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READING GAOL REVISITED: ADMISSION OF UNCHARGED MISCONDUCT EVIDENCE IN SEX OFFENDER CASES[1]

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In Reading Gaol by Reading Town
There is a pit of shame,
And in it lies a wretched man
Eaten by teeth of flame.

Oscar Wilde, *The Ballad of Reading Gaol*

I. INTRODUCTION.

In 1894, Oscar Wilde commenced a criminal libel prosecution against the Marquis of Queensberry. The Marquis' son, Alfred Douglas, was sexually involved with Wilde. The Marquis threatened to make a public scandal of his son's affair, unless he broke off with Wilde. When Alfred refused to give up Wilde, the Marquis left a post card in the Albermarle Club addressed to "Oscar Wilde posing as a sondomite (*sic*)."[2] Wilde's criminal prosecution blew up in his face when Sir Edward Carson, Queensberry's defense counsel, cross examined Wilde on his prior deviant sexual activities with young, handsome men such as Alfred Douglas.[3] Wilde's counsel withdrew the case during Carson's opening statement for the defense, knowing that Carson would put Wilde's former lovers on the stand.[4]

Queensberry turned the case over to the public prosecutor who indicted Wilde for sodomy. Wilde was convicted and sentenced to two years at hard labor in Reading Gaol, leading Wilde to produce *The Ballad of Reading Gaol*, a thinly disguised autobiographical poem which may have been his masterpiece.[5]

Oscar Wilde was tripped up by an exception to the character evidence rule that permitted proof of Wilde's prior sexual misconduct to prove his predisposition to engage in sodomy. The character evidence rule forbids the prosecution from proving a criminal defendant's bad character. However, exceptions exist which may be used to prove the defendant's bad moral character. One of those exceptions allows the prosecution to prove an accused sex offender's propensity for committing uncharged sexual misconduct. When the state prosecutes someone for a sex offense, the specter of the defendant's uncharged sexual misconduct haunts the trial process, as it did the Oscar Wilde trial. The person accused of a sex offense must expect that any deviant sexual history will be put into evidence by proof of similar uncharged sexual misconduct. The jury will convict the defendant on the basis of predisposition to commit sex crimes.

The American form of criminal prosecution is accusative, not inquisitorial.[6] Since the defendant is

presumed innocent, the defendant will be tried for committing a specific act, not for the defendant's general predisposition to do wrong.[7] The courts have fashioned the character evidence rule that bars the prosecution from proving the defendant's predisposition to do wrong.[8] The courts admit that the trier of fact can reason from proof that the defendant committed one or more similar acts to a conclusion that the defendant is predisposed to commit those same acts.[9] The trier of fact can then deduce from the defendant's proven general predisposition to commit a certain kind of criminal act that the defendant committed the act charged in the indictment.[10] The courts assert that even if the defendant's commission of similar acts is relevant to proving the defendant committed the act charged in the indictment, the probative value of such evidence is substantially outweighed by prejudice to the accused.[11]

The courts are apparently committed to the established method of criminal prosecutions because they perceive that the accusative system of criminal justice is part of the collective moral fabric of the United States.[12] No other type of criminal prosecution is acceptable as a model of a fair trial.

Perhaps the courts are not as committed to the accusative system of criminal justice as they think. In fact, the courts may be permitting inquisitorial

prosecutions while they speak the rhetoric of the accusative system. It may be more important to examine what the courts do with uncharged misconduct evidence than to examine the verbal formulae the courts employ to describe what they do.

This article analyzes only one type of criminal prosecution: sex offenses. The courts are willing to allow the prosecution to prove the defendant's predisposition to commit sex crimes by proof of specific acts of uncharged sexual misconduct.[13] The trier of fact is free to reason from proof of one or more similar acts committed by the defendant to the conclusion that the defendant is predisposed to commit sex crimes. Then, the defendant may be found guilty based, in part, upon prior uncharged sexual misconduct. While this system is not unique to sex crime prosecutions, all the issues surrounding admission of uncharged misconduct in criminal prosecutions are raised in the most sharply defined manner in sex offender cases.

Since 1988, the moral issues raised by proof of uncharged sexual misconduct in sex offender cases have been openly discussed by the Supreme Courts of Delaware, Indiana and Rhode Island. In each state, a sex offender was convicted in part on evidence of uncharged sexual misconduct that proved the sex offender's propensity to commit such misconduct. These defendants were in the same situation as Oscar Wilde was in 1894. Delaware and Indiana chose to

reject a specific exception that admitted uncharged sexual misconduct in sex offender cases to prove the defendant's lustful disposition or predisposition to commit sex crimes. Rhode Island chose to keep that exception. In each case, however, the court chose to set down guidelines for admission of uncharged sexual misconduct in sex offender cases. There is little practical difference in the outcome in each of the three decisions. Uncharged sexual misconduct will be admitted in sex offender cases, given the right conditions showing relevance and probative value.

II. PROFILE OF THREE SEX OFFENDER CASES.

A. DELAWARE.

Charles R. Getz was arrested for allegedly raping his eleven year old daughter. He was tried in Superior Court, Kent County, Delaware. Delaware had adopted the 1973 edition of the Uniform Rules of Evidence in 1980. The State offered two uncharged sexual misconduct incidents between Getz and his daughter to prove Getz' motive, intent, plan and as "proof of sexual interest in his daughter"[14] under Rule 404(b) Delaware Rules of Evidence. Pre-1980 Delaware case law contained no reported opinions supporting admission of similar sexual misconduct to show the defendant's predisposition to commit sex crimes.

The State called Dr. Kuhn, a physician who had examined Getz' daughter about 10 days after the incident for which he

stood trial. Kuhn's medical history notes included the child's story of the two similar episodes of sexual activity with her father. The physician was allowed to put the medical history record into evidence.[15] Next, Getz' daughter, the victim, took the stand and testified to three different episodes of incest or child molesting with her father.[16] Getz claimed he had been "set up" by his ex wife so she could obtain a divorce from him on misconduct grounds to protect her right to remain in the United States. The jury did not believe Getz and found him guilty. He drew a mandatory life sentence for first degree rape.[17] Getz appealed his conviction on the ground that the admission of uncharged sexual misconduct under Rule 404(b) was improper.

The Delaware Supreme Court wrestled with Getz' case. Getz was not charged with a crime requiring proof of specific intent. Mens rea was established by the facts of partial intercourse. Getz raised no defense based on lack of intent, such as insanity. If Getz had a plan to molest his daughter, it was irrelevant because any criminal plan to seduce his daughter proved no more than mens rea, which was already established by the fact of the assault. The State did not have to prove Getz' guilty knowledge, and Getz did not claim he touched his daughter accidentally or by mistake. If mens rea was not at issue, Getz' motive for engaging in sexual conduct with his daughter was also

irrelevant. Getz' identity as the perpetrator of whatever happened was not an issue. The two earlier child molesting incidents were too remote to be part of the same criminal act which led to his arrest. The only logical purpose for proving these two uncharged instances of misconduct was to show the jury that Getz habitually satisfied his sexual desires by molesting his daughter.

The court disposed of the State's unsupported claim that it could offer this evidence as anticipatory impeachment. After examining the commentators' views on Rule 404(b) of the Uniform Rules of Evidence, the Court determined that a majority of jurisdictions considered Rule 404(b) an inclusionary rule admitting specific instances of uncharged misconduct to prove any relevant issue other than the accused's bad character.[18] Although the Court held that Rule 404(b) was not to be used as a laundry list of exceptions to the character evidence rule, the balance of its opinion examined the State's evidence of uncharged misconduct on its "fit" with the laundry list, and found it deficient.

The court found that other states admitted uncharged sexual misconduct in sex offender cases in two ways: by matching the offer of proof to the examples listed in Rule 404(b),[19] or by using a special exception known as the "lustful disposition or sexual propensity exception".[20]

However, the court incorrectly equated the "lustful disposition" exception with the "motive" example listed in Rule 404(b), although Getz' habitual sexual misconduct with his daughter was circumstantial proof his predisposition to commit the crime charged in the indictment.

The court correctly held that Getz' motive was irrelevant to the charge at hand. Readers were assured that Delaware did not recognize a "lustful disposition" exception to the character evidence rule.[21] The court also held that the two prior episodes of fondling and incest were irrelevant to prove a plan or design to commit sexual misconduct, because the uncharged misconduct would only prove Getz' plan to satisfy his sexual desire by using his daughter, which would only establish his intent, and intent was not an issue.[22] The Supreme Court reversed Charles Getz' conviction.

The court then set forth six specific standards to be followed by trial judges in evaluating uncharged misconduct evidence, and mandated a limiting instruction which the trial court would be required to use in future cases.[23] Getz' habitual criminal sexual behavior was the real issue. If a person who has engaged in sexual misconduct in the past is more likely to commit the same kind of prohibited act than someone who has never done so, given the same circumstances, then proof of similar sexual misconduct

tends to corroborate the victim's version of the crime charged in the indictment because it proved habitual criminal behavior or recidivism. Proof of recidivism is circumstantial proof of guilt.[24] However, the Delaware Supreme Court did not recognize this relationship, which would have been the "corroboration" version of the lustful disposition rule that it rejected.

B. INDIANA.

Until the fall of 1992, Indiana permitted proof that the defendant had committed similar sexual misconduct to show that the defendant had a "depraved sexual instinct"[25] that predisposed the defendant to commit the crime charged. Indiana admitted similar sexual misconduct evidence that occurred before[26] and after[27] the crime charged in the indictment to show depraved sexual instinct in statutory rape,[28] sodomy,[29] indecent liberties,[30] incest[31] and child molesting[32] prosecutions. The type of sexual misconduct did not have to match the incident in the indictment. For example, in *Grey v. State*,[33] the defendant gave a statement to the police confessing to a rape, an earlier child molesting incident with a small child, and an indecent exposure incident occurring several years before the date the defendant was arrested for rape. The court approved of admission of the child molesting and indecent exposure incidents in defendant's rape trial to

prove his lustful disposition.

Lapse of time between incidents of sexual misconduct did not exclude evidence of stale sexual misconduct. The court also allowed the state to prove the defendant molested three other children ten to twenty years before trial, because the court believed the prior incident showed the defendant's depraved sexual instinct at the time of the commission of the incident alleged in the indictment.[34] These situations show that sexual misconduct evidence admitted under the Indiana depraved sexual instinct exception to the character evidence rule was seldom restrained by analysis of the probative value of the uncharged sexual misconduct weighed against prejudice to the defendant.[35]

However, in two 1987 rape cases, the Indiana Supreme Court overturned convictions because the trial court erroneously admitted evidence of other rapes. In *Lehiy v. State*[36] and in *Reichard v. State*,[37] the court held that the State was not permitted to prove the defendant's depraved sexual instinct in rape cases because the elements of rape did not require proof of satisfaction of unnatural sexual desires. The court limited admission of uncharged sexual misconduct in rape cases to similar sexual activity proving plan, design, modus operandi and the like, because depraved sexual instinct is irrelevant to any issue in a

forcible rape case.[38]

In 1992, Indiana abolished the depraved sexual instinct exception to the character evidence rule. Donald Lannan of South Bend was indicted for molesting his fourteen year old female cousin, V.E. On the night of June 17, 1989, V.E. was staying at her grandmother's house. She shared a room with her female cousin, T.W. According to V.E., Lannan came into the bedroom shared by the two females and asked T.W. "to mess around with him". When T.W. refused, Lannan then removed V.E.'s pants and had conventional intercourse with her.[39]

V.E. testified to three additional incidents of sexual intercourse with Lannan after June 17.[40] V.E. also related that in the summer of 1988, she and T.W. had been riding with Lannan in his truck when Lannan stopped the truck and began fondling both of the females.[41] T.W. also testified against Lannan. After reciting the events of June 17, describing how Lannan had fondled her and tried to inveigle her into having sexual intercourse with him before attacking V.E., T.W. also described the fondling incident in the summer of 1988.[42] All four incidents of earlier and later misconduct with V.E. or T.W. were admitted to show Lannan's depraved sexual instincts. He was convicted and appealed on the ground that evidence of other child molesting incidents should have been excluded. The Indiana

Court of Appeals affirmed[43] and the Indiana Supreme granted his petition for transfer.[44]

The defendant asked the Indiana Supreme Court to do away with the depraved sexual instinct rule and to adopt Uniform or Federal Rule of Evidence 404(b) as the sole standard for admission of uncharged misconduct evidence in criminal prosecutions.[45]

The defendant argued that the depraved sexual instinct rule was based on two principles: the alleged higher recidivism rate of sex offenders and the need to bolster or corroborate the testimony of the complaining witness by showing other instances of similar conduct by the defendant.[46] The Supreme Court acknowledged that more than twenty jurisdictions followed some version of the lustful disposition rule, and others stretched the common scheme or plan exception to the character evidence rule in sex offender cases in order to admit uncharged misconduct.[47] It acknowledged that the rationale for allowing greater latitude in sex offender cases was in part based on the court's concern for the victim, not the accused, and represented an attempt to "level the playing field"in sex crime prosecutions to protect the victim and to ensure more convictions.[48] However, the court said these concerns were insufficient to justify the depraved sexual instinct exception to the character evidence rule.

The court agreed that studies of sex offender recidivism rates contradicted each other. It admitted that sex offenders may have a much higher recidivism rate than other offenders.[49] It agreed that juries might not believe child molesting victims' accusations against the defendant because the charges were incredible,[50] but stated that these policy reasons were insufficient to support a specific exception for uncharged misconduct evidence in sex crimes.[51] The court criticized the depraved sexual instinct rule because it allowed the prosecution to put in uncharged misconduct evidence without notice to the defendant, even when the uncharged misconduct occurred many years before the crime charged in the indictment. The court then held that it would adopt Rule 404(b) of the Federal Rules of Evidence as the standard for admitting uncharged misconduct evidence in Indiana.[52]

Turning to Rule 404(b), the court insisted that uncharged sexual misconduct evidence was admissible under Rule 404(b) when the evidence tended to prove a common scheme or plan to commit sex crimes,[53] or as part of the res gestae, such as the attempt to assault T.W.,[54] or to prove identity of the accused or absence of mistake or surprise.[55]

The court then held that the new rule applied to Lannan's case would have resulted in admission of T.W.'s

testimony about Lannan's improper advances on June 17, but would have excluded evidence of the 1988 incident. However, the case against Lannan was one of overwhelming guilt, and the admission of the 1988 episode was harmless error. It affirmed Lannan's conviction.[56]

The court apparently wanted to reassure the public that uncharged sexual misconduct would still be available to the prosecution when the prosecutor could concoct a theory of relevance that did not involve depraved sexual instincts. However, the court could not have rejected admission of the 1988 incident by a probative value versus prejudice analysis, since the 1988 incident did demonstrate the defendant was predisposed to sexual misconduct with V.E. and T.W.

C. RHODE ISLAND.

Rhode Island also admitted uncharged sexual misconduct to prove the defendant's lustful disposition under the lustful disposition exception to the character evidence rule.[57] In 1992, Rhode Island dealt with a challenge to its lustful disposition rule very similar to that raised in *Getz* and *Lannan*. James M. Tobin, Jr. of Providence was charged with second degree sexual assault allegedly committed against defendant's niece "Jill". In May, 1984, when "Jill" was 13, she spent a night in defendant's home while her parents were moving into a new house. The

defendant cornered her in the kitchen and placed his hand on her vagina and put her hand on his penis. "Jill" did not inform her parents nor did she notify any authorities about this incident. At trial, "Jill" testified to three earlier incidents and one later incident of uncharged sexual misconduct with the defendant. On Christmas Eve, 1981, the Tobin family was gathered at her grandmother's house in Johnston. The defendant cornered "Jill" on the staircase, pulled down her pants and placed his hand on her vagina and inserted his index finger in her. Earlier that day, her uncle fondled her while he held her on her knee. In 1976, when "Jill" was only six years old, the defendant and his son allegedly stripped her and the defendant forced his son to have conventional intercourse with her. "Jill" did not inform her parents nor did she notify any authorities about any of these incident when they occurred.

The later incident occurred on Christmas Day, 1985. The defendant and his son were visiting her family. The defendant and his son untied her dress and pinched her buttocks several times in the presence of other family members, who considered the actions "horseplay". All of these uncharged incidents were offered to prove defendant's lewd disposition towards "Jill" and were objected to at trial.[58]

Tobin was convicted on two counts of sexual assault,

and he appealed. His counsel argued that Rhode Island should follow Delaware's example, and reject the lustful disposition rule, because Rhode Island Rule of Evidence 404(b) makes no reference to any lustful disposition exception to the character evidence rule. The Rhode Island Supreme Court found, however, that there was much support for a specific exception for evidence of lustful disposition in sex offender cases in those states that had adopted the Uniform Rules. The lustful disposition exception existed outside the structure of Rule 404.[59]

Although the Rhode Island Supreme Court referred to Justice Walsh's well-crafted *Getz* opinion, it declined to follow Delaware's lead. Carefully setting out the procedural safeguards that it had applied in an earlier decision, the court declined to rule that the lustful disposition rule had been abolished by adoption of Rule 404.[60] Persons charged with sex offenses in Rhode island would have to expect that similar, deviant sexual misconduct would be openly admitted to show the defendant's lustful disposition, or propensity to commit sex offenses of that kind.

D. ANALYSIS.

None of the three decisions discussed above faced up to the moral and social implications of similar uncharged sexual misconduct evidence in sex offender cases. A

structural analysis of the character evidence rule and its policy objectives does not begin to meet the real issues raised by similar misconduct evidence.

For example, the three decisions assumed that prior criminal history was relevant to proof of a particular criminal act charged in the indictment, but did not articulate a reason why relevant evidence leading to conviction ought to be suppressed in sex offender prosecutions. The three defendants may have been habitual sex offenders. For example, Getz twice tried to commit rape on or to molest his daughter before the offense with which he was charged tended to prove that he was a pedophile.[61] Lannan's prior attempts to molest V.E. and T.W. before they reached puberty also tend to establish that Lannan was a pedophile. Tobin's sexual activities with "Jill" over a nine year period from age 6 to 13 indicates that Tobin had the same mental disorder. Police officers and social scientists may have taken action to arrest or to treat these offenders based on these uncharged episodes of pedophilia.

Pedophilia is no excuse for criminal behavior connected with the objects of the mental disorder. However, the diagnostic criteria for the disorder suggest that there is a medical and psychological basis for inferring that a person who has a history of repeated uncharged sexual misconduct

misconduct with children will commit the act again. Assuming that the prosecution can prove that the defendant in a sex offense involving children is a pedophiliac, it is rational to infer that the defendant committed the act charged in the indictment. It is also highly likely that a child's accusations that an adult committed pedophilia on the child is not made up. Such proof corroborates the accuser.

It is difficult to describe and to analyze the torturous history of the law of uncharged sexual misconduct evidence. Before the widespread adoption of the Uniform Rules of Evidence, the courts were unable to provide a convincing reason either to admit or to exclude evidence of similar uncharged misconduct in sex offender cases. Since the advent of the Uniform Rules of Evidence, the courts have no better rationale for admitting or excluding uncharged sexual misconduct evidence. Uniform Rule 404(a) was drafted to exclude proof of the defendant's character for the purpose of showing that the defendant acted in accordance with that character. Rule 404(a) provides for three specific exceptions to the general rule. Rule 404(b), which is a stand-alone rule, authorizes admission of uncharged misconduct to prove any issue other than the defendant's character. Rule 406, which authorizes proof of habit or routine practice does not define habit, nor does it detail

the conditions of admission of habitual behavior.

Recidivism, or habitual criminal conduct is the primary reason why similar uncharged misconduct evidence is relevant in sex offender prosecutions. The sex offender's propensity to commit similar sex crimes has been amply demonstrated by social science.

Proposed new Federal Rules of Evidence 413 through 415 are legislatively inspired attempts to deal with the specific problem of similar uncharged misconduct evidence in sex offender cases. These proposed rules are designed to establish a federal exception to the character evidence rule for similar uncharged misconduct in sex offender cases.[62] These legislative initiatives respond to public pressure to level the playing field for the victim of sex offenses, to increase the conviction rate for sex offenders, and to increase the honesty with which uncharged misconduct evidence is admitted in such prosecutions.[63] At the same time, these proposed amendments to the Federal Rules of Evidence will have far-reaching impact on state courts and on the nature of the criminal trial process in sex offenses.[64]

This article advocates admission of specific instances of similar criminal sexual misconduct to establish that the defendant is an habitual sex offender and guilty of the crime charged in the indictment. After review of pertinent

social scientific literature which supports the logical relevance of such evidence, and a short history of the common law roots of the character evidence and lustful disposition rules, this article will take up the current rationale for admitting uncharged sexual misconduct. Since the current rationale fails to explain why courts allow such evidence or exclude uncharged sexual misconduct, this article proposes admissions guidelines for proof of habitual criminal sexual activity. Although sex offender cases are the focus of this article, an amendment to the Uniform or Federal Rules of Evidence that would permit uncharged sexual misconduct evidence would affect the handling of uncharged misconduct evidence in other forms of criminal prosecution, now ostensibly covered by Rule 404. Habitual criminal misconduct is not confined to sex offenders.

III. THE LOGICAL RELEVANCE OF UNCHARGED MISCONDUCT EVIDENCE IN SEX OFFENDER CASES.

A. RECIDIVISM.

If a person's past criminal behavior is a strong predictor of future, similar criminal behavior, as some evidence commentators have conceded, then an accused's criminal history would be logically relevant to proof of guilt.[65] If an empirical relationship between prior and present criminal sexual misconduct can be established, then

the criminal history of a sex offender, limited to uncharged sexual misconduct evidence will be relevant in sex offender prosecutions.[66]

However, not all sex offenders have the same criminal histories. There is a difference between the typical criminal histories for rapists and that of pedophiles, hebrephiles and exhibitionists.[67] This difference is important to making inferences from prior criminal histories in sex offender cases.

1. Rapists.

Rape is a violent crime. In some American subcultures, violence is a socially approved way of getting what one wants, including control over other persons. One way men can control women is to assault them, to force them to submit to degrading activities, including sexual intimacy against their will.[68] This is the most plausible sociological explanation for a person's motivation to rape. It is drawn from the sex offender studies that include detailed self reported circumstances of each crime committed by the offender.[69]

Other explanations for male rape have been discredited. Criminal sexual psychopaths probably do not exist. Rapists are not usually seriously mentally ill people.[70] Rape is usually not victim precipitated by sexual frustration short of intercourse. Rape is a species of assault and battery

directed at humiliating and degrading its victims.

Rape is usually committed by a single male of the same race as the victim. Normally the assailant works alone, although multiple or gang rapes do occur. Typically, solo intraracial rape occurs between persons who live in the same neighborhood or in an adjacent neighborhood triangle.[71] In many instances the victim and the attacker are acquainted, though rarely intimate friends or former lovers.[72] The victim and the attacker both tend to be adolescents or young adults.[73] Solo rape victims are more likely to use force in resisting an assault than multiple rape victims and more likely to be sexually degraded or badly beaten by an attacker.[74] The most likely place where victim and attacker meet is usually the place where either the victim or the attacker lives.[75] The criminal history profile of those men who commit solo rapes on persons of their own race resemble those of other violent criminals.

Multiple intraracial rapes, involving two or more attackers and a single victim also tend to be neighborhood affairs in which the victim and her attackers are acquainted. The attack scene is the street. The victim seldom resists her attackers.[76]

Interracial rapes tend to be attacks by black men on older white victims in a neighborhood other than the home of

either victim or rapist.[77] The white victim is very unlikely to resist rape by force or flight.[78] The victim is more likely to be beaten or degraded sexually than the victim of an intraracial rape.[79]

A generation or two ago, some writers tried to explain rape as the act of a "sex maniac" who was motivated by unnatural sex drives, i.e., his overcharged libido, to seek out women and force sexual contact with them.[80] This was an oversimplified, incorrect application of Freud's doctrine of the libido. However, it influenced judicial thinking on the admission of uncharged sexual misconduct into relatively modern times.[81] Careful analysis of the criminal histories of rapists in recent years shows that rapists tend to commit assaults, robberies and murders more frequently than rapes.[82]

In the 1950's the recidivism rate for rapists was thought to be fairly low, based on a New Jersey statistical study which defined recidivism as conviction of the same type of crime within two years' time.[83] This over-simplified definition of recidivism ignored two forms of recidivism peculiar to sex offenders: arrests for the same type of criminal activity that did not lead to a conviction and prohibited conduct which was never reported to the police. It also ignored the relationship between rape, assault and battery, mayhem, robbery and murder. The two

recidivism. More recent long term studies of convicted sex offenders demonstrated that rapists were fairly likely to be rearrested for other violent crimes, and infrequently for another rape.[84] Rapists have a 50% recidivism for all types of violent crimes, which is about the standard rate for violent criminals as a whole. Their recidivism rate is much closer to the average recidivism rate than was once supposed.[85] A rapist with at least one prior rape conviction is much more likely to be a recidivist than a first time offender.[86] Rapists confined to penitentiaries and to sex offender treatment centers who participated in self reported recidivism studies reported five times as many uncharged, unreported cases of rape or attempted rape than their official arrest records confirmed.[87] This fact suggests that the low visibility of sex offenders in general and rapists in particular obscures a high recidivism rate for rapists.[88]

The profile data on rapists and the self reported data from sex offenders does not prove that rapists are compulsively driven to rape to satisfy their lust. It is not an indication of deep seated psychological pathology. Those data show the typical rapist to be a vicious man who uses women in a horrible exaggeration of the stereotype of the tough male, to prove his physical prowess and control over others. A rapist's criminal history, like that of any

other violent criminal, may be relevant to circumstantial proof of guilt in a rape prosecution, but relevance alone does not solve the problem of admission of a rapist's criminal history in a rape prosecution.[89]

The defendants in Getz, Lannan and Tobin did not have a rapist's profile. Getz had no prior convictions for violent crime, although he did have a history of violent behavior towards his wives.[90] Lannan also had no history of violent behavior with his two pre-teen cousins. Tobin's nine year pursuit of "Jill" was essentially non-violent.

2. Pedophiles and Incestuous Persons.

a. Pedophiles.

Pedophiles come in two types: heterosexual and homosexual. Heterosexual pedophilia is much more common than homosexual pedophilia. While pedophiliacs are generally speaking more likely to be seriously mentally ill than rapists, few pedophiliacs are anything other than mildly disturbed men.[91] Pedophiliacs have about as high a rearrest rate as exhibitionists, and thus close to the national average for all criminal recidivism.[92] Child molesters are likely to be re arrested for child molesting again and again.[93] Child molesters come in two distinct types: "bad boys" and "dirty old men". The "bad boy" is an adolescent or a man in his early 20's who is unable to handle his own sexual changes and finds sexual gratification

handle his own sexual changes and finds sexual gratification in fondling little girls.[94] The "dirty old man" is likely to be between 30 and 40 years of age. He has a bad marriage and generally has a hard time relating to women above the age of puberty.[95] Consequently, he forms attachments to small children and fondles their genitals or breasts.[96] This type of pedophilia is often associated with game-playing strategies in which the attacker's regression to pre adolescent behavior is marked.[97]

The pedophiles who participated in the inmate population studies of recidivism reported many more pedophiliac acts than their arrest and conviction records showed.[98] The recidivism rate for these individuals may be quite high, and is certainly much higher than was originally thought.[99] Pedophiliacs with prior child molesting convictions are more likely to repeat the act than a first time offender.[100]

Turning to the defendants in our trilogy, all three men had a prior history of pedophilia. Getz' background, if the two prior instances of pedophilia were to be believed, indicated that he may have been a heterosexual pedophile.[101] Lannan, according to V.E.'s and T.W.'s testimony, had attempted to fondle or to have sexual intercourse with both young females repeatedly in 1988 and 1989.[102] Tobin committed at least five separate pedophiliac

acts on "Jill" from 1976 until Christmas, 1985.[103] If these three men were habitual heterosexual pedophiles, then the probability of their commission of future pedophiliac acts on pre-pubescent children was about 50%.

b. Incestuous Men.

An adult who satisfies his sexual urges with females who have passed puberty and not yet reached the age of consent may be a hebrephile (lover of teen agers). Hebrephiles may look to family members for satisfaction, or to other young women. All forms of hebrephiliac sexual activity were once considered statutory rape, but one of the results of the sexual revolution of the 1960's was the gradual disappearance of statutory rape from the list of sex offenses. New comprehensive sexual assault statutes adopted in many jurisdictions over the past twenty years use a classification scheme for prohibited sexual conduct between adults and adolescents, usually some form of sexual assault in a lesser degree than rape.[104] The number of prosecutions of teen aged boys for voluntary sexual activity with teen aged girls under 16 is negligible. Consequently, older recidivism studies on statutory rapists cannot be followed in modern literature. The pioneer New Jersey study done in the 1950's indicated that statutory rapists were unlikely to repeat their offense within two years of conviction.[105]

However, in recent years, incest and child sexual abuse

could theoretically occur between two adults, the type of incest which the courts see at this time is hebrephiliac incest. The victim is usually a teen aged daughter or step daughter. "Child sexual abuse" includes pedophilia, forcible rape of children of both sexes and hebrephilia. The new comprehensive child sexual abuse statutes are modeled on the guidelines put forth by the American Bar Association's Resource Center for Child Advocacy and Protection.[106] These statutes prescribe a detailed, structured series of prohibited acts and corresponding punishments for sexual intercourse between persons 18 or over and adolescents under 16, as well as punishment for sexual activity with anyone who is related within the prohibited degree of consanguinity.[107]

Child sexual abuse and incest have been featured in made for television motion pictures and in Sunday supplement literature since the early 1980's.[108] These accounts describe male sexual intercourse with children, stepchildren, sisters, nieces or cousins, as well as fondling and touching incidents characteristic of pedophilia. Clinical reports on child sexual abusers recount a large number of incidents of intercourse with teen aged boys and girls which went unreported and unpunished, suggesting that child abusers of this type may have a criminal history and recidivism rate closer to that of pedophiles than to rapists.[109]

Men who have voluntary sexual relationships with adolescents generally use their children, stepchildren, younger siblings or girl friend's children as victims. The psychological data on these individuals is similar to that of pedophiles.[110] They never grew up. The incestuous hebrephiliac male is a man in mid life with a poor sexual relationship with his adult sexual partner.[111] He may be a blood relative of the victim, a step parent or a live in boy friend.[112]. The abuser who makes use of his position as a clergyman, camp counselor or school teacher to obtain access to adolescents is a statistical rarity, although such cases receive much publicity.

Getz, Lannan and Tobin committed pedophiliac acts against family members within the second degree of consanguinity. Two committed or attempted to commit sexual intercourse with a close relative. Getz' daughter fit the description of the average incest victim. Getz allegedly committed a single act of hebrephiliac incest. He was charged with first degree rape, which forbade consensual sexual activity with any minor.[113] The record does not show that Getz' daughter resisted or refused her father's advances.[114] V.E. related three instances of consensual sexual intercourse with her cousin, including one incident occurring in her grandmother's house when Lannan and his wife were living with her grandparents.[115] Although Tobin was "Jill's" uncle, he never

attempted to have sexual intercourse with "Jill". His sexual misconduct was limited to frottage[116] and voyeurism.[117]

4. Exhibitionists.

According to the record, none of the three defendants in this trilogy had a history of exhibitionism.[118] Exhibitionists have a higher recidivism rate than any other sexual offenders.[119] Exhibitionists tend to be white males in mid-life, who have had considerable trouble in establishing conventional sexual relationships with women.[120] Most are unmarried or divorced.[121] Exhibitionists tend to be rearrested for exhibitionism if they have ever been arrested in the past.[122]

B. SIMILAR SEXUAL MISCONDUCT IS RELEVANT TO PROOF OF A SEX OFFENDER'S GUILT.

Summarizing the preceding discussion, enough empirical evidence on sex offenders' recidivism rates has been compiled to show that exhibitionists, pedophiles and adolescent child abusers have a 50% recidivism rate for sex offenses, which is much higher than earlier studies indicated. A pedophiliac's probability of future criminal sexual conduct can be predicted from known prior criminal sexual conduct. Therefore, a sex offender's similar sexual misconduct before or after the incident alleged in the indictment is circumstantial proof of

charged misconduct. Therefore, the trier of fact can draw a logical inference that the defendant was an habitual sex offender if the defendant had committed a sufficient number of similar sexual misconduct before.

However, a rapist's probability of future rape is less than 50%, but at or near 50% for all violent crimes, making a rapist's criminal history the basis for predicting future violent conduct not confined to sex offenses. The number of violent criminal acts committed by the defendant in a rape case is relevant to proof of guilt because it proves habitual use of violence. Although a rapist has about a 1 in 4 chance of rearrest for rape, he has a 1 in 2 chance of rearrest for violent crimes in general.[123] Since prior rapes or attempted rapes would prove the rapist's predisposition to violent conduct to get his way, then proof of a history of violent criminal activity would be circumstantially relevant to proof of guilt in a particular case.

However, the national recidivism rate for rearrest within three years for all types of criminals hovers around 65%.[124] Recidivism rates for violent criminals runs around 50%.[125] Therefore, the statistical probabilities of recidivism for burglars, check forgers and credit card thieves is higher than that of rapists, child molesters and exhibitionists. Rapists have a 35% reported recidivism rate. The reported recidivism rates for exhibitionists, pedophiles and adolescent child

abusers is about 30%, but the literature suggests that these kinds of criminal activity are very likely not to be reported and result in an arrest. It is highly likely that the recidivism rate for exhibitionists, pedophilies and adolescent child abusers, defined in terms of commission of similar misconduct within five years of an arrest for a sexual offense is at or above the national average for all violent criminals.

Turning to our three bellwether cases, the *Getz* court had these questions in mind when it dealt with Getz' contention that he was unfairly convicted on the basis of uncharged criminal misconduct. The *Lannan* court conceded the logical relevance of adverse character evidence on the issue of guilt or innocence. The *Lannan* court was less interested in the undue prejudice aroused by admission of similar sexual misbehavior than it was in restructuring the rules guiding admission of character evidence to conform to Rule 404(b).[126] The *Tobin* court, on the other hand, wanted to continue a specific, categorical exception to the character evidence rule for similar criminal misconduct in sex offender prosecutions. It was interested in harmonizing a pre-rules line of authority with the structural limitations of Rule 404(b).[127]

If prior criminal history is relevant to proof of habitual sexual misconduct, then the trier of fact should be able to deduce from proof of habitual behavior that the defendant behaved in accordance with his habits in the case at bar. This

judgment would be derived from a probabilistic chain of logic, which would go to proof of guilt from all the evidence beyond a reasonable doubt. If this hypothesis is correct, then why do the courts erect such formidable barriers to the admission of criminal character evidence as part of the state's case in chief? If admission of criminal character evidence is so poisonous that it cannot be used to establish a prima facie case of guilt, then why do the courts let down the bars in many specific instances, admitting incidents of uncharged sexual misconduct in sex offender cases, on the flimsiest pretexts?

This inquiry must shift from social science and extended case analysis to a review of the origin and development of the rules surrounding admission of uncharged sexual misconduct in sex offender cases.

