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The Supreme Court's Bifurcated Interpretation of the Confrontation Clause

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The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[1] Under a functional view, the clause prevents prosecutorial misconduct and increases the reliability of guilty verdicts by requiring that certain evidence be subject to in-court challenge before it can serve as the basis for a conviction. Under a formalistic view, the clause merely creates specific rules of the game for criminal trials—rules that are constitutionally mandated without regard to any policy.

Many people prefer a functional view; others, a formalistic view. The Supreme Court prefers both. When the issue has been whether a defendant's confrontation of a witness at trial was constitutionally adequate, the Court has been formalistic and largely has disregarded policy. But when the issue has been whether confrontation at trial was constitutionally necessary (for instance, whether a conviction based on hearsay was constitutional), the Court has treated the policy of ensuring reliability as determinative.

Thus, the Court has applied a bifurcated approach to the Confrontation Clause, without acknowledgement or explanation. This Article first describes this approach through the examination of several recent cases. Then it briefly considers both the defects of this approach and why the Court has followed it.

Part I sets out the legal background of the Confrontation Clause. Part II discusses the recent cases that have taken a bifurcated view of the clause. Part III considers both the failings of the approach and the reasons for it.

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1. U.S. CONST. amend. VI.

I. Legal Background

In Justice Harlan's words, the Confrontation Clause "comes to us on faded parchment."[2] Like the hearsay rules, it reflects common-law abhorrence of the Tudor and Stuart practice of trial by affidavit (as in the notorious treason trial of Sir Walter Raleigh in 1603, when a sworn affidavit by Lord Cobham, presumably obtained under duress, led to Raleigh's execution even though Cobham had recanted and was available to testify in person).[3]

Nevertheless, there is no direct evidence of the intent underlying the enactment of the Confrontation Clause. The Supreme Court considered confrontation only rarely[4] until 1965, when it held for the first time that the clause applies against the states under the Fourteenth Amendment.[5] Despite the lack of historical background, everyone seems to agree about two things: that the clause does not say what it means and that it does not mean what it says.

With respect to saying what it means, the statement that criminal defendants have the right to "be confronted with" the witnesses against them is far from self-explanatory. Nonetheless, since at least the time of Dean Wigmore, it has generally been agreed that the words create a right to cross-examine the prosecution's witnesses.[6]

With respect to meaning what it says, the Confrontation Clause on its face is unambiguous: "In *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[7] This clearly suggests that hearsay evidence can *never* be used to support a criminal conviction. Yet this interpretation has long been rejected[8] even by those who view defendants' constitutional rights most expansively.

2. California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring).

3. *See* C. MCCORMICK, EVIDENCE § 244 (3d ed. 1984); E. GREEN & C. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 273 (1983).

4. *But see* Mattox v. United States, 156 U.S. 237 (1895) (Confrontation Clause was not violated, upon retrial of a defendant, by the use of the transcript of testimony at the first trial of a subsequently deceased witness); Kirby v. United States, 174 U.S. 47 (1899) (Confrontation Clause was violated by the use of evidence that other persons had been convicted of theft to prove that property received by the defendant had been stolen).

5. Pointer v. Texas, 380 U.S. 400 (1965).

6. *See* 5 J. WIGMORE, EVIDENCE §§ 1365, 1395-1400 (J. Chadbourn rev. ed. 1974).

7. U.S. CONST. amend. VI (emphasis added).

8. *See Mattox*, 156 U.S. at 243, in which the Court states:

> There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards [i.e., in-court confrontation] even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules 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.

Nor could such an interpretation have been historically intended given the longstanding hearsay exception under which dying declarations were admissible as prosecution evidence of the cause of death in homicide cases.[9] Thus, what the clause actually means is that defendants should be allowed to confront adverse witnesses as a general rule but subject to exceptions.

The issues presented by the Confrontation Clause divide into at least two categories. In one, the prosecution uses hearsay evidence without producing the out-of-court declarant, and the question is whether this use falls within an unstated exception to the right of confrontation. In the other, the defendant arguably confronted a prosecution witness at some stage in the proceedings, but it is alleged that the encounter failed to satisfy the clause.[10]

As the following Part shows, the Supreme Court seems tacitly and perhaps unconsciously to view these two types of cases as different.[11] While it has never suggested any distinction between the two, it has resolved them using fundamentally different approaches.

In determining whether the Confrontation Clause applies, the Court applies a functional approach. It treats confrontation as a means to the end of preventing convictions based on unreliable evidence and thus as a procedure that may be foregone in cases in which the challenged evidence appears sufficiently reliable.

By contrast, in determining how the clause applies when a witness has appeared in court, the Supreme Court applies a formalistic approach.[12] It treats confrontation rights as ends in themselves, existing simply because our Constitution and legal tradition say so, and to be interpreted without reference to any policy. In effect, the letter of the Constitution controls, although we must edit the text to clarify its meaning.

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9. The dying declaration rule was well established by the time of the American Revolution. *See* C. MCCORMICK, *supra* note 3, § 281.

10. In a subcategory of these cases, the question presented is whether the trial court impermissibly limited cross-examination by defense counsel. *See, e.g.,* Davis v. Alaska, 415 U.S. 308 (1974).

11. *See infra* notes 13-35 and accompanying text.

12. The Court, however, follows a functional approach in determining whether the trial court impermissibly limited defense cross-examination. *See, e.g.,* Smith v. Illinois, 390 U.S. 129, 131 (1968) (limitations are impermissible where they "effectively . . . emasculate the right of cross-examination.").

II. The Recent Supreme Court Cases

In three cases decided since 1986 the Supreme Court considered whether the Confrontation Clause barred convictions based on hearsay statements by out-of-court declarants. In three other cases decided since 1986 the Court considered whether the clause was satisfied by a witness's limited appearance.

A. Cases Concerning the Use of Hearsay Statements by an Out-of-Court Declarant

1. Inadi

In *United States v. Inadi*[13] the defendant was tried for conspiracy to distribute narcotics. The prosecution used as evidence a legally authorized wiretap, which contained statements by a coconspirator, Lazaro, that apparently had been made in furtherance of the conspiracy and while it was in progress. The defendant argued to the trial court that the wiretap was inadmissible as hearsay unless Lazaro was called as a witness or shown to be unavailable.

The trial court initially agreed and admitted the wiretap subject to the prosecution's later production of Lazaro in court or showing his unavailability. Lazaro was subpoenaed by the government but failed to appear, claiming car trouble. Neither the prosecution nor the defense made any further effort to secure his presence in court. The trial court then ruled that the wiretap evidence was admissible anyway, under the coconspirator exception to the hearsay rules.[14]

The Court of Appeals for the Third Circuit reversed the conviction on the ground that, while the statutory hearsay exception for coconspirators' statements had been satisfied, the Confrontation Clause had not.[15] The Supreme Court reversed, restoring the conviction.[16]

The Supreme Court agreed that, in some situations, hearsay cannot be used against a criminal defendant without showing that the declarant is unavailable.[17] It said that an in-court appearance, subject to cross-examination, generally produces better evidence than the hearsay.[18] The Court nonetheless held that the rule preferring in-court testimony should

13. 475 U.S. 387 (1986).

14. FED. R. EVID. 801(d)(2)(E).

15. United States v. Inadi, 748 F.2d 812, 818-20 (3d Cir. 1984), *rev'd*, 475 U.S. 387 (1986).

16. United States v. Inadi, 475 U.S. 387, 400 (1986).

17. *Id.* at 392.

18. *Id.* at 394.

not apply to coconspirator statements.[19] Such statements, the Court argued, are better evidence than in-court testimony since conspirators are likely to be more candid "when talking to each other in furtherance of their illegal aims than when testifying on the witness stand."[20]

As the dissent noted, the Court's preference for out-of-court statements over in-court testimony was inconsistent with the clause's historical background—in particular, the common law's pervasive preference for live testimony.[21] Yet the majority had a point. Statements made in private by coconspirators in furtherance of a conspiracy, unlike affidavits extracted by the King's torturers in the Raleigh trial, may be more reliable than in-court testimony.[22]

2. Lee

In *Lee v. Illinois*[23] a man and a woman were charged with murdering the woman's aunt. Both had confessed to the crime, and the man's confession came after the police told him that the woman had confessed. The two confessions were similar in many respects, but had at least two significant inconsistencies: the man's confession suggested greater premeditation by the couple, and each confession portrayed the confessor's accomplice as somewhat more responsible for the murder.

The woman was convicted after a trial at which both confessions were used as evidence against her.[24] She challenged the use of the man's confession under the Confrontation Clause, but the state appeals court affirmed[25] and Illinois argued before the Supreme Court that the two confessions were sufficiently "interlocking" to be reliable.[26]

The Supreme Court reversed the conviction on the ground that the man's confession was *not* sufficiently reliable.[27] The Court noted both

19. *Id.* at 395.

20. *Id.* The Court further noted that the defense could have called Lazaro. In addition, the Court argued that a blanket "production-or-unavailability" rule would burden prosecutors more than it would benefit defendants. *Id.* at 399-400.

21. *Id.* at 403 (Marshall, J., dissenting).

22. *But see id.* at 405 (Marshall, J., dissenting) (disputing the greater reliability of coconspirators's statements). Moreover, the prosecution's failure to call an available hearsay declarant may itself make the hearsay unreliable by suggesting a tactically based reluctance to have the witness appear in court.

23. 476 U.S. 530 (1986).

24. The man and woman were tried jointly, and while his confession ostensibly was admitted only against him, both the prosecutor and the judge referred to it when summing up the case against her. *Id.* at 537-38.

25. People v. Lee, 129 Ill. App. 3d 1167, 491 N.E.2d 1391 (1984), *rev'd*, Lee v. Illinois, 476 U.S. 530 (1986).

26. Lee v. Illinois, 476 U.S. 530, 545 (1986).

27. *Id.* at 546-47.

the inconsistencies between the two confessions and the danger that the man, after learning of the woman's confession, might shift blame to her for reasons of self-interest or revenge.[28]

3. Bourjaily

In *Bourjaily v. United States*[29] a government informant had arranged a drug deal with a middleman named Lonardo. During a taped telephone conversation, Lonardo told the informant that his "friend" would buy the drugs in a designated hotel parking lot. The defendant was arrested in the parking lot immediately after receiving the drugs but before paying for them. The police found $20,000 in cash in his car.

At trial the prosecution used the taped conversations between Lonardo and the informant as evidence against the defendant. The defendant appealed under both the Federal Rules of Evidence[30] and the Confrontation Clause, but the Sixth Circuit,[31] and then the Supreme Court, affirmed.[32]

The Supreme Court held that, so long as a coconspirator's statement is admissible under the Federal Rules of Evidence, courts need not independently enquire into its reliability.[33] The Court's rational was that the coconspirator exception's firm common-law roots (ostensibly grounded on reliability[34]) made separate consideration of reliability by the trial court unnecessary.[35]

B. Cases Determining Whether a Witness's Appearance in Court Satisfied the Confrontation Clause

The prior subpart showed that the Supreme Court views reliability as critical in assessing whether the Confrontation Clause bars the use of

28. *Id.* at 544-46. Justice Blackmun, dissenting, applied the same legal standard but disagreed about the facts, arguing that the man's confession was reliable. *Id.* at 551 (Blackmun, J., dissenting).

29. 483 U.S. 171 (1987).

30. The principal question was whether Lonardo's statement, admitted under the coconspirator exception to the hearsay rules, could be considered by the judge in determining its own admissibility (i.e., in determining whether a conspiracy existed). *See* FED. R. EVID. 801(d)(2)(E). While the defendant argued that this use was improper "bootstrapping," the Supreme Court held that under the Federal Rules it was permissible. *Bourjaily*, 483 U.S. at 181.

31. United States v. Bourjaily, 781 F.2d 539 (6th Cir.), *aff'd*, 483 U.S. 171 (1987).

32. Bourjaily v. United States, 483 U.S. 171, 184 (1987).

33. *Id.* at 183-84.

34. In fact, the coconspirator exception historically reflects an agency theory of conspiracy, more than a judgment about reliability. *See* FED. R. EVID. 801(d)(2)(E) advisory committee's notes.

35. *Bourjaily*, 483 U.S. at 183.

hearsay evidence against criminal defendants. This subpart will show that the Court views reliability as irrelevant when it assesses the adequacy of an in-court confrontation, when the issue is not whether the trial court impermissibly limited cross-examination. The subpart begins by discussing some early cases in which this view emerged.

1. Antecedent Cases

In *California v. Green*[36] the Supreme Court considered the constitutionality of a criminal conviction based on testimony given at a pretrial hearing. The witness who provided that testimony appeared at trial, but claimed a lack of memory about the underlying events. The Court held that cross-examination about one's prior testimony at the time of trial generally satisfies the Confrontation Clause;[37] but the Court declined to consider whether the witness's claimed memory loss made the opportunity for cross-examination at trial constitutionally inadequate, holding that the issue would not be ripe until considered by the California Supreme Court on remand.[38] Only Justice Harlan, in a concurring opinion, took the position that the effect of the witness's claimed memory loss on the adequacy of the defendant's opportunity for cross-examination was constitutionally irrelevant.[39]

Ten years later, in *Ohio v. Roberts*,[40] the Court moved closer to Justice Harlan's position, upholding a conviction based on testimony at a pretrial hearing although the witness had not appeared at trial. The Court viewed cross-examination at the preliminary hearing as sufficient to justify admissibility.[41]

Moreover, the Court suggested that the opportunity to cross-examine at the preliminary hearing, even without actual cross-examination, might satisfy the Confrontation Clause.[42] The Court disregarded that the motive to cross-examine at a preliminary hearing may be far weaker than at trial. The applicable standard at a preliminary hearing is probable cause rather than proof beyond a reasonable doubt; defense counsel may be less prepared at the preliminary hearing stage; and it may be tactically unwise to "rehearse" a hostile witness by familiarizing him

36. 399 U.S. 149 (1970).

37. *Id.* at 158-61.

38. *Id.* at 168-70.

39. *Id.* at 188 (Harlan, J., concurring) ("The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony . . . does not have Sixth Amendment consequence.").

40. 448 U.S. 56 (1980).

41. *Id.* at 73.

42. *Id.* at 70.

with lines of attack that one may want to use at trial.[43]

The Court did not ultimately rely upon its suggestion that the opportunity to cross-examine at a preliminary hearing might be sufficient. It found that the cross-examination actually conducted by defendant's counsel at the pretrial hearing was an adequate confrontation, even assuming that the opportunity was not enough.[44]

2. Owens

In *United States v. Owens*[45] a correctional counselor at a federal prison was savagely assaulted, causing permanent brain damage and severe, progressive memory impairment. Shortly after the assault, while speaking with hospital attendants, the victim apparently identified someone other than the eventual defendant as his assailant.[46]

A week later the victim no longer remembered who had attacked him. A month later, in the presence of an FBI agent who visited him in the hospital, he identified the defendant as his assailant.

By the time of trial the victim had again forgotten who had assaulted him, but he ostensibly remembered making the identification during the FBI agent's visit. He also remembered feeling certain that he was correct when he made it. He had no memory of any hospital visitors during his stay other than the agent on this occasion, although he had received numerous visitors, both official and personal, including his wife on a daily basis. He also did not remember whether anyone had suggested to him that the defendant was responsible. In fact, his condition probably made him highly susceptible to suggestion.

The Ninth Circuit reversed the conviction on Confrontation Clause grounds, holding that the victim was not adequately subject to cross-examination given his nearly complete memory loss about both the attack and the circumstances surrounding the identification.[47] The Supreme Court reversed, however, restoring the conviction.[48]

In an opinion by Justice Scalia, the Court endorsed Justice Harlan's concurring view in *Green* that the mere opportunity to cross-examine is

43. *See, e.g.,* United States v. Zurosky, 614 F.2d 779, 791-93 (1st Cir. 1979), *cert. denied,* 446 U.S. 967 (1980).

44. *Roberts,* 448 U.S. at 70.

45. 484 U.S. 554 (1988).

46. The hospital records indicated that someone other than the defendant had attacked the victim. Defense counsel used the records at trial in an unsuccessful effort to refresh the victim's memory. The records presumably were substantively inadmissible as hearsay because the attacker's identity was not pertinent to medical treatment. *See* FED. R. EVID. 803(4) (hearsay exception for medical records).

47. United States v. Owens, 789 F.2d 750 (9th Cir. 1986), *rev'd,* 484 U.S. 554 (1988).

48. United States v. Owens, 484 U.S. 554, 564 (1988).

constitutionally sufficient even if the witness's good faith memory loss prevents "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[49] Justice Brennan, dissenting, criticized the Court's opinion for reducing the right of confrontation to a "purely procedural protection" that lacked value when the witness remembered virtually no relevant facts that could be explored on cross-examination.[50]

3. Stincer *and* Coy

In *Kentucky v. Stincer*[51] and *Coy v. Iowa*[52] the Supreme Court considered the constitutionality of rules shielding child witnesses in sex abuse cases. *Stincer* upheld a conviction in which the judge determined the child witnesses' competency at an in-chambers hearing from which the defendant, but not his lawyer, was excluded.[53] The Court noted that the defendant was present during the witnesses' testimony at trial.[54]

In *Coy*, however, the Court reversed a conviction because at trial a screen was placed between the defendant and the child witnesses, permitting the defendant to see the witnesses dimly, but blocking their view of him.[55] In an opinion by Justice Scalia the Court concluded that, under the Confrontation Clause, in the absence of any waiver by the defendant, prosecution witnesses must have the defendant in their sight when they testify.[56]

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49. *Owens*, 484 U.S. at 559. The Court relied in large part on Delaware v. Fensterer, 474 U.S. 15 (1985), a per curiam opinion rejecting a Confrontation Clause challenge to a conviction when an expert witness for the prosecution had forgotten which of three possible scientific theories he had used in formulating his opinion. *Fensterer* expressly declined to resolve the question open from *Green* whether memory loss could affect the constitutional adequacy of cross-examination. *Id.* at 20.

50. *Owens*, 484 U.S. at 565 (Brennan, J., dissenting). Justice Brennan argued that the Confrontation Clause guarantees an opportunity for *effective* cross-examination and that when a witness claims forgetfulness about an out-of-court statement the critical question is whether the cross-examination affords the trier of fact a satisfactory basis for assessing the statement. *Id.* at 568. The dissent agreed that in *Fensterer* a satisfactory basis existed because the expert witness's memory loss at trial was self-impeaching. In *Owens*, however, the memory loss at trial was not self-impeaching since the victim's condition caused progressive memory loss and the trial took place eighteen months after the out-of-court identification. *See id.* at 566-67.

51. 482 U.S. 730 (1987).

52. 108 S. Ct. 2798 (1988).

53. *Stincer*, 482 U.S. at 732-33.

54. *Id.* at 740.

55. *Coy*, 108 S. Ct. at 2803. The child witnesses testified only about what had happened and did not identify the defendant. *Id.* at 2806 n.1 (Blackmun, J., dissenting).

56. The Court declined to decide whether the right to a face-to-face view might give way under some circumstances to a compelling state interest. *Id.* at 2803. It found that no such interest existed in this case because the Iowa statute presumed trauma to child witnesses in sex abuse cases without requiring case-specific findings about trauma by trial judges. *Id.* Justices

Rejecting the traditional view that the clause principally affords a right to cross-examination, the Court deduced the right to make prosecution witnesses have the defendant in their sight from Western cultural tradition, as evidenced principally by the following sources: the Latin derivation of "confront,"[57] the words of the Roman Governor Festus,[58] a speech by Shakespeare's Richard II,[59] and the childhood memories of Dwight Eisenhower.[60] The opinion states that the right to visual confrontation may have a higher constitutional status than the right to cross-examination because it is "narrowly and explicitly set forth in the clause . . . [not just] reasonably implicit."[61]

The Court argued that the right to face-to-face visual confrontation survived for many centuries because in some circumstances it improves reliability by shaming the false accuser.[62] Essentially, however, the Court's opinion rested on perceived tradition, not policy. The Court conceded that the sight of the defendant might upset a truthful accuser, particularly a victim of child abuse, but viewed this as irrelevant since "[i]t is a truism that constitutional protections have costs."[63] Thus, the Court dismissed any argument that an exception for child witnesses in sex abuse cases might improve reliability.[64]

III. Attempting to Explain the Supreme Court's Position

As the previous Part showed, under the Supreme Court's decisions reliability only matters when the question is whether out-of-court hearsay should be admitted, but not when the question is whether an in-court appearance by a witness satisfies confrontation rights. This Part briefly assesses the Court's approach and then tries to explain what has led to it.

O'Connor and White, concurring, offered the view that some procedural devices to shield child witnesses are constitutionally permissible. *Id.* at 2803-05 (O'Connor, J., concurring).

57. Justice Scalia noted that "[s]imply as a matter of Latin . . . the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)." *Id.* at 2800. He also cited Justice Harlan for the proposition that a right to face-to-face contact follows from the word "confront" "[s]imply as a matter of English." *Id.* Yet "confrontation," at least in modern usage, denotes a *hostile* encounter and thus suggests that adversarial interaction is at the heart of the clause.

58. *Id.*

59. *Id.*

60. *Id.* at 2801.

61. *Id.* at 2802.

62. *Id.*

63. *Id.*

64. *Id.*

A. Assessment of the Court's Bifurcated Approach

On its face, the Court's unacknowledged bifurcated approach to the Confrontation Clause is perverse. It becomes more so when one closely examines the results. In particular, the Court's formalistic decisions create a bizarre pattern, whether they are compared to each other or to the functional decisions.

The Confrontation Clause, however it should ultimately be interpreted, plainly reflects concern about injustice in the form of erroneous guilty verdicts and Raleigh-style prosecutorial misconduct. The Court's formalistic decisions correlate with this concern either negatively or not at all.

To begin, consider *Owens*, which gives every appearance of being a railroaded conviction, conceivably obtained by making suggestions to a medically impaired witness with a faulty memory. The case is hardly better than the trial of Raleigh; it is almost as if Lord Cobham had been brought into court, but under circumstances in which he remembered nothing but the act of signing his affidavit.

Given the condition of the witness in *Owens*, the right to cross-examination did little to address the inherent Raleigh-style dangers. Even demonstrating the witness's limitations did little to impeach him since his injuries caused progressive memory loss and the trial took place eighteen months after the out-of-court identification.[65]

By comparison, the practice in *Coy* was innocuous. Whether or not the use of screens to protect child witnesses in sex abuse cases is wise,[66] it hardly poses a comparable danger of prosecutorial misconduct. The use of screens not only protects children from trauma and increases the likelihood that they will testify, it also may improve reliability by reducing the danger of psychological intimidation.[67]

In summary, *Owens* turns confrontation rights against the defendant, treating them as a substitute for the usual reliability requirement for the hearsay use of an out-of-court identification because under different

65. United States v. Owens, 484 U.S. 554, 566-67 (1988) (Brennan, J., dissenting).

66. The use of a screen may have an undesirable tendency to brand the defendant as guilty in the eyes of the jury. Moreover, in most situations, and perhaps with all adult witnesses, requiring the witness to have the defendant in sight may improve reliability.

67. *Coy* is somewhat more defensible on reliability grounds if, as Justice O'Connor's concurrence suggests, screens may be used when the judge makes case-specific findings of necessity. If case-specific findings of necessity are constitutional, however, it is unclear why rules conclusively finding it in narrowly defined circumstances (i.e., for all child witnesses in sex abuse cases) are not. Almost the entire history of the hearsay exceptions is one of developing general categories so that case-specific assessments of reliability are unnecessary. In *Bourjaily* the Supreme Court held that such categories can serve as substitutes for case-specific findings. Bourjaily v. United States, 483 U.S. 171, 182-84 (1987).

circumstances the rights might have ensured reliability. *Coy* triumphantly vindicates confrontation rights, but under circumstances in which they seem unrelated to preventing injustice.

Coy becomes even more bizarre alongside *Inadi*. Considered together, the two cases suggest that if a child sex abuse witness would be intimidated by testifying in sight of the defendant, the prosecution can keep him or her out altogether while using the witness's testimony in hearsay form;[68] but it cannot bring the witness into court and protect him or her by using a screen.[69] Thus, the prosecution can spare the accusing witness from having the defendant in sight, but only if it avoids cross-examination by the defendant and denies the jury a view of the witness as well.[70]

One possible way to rationalize the Court's decisions is to view its approach as analogous to that which applies to writings through the best evidence rule (that is, the rule that, when a party seeks to prove the contents of a writing, the original generally must be produced if possible).[71] Under this explanation in-court testimony must be used whenever possible (unless, as in *Inadi*, the out-of-court evidence is more reliable), but once the prosecution has done all it can to provide a full confrontation (as it arguably did in *Owens* but failed to do in *Coy*), nothing further is required.

The problems with this explanation are twofold. First, since the meaning of "confrontation" is not facially obvious, it is only reasonable to consider its purposes in determining its scope (as the Court failed to do in *Coy*).[72] Both policy and the history of the hearsay rules suggest that these purposes have something to do with reliability and with the capacity of cross-examination to subject evidence to meaningful

68. The hearsay must be considered more reliable than in-court testimony for *Inadi* to support its use.

69. Indeed, the Seventh Circuit so held in *Nelson v. Farrey*, 874 F.2d 1222, 1227-30 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 835 (1990). In *Nelson* the defendant was convicted of sexually assaulting a three-year old child, based in part on hearsay statements that the child had made out of court to a psychologist. The child's unavailability for constitutional purposes was unclear; she could have been called as a witness, but was considered unlikely to respond to questioning in court about the incident. The Seventh Circuit upheld the conviction on the ground that under *Inadi* the out-of-court statements by the child to the psychologist were more reliable and better evidence than an in-court appearance. *Id.* at 1228-30.

70. Of course, the defendant can call any available witness whose testimony the prosecution chooses to introduce only in hearsay form. This often is tactically undesirable, however, in comparison to cross-examination during the prosecution's case.

71. *See* FED. R. EVID. 1001-1008.

72. The best evidence rule for writings is not similarly unclear on its face.

challenge.[73]

Second, in light of *Owens*, the Court's decisions do not fulfill the analogy to the treatment of writings under the law of evidence. In effect, they apply the best evidence rule without the accompanying requirement that a writing that is admitted in evidence be authenticated (for instance, through handwriting evidence or reasonable self-authentication).[74] Arguably, live testimony is not analogously authenticated unless cross-examination can provide the jury with some basis for evaluating the testimony—as was impossible in *Owens* due to the witness's progressive memory loss during the nineteen month period between the identification and the trial.[75]

B. Broader Reasons for the Court's Bifurcated Approach

Despite its peculiarities, the Supreme Court's formalistic approach to the adequacy of confrontation rights might be understandable if it were necessary as a matter of textual interpretation. It is not. As to *Owens*, no established canon of constitutional interpretation holds that when a right is technically vindicated, but under circumstances that may eliminate its value, all constitutional inquiry must come to an end. As to *Coy*, the Constitution does not say that confrontation means having the defendant in the witness's sight. Dean Wigmore, the pre-eminent scholar in the history of the law of evidence, long ago argued that the term refers essentially to cross-examination.[76] Moreover, the Court allows the use of reliable out-of-court hearsay, despite the lack of face-to-face confrontation, expressly on the ground that policy, not the literal text of the Constitution, controls.

Accordingly, the question arises why the Supreme Court has thought it necessary to adopt an approach that is so logically inconsistent and perverse as policy. In considering this question it is important to avoid the fallacy of over-interpretation. One should not expect too much consistency from an overworked Court that responds ad hoc to cases as

73. *See, e.g.*, C. MCCORMICK, *supra* note 3, § 244 (noting the actual and perceived unreliability of hearsay); J. WIGMORE, *supra* note 6, § 1367 (describing cross-examination as "the greatest legal engine ever invented for the discovery of truth.").

74. *See* FED. R. EVID. 901-903.

75. It makes sense to accompany a best evidence rule with an authentication rule for live testimony as well as writings. Both types of evidence may otherwise be unduly credited by juries. Moreover, in both cases one could argue that concern about reliability should not come to an end simply because the litigant has advanced a type of evidence that usually is good. A best evidence rule's purpose of preventing the tactical choice to use worse evidence arguably is just an application of reliability—the fact that a self-interested litigant preferred the worse evidence suggests that it is unreliable.

76. *See* J. WIGMORE, *supra* note 6.

they arise and decides them based on shifting internal coalitions. Moreover, since the bifurcated approach has never been made explicit by the Court, it may be discarded at any time, consciously or unconsciously. The approach seems more a reflex than a considered strategy.

Yet even reflexes have their reasons. Issues concerning the admissibility of hearsay may evoke a different response than issues concerning the adequacy of a confrontation for reasons relating to the Court's perceptions and intellectual baggage.

When the question is whether hearsay can be used against a defendant, the Court recognizes that it is departing from the literal text of the Constitution. It also has the long history of hearsay exceptions to guide it in determining when hearsay can be used. These exceptions are too cumbersome and rigid to be specifically constitutionalized (although *Bourjaily* moves in that direction), but they focus the Court's attention on the exceptions' principal guiding policy: reliability.

When the question is whether adequate confrontation rights have been afforded, the Court is similarly unguided by the text of the Constitution, but cannot similarly draw guidance from the common law. It therefore must fall back on broader principles, and in several key cases these principles have been supplied by Justice Scalia, an important swing vote[77] and the author of *Owens* and *Coy*.[78]

Justice Scalia is self-consciously a jurisprudential conservative. He frequently argues that a judge's job is to interpret the law, not to act as a legislator imposing his own preferences. Moreover, he views constitutional interpretation as requiring a strict reading of the text, supplemented only by reference to clear community traditions.[79]

Owens and *Coy* show Scalia at work in the area of adequacy of confrontation rights when neither the constitutional text nor common-law traditions provide helpful guidance. His response, essentially, has been

77. In the four confrontation cases decided since his arrival Scalia has been willing to support either prosecution or defense (although the latter only in *Coy*) and has been part of the majority each time.

78. *Roberts*, which began the movement towards formalism, was decided before Justice Scalia's arrival on the Court. Its suggestion that the mere opportunity to cross-examine witnesses at preliminary hearings is sufficient may reflect the idiosyncratic nature of the issue presented. Extensive cross-examination at the preliminary hearing, as was conducted in *Roberts*, arguably establishes reliability. Yet once one decides to admit preliminary hearing testimony that has been extensively crossed, excluding it in other cases has the perverse effect of penalizing defendants who elect to cross-examine adverse witnesses at that stage. This may appear unduly to reward a tactical calculation that the witness may disappear before trial. Moreover, it may weaken the capacity of preliminary hearings to weed out unmeritorious cases.

79. *See, e.g., Coy*, 108 S. Ct. 2798, 2800-02 (1988) (relying on clear community tradition).

to pretend that he has a text. He strictly and narrowly interprets a revised Confrontation Clause that states, "The accused shall enjoy the right to meet face-to-face the witnesses against him, except when these witnesses have provided reliable hearsay." In interpreting this imagined language, concerns of policy, when not explicit (that is, "reliable hearsay") are anathema—although a general concern about reliability and preventing prosecutorial misconduct should be relatively uncontroversial as policy.

Even when applied coherently, Scalia's jurisprudential conservativism tars all policy concerns with the same brush. It makes no distinction for policies that are relatively uncontroversial. Moreover, his approach ensures that the law of evidence will fail to advance any consistent set of purposes.

Constitutional rights such as confrontation arose for reasons: they are today's traditions because they were yesterday's policies. Justice Scalia's jurisprudential conservatism rigidifies and totemizes these policies. When the justifications for rights are forgotten or ignored, the rights become impediments to a rational legal procedure, not means of ensuring rationality.