of the former-testimony issues under consideration cannot be analogized to or premised upon the admissibility of dying declarations, but instead requires separate analysis.

Turning to the first of the three situations considered by the Advisory Committee, in due process terms the offering of testimony against its former proponent should cause little difficulty. There may be a slight reduction of evidentiary trustworthiness because of the previously discussed inhibitions in attacking one's own witness, but otherwise, in terms of the effects on the accused's interest in a full defense and the state's interest in efficient criminal process, former testimony offered against its proponent does not differ from other former testimony situations previously discussed.

Likewise, when former testimony from another proceeding is offered, the application of the "similar motive and interest" criteria in the particular case might somewhat reduce the satisfaction of the trustworthiness and full-defense interests. So long as the "motive and interest" requirement is applied within proper limits, however, there should be no fundamental unfairness to the accused.

When former testimony is offered against an accused who was not a party to the former proceeding, a due process problem might exist.\textsuperscript{247} It is true that examination conducted by another person with the same

\textsuperscript{246} See The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 113 n.22 (1970).

\textsuperscript{246} Cf. id. at 113-14 & n.22.

\textsuperscript{247} Cf. Falknor, supra note 240, at 656-60; Note, Confrontation, Cross-Examination, and the Right to Prepare a Defense, supra note 230, at 948; Note, Preserving the Right to Confrontation, supra note 128, at 759-60.
motive and interest to develop the testimony should ensure that it is not so untrustworthy that its admission would be fundamentally unfair. Furthermore, the state interest is similar to that which existed in other former testimony cases as previously discussed. Nevertheless, a difficulty may be perceived when considering the accused's opportunity to present his best defense. When compared to his opportunity in other former testimony situations, he is substantially prejudiced—he has no opportunity at any time to test the declarant's preception, memory, or sincerity, or to elicit favorable testimony. However, when compared to the dying declaration situation, as was done by the Advisory Committee in reaching its conclusion, there is no substantial difference in the accused's opportunity to make his defense. If dying declarations satisfy due process, then so should former testimony in this situation. However, even if dying declarations are constitutionally inadmissible, as would seem likely in view of analysis developed above, it may be argued that this type of former testimony is distinguishable because of trustworthiness substantially greater than that of dying declarations, and that it should therefore be admissible. An exception to this conclusion should probably be applied when the declarant is available to testify. In that exceptional case recognition should be given to the accused's greater interest in production of a witness he has never had an opportunity to examine.

VI. Conclusion

It is perhaps understandable, given the infrequent appearance of the issues at the Supreme Court level, that the Court's recent pronouncements on the constitutional standards for confrontation cases have evidenced no clearly discernable approach. This ambiguity is especially unfortunate in its effect on the former-testimony provision of the proposed Federal Rules, for the drafters may well have been thereby inhibited from removing one of the least justifiable evidentiary restrictions, that requiring the declarant to be unavailable. The Federal Rules' treatment of the criteria ensuring reliability and of testimony offered against its former proponent, while perhaps not the most radical reforms possible, constitute at least substantial modernizations of the former-testimony exception. To retain the unavailability requirement in this context, however, is to perpetuate an anachronism—and unnecessarily, in view of the argument which can be made that it is not constitutionally compelled. Therefore, removal of the requirement should be a high priority change in the final Rules.