III. THE DEVELOPMENT OF THE USE OF UNCHARGED SEXUAL MISCONDUCT EVIDENCE IN SEX OFFENDER CASES.

A. THE CHARACTER EVIDENCE RULE.

Since the days of the Glorious Revolution of 1688, English and American courts have refused to permit the prosecution to offer evidence of the defendant's bad moral character to prove the defendant committed the crime charged in the indictment.[128] If the defendant makes an issue of his or her good moral character, the prosecution may then rebut the

defendant's evidence of good moral character with evidence of the defendant's bad moral character.[129] The defendant may not prove his or her good character by proving specific good acts. The defendant may, however, prove good moral character by the defendant's own opinion testimony, or by calling reputational character witnesses. These witnesses are limited to testifying that they are familiar with the defendant's reputation in the community in which the defendant resides, and that the defendant's reputation for moral character is good.[130] The prosecution is then allowed to cross examine the defense character witness on the basis for that testimony. The prosecution may ask the character witness if the witness ever heard of any uncharged misconduct of the defendant, since it is relevant to the basis of the character witness' opinion.[131] The prosecution is also free to call its own reputational character witnesses who will testify that the defendant's reputation for moral character is bad.[132]

If the defendant chooses to testify, the defendant puts his or her credibility at issue, and the prosecution may cross examine the defendant about prior convictions for major felonies and crimes of deception,[133] or upon prior bad actions which did not result in conviction if the prior bad act reflects adversely on the defendant's credibility.[134]

Ordinarily, the prosecution cannot prove the defendant's prior similar uncharged misconduct in its case in chief or in

rebuttal. To do so would violate the rule against proof of the defendant's bad moral character. When the defendant makes an issue of his or her moral character the prosecution can prove his or her bad moral character only through reputational witnesses.[135] However, there are exceptions to the bar against specific similar acts evidence. If the defendant testifies in his or her own behalf, the prosecution may cross examine the defendant on relevant specific instances of uncharged misconduct showing the defendant's lack of truthfulness.[136] The defendant may be cross examined about prior criminal convictions, or independent proof of the defendant's criminal convictions can be submitted by the prosecution to show lack of truthfulness.[137] If the prosecution must prove some intermediate issue such as motive, intent, knowledge, plan or design, the identity of the accused or other related sub issues, the courts allow the prosecution to use specific instances of the defendant's uncharged misconduct to do so, if the probative value of these instances of uncharged misconduct is not substantially outweighed by the inevitable prejudice to the defendant arising from proving the defendant's bad moral character to the jury.[138] The prosecution could also prove the defendant's habitual criminal activity by submitting proof of sufficient similar instances of misconduct to establish a criminal habit.[139] The ritual for admission of uncharged criminal misconduct set out above has

been codified by Rules 404, 405, 406, 608 and 609 of the 1973 edition of the Uniform Rules of Evidence.

The courts of the thirty seven jurisdictions that have adopted the Uniform Rules of Evidence[140] liberally interpret Uniform Rules 404 and 405 to permit admission of prior and later uncharged sexual misconduct with the same victim or other victims against an alleged sex offender. California and New Jersey, which follow similar evidence codes adopted before the 1973 edition of the Uniform Rules of Evidence, also permit admission of uncharged sexual misconduct.[141] The remaining twenty-two states which follow a common law version of the rules expounded in Rules 404 and 405 are likewise willing to permit the prosecution to prove uncharged sexual misconduct against a sex offender.[142] A plurality of states also use a special exception to the character evidence rule just for sex offenders called the "lustful disposition" rule.[143] The courts treat a sex offender's propensity to commit sex crimes as a significant issue in a sex crime case.

There are buried constitutional problems caused by unannounced evidence of similar sexual misconduct. The major commentators calmly accept the use of uncharged sex offenses against persons charged with rape, statutory rape, carnal knowledge, sodomy and indecent liberties as appropriate.[144] Although the notice clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment may be violated

every time the prosecution raises an unannounced case of uncharged misconduct, there are no shock waves of protest by constitutional scholars.[145]

A new kind of criminal trial process is evolving through manipulation of the principles of evidence. The traditional model for Anglo-American criminal trials was accusative. The prosecution was obliged to prove a specific charge under the accusative model, and the judge and jury were equally obliged to acquit the defendant if the prosecution failed to prove the defendant committed a forbidden act on the day charged in the indictment. If the prosecution proved the defendant committed a similar act on another day, the defendant was acquitted because of a fatal variance between indictment and proof. Under the new dispensation, the prosecution is still required to indict the defendant and elect a day and time for commission of the prohibited act, but the prosecution may prove that the defendant is predisposed to commit that type of crime by proving the defendant did similar bad acts on another occasion. Providing the demands of the Bill of Rights for due notice of pending charges and a fair trial can be satisfied, the new dispensation in criminal justice may be accommodated by the Constitution. In the future, criminal defense counsel will have to come to court prepared to defend their client against accusations of similar, uncharged criminal activity, as well as the charges stated in the indictment.

The men who wrote the Constitution and the Bill of Rights feared royal tyranny more than internal criminal aggression. The memories of royal abuse of judicial process through the Court of Star Chamber and the Courts of Vice Admiralty caused them to limit the growth of inquisitorial criminal justice by a constitutional strait jacket. These courts, which followed continental models of criminal justice administration, were very effective in sending criminals to the gibbet.

In the late 18th century, the thirteen original colonies did not have serious problems with criminal aggression. The colonists were troubled by royal tyranny, enforced by royal judges who held deep seated class and religious prejudices against the majority of the colonists. Two hundred years later, the United States has the highest violent crime rate of any western democracy.[146] Criminal aggression against innocent victims is one of the top ten social problems which agitate the public.[147] One in four American family units were crime victims during 1981.[148] Half of the American public is afraid to walk alone at night in their own neighborhood.[149] Americans are more likely to be victims of crime than to be injured in an auto accident.[150] Criminal aggression control absorbs a disproportionate amount of governmental time and money. The prison system is filled with an inordinate amount of repeat offenders.[151] The state is unable to protect citizens from criminal aggression.

Uncontrollable criminal aggression is a formidable threat to the constitutional liberties of all U.S. citizens. The Bill of Rights was designed to restrain executive and judicial tyranny. It made no provision to restrain criminal tyranny. The U.S. Constitution relies on the states to exercise their inherent authority to provide for the health, welfare and safety of their citizens through criminal law and procedure, vigorous police work and efficient courts. However, the states cannot provide effective police protection for their citizens. As the Indiana Supreme Court pointed out in *Lannan*, there is a universal desire to give the victim of criminal violence a greater opportunity to win in court. This desire is sustained by the need to provide freedom from criminal aggression as a condition of a stable social order. Without this freedom, the liberties set forth in the Bill of Rights are so much paper.

At the same time, the courts have to be exceptionally careful not to turn the desire to even the odds between victim and defendant into a crusade against social deviants. Americans have a tendency to launch crusades against undesirable social activity. The outcry against sex offenders from television and newspaper commentators the past decade has elements of a crusade against rapists and child molesters. The opening salvo of an American crusade is usually widespread publicity pointing out the impending end of the world if a particular vice is not immediately eradicated. The next round

consists of legislation making that kind of activity criminal. The third round consists of aggressive prosecution of offenders before tribunals which alter or suspend basic constitutional guaranties of due process in order to increase the number of convictions.

Ultimately, the public tires of the crusade and goes on to a new diversion, leaving the precedential ghost of the crusade behind in "exceptions" to the rules of evidence.

During a crusade, the historical accusatorial process of proof in criminal cases is unconsciously suspended so that inquisitorial methods of proof can be used. Usually, the first rule of evidence to be suspended is the limit on proof of the defendant's bad moral character.[152] Consequently, the courts have a duty to protect the liberty interests enumerated in the Bill of Rights against encroachment or destruction brought on by a commendable effort to stamp out a social abuse.

This double effect raises some serious questions. If inquisitorial justice is deemed expedient during a crusade against crime, why is inquisitorial justice not justified at all times? The Bill of Rights does not legislate an accusative system of criminal justice. If one component of inquisitorial justice is proof of the defendant's habitual criminal activity, then the trier of fact should receive evidence of the defendant's similar habitual criminal conduct, which is circumstantial proof of the crime charged in the

indictment. If the trier of fact does not evaluate the defendant's criminal habit, it may acquit the defendant unjustly, and turn an habitual offender loose to prey on the public. This result would impair each citizen's right to be free from criminal aggression.

In the past decade, a public outcry against rape and child molesting has produced new legislation against sex offenders, and aggressive prosecution of rapists and child molesters. The judicial treatment of evidence brought up in sex crime prosecutions shows a consistent pattern.[153] The defendant's motions in limine to exclude evidence of prior criminal convictions to permit the defendant to testify without cross examination on prior similar convictions are denied. The court relaxes the bar to proof of the defendant's bad moral character by specific bad acts to permit the prosecution to bring up the defendant's similar uncharged acts of misconduct in its case in chief. Few convictions are overturned on appeal because the court allowed the prosecution too much leeway in proving the defendant's uncharged misconduct.[154] Over the years, sex offenders have been the objects of numerous crusades of this type.

IV. DEVELOPMENT OF USE OF UNCHARGED MISCONDUCT AGAINST SEX OFFENDERS.

A. COMMON LAW.

The common law defined rape,[155] bigamy[156] and sodomy[157] as felonies without benefit of clergy. Adultery, fornication, incest and other sexual misconduct were matters of confession and subject to the ecclesiastical courts, not the secular courts.[158] The secular courts also had jurisdiction to try cases of abduction of an heiress[159] and after 1574, of carnal knowledge of a female under the age of ten.[160]

The English were skeptical about accusations of rape or carnal knowledge, preferring to protect the defendant from an unjust conviction for a crime which merited the death penalty, and to push some or all of the blame for the assault off on the victim.[161] The common law required that a rape victim prove she yielded to her attacker under force, either through proof of actual violence worked upon her, or through proof of duress.[162] English law allowed the defendant to prove the victim's consent to sexual intercourse as a complete defense to the crime.[163] Sir Matthew Hale described rape as an "accusation easily made, hard to prove and difficult to defend."[164] The victim's failure to make an immediate outcry and search for her attacker weighed against her and in favor of acquittal.[165]

The Continental view, however, was much different. The Roman law forbade ravishment of any woman of any age.[166] The male involved in sexual activity with a female was presumed guilty of ravishment, and punished accordingly, unless he

cleared himself. The woman's consent was immaterial. Thus, ravishment was a status offense on the Continent. Men were simply not allowed to have sexual relations with women outside of marriage, unless the women were concubines or prostitutes.[167]

The English courts placed great emphasis on corroboration. Corroboration could be had by proof of an immediate hue and cry after the sex offender,[168] by testimony of women who had examined the victim, but not by proof of other sexual assaults pressed by the defendant on the victim.

In sodomy prosecutions, the English abhorrence of buggery led to guarded discussions of the elements of proof of sodomy. Sir William Blackstone, following Sir Matthew Hale, warned the reader against accepting uncorroborated accusations of sodomy.[169]

The English prosecuted very few men for rape, carnal knowledge and sodomy. Few of these men were convicted, and even fewer still were put to death for their sexual crimes.[170] Even though convicted rapists and sodomizers were not allowed benefit of clergy, the King pardoned a great number of offenders or commuted their sentences to transportation.[171] The English attitude toward rape, carnal knowledge and sodomy simply reflected the prejudices of a male dominated society based on class structure. Eighteenth century English literature scoffed at the criminality attached to all

three crimes. Authors such as Fielding presented a favorable portrait of a lusty gentleman who forced himself upon women, particularly of a lower social class.[172] Defoe[173] and Smollett[174] portrayed women who were involved in sexual affairs with men as provocative instigators who invited men to engage in aggressive sexual romps with them.[175]

English laws and English attitudes toward male sex offenders crossed the Atlantic and became part of American colonial law. The colonies dutifully outlawed rape, carnal knowledge and sodomy.[176] In addition, because the English ecclesiastical courts had no jurisdiction in the colonies, some of the colonies passed statutes making crimes out of incest, fornication or adultery.[177] The courts of oyer and terminer and general gaol delivery had jurisdiction over all these sex offenses in most of the colonies.[178] When weighty matters of criminal law and procedure came before these courts, the justices broke out their *Blackstone's Commentaries* or Sir Matthew Hale's *Pleas of the Crown* for advice.

However, the combination of ecclesiastical and common law in the colonies imported an element of criminal procedure and evidence into colonial criminal law not present in the mother country. Under ecclesiastical law, adultery was a status offense which could consist of either an isolated coupling or a continuous liaison, e.g., living in a state of adultery.[179] When the ecclesiastical courts punished men and women for

adultery, it was relevant to prove that they had lived together for some time, and specific instances of sexual activity between the couple were admissible to show the continuing relationship.[180] The same dual status applied to incest.[181] As a result, when the American courts began to punish people for criminal adultery they looked back to ecclesiastical precedent, and allowed proof of uncharged sexual activity between the parties to show their lustful disposition toward one another, and thus prove their sexual misconduct.[182] The Treason Act of 1695 never applied to canon law offenses tried before ecclesiastical courts.

Early American incest prosecutions permitted proof of sexual misconduct between the parties to prove an ongoing relationship between them.[183] By the mid nineteenth century, the rules of evidence about proof of incest were so well settled that a Michigan court could hardly believe that a defendant in an incest case would appeal his conviction based on the admission of several acts of incest between himself and his victim not charged in the indictment.[184]

By the mid nineteenth century, societal attitudes toward women and their sexual role had moved a light year from that of the eighteenth century. Women had been placed upon a literary pedestal where they would remain until the twentieth century. Instead of dwelling on the literary picture of women as seducers and pleasure givers, the nineteenth century wallowed

in romanticism, which alternatively depicted women as weak and spineless victims of men and as creatures of unapproachable virtue, refinement and sensitivity.[185] Sir Matthew Hale's admonition on rape was lost in the popular wave of literary depiction of Victorian women being ravished by villains who deserved the worst sort of punishment. Scientific criminology was also discovered during the mid nineteenth century, generating theories about criminal character and criminal disposition which marvelously suited prosecutors in bringing sex offenders to the bar of justice.[186]

C. THE LUSTFUL DISPOSITION RULE.

At the same time as romanticism changed the literary and popular view of women, women were trying to change their legal and social status. The mid-nineteenth century feminist movement initiated widespread legislative changes in women's legal status. The feminists made allies of the temperance societies in a joint demand for legislation protecting young girls from male sexual advances which they were powerless to resist. In so doing, they reflected the cultural view of women as virtuous maidens to be protected from the grasping hands of sex fiends. Common law carnal knowledge was replaced by the new status offense of statutory rape, which was defined as engaging in sexual intercourse with any female aged 16 or under, without regard to consent.[187]

Statutory rapists were aggressively prosecuted. The

courts began to expand admission of other sexual misconduct in sex offender prosecutions from the old ecclesiastical offenses of adultery and incest to statutory rape[188] and carnal knowledge.[189] The courts also created a special exception to the character evidence rule just for sex offenders called the "lustful disposition rule".[190]

According to the lustful disposition rule, the prosecution in its case in chief could prove the defendant's lustful disposition to commit sex crimes by proof of prior or later instances of sexual misconduct with the same victim or a different victim.[191] The prosecution could do so, whether or not the defendant made an issue of his or her good moral character. The jury was free to draw an inference from proof of the defendant's other sexual misconduct, that the defendant committed the act of sexual misconduct stated in the indictment.[192] The court's own notion of relevance and fair play was the only outside limitation on the use of uncharged sexual misconduct. These specific instances of sexual misconduct did not have to be included in the indictment, and the defendant was entitled to no advance warning that he would be prosecuted by innuendo on those other uncharged acts.[193] The lustful disposition exception to the character evidence rule grew up alongside the uncharged misconduct exception to the character evidence rule. At times the courts used both rationales to admit or to exclude uncharged sexual misconduct

evidence. The confusion which led the *Getz* court to equate "lustful disposition" with "motive" is understandable. In order to untangle the knots, the use of uncharged sexual misconduct evidence in statutory rape, rape, incest, adultery and sodomy cases must be separately studied and analyzed.

B. UNCHARGED SEXUAL MISCONDUCT EVIDENCE FROM THE STANDPOINT OF PARTICULAR SEX OFFENSES.

1. Statutory Rape.

Statutory rape prosecutions in the last half of the nineteenth century resulted in two lines of cases. The first line favored strict compliance with the character evidence rule. Unless the defendant denied committing the criminal sexual act and offered good moral character evidence, the prosecution could not show that the defendant had sexual relations with the victim at other times.[194] These cases held that an accused is not to be tried on any offense other than the one stated in the indictment. Proof of other criminal sexual activity with the victim would violate that rule, and was therefore inadmissible.[195] Consequently, the prosecution could not use uncharged sexual misconduct evidence against the defendant. Alabama, Idaho and Illinois adopted this view before World War I.[196] California, the District of Columbia and New Jersey courts issued conflicting decisions which in part restricted and in part favored the use of uncharged misconduct evidence in statutory rape cases.[197]

However, the majority of jurisdictions followed ecclesiastical precedent and admitted other sexual activity between the victim and the defendant in statutory rape cases to prove the defendant's guilt by showing his predisposition to commit sex offenses.[198] The courts accomplished this result in several ways. A number of courts used the "lustful disposition" exception to the character evidence rule. These courts held that sex offenders were more likely than other criminals to repeat their sex crimes, because of their peculiar criminal personality.[199] Consequently, a criminal history of deviant sexual activities was a much stronger predictor of criminal behavior of the same type than in other kinds of crimes.[200] Therefore, the courts held that the prosecution could offer evidence of prior sexual misconduct between the defendant and the victim in its case in chief because it was highly relevant to proof of later misconduct at the time of the offense charged in the indictment.[201] The courts said that prior sexual activity between defendant and victim was relevant to show a "lustful disposition" to commit sex crimes and therefore admissible.[202]

There were variations on this theme. One jurisdiction, fearing the consequences of such a blatant acknowledgement of trial by propensity, allowed the prosecution to admit uncharged sexual misconduct to prove "a purpose to commit the offense charged."[203] Several jurisdictions decided that uncharged

sexual misconduct could be admitted to "corroborate" the victim's story.[204] To corroborate an event is to confirm the event. The defendant's uncharged sexual misconduct confirmed the defendant's guilt precisely because it proved the defendant's predisposition to satisfy his sexual desires with the victim. The courts which accepted corroboration as sufficient reason for admitting uncharged sexual misconduct evidently viewed the victim's complaint of a second sexual encounter with the defendant as corroboration through proof of the defendant's lust for the victim.[205]

By the roaring 20's, twenty-four American jurisdictions admitted evidence of prior sexual misconduct between defendant and victim in statutory rape cases to prove the defendant's lustful disposition.[206] Some states, such as Texas, were unable to make up their minds whether to adopt a lustful disposition exception to the character evidence rule. *Battles v. State*[207] ratified proof of uncharged sexual misconduct between defendant and victim to show the defendant's lustful disposition, overruling a dozen earlier cases which excluded such evidence.[208] Fourteen years later, the same court excluded evidence of prior sexual misconduct between victim and defendant without reference to *Battles*, on the ground that such evidence merely went to prove the defendant's propensity to satisfy his sexual urge with the victim, an impermissible ground for admission of such evidence.[209] Idaho and New

Jersey also had decisions going both ways on admission of uncharged sexual misconduct to prove the defendant's lustful disposition.[210]

New York's early struggle with the lustful disposition rule reflects the general development of this exception to the character evidence rule. Until the end of the nineteenth century, admission of prior sexual misconduct between victim and defendant in second degree rape (statutory rape) cases was not raised on appeal.[211] In 1887, the Court of Appeals determined that evidence of a prior attempted sexual assault upon the victim by the defendant was admissible to prove the defendant had the guilty intent to commit rape upon the victim at a later date.[212] In 1892, The Appellate Division, First Department, affirmed the conviction of a step father who had ravished his 15 year old epileptic step daughter for two years.[213] The court held that second degree rape involved the adulterous disposition of both parties, making their disposition to have sexual relations material to proof of the defendant's guilt.[214] The court found that the two year pattern of sexual relationship between the defendant and his step daughter corroborated her story about the offense for which the defendant was convicted.[215]

However, from 1890 to 1914, the courts rejected proof of later sexual relations between victim and defendant in second degree rape cases.[216] The Court of Appeals overruled these

cases in *People v. Thompson*.[217] Although the court had held later sexual relations inadmissible in *People v. Flaherty*[218], it dismissed *Flaherty* as a case of failure to elect the proper charge among several possible incidents. The Court of Appeals squarely held that both prior and subsequent sexual acts between the parties in both first and second degree rape were admissible in the trial of a single instance of rape to corroborate the victim's testimony and to show the defendant's lewd disposition.[219]

In 1926, an Asian named Hop Sing was charged with second degree rape of a 13 year old. The 13 year old went to Hop's laundry with a 12½ year old girl friend. Hop Sing also had sexual intercourse with the other child that day. At trial, evidence of both sexual encounters was admitted. The jury returned a conviction and Hop Sing appealed, claiming that any sexual activity with another female was irrelevant to the crime charged.[220] The Appellate Division disagreed and affirmed on the ground that the second sexual encounter was so interwoven with the first offense, for which he stood trial, that the two stories could not be told separately.[221]

By the 1930's New York allowed proof of prior and subsequent sexual activities between the defendant and his victim, or between the defendant and another victim, closely related in time to the time of the offense charged.

At the same time, New York was developing the general

theory of the uncharged misconduct exception to the character evidence rule. In *People v. Molineux*,[222] the Court of Appeals laid out the generally accepted structure for allowing the prosecution to prove specific instances of uncharged misconduct in its case in chief, despite the character evidence rule. If there was a substantial issue in the case as to the defendant's criminal intent, guilty knowledge, motive, criminal plan or design or identity of the perpetrator, or if the defendant's criminal activity charged in the indictment was so bound up with uncharged criminal misconduct occurring at the same time, the prosecution could offer evidence of specific instances of uncharged criminal misconduct to prove the intermediate issue, unless the probative value was counterbalanced by excessive prejudice to the defendant.[223] This rule later became the core of Rule 55 of the 1952 edition and Rule 404 of the 1973 edition of the Uniform Rules of Evidence.

Consequently, uncharged sexual misconduct evidence could be admitted under the *Molineux* rule when it was relevant to proving intent, knowledge, identity of the perpetrator or a criminal plan or design. The courts employed the *Molineux* rule to admit sexual misconduct evidence at the same time they used the lustful disposition rule for the same purpose, leading to confusion among the courts on the appropriate rationale for admitting this type of evidence.[224]

When a state court used the *Molineux* doctrine to review

admission of uncharged sexual misconduct evidence, it restricted admission of other sexual offense evidence in statutory rape cases to prior instances of forbidden sexual activity between the victim and defendant.[225] Sexual misconduct with the victim committed after the act charged in the indictment was usually,[226] but not always[227] excluded. The defendant's similar sexual activity with other victims was usually but not always excluded.[228] Intent, plan or design or identity of the accused were the *Molineux* categories most frequently used to justify admission of uncharged sexual misconduct.[229]

On the other hand, when a state court used the lustful disposition rule to review admission of uncharged sexual misconduct at trial, it tended to sustain admission of any prior[230] or later[231] sexual activity between victim and defendant. The courts rationalized this free use of uncharged sexual misconduct as "tending to shed light upon the relationship between the defendant and the complaining witness",[232] or to "corroborate the complaining witness' testimony".[233]

Since the courts frequently used both rationales to justify decisions sustaining admission of uncharged sexual misconduct in statutory rape cases, there was no consensus on the basis for admitting or excluding uncharged sexual misconduct evidence. No one could expect the cases to produce

a consistent guideline for admission or exclusion of uncharged sexual misconduct evidence.

The courts were also split on admission of other kinds of sexual activities between victim and defendant. A number of courts admitted any prior sexually oriented activities between victim and defendant, including fondling and caressing[234] and sodomy.[235] A few courts admitted evidence showing the defendant aided and abetted a third party's defiling of the same victim.[236] On the other hand, some courts excluded dissimilar sexual contact between victim and defendant on grounds of lack of relevance.[237]

However, the great division between the states had to do with admission of uncharged sexual misconduct between the defendant and other victims below the age of consent. A minority of reported decisions favored admission of any prior and later uncharged sexual misconduct with other victims, if not too remote in time, either to demonstrate the defendant's lustful disposition,[238] or to show a criminal plan or design.[239] In a few cases, such as *People v. Hop Sing*,[240] the court thought that the tale of a second victim who engaged in forbidden sexual activities with the defendant shortly after the first victim's defilement was so interwoven with the first victim's story that one could not be related without telling the other.[241] Some states, such as California, had cases going both ways, as the inferior appellate courts could not

decide on the proper way to limit admission of uncharged sexual misconduct.[242] One might expect a state using the lustful disposition rule to be more lenient on admission of similar sexual activities with different victims, but Idaho followed the lustful disposition rule when it excluded evidence of the defendant's prior sexual activities with the victim's sister below the age of consent as "too remote".[243] Missouri, a state which more or less adhered to the corroboration version of the lustful disposition rule and to the *Molineux* rule on uncharged misconduct, allowed proof of the defendant's misconduct with other victims to corroborate the victim's story, only after the defendant had testified that he did not have sex relations with the victim.[244]

2. Rape.

The courts were also busy between 1880 and 1930 fashioning a rule for admitting evidence of the defendant's uncharged sexual assaults in rape cases. The courts uniformly approved of admission of other attempted rapes or rapes of the victim perpetrated by the defendant when the defendant was charged with assault with intent to rape.[245] This represented a moderate use of the *Molineux* rule exception to the character evidence rule, since assault with attempt to rape required the prosecution to prove specific intent in its case in chief.[246]

Forcible rape was not a status offense like statutory rape. Some courts acknowledged that rape did not permit the

prosecution to prove a continuous relationship between the parties to corroborate their lustful disposition.[247] If so, then prior rapes or attempted rapes perpetrated by the defendant upon the complaining witness were irrelevant.[248]

The majority of U.S. jurisdictions admitted instances of prior rape or attempted rape between the victim and the defendant nonetheless. The courts often cited precedent derived from attempted rape and statutory rape cases to allow the prosecution to use prior rape evidence to show either lustful disposition[249] or a plan or design to rape[250] when the defendant raised no issue challenging mens rea. The elements of rape do not require proof of specific intent. Consequently, neither the defendant's motive nor any criminal plan or design to satisfy lust by sexual assault would have been relevant to proving guilt in such cases. At times, when the identity of the attacker was not at issue, and the defendant did not raise consent as an affirmative defense, the courts excluded evidence of prior rapes perpetrated on the victim by the defendant as irrelevant to proof of later guilt.[251]

However, when the attacker's identity was at issue, the courts were willing to admit evidence of prior rapes perpetrated on the victim by the defendant[252] or upon other women,[253] providing the modus operandi of the attacker was characterized as a "signature" sufficient to identify the

attacker in the case at bar as the defendant.[254] Many of these "signature" crimes were very commonplace assaults with practically no distinctive characteristics.[255]

The courts also admitted later sexual assaults on the victim if the later assault was characterized as part of the "res gestae".[256] Some courts excluded later assaults, if too remote.[257] Just about every case which authorized admission of prior sexual assaults committed by the defendant could be paired with a case from another jurisdiction on like facts which excluded the same evidence.[258]

A majority of courts continued to admit evidence of the defendant's other sexual assaults to show the defendant's lustful disposition to rape women.[259] These cases seemed to accept the theory that rape was committed by sexual psychopaths.[260] A few jurisdictions permitted proof of the defendant's other sexual assaults to corroborate the victim's account of the assault.[261] The theory behind this kind of corroboration is that the complaining witness could show lack of consent by proving the defendant had ravished her at other times, by multiplying her accusations. In some instances, the courts permitted proof of the defendant's assaults on other victims to corroborate the victim's story on the same rationale.[262]

The courts prior to World War II could not agree on a threshold rule permitting admission of uncharged sexual

misconduct. The courts had no coherent doctrine describing the foundation for admission of uncharged sexual misconduct, taking into account the time interval between the crime charged in the indictment and the uncharged incident. The courts were unable to articulate the degree of similarity required between the uncharged misconduct and the facts of the case at bar. The courts had no consistent rule on the quantum of proof necessary to establish the facts of any uncharged sexual misconduct. Most of the courts failed to note the dissimilarity between the elements of rape and those of such status crimes as adultery, fornication, incest and statutory rape. The courts frequently relied on precedent derived from status crimes such as statutory rape to admit uncharged sexual misconduct in rape cases.[263]

3. Incest, Adultery and Sodomy and the Defendant's Other Sexual Misconduct.

Incest cases generally followed the pattern of statutory rape cases. Prior incestuous acts between victim and perpetrator were admitted to show lustful disposition of the parties.[264] In most cases, incestuous acts between the defendant and other victims was excluded, unless the court felt that there was some incestuous design or plan at issue.[265] The handful of adultery prosecutions used uncharged sexual misconduct evidence in the same manner as in incest cases. Prior sexual activity between the parties was

admissible to show either lustful disposition[266] or a plan or design of adultery.[267]

Sodomy prosecutions were also treated as if sodomy was a status offense. The defendant's other sodomies committed on the same victim were held to be evidence of a lustful disposition[268] or a plan or design to commit sodomy.[269] Identity of the accused seems not to have been an issue in older sodomy cases.[270]

The widespread use of uncharged misconduct evidence in sex offender cases corresponded to deep seated public attitudes about sexual behavior. The courts followed the prevailing consensus about women's role in sexual relations. The ideal of feminine chastity had to be defended by effective prosecution of any man who took away a woman's virtue. Sodomists were depraved perverts. Rapists were depraved perverts. In 1937, the Gallup Poll asked Americans whether the whipping post should be reinstituted. Thirty nine percent of those polled favored its use principally for sex offenders.[271] This poll reflected the punitive, judgmental attitude toward antisocial sexual activity held by most Americans prior to World War II.

V. THE MODERN RATIONALE FOR ADMISSION OF EVIDENCE OF UNCHARGED SEXUAL MISCONDUCT.

A. THE REVOLUTIONS IN PUBLIC MORAL OPINION ABOUT SEXUAL CONDUCT.

Since the end of World War II, the United States has passed through a spiritual ordeal which altered the public attitude toward sexual activity. The great consensus about protecting women's virtue which endured for a century or more crumbled. Two books provide insight into the depth of these changes in American law and society: *Sex and the Law* and *The Closing of the American Mind*.

In 1951, when Judge Morris Ploscowe wrote *Sex and the Law*, most states forbade sodomy with any partner, male or female.[272] Most states had statutes making a crime out of fornication and adultery, although prosecutions under these statutes were exceedingly rare.[273] In 1951, a 16 year old boy could be sentenced to a long prison term for having sexual relations with a 15 year old girl.[274] Rape was a capital offense in two thirds of the states. Ploscowe's impassioned plea for decriminalization of sodomy between consenting adults caused clerics to denounce his book as immoral. His recommendations that adultery and fornication be struck from the statute books were denounced.

Almost everything Judge Ploscowe suggested in 1951 is commonplace in 1992. In many states, sodomy between consenting adults is no longer a crime.[275] Adultery and fornication have been decriminalized altogether in twenty eight states.[276] In twenty two states, a 16 year old boy cannot be imprisoned for sexual activity with a 15 year old girl.

Comprehensive sexual assault statutes have decriminalized statutory rape between partners over 12, unless there was a three or four years age differential between the partners.[277] However, some of Judge Ploscowe's thinking seems pretty old fashioned. His easy going male chauvinist attitude toward rapists and child molesters does not abide well after public disclosure of the menace of male rape and child molesting since the mid 1970's. Ploscowe's suggestion that rape victims' stories shouldn't be accepted at face value sounds suspiciously like Sir Matthew Hale's famous denunciation of rape victims. Ploscowe almost ignored child molesting, as if it were not a serious, pervasive social problem. Ploscowe was a precursor of the 1960's student rebels who demanded greater sexual freedom on campus.

Allan Bloom's thesis in *The Closing of the American Mind* is that the nation has passed through a revolution of sexual permissiveness followed by a new sexual puritanism which was the product of feminism.[278] *The Closing of the American Mind* has been one of the most challenging social and intellectual critiques of the intellectual foundations for life in the 1980's. Bloom suggests that the two sexual revolutions of the past two decades have sabotaged the underpinnings of family life and encouraged hedonistic devotion to self expression at the expense of the common welfare of families. He believes that the double revolutions of permissiveness and

puritanism were the product of a major event in American intellectual history, the scrapping of Enlightenment rationalism and its replacement by Max Weber's sociology and Nietzche's antirational philosophy.[279] If Bloom is correct, then the underpinning upon which the old consensus about the ideal of female modesty and virtue which supported the admission of uncharged sexual misconduct in sex offender cases has been replaced by a new ideal. Bloom does not describe the shape of the new view of sexuality and women. The best one can do is to sketch the portrait of women as equals in the work place who are the rulers of their own bodies, who are also protectors of children from the invasive sexual incursions of unreconstructed males.

Public opinion polls confirm Bloom's prediction of a revolution in the American view of sexuality. In 1968, 68% of all respondents told the Gallup Poll that extramarital sex was wrong. By 1985, the number of respondents condemning extramarital sex had shrunk to 39%.[280] Despite a recent increase in those disapproving of premarital sex apparently due to the AIDS scare, the majority of Americans, classified by sex, age, race or religious affiliation no longer condemn fornication and adultery.[281] Forty four percent of all Americans favor the legalization of sodomy between consenting adults.[282] Extra marital sexual activity has become common practice among most middle class Americans. Such great changes

in public opinion on sexual conduct reflect a major shift in public morality. People are free to engage in any form of voluntary sexual activity they choose to do, so long as everyone participating in that sexual conduct does so freely, willingly, and voluntarily. The key word in this shift is voluntariness.

The feminist revolution can be verified from similar public opinion data. When women were polled regarding their ideal personal lifestyle in 1986, 43% responded that they wished to be married, have children and keep a full time job. Thirty per cent preferred marriage and children without outside work, a significant decline since 1975. Fifty eight percent of all women polled indicated that they expected to hold a full time job in their ideal life style. In 1975, 50% of all respondents wanted to be married and not to hold a full time job.[283] The Gallup Polls also indicated a heightened awareness of child abuse in the 1980's. Fifteen percent of adult Americans reported that they knew of at least one serious episode of child abuse occurring in the neighborhood or among friends in 1982.[284] It is difficult to summarize the public opinion poll results on feminist issues, because the polls have not asked all the right questions. The key to understanding these results seems to be that women want to be independent, and to be able to make voluntary choices with respect to career, marriage, family and other activities. The public

approves of such freedom of choice. The Gallup polls have not asked about women's attitude toward sexual activity. There are no available poll results on the issue of sexism in the work place or sexual harassment.

The three decisions that form the core of this article represent three approaches to the social policy behind the sexual revolutions. The *Getz* court, in an exceptionally well crafted opinion, took a conservative course. It confined admission of uncharged sexual misconduct to a limited number of situations matching the examples listed in Rule 404(b). The *Getz* court did not accept the principle of inquisitorial proof in sex offender cases. At the same time, Delaware prosecutors would be permitted to introduce uncharged misconduct evidence which would be taken as proof of predisposition to commit criminal activity by the jury, although ostensibly offered under express limitations confining the jury's use of uncharged misconduct evidence to the traditional *Molineux* list of exceptions.[285] The *Getz* court achieved a temporary truce between inquisitorial proof and traditional Anglo-Saxon accusative proof.

The *Lannan* court was much less sure of itself. The court wanted to integrate its long-standing depraved sexual instinct exception to the common law character evidence rule in sex offender cases with its own case law following the *Molineux* rule. It chose to do this by abolishing the depraved sexual

instinct exception by adopting Rule 404(b) of the Federal Rules of Evidence as the only guideline for admitting uncharged misconduct evidence. At the same time the court embraced Rule 404(b), it treated Rule 404(b) as an enumeration of exceptions to the character evidence rule, as if it were the common law *Molineux* rule. The court added to the enumerated "exceptions", a "res gestae" exception that does not appear in the text of Rule 404(b).[286] Federal Rule 404(b), however, was expressly designed to do away with a list of specific exceptions to the general character evidence rule, in order to prove a non-character reason for admitting uncharged misconduct evidence.[287]

Finally, the *Tobin* court wanted to continue its long-standing common law treatment of character evidence, even though it had adopted the Uniform Rules of Evidence, and imported wholesale the inclusionary view of Rule 404(b) favored by the commentators. It wanted to use Rule 404(b) as a laundry list of pigeonhole exceptions to a general exclusionary character evidence rule, and provide for a further special exception for uncharged misconduct evidence in sex offender cases. The *Tobin* court did not see the inconsistencies between the exclusionary and inclusionary versions of the character evidence rule and the treatment of uncharged misconduct evidence.

It is time to review the current state of the law of

uncharged misconduct evidence as applied to sex offender cases.

The United States and thirty six other jurisdictions have adopted the 1973 edition of the Uniform Rules of Evidence.[288] Uniform Rules 404, 405, 406, 608 and 609 have supplanted the common law basis for admission of other sexual misconduct evidence in sex offender cases. Two states follow their own codified rules of evidence which differ somewhat from the Uniform Rules, but contain provisions essentially similar to Rule 404 of the Uniform Rules of Evidence.[289] The remainder have adopted the *Molineux* rule as a matter of case law.[290] A plurality of jurisdictions admit uncharged sexual misconduct evidence under either the lustful disposition exception to the character evidence rule or under the *Molineux* rule, without distinguishing the basis for choice of one rule over another.[291] A few states confine admission of uncharged sexual misconduct to the *Molineux* rule list of exceptions to the character evidence rule.[292] Three states have repudiated the lustful disposition rule by decision.[293]

B. MODERN LUSTFUL DISPOSITION RULE JURISDICTIONS: GEORGIA, ARKANSAS, ARIZONA.

Georgia, Arkansas and twenty six other states[294] admit sexual misconduct evidence via the common law lustful disposition rule, although they also employ the *Molineux* rule for the same purpose. Georgia practice is representative of those states that still recognize the lustful disposition

exception to the character evidence rule. Georgia admits evidence of an offender's other sexual misconduct to show the offender's lustful disposition in statutory rape,[295] sodomy,[296] indecent liberties,[297] incest,[298] and child molesting[299] cases. The Georgia courts admit evidence of other similar sexual misconduct either to show the defendant's "bent of mind"[300] or the accused's "lustful disposition".[301] Georgia also follows the common law *Molineux* rule, and occasionally admits evidence of the defendant's other sexual misconduct to show motive, intent, plan or design as well as the defendant's bent of mind or lustful disposition.[302] Georgia courts admit evidence of prior similar sexual misconduct if the evidence is deemed relevant to showing a lustful disposition to engage in that type of criminal deviant behavior.[303] The Georgia courts have no compunction about admitting uncharged sexual misconduct occurring after the incident charged in the indictment.[304]

A few cases help explain how the lustful disposition rule works in practice in Georgia. In *Hall v. State*,[305] the court followed the "bent of mind" version of the lustful disposition rule. The defendant was charged with child molesting, attempted rape and battery committed on his 12 year old daughter. At trial, the victim's younger sister testified over objection that the defendant had sexual relations with her at age 12 or 13, some 16 years before the trial and 15 years

before the alleged sexual activity by the defendant with his daughter. The trial judge held a hearing on admissibility of the 16 year old incest outside the presence of the jury and held the former misconduct admissible to prove the defendant's lustful disposition, although the current indictment did not allege penetration, and the 16 year old offense involved a single act of conventional intercourse between defendant and his younger sister. The Court of Appeals affirmed Hall's conviction. Relying on much precedent, it found the 16 year old act of incest on the defendant' sister probative of the defendant's predisposition to commit crimes of that sort on his own daughter.[306]

Burris v. State[307] represents a further extension of the lustful disposition doctrine. The defendant was accused of child molesting. The State produced Cindy Sexton, who testified that the defendant's sister-in-law told her that the defendant and his wife had intercourse while the victim was in their bed. Sexton testified to the presence of pornographic literature in the Burris household. She also testified that she was in Burris' home when unnamed sexual devices were delivered by UPS.[308] The defendant argued that possession of pornography and of sexual devices was not criminal, and dissimilar to the crime with which he was charged. The court held, however, that proof that the defendant possessed pornographic literature and special devices designed for sexual

stimulation tended to show the defendant's unnatural bent of mind, which was relevant to the crime with which he was charged.[309]

Most lustful disposition jurisdictions admit uncharged sexual misconduct evidence on much the same basis as Georgia does. The courts allow uncharged similar sexual misconduct evidence to be used by the trier of fact in determining the defendant's lustful disposition by circumstantial proof of a general character trait, followed by an inference from that inductively proved general character trait that the defendant committed the crime charged in the indictment.[310]

Some jurisdictions also follow the lustful disposition rule although the jurisdiction has adopted the Uniform Rules of Evidence. Arkansas and Arizona are examples of two different approaches to amalgamating the lustful disposition rule with Rule 404(b). Both jurisdictions have done a better job than Indiana has done. Arkansas limits the use of its lustful disposition exception to incest and child abuse cases.[311] Arkansas, unlike Georgia, has adopted the Uniform Rules of Evidence. The Arkansas Supreme Court's leading decision on admission of similar instances of uncharged misconduct, *Price v. State*,[312] held that uncharged misconduct could be admitted under Rule 404(b) if the prosecution established some independent grounds of relevance other than proof of the defendant's bad character, providing that the probative value

of the uncharged misconduct outweighed any prejudice to the defendant.[313] It construed Rule 404(b)'s limitations on admission of uncharged misconduct as a series of examples, rather than a strict laundry list of exceptions to the exclusion of character evidence.[314] In incest and child abuse cases, however, the Arkansas Supreme Court has continued its earlier case law sanctioning admission of similar uncharged misconduct to prove "a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship".[315] Arkansas has also been known to extend its rules on admission of uncharged sexual misconduct in forcible rape cases involving family members to permit introduction of child molesting incidents preceding the forcible rape.[316]

Arkansas has taken an approach prefiguring proposed new Federal Rule of Evidence 414, which would allow similar uncharged sexual misconduct evidence to be admitted for any relevant purpose, without regard to Rule 404(b). It has established a highly specialized rule for admitting sexual misconduct in child molesting and incest cases, which it has extended to forcible rape cases whose victims are children or close relatives.

Arizona also retains the lustful disposition rule, but applies the rule in an unusual manner to sex offenses. Arizona's leading cases on uncharged misconduct happen to be a

sex offender case. In 1973, before the Arizona Supreme Court had adopted the Uniform Rules of Evidence, the court reaffirmed its earlier case law admitting uncharged sexual misconduct evidence in sex offenses where "there is sufficient basis to accept proof of similar acts near in time to the offense charged as evidence of the accused's propensity to commit such perverted acts."[317] Four years later, after Arizona had adopted the Uniform Rules of Evidence, but prior to their effective date, the Arizona Supreme Court took up uncharged sexual misconduct again in *State v. Treadaway*.[318] The defendant was charged with the sodomy and murder of a 6 year old boy. The assailant had crept into the boy's bedroom through a window and had raped and murdered him. Treadaway was arrested on fingerprint evidence. At trial, a three year old incident in which Treadaway sodomised a 13 year old boy was admitted to show his emotional propensity for sexual satisfaction with little boys.[319] The Arizona Supreme Court reversed his conviction, holding that the prior sodomy was too remote in time and too dissimilar to be relevant without a foundation from an expert medical witness which would show that a three year old sodomy of a boy demonstrated an emotional propensity to commit such crimes.[320]

The Arizona Supreme Court has a passion for reviewing social science literature to support its decisions in sex offender cases. In *State v. McDaniel*,[321] decided back in

1956, the Arizona Supreme Court relied on the obsolete criminal sexual psychopath theory to explain why it admitted uncharged misconduct evidence against the defendant, who was charged with committing anal and oral sexual acts with two 12 year old boys.[322] The court found that a person who has "given way to unnatural proclivities"[323] within a short time of the offense in the case at bar demonstrated a "specific emotional propensity for sexual aberration."[324] Twenty one years later, the court reviewed Tappan's 1951 New Jersey work in *Treadaway*, to show that it now had doubts about the recidivism of sex offenders and of the relevance and materiality of prior similar uncharged sexual misconduct evidence.[325] Since *Treadaway*, the Arizona courts have waffled on the basis for admitting uncharged sexual misconduct.

In *State v. Day*,[326] decided in 1986, the Arizona Supreme Court approved of joinder of 17 separate, distinct counts of first degree sexual assault on the ground that evidence of each assault was relevant to establish the defendant's "emotional propensity" to engage in rape.[327] The opinion is devoid of any reference to the proper psychiatric foundation for such evidence required by *Treadaway*. In *State v. Cousin*,[328] a child molesting case, the Court of Appeals approved of admitting prior episodes of child molesting involving the defendant's 18 year old daughter which occurred four to seven years before the acts charged in the indictment. The state

called a psychiatrist who testified that the earlier acts demonstrated the defendant's emotional propensity for child molesting.[329] In two recent child molesting cases, *State v. Lindsey*[330] and *State v Smith*,[331] the prosecution offered photographs of defendant's victims while engaged in different forms of perverse sexual activity with the defendant to show a common plan or scheme, without reference to the fact that the photos also proved the defendant's emotional propensity to commit depraved sexual acts on children. Apparently no psychiatric foundation evidence was put in to prove that the photographs demonstrated emotional propensity.

The practical criteria for choosing between the lustful disposition rule and the *Molineux* rule in Arizona is the availability of a psychiatrist who can lay the foundation required for proof of emotional propensity. When the State cannot find such a witness, it chooses a *Molineux* exception. In either case, the State usually succeeds in putting in evidence that shows the defendant's predisposition to commit sex offenses.[332] The Arizona approach does require the court to make an assessment of the probative value of uncharged misconduct incidents and to review the potential for unfair prejudice against the defendant arising from over-generalizing from a few instances of similar sexual misconduct to an improper guilty verdict. However, Arizona has departed from accusative criminal justice. The defendant's whole sex

life is on trial during the state's case in chief, providing that an expert witness has examined the defendant and reviewed the defendant's sexual case history.[333] This expert will help the jury interpret specific instances of sexual misconduct and apply those incidents to the general verdict of guilt or innocence. The jury, being thus advised, will be reaching a verdict on the basis of general predisposition to commit crimes of that ilk.

C. MOLINEUX RULE STATES.

The majority of U.S. jurisdictions admit uncharged sexual misconduct evidence under one or more of the traditional exceptions to the character evidence rule formulated in *Molineux*. Most of the states that have adopted the *Molineux* rule by case law, by statute or by rule view it as a specialized rule of relevance allowing admission of the defendant's specific acts of uncharged misconduct when relevant to some intermediate issue such as motive, intent, knowledge, opportunity, plan or design, identity or the like.[334] Uniform Rule 404 and its common law predecessors do not list "lustful disposition" or "corroboration of the victim's testimony" as an example of another relevant purpose for which uncharged sexual misconduct would be admissible in sex offenses. Those states that follow a judge made version of Rule 404 adhere to much the same line of reasoning as do those jurisdictions following the Uniform Rules. A surprising number

of these jurisdictions, however, retain one version or another of the lustful disposition rule alongside more modern character evidence rules.

Uncharged sexual misconduct is admitted under the *Molineux* rule to show the accused's motive, to show the accused had a plan or design to commit the sex crime charged, to prove identity of the accused through modus operandi evidence, and to rebut a claim of accidental touching. Intent is not an issue in sex offenses, unless the accused is charged with sexual assault against a non-consenting adult, and raises the defense that the victim consented to the defendant's sexual conduct, where consent would decriminalize the act. The courts generally grant the prosecution great leeway to introduce uncharged sexual misconduct when the intermediate issue, enumerated under Rule 404(b) or its common law predecessor, is not truly an issue in the case.

1. Proof of Motive Where Motive is A Non-Issue.

Proof of motive is proof of intent. Sex crimes are not crimes of specific intent. Mens rea is established by consciously committing the forbidden act against the victim. Two recent cases will illustrate the appropriate and inappropriate admission of uncharged sexual misconduct to prove motive under the *Molineux* rule.

In *State v. Yager*,[335] the defendant was indicted on a single count of sexual assault on a male child committed around

Thanksgiving, 1988. The 31 year old defendant was accused of touching the penis of C.M., an 8 year old child for whom he was babysitting. The defendant first admitted touching the victim, claiming that his hand accidentally slipped while massaging the child's stomach to cure his stomach ache. At trial, the defendant changed his story and denied touching the boy. The prosecution produced two young men, A.L. and A.G., who testified to long-term sexual relationships with Yager, beginning when they were children with fondling episodes. Yager objected to A.L.'s and A.G.'s testimony on the ground that the testimony was improper character evidence. The court permitted the men to testify in order to show the defendant's motive for touching C.M.

In short, Yager claimed an "innocent reason" for touching C.M., and the State sought to rebut that evidence by showing that Yager had long-term sexual relations with two other boys anywhere from ten to fifteen years before the date of the offense charged in the indictment.[336] Yager was convicted and appealed. The court found that Yager's original story put his intent at issue, because he first claimed to have touched C.M. innocently. Consequently, the court ruled that the State was properly permitted to prove Yager's motive for the touching by showing his prior sexual misconduct with other young boys.[337]

This case follows earlier decisions allowing proof of

similar sexual misconduct to rebut the defendant's claim of lack of mens rea due to accidental touching or touching for an innocent purpose. Once the defendant makes an issue out of mens rea, the prosecution is free to rebut a claim of lack of mens rea by proof of similar misconduct, which eliminates any claim of accident or innocent purpose by the rule of probabilities.[338] Of course, the jury will also learn that the defendant has a criminal history involving sex offenses.

However, *State v. Plymesser*[339] represents misuse of the motive category in sex offender cases. The defendant was charged with a single count of second degree sexual assault of a child. The defendant was alleged to have placed his hand over the vagina of Kelly, D., a 13 year old daughter of defendant's friends. The defendant had Kelly in his car and was driving her to his house to decorate a Christmas tree. He stopped the car, began french kissing the child and touched her breasts and vagina with his hand. He then got out of the car, urinated, re-entered the car and forced Kelly to touch his penis.[340]

The state filed a motion in limine to permit it to introduce evidence of prior sexual misconduct. After much wrangling over admitting two prior 1969 and 1977 convictions for child molesting, psychiatric testimony surrounding each of the prior offenses, and the arresting officer's testimony relating the defendant's confession to the 1977 incident, the

trial judge permitted proof of the 1977 conviction for sexual assault of a child and the arresting officer's version of defendant's confession that he put his penis in the child's mouth while intoxicated. The defendant objected on the ground that admission violated the character evidence rule.[341] The defendant was convicted and his conviction was affirmed by the Wisconsin Supreme Court. According to the court, the trial judge properly admitted the 1977 sexual assault conviction and the accompanying confession under Wisconsin's relaxed version of Rule 404(b) that permits proof of uncharged sexual misconduct to show the defendant's motive to commit the crime.[342]

However, the defendant never claimed an accidental or innocent purpose for his actions. He denied touching the victim as described in the indictment. Intent was not an issue, and the defendant's motive for his actions was not an issue. The court in fact was admitting proof of the defendant's prior misconduct to show his lustful disposition towards the 13 year old victim. Nonetheless, the jury in *Yager* and *Plymesser* considered the defendant's criminal sexual misconduct in precisely the same way: in each case a limiting instruction was given, allegedly confining the jury to consider criminal history as it related to motive, but the jury had the defendant's criminal sexual misconduct history and could do what it pleased with that history.

2. A Plan or Design Which Proves Defendant's Disposition to Commit Sex Offenses.

The *Molineux* rule contemplates use of uncharged sexual misconduct to demonstrate a continuing criminal activity, such as a conspiracy, or to demonstrate intent by showing the defendant's criminal plan or design.[343] While a continuing criminal activity such as running an illegal still[344] or a house of ill fame[345] can be proved by proving more than one overt instance of resort to such a place, sex offenders rarely show any concerted plan or design to engage in sex offenses. If the courts, following the *Molineux* rule, limited admission of uncharged sexual misconduct to those instances where the defendant has a criminal plan or design, such as the case of the physician who drugged his female patients to commit sexual assaults upon them, no abuse would occur. However, the courts have shown great willingness to admit prior and later instances of sexual assaults by rape defendants to show a design or plan to commit rape, which simply proves that the defendant had a propensity to commit rape.[346]

People v. Ing[347] illustrates appropriate use of the plan or design exception to admit uncharged sexual misconduct. Dr. Ing, an obstetrician, was accused of committing a sexual assault on a patient during a pelvic examination. Ing simply denied any offensive touching. The State was allowed to prove that Dr. Ing had assaulted other patients as much as 18 years

prior to the date of the crime charged in the indictment, to show that Ing had a long standing criminal plan or design to take advantage of anesthetized patients.[348] The jury was permitted to consider Dr. Ing's criminal history in reaching a verdict.

State v. Hampton[349] illustrates the misuse of the plan or design exception. The victim and the defendant worked at the same business. While at work, the victim testified the defendant approached her, threw her down on the floor, strangled her, pressed a sharp instrument to her throat and raped her. After copulation, the defendant allegedly offered the victim money if she would have sex with him again. Two other women who were not fellow employees, who were not attacked at the same location, testified that the defendant had approached them, thrown them down and attempted to strangle them while he tried to have sexual intercourse with them.[350] A third woman testified the defendant had strangled her, thrown her to the floor and raped her, offering her money for further sexual relations. The Kansas Supreme Court sustained Hampton's conviction on the ground that the three other victims' stories proved a plan or design of rape on Hampton's part. This evidence merely showed that Hampton committed several sexual assaults in a similar manner. The offer of money might have made the three assaults similar enough to be modus operandi evidence if the identity of the accused was an issue in the

case. However, neither specific intent nor identity of the accused was an issue, and the location of the assault and the relationship the defendant had with the other victims were not identical to those connected with the victim in the case tried. The evidence of other attacks amounted to proof of the defendant's predisposition to commit sexual assault.[351] However, the jury had Hampton's criminal history to consider in reaching verdict. Although *Ing* presented a better rationale for allowing the jury to consider the defendant's criminal history, the jury was allowed to consider the defendant's criminal history in reaching a verdict in both cases.

3. Proof of Identity of the Sex Offender When Identity is not a Bona Fide Issue.

The *Molineux* rule was formulated in a case in which the identity of the accused was the only issue. The courts have admitted uncharged sexual misconduct evidence to prove the identity of the accused. *King v. State*[352] represents an orthodox use of the identity exception. The victim was stopped by a man while she was driving home. He told her that her tail lights were out. As he engaged the victim in conversation, he pulled out a pistol and forced the victim into his car and drove her to a secluded place where the victim was raped.[353] Two weeks later, she was stopped again by a man in a similar light colored station wagon who forced her at gunpoint into his car and drove her to a secluded place where the victim was

raped again. She identified the defendant as the perpetrator of the first assault, but was unsure of her second attacker's identity. The Arkansas Supreme Court sustained King's conviction, holding that the prosecution was properly permitted to prove that the defendant committed the first sexual assault to prove the identity of the accused in the second case.[354] This particular rapist had an unusual modus operandi which warranted the inference that the same person perpetrated both rapes. Therefore, the jury could consider the defendant's criminal history with respect to the victim in reaching a verdict.

People v. Oliphant[355] represents an abuse of the identity exception to the character evidence rule. A Michigan State University coed was raped by a black man after a social encounter. She had agreed to accept a ride home from the campus with her new found friend. On the way home, the defendant made a detour to an out of the way place and according to the victim, importuned her for sexual intercourse. When she refused, he grabbed her. Under fear for her life, the victim did not resist further and the defendant completed intercourse with her.[356] Identity was not an issue. Oliphant claimed the victim consented to interracial sexual intercourse with him. The prosecution was allowed to bring on four other white women who identified Oliphant as the young black man who had offered them a ride home from the Michigan State campus,

made a detour to an out of the way place and importuned them for sexual intercourse. Each said they refused his advances. When they refused, all four claimed he forced them to have sex relations with him. Two of the four women had made criminal complaints against Oliphant which had resulted in Oliphant's acquittal before another jury.[357]

Oliphant was convicted. The Michigan Supreme Court affirmed his conviction, finding that the four other uncharged acts of sexual misconduct were properly admitted to prove Oliphant's identity as the rapist, to corroborate the victim's story and to disprove any consent to his amorous advances.[358] First, Oliphant had admitted sexual intercourse with the victim, eliminating identity of the accused as an element in the case. Second, the victim's story could not be corroborated by testimony by other victims that they had been raped by the defendant at other times. Third, the State could not prove that Oliphant had sexual intercourse with the victim against her will by proving that at some other time, Oliphant had sexual intercourse with another woman against her will. In reality, the court employed the identity exception to allow proof of four similar complaints of sexual assault to corroborate the victim's story by proving the defendant's propensity to commit sexual assaults on white women. This is precisely the same result reached by the House of Lords in *Dept. of Public Prosecutions v. Boardman*.[359] The effect upon

the jury is the same, whatever rationale the courts use to explain away admission of uncharged sexual misconduct. The jury will have the relevant portion of the defendant's criminal history before it for consideration in reaching a verdict.

Finally, the courts have faced one or two cases in which the alleged perpetrator committed multiple acts of rape or sodomy on more than one victim at the same time. Using the interwoven crime exception to the character evidence rule, the prosecution has been allowed to prove all of the multiple acts committed by the defendant.[360] The jury again was permitted to receive the defendant's relevant criminal history and to use that history in reaching a verdict.

The point of this analysis of the operation of the *Molineux* rule is to demonstrate that following the *Molineux* rule and Rule 404(b) does not stop the state from proving the criminal history of a sex offender. It requires the state to give some plausible intermediate issue such as motive, intent, plan, design or identity that the defendant's criminal history might also prove. If the state can prove the defendant's relevant criminal history by a preponderance, following the standard of proof established by *Huddleston v. United States*,[361] the jury will receive that history. Although the *Molineux* rule requires a limiting instruction that informs the jury that it can apply that criminal history only to an appropriate intermediate issue, the legal cure provided by a

limiting instruction is not a psychological or practical remedy for the harm done. No one can guarantee that the jury has not used the defendant's criminal history to reach a general verdict of guilty based in predisposition.

Prior to World War II, statutory rape prosecutions made most of the law relative to uncharged sexual misconduct, but statutory rape has been reclassified by many jurisdictions as sexual assault on a person under 16.[362] In the infrequent modern prosecutions for sexual assault on a non-relative under 16, prior and subsequent sexual activity with the same person under 16 is generally admitted to show plan, design, motive intent or identity.[363] Child molesting and incest decisions have made more law since the 1960's than criminal sexual assault cases involving non-relations. The same sexual assault statute which forbids genital contact with a person under 16 also forbids fondling, touching the genitals, oral sexual activity or anal sexual activity with a person under 16. Most of the recent prosecutions under the sexual assault statutes have involved child molesters. The defendant's other similar, sexual acts with the same victim are admitted to show the defendant's plan or design.[364] Dissimilar acts with the same victim are also routinely admitted.[365] Additionally, the defendant's sexual misconduct with the victim's brothers and sisters are admitted to prove a guilty plan or design, or motive.[366] The courts disregard the passage of time between

child molesting incidents for the most part, admitting former sexual misconduct with the victim's siblings occurring as long as ten years prior to the assault on the victim.[367] In short, accused child molesters must expect the state to prove other similar child molesting incidents at trial, just as the State of Delaware did in *Getz*. Many states still allow proof of uncharged sexual misconduct between defendant and victim to corroborate the victim's story or to prove the attacker's lustful disposition in those states adhering to the lustful disposition rule.[368] Whatever rationale the court may invoke to permit proof of the defendant's criminal history, the result is essentially the same. The jury will receive the defendant's history of criminal sexual misconduct and convict the defendant, in part, on propensity to commit that type of crime.

Since the *Molineux* rule fails to explain judicial behavior on admission of uncharged sexual misconduct, it is a dishonest rule to use in sex offenses. It may be a dishonest rule in other criminal prosecutions as well, when the defendant's propensity to commit similar criminal misconduct is submitted to the jury to be used to determine the defendant's guilt.

California and New York jurisprudence on uncharged sexual misconduct is intriguing and a perfect example of the confusion that the *Molineux* rule causes when the courts try to admit uncharged sexual misconduct.

C. NEW YORK AND CALIFORNIA

New York and California each claim to follow the *Molineux* rule with respect to uncharged misconduct. However, New York retains a vestigial version of the lustful disposition rule for incest cases. California's jurisprudence on uncharged misconduct evidence has been shattered by bewildering appellate decisions and Proposition 8 that restrains appellate review of evidence in criminal prosecutions. Since neither state neatly fits into the general mold of *Molineux* rule states, their version of the law on uncharged sexual misconduct has to be treated separately.

1. New York: A State in Which a Vestigial Lustful Disposition Rule Coexists with the Molineux Rule.

New York happens to be one of the twenty nine jurisdictions which recognize the *Molineux* rule for uncharged misconduct. These states also recognize some version or another of the lustful disposition rule. In recent years, New York has gradually abandoned its lustful disposition exception to the character evidence rule in sex offender cases. The Court of Appeals ruled in *People v. Johnson*,[369] in 1968 that the defendant's prior uncharged sexual assaults were irrelevant and inadmissible to prove any issue, because the defendant was charged with both forcible and statutory rape, and he had made no issue of the victim's consent.[370] In 1987, the Court of Appeals overruled *People v. Thompson*[371] in *People v.*

Lewis.[372] Lewis was charged with committing incest with his 14 year old illegitimate daughter, Ceceil. She testified to at least ten different sexual encounters with the defendant over a period of several months in addition to the incestuous act charged in the indictment.[373] The Court of Appeals held that none of the traditional *Molineux* rule exceptions applied to Ceceil's testimony about the ten other acts of sexual intercourse with her father. The court disposed of the "amorous design" exception derived from *Thompson* by stating that the "amorous design" rule was *dicta* and unsupported by the English and American cases cited in support of the rule.[374] It limited the *Thompson* decision to condoning proof of other uncharged sexual misconduct in those kinds of sexual misconduct cases in which a mutual decision to engage in sexual activity is relevant.[375] The court also held that a complaining witness cannot corroborate her report of one offense by making further uncorroborated charges against the accused.[376]

Later New York cases followed *Lewis* in excluding evidence of uncharged sexual misconduct merely to demonstrate the defendant's "amorous designs".[377] However, New York courts found other ways to approve admission of uncharged sexual misconduct evidence after *Lewis*. In *People v. DeLeon*,[378] the Appellate Division held that the defendant's statement to the victim that "he had just recently . . . raped a girl" made during the course of a sexual assault on the victim was

admissible to rebut any suggestion of consent in a case of overwhelming guilt.[379]

New York courts following the *Molineux* rule have already admitted uncharged sexual misconduct to prove plan or design[380] and identity of the accused.[381]

New York's experience with the *Molineux* rule in sex offender cases has been paralleled in Illinois[382] where vestiges of the lustful disposition rule may coexist with the *Molineux* rule in sex offender cases. Kentucky's lower appellate courts continue to apply the lustful disposition rule, questioning the real intent of the Supreme Court in *Pendleton*.[383] New York's vestigial amorous design exception to the character evidence rule would still apply in incest and bigamy prosecutions. New York has rejected corroboration as a reason for admitting the defendant's sexual misconduct history with the victim, but its jurisprudence has the plan or design rational at hand to permit proof of the same misconduct to demonstrate a plan or design.

Despite an attempt to reform its law on character evidence and a further attempt to limit uncharged sexual misconduct evidence, New York has really made no improvement in its law on uncharged sexual misconduct, although the courts may feel better because their approach to admission of uncharged sexual misconduct has some plausible theoretical consistency.

2. California: Failure to Harmonize The Molineux Rule or

to Develop Any Consistent Policy Towards Uncharged Sexual Misconduct Evidence.

California has an almost unintelligible position on admission of uncharged sexual misconduct in sex offender cases. Because it is so baffling, it is worthwhile to review the twists and turns of California's case law, statutes and constitutional initiatives to see how the common-law approach to the character evidence rule can absolutely fail to achieve any clarity or consistency in practice.

California's case law on proof of other sexual misconduct in sex offender cases has always been confusing. A number of pre-Evidence Code intermediate appellate court decisions seemed to have adopted the lustful disposition rule.[384] However, a significant number of pre-1967 cases followed the *Molineux* rule, admitting uncharged sexual misconduct only when relevant to prove intent, motive, design or plan or identity of the accused.[385] Section 1101 of the California Evidence Code, which restated the common law bar against admitting character evidence, did very little to ease the confusion. Section 1101(b) set out the common law exceptions to the character evidence rule for uncharged misconduct in much the same way as the Uniform Rules did. The lustful disposition rule was not clearly repealed by the Evidence Code.

Since 1967, the California courts have struggled with the application of section 1101(b) of the Evidence Code to sex

offender cases. At times the courts tend to use section 1101(b) as a series of magic words, which if uttered by the State in its offer of proof, sanctify use of the defendant's criminal history. At other times, the courts prescribe limitations and controls on use of the defendant's criminal history, derived from the Evidence Code and from its common law tradition.

The history of the development of the admission of uncharged sexual misconduct evidence under section 1101(b) of the Evidence Code really began with *People v. Covert*.[386] The defendant was charged with committing incest and lewd and lascivious acts on his 16 year old daughter. The defendant's 19 year old daughter testified to earlier, similar incest committed on her by defendant. The Court of Appeals approved of admission of these stories to show the defendant's criminal plan or design and also to corroborate the story of the 16 year old victim.[387] In the same year, in *People v. Paxton*,[388] a rape and robbery case, the state called a second victim to testify to an earlier rape committed on her by defendant in what the court thought was a strikingly similar manner. This second uncharged incident was admitted to prove identity, although identity was not a real issue in the case.[389] In *People v. Gray*,[390] which was decided the year after the Evidence Code became effective, the defendant claimed the victim consented to his advances. The defendant also proved

that he had voluntary sexual relations with the victim before the alleged assault.[391] The prosecution put on three rebuttal witnesses who stated that they had been casual acquaintances of the defendant, and were forcibly raped and beaten by the defendant when they did not consent to his advances.[392] So far, the California courts were using section 1101(b) as a vehicle to funnel uncharged sexual misconduct evidence into the prosecution's case in chief with minimal restraints.

The court did not care much about the age of prior sexual misconduct. In *People v. Ing*,[393] the California Supreme Court admitted similar episodes of uncharged sexual assaults perpetrated by an obstetrician on patients as much as 18 years before trial to show modus operandi and plan or design on the theory that Dr. Ing had a single conception or plot for ravishing his patients. Although the court's rationale was classic *Molineux* rule theory, it did not explain why the 18 year old episodes of similar misconduct were still probative.

California courts used the modus operandi rationale to admit prior sexual misconduct under section 1101(b) in *People v. Whittington*,[394] decided in 1977. The First District Court of Appeals held that a rape committed almost three years before the date of the crime charged was relevant to prove the identity of the perpetrator because the modus operandi in both instances was similar.[395] In both instances, the victim was

accosted while emptying garbage outside her apartment. The perpetrator threatened to rob the victim, but informed the victim that he was free of venereal disease and had not had any sexual relations for a long time. The sexual assault then followed.[396] It may have been the defendant's express warranty of freedom from venereal disease that the court found to be a "signature" of the accused.

In *People v. Cramer*,[397] the defendant was charged with sexual assault on a 13 year old boy. Intent and identity of the accused were not in issue. Nonetheless, the court approved admission of similar homosexual acts committed by defendant on another boy to show "common design or modus operandi".[398]

So far, this section has reviewed cases that treat section 1101(b) as "magic words". *People v. Stanley*[399] represents the other side of the coin. The defendant was charged with sexual assault of a boy. Prior similar assaults by the defendant on the same victim were admitted at trial, but admission was disapproved by the Supreme Court on the ground that the prior uncharged sexual misconduct evidence was inadmissible when the only issue was the veracity of the victim at trial.[400] *Stanley* was complicated by the fact that the victim may have been an accomplice under California law. At any rate, the Supreme Court tried to limit admission of uncharged sexual misconduct evidence to cases in which there was real issue raised under section 1101(b) requiring weighing

of probative value against prejudice to the defendant.

During the mid 1970's, the California Supreme Court continued to ease the limits on the use of uncharged sexual misconduct. *People v. Thornton*,[401] involved the identity of the perpetrator of robbery, kidnap, sodomy and rape against two different victims, Ottila J. and Eileen S. The defendant gave alibi evidence at trial. The prosecution retaliated by producing Marcia B., Edith B., and Suzanne P., who had identified the defendant as the man who robbed and sexually assaulted them. The five separate instances of sexual assault had unusual and distinctive common elements. The perpetrator used a ruse to gain access to the victim's car. The victim was driven to a remote place in her own car and ordered to completely disrobe. The victim's purse was ransacked before sexual assault was perpetrated. The victim was threatened with death if she talked. Finally, in all five cases, the victim was physically abused, kicked, beaten and foreign matter was stuffed in the victim's vagina.[402] The trial court admitted the other victim's stories. The Supreme Court, on mandatory review of a death penalty, set aside the penalty phase of the trial, but affirmed Thornton's guilt on the ground that the five similar sexual assaults amounted to signature crimes rebutting his alibi.[403]

People v. Pendleton[404] came up in 1979. It involved prosecutorial use of two prior instances of rape against the

defendant in a rape trial. In each case, the victim had been attacked early in the morning by an intruder who entered the victim's locked residence, threatened the victim with harm and robbery. The attacker then started discussing his family and friends, and the victim's friends while holding the victim. The victim was then struck and sexually assaulted.[405]

Identity of the accused was not an issue during Pendleton's trial on a third sexual assault charge. The victims of the two prior assaults testified, giving their stories to prove the defendant's intent. The California Supreme Court affirmed Pendleton's conviction on the theory that the stories of the other two victims proved criminal intent, although rape was not a crime of specific intent. The court also found that the two prior sexual assaults proved the defendant's plan or design, but it is difficult to see what kind of plan was carried out by these separate attacks. The court seemed to be returning to the lustful disposition rule without explicitly reaffirming its existence.[406] The Pendleton decision was not classic *Molineux* rule theory, because the intermediate issues for which the prior assaults were offered were not actually litigated at trial. The court slipped back into the magic words approach.

By the mid 1980's California's inferior appellate courts responded to the *Pendleton* opinion by letting down the bars to use of uncharged misconduct evidence in sex offender

cases.[407] In 1984, however, the Supreme Court pulled in the reins in *People v. Tassel*.[408] Tassel was charged with sexually assaulting Ann B., a waitress, whom Tassell allegedly forced to commit oral copulation with him and conventional intercourse in her Volkswagen vanagan.[409] Tassell testified in his own behalf, claiming that Ann B. willingly consented to his sexual advances. The prosecution then produced Mrs. G. and Cherie B. Mrs. G., a waitress in a bar, testified that Tassell had picked her up after work and forced her to engage in sexual intercourse. Cherie B., a hitchhiker, told a similar story. She claimed Tassell had picked her up and forced her to engage in sexual relations with him. The prosecution offered these two tales to prove that Tassell had a design or plan to pick up women and assault them.[410] The Supreme Court affirmed Tassell's conviction, but held that the two rebuttal witness' stories were irrelevant to any issue which could be proved under section 1101(b). The court found that the only issue to which these two stories related was the defendant's evil propensity to commit sexual crimes. The court reasoned that the two other victim's stories were harmless error in an overwhelming case of guilt.[411]

Shortly after the *Tassell* decision was announced, the California Legislature amended section 1101(b) of the Evidence Code to "clarify" the decision by providing that uncharged similar misconduct evidence was admissible in sexual assault

cases whenever the defendant raised the issue of consent.[412]

In 1985, the Supreme Court put further limitations on the use of uncharged sexual misconduct evidence in *People v. Ogunmulga*.[413] The defendant, a gynecologist, was charged with sexual assault on a patient during a pelvic examination. The defendant claimed that the step at the end of the examining table made it impossible for the examining physician to perform sexual acts on a patient during a pelvic exam. To rebut this contention in advance of defense evidence, the prosecution called two other victims who testified that Dr. Ogunmugla had sexually assaulted them during their pelvic exams.[414] The trial court allowed the other victim's testimony to prove Ogunmulga's plan or design, although neither identity of the accused nor criminal intent was at issue in the case. The Supreme Court reversed an Appeals Court affirmation of conviction, finding that the admission of the two other victims' stories was error, since neither identity nor intent was at issue.[415] This decision is very difficult to accept. The defendant claimed that it was physically impossible to commit rape upon his patients during a pelvic examination. The testimony of the other victims rebutted that claim squarely. While section 1101(b) does not contain an enumerated exception authorizing admission of uncharged misconduct to rebut a claim of physical impossibility, the evidence was certainly relevant under any view of the uncharged misconduct rule.

California law on uncharged sexual misconduct is too confused to generalize. California may still recognize a "lustful intent" exception to the character evidence rule in criminal sexual assault cases. On the other hand, it may limit evidence of uncharged sexual misconduct to those few cases where identity of the accused or intent are real issues. In 1982, the voters passed Proposition 8, an initiative that abolished nearly all limitations on evidence in criminal prosecutions. Section 28(d) was an attempt to deprive the appellate courts of supervision over admission or exclusion of evidence in criminal prosecutions.[416] It is extremely difficult to assess the impact of Proposition 8 on admission of uncharged sexual misconduct. If Proposition 8 is rigorously applied to the character evidence rule, the character evidence rule embodied in section 11101 of the Evidence Code no longer applies to any criminal prosecution. So far, the California courts have not followed Proposition 8's literal command to permit proof of the defendant's predisposition to commit evil.[417]

VI. CONCLUSION.

The jury usually gets to review the criminal history of sex offenders, despite the character evidence rule that bans convicting any U.S. citizen on his or her predisposition to commit crimes. There are two popular rationales that permit

the courts to ignore the character evidence rule: the lustful disposition rule and the *Molineux* rule.

The *Molineux* rule, codified by Uniform Rule 404(b), permits introduction of criminal history when some straw man issue can be interposed to make criminal history evidence relevant to something other than character or predisposition to do evil. All U.S. jurisdictions recognize one version or another of this rule.[418] The *Molineux* rule permits the jury to consider uncharged sexual misconduct when it proves both the defendant's bad moral character and some other issue, such as criminal intent, plan or identity of the accused. The palliative offered is a limiting instruction telling the jury not to consider the defendant's criminal history on the issue of guilt or innocence, but only to prove the intermediate issue.

Twenty nine states follow some version of the lustful disposition rule. Four states have done away with their version of the lustful disposition rule in the past four years.[419] West Virginia dumped its lustful disposition rule in 1987, but returned to it in 1990.[420] Rhode Island considered rejecting the lustful disposition rule, but decided not to do so.[421] The lustful disposition rule permits proof of a sex offender's criminal history to show his or her predisposition to commit sex crimes. No intermediate issue must be at stake when prior sexual misconduct is offered under

the lustful disposition rule. The rule simply permits proof of bad character in sex crimes.

The character evidence rule was made by judges to explain why the defendant's criminal history could not be used to prove the defendant's guilt. The *Molineux* and lustful disposition exceptions to the rule permit proof of character or predisposition to act in predictable ways to prove the defendant's guilt in sex cases. The exceptions have swallowed the exclusionary rule. In truth, character evidence is inadmissible in sex crime prosecutions only when the court finds that such evidence is unreliable.

Unreliability means that the court finds that the probative value of the uncharged misconduct evidence is exceeded by prejudice to the defendant, confusion of the issues and waste of time in collateral matters. When uncharged sexual misconduct is dissimilar to the crime charged in the indictment, or committed at a time judged to be too remote to show the defendant's propensity to commit sex crimes, or the quantum of proof of uncharged misconduct fails to meet the threshold level set by the court, it is excluded.

However, the same analysis will hold true if applied to other criminal prosecutions in which uncharged misconduct evidence is frequently offered and admitted, such as drug or conspiracy cases. There is nothing particularly unique about sex offenses that requires a special rule just for sex crime

prosecutions that lets in uncharged criminal conduct more leniently than in drug sales or possession of stolen property prosecutions. Prior uncharged misconduct evidence, based on recidivism, is relevant in those prosecutions as well.

What makes sex crimes unique is the public reaction to sex offenses. The public is morally outraged by sex offenses, particularly those that involve small children or others unable to protect themselves from harm. If Oscar Wilde had been accused of writing rubber checks, there would have been no criminal libel prosecution and Wilde would not have been cross examined about his prior criminal behavior.

In short, the courts bow to public pressure to convict sex offenders and try to make it easier for the victim of a sex crime to secure retribution than the victim of a crime against property. This is done by relaxing the evidentiary safeguards that were supposed to protect U.S. citizens from Star Chamber justice.

The Sixth and Fourteenth Amendments do not require accusative criminal justice. The Sixth Amendment mandates the defendant's rights to receive due notice of the charges made against him, to legal counsel, to confrontation by the accuser, and to compulsory process. The Fourteenth Amendment incorporates these specific rights, and also guarantees the defendant a fundamentally fair trial that requires the state to prove guilt beyond a reasonable doubt.[422] Indiana gave up

the lustful disposition rule because it did not provide for due notice to be given to the defendant. It could have kept the rule by ordering the prosecution to give notice of intent to use uncharged misconduct evidence. The United States, Minnesota and a few other states have faced the notice issue by requiring notice of intent to use specific instances of uncharged misconduct.[423] This satisfies the notice clause of the Sixth Amendment by putting the defendant on guard that uncharged misconduct will come up, and allows the defendant to prepare a rebuttal case.

More than forty years ago, Justice Jackson characterized the character evidence rule as absurd in *Michelson v. United States*.[424] The foregoing analysis shows that the rule is still absurd, especially as it works out in sex crime prosecutions. The lustful disposition rule, which acknowledges the probative value of criminal history, and would admit such history in sex crime prosecutions, is more rational than the *Molineux* rule. Nothing but inertia and fear of inquisitorial proof stands in the way of a reversal of the character evidence rule in criminal prosecutions. Since the courts generally permit admission of uncharged misconduct, particularly in high profile prosecutions such as sex offender cases, the rule should be that the defendant's propensity to commit crimes of the type charged in the indictment may be proved by specific instances of uncharged misconduct or opinion evidence showing

the defendant's propensity to commit crimes of that type. Propensity evidence would be excluded if proof submitted is more prejudicial to the defendant than probative on the issue of predisposition.

If the courts cannot bring themselves to reverse the character evidence rule entirely, then the courts can do so in sex offender cases by adopting a modified lustful disposition rule. The courts would permit admission of uncharged misconduct evidence to prove habitual criminal sexual activity. Arizona has taken this course. The *Treadaway* rule that permits proof of uncharged sexual misconduct to serve as basis for an expert opinion on the defendant's habitual sexual behavior patterns is an honest rule of law fashioned for sex crime prosecutions. It does change the dynamics of the criminal prosecution. The defendant's sexual behavior in general is on trial. The jury, aided by an expert, will use evidence of the defendant's sexual behavior in general to convict or acquit the defendant. Arizona has given the victims of sex crimes an equal opportunity to obtain redress for the wrong done to them. It has recognized the needs of victims for justification and revenge as well as the need for effective punishment for sexual offenders.

The second approach is adopt court rules similar to proposed Rules 413 through 415 that establish a specialized character evidence rule for sex crime prosecutions without the

requirement that uncharged sexual misconduct evidence be the basis for an expert opinion.

However, conservative courts would be extremely uncomfortable with either of these solutions because they turn a sex crime prosecution into an inquisition. Like the Delaware Supreme Court, conservative courts will reject open acceptance of inquisitorial justice in sex offender cases. They will continue to try to limit admissibility of similar uncharged sexual misconduct to one or more of the intermediate objects of proof noted in *Molineux*. In *Getz*, the Delaware Supreme Court tried to restrict such evidence to the minimum absolutely necessary to support a criminal prosecution. The issue of habitual criminal conduct evidence offered under Rule 406 was neither briefed nor argued and was not raised at trial. However, the *Getz* decision continues to permit proof of uncharged sexual misconduct. Delaware's courts can be comforted by the formalistic instruction that tells the jury not to consider uncharged misconduct evidence on the issue of guilt or innocence. Perhaps the jury will understand the instruction and follow it, and apply the uncharged misconduct only to the allowable intermediate issue. Perhaps the jury will get the instruction wrong and convict the defendant based on predisposition, but the jury cannot be impeached for such misconduct.

1. The writer is indebted to the thorough review of this manuscript by Prof. Edward J. Imwinkelried, University of California at Davis School of Law, for his thoughtful suggestions that improved the quality of this article.

2. 5 VAN WINKLE, SIXTY FAMOUS CASES 69-70 (1956).

3. *Id.* at 70-73. Alfred Douglas had received a letter from Wilde which fell into the hands of blackmailers who extorted money from Wilde. The letter read as follows:

My own boy,

Your sonnet is quite lovely, and it is a marvel that those red rose leaf lips of yours should have been made no less for music or song than for madness of kisses. Your slim gilt soul walks between passion and poetry. I know Hyacinthus, whom Appollo loved so madly, was you in Greek days. Why are you alone in London, and when do you go to Salisbury? Do go there

to cool your hands in the gray twilight of Gothic things, and come home whenever you like. It is a lovely place and only lacks you, but go to Salisbury first.

Always with undying love,

yours

Oscar

Here is an example of Sir Edward Carson's cross examination technique. Carson eventually got around to Wilde's letter to Douglas.

Q. Have you ever loved a young man madly?

A. No, not madly. I prefer love that is a higher form.

Q. Let us keep down to the level we are at now.

A. I have never adored anybody except myself.

* * * * *

Q. I suggest there is nothing very wonderful in this "red rose leaf lips" of yours?

A. A great deal depends on the way it is read. You read it [the letter] very badly.

Q. Your "slim gilt soul walks between passion and poetry." So that is a beautiful phrase?

A. Not as you read it, Mr. Carson.

Q. I don't profess to be an artist. And when I hear you give evidence, I am glad I am not.

* * * * *

Q. Did you ever kiss him [an alleged lover]?

A. Oh, no. He was a peculiarly ugly boy.

4. *Id.* at 74.

5. NASSAAR, INTO THE DEMON UNIVERSITY: A LITERARY EXPLORATION OF OSCAR WILDE 147 (1974).

6. LaFave & Israel give nine basic goals of the American criminal justice process:

(1) discovery of the truth;

(2) establishing an adversary system of adjudication;

(3) establishing an accusatorial system;

(4) minimizing erroneous convictions;

(5) minimizing the burdens of accusation and litigation;

(6) providing lay participation;

(7) respecting the dignity of the individual;

(8) maintaining the appearance of fairness; and

(9) achieving equality in the application of the process. LAFAVE & ISRAEL, CRIMINAL PROCEDURE §1.6 (2d ed. 1992).

According to LaFave & Israel, the accusative nature of the Anglo-American criminal justice process is reflected by allocation of the burden of proof to the State, by assigning the State burden of proof beyond a reasonable doubt, by adopting the presumption of

innocence and the privilege against self-incrimination as limitations on evidence. *Id.* §1.6 at 37-38. Their position is supported by heavy precedent. *See, e.g.*, Murphy v. Waterfront Comm'n. 378 U.S. 52 (1964).

7. *See, e.g.*, the remarks of Senator Verplanck in People v. White, 24 Wend. 570, 574 (N.Y. 1840):

> The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of the law is due alike to the righteous and unrighteous. The sun of justice shines alike "for the evil and the good, the just and the unjust." Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule, even in any degree, would open a door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the operation of prejudices as to religion, politics, character, profession, manners upon the minds of honest and well-intentioned jurors. Id. at 574. See also People v. Shea, 147 N.Y. 78, 41 N.E. 505, 511 (1895); LAFAVE & ISRAEL, §1.6 at 38.

8. *See, e.g.*, Michelson v. United States, 335 U.S. 469, 474-75 (1948). Wigmore restates the rule and the

underlying rationale for the general exclusion of evidence of the defendant's bad moral character in a criminal prosection:

> The rule, then, firmly and universally established in policy and tradition is that the prosecution may not initially attack the defendant's character.
>
> * * * * *
>
> This policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normanism -- the instinct of giving the game fair play even at the expense of efficiency of procedure. This instinct asserts itself in other departments of our trial law to much less advantage. But as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish not because our victim is guilty this time but because he is a bad man and may as well be condemned now that he is caught is a tendency that cannot fail to operate with any jury in or out of court. . . . 1 WIGMORE ON EVIDENCE §57 at 1185 (Tillers rev. 1983).

9. R. 404(a) Fed. R. Evid and R. 404(a) Unif. R. Evid. state that evidence of an actor's character is inadmissible to prove that the acted in conformity therewith, subject to the exceptions set out in R. 404(a). Therefore, character evidence in criminal prosecutions is legally irrelevant to prove the defendant acted in conformity therewith, unless, as indicated by R. 404(a)(1), the defendant chooses to prove that the defendant is a person of good character. However, Wigmore correctly believed that character evidence was logically relevant to proof of guilt:

> A defendant's character, then, as indicating the probability of his doing or not doing the act charged. is essentially relevant. In point of human nature in daily experience, this is not to be doubted. The character or disposition -- i.e., fixed trait or sum of traits -- of the person we deal with is in daily life always more or less considered by us in estimating the probability of their future conduct. 1 WIGMORE ON EVIDENCE §55 (Tillers rev. 1983).

10. The typical judicial attitude to character evidence can be gleaned from Regina v. Rowton, Leigh & C. 520, 167 Eng.Rep. 1497, 1506 (Cr.Cas.Res. 1865). Willes, J. delivered an opinion that summarized the view about

deducting specific behavior from general character traits:

> [Character evidence} is not admissible upon the part of the prosecution, because . . . . if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you night begin by shewing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted on that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because, although by admitting if you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine.

This position may not represent the current English position typified by R. v. Boardman, [1975] A.C. 421. It has been challenged by commentators as well, who support admission of the defendant's similar criminal misconduct in the prosecution's case in chief based on logical relevance and judicious weighing of probative

value vs. prejudice. See, e.g., Allan, *Similar Fact Evidence and Disposition: Law, Discretion and Admissibility*, 48 MODERN L. REV. 253 (1985); Allan, *Admissibility of Evidence of Disposition Against the Defendant*, 99 LAW Q. REV. 349 (1983).

11. Typically, the courts believe that an accused who must defend against uncharged misconduct is at a significant procedural disadvantage, being unable to prepare adequately to deal with collateral issues raised by accusations made about prior acts not described in the indictment. The courts also believe that juries, in particular, will be over-persuaded by tales told of one or more similar acts of misconduct, disregarding other evidence that may exonerate the defendant. 1 WIGMORE ON EVIDENCE §57 at 1180-81.

12. *See, e.g.*, Michelson, 335 U.S. 475.

13. This same point has been suggested by other authors. *See, e.g.*, Tillers' personal comments in 1 WIGMORE ON EVIDENCE §54.1 at 1151-52. Tillers asserts that the character evidence rule is often eviscerated in practice by the principle of multiple admissibility which permits prohibited character evidence to be admitted under one of the many exceptions to the ban against character evidence.

14. Getz v. State, Del. Supr., 538 A.2d 726, 729 (1988). See also record Vol. A at 15-21 for Deputy Attorney General Ferris Wharton's representations to the court.

15. *Id.* See also Record Vol. B. at 57-58 (testimony of Dr. Kuhn admitting State's Exhibit 8, the one page office visit record. The visitation record contained the following statement:

> Mother states child sexually abused by father on multiple occassions (*sic*). Child herself states that there have been multiple episodes where father has molested her over last 1 year. Says about 3 weeks ago father penetrated her vagina causing great pain - Denies any incident in last 3 weeks. Child protective services notified.

16. *Id.* Unfortunately, Ms. Getz' testimony on direct examination was unclear. She experienced a great deal of difficulty in getting out the facts of the last episode. On cross examination, she stated that her father had had sexual relations with her several times. See record Vol. B. at 19-24. Her step mother testified that the victim told her immediately after the incident that her father had had sex relations with her or molested her twice before the incident which led to Getz' arrest. Record Vol. B. at 36-39.

17. *Id.* at 538 A.2d 728.

18. *Id.* at 538 A.2d 731-32. Justice Walsh, speaking for a unanimous court, noted that the State could not use the evidence in its case in chief solely to impeach a witness who had not testified. The court also noted in dicta that the use of these uncharged acts of misconduct on impeachment of Getz would extend no further than to cross examine any defense character witnesses on the basis for the opinion or reputational evidence.

19. The Attorney General did not cite Dept. of Public Prosecution v. Boardman [1975] App. Cas. 421, or other English cases or commentators that favor a liberalized application of the character evidence rule in criminal prosecutions as "similar acts" evidence to discount any claim that the victim made a false accusation. *See, e.g.,* Allan, *Admissibility of Evidence of Disposition Against the Defendant*, 99 LAW Q. REV. 349 (1983) discussing Regina v. Lewis, [1982] 76 Crim. App. 33, a case in which the defendant was accused of assaulting 10 year old twin girls, the daughter of his live-in girl friend. Lewis claimed that his touching actions were innocent. The trial court admitted evidence that he had subscribed to pedophiliac magazines, and that Lewis had admitted to the police that he was a pedophile. The Court of Appeals affirmed his

conviction on the strength of Dept. of Public Prosecution v. Boardman.

20. Getz, 538 A.2d 730-31.

21. *Id.* at 538 A.2d 732.

22. *Id.* at 538 A.2d 733-34.

23. *Id.* at 538 A,2d 734-35. Justice Walsh's highly articulate opinion set out the following specific guidelines for future situations when uncharged misconduct evidence is presented by the State:

(1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in he case.

(2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the prohibition on use of character evidence.

(3) The other crimes must be proved by plain, clear and conclusive evidence.

(4) The other crime must not be too remote in time from the offense charged in the indictment.

(5) The court must weigh the probative value of the evidence of other crimes against any unfairly prejudicial effect under Rule 403.

(6) The jury must receive a cautionary instruction which states that any evidence of similar offenses received at trial is not to be used to prove the

defendant is a bad person and therefore committed the crime charged, but only to for one of the limited purposes enumerated in Rule 404(b).

The court did not mandate the prosecution provide prior written notice of intent to use uncharged misconduct to the defendant because the defendant did not raise any issue about notice.

24. *See, e.g.*, Dept. of Public Prosecution v. Boardman, [1975] App. Cas. 421, where a headmaster was indicted for 1 count of attempted buggery and 2 counts of incitement to buggery occurring at different times with different young men aged 16 to 18, who were pupils at his school. In two cases, the defendant incited the younger male to take the lead and to be the aggressor. The trial court allowed the Crown to join all three counts and to prove the victim's stories of the first and second offenses to "corroborate" each other's accounts. The third count described sexual activity that was characteristically different from those in Counts I and II. Although the reasoning of the Law Lords is somewhat complex, the best interpretation of Boardman is that the case authorized admission of similar sexual misconduct to prove that the allegations laid against the headmaster by one pupil were not a matter of coincidence or fabrication, since the

defendant claimed that two of the victims made false allegations against him in order to get even for refusing to grant them special favors. For interpretations of Boardman, see Allan, *Similar Fact Evidence and Disposition: Law, Discretion and Admissibility*, 48 MOD. L. REV. 253 (1985); Cross, *Fourth Time Lucky-Similar Fact Evidence in the House of Lords*, 1975 CRIM. L. REV. 62.

25. *See, e.g.*, Baxter v. State, 522 N.E.2d 362 (Ind. 1988); Grey v. State, 273 Ind. 439, 404 N.E.2d 1348 (1980) (prior child molesting incident with other children admissible to show depraved sexual instinct in prosecution for rape of 8 year old); Miller v. State, 256 Ind. 296, 268 N.E.2d 299 (1971) (other oral sodomy on same victim admitted to show depraved sexual instinct).

26. Miller v. State, 256 Ind. 296, 268 N.E.2d 299 (1971) (other oral sodomy on same victim admissible to show depraved sexual instinct); State v. Robbins, 221 Ind. 125, 96 N.E.2d 691,694-96 (1943) (anal sodomy on boys and girls: similar acts on other children admissible to show "indecent familiarity" between defendant and girls & boys).

27. *See, e.g.*, Penley v. State, 506 N.E.2d 804, 809-10 (Ind. 1987) (rape: two later incidents with same victim

admitted to show plan, design, modus operandi, incidents with other victims inadmissible); Watkins v. State, 460 N.E.2d 514 (Ind. 1984) (attempted rape; other rape evidence admitted to show modus operandi); Whitely v. State, 439 N.E.2d 715 (Ind. App. 1974) (attempted rape: other attempts admitted to show a common scheme or design).

28. *See, e.g.*, Watkins v. State, 460 N.E.2d 514 (Ind. 1984); Whitely v. State, 439 N.E.2d 715 (Ind. App. 1974).

29. *See, e.g.*, Kuchel v. State, 501 N.E.2d 1032 (Ind. 1986); Clifford v. State, 474 N.E.2d 963 (Ind. 1985) (also plan or design); Loman v. State, 265 Ind. 255, 354 N.E.2d 205 (1976); Pieper v. State, 262 Ind. 580, 321 N.E.2d 196 (1975). Indiana also allows admission of later rapes of the same victim by the defendant to prove plan or scheme. Willis v. State, 268 Ind. 269, 374 N.E.2d 520 (1978) as well as later acts of sodomy on the same victim.

30. *See, e.g.*, Clifford, 474 N.E.2d 963; Oldham v. State, 467 N.E.2d 419 (Ind. App. 1984).

31. *See, e.g.*, Woods v. State, 250 Ind. 132, 235 N.E.2d 479 (1968); Merry v. State, 166 Ind. App. 199, 335 N.E.2d 249 (1975).

32. *See, e.g.*, Baggett v. State, 514 N.E.2d 1244 (Ind. 1987); Maynard v. State, 513 N.E.2d 641 (Ind. 1987); Lehiy v. State, 509 N.E.2d 1116 (Ind. 1987); Harp v. State, 518 N.E.2d 497 (Ind. App. 1988).

33. 273 Ind. 439, 404 N.E.2d 1348 (1980). The defendant was charged with raping his 8 year old daughter. The defendant's statement to the police confessing prior child molesting incidents with another child, and an indecent exposure episode several years prior to the date of the rape in the indictment were held admissible to show the defendant's "depraved sexual instinct".

34. Harp v. State, 518 N.E.2d 497 (Ind. App. 1988) (three prior child molesting incidents ten to twenty years before trial admitted to show depraved sexual instinct).

35. *See, e.g.*, the dissenting opinion of DeBruler, J. , in Kerlin v. State, 255 Ind. 420, 427, 265 N.E.2d 22, 26 (1970). Justice DeBruler severely criticized admission of two prior seven and eight year old instances of homosexual sodomy with adult males allegedly committed by the defendant in a sodomy prosecution for committing a similar act with a fifteen year old boy. He argued that the earlier sodomies were admitted simply to show that the defendant had a predisposition to commit sodomy. He noted the earlier sodomies lacked any

probative value on the defendant's propensity to commit sodomy with a child.

36. 509 N.E.2d 1116 (Ind. 1987).

37. 510 N.E.2d 163 (Ind. 1987).

38. *See, e.g.*, Reichard, 510 N.E.2d 165; Lehiy, 509 N.E.2d 166. When lack of consent is the only issue, such evidence is inadmissible. Brown v. State, 459 N.E.2d 376 (Ind. 1984).

39. Lannan v. State, 600 N.E.2d 1334, 1340-41 (Ind. 1992).

40. *Id.* at 600 N.E.2d 1341.

41. *Id.* The details of the 1988 incident are not related in the opinion. The court also remarked somewhat confusingly that had the State charged the defendant with the 1988 fondling incident, evidence of that issue could have been admitted at trial, ignoring any issues of prejudicial joinder that might have been raised.

42. *Id.*

43. Lannan v. State, 590 N.E.2d 668 (1992).

44. State v. Lannan, 600 N.E.2d 1334 (Ind. 1992).

45. *Id.* at 600 N.E.2d 1335.

46. *Id.* at 600 N.E.2d 1336. The court, however, judicially noticed *Discovering and Dealing with Deviant Sex*, PSYCHOLOGY TODAY, 8, 10 (April 1985), written by a psychiatrist who stated that sex criminals commit hundreds of similar uncharged sexual misconduct

incidents. The court disbelieved the Indiana Trial Lawyers sociological data that showed a low recidivism rate among sex offenders, defined as re-arrest and conviction for a sex crime. Apparently, neither the State, the defendant nor the amici brought Dept. of Public Prosecution v. Boardman, [1975] App. Cas. 421, or any commentary on Boardman to the court's attention. Specifically, V.E.'s recitation of the earlier fondling episode corroborated her later story that Lannan forced her to have sexual relations with him.

47. *Id.* at 600 N.E.2d 1335-36.

48. *Id.* at 600 N.E.2d 1335.

49. *Id.* at 600 N.E.2d 1336-37, particularly n. 6. The court apparently was not invited to review the growing critical literature on the logical relevance of so-called character evidence. One of the best critical discussions of the predictability of human behavior based on knowledge of the character structure of an actor may be found in Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 511-19 (1991). Ms. Davies reviewed most of the contemporary psychological literature on character structure. She concluded that opinion evidence and specific instances of conduct should be admitted to establish the defendant's character in the

prosecution's case in chief, from which the trier of fact would be able to reason that the defendant acted in conformity with his or her predisposition at the time the crime charged in the indictment was allegedly committed. Ms. Davies recommended that such evidence be admissible unless the probative value of character evidence presented in this fashion was substantially outweighed by prejudice to the defendant. *Id.* at 533-36.

50. *Id.* at 600 N.E.2d . The court recited the history of the notorious Robbins case. In State v. Robbins, 221 Ind. 125, 96 N.E.2d 691 (1943) Judge Robbins of the Knox County Circuit Court was accused of molesting a twelve year old female in chambers in the late 1930's. The prosecutor offered evidence that the judge molested several other male and female children in order to show his depraved sexual instinct. The trial judge refused to admit the other incidents of child molesting. Although the trial court threw out Judge Robbins' conviction on other grounds, the state appealed the issue of admission of the other uncharged acts of child molestation. The Supreme Court believed that most of Indiana's law on similar misconduct in sex crime cases originated with Robbins. The court said that in Robbins' time, the public would find accusations of

child molestation lodged against a pillar of the community unbelievable without bolstering the victim's credibility by stories of other, similar incidents. However, the court said:

> "[s]adly it is our belief that fifty years later we live in a world where accusations of child molest(sic) no longer appear improbable as a rule. This decaying state of affairs in society ironically undercuts the justification for the depraved sexual instinct exception at a time when the need to prosecute is greater. Lannan, 600 N.E.2d 1337.

51. The court apparently had not been invited to review such articles as Allan, *Similar Fact Evidence and Disposition: Law, Discretion and Admissibility*, 48 Mod. L. Rev. 253 (1985), which might suggest that the State had a non-character rationale for admitting Lannan's prior sexual intercourse with V.E., his attempts to seduce T.W. and the prior 1988 episode. The other sexual misconduct episodes would be admissible to show that the complaints lodged against Lannan by V.E. were not fabrications or coincidences because of the objective improbability of so many similar, false accusations against the same accused. This course of action, in exceptional cases, has been recommended by

Prof. Imwinkelreid. Imwinkelreid, Some Comments About Mr. David Karp's Remarks on Propensity Evidence 3, 1993 AALS Evidence Section Annual Meeting, Jan. 9, 1993.

52. *Id.* at 600 N.E.2d 1338-39.

53. *Id.* at 600 N.E.2d 1339.

54. *Id.* at 600 N.E.2d 1340, 1341. The court referred to admission of other similar, uncharged misconduct committed in the course of committing the crime charged as the "res gestae" exception to the character evidence rule. Imwinkelreid refers to this rule, which permits admission of evidence showing the defendant committed an uncharged crime simultaneously with the crime charged in the indictment as the "res gestae" doctrine. He also applies the same doctrine to admission of criminal activity committed in the course of or as part of the preparation for or escape from the crime charged in the indictment. IMWINKELREID, UNCHARGED MISCONDUCT §§6:21-6:23 (1984). Some modern commentators prefer to call this the "interwoven crime" theory of admissibility, and do not consider it an exception to the general exclusionary rule. See Reed, *Admission of Other Criminal Acts Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. (1984).

55. Lannan, 600 N.E.2d 1340.

56. *Id.* at 600 N.E.2d 1340-41. The court agreed that admission of the 1988 fondling episode in an ordinary case might have had a major impact on the jury, but the court noted that another witness had testified that Lannan told the witness in May, 1990, that Lannan was going to V.E.'s house to "f* * * them again", meaning V.E. and T.W.

57. *See, e.g.,* State v. Bernier, 491 A.2d 1000,1004 (R.I. 1985); State v. Jalette, 119 R.I. 614, 627, 382 A.2d 526, 533 (1978).

58. State v. Tobin, 602 A.2d 528, 529-30 (R.I. 1992). One of the incidents, the Christmas 1985, "horseplay", resulted in a "no true bill" finding by the indicting grand jury. The trial justice did not tell the jury that the grand jury had failed to indict on this act. The Supreme Court held that the trial justice withheld relevant information, and reversed Tobin's conviction for nondisclosure. *Id.* at 602 A.2d 533.

59. *Id.* at 602 A.2d 531. The court cites IMWINKELREID §4.18 in support of this view. Imwinkelreid warned readers that states that have adopted the Uniform Rules of Evidence often have older case law admitting uncharged sexual misconduct in sex offender cases that has not been overruled. He also quoted Slough's seminal

Relevancy Unraveled, 6 KAN. L. REV. 38, 51 (1957) in support of the existence of a "special exception for evidence of the defendant's disposition to commit sexual offenses." However, Prof. Imwinkelreid actually supports the contrary view that adoption of Rule 404 abolished prior exceptions for lustful disposition in those jurisdictions that had prior case law supporting the exception.

60. *Id.* at 602 A.2d 532. In Jalette, the court had discussed the danger that indiscriminate use of uncharged sexual misconduct evidence in sex offender cases might be a substantial risk to a constitutionally fair trial. It again reiterated its view that uncharged misconduct evidence should be used sparingly, when reasonably necessary, never when the evidence is purely cumulative, and accompanied by a proper cautionary instruction to the jury describing how the jury should take the evidence. Jalette, 119 R.I. 627, 382 A.2d 533. The Rhode Island Supreme Court was also not presented with Dept. of Public Prosecutions v. Boardman or any English commentary on admission of uncharged misconduct evidence. If it had, it would have been able to solidify its opinion by using the Boardman standard for corroboration applicable to the way in which Tobin stalked "Jill" over a nine year

period.

61. Pedophilia is described in AMERICAN PSYCHIATRIC ASS'N, ED., DIAGNOSTIC AND STATISTICAL MANUAL 279 (3rd ed. 1992) (hereafter "DSM IIIR") under paraphilia. Paraphilia is a sexual disorder characterized by sexual arousal in the sufferer involving (1) non-human objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated); or (3) children or other nonconsenting persons. Pedophilia (sexual arousal by children) is a paraphiliac disorder. The essential feature of the disorder is recurrent, frequent intense sexual urges and sexually arousing fantasies of at least six months' duration involving sexual activity with a prepubescent child. *Id.* at 284. The American Psychiatric Association set a diagnostic limitation on pedophilia requiring that the victim be 13 or younger, and the sufferer be at least 16, and at least 5 years older than the victim. *Id.* at 285.

62. There are two bills pending before the U.S. Congress that call for amending the Federal Rules of Evidence to include specific provisions for admitting prior uncharged sexual misconduct in sex offender cases. which read as follows:

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases. (a) In a criminal case in which the defendant

is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the schedule date of trial or at such later time as the court may allow for good cause.

(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) for purposes of this Rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved --

(1) any conduct proscribed by Chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1) - (4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases. (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the schedule date of trial or at such later time as the court may allow for good cause.

(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other

rule.

(d) for purposes of this Rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved --

(1) any conduct proscribed by chapter 109A of title 18, United States Code that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1) - (5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molesting.

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged

commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these Rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other rule. §121, S. 3271, 102d Cong. 2d sess., 138 CONG. REC. 15159 (1992) (introduced Sept. 25, 1992 by Sen. Dole with multiple co-sponsors).

Identical or substantially similar versions of these rules also appeared in H.R. 5960, 102d Cong. 2d sess., §121, 138 CONG. REC. 8647 (1992) (introduced by Rep. Molinari with multiple sponsors); H.R. 5218, 102d Cong. 2d Sess., §711, 138 CONG. REC. 3643 (1992); H.R. 3463, 102d Cong. 1st sess., 137 CONG. REC. 137 (1991); H.R. 1400, 102d Cong. 1st sess., §801, 137 CONG. REC. 1669 (1991); H.R. 1149, 102d Cong. 2d

sess., §231, 137 CONG. REC. 1279 (1991); S. 1335, 102d Cong. 1st sess., §301, 137 CONG. REC. 8310 (1991); S. 1151, 102d Cong. 1st sess., §801, 137 Cong. Rec. 6654 (1991); S. 635, 102d Cong. 1st sess., §801, 137 Cong. Rec. 3192 (1991); and S. 472, 102d Cong. 1st sess., §231, 137 Cong. Rec. 2189 (1991).

63. These policy considerations have been laid out in *Report of the Attorney General on the Admission of Criminal Histories at Trial,* 22 MICH. J. L. REFORM 707, 723, 724-27.

64. The panelists at the 1993 AALS Evidence section did not acknowledge this in their prepared remarks. Imwinkelreid, Some Comments About Mr. David Karp's Remarks on Propensity Evidence, Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases papers delivered before the Evidence Section, Ass'n of American Law Schools, Jan. 9, 1993.

65. Wigmore recognized this connection at the turn of the century. See J. WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF 178 - 83 (1913). Modern commentators have tended to treat the admission of uncharged misconduct evidence as a formalistic problem in discovering the right verbal formula which must be uttered to gain the objective: admission of the uncharged misconduct. Wigmore was concerned with the relevance of recidivism to

conviction. In his estimation, drawn before sophisticated statistical studies of recidivism were available, prior criminal behavior was a strong predictor of future or consequential criminal behavior. As he developed his discussion of evidence proving a trait of behavior, he pursued his insight into the power of recidivism to lead to the just result: conviction. See *Id.* at 188-89 (quoting H.L. Adam's impression of habitual criminal behavior).

This point has been made recently by the person responsible for drafting new proposed Federal Rules of Evidence 413 to 15. Mr. Karp stated at the 1993 AALS Evidence Section meeting that:

> When I make my own assessment of evidentiary rules, I start by asking myself what information a reasonable person would want to have in deciding an important matter. If I conclude that a reasonable person would want to have information that is excluded by existing evidentiary rules, I then ask whether there is a sufficient basis for denying juries evidence that one would reasonably desire to make an informed decision. Karp, *supra* note 64 at 11.

* * * * *

Ordinary people do not commit outrages against

> others because they have relatively little inclination to do so, and because any inclination in that direction is suppressed by moral inhibitions and fear of the practical risks associated with the commission of crimes. A person with a history of rape or child molestation stands on a different footing. His past conduct provides evidence that he has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him. A charge of rape or child molestation has greater plausibility against a person with such a background. *Id.* at 5.

66. The principle is a simple statistical statement, pursued in civil litigation in such cases as Halloran v. Virginia Chemicals, Inc., 41 N.Y.2d 386, 393 N.Y.S.2d 341, 361 N.E.2d 991 (1977) and in criminal cases exemplified by United States v. Woods, 484 F.2d 127 (4th Cir.), *cert. denied*, 415 U.S. 979 (1973). The fact to be proved is the commission of an act on the date in question in the complaint or indictment. The perpetrator has done the same or similar act before. The more times the perpetrator repeats that act, the

more likely it is that he repeated it on the date in question, if the conditions for its perpetration are much the same as before. The logical relevance of prior uncharged misconduct is based on this insight. The more frequently that a person has committed the same act, the more likely it is that under the same conditions, he or she repeats that act. The legal question is just how many prior or subsequent similar incidents are enough to prove the fact of commission in the case at bar. The principle of recidivism lies behind most criminal investigation techniques. See COX & WADE, THE CRIMINAL JUSTICE NETWORK 231 (2d ed. 1989). These authors cite Daniel Glazer's 1964 recidivism study which predicted a general 35% recidivism rate by convicted felons. GLAZER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964). These results are contradicted by common police perceptions of a 50 to 60% general recidivism rate among known offenders, and by studies such as MILLER, DINITZ & CONRAD, CAREERS OF THE VIOLENT (1982) which predicted recidivism based on rearrest rates rather than on conviction. There is a relatively high correlation between prior conviction for a crime and later rearrest for the same type of crime. The 1581 FBI rap sheets examined by Miller, Dinitz & Conrad for Columbus, Ohio, violent criminals

showed a 95% second arrest rate for violent criminals. According to these authors, 64.5% of all violent criminals are rearrested from two to five times for various crimes after their first conviction. However, the recidivism rate for purely violent crimes is considerably less than for all crimes. Miller, Dinitz & Conrad found about a 50% rearrest among those convicted of violent crime for a second violent crime. Thus, the chances are one in two that a violent criminal will be rearrested for a second violent crime. If similar recidivism rates are characteristic of the various types of sex offenders, then the fact of prior conviction or a well established prior offense not resulting in arrest or conviction tends to prove that the perpetrator has repeated the former criminal act again. The literature and case law on sex offenders is hard to evaluate because the terms used to describe sex offenses by the courts and by commentators do not make logically watertight compartments. For purposes of this paper, a "rapist" is anyone who engages in sexual intercourse with anyone else against the other person's will. This category obviously includes some cases of incest committed in violent fashion without the victim's consent. Involuntary sexual intercourse is not limited to male - female genital intercourse, but

includes involuntary anal and oral intercourse and all forms of involuntary homosexual intercourse. A "pedophile" (child molester) is anyone who engages in sexual activity short of intercourse with any person under sixteen (those who cannot consent by law). which covers such events as fondling, masturbating, exposure and digital penetration. The category includes both homosexual and heterosexual activities short of intercourse. The fact that the victim voluntarily took part in the activity is irrelevant. "Incestuous persons" are those who engage in voluntary sexual intercourse with someone within the prohibited degree of consanguinity. Thus, a parent who fondles his daughter is a pedophile, and a parent who has sexual intercourse with his son is an incestuous person, not a sodomist. A parent who has involuntary intercourse with his child is a rapist. Hebrophiles or "statutory rapists" are those who engage in voluntary sexual intercourse with unrelated persons of the opposite sex who cannot legally consent to such activity. A man who has sexual relations with his 15 year old female first cousin is a statutory rapist in those states where such persons may marry, and an incestuous person everywhere else. A "sodomist" is any person who engages in voluntary anal or oral intercourse with a

person who is of the same sex. Thus voluntary oral or anal sexual relations with a person of the opposite sex is not included in this category, although the act could be statutory rape or incest under the right conditions.

67. See text accompanying notes 68-121.

68. Groth & Burgess, *Rape: A Sexual Deviation* in SCACCO, JR., ED., MALE RAPE A CASEBOOK OF SEXUAL AGGRESSION 230,234-35, 237-38 (1982); MCCAGHY, CRIME IN AMERICA 124, 125-28 (1930).

69. *Id.*

70. Amir, *Forcible Rape,* 31 FED. PROBATION 51, 53 (March, 1967). Amir's profile of Philadelphia rapists remains the seminal work on rape profile.

71. *Id.* at 56-57.

72. *Id.* at 52.

73. *Id.* at 54, 57.

74. *Id.* at 54.

75. *Id.* at 55-56.

76. *Id.* at 53, 57.

77. *Id.* at 53, 55.

78. *Id.* at 55.

79. MCCAGHY, CRIME IN AMERICA 124, 128-29 (1930).

80. *See, e.g.*, CAPRIO & BRENNER, SEXUAL BEHAVIOR - PSYCHO LEGAL ASPECTS, 184-85 (1961) which restates the old sexual psychopath theory. This type of thinking surfaced in such decisions as State v. McDaniel, 80 Ariz. 381, 298 P.2d 798 (1956). The defendant was accused of homosexual pedophilia and sodomy with a 14 year old boy. Other high school boys were allowed to testify that the defendant had fondled them and had inveigled them to commit fellatio on him. The court approved admission of these other tales to show McDaniel's plan or scheme of sexual satisfaction. It then embarked on a side tour into social science:

> There is still another relevancy in the evidence herein adduced. Certain crimes to day are recognized as stemming from a specific emotional propensity for sexual aberration. The fact that in the near past one has given way to unnatural proclivities has a direct bearing upon the ultimate issue whether in the case being tried he is guilty of a particular unnatural act of passion. The importance of establishing this fact far outweighs the prejudicial possibility that the jury might convict for general rather than specific criminality. . . *Id.* at 80 Ariz. 385, 298 P.2d 802.

81. McCAGHY, *supra* note 80, 24; Bard, Carter, Cerce, Knight, Rosenberg & Schneider, *A Descriptive Study of Rapists and Child Molesters: Developmental, Clinical and Criminal Characteristics,* 5 BEHAVIORAL SCIENCE & THE LAW 203, 217-18 (1982). The Bard study consisted of in depth interviews of sex offenders in a Massachusetts sex offender rehabilitation program and a control group of sex offenders held in the Walpole State Prison. Rapists in this study had a higher incidence of violent behavioral problems, were less likely to be socially withdrawn and had fewer medical complaints than pedophiles in the study population had. While the rapists scored higher on measures of aggressiveness and narcissism, child molesters were significantly more likely to show psychotic symptoms and passive sexuality.

82. McGAHY, *supra* note 80 at 124-25. See also Romero & Williams, *Recidivism Among Convicted Sex Offenders: A Ten Year Follow Up Study,* 49 FED. PROBATION 58, 63-64 (1985); Amir, *supra* note 71 at 54. According to Amir, 19% of his Philadelphia rapists had a prior arrest record, 9% had been arrested for rape before. Examining continuity from juvenile to adult arrest records, Amir concluded that the highest proportion in continuity was for offenses against the

person. Adults arrested for rape were less like to be first offenders than adults arrested for other types of crime.

83. The New Jersey study was published as TAPPAN, THE HABITUAL OFFENDER (1950). Tappan also reported extremely low recidivism rates for rapists and child molesters in New York. He cited figures showing that only 7% of convicted sex offenders were rearrested for a sex offense within 12 years of first detention. Id. at 22-25. In 1958, Frisbie reported similar low recidivism rates for sex offenders in California. See Frisbie, *The Treated Sex Offender*, 21 FED. PROBATION 18, 19-20 (1958). Until recently, both studies were considered authoritative and the commentators considered rape, sodomy, incest and child molesting to be low recidivist crimes.

84. Romero & Williams, *supra* note 82 at 63.

85. Bard et al. *supra* note 81; Groth, Longo & McFadden, *Undetected Recidivism Among Rapists and Child Molesters* 28 CRIME & DELINQUENCY 450, 454, 457-58 (1982). These researchers interviewed convicted rapists and child molesters in the North Florida Evaluation and Treatment Center, Gainesville, FL and the Somers, CT, Correctional Institution. The Florida sample consisted of 90 offenders, 49 of whom had committed some form of

sexual assault on an adult, and 41 of whom had assaulted a child. The Connecticut sample of 47 was composed of 34 rapists and 13 child molesters. Each subject was asked the following five questions:

1. How old were you at the time of your first sexual assault or attempted assault, regardless if you were caught for this or not?

2. How many sexual assaults have you been convicted of, to date?

3. How many sexual assaults have you attempted or committed for which you were never apprehended or caught?

4. How many sexual offenses (assaults or attempted assaults) have you been acquitted for, which in fact you did do?

5. How many offenses (assaults or attempted assaults) have you been found guilty of, which in fact, you did not do?

Reported recidivism was checked against actual FBI records for each subject. The reported FBI recidivism rate for the 83 rapists amounted to 54 of 83 (65%). The reported recidivism rate for child molesters was 20 of 54 (37%). Fifty one of 76 (67.1%) rapists reported one or more unreported incidents of recidivism. Twenty six of 52 (50%) child molesters reported one or more

unreported acts of child molesting. The rapists and child molesters in this study admitted to an average of five similar sexual assaults for which they were not apprehended. If this study represents typical behavior patterns for sex offenders, then sex offenders have a recidivism rate close to that of robbers, burglars, thieves and drug offenders.

86. Romero & Williams, *supra* note 82 at 62-63.

87. Groth, Longo & McFadden, *supra* note 85 at 457.

88. *Id.*

89. There are some authorities who consider that logical relevance alone is sufficient to warrant admission of prior criminal histories. *See, e.g., Admission of Criminal Histories at Trial*, 22 J. LAW REFORM 707, 725 (1989).

90. Record Vol. B at 129-32. Getz admitted on cross examination that he had struck his second wife during an altercation which led the State Police being called to the Getz residence to break up the affray. Getz' character witnesses were cross examined by Mr. Wharton for Prosecution on whether or not they were aware that Getz had been arrested in 1979 for an alleged assault on his first wife, Cathy, and again in 1985 for an assault on his second wife Audie. See record Vol. C at 70-71. However, Getz had never been

charged with any other violent crime, and had no criminal convictions. Telephone conversation with Ferris W. Wharton, Deputy Attorney General for the State of Delaware, August 4, 1989.

91. Groth & Gary, *Heterosexuality, Homosexuality and Pedophilia: Sexual Offenses Against Children and Adult Sexual Orientation* in Scacco, Jr., ed., MALE RAPE A CASEBOOK OF SEXUAL AGGRESSION 143, 145 (1982); Gigeroff, Mohr & Turner, *Sex Offenders on Probation: Heterosexual Pedophiles*, 32 FED. PROBATION 17 (1968).

92. McCAGHY, *supra* note 80, Bard, Carter, Cerce, Knight, Rosenberg & Schneider, *supra* note 81.

93. Groth, Longo & McFadden, *supra* note 85 at 452, 454.

94. Id. See also Gigeroff, Mohr & Turner, *Sex Offenders on Probation: Heterosexual Pedophiles*, 32 FED. PROBATION 17, 19 (1968).

95. Gigeroff, Mohr & Turner, *supra* note 94 at 18.

96. *Id.*

97. *Id.* The testimony regarding the alleged prior incidents of molesting given by Audie Getz indicated that Getz may have fondled his daughter on the family room couch. Record Vol. B. at 39. Getz stated in his own testimony that he wrestled with his children. Record Vol. B. at 108-110. Tobin's frequent genital fondling assaults on "Jill" were described by at least

one witness as "horseplay".

98. Gigeroff, Mohr & Turner, *supra* note 94 at 18-19.

99. Groth, Longo & McFadden, *supra* note 85 at 452, 454.

100. *Id.*

101. The testimony most relevant to this point was the statement made by his daughter, Connie, to her step mother shortly after the alleged incident. See Record Vol. B at 35-39.

102. Lannan, 600 N.E.2d 1340-41.

103. Tobin, 602 A.2d 529-30.

104. See *infra* statutes in note 278.

105. Tappan, *supra* note 83.

106. See Kocen & Bulkley, *Analysis of Criminal Child Sex Offense Statutes* in American Bar Ass'n Nat'l Legal Resource Ctr. for Child Advocacy & Protection, ed., CHILD SEXUAL ABUSE AND THE LAW 1-12 (1983) which explicitly suggests that New Jersey's child sexual abuse statute serve as a model for other jurisdictions after an exhaustive review of sexual misconduct statutes in all 50 states. The writers favored special protection for teen agers from older sex offenders, a tiered series of ages for sexual contact and intercourse up to 18, and its reasonable penalty structure.

107. *Id.*

108. The literature on child sexual abuse and incest is massive. For representative examples, see Simpson, *Incest - Society's Last and Strongest Sexual Taboo*, MAGAZINE OF THE SAN FRANCISCO EXAMINER 10, (Oct. 4, 1981).

109. Groth, Longo & McFadden, *supra* note 85 at 454.

110. Groth, Longo & McFadden, *supra* note 85 at 452, 454. This class of offenders has been christened "hebrephiles" (lovers of teen agers). See Baxter, Marshall, Barbaree, Davidson & Malcolm, *Deviant Sexual Behavior - Differentiating Sex Offenders by Criminal and Personal History, Psychometric Measures and Sexual Response*, 11 CRIMINAL JUSTICE & BEHAVIOR 477, 488 (1984).

111. Groth, Longo & McFadden, *supra* note 85 at 452, 454.

112. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children* in WALKER, ED., HANDBOOK ON SEXUAL ABUSE OF CHILDREN 19, 26-29 (1988).

113. Since his indictment, Delaware law has been changed to limit mandatory life sentences to consensual intercourse with a minor under 16 who was not the defendant's social companion.Former 11 Del. Code. §764 (1979). This statute was superseded by current 11 Del. Code §775 (unlawful first degree sexual intercourse). Both statutes would have defined any voluntary sexual intercourse with a victim under 16 who had not

previously consented to intercourse as a class A felony.

114. Record Vol. B at 18-20.

115. Lannan, 600 N.E.2d 1341.

116. Frotteurism is defined as recurrent, intense sexual urges and sexually arousing fantasies of at least six months; duration involving touching and rubbing against a non-consenting person. DSM IIIR 283. "Jill" did not willingly consent to her uncle's digital penetration or fondling. Although these acts of frottage did not occur in a crowded place among strangers, apparently, Tobin did make his assaults on "Jill" during crowded family gatherings.

117. Tobin, 602 A.2d 529-30. Tobin once watched his teen age son attempt to have sexual intercourse with "Jill"; he fondled her genitalia and inserted his finger in her vagina on three separate occasions. The record does not reflect that he ever attempted sexual intercourse with "Jill". Voyeurism is defined as recurrent sexual intense sexual urges and sexually arousing fantasies involving the act of observing an unsuspecting person who is naked, in the process of disrobing, or engaging in sexual activity. DSM IIIR 289. One element of typical voyeurism is missing in the 1976 "strip poker" incident: the victim was aware that Tobin was watching

him.

118. Exhibitionism is defined as recurrent, intense sexual urges and sexually arousing fantasies of at least six months; duration, involving the exposure of one's genitals to a stranger. There is usually no attempt made by the exhibitionist to have sexual activity with the stranger, and exhibitionists are not a physical threat to their victim. The damage they do is confined to psychological stress and shock. DSM IIIR 282.

119. Gigeroff, Mohr & Turner, *Sex Offenders on Probation: The Exhibitionist,* 32 FED. PROBATION 18, 21 (July, 1968). This is the traditional view of police and researchers. Wheeler, *Sex Offenses, a Sociological Critique,* 25 LAW & CONTEMPORARY PROBLEMS 324, 340 (Table 29,4) (1961).

120. Gigeroff, Mohr & Turner, *supra* note 119 at 19.

121. *Id.* at 19-20.

122. *Id.* at 21.

123. *Inter Alia,* CORRECTIONS COMPENDIUM 9 (March, 1989).

124. *Id.*

125. *Id.*

126. Lannan, 600 N.E.2d 1338-39. The court conceded that the recidivism and corroboration arguments in support of a specific exception to the character evidence rule had some merit. It was more concerned with the

supposed mischief that a special exception in sex offender cases would cause to the structure of character evidence law in Indiana, such as lack of notice to the defendant of intent to use uncharged misconduct, and the extreme laxity with which Indiana's courts used the probative value versus prejudice balancing test to exclude sexual misconduct that was extremely remote in time from the events at issue in the trial. It should be noted that the similar episodes of sexual misconduct in Lannan's case history were not remote (the first being only a year before the offense charged in the indictment) and the defendant did not argue the constitutional point that the State's failure to notify him of its intent to use uncharged misconduct evidence violated his Sixth and Fourteenth Amendment right to notice of the charges laid against him.

127. Tobin, 602 A.2d 531. The portion of the opinion devoted to uncharged sexual misconduct evidence was intended to guide the trial justice when Tobin was retried for the alleged sexual assault, since the court reversed the trial court because the jury was not told that one of these incidents of uncharged misconduct resulted in a "no true bill" finding by the indicting grand jury.

128. *See, e.g.*, IMWINKELREID, UNCHARGED MISCONDUCT EVIDENCE §101 (1984); LOUISELL & MUELLER, FEDERAL EVIDENCE §190 (1985); CLEARY, ED., MCCORMICK ON EVIDENCE §§186, 187, 190 (3rd ed. 1984); 2 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE ¶404[1] (1988); 1 WHARTON, WHARTON'S CRIMINAL EVIDENCE §177 (Torcia rev. 1985); 22 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE, §§5236, 5239 (1984). The early history of the character evidence rule has been very accurately stated by prior authors and need not be repeated at length here. Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 958-73 (1934) accurately traces the English history of the character evidence rule and its major exceptions. *Id.*, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938) explains the American character evidence rule and similar acts exception in detail. See also Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 U. CIN. L. REV. 713 (1981).

129. *See, e.g.*, LOUISELL & MUELLER, *supra* note 128 at §190; CLEARY, ED., *supra* note 128 at §§186, 187, 190; 2 WEINSTEIN & BERGER, *supra* note 128 at ¶404[1]; 1 WHARTON, *supra* note 128 at §177; 22 WRIGHT & GRAHAM, *supra* note 128 at §§5236, 5239.

130. *See, e.g.*, IMWINKELREID, *supra* note 128 at §1:09; LOUISELL & MUELLER, *supra* note 128 at §190; CLEARY, ED., *supra* note 128 at §§186, 187,190; 2 WEINSTEIN & BERGER, *supra* note 128 at ¶404[1]; 1 WHARTON, *supra* note 128 at §177; 22 WRIGHT & GRAHAM, *supra* note 128 at §§5236, 5239.

131. *See, e.g.*, LOUISELL & MUELLER, *supra* note 128 at §190; CLEARY, ED., *supra* note 128 at §§186, 187, 190; 2 WEINSTEIN & BERGER, *supra* note 128 at ¶404[1]; 1 WHARTON, *supra* note 128 at §177; 22 WRIGHT & GRAHAM, *supra* note 128 at §§5236, 5239.

132. *See, e.g.*, LOUISELL & MUELLER, *supra* note 128 at §190; CLEARY, ED., *supra* note 128 at §§43,187,190; 3 WEINSTEIN & BERGER, *supra* note 128 at ¶609[1]-[11]; 3A WIGMORE, *supra* note 128 at §§980,980A, 985-87; 22 WRIGHT & GRAHAM, *supra* note 128 at §§5236, 5239.

133. *See, e.g.*, LOUISELL & MUELLER, *supra* note 128 at §190; CLEARY, ED., *supra* note 128 at §§42, 187, 194; 3 WEINSTEIN & BERGER, *supra* note 128 at ¶608[1]-[8]; 3A WIGMORE, *supra* note 128 at §§980, 980A, 985-87; 22 WRIGHT & GRAHAM, *supra* note 128 at §§5236, 5239.

134. *See, e.g.*, LOUISELL & MUELLER, *supra* note 128 at §190; CLEARY, ED., *supra* note 128 at §§43, 191; 2 WEINSTEIN & BERGER, *supra* note 128 at ¶404[1]-[11]; 1 WIGMORE , *supra* note 128 at §§55-60, 3A *Id.* at §925; 22 WRIGHT & GRAHAM, *supra* note 128 at §§5236, 5239 (1984).

135. CLEARY, ED., *supra* note 128 at §42.

136. *Id.* at §44.

137. *See, e.g.*, CLEARY, ED., *supra* note 128 at §§186, 190; 2 WEINSTEIN & BERGER, *supra* note 128 at ¶404[1]-[11]; 3A WIGMORE, *supra* note 128 at §§980-980A, 985-87.

138. CLEARY, ED., *supra* note 128 §190 at 566-69. R. 404(a) Fed. R. Evid. (1988) states that character evidence is generally inadmissible to prove that a person acted in conformity with his or her character on a particular occasion. The rule recognizes three exceptions to the general bar to character evidence: (1) the defendant in a criminal prosecution may offer evidence of his or her good character, which the prosecution may rebut with bad character evidence; (2) the defendant in a criminal prosecution may offer evidence of a pertinent character trait of the victim of a crime, to show the victim's predisposition to be the first aggressor in the case of violent crimes or homicides, which the prosecution may rebut with evidence of peacefulness; and (3) evidence of a witness' character for truth and veracity. Rule 405 requires that character evidence, when offered, be tendered in the form of reputational or opinion evidence, unless the character trait which is to be proved is essential to a charge, claim or defense. In the latter case, specific instances of the person's

conduct in conformity with the character trait may be admitted. Compare R. 406 Fed. R. Evid. which allows proof of habit or routine practice without mandating a particular kind of proof.

139. *Id.* at §195. *See also* R. 406 Fed. R. Evid. (1988).

140. The following jurisdictions have adopted the Uniform Rules of Evidence as of July 1, 1989:

Alaska: Alaska R. Evid. 101 to 1101 (1988);

Arizona: Ariz. R. Evid. 101 to 1103 (1988);

Arkansas: Ark. R. Evid 101 to 1102 (1989);

Colorado: Colo. R. Evid. 101 to 1102 (1984);

Delaware: Del. R. Evid. 101 to 1103 (1987);

Florida: Fla. Stat. Ann. §§90.101 to 90.958 (West, 1979);

Guam: Guam Civil Code §§101 to 1102 (1988);

Hawaii: Hawaii Rev. Stat. §626-1 (1988);

Idaho: Idaho R. Evid. 101 to 1103 (1989);

Iowa: Iowa R. Evid. 101 to 1103 (1988);

Kentucky: Ky. R. Evid. 101 to 1102 (1992);

Louisiana: La. Code Evid. Art.101 to 1102 (1989);

Maine: Me. R. Evid. 101 to 1102 (1980);

Michigan: Mich. R. Evid. 101 to 1102 (1985);

Minnesota: Minn. R. Evid. 101 to 1101 (1980);

Mississippi: Miss. R. Evid. 101 to 1102 (1989);

Montana: Mont. R. Evid. 100 to 1008) (1988);

Nebraska: Neb. Rev. Stat. §§27-101 to 1103 (1985);

Nevada: Nev. Rev. Stat. §§47.020 to 52.435 (1988);

New Hampshire: N. H. R. Evid. 100 to 1103 (1988);

New Mexico: N.M. Evid. R. 11-101 to 11-1102 (1988);

North Carolina: N.C. R. Evid. 8.1 to 8.103 (1986);

North Dakota: N.D. Evid. R. 101 to 1103 (Supp. 1988);

Ohio: Ohio R. Evid. 101 to 1103 (1981);

Oklahoma: Okla. Stat. Ann. tit. 12 §§2101 to 3103 (1980);

Oregon: Or. Rev. Stat. §§40.010 to 40.585 (1988);

Puerto Rico: P.R. Laws Ann. tit. 32, app. IV rules 1 to 84 (1988);

Rhode Island: R.I. R. Evid. 101 to 1102 (1987);

South Dakota: S.D. Comp. Laws Ann. §§19-9-1 to 19-18-8 (1987);

Texas: Tex. Rules of Civil Evidence, R. 101 to 1008 (1988); Tex. Rules of Criminal Evidence., R. 101 to 1103 (1988);

Utah: Utah R. Evid. 101 to 1103 (1989);

Vermont: Vt. R. Evid. 101 to 1103 (1983);

Washington: Wash. R. Evid. 101 to 1103 (1988);

West Virginia: W. Va. R. Evid. 101 to 1102 (1989);

Wisconsin: Wis. Stat. Ann. §§901.01 to 911.02 (1975);

Wyoming: Wyo. R. Evid. 101 to 1104 (1988).

The United States has adopted substantially similar

Federal Rules of Evidence. The 1974 version of the Uniform Rules of Evidence were in part based on the 1973 edition of the Federal Rules of Evidence.

141. Cal. Evid. Code §1101 (1988); N.J. Evid. Rule 55 (1988).

142. *See infra* text accompanying notes 326-373.

143. *See infra* text accompanying notes 295-334.

144. For an example of this uncritical acceptance of uncharged sexual misconduct evidence, see E. CLEARY, ED., *supra* note 128 §190 at 560-61; LOUISELL & MUELLER, *supra* note 128 §140 at 212; 1 WHARTON, *supra* note 128 at §188. 22 WRIGHT & GRAHAM, *supra* note 128 §§5236, 5239 at 436-37 mentions the use of uncharged sexual misconduct to prove predisposition to commit sex crimes. At 461-62, the authors criticize the making of a special exception to the character evidence rule for sex crimes alone. *But see* IMWINKELREID, *supra* note 128 at §§3:08 4:11-18,6:02, 6:05. In §§6:02 and 6:05, Prof. Imwinkelreid mentions the use of uncharged sexual misconduct evidence to counter a defense based on consent, or to corroborate the victim's testimony. In §3:08 he notes that the courts have been more willing to permit use of uncharged sexual misconduct to prove identity in sex offenses than in other crimes. Finally, in §§4.11-18 Imwinkelreid presents the lustful disposition exception

to the character evidence rule and describes its gradual demise, citing most of the critical commentary which had appeared in legal periodicals up to 1983. For the author's contrary view that the lustful disposition exception is alive and well, see note 295. 2 WEINSTEIN & BERGER, *supra* note 128 at ¶404[11] (1988) notes that there are relatively few federal prosecutions for sex crimes, but notes that the states liberally allow evidence of other uncharged sexual misconduct in sex offender cases. The authors state that "This liberality arises from a general (and somewhat spurious) notion that the mere fact of commission of a similar offense has more probative value in proving the commission of the offense charged in cases involving sexual crimes than it does in cases involving other crimes." LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE §5.15 at 166-67 (2d ed. 1987) presents a thoughtful analysis of this problem. 2 WIGMORE, *supra* note 128 at §§358, 398-402 remains committed to the use of uncharged sexual misconduct evidence in sex offender cases, because the authors believe that the predisposition of sex criminals to repeat their actions is greater than that of other types of deviant criminal behavior. The law review commentators are divided. Some few uncritically accept and favor admission of

uncharged sexual misconduct evidence in sex offender cases. Melville, *Evidence as to Similar Offenses or Transactions in Criminal Cases*, DICTA, 247, 248 (July, 1952); Thomas, *Looking Logically at Evidence of Other Crimes in Oklahoma*, 15 OKLA. L. REV. 431, 446 (1962). Other commentators are highly critical of the use of such evidence. *See, e.g.*, Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212 (1965); Payne, *The Law Whose Life is Not Logic: Evidence of Other Crimes in Criminal Cases*, 3 U. RICHMOND L. REV. 62, 67-70 (1968) (in context of defendant's exercise of Fifth Amendment privilege against self incrimination); Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 335-36 (1956). Earlier Stone had suggested that the traditional formula for the rule excluding uncharged misconduct unless relevant to motive, intent, knowledge, plan or design or identity of the accused was "spurious" and should be disregarded in favor of a general rule admitting uncharged misconduct whenever the uncharged misconduct was relevant to some issue besides the defendant's propensity to commit crimes. Stone used a sex offense case as an example favoring his inclusive formulation of the rule, which he called the "original rule". Stone, *The Exclusion of Similar*

Fact Evidence: America, 51 HARV. L. REV. 988, 1011-12 (1938). Recently, Stone's original inclusive admission theory has been carried one step further by Uvillier, who favors an inclusive rule admitting evidence of an actor's predisposition to act in habitual or characteristic ways. See Uvillier, *Evidence of Character to Prove Conduct: Illusion, Illogic and Injustice in the Court Room*, 130 U. PA. L. REV. 845, 889-90 (1982). Uvillier's formula would ensure admission of a defendant's predisposition to commit sex offenses by proof of specific instances of similar uncharged misconduct. Student notes and comments tend to be highly critical of the sex offense exception. *See, e.g.*, Note: *Criminal Law: Evidence of Prior Misconduct*, 51 MARQ. L. REV. 104, 111 (1967): Note: *Evidence--Criminal Law--Prior Sex Offenses Against a Person Other than the Prosecutrix*, 46 TUL. L. REV. 336, 341-42 (1971); Note: *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L. J. 763, 764 (1961); Comment: *Evidence of Other Crimes as Substantive Proof of Guilt in Maryland*, 9 U. BALT. L. REV. 245, 255 (1980); Comment: *A Proposed Analytical Method for the Determination of the Admissibility of Evidence of Other Offenses in California*, 7 UCLA L. REV. 463, 479-80 (1960); Case Comment, 2 FLA. ST. U. L. REV.

197, 201 (1974); Case Comment: 30 KY. L. J. 433, 434 (1942); Comment: *Other Crimes Evidence in Louisiana*, 33 LA. L. REV. 614, 623 (1973); Recent Decision, 17 OHIO ST. L. J. 351, 352 (1956).

145. It should be noted that the proposed new Rules 413 and 414 Fed. R. Evid. call for advance notice of intent to use uncharged misconduct in sex offender cases. The government must inform the defendant of its intent, and supply witness's statements or summaries not later than fifteen days before the first scheduled trial date. This proposed rule supplements Rule 16 Fed. R. Crim. Pro. which calls for discovery and inspection of inculpatory and exculpatory matter. Current R. 404(b) Fed. R. Evid. also provides for advance notice of intent to use specific instances of misconduct if the defendant makes some type of request in advance of trial to receive disclosure of such matter.

146. COLE, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 10 (1989). Dr. Cole notes that the American homicide rate is ten times that of Japan, Austria, West Germany or Sweden. The New York City robbery rate is five times that of London, and one hundred twenty five times that of Tokyo.

147. Gallup, *The Gallup Report No. 252* 28-29 (Sept. 1986) (most important problem). Crime ranks 8th as of 1986

among major concerns. If "drug abuse", a separate category under Gallup's poll, was included with "crime", then "crime" would rank fourth overall.

148. Gallup, *The Gallup Report No. 189* 17 (Feb. 1982) (Gallup crime audit).

149. *Id.* at 21. The percentage of those afraid to walk alone at night within a mile of their residence has gone up from 34% in 1965 to 48% in 1982.

150. COLE, *supra* note 146, Table 1.3 at 23. The personal theft rate is 82 per 1,000, the violent victimization rate, 33 per 1,000 and the simple and aggravated assault rate 25 per 1,000. The motor vehicle accident injury rate is 23 per 1,000. Women are about as likely to be raped as they are to die from cancer. People are more likely to be crime victims than to be divorced.

151. *Id.* at 27, 534-35. According to Cole, 65% of adult felons are rearrested and jailed, soaking up the time of corrections officers, probation and parole officers, prosecutors, defense counsel and the courts. This represents a shift in the prison population of more than 20% in the past 20 years. In the 1950's only 40% of the inmate population were recidivists: in the 1980's, 60% of the inmate population are recidivists.

152. This phenomenon was noted first in the trial of Americans for pro-German utterances during World War I. As the public outcry for sedition convictions increased, federal prosecutors were under great pressure to bring home convictions. The sedition cases saw an increased use of prior pro-German and anti-draft remarks introduced as evidence against the accused, including such remarks made before passage of the 1917 Sedition Act. *See* Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 733 (1981).

153. *See infra* text at notes 295-334.

154. Arizona, California and Indiana cases show this progression. For Arizona's struggle with the crusade against sex crimes, *see infra* text and cases cited at notes 318-334. California's plight may be found *infra* at notes 390-421. Both states have struggled to meet shifts in public opinion over the past two decades regarding prosecutable sexual misconduct. The appellate decisions of the 1970's reflect a response to public opinion which increasingly looked upon voluntary extramarital sex activity as "all right". The decisions of the late 1970's and 1980's reflect the shift in opinion against certain kinds of sexual activities, e.g., rape, child molesting and homosexual

activities. In the 1970's admission of uncharged sexual misconduct evidence was restricted. In the 1980's it is encouraged in child molesting and rape cases. During the entire two decade period that Arizona and California struggled with the lustful disposition rule, Indiana continued to use it to convict sex criminals in a traditional, punitive way until it abolished the rule in Lannan. *See supra* text at notes 24-55.

155. 4 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 209 (St. George Tucker rev. Philadelphia: 1803); 1 HALE, THE HISTORY OF THE PLEAS OF THE CROWN 631 (Stokes & Ingersoll ed. Philadelphia: 1847); 1 HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 108 (1716).

156. 1 HAWKINS, *supra* note 155, at 110.

157. BLACKSTONE, *supra* note 155 at 215-16; 1 HALE, *supra* note 155 at 642.

158. PLOSCOWE, SEX AND THE LAW 1-3 (1951). *See also* 2 BURN, ECCLESIASTICAL LAW 241 (7th ed. 1842)(lust).

159. 4 BLACKSTONE, *supra* note 155 at 207.

160. 3 CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 814 (1816).

161. 4 BLACKSTONE, *supra* note 155 at 213; 3 CHITTY, *supra* note 160 at 812; 1 HALE, *supra* note 155 at 633-34.

162. 3 CHITTY, *supra* note 160 at 810.

163. If the victim was twelve or older. 4 BLACKSTONE, *supra* note 155 at 211.

164. 1 HALE, *supra* note 155 at 634.

165. 1 HAWKINS, *supra* note 155 at 108.

166. *Justinian's Code, Book IX, tit. XIII Concerning the Rape of Virgins, Widows and Nuns* in 15 SCOTT, THE CIVIL LAW 24 (1932).

167. *Id.* at 26. Justinian's Code made elaborate provisions for the award of the ravished woman's property after her attack. Justinian forbade the victim's marriage with her ravisher, although anyone else whom the parents of the victim happened to think made a fitting husband could marry her and claim her property. This perception of ravishment as a crime against property rights persisted in medieval Europe and was recognized by the Canonists. Parker, *The Legal Regulation of Sexual Activity and the Protection of Females*, 21 OSGOODE HALL L. J. 187, 193-94 (1983).

168. 3 CHITTY, *supra* note 160 at 812-13.

169. 4 BLACKSTONE, *supra* note 99 at 215.

170. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 149-59 (1948). In 1810 for example, 24 prisoners were committed for trial for rape, at that time a capital crime. Sixteen were not indicted by the grand jury. Six were indicted,

tried and acquitted. Two were convicted, resulting in a single execution. *Id.* at 155. While such detailed statistics are unavailable for earlier years, between 1761 and 1765, the royal justices recommended death sentences in 2 rape cases commuted to transportation. *Id.* at 113. In the same four year period, four pardon warrants or commutation warrants were issued to convicted rapists. *Id.* at 119. Radzinowicz considers the eighteenth century to have been a much more lenient period for executions than the preceding two centuries. *Id.* at 140-42. Modern criminal statistics begin in 1810. Available Home Office figures for the period from 1810 forward indicates that the total number of prisoners committed for trial for rape represented only a tiny fraction of all capital offenders. In 1817, for example, 47 prisoners were committed for rape and 42 for assault with intent to rape, out of a total of 13,932 prisoners charged with capital crimes. This represents only .6% of all capital cases.

171. *Id.* at 113, 119.

172. FIELDING, THE HISTORY OF TOM JONES, A FOUNDLING 99-107 (1745) (Random House ed. New York: 1964) (contrasting the characters of Sophia and Molly and Tom's reaction to each); THE LIFE OF JONATHAN WILD THE GREAT (1751).

See also the critique of both novels in DIGEON, THE NOVELS OF FIELDING 91-194 (1925).

173. DEFOE, MOLL FLANDERS (1722) (Modern Library ed. New York: 1967). The history of the notorious escapades of DeFoe's favorite lady of easy virtue may be found therein.

174. SMOLLETT, THE ADVENTURES OF RODERICK RANDSOM Ch. 17, 55 (1748) (Saintsbury ed.New York: 1925); THE ADVENTURES OF PEREGRINE PICKLE Ch. 52-55 (1751) (Saintsburg ed. New York: 1925). Spector provides a critique of both novels and their relationship to the development of an English picaresque novel form. SPECTOR, TOBIAS SMOLLETT 24-66 (1989).

175. *See, e.g.*, the accounts of Tom Jones adventures with Molly, the serving girl, or the details of Moll Flanders' various affairs.

176. FRIEDMAN, A HISTORY OF AMERICAN LAW 68-75 (2d ed. 1985). Considerable original work on colonial criminal law has been done in the past decade. Some of that research deals with laws respecting sexual conduct. *See, e.g.*, Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 339 (Mass. Body of Liberties), 336-38 (Pennsylvania - Penn's Code).

177. The Massachusetts Body of Liberties of 1641 listed twelve capital offenses, including bestiality, sodomy,

adultery and rape. Between 1630 and 1692, the county courts of Essex, Suffolk and Plymouth executed four people for rape, and two each for bestiality and adultery. Preyer, *supra* note 176 at 333-34. Massachusetts removed adultery from the list of capital crimes in 1692. *Id.* at 342. Pennsylvania's Code of 1682 (Penn's Code) punished rape and sodomy with whipping and imprisonment for a second offense for life. Adulterers were to be whipped and made to wear the letter "A" on their garments. *Id.* at 336-37. Virginia colony enacted statutes against fornication, adultery and rape which it sporadically enforced. Virginia followed English tradition by allowing benefit of clergy in felony cases, extending the provisions of this rule to include rape cases. *Id.* at 340-41.

178. There were no Courts of Ordinary having jurisdiction over ecclesiastical law in any of the colonies. FRIEDMAN, *supra* note 176 at 202.

179. 4 BLACKSTONE, *supra* note 155 at §66.

180. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §47 (16th Am. Ed. Boston: 1899); 1 WHARTON, A TREATISE ON CRIMINAL LAW §§2062-65 (11 ed. Kerr rev. Rochester, N.Y. : 1912).

181. 1 WHARTON, *supra* note 180 at §2096 (erroneously characterized as a "common law" crime). The same comment may be made with respect to fornication, also

a crime unknown to the English common law.

182. *See, e.g.*, Alsabrooks v. State, 52 Ala. 24 (1875) (prior and subsequent adultery; Lawson v. State, 20 Ala. 65, 75-77 (1852) (prior adultery); Brevaldo v. State, 21 Fla. 789 (1886) (prior sexual misconduct); State v. Witham, 72 Me. 531 (1881) (prior and subsequent adultery); Commonwealth v. Lahey, 80 Mass. (14 Gray) 91 (1868) (prior adultery); People v. Jenness, 5 Mich. 305, 320 (1858); State v. Way, 5 Neb. 283 (1877)(prior acts); State v. Wallace, 9 N.H. 515 (1838) (prior adultery); Cole v. State, 65 Tenn. 239 (1873)(prior and subsequent adultery); Funderberg v. State, 23 Tex. Crim. 392, 5 S.W. 244 (1887)(prior sexual misconduct); State v. Bridgeman, 49 Vt. 202 (1876) (prior and subsequent adultery).

183. *See, e.g.*, People v. Patterson, 102 Cal. 239, 36 P. 436 (1894); Taylor v. State, 110 Ga. 150, 35 S.E. 161 (1900); State v. Markins, 95 Ind. 464 (1884); State v. Hurd, 101 Iowa 391, 70 N.W. 613 (1897); Mathis v. Commonwealth, 11 Ky. L. Rep. 882, 13 S.W. 360 (1890); Jenness, 5 Mich. 305; Commonwealth v. Bell, 166 Pa. 405, 31 A. 123 (1895); Burnett v. State, 32 Tex. Crim. 86, 22 S.W. 47 (1893), *overruled* 46 Tex. Crim. 16,18, 79 S.W. 826, 829 (1904) (both prior and subsequent sexual misconduct); State v. Wood, 33 Wash.

290, 74 P. 380 (1903); Porath v. State, 90 Wis. 527, 63 N.W. 1061 (1895).

184. Jenness, 5 Mich. at 320. The court in Jenness formulated what became the American approach to uncharged sexual misconduct:

> The general rule in criminal cases is well settled, that the commission of other, though similar offenses by the defendant, can not be proved for the purpose of showing that he was more likely to have committed the offense for which he is on trial, nor as corroborating the testimony relating to the commission of such principal offense. But the courts in several of the States have shown a disposition to relax the rule in cases where the offense consists of illicit intercourse between the sexes; and it is principally to the American cases that we are to look for the authorities upon this subject, as such intercourse is not generally rendered criminal in England, or prosecuted by indictment, being only of ecclesiastical cognizance. *Id.*

185. Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology* in COTT & PLECK, ED., A HERITAGE OF HER OWN 162-81 (1979).

186. John H. Wigmore fell under the spell of German criminology. His evidentiary writings, particularly *The Principles of Judicial Proof* (1913), are infected with a heavy dose of German criminology. At the turn of the century, German theoreticians such as Hans Gross

placed great reliance upon the prediction of criminal behavior from information on recidivists. Wigmore tried to rationalize the contradiction between traditional Anglo American abhorrence of trial by propensity and the new methods of continental criminology which pointed toward accurate prediction of future criminal behavior from prior criminal behavior. Wigmore's "spurious" propensity rule was one of the unsatisfactory outcomes of this attempted fusion. See Stone, *The Rule of Exclusion of Similar Fact Evidence America* 51 HARV. L. REV. 988, 1001-03 (1938).

187. The movement to change existing carnal knowledge statutes and to raise the age of consent to 18 for female victims of a sexual liaison started after the Civil War. Frances E. Willard, the president of the Women's Christian Temperance Union, among other Victorian reformers, actively pushed for, and achieved new legislative measures strengthening the criminal sanctions for voluntary sexual relations with minor female children. Willard advocated raising the age of consent to 21. See Lillian Harman's reply to Mrs. Willard's proposal to raise the age of consent to 18, originally published in *Liberty* February 9, 1895 reprinted in MCELROY, ED. FREEDOM, FEMINISM, AND THE STATE 87-100 (1982).

188. *See, e.g.*, People v. Fultz, 109 Cal. 258, 41 P. 1040 (1895); State v. Lancaster, 10 Idaho 410, 78 P. 1081 (1904); State v. Gaston, 96 Iowa 505, 65 N.W. 415 (1895); People v. Abbott, 97 Mich. 484, 56 N.W. 862 (1893); People v. Grauer, 12 A. D. 464, 42 N.Y.S. 721 (1896); State v. Parrish, 104 N.C. 679, 10 S.E. 457 (1889); State v. Robinson, 32 Or. 43, 48 P. 357 (1897). The English cases of Reg. v. Chambers, [1848] 3 Cox Cr. Cas. 92 and Reg. v. Reardon, [1864] 4 Fost. & F. 76, 176 Eng. Rep. 473 are likely sources for the spread of admission of other sexual misconduct between the parties to prove a sex offense with a consenting female under the age of legal consent. Chambers countenanced the admission of prior sexual activity between the defendant and the victim. Reardon allowed admission of subsequent sexual misconduct between the defendant and the victim.

189. *See, e.g.*, State v. Cannon, 72 N.J. L. 46, 60 A.177 (1905); State v. Ritchey, 88 S.C. 239, 70 S.E. 729 (1911).

190. CLEARY, ED., supra note 128, §190 at 560-61 (3rd ed. 1984). The name comes from State v. Ferrand, 137 La. 229, 27 So.2d 174 (1946). That case was the leading case in an oft cited ALR annotation on uncharged sexual misconduct evidence. Annot: *Admissibility, in*

Prosecution for Sexual Offense, of Evidence of Other Similar Offenses, 167 A.L.R. 559. The rule goes by many similar names. In Indiana, it is known as the "depraved sexual instinct" rule. Woods v. State, 250 Ind. 132, 235 N.E.2d 479 (1968); Washington refers to the rule as the "lustful inclination" rule. State v. Schut, 71 Wash.2d 400, 429 P.2d 126 (1967).

191. 2 WIGMORE, supra note 128 §§398-402 (Chadbourne rev. 1978). Wigmore believed that proof of the defendant's sexual passion for the victim before and after the acts alleged in the indictment were relevant to proof of the existence of the same desire at the time of the sexual crime stated in the indictment.

192. Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212, 218-21 (1965).

193. The issue of notice to the accused was raised many years ago and quickly rejected by reviewing courts. *See, e g.*, State v. Maestas, 224 N.W.2d 248, 252 (Iowa, 1974) (defendant's claim to violation of 14th Amendment on ground of lack of notice rejected due to defendant's failure to challenge the indictment prior to trial). In Louisiana and in Minnesota, leading decisions require written notice to the defendant of prosecutorial intent to use uncharged misconduct evi-

dence. These decisions were reached on evidentiary grounds or on state constitutional grounds, and not on the Notice Clause of the Sixth Amendment. State v. Prieur, 277 So.2d 126 (La. 1973); La. Code Crim. Procedure §720 (1981); State v. Spriegl, 272 Minn. 488, 139 N.W.2d 167 (1965).

194. *See, e.g.*, Thompson v. State, 27 Ala. App. 104, 166 So. 440 (1937); State v. Garney, 45 Idaho 768, 265 P. 668 (1928); Parkinson v. People, 135 Ill. 401, 25 N.E. 764 (1890); Snurr v. State, 4 Ohio C.C. 393, 2 Oh. C.D. 614 (1890).

195. Garney, 45 Idaho 768, 265 P. 668. The court said:

> The general rule is that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime, wholly unconnected with that for which he is put upon trial, must be excluded. *Id.*

196. Thompson, 27 Ala. App. at 104, 166 So. at 440; Garney, 45 Idaho at 768, 265 P. at 668; Parkinson, 135 Ill. at 401, 25 N.E.at 764; Snurr, 4 Ohio C.C. at 393, 2 Oh. C.D. at 614.

197. People v. Ah Lean, 7 Cal. App. 626, 95 P. 380 (1908) (excluded); People v. Lenon, 79 Cal. 625, 21 P.967 (1889) (admissible); Kidwell v. United States, 38 App. D. C. 566 (1912) (excluded); Weaver v. United States, 55 App. D. C. 26, 299 F. 893 (D. C. 1924) (admitted); Statev. Cannon, 72 N. J. L. 46, 60 A. 177 (1905)(admissible); State v. Pitman, 119 A. 438 (N.J. 1922) (excluded).

198. State v. Heston, 64 Ariz. 72, 166 P.2d 141 (1946); Williams v. State, 103 Ark. 70, 146 S.W. 471 (1912); Lenon, 79 Cal. 625, 21 P.967; Eby v. People, 63 Colo. 276, 165 P. 765 (1917); Wright v. State, 184 Ga. 62, 190 S.E. 663 (1937); Barker v. State 188 Ind. 263, 120 N.E. 593 (1918); State v. Gaston, 96 Iowa 505, 65 N.W. 415 (1895); State v. Borchert, 68 Kan. 360, 74 P. 1108 (1904); McCreary v. Commonwealth, 158 Ky. 612, 165 S.W. 981 (1914); State v. Wichers, 149 La. 643, 89 So. 883 (1921); Commonwealth v. Piccerillo, 256 Mass. 487, 152 N.E. 746 (1926); Abbott, 97 Mich. 484, 56 N.W. 862 (1893); State v. Schueller, 120 Minn. 26, 138 N.W. 937 (1912); State v. Scott, 172 Mo. 536, 72 S.W. 897 (1903); State v. Peres, 27 Mont. 358, 71 P. 162 (1903); Leedom v. State, 81 Neb. 585, 116 N.W. 496 (1908); State v.Braley, 81 N.H. 323, 126 A. 12 (1924); Cannon, 72 N.J. L. 46, 60 A. 177; State v. Whitener, 25 N.M.

20, 175 P. 870 (1918); People v. Thompson, 212 N.Y. 249, 106 N.E. 78 (1914); State v. Parrish, 104 N.C. 679, 10 S.E. 457 (1889); State v. Rice, 39 N.D. 597, 168 N.W. 369 (1918); Boyd v. State, 81 Oh. St. 239 90 N.E. 355 (1909); Myers v. State, 6 Okla Crim. 389, 119 P. 136 (1911); State v. Robinson, 32 Or. 43, 48 P. 357 (1897); Commonwealth v. Senak, 9 Luzerne L. Rep. 558 (1900); State v. Ritchey, 88 S.C. 239, 70 S.E. 729 (1911); State v. Sysinger, 25 S.D.110, 125 N.W. 879 (1910); Sykes v. State, 112 Tenn. 572, 82 S.W. 185 (1904); State v. Hilberg, 22 Utah 27, 61 P. 215 (1900); State v. Willett, 78 Vt. 157, 62 A. 48 (1905); State v. Fetterly, 33 Wash. 559, 74 P. 810 (1903); State v. Beacraft, 126 W. Va. 895, 30 S.E.2d 541 (1944), *overruled,* 347 S.E.2d 208, 216 (W.Va 1987); Strand v. State, 36 Wyo. 78, 252 P. 1030 (1927).

199. *See, e.g.,* State v. Clough. 33 Del. 140, 132 A. 219 (1925); Commonwealth v. Bemis, 242 Mass. 582, 136 N.E. 597 (1922).

200. *See, e.g.,* Schueller, 120 Minn. 26, 138 N.W. 937.

201. *See, e.g.,* the truncated statement of the propensity rule in State v. Marty, 52 N.D. 478, 203 N.W. 679 (1925). The North Dakota Supreme Court concluded that the state was forbidden from convicting Marty by proof

of his predisposition to commit statutory rape via the medium of proof of other sexual activity between Marty and the victim. The court went on to approve of admission of Marty's other sexual activity because it tended to prove "all relevant facts and circumstances which tend to establish any of the constitutive elements of the crime . . . ". *Id.* at 681.

202. *See, e.g.*, People v. Martinez, 59 Cal. App. 121, 210 P. 61 (1922); State v. Henderson, 19 Idaho 524, 114 P. 30 (1911); State v. Stitz, 111 Kan. 275, 206 P. 910 (1922), *overruled* 190 Kan. 290, 294, 424 P.2d 612, 615 (1967); State v. Driver, 88 W.Va. 479, 107 S.E. 189 (1921), *overruled*, 347 S.E.2d 216 (W.Va. 1987). State v. Stitz is one of the better examples of this type of judicial rationale. The trial court admitted prior and subsequent sexual misconduct between victim and defendant for the purpose of showing defendant's "lustful disposition, the existence and continuance of the illicit relation, as these tend to explain the act charged and corroborate other testimony of the prosecution." *Id.* at 11 Kan. 276, 206 P. 911.

203. Braley, 81 N.H. 323, 126 A. 12.

204. *See, e.g.*, Gilbert v. Commonwealth, 204 Ky. 505, 264 S.W. 1095 (1924); Lancaster, 10 Idaho 410, 73 P. 1081; State v. Roby, 128 Minn. 187, 150 N.W. 793 (1915);

State v. Henderson, 243 Mo. 503, 147 S.W. 480 (1912); Kotouc v. State, 104 Neb. 580, 178 N.W. 174 (1920); Whitener, 25 N.M. 20, 175 P. 870 ; People v. Todoro, 160 N.Y.S. 352 (App. Div. 1916); State v. Parrish, 104 N.C. 679, 10 S.E. 457 (1889) (to explain the victim's conduct); Penn v. State, 13 Okl. Crim. R. 367, 164 P. 992 (1917); State v. Conlin, 45 Wash. 478, 88 P. 932 (1907); Proper v. State, 85 Wis. 615, 55 N.W. 1035 (1893) (assault with intent to rape).

205. *See, e.g.,* Lancaster, 10 Idaho 410, 73 P. 1081. Modern English case law recognizes "corroboration" by proof of "strikingly similar acts" as a non-character reason for offering uncharged misconduct evidence in criminal prosecutions. See Dept. of Public Prosecutions v. Boardman [1975] App.Cas. 421, 427.

206. *Arizona:* Levy v. Territory, 13 Ariz. 425, 115 P. 415 (1911).

Arkansas: Williams v. State, 103 Ark. 70, 146 S.W. 471 (1912).

California: People v. Soto, 11 Cal. App. 431, 105 P. 420 (1909).

Colorado: Mitchell v. People, 24 Colo. 532, 52 P. 672 (1899).

Connecticut: State v. Sebastian, 81 Conn. 1, 69 A. 1054 (1908).

Idaho: State v. Henderson, 19 Idaho 524, 114 P. 30 (1911).

Indiana: Barker v. State, 188 ind. 263, 120 N.E. 593 (1917).

Kansas: State v. Borchert, 68 Kan. 360, 74 P. 1108 (1904).

Louisiana: State v. De Hart, 109 La. 570, 33 So. 605 (1902).

Massachusetts: Commonwealth v. Bemis, 242 Mass. 582, 136 N.E. 597 (1922).

Michigan: People v. Coston, 187 Mich. 538, 153 N.W. 831 (1915).

Minnesota: State v. Friend, 151 Minn. 138, 186 N.W. 241 (1922).

Montana: State v. Vinn, 50 Mont. 27, 144 P. 773 (1914).

Nebraska: Reinoehl v. State, 62 Neb. 619, 87 N.W. 355 (1901).

New Hampshire: State v. Knapp, 45 N.H. 148 (1863).

New Jersey: State v. Cannon, 72 N.J. L. 46, 60 A. 177 (1905).

New Mexico: State v. Whitener, 25 N.M. 20, 175 P. 870 (1918).

New York: People v. Thompson, 212 N.Y. 249, 254-55, 106 N.E. 78, 80 (1914).

Pennsylvania: Commonwealth v. Bell, 166 Pa. 405, 31 A. 123 (1899).

South Carolina: State v. Ritchey, 88 S.C. 239, 70 S.E. 729 (1911).

Utah: State v. Neel, 23 Utah 541, 65 P. 494 (1908).

West Virginia: State v. Driver, 88 W. Va. 479, 107 S.E. 189 (1921) (assault with intent to commit statutory rape).

Wisconsin: Lamphere v. State, 114 Wis. 193, 89 N.W. 128(1902).

207. 63 Tex. Crim. 147, 140 S.W. 783 (1911). Battles had been tried and appealed before, resulting in a reversal. The 43 year old defendant, a married man, lived near Waxahatchie, Texas, as did his girl friend, a 15 year old girl, Ida Dutton. He took her on trips to Dallas, and bought her clothing and presents. One evening in November, 1905, Battles and Dutton had sexual intercourse in Battles' buggy. This was the specific offense charged in the indictment. The prosecution introduced evidence showing that Battles and Dutton had taken overnight trips together before and after the November, 1905, incident. The State showed that the two spent the night together at a Mr. Lane's house after Dutton's family had moved to Midlothian, Texas, in 1906. The fact the couple spent

the night alone was circumstantial proof of a second subsequent incident of sexual misconduct between the two. Battles objected to introduction of this evidence on a number of grounds, basically that the evidence of the couples' trips together enflamed the jury's passions and were irrelevant to prove the sexual coupling in November, 1905. The prosecution's offer of proof stated the evidence of the couple's activities together tended to prove "the motive and purpose of appellant and such seductive arts and purposes as to make and render the prosecutrix an easy, if not willing, subject of his lust." *Id.* at 63 Tex. Crim. 147, 140 S.W. 785. The Court of Criminal Appeals reviewed practically every American statutory rape, carnal knowledge, incest and adultery case decided up to 1911 in which the court passed on the admissibility of prior sexual misconduct between the parties. It decided the weight of authority authorized admission of prior sexual misconduct evidence and overruled a dozen contrary Texas decisions. *Id.* at 63 Tex. Crim. 147, 140 S.W. 790, 797.

208. *Id.*

209. Rosamond v. State, 94 Tex. Crim. 8, 249 S.W. 468 (1923). Rosamond was followed in Folsom v. State, 103 Tex. Crim. 652, 281 S.W. 1069 (1928). Both cases

held that prior sexual misconduct between the victim and the defendant were inadmissible to prove statutory rape on a later occasion, without expressly overruling Battles.

210. State v. Henderson, 19 Idaho 524, 114 P. 30 (1911) and State v. Lancaster, 10 Idaho 410, 78 P. 1081(1904) held that prior sexual misconduct between victim and defendant was admissible to prove statutory rape at a later date. But State v. Garney, 45 Idaho 768, 265 P. 668 (1928) expressly held that such evidence was inadmissible, without citing or overruling Henderson or Lancaster. New Jersey had admitted prior sexual misconduct evidence to corroborate a later statutory rape in State v. Cannon, 72 N.J.L. 46, 60 A. 177 (1905). In State v. Pitman, 119 A. 438 (N.J. 1922) the Law Court held such evidence inadmissible without citing Cannon.

211. No case earlier than People v. O'Sullivan have been located.

212. People v. O'Sullivan, 104 N.Y. 481, 10 N.E. 880 (1887).

213. People v. Grauer, 12 A. D. 464, 42 N.Y.S. 721 (1892).

214. *Id.* at 12 App. Div. 465, 42 N.Y.S. 723.

215. *Id.* at 12 App. Div. 465, 42 N.Y.S. 724.

216. People v. Bills, 129 App. Div. 798, 114 N.Y.S. 587 (1909); People v. Robertson, 88 App. Div. 198, 84

N.Y.S. 401 (1903).

217. 212 N.Y. 249, 106 N.E. 78 (1914).

218. 162 N.Y. 532, 57 N.E. 73 (1900).

219. Thompson, 212 N.Y. 249, 106 N.E. 82. The Court of Appeals apparently considered corroboration and lustful disposition to be two ways of stating the same exception to the character evidence rule.

220. People v. Hop Sing, 216 App. Div. 404, 215 N.Y.S. 301 (1926).

221. *Id.*

222. 168 N.Y. 264, 61 N.E. 286 (1901). Molineux was charged with murdering Katherine J. Adams. Mrs. Adams let rooms in her home to Harry Cornish, the manager of the Knickerbocker Athletic Club. Molineux had belonged to the Knickerbocker and had tried to get Cornish fired because Cornish had insulted him and interfered with a club show. Mrs. Adams died from cyanide of mercury poisoning which she had ingested from a bottle of Bromo Seltzer originally sent to Cornish in the mail on Christmas eve, 1898. Cornish had given the Bromo Seltzer to his land lady when she complained of a head ache on December 27. Molineux, a chemist, was alleged to have mailed the poison patent medicine sample to Cornish. Identification of the sender was based on expert opinion on the handwriting on the address of the

package, which Cornish had saved.

A similar box of patent medicine laced with cyanide of mercury had been sent to Henry Barnett, a Knickerbocker Club member in October, 1898. Barnett had swallowed a dose of powder from the box and became violently ill. Barnett died November 10, 1898. His remains were later exhumed after Mrs. Adams' death, and an autopsy showed he had died from cyanide of mercury poisoning. His patent medicine box had also been poisoned with cyanide of mercury. Barnett had tried to lured Molineux' girl friend, Ms. Cheeseborough, away from him. Both samples came from private mail drops rented and used by Molineux. The original package in which Barnett's sample had been sent was lost, and no handwriting identification could be made linking Molineux to that sample. The prosecution was allowed to prove the essential facts surrounding Barnett's death to prove that Molineux perpetrated the killing of Mrs. Adams. The New York Court of Appeals reversed Molineux' conviction, finding that the prosecution had failed to show that the earlier poisoning episode had been perpetrated by Molineux. In its analysis, the court formulated the modern or "spurious" propensity rule. Specific instances of misconduct are inadmissible to prove that the defendant

had a predisposition to perpetrate similar types of criminal activities, thus leading to the conclusion that the defendant acted in conformity his predisposition to commit that type of crime. However, the prosecution may offer evidence of specific instances of the defendant's similar criminal misconduct to prove some other issue such as intent, knowledge, motive, plan, preparation or identity of the perpetrator. In each instance, the prosecution must establish the elements of the uncharged incident of misconduct by sufficient evidence. *Id.* at 168 N.Y. 277, 61 N.E. 303.

223. Molineux has been cited hundred of times by courts in most U.S. jurisdictions in support of the uncharged misconduct rule. It is frequently cited by the courts today, 88 years after its rendition. See Shepard's Citator, Northeast Reporter ed. July, 1989 Advance ed. The most recent case to cite Molineux was People v. Johnson, App. Div. , 540 N.Y.S.2d 64,65 (1989).

224. *See, e.g.*, Arizona's plight. State v. Treadaway, 116 Ariz. 163, 568 P.2d 1061 (1977) authorized admission of similar sexual misconduct to prove the defendant's lustful disposition. Although Arizona did not repudiate Treadaway when it adopted the Uniform Rules

of Evidence, evidence which would have been admitted under Treadaway as evidence of lustful disposition are currently offered to show a plan or design to carry out sexual activities. The best example of this is State v. Smith, 156 Ariz. 518, 753 P.2d 1174 (Ariz. App. 1988). The defendant was charged with two counts of child molesting. He had kept pictures of other boys he had sexual relations with. These pictures were admitted "to show that he was committed to a particular scheme of keeping photographs of the victim which depict him in various stages of undress and in various ano-genital poses, some of which also include appellant's hands and fingers." *Id.* at 156 Ariz. 524, 753 P.2d 1180. Since the State's case did not rest on proof of some plan to lure boys into the defendant's living quarters, and the defendant was caught red handed fondling the victim by alert motel guests, the actual value of these photographs showing other lewd acts with the victim and other boys was to prove the defendant's predisposition to commit child molestation. In 1986, the Arizona Supreme Court reaffirmed the vitality of the Treadaway doctrine in State v. Day, 158 Ariz. 490, 715 P.2d 743, 747 (1986). The defendant, the "pot bellied rapist", was charged with 17 counts of sexual assault among 50 felony counts laid against him.

Day argued that these counts amounted to prejudicial joinder. The Supreme Court disagreed and affirmed his conviction, stating that the defendant could suffer no prejudice if the 17 sexual assault counts were joined because each could be evidence in any other count to prove his "emotional propensity" to commit sexual assault.

225. *See, e.g.*, Thomas v. State, 20 Ala. App. 128, 101 So. 93 (1924); People v. Ayers, 159 Mich. 355, 124 N.W. 25 (1914); State v. Pittman, 119 A. 438 (N.J. 1922).

226. *See, e.g.*, State v. Amende, 336 Mo. 717, 92 S.W.2d 106 (1936); State v. Yeager, 41 S.D. 51, 168 N.W. 749 (1918).

227. *See, e.g.*, Morris v. State, 9 Okla. Crim. 241, 131 P. 731 (1913); State v. Ritchey, 88 S.Ca. 299, 70 S.E. 729 (1911); State v, Willett, 78 Vt. 157, 62 A. 48 (1905).

228. *See, e.g.*, Brasher v. State, 249 Ala. 96, 30 So. 2d 31 (1947); People v. Gibson, 255 Ill. 302, 99 N.E. 599 (1903).

229. *See supra* text at notes 335-373.

230. *See, e.g.*, State v. Haston, 64 Ariz. 72, 166 P.2d 141 (1946); Williams v. State, 103 Ark. 70, 146 S.W. 471 (1912); People v. Fultz, 109 Cal. 258, 41 P. 1040 (1895); Bracey v. United States, 79 D.C.App. 23, 142 F.2d 85 (D.C. Cir.), *cert. denied*, 322 U.S. 762 (1944);

Wright v. State, 184 Ga. 62, 190 S.E. 663 (1937); State v. Henderson, 19 Idaho 524, 114 P. 30 (1911); Barker v. State, 188 Ind. 263, 120 N.E. 593 (1918); State v. Beltz, 225 Iowa 155, 279 N.W. 386 (1938); State v. Stitz, 111 Kan. 275, 206 P. 910 (1922); State v. Mc Collugh, 149 La. 1061, 90 So.404 (1922); Commonwealth v. Piccerillo, 256 Mass. 487, 152 N.E. 746 (1926); Smith v. State, 127 Neb. 776, 257 N.W. 59 (1934); State v. Hardin, 63 Or. 305, 127 P.789 (1912); Commonwealth v. Ransom, 169 Pa. Super. 306,82 A.2d 547, *aff'd without opinion,* 369 Pa. 153, 85 A.2d 125 (1951); Nash v. State, 167 Tenn. 288, 69 S.W.2d 235 (1934); State v. Jameson, 103 Utah 129, 134 P.2d 173 (1945); State v. Jordan, 6 Wash. 2d 719, 108 P.2d 657 (1940).

231. *See, e.g.*, Garlach v. State, 217 Ark. 102, 229 S.W.2d 37 (1950); People v. Foster, 117 Cal. App. 439, 4 P.2d 173 (1931); Wesner v. People, 126 Colo. 400, 250 P.2d 124 (1952); Talley v. State, 160 Fla. 593, 36 So.2d 201 (1948); Randolph v. State, 266 Ind. 179, 361 N.E.2d 900 (1977); State v. Whitsell, 262 La. 165, 262 So. 2d 509 (1972); Commonwealth v. Bemis, 242 Mass. 582, 136 N.E.597 (1922); State v. Stewart, 64 Miss. 626, 2. So. 73 (1887) (15 to 20 months after incident in indictment); State v. Jensen, 153 Mont. 233, 455 P.2d

631 (1969) (similar acts two years after incident in indictment); Woodruff v. State, 72 Neb. 815, 101 N.W. 114 (1902); Stump v. Commonwealth, 137 Va. 804, 119 S.E. 72 (1923); State v. Crowder, 119 Wash. 450, 205 P. 850 (1922).

232. *See, e.g.*, Bemis, 242 Mass. 582, 136 N.E. 597.

233. *See, e.g.*, State v. Hirsch, 64 Idaho 20, 127 P.2d 764 (1942); State v. Stitz, 111 Kan. 275, 206 P.2d 910, 912 (1922).

234. *See, e.g.*, State v. Clough, 33 Del. 140, 132 A. 219 (1925) (lascivious acts); Head v. State, 160 Tex. Crim. 42, 267 S.W. 2d 419 (1954); State v. Thorne, 43 Wash. 2d 47, 260 P.2d 331 (1953).

235. *See, e.g.*, People v. Meraviglia, 73 Cal. App. 402, 238 P. 794 (1925); State v. McMullin, 142 Wash. 7, 252 P. 108 (1927).

236. *See, e.g.*, Shively v. Commonwealth, 227 Ky. 748, 14 S.W.2d 205 (1923), but see State v. Shobe, 268 S.W. 81 (Mo. 1924) (excluding evidence that on the same day as the offense occurred, defendant solicited other men to have sex with the victim).

237. *See, e.g.*, State v. Letz, 294 Mo. 333, 242 S.W. 681 (1922) (attempted abortion after sexual activity held inadmissible); Birmingham v. State, 228 Wis. 448, 279 N.W. 15 (1938) (other dissimilar unspecified acts).

238. The majority of those cases allowing proof of similar acts with other persons use the rationale that the offenses committed with other people corroborate the victim's story, or demonstrate the defendant's lustful disposition. *See, e.g.*, Bracey v. United States, 79 D.C. App. 23, 142 F.2d 85, 88-89 (1944); State v. Dowell, 47 Idaho 457, 276 P. 39 (1929); State v. King, 342 Mo. 975, 119 S.W.2d 277 (1938); State v. Poole, 161 Or. 481, 90 P.2d 472 (1939) (other sexual assault part of res gestae). The remainder justify admission by claiming that other similar sexual misconduct with different victims shows a plan or design. In the cases, the defendant's criminal plan is not a material issue in the case. *See, e.g.*, Lee v. State, 246 Ala. 69, 18 So.2d 706 (1944); Taylor. v. State, 55 Ariz. 13, 97 P.2d 543 (1940); State v. Bisagno, 121 Kan. 186, 246 P. 1001 (1926).

239. *See, e.g.*, People v. Whalen, 70 Cal. App. 2d 142, 160 P.2d 560 (1946); Moose v. State, 145 Ga. 361, 89 S.E.335 (1916); State v. Larsen, 42 Idaho 517, 246 P. 313(1926); People v. Blockburger, 354 Ill. 301, 188 N.E.440 (1933); State v. Huntley, 204 Iowa 981, 216 N.W. 67 (1927); People v. Gengels, 218 Mich. 632, 188 N.W. 398 (1922); State v. Haney, 291 Minn. 518, 18 N.W.2d 315 (1945); State v. Bowman, 272 Mo. 491, 199

S.W. 161 (1927); State v. Tieslemann, 139 Mont. 237, 362 P.2d 529 (1959); Nickolizack v. State, 75 Neb. 27, 105 N.W. 895 (1905); State v. Hersom, 84 N.H. 433, 152 A. 276 (1930); Landon v. State, 77 Okla. Crim. 190, 140 P.2d 242 (1945); State v. Poole, 161 Or. 481, 90 P.2d 472 (1939); State v. La Mont, 23 S.D. 174, 120 N.W. 1104 (1909); Birdwell v. State, 134 Tex. Crim. 77, 114 S.W.2d 256 (1938); State v. Williams, 36 Utah 273, 103 P. 250 (1909).

240. 216 App. Div. 404, 215 N.Y.S. 301 (1926).

241. Id. at 216 App. Div. 405, 215 N.Y.S. 301.

242. Whalen, 70 Cal. App. 2d 142, 160 P.2d 560 (excluding other sexual misconduct with different young girls); People v. Branch, 77 Cal. App. 384, 246 P. 811 (1926), *overruled on other grounds,* 183 Cal. App.2d 816, 7 Cal. Rptr. 192 (1960) (similar acts with other girls admissible).

243. State v. Larsen, 42 Idaho 517, 246 P. 313 (1926).

244. State v. Burkhart, 242 S.W.2d 12 (Mo. 1949).

245. *See, e.g.,* People v. Cosby, 137 Cal. App. 332, 31 P.2d 218 (1934); People v. Greeley, 141 Ill.2d 428, 152 N.E.2d 825 (1957); Onstott v. State, 156 Neb. 55, 54 N.W.2d 380 (1951); Webb v. State, 82 Tex. Crim. 1, 187 S.W. 485 (1916); State v. Driver, 88 W.Va. 479, 107 S.E.189 (1921). *But see* State v. Riggio, 124 La. 614,

50 So. 600 (1909) (prior assaults on victim inadmissible); Grimes v. State, 64 Tex. 64, 141 S.W. 261 (Cr. App. 1911). Evidence of attempted rapes or assaults on different victims was generally held inadmissible. *See, e.g.*, Webb v, State, 7 Ga. App. 35, 66 S.E. 27 (1909); State v. Smith, 250 Mo. 274, 157 S.W. 307 (1913); Harris v. State, 88 Okla. Crim. 422, 204 P.2d 305 (1949); Brockman v. State, 60 Okla. Crim. 330, 93 P.2d 1107 (1939); State v. Jensen, 70 Or. 156, 140 P. 740 (1914) (evidence of assault with intent to rape another female violates constitutional right to notice); Day v. Commonwealth, 196 Va. 907, 86 S.E.2d 23 (195); Barber v. Commonwealth, 182 Va. 858, 30 S.E.2d 565 (1944). In State v. Powers, 181 Iowa 452, 164 N.W. 856 (1917), *overruled on other grounds*, 200 Iowa 636, 204 N.W. 307 (1925) the court admitted a later attempted rape perpetrated on the same victim to show earlier intent.

246. *See, e.g.*, Powers, 181 Iowa 452, 164 N.W. 856.

247. *See, e.g.*, State v. Lebo, 339 Mo. 960, 98 S.W.2d 695, 698 (1936) (forcible rape of 10 year old daughter).

248. *Id.* at 98 S.W.2d 699.

249. *See, e.g.*, Onstott, 156 Neb. 55, 54 N.W.2d 380 (corroboration); Bradshaw v. State, 82 Tex. Crim. Rep. 351, 198 S.W. 942 (1917); Driver, 88 W.Va. 479, 107

S.E. 189.

250. *See, e.g.*, Cosby, 137 Cal. App. 332, 31 P.2d 218 (common plan or design with other women); *but see* Riggio, 124 La. 614, 50 So. 600 (evidence of other assaults on prosecuting witness inadmissible).

251. *See, e.g.*, Webb, 7 Ga. App. 35, 66 S.E. 27; State v. Smith, 250 Mo. 274, 157 S.W. 307 (1913); People v. Farina, 134 App. Div. 110, 118 N.Y.S. 817 (1909) (later assault on victim held admissible); Jensen, 70 Or. 156, 140 P. 740; Harris v. State, 88 Okla. Crim. 422, 204 P.2d 205 (Okl. 1948); Day v. Commonwealth, 196 Va. 907, 86 S.E.2d 23 (1949).

252. For cases supporting admission of other sexual assaults on the same victim proving motive, intent or corroboration, *see, e.g.*, Bigcraft v. People, 30 Colo. 298, 70 P. 417 (1902), *overruled on other grounds,* 770 P.2d 1243, 1247 (Colo. 1989) (other sexual assaults on victim admissible to show corroboration); State v. Gonzales, 217 Kan. 159, 535 P.2d 988 (1975); Commonwealth v. Ransom, 169 Pa. Super. 306, 82 A.2d 547, *aff'd,* 369 Pa. 153, 85 A.2d 125 (1951). For cases involving other victims, *see, e.g.*, Daniels v. State, 243 Ala. 675, 11 So.2d 756, *cert. denied*, 319 U.S. 755 (1943) (ravishment of other women admissible to prove motive and intent) Johnson v. State, 242 Ala. 278, 5

So.2d 632, *cert. denied*, 316 U.S. 713 (1942); People v. Pendleton, 25 Cal.3d 371, 158 Cal. Rptr. 343, 599 P.2d 649 (1979); Merritt v. State, 168 Ga. 753, 149 S.E. 46 (1929); People v. Lilly, 9 Ill. App. 3d 46, 291 N.E.2d 207, *rev'd on other grounds*, 56 Ill. 2d 493, 309 N.E.2d 1 (1972); State v. Hampton, 215 Kan. 907, 529 P.2d 127 (1974), *overruled on other grounds*, 234 Kan. 426, 673 P.2d 1154 (1983); State v. Taylor, 290 Minn. 515, 187 N.W.2d 129 (1971). A few jurisdictions excluded evidence of other sexual assaults on the same victim when offered to prove motive, intent or to corroborate the victim's claim of rape. *See, e.g.*, Alford v. State, 223 Ark. 330, 266 S.W.2d 804 (1954); State v. Moore, 278 So.2d 781 (La. 1972) (rape not crime of specific intent, prior rapes of other victims not admissible to show intent); State v. Houghton, 272 N.W.2d 788 (S.D. 1978) *overruled on other grounds*, 370 N.W.2d 193 (S.D. 1985) (rape not crime of specific intent).

253. *See, e.g.*, State v. Martinez, 67 Ariz. 389, 198 P.2d 115 (1948), *overruled on other grounds*, State ex rel. Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 246 (1979); State v, Finley, 85 Ariz. 327, 338 P.2d 790 (1959); People v. Ing, 65 Cal.2d 603, 55 Cal. Rptr. 902, 422 P.2d 590 (1965); People v. Sullivan, 101 Cal.

App.2d 322, 225 P.2d 645 (1950) (same victim raped by defendant 2 months before); Williams v. State, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959) (rapist invaded victims' cars at shopping center armed with ice pick); Rhine v. State, 336 P.2d 913 (Okla. Crim. 1959) (physician administering nembutol to patients).

254. *See, e.g.*, Johnson, 242 Ala. 278, 5 So.2d 632. Cases falling under this exception are often characterized by the courts as evidence of a plan or scheme. *See, e.g.*, Martinez, 67 Ariz. 389, 198 P.2d 115 (characterizing modus operandi evidence as "plan").

255. *See, e.g.*, Martinez, 67 Ariz. 391, 198 P.2d 119 (women assaulted by defendant on same evening allowed to testify on grounds of modus operandi or plan); Talley v. State, 160 Fla. 593, 36 So.2d 201 (1943) (five victims of rape allowed to testify defendant approached them and made indecent proposals to them before forcing them to engage in sexual intercourse); Allen v. State, 201 Ga. 391, 40 S.E.2d 144 (1946) (two other women who had been raped by a man using knife allowed to testify to show modus operandi).

256. *See, e.g.*, People v. Murphy, 53 Cal. App. 474, 200 P. 484 (1921); State v. Ward, 337 Mo. 425, 85 S.W. 2d 1 (1935); Commonwealth v. Winter, 289 Pa. 284, 137 A. 261

(1927).

257. *See, e.g.*, State v. Stevens, 56 Kan. 720, 44 P. 992 (1896) (rape perpetrated two years after offense in indictment too remote); State v. Mertz, 129 Wash. 420, 225 P. 62 (1924) (six months later too remote).

258. *See, e.g.*, Adams v. State, 229 Ark. 773, 318 S.W.2d 599 (1952) (error to permit cross examination of defendant about other assaults on other victims); People v. Nails, 214 Cal. App.2d. 689, 29 Cal. Rptr. 671 (1963) (generally inadmissible); State v. Sauter, 125 Mont. 109, 232 P.2d 731 (1956); State v. Davis, 239 S.C. 280, 122 S.E.2d 633 (1959); Thompson v. State, 168 Tex. Crim. 320, 327 S.W.2d 745 (Tex. Crim. App. 1960).

259. *See, e.g.*, State v. Hill, 104 Ariz. 238, 450 P.2d 696 (1969); People v. Gray, 259 Cal. App.2d 846, 66 Cal. Rptr. 654 (1968); Williams, 110 So.2d 654; Hunt v. State, 233 Ga. 329, 211 S.E.2d 288 (1974); State v. Iaukea, 56 Hawaii 343, 537 P.2d 724 (1975); People v. Lightheart, 62 Ill. App.3d 720, 379 N.E. 2d 403 (1978); People v. Oliphant, 399 Mich. 472, 250 N.W.2d 443 (1975). But see Lovely v. United States, 169 F.2d 386 (5th Cir. 1948), *cert. denied*, 338 U.S. 834 (1949) (rape on federal reservation; prior rape of same victim 15 days before case at bar inadmissible to prove lack of consent or use of force); Meeks v. State, 249 Ind.

659, 234 N.E.2d 629 (1968); Jackel v. State, 506 S.W.2d 229 (Tex. Crim. App. 1974) (victim raped by defendant 17 months before incident at trial, inadmissible to show lack of consent).

260. *See, e.g.*, Melton v. State, 184 Ga. 343, 191 S.E. 91 (1937) (attempted rape on another victim one night later in same place admitted to show defendant's "bent of mind"); Landon v. State, 77 Okla. Crim. 190, 140 P.2d 242 (1943) (admitting evidence of other rapes by defendant on prosecutrix, but excluding similar rapes on other daughters). *See also* 1 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§193, 402 (2d ed. 1923), which gives Wigmore's view that evidence of prior misconduct is relevant to prove the disposition of a defendant to act criminally, and to prove a particular design to fulfil sexual passion in rape cases.

261. *See, e.g.*, Bigcraft v. People, 30 Colo. 298, 70 P. 417 (1902) (other sexual assaults on victim admissible to show corroboration).

262. *See, e.g.*, State v. Terry, 199 Iowa 1221, 203 N.W. 232 (1925).

263. Only Missouri paid close attention to the different elements of proof in rape cases. It refused to follow precedent admitting uncharged misconduct evidence in

statutory rape, incest and child molesting cases in rape cases. *See* Lebo, 98 S.W.2d 698-99. Kansas, one of the examples of the worst confusion, freely followed statutory rape precedent in rape cases. *See* State v. Allen, 163 Kan. 374, 183 P.2d 458, 460 (1947), *overruled on other grounds*, 198 Kan. 290, 424 P.2d 612 (1967) (assault with intent to rape case, citing to State v. Bisagno, 121 Kan. 186, 246 P. 1001 (1925) (statutory rape), State v. Jenks, 126 Kan. 493, 268 P. 850 (1928) (same) to support admission of uncharged misconduct.

264. *See, e.g.,* Power v. State, 43 Ariz. 329, 30 P.2d 1059 (1934); Adams v. State, 78 Ark. 16, 92 S.W. 1123 (1906); People v. Patterson, 102 Cal. 239, 36 P. 436 (1894); Hodge v. United States, 75 D.C. App. 332, 126 F.2d 849 (D.C. App. 1942); Taylor v. State, 110 Ga. 150, 35 S.E. 161 (1900); State v. Markins, 95 Ind. 464, 467 (1884); State v. Heft, 155 Iowa 21, 134 N.W. 950 (1912); People v. Block, 120 A.D. 364, 105 N.Y.S. 275 (1907); Pruett v. State, 35 Okla. Crim. 359, 250 P. 1029 (1936) (corroboration).

265. For cases excluding incest with other children *see, e.g.*, People v. LeToile, 31 Cal. App. 166, 159 P. 1057 (1916); Wentz v. State, 159 Md. 161, 150 A. 278 (1930); Henry v. State, 136 Neb. 454, 286 N.W. 338

(1939); Greer v. State, 87 Tex. Crim. Rep. 432, 232 S.W. 986 (1920) (relevant only to show intent or identity, neither at issue). For cases admitting prior incest to show plan, design or lustful disposition, see State v. Edwards, 224 N.C. 527, 31 S.E.2d 516 (1944).

266. *See, e.g.*, Brevaldo v. State. 21 Fl. 789 (1886); Bass v. State, 103 Ga. 227, 29 S.E. 966 (1897); Crane v. People, 168 Ill. 395, 48 N.E. 54 (1897) (subsequent acts); State v. Briggs, 68 Iowa 416, 27 N.W. 358 (1892); People v. Fowler, 104 Mich. 449, 62 N.W. 572 (1895).

267. *See, e.g.*, Hettle v. State, 144 Ark. 564, 222 S.W. 1066 (1920); State v. Ball, 93 Kan. 606, 144 P. 1012 (1914); Stewart v. State, 64 Miss 626, 2 So. 73 (1887); State v. Coffee, 75 Mo. App. 88 (1898).

268. *See, e.g.*, People v. Love, 29 Cal. App. 521, 157 P. 9 (1916); Posey v. United States, 41 A.2d 300 (D.C. Mun. 1945); McMichen v. State, 62 Ga. App. 50, 7 S.E.2d 749 (1940); State v. Robbins, 221 Ind. 125, 46 N.E.2d 601 (1943); State v. Badders, 131 Kan. 683, 42 P.2d 943 (1935); State v. Young, 140 Or. 228, 13 P.2d 604 (1932); State v. Oberg, 187 Wash. 429, 60 P.2d 66 (1936).

269. *See, e.g.*, People v. Singh, 121 Cal. App. 107, 8 P.2d 898 (1932); State v. Wellman, 253 Mo. 302, 161 S.W. 795

(1913); People v. Rosenthal, 289 N.Y. 482, 46 N.E.2d 895 (1943); State v. Start, 65 Or. 178, 132 P. 512 (1913); Abaly v. State, 163 Wis. 469, 158 N.W. 308 (1916).

270. In Borolos v. State, 194 Ind. 469, 143 N.E. 360 (1924) the Indiana Supreme Court held that prior and subsequent acts of sodomy with different victims were admissible. To the same effect see Hummell v. State, 210 Ark. 471, 196 S.W.2d 594 (1946); People v. Galeno, 25 Cal. App.2d 14, 76 P.2d 187 (1938) (sodomy on other boys admissible to prove corroboration) Barnett v. State, 104 Oh. St. 298, 135 N.E. 647 (1922) (to prove identity of accused). In State v. Robbins, 221 Ind. 125, 46 N.E.2d 691 (1943) the defendant was charged with sodomy with a female. The court admitted evidence that defendant committed sodomy on two other girls two days after the incident charged in the indictment to prove the defendant's lustful disposition, but excluded an instance of sodomy on a boy committed a year and a half after the offense on the grounds that it did not prove the same lustful disposition.

271. 1 GALLUP, THE GALLUP POLL 92 (1972) (Mar. 9, 1937: Crimes & Punishment).

272. For an extended discussion of former law on this subject see PLOSCOWE, SEX AND THE LAW 195-215 (1951).

Most American statutes regulating sexual misconduct enacted prior to 1950 indiscriminately outlawed cunnilingus, fellatio and anal intercourse between consenting adult male and female parties, as well as similar contact between persons of the same sex.

273. *Id.* at 221.

274. *Id.* at 144.

275. The following states have statutes which criminalize homosexual activities between consenting adults:

Arizona: Ariz. Rev. Stat. Ann.§13-1411 (1987 & Supp. 1988) (crime against nature);

California: Cal. Penal Code §§286 (sodomy),288a (1985) (oral copulation);

District of Columbia: D.C. Code Ann. §22-3502 (sodomy) (1981);

Florida: Fla. Stat. Ann. §800.02 (1976) (unnatural and lascivious acts);

Georgia: Ga. Code Ann. §16-6-2 (1985) (sodomy; aggravated sodomy);

Idaho: Idaho Code §18-6606 (1981) (crime against nature);

Kansas: Kan. Stat. Ann. §21-3505 (1988) (criminal sodomy);

Kentucky: Ky. Rev. Stat. Ann. §510.100 (1988) (sodomy 4th degree);

Louisiana: La. Rev. Stat. Ann. §14:89 (19868) (crime against nature);

Massachusetts: Mass. Gen. Laws Ann. ch. 272, §§34 (crime against nature), 35 (unnatural & lascivious acts) (1970);

Michigan: Mich. Comp. Laws Ann. §§28.570 (gross indecency between male persons), 28.570(1) (gross indecency between female persons), 28.570(2) (1982) (gross indecency between male and female);

Minnesota: Minn. Stat. Ann. §609.293 (1987) (sodomy);

Mississippi: Miss. Code Ann. §97-29-59 (1973) (unnatural intercourse);

Missouri: Mo. Ann. Stat. §566.060 (Vernon Supp. 1988) (sodomy);

Montana: Mont. Code Ann. §45-5-505 (1988) (deviate sexual conduct);

Nevada: Nev. Rev. Stat. §201.190 (1988) (crime against nature);

New York: N.Y. Penal Law §130.38 (1987) (sodomy);

North Carolina: N.C. Gen. Stat. 14-177 (1988) (crime against nature);

North Dakota: N.D. Cent. Code §12.1-20-12 (1985) (deviate act);

Oklahoma: Okla. Stat. Ann. tit. 21, §886 (1983) (crime against nature);

Pennsylvania: 18 Pa. Cons. Stat. Ann. §3124 (1988) (voluntary deviate sexual intercourse);

Rhode Island: R.I. Gen. Laws. §11-10-1 (1988) (abominable and detestable crime against nature);

South Carolina: S.C. Code Ann. §16-15-120 (1985) (buggery);

Tennessee: Tenn. Code Ann. §39-2-612 (1982) (crimes against nature);

Texas: Tex. Penal Code §21.0 (1989) (homosexual conduct);

Utah: Utah Code Ann. §76-5-403 (1987) (sodomy);

Virginia: Va. Code §18.2-361 (1988) (crimes against nature);

Wisconsin: Wis. Stat. Ann. §944.17 (1982) (sexual perversion).

276. The following states have statutes outlawing adultery or fornication or both:

Alabama: Ala. Code §13A-13-2 (1982) (adultery);

Arizona: Ariz. Rev. Stat. Ann.§14-1409 (Supp. 1988) (open & notorious cohabitation);

Colorado: Colo. Rev. Stat. §18-6-501 (1986) (adultery);

Connecticut: Conn. Gen. Stat. Ann.§53a-81 (1985) (adultery);

District of Columbia: D.C. Code Ann. §§22-301 (adultery), 22-1002 (1981) (fornication);

Florida: Fla. Stat. Ann. §§798.01 (adultery),798.02 (lewd & lascivious behavior), 798.03 (1976) (fornication);

Georgia: Ga. Code Ann. §§16-6-18 (fornication), 16-6-19 (1985) (adultery);

Idaho: Idaho Code §§18-6601 (adultery), 18-6603 (fornication), 18-6604 (1987) (lewd cohabitation);

Illinois: Ill. Ann. Stat. Ch. 38, §§11-7 (adultery) 11-8 (Smith-Hurd 1979) (fornication);

Kansas: Kan. Stat. Ann. §§21-3507 (adultery), 21-3508 (1988) (fornication);

Massachusetts: Mass. Gen. Laws Ann. ch. 272, §§14 (adultery), 16 (lascivious cohabitation), 18 (1970) (fornication);

Michigan: Mich. Comp. Laws Ann. §28.567 (1982) (lewd & lascivious cohabitation);

Minnesota: Minn. Stat. Ann. §§609.34 (fornication), 609.36 (1987) (adultery);

Mississippi: Miss. Code Ann. §§97-29-1 (adultery & fornication - unlawful cohabitation),97-29-2 (adultery & fornication - between teacher & pupil), 97-29-5 (adultery & fornication - between persons forbidden to marry), 97-29-7 (adultery & fornication - between guardian & ward), 97-29-9 (1973 & Supp. 1988) (adultery & fornication - going out of state to marry);

Nebraska: Neb. Rev. Stat. §28-704 (1985) (adultery);

North Carolina: N.C. Gen. Stat. §14-184 (1988) (fornication & adultery);

North Dakota: N.D. Cent. Code §§12.1-20.08 (fornication), 12.1-20-09 (adultery), 12.1-20-10 (1985) (unlawful cohabitation);

Oklahoma: Okla. Stat. Ann. tit. 21, §871 (1983) (adultery);

Rhode Island: R.I. Gen. Laws §§11-6-2 (adultery), 11-6-3 (1988) (fornication);

South Carolina: S.C. Code Ann. §16-15-60 (1985) (adultery & fornication)

Virginia: Va. Code §§18.2-365 (adultery), 18.2-366 (1988) (adultery & fornication by persons forbidden to marry);

West Virginia: West Va. Code §§61-8-3 (adultery & fornication), 61-8-4 (1989) (lewd & lascivious cohabitation);

Wisconsin: Wis. Stat. Ann. §§944.15 (fornication), 944.16 (1982) (adultery).

277. The following states have reclassified statutory rape into some other form of sexual misconduct.

Alaska: Alaska Stat. §§11.41.434 (sexual abuse of minor 1st degree), 11.41.436 (sexual abuse of minor 2d degree), 11.41.438 (sexual abuse of minor 3rd

degree), 11.41.440 (1988) (sexual abuse of minor 4th degree);

Arizona: Ariz. Rev. Stat. §13-1405 (1978 & Supp. 1988) (sexual conduct with minor);

Arkansas: Ark. Rev. Stat.§§5-14-104 (carnal abuse 1st degree: victim under 14, perpetrator 18), 5-14-106 (carnal abuse 2d degree: victim under 16, perpetrator 20), 5-14-107 (1987) (sexual misconduct: victim under under 16);

California: Cal. Penal Code §261.5 (1985) (unlawful sexual intercourse w/ female under 18);

Colorado: Colo. Rev. Stat. §§18-3-403 (sexual assault 2d Degree: victim under 15, 4 year age difference), 18-3-404 (sexual assault 3d degree (victim under 18, perpetrator guardian), 18-3-405 (1986 & Supp. 1988) (sexual assault on a child: victim under 15, 4 year age difference);

Connecticut: Conn. Gen. Stat. §§53a-71 (sexual assault 2d degree), 53a-72a (1985) (sexual assault 3d degree);

Delaware: 11 Del. Code §§767 (unlawful sexual contact 3d degree), 768 (unlawful sexual contact 2d degree 773 (unlawful sexual intercourse 3d degree: victim under 16), §775(a)(4) (Supp. 1988) (unlawful sexual intercourse 1st degree: victim under 16);

Florida: Fla. Stat. Ann.§§794.041 (sexual

activity with child by or at solicitation of person in familial or custodial authority) 794.05 (1976 & Supp. 1988) (carnal intercourse with unmarried person under 18;

Hawaii: Hawaii Rev. Stats. §707-732 (Supp. 1988) (sexual assault 3d degree).;

Illinois: Ill. Ann. Stat. Ch. 38, §§12-13 (criminal sexual assault: victim under 18, family member, 13 -17 defendant 17), 12-14 (aggravated criminal sexual assault victim under 13, defendant 17), 12-15 (criminal sexual abuse: victim 9-17, defendant under 17; victim 13 to 17, defendant 5 years older), 12-16 (1979 & Supp 1988) (aggravated criminal sexual abuse: victim 9-17, defendant under 17; victim 13-17, defendant 5 years older; victim 13-17, defendant 17, position of trust)

Indiana: Ind. Code §35-42-4-3 (1985) (child molesting);

Iowa: Iowa Code Ann. §§709.3 (sexual abuse 2d degree: victim under 12), 709.4 (1979 & Supp. 1988) (sexual abuse 3d degree: victim 14-15);

Kansas: Kan. Stat. Ann. §21-3503 (1988) (indecent liberties) ;

Kentucky: Ky. Rev. Stat. Ann.§§510.040 (rape 1st degree victim under 12), 510.050 (rape 2d degree: victim 12-13), 510.060 (1988) (rape 3d degree: victim

14-15, defendant 21);

Louisiana: La. Rev. Stat. Ann. §14:42 (aggravated rape: victim under 12), 14:43.1 (sexual battery) (1986);

Maine: Me. Rev. Stat. Ann. tit. 17-A, §§252 (rape: victim under 14), 253 (gross sexual misconduct); 254 (1983 & Supp. 1988) (sexual abuse of minors);

Maryland: Md. Crim. Law Code §§463 (second degree rape: victim under 14), 464C (1974) (fourth degree sexual offense: victim 14-15, defendant 4 years older);

Massachusetts: Mass. Gen. Laws Ann. ch. 265, §§23 (rape and abuse of Child), ch. 272, §4 (1970) (inducing person under 18 to have sexual intercourse);

Michigan: Mich. Comp. Laws Ann. §§28.788(2) (criminal sexual conduct 1st degree (victim under 13; victim 13-15, member of household), 28.788(3) (criminal sexual conduct 2d degree), 28.788(4) (1982 & Supp. 1988) (criminal sexual conduct 3d degree (victim 13-15);

Minnesota: Minn. Stat. Ann. §§609.342 (criminal sexual conduct 1st degree: victim under 13, defendant 36 months older; victim 13-15, defendant 48 months older), 609.344 (1987 & Supp. 1988) (criminal sexual conduct 3d degree: same);

Mississippi: Miss. Code Ann. §§97-3-65 (rape: victim

under 14), 97-3-67 (Supp. 1988) (rape, carnal knowledge: victim 14 to 17, defendant older); *Missouri:* Mo. Stat. Ann. §566.050 (1979) (sexual assault 2d degree: victim 16, defendant 17); *Montana:* Mont. Code Ann. §§45-5-502 (sexual assault (victim under 16, defendant 3 years older); 45-5-503 (1988) (sexual intercourse w/o consent); *Nebraska:* Neb. Rev. Stat. §28-319 (1985) (sexual assault 1st degree); *Nevada:* Nev. Rev. Stat. §200.366 (1989) (sexual assault: victim under 14); *New Hampshire:* N.H. Rev. Stat. Ann. §§632-A:2 (aggravated felonious sexual assault: victim 13-15; victim 13-17, person in authority), 632-A:3 (1986 & Supp. 1988) (felonious sexual assault (victim 13-15); *New Jersey:* N.J. Stat. Ann. §2C:14-2 (1982 & Supp. 1988) (sexual assault (victim under 13; victim 13-15, defendant family member; victim 16-17, defendant in household w/ supervisor duty); *New Mexico:* N.M. Stat. Ann. §30-9-11 (1988) (criminal sexual penetration: victim under 13; victim 13-15 defendant in authority; victim 13-15, defendant 18); *New York:* N.Y. Penal Law §§130.20 (sexual misconduct: victim under 17, defendant 21), 130.30 (rape 2d degree: (victim under 14), 130.35 (rape 1st degree: victim

under 11), 130.70 (1987) (aggravated sexual abuse: attempt: victim under 11 w/ instrument);

North Carolina: N.C. Gen. Stat. §§14-27.2 (first degree rape: victim under 13, defendant over 12, 4 years older), 14-27.7 (1988) (intercourse and sexual offenses w/ certain victims: victim under 18 defendant assumed position of parent);

North Dakota: N.D. Cent. Code §§12.1-20-03 (gross sexual imposition: victim under 15), 12.1-20-05 (1985) (corruption or solicitation of minors: victim 15-17);

Ohio: Ohio Rev. Code Ann. §§2907.02 (rape: victim under 13), 2907.03 (sexual battery: w/parent or step parent), 2907.04 (Page 1987 & Supp. 1988) (corruption of minor: victim 12-15);

Oklahoma: Okla. Stat. Ann. tit. 21, §§1111 (rape: victim under 16), §1114 (Supp. 1988) (rape 1st, 2d degree: victim less than 14);

Oregon: Or. Rev. Stat. §§163.355 (rape 3d degree: victim under 16), 163.365 (rape 2d degree: victim under 14) , 163.375 (rape 1st degree: victim under 12; victim under 16; defendant brother, father, step father), 163.445 (1988) (sexual misconduct (victim under 18);

Rhode Island: R.I. Gen. Laws §§11-37-6 (3d degree sexual assault: victim 14-15); 11-37-8.1 (1988) (1st

degree child molestation sexual assault: victim under 15);

South Carolina: S.C. Code Ann. §16-3-655 (1985) (criminal sexual conduct w/ minor: (victim under 16);

South Dakota: S.D. Comp. Laws Ann. §22-22-1 (1988) (rape: victim under 10; victim 10-16, defendant 3 years older);

Texas: Tex. Penal Code §§22.011 (sexual assault: victim under 17), 22.021 (1989) (aggravated sexual assault: victim under 14);

Utah: Utah Code Ann. §§76-5-401 (unlawful sexual intercourse: victim under 16), 76-5-402.1 (1987) (rape of a child: victim under 14);

Vermont: Vt. Stat. Ann. tit. 13, §§3252 (sexual assault (victim under 16), 3253 (1974 & Supp. 1988) (aggravated sexual assault (same);

Washington: Wash. Rev. Code Ann. §§9A.44.073 (rape of child 1st degree: victim under 12, defendant 2 years older), 9A.44.076 (rape of child 2d degree: victim 12-13, defendant 3 years older), 9A.44.079 (1988) (rape of child 3d degree: victim 14-16, defendant 4 years older);

West Virginia: West Va. Code §§61-8B-3 (sexual assault 1st degree: victim under 12, defendant 14), 61-8B-5 (1989) (sexual assault 3d degree: victim under 15,

defendant 16);

Wisconsin: Wis. Stat. Ann. §940.225 (1982 & Supp. 1988) (sexual assault: 1st degree: victim under 12, 2d degree: victim 12 -17);

Wyoming: Wyo. Stat. §§6-2-303 (sexual assault 2d degree: victim under 12, defendant 4 years older), 6-2-304 (1988) (sexual assault 3d degree: victim under 16, defendant 4 years older).

278. BLOOM, THE CLOSING OF THE AMERICAN MIND 97-98 (1987).

279. *Id.* at 99-101, 141-240.

280. GALLUP REPORT #263 19-20 (Aug. 1987) (Premarital Sex).

281. *Id. See also* GALLUP REPORT #259 32-33 (Apr. 1988) (Catholics) which shows a majority of U.S. Catholics favor changes in the Church's sexual morality with regard to its teachings on extramarital sex.

282. GALLUP REPORT #244-45 2-3 (Jan.-Feb. 1986) (Homosexuality).

283. GALLUP REPORT #267 24-25 (Dec. 1986) (Women).

284. GALLUP REPORT #197 28-29 (Feb. 1982) (Child Abuse).

285. Getz v. State, Del Supr., 538 A.2d 6126, 733-74 (1988).

286. The majority of scholars examining Rule 404(b) treat it as an inclusionary rule for specific instances of conduct proving intermediate issues, and treat the list of possible intermediate issues in Rule 404(b) as examples, and not an exclusive enumeration of

exceptions. IMWINKELREID, *supra* note 178, §§2.29-2.31.

287. *Id.* at §2.30.

288. *See supra* note 140.

289. *See supra* note 141.

290. *See supra* note 142.

291. *See infra* text accompanying notes 336-66.

292. *See infra* text accompanying notes 425-26.

293. They are Delaware (Getz v. State, Del. Supr., 538 A.2d 726, 729 (1988)), Indiana, Lannan v. State, 600 N.E.2d 1334 1992), Kentucky (Pendelton v. Commonwealth, 685 S.W.2d 549 (1985)), New York (People v. Lewis,69 N.Y.2d 321, 514 N.Y.S.2d 205, 506 N.E.2d 644 (1987)). West Virginia repudiated the lustful disposition rule in 1986, State v. Dolin, 347 S.E.2d 208 (W.Va. 1986). However, West Virginia reversed itself and overruled Dolin in State v. Edward Charles L., 398 S.E.2d 123 (W.Va. 1990).

294. The following states still recognize the lustful disposition exception to the general bar against character evidence:

Alaska: Soper v. State, 731 P.2d 587 (Alaska App. 1987); Burke v. State, 624 P.2d 1240 (1980) (lustful motive child molesting). *But see* Johnson v. State, 727 P.2d 1062 Alaska App. 1986) (prior sexual relations between victim and defendant inadmissible only to show

lewd disposition).

Arizona: State v. Treadaway, 116 Ariz. 163, 568 P.2d 1061 (1977) (child molesting); State v. Beck, 151 Ariz. 130, 726 P.2d 227 (App. 1986) (incest); State v. Speno, 14 Ariz. 142, 704 P.2d 272 (App. 1985).

Arkansas: Free v. State, 293 Ark. 65, 732 S.W.2d 452 (1987); White v. State, 290 Ark. 130, 717 S.W.2d 784 (1986) (only in cases of incest and child abuse).

California: People v. Sylvia, 54 Cal. 2d 115, 4 Cal. Rptr. 509, 351 P.2d 781 (1967) (rape); People v. Stewart, 181 Cal. App. 3d 300, 226 Cal. Rptr. 252 (1986).

District of Columbia: Pounds v. United States, 529 A.2d 791 (D.C. App. 1987) (predisposition to gratify passion); Bracey v. United States, 79 U.S. App. D.C. 23, 142 F.2d 881 (1944)(statutory rape).

Georgia: Davis v. State, 249 Ga. 309, 290 S.E.2d 273 (1978); Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978) (to show defendant's bent of mind in rape prosecution); Rodgers v. State, 261 Ga. 33, 401 S.E.2d 735 (1991) (to show bent of mind in child molestation prosecution); Smith v. State, 182 Ga. App. 740, 356 S.E.2d 723 (1978) (child molesting).

Idaho: State v. Schwartzmiller, 107 Idaho 89, 685 P.2d 830 (1984) (lewd disposition).

Iowa: State v. Plaster, 424 N.W.2d 227 (Iowa, 1988); State v. Ripperger, 409 N.W.2d 693, 694 (Iowa 1987); State v. Spaulding, 313 N.W.2d 878, 880 (Iowa, 1981); (to show passion or propensity for illicit sexual relations with the particular victim).

Kansas: State v. Damewood, 245 Kan. 676, 783 P.2d 1249 (1989) (to corroborate complaining child witness's testimony in sexual assault case); State v. Moore, 242 Kan. 1, 748 P.2d 833, 837-38 (1987); State v. Clements, 241 Kan. 77, 734 P.2d 1096 (1987) (sodomy).

Louisiana: State v. Morgan, 296 So.2d 286 (La. 1974); State v. Hammond, 520 So.2d 1150 (La. App. 1987) (aggravated rape).

Massachusetts: Commonwealth v. King, 387 Mass. 464, 441 N.E.2d 248 (1982) (lecherous disposition: child molesting); Commonwealth v. Bemis, 242 Mass. 582, 585, 136 N.E. 597 (1922) (statutory rape); Commonwealth v. Thomas, 19 Mass. App. 1, 471 N.E.2d 376 (1984) (to show probable existence of same passion or emotion at the time in issue).

Mississippi: Coates v. State, 495 So.2d 464, 468 (Miss. 1986) (sexual battery of a teen age step daughter); Brooks v. State, 242 So.2d 865, 869 (1971) (lustful disposition: rape of a child of 8).

Missouri: State v. Graham, 641 S.W.2D 102, 105 (1986)

(rape of step daughter: to show motive for rape, satisfaction of sexual desire); State v. Garner, 481 S.W.2d 239, 241 (Mo. 1972); State v. Taylor, 735 S.W.2d 412 (Mo. App. 1987) (sodomy: to demonstrate strength of passion for victim).

Nebraska: State v. Craig, 219 Neb. 184, 361 N.W.2d 206 (1985) (to show pattern of deliberately motivated sexual acts).

Nevada: McMichael v. State, 94 Nev. 184, 577 P.2d 398 (1978) (fellatio of a 12 year old boy: adopting McDaniel v. State: to show the nature of accused's emotional proclivity).

New Mexico: State v. Mankiller, 104 N.M. 461, 722 P.2d 1183, 1191 (N.M. App. 1986) (child molesting: lewd & lascivious disposition); State v. Minns, 80 N.M. 269, 454 P.2d 355 (N.M. App. 1969).

Oregon: State v. Pace, 187 Or. 498, 212 P.2d 755, 759 (1949) (incest: to show lustful disposition); State v. Hisey, 55 Or. App. 427, 637 P.2d 1388 (1981) (lustful disposition or propensity).

Pennsylvania: Commonwealth v. McLucas, 357 Pa. Super. 449, 516 A.2d 68, 71 (1986) (statutory rape & incest: to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime at trial); Commonwealth v. Leppard, 271 Pa.

Super. 317, 413 A.2d 424, 425 (1979) (incest). But see Commonwealth v. Boulden, 179 Pa. Super. 328, 114 A.2d 867 (1955) (corrupting morals of child: uncharged misconduct held inadmissible to prove proclivity to engage in child molesting); Commonwealth v. Shively, 492 Pa. 411, 424 A.2d 1257 (1981) (admission of uncharged misconduct in sex offenses no longer more liberalized than in other types of crime: overruling Commonwealth v. Kline, 361 Pa. 434, 65 A.2d 348 (1949)). *But c.f.* Commonwealth v. Claypool, 508 Pa. 198, 495 A.2d 176 (1985) (concurring opinion of Hutchinson, J.: quoting Kline with approval on general rule of admission of similar sexual crimes to show the defendant's "state of mind" at the time of the commission of the offense charged).

Rhode Island: State v. Tobin, 602 A.2d 528 (R.I. 1992) (lewd disposition or . . . intent); State v. Burns, 524 A.2d 564, 568 (R.I. 1987) (child molesting step daughter: to show lewd disposition or intent); State v. Jalette, 119 R.I. 621, 624-25, 382 A.2d 530, 531-34 (1971) (indecent assault on daughter).

South Dakota: State v. Champagne, 422 N.W.2d 840, 841-44 (S.D. 1988) (unlawful sexual contact, crime of specific intent: prior sexual misconduct with other victims admitted to show specific intent to touch for

lustful purposes); State v. Roden, 380 N.W.2d 669, 670-71 (S.D. 1986) (digital rape of child: other similar misconduct admitted to show "implied intent or objective to satisfy his sexual urges with children").

Texas: Williams v. State, 490 S.W.2d 604 (Tex. Crim. App. 1973); Sherwinksi v. State, 1991 Tex.App. Lexis 3073; Boutwell v. State, 719 S.W.2d 164, 174-79 (Tex. Crim. App. 1985) (child molesting of little boys: on rehearing, restating Battles v. State for limited lustful disposition exception to prove familiarity between defendant and victim held not applicable to rape cases: evidence of contact with other boys held inadmissible because not within Battles exception showing continuous relationship between victim and defendant); Meyers v. State, 737 S.W.2d 6 (Tex. App. 1987) (incest: to show opportunity).

Utah: State v. Neel, 23 Utah 541, 65 P. 494, 495 (1908) (never overruled).

Vermont: State v. Cardinal, 584 A.2d 1152 (1990) (to prove defendant had proprietary interest in daughter-victim).

Virginia: Moore v. Commonwealth, 222 Va. 72, 77, 278 S.E.2d 822, 825 (1981) (incest: to show incestuous disposition); Waitt v. Commonwealth, 207 Va. 230, 235,

148 S.E.2d 805, 809 (1960) (rape of 14 year old daughter: to show disposition of defendant toward victim): Stump v. Commonwealth, 137 Va. 804,808, 119 S.E.2d 72,73 (1923) (statutory rape: subsequent sexual relations admissible to show relationship between victim and defendant); Marshall v. Commonwealth, 5 Va. App. 248, 361 S.E.2d 634, 637 (1987) (statutory rape: rev'd on error in cautionary instruction to jury on admission of prior and later sexual activity between defendant and victim, admission of other acts held no error, proved disposition to engage in sexual activity).

Washington: State v. Ray, 116 Wash.2d 531, 806 P.2d 1220 (1991) (lustful disposition in incest prosecution); State v. Ferguson, 100 Wash. 2d 131, 667 P.2d 68 (1983) (indecent liberties: lustful disposition); State v. Carver, 37 Was. App. 122, 678 P.2d 842 (1984) (statutory rape: lustful disposition).

West Virginia: In re Carlita B., 408 S.E.2d 365 (W.Va. 1991) (lustful disposition in child molestation prosecutions); State v. Edward Charles L., 398 S.E.2d 123 (1990).

Wisconsin: State v. Friederich, 135 Wis.2d 763, 398 N.W.2d 763, 771-74 (1987) (Incest: prior child molesting incidents admitted to show plan to satisfy

lustful motive); State v. Fishnick, 127 Wis. 2d 247, 253, 378 N.W.2d 272, 276, 279-80 (1985) (child molesting: to show lustful motive); State v. Conley, 141 Wis. 2d 384, 416 N.W.2d 69, 75 (1987) (indecent liberties: to show motive of sexual gratification) *Wyoming*: Maniken v. State, 737 P.2d 345, 346-47 (Wyo. 1987) (incest: to show history of event); Brown v. State, 736 P.2d 1110 (Wyo. 1987) (incest: to show motive for relationship).

While Maine follows the orthodox version of R. 404(b) in admitting uncharged misconduct, that dicta in State v. DeLong, 505 A.2d 803 (Me. 1986) speaks about admission of other incestuous acts between father and daughter as proof of the defendant's attraction towards the victim, which sounds very much like the "lustful disposition" rule.

295. *See, e.g.*, Johnson v. State, 188 Ga. App. 499, 373 S.E.2d 284 (1988).

296. *See, e.g.*, McGuire v. State, 188 Ga. App. 891, 374 S.E.2d 816 (1988).

297. *See, e.g.*, Sears v. State, 182 Ga. App. 480, 3562 S.E.2d 72 (1987).

298. *See, e.g.*, Sears v. State, 182 Ga. App. 480, 356 S.E.2d 72 (1987); Cooper v. State, 173 Ga. App. 254, 325 S.E.2d 877 (1985) (19 years between incidents).

299. *See, e.g.*, Johns v. State, 181 Ga. App. 510, 352 S.E.2d 826 (1986).

300. *See, e.g.*, Rodgers v. State, 261 Ga. 33, 35, 401 S.E.2d 735, 736 (1991); Johnson v. State, 242 Ga. 649, 652, 250 S.E.2d 395, 398 (1978).

301. Georgia has two different lines of development. One line springs from Dorsey v. State, 204 Ga. 345, 49 S.E.2d 886 (1948). In Dorsey, the African-American defendant was charged with sexually assaulting Bertie Mae Kelly, a white woman, on January 25, 1947. The method used was commonplace, a mugging attack from behind. The victim was forcibly dragged behind a house and the perpetrator accomplished conventional sexual intercourse on the victim without further physical battery. The victim identified the defendant at a line up of African-American males. The State offered evidence of a later similar sexual assault on Sara Crumley, another white victim, on September 8, 1947. She also identified the defendant as the perpetrator of the assault on her. The Georgia Supreme Court affirmed Dorsey's conviction, holding that the admission of the second, later sexual assault was relevant to prove the "bent of mind" of the defendant in the earlier January incident. The crime did not require proof of specific intent. The introduction of the later assault may

answer the questions "Why did he do it?", but it does so by saying that he did it to gratify his abnormal sexual passions by rape. Dorsey has been followed in recent years by the Georgia Supreme Court on the idea that evidence of other uncharged sexual misconduct should be liberally admissible. *See, e.g.*, Rodgers v. State, 261 Ga. 33, 35, 401 S.E.2d 735, 736 (1991) (child molestation & sodomy); Johnson v. State, 242 Ga. 649, 250 S.E.2d 395, 398 (1978) (kidnapping and rape); Wimberly v. State, 180 Ga.App. 148, 348 S.E.2d 692 (1986). The second line of development follows from child molestation and incest cases holding that evidence of similar sexual misconduct in such cases is relevant to prove lustful disposition. *See, e.g.*, Stephens v. State, 205 Ga. App. 403, 1992 Ga. Lexis 1205 (1992); Franklin v. State, 201 Ga. App. 147, 148, 410 S.E.2d 451, 452 (1991); Conaway v. State, 188 Ga. App. 561, 373 S.E.2d 660 (1988). The lustful disposition cases started with McMichen v. State, 62 Ga. App. 50, 53, 7 S.E.2d 747, 750 (1940). The court held that other instances of sexual misconduct committed by the defendant before and after the crime charged in the indictment were admissible to show the defendant's plan or design, or to show his lustful disposition. McMichen cited State v. Katz, 21 Mo. 493,

181 S.W. 425 (1915) to support admission. Katz, a rape case, involved admission of later assaults committed by the three defendants against the same victim on the same day as the sexual assault charged in the indictment. The Katz court did not use the words "lustful disposition". McMichen was cited as the source of the lustful disposition rule in Warren v. State, 95 Ga. App. 79, 97 S.E.2d 194 (1957). Warren was cited as the source of the lustful disposition exception in Feltz v. State, 154 Ga. App. 571, 269 S.E.2d 73 (1980). Feltz was cited in Gaskin v. State, 166 Ga. App. 331, 303 S.E.2d 778 (1983). Gaskin was cited in Tucker v. State, 191 Ga. App. 648, 382 S.E.2d 425 (1989). Tucker was cited for support for the lustful disposition rule in Stine v. State, 199 Ga. App. 898, 406 S.E.2d 293 (1991). Stine also cited State v. Johnson in support of admission of other sexual misconduct evidence.

302. *See, e.g.*, Bacon v. State, 209 Ga. 261, 71 S.E.2d 615 (1952), which announced a general rule permitting introduction of similar sexual misconduct to prove motive, intent, plan or design. This doctrine is followed in rape cases as a justification for admitting prior rapes of the same victim by the defendant. *See, e.g.*, Tiller v. State, 238 Ga. 67, 230 S.E.2d 874

(1976). The Bacon doctrine has been applied to admit proof of other similar, rapes of different victims in the vicinity of the rape for which the defendant was charged. *See, e.g.*, Houston v. State, 187 Ga.App. 335, 370 S.E.2d 178 (1988).

303. For earlier, similar offenses, *see, e.g.*, Houston v. State, 187 Ga. App. 335, 370 S.E.2d 178 (1988) (two prior, similar burglaries & rapes); Hill v. State, 183 Ga. App. 404, 359 S.E.2d 190 (1987) (11 year old rape conviction on victim also living in his home); Nolley v. State, 181 Ga. App. 585, 353 S.E.2d 80 (1987); Keller v. State, 181 Ga. App. 208, 351 S.E.2d 731 (1986) (prior child molesting acts against stepdaughter admissible in prosecution for molesting stepson); Evans v. State, 180 Ga. App. 1, 348 S.E.2d 561 (1986) (prior incest with niece). For later, similar offenses, *see., e.g.*, Chambley v. State, 177 Ga. App. 647, 340 S.E.2d 635 (1986) (rape occurring one week after rape charged in indictment).

304. Rodgers v. State, 261 Ga. 33, 401 S.E.2d 735 (1991). The defendant was charged with molesting a 12 year old boy. While incarcerated awaiting trial, Rodgers allegedly made homosexual overtures to two fellow prisoners. These later homosexual encounters with adults who had the legal right to consent to Rodgers'

request, were admitted to show Rodgers' earlier proclivity towards children.

305. 204 Ga. App. 469, 419 S.E.2d 503 (1992).

306. *Id.* at 204 Ga. App. 471, 419 S.E.2d 505.

307. 204 Ga. App. 806, 420 S.E.2d 582 (1992).

308. *Id.* at 204 Ga.App. 808, 420 S.E.2d 583. This case is strikingly similar to Regina v. Lewis [1982] 76 Crim. App. 33. The Court of Appeal also admitted evidence showing the accused had collected pedophiliac pornographic materials in his residence. It is not clear whether the defendant in Burris simply denied the allegations, or claimed an innocent reason for touching the children.

309. *Id.* at 204 Ga. App. 808, 420 S.E.2d 582.

310. *See, e.g.*, Ex Parte Corbitt, 596 So.2d 430 (Ala. Cr. App. 1991); George v. State, 306 Ark. 360, 813 S.W.2d 792 (1991); State v. Esponge, 593 So.2d 677 (La.App. 1991); Commonwealth v. Purinton, 32 Mass. App. Ct. 640, 593 N.E.2d 1307 (1992); State v. Lachterman, 812 S.W.2d 759 (Mo. App. 1991); State v. Delgado, 815 P.2d 631 (N.M. App. 1991); State v. Tobin, 602 A.2d 528 (R.I. 1992); Williams v. State, 490 S.W.2d 604 (Tex. Crim.App. 1973); State v. Ray, 116 Wash.2d 531, 806 P.2d 1220 (1991); State v. Chittum, 408 S.E.2d 31 (W.Va. 1991) (child molesting). See also the analysis

of the Kentucky Court of Appeals in Thacker v. Commonwealth, 816 S.W.2d 660, 662 (Ky. App. 1991) that questions whether Kentucky ever departed from the lustful disposition rule in Pendleton v. Commonwealth, 685 S.W.2d 549 (Ky. 1985), although Pendleton ostensibly overruled earlier case law using the lustful deposition rule.

311. *See, e.g.*, Free v. State, 293 Ark. 65, 732 S.W.2d 452, 455 (1987) (sodomy with children); White v. State, 290 Ark. 130, 717 S.W.2d 784 (1986); Johnson v. State, 288 Ark. 101, 104, 702 S.W.2d 2,4 (1986) (incest); Williams v. State, 103 Ark. 70, 146 S.W.2d 471 (1912) (carnal knowledge).

312. 268 Ark. 535, 597 S.W.2d 598 (1980).

313. *Id.* at 268 Ark. 537, 597 S.W.2d 599.

314. *Id.*

315. White, 290 Ark. at 132, 717 S.W.2d at 785.

316. Free, 293 Ark. at 67, 732 S.W.2d at 455. Free was charged with five counts of homosexual forcible rape upon a nine year old nephew. The boy was allowed to testify to prior incidents of oral and anal sex with defendant. See also Sullivan v. State, 289 Ark. 325, 327, 711 S.W.2d 479, 480 (1986). Sullivan was charged with forcibly raping his 13 year old step daughter in the bathroom of their house when several other family

members were present. The girl testified to other acts of fondling and sexual intercourse with defendant starting a year before the rape.

317. State v. McFarlin, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973).

318. 116 Ariz. 163, 568 P.2d 1061 (1977).

319. *Id.* at 116 Ariz. 165, 560 P.2d 1063.

320. *Id.* at 116 Ariz. 169, 560 P.2d 1065.

321. 80 Ariz. 381, 298 P.2d 798 (1956).

322. *Id.* at 80 Ariz. 385, 298 P.2d 802-03.

323. *Id.*

324. *Id.*

325. Treadaway, 116 Ariz. 169, 560 P.2d 1065. The court reviewed a smattering of recidivism studies dating from the 1950's to support its doubt as to the validity of recidivism as a predictor of future sexual misbehavior. Besides Tappan's New Jersey report, the court reviewed the Mayor's Special Committee Report for the Study of Sex Offenses produced for Mayor La Guardia of New York City back in 1941, and the 1950 study of 102 sex offenders at Sing Sing. None of these studies would hold water today.

326. 148 Ariz. 490, 715 P.2d 743 (1986).

327. *Id.* at 148 Ariz. 495, 715 P.2d 747.

328. 136 Ariz. 83, 664 P.2d 233 (App. 1985).

329. *Id.* at 136 Ariz. 86, 664 P.2d 235.

330. 149 Ariz. 493, 720 P.2d 94 (App. 1985).

331. 156 Ariz. 518, 753 P.2d 1174 (App. 1987).

332. The Arizona Court of Appeals was faced with a double barrelled challenge to admission of uncharged sexual misconduct in State v. Lopez, 170 Ariz. 112, 822 P.2d 465 (1991). Lopez was charged with 6 counts of homosexual conduct with a 15 year old boy. The State introduced evidence that Lopez had three, relatively similar encounters with young boys, the first dating back to 1977. In each case, the defendant lured a teen age or pre-teen age boy into his house with a promise of a lawn care job. The boy was given alcohol and marijuana in return for oral sex and anal sex with Lopez. Each boy was also promised conventional sex with a woman in return for sexual activity with Lopez. The State had a psychiatrist who would supply expert testimony mandated by Treadaway showing the defendant had an unnatural propensity for such type of sexual encounters. The defendant objected on two grounds: (a) the earlier sexual conduct was too dissimilar to prove a propensity for that type of activity, and (b) even if it did, the XIVth Amendment precluded use of such evidence. The defendant claimed that inclusion of similar sexual misconduct only in sexual prosecutions

was an underinclusive and overinclusive rule. The court of appeals affirmed Lopez' conviction. It held that the "emotional propensity" exception, although non cataloged under R. 404(b) Ariz. R. Evid. was nonetheless similar to those listed in the rule. The court rejected Lopez' constitutional challenge, finding that sex crimes were of such special character, e.g., committed often in secret and without other corroboration, that the Supreme Court had a rational basis for relaxing the bar to uncharged misconduct evidence in sex offender cases.

333. State v. Lopez, 170 Ariz. 112, 822 P.2d 465 (App. 1991). The court held that an expert witness may testify about the general characteristics and behavior of sex offenders and victims, providing that the information is not within the realm of everyday knowledge. The expert cannot give an opinion on the ultimate issue of guilty by expressing an opinion that the behavior of the defendant, evidenced by prior uncharged sexual misconduct, is consistent with the crime charged in the indictment. *Id.* at 170 Ariz. 115, 811 P.2d 471. These limits were originally set up in State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986).

334. Modern case law permits admission of uncharged sexual misconduct under the Molineux rule when:

(a) In rape cases, prior uncharged sexual misconduct between the defendant and the same victim may be offered to prove the defendant's intent through proof of course of conduct, plan or design, or identity through modus operandi. Martin v. State, 504 So.2d 335 (Ala. Crim. App. 1986); Sullivan v. State, 289 Ark. 323, 711 S.W.2d 469 (1986); State v. Howard, 187 Conn. 681, 487 A.2d 1167 (1986); State v. Spaulding, 313 N.W.2d 878 (Iowa, 1981); People v. Wright, 161 Mich. App. 682, 411 N.W.2d 826 (1982); State v. Kannianen, 367 N.W.2d 104 (Minn. App. 1985); State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987).

(b) Subsequent sexual misconduct between defendant and victim in rape cases may be offered to prove intent, motive, identity through modus operandi, as part of interwoven crime, or of res gestae. Chancellor v. State, 38 Ala. App. 89, 80 So.2d 313, *cert. denied*, 262 Ala. 700, 80 So.2d 315 (1954) (later rape within hour on same victim by defendant admissible to prove intent via motive); Rogers v. State, 257 Ark. 144, 515 S.W.2d 79, *cert. denied*, 421 U.S. 930 (1974) (to prove identity by modus operandi); People v. Ford, 81 Cal. App.2d 580, 184 P.2d 524 (1947) (later attempted sodomy on victim followed by intercourse part of course of conduct); Gunter v. State, 223 Ga. 290, 154 S.E.2d 608

(1967) (identity and motive). But see Davenport v. State, 426 So.2d 464 (Ala. Crim. 1981), *rev'd*, 426 So.2d 472 (1982) (subsequent rape 40 minutes after the incident charged in indictment not admissible as part of res gestae).

(c) In rape prosecutions, prior similar uncharged sexual misconduct between defendant and other victims to prove identity through modus operandi, intent through plan or design, part of res gestae or to rebut consent. United States v. Cuch, 842 F.2d 1173 (10th Cir. 1988) (two similar rapes by defendant in five years' time); Primm v. State, 473 So.2d 1149 (Ala. Crim. App. 1985) (to rebut defendant's claim of consent); Humphrey v. State, 54 Ala. App. 62, 304 So.2d 617 (1974) (identity by modus operandi); King v. State, 253 Ark. 614, 487 S.W.2d 596 (1972) (identity); People v. Whittington, 74 Cal. App.3d 806, 141 Cal. Rptr. 742 (1977) (identity); People v. Adrian, 748 P.2d 768 (Colo. App. 1987); State v. Morowitz, 200 Conn. 440, 512 A.2d 175 (1986) (podiatrist and patients); Williams v. State, 110 So.2d 654 (Fla. 1959), *cert. denied*, 361 U.S. 847 (1960); Burnett v. State, 236 Ga. 597, 225 S.E.2d 28 (1976) (four witnesses on modus operandi); State v. Iaukea, 56 Hawaii 343, 537 P.2d 724 (1975) (to prove victim's fear and cooperation: knowledge of

defendant's prior rapes); People v. Lighthart, 62 Ill. App.3d 720, 379 N.E.2d 403 (1978) (to rebut defense of consent); People v. Oliver, 50 Ill. App.3d 665, 365 N.E.2d 618 (1977)(identity rape & robbery); State v. Terrill, 241 N.W.2d 16 (Iowa, 1976) (identity through aunt's testimony of prior rape); State v. Smith, 216 Kan. 265, 530 P.2d 1215 (1975) (to rebut lack of consent); Edmonds v. State, 521 So.2d 269 (La. App. 1988); State v. Adams, 513 A.2d 854 (Me. 1986); Commonwealth v. Helfant, 398 Mass. 214, 496 N.E.2d 433 (1986) (physician's modus operandi with patient victims); People v. Oliphant, 399 Mich. 472, 250 N.W.2d 443 (1976) (identity by modus operandi); State v. Crocker, 409 N.W.2d 840 (Minn. 1987) (prior lewd acts); State v. Bolonos, 743 S.W.2d 442 (Mo. App. 1987); State v. Lopez, 80 N.M. 599, 458 P.2d 851, *cert. denied*, 80 N.M. 607, 458 P.2d 859, *cert. denied*, 398 U.S. 942 (1969) (identity); State v. Teeter, 85 N.C.App. 624, 355 S.E.2d 804 (1987); State v. Whitman, 16 Oh. App.3d 246, 475 N.E.2d 486 (1984); Eberhart v. State, 727 P.2d 1374 (Okl. Crim. 1986); Free v. State, 721 P.2d 1327 (Okl. Crim. App. 1986) (part of res gestae); White v. State, 533 S.W.2d 735 (Tenn. Crim. 1975) (two similar prior acts to prove identity); State v. Goebel, 40 Wash.2d 18, 240 P.2d 251 (1952); Sanford

v. State, 76 Wis.2d 72, 250 N.W.2d 348 (1977) (similar rape 1½ years before incident in indictment admissible to prove identity). *But see* Wimberly v. State, 180 Ga. App. 148, 348 S.E.2d 692 (1982) (12 year old rape conviction too remote to show plan or design to rape); State v. Christenson, 414 N.W.2d 843 (Iowa App. 1987) (lack of consent defense does not allow proof of similar conduct with other victims); Foster v. Commonwealth, 5 Va. App. 316, 362 S.E.2d 745 (1987) (two similar rape incidents, not similar enough to be "signature" crimes, error to admit same).

(d) Subsequent similar uncharged sexual misconduct between defendant and other women in rape cases to prove intent through plan or design, identity through modus operandi, or as part of res gestae. Shelby v. State, 340 So.2d 847 (Ala. App.), *cert. denied*, 340 So.2d 849 (1976) (rape of second victim sandwiched between two rapes of victim admissible as res gestae); People v. Jamieson, 150 Cal. App.3d 1167, 198 Cal. Rptr. 407 (1984); People v. Crocker, 25 Ill.2d 52, 183 N.E.2d 161 (1962) (second rape immediately following first part of res gestae); Randolph v. State,266 Ind. 179, 361 N.E.2d 900 (1977) (rape 7 months later admitted to prove identity); State v. James, 217 Kan. 96, 535 P.2d 991 (1975) (two subsequent rapes 2 and 5

months after incident in indictment admitted to prove identity); State v. Vince, 305 So.2d 916 (La. 1974) (rape of two teen age girls within month of offense charged in indictment to prove modus operandi); People v. Kelly, 386 Mich. 330, 192 N.W.2d 494 (1971); Nester v. State, 75 Nev. 41, 334 P.2d 524 (1959); State v. Sterling, 15 Or. App. 425, 516 P.2d 87 (1973) (similar rape of two teen age girls admissible to show identity); Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963) (attempted rape after break in within a few minutes of first rape admissible as res gestae); DeVonish v. State, 500 S.W.2d 800 (Tex. Crim. App. 1973) (identity); Williams v. State, 500 S.W.2d 163 (Tex. Crim. App. 1973) (rape of accused's daughter in same bed as complaining witness admissible as res gestae); State v. Goebels, 40 Wash. 2d 18, 420 P.2d 251 (1952). *But see* Commonwealth v. Patterson, 484 Pa. 374, 399 A.2d 123 (1979) (rape five days later too dissimilar to be "signature").

(e) Prior similar uncharged sexual misconduct between defendant and victim in incest and child molesting cases to prove intent through proof of course of conduct, plan or design, identity through modus operandi, or familiarity between the parties. Coleman v. State, 491 So.2d 1086 (Ala. Cr. App. 1986);

Covington v. State, 703 P.2d 436 (Alaska 1985); State v. Smith, 156 Ariz. 518, 753 P.2d 1174 (App. 1987) (nude photos of child molester's victims to show plan); Tharp v. State, 20 Ark. App. 93, 724 S.W.2d 191 (1987) (incest); Free v. State, 293 Ark. 65, 717 S.W.2d 215 (1986) (incest); People v. Martinez, 135 Cal. App.3d 819, 185 Cal. Rptr. 610 (1982); Smith v. State, 182 Ga. App. 740, 356 S.E.2d 723 (1987) (child molesting:plan, scheme or lustful disposition); State v. Maylett, 108 Idaho 671, 701 P.2d 291 (Idaho App. 1985) (sexual abuse of child); State v. Gray, 235 Kan. 632, 681 P.2d 669 (1984); Commonwealth v. Banker, 21 Mass. App. 976, 489 N.E.2d 1029 (1986) (incest); Hicks v. State, 441 So.2d 1359 (Miss. 1983); People v. Miller, 165 Mich. App. 832, 418 N.W.2d 668 (1987) (plan or opportunity); State v. St. Goddard, 226 Mont. 158, 734 P.2d 680 (1987); State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1984) (indecent liberties); Salyers v. State, 755 P.2d 97 (Okla. Crim. 1988 (incest); Little v. State, 725 P.2d 606 (Okla. Crim. 1986) (plan or scheme to satisfy sexual desires); Commonwealth v. McLucas, 357 Pa. Super. 449, 516 A.2d 68 (1986); Commonwealth v. Robinson, 316 Pa. Super. 152, 462 A.2d 840 (1983) (part of one and same transaction); State v. Bernier, 491 A.2d 1000 (R.I. 1985); State v. Loop, 422 N.W.2d 420

(S.D. 1988); Baldonado v. State, 745 S.W.2d 491 (Tex. App. 1988) (child molesting: defendant claimed touching accidental); State v. Catsam, 148 Vt. 366, 534 A.2d 184 (1987);

(f) Prior similar uncharged sexual misconduct between defendant and other victims in incest and child molesting cases to prove intent through proof of course of conduct, plan or design or identity through modus operandi. McFaddin v. State, 290 Ark. 177,717 S.W.2d 812 (1986) (incest); Beasley v. State, 518 So.2d 917 (Fla.App. 1988); State v. Maylett, 198 Idaho 671, 701 P.2d 291 (App. 1985); Pendleton v. Commonwealth, 685 S.W.2d 549 (Ky. 1985); People v. Garland, 152 Mich. App. 301, 393 N.W.2d 896 (1986) (incest); State v. Shamp, 427 N.W.2d 228 (Minn. App. 1988); State v. Holden, 414 N.W.2d 516 (Minn. App.1987); State v. Long, 223 Mont. 502, 726 P.2d 1364 (986) (child molesting); State v. Tecca, 220 Mont. 168, 714 P.2d 136 (1986) (child molesting); State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988); Salyer v. State, 755 P.2d 97 (Okla.Crim. 1988) (incest: plan or design); State v. Champagne, 422 N.W.2d 840 (S.D.1988); State v. Means, 363 N.W.2d 565 (S.D. 1985); Rodda v. State, 745 S.W.2d 415 (Tex. App. 1988) (to rebut claim of impotence); State v. Friederich, 135 Wis.2d 763, 398

N.W.2d 763 (1987). *But see* Bolden v. State, 720 P.2d 957 (Alaska App. 1986) (intent at issue: prior molesting incidents excluded); State v. Rogers, 293 S.C. 505, 362 S.E.2d 7 (1987) (prior child molesting incident two years prior to incident in indictment too remote); Elmore v. State, 510 So.2d 127 (Miss. 1987) (prior incest too remote); State v. Ramirez, 46 Wash.App. 223, 730 P.2d 98 (1986) (proof of touching genitals of victim satisfies proof of intent: other incidents of child molesting with other victims not relevant to prove intent).

(g) Prior similar uncharged sexual misconduct between defendant and same victim in sodomy cases to prove intent through proof of course of conduct, plan or design or identity through modus operandi.

State v. Hopfe, 249 Minn. 464, 82 N.W.2d 681 (1957) (also later offenses); State v. Taylor, 735 S.W.2d 412 (Mo. App. 1987); State v. Sandlin, 703 S.W.2d 48 (Mo. App. 1985); (strength of passion for victim); Woods v. State, 95 Okla. Crim. 21, 238 P.2d 367 (1951); State v. Mayfield, 302 Or. 631, 733 P.2d 438 (1987); State v. Seiler, 397 N.W.2d 89 (S.D. 1988).

(h) Prior similar uncharged sexual misconduct between defendant and different victims in sodomy cases to prove intent through proof of course of conduct, plan

or design or identity through modus operandi. Coalter v. State, 183 Ga. App. 335, 358 S.E.2d 894 (1987); Kerlin v. State, 255 Ind. 420, 265 N.E.2d 22 (1970) (8 years between sodomies); State v. Hopfe, 249 Minn. 464, 82 N.W.2d 681 (1957); State v. V__. C__., 734 S.W.2d 873 (Mo. App. 1987); State v. Muthofer, 731 S.W.2d 504 (Mo. App. 1987) (plan or design with members of soccer team); Mayfield, 302 Or. 631, 733 P.2d 438 (1987). *But see* State v. Clements, 241 Kan. 77, 734 P.2d 1096 (1987) (earlier court martial conviction for sodomy held not plan or design to sodomize); Potts v. State, 500 So.2d 470 (Ala. Cr. App. 1986) (20 year old sodomy charge too old to be proof of plan or design).

335. 236 Neb. 481,461 N.W.2d 741 (1990).

336. *Id.* at 234 Neb. 482-83, 461 N.W.2d 742-43.

337. *Id.* at 236 Neb. 485, 461 N.W.2d 745.

338. English law has long recognized this reason for admitting uncharged sexual misconduct. *See, e.g.*, Rex v. Ball, [1911] App. Cas. 47 (incest: evidence of prior sexual activity between couple admitted to rebut claim of innocent association of brother and sister in same bed); Regina v. Lewis, [1983] 76 Crim. App. 33, although much detested by the commentators restates this same principle by admitting evidence of the defendant's possession of pedophiliac literature to

rebut his claim of innocent touching.

339. 1992 Wis. Lexis 773 (1992).

340. *Id.* at 773 *5.

341. *Id.*

342. *Id.* See State v. Friederich, 135 Wis.2d 1, 398 N.W.2d 763 (1987), in which the Wisconsin Supreme Court held that evidence of prior sexual misconduct was relevant to prove motive "because the purpose of the sexual contact is an element of the crime" since the statute describes sexual assault as touching for the purpose of sexually degrading or humiliating the complainant or sexually arousing the defendant." The court made the argument in Friederich that the state was obliged to prove a crime of specific intent in its case and chief, making intent, and motive a real issue in the case. The Wisconsin statute is a garden variety sexual assault statute that does not require proof of specific intent, because the act itself proves mens rea, which is the gravamen of the words quoted from the statute.

343. IMWINKELREID, *supra* note 128 §§5:15 (membership in conspiracy), 533 (plan).

344. *See, e.g.*, Webb v. State, 191 Ala. App. 359, 97 So. 246 (1923) (defendant's presence at illegal still two weeks before offense admissible to show continuing enterprise); Casteel v. State, 151 Ark. 69, 235 S.W. 386,

388 (1921) (subsequent sale of illegal liquor admissible to prove illegal still operation).

345. *See, e.g.*, State v. Gaetano, 96 Conn. 306, 114 A. 82, 86 (1921) (other visitors to premises knocked on wrong door asking for prostitutes, admissible to show continuing enterprise); People v. Levin, 292 Ill. App. 413, 11 N.E.2d 224, 227 (1937); Adams v. Commonwealth, 313 Ky. 298, 231 S.W.2d 55,58 (1950) (reputation of premises as whore house admissible); State v. Rogers, 145 Minn. 303, 177 N.W. 358, 359 (1920).

346. See cases cited in note 334.

347. 65 Cal.2d 603, 55 Cal.Rptr. 902, 422 P.2d 590 (1967).

348. *Id.* at 65 Cal.2d 607, 55 Cal. Rptr. 905, 422 P.2 595.

349. 215 Kan. 907, 529 P.2d 127 (1974), *overruled on other grounds*, 234 Kan. 462, 464, 673 P.2d 1147, 1154 (1983).

350. *Id.* at 215 Kan. 910, 529 P.2d 129.

351. *Id.* at 215 Kan. 911, 529 P.2d 130.

352. 253 Ark. 614, 487 S.W.2d 596 (1972).

353. *Id.* at 253 Ark. 616, 487 S.W.2d 597.

354. *Id.* at 253 Ark. 619, 487 S.W2d 599.

355. 399 Mich. 472, 250 N.W.2d 443 (1976).

356. *Id.* at 399 Mich. 474, 250 N.W.2d 445.

357. *Id.* at 399 Mich. 475-76, 250 N.W.2d 446-47.

358. *Id.* at 399 Mich. 477, 250 N.W.2d 447.

359. [1975] App. Cas. 421.

360. *See, e.g.*, Gross v. Greer, 773 F.2d 116 (7th Cir. 1985) (Illinois on habeas corpus: both victims attacked during one episode of breaking & entering); Davenport v. State, 426 So.2d 464 (Ala. App.) *rev'd on other grounds*, 426 So.2d 472 (1981); Shelby v. State, 340 So.2d 847 (Ala. App. 1976) (rape of victim's 11 year old companion); People v. Lilly, 9 Ill. App. 3d 46, 291 N.E.2d 207, *rev'd on other grounds*, 56 Ill. 2d 493, 309 N.E.2d 1 (1972).

361. 485 U.S. 681 (1988).

362. *See supra* statutes cited in note 277.

363. The conversion of statutory rape into various forms of sexual assault makes it difficult to compare results under former statutes outlawing statutory rape with modern case law. In general modern case law can be organized under the following headings:

(a) Cases admitting prior similar sexual activities with the same non incestuous minor partner to prove intent, plan or design and identity through modus operandi. Hammes v. State, 417 So.2d 594 (Ala. App. 1982); Oswald v. State, 715 P.2d 276 (Alaska App. 1986) (plan of assaulting under age women); Brown v. State, 173 Ga. App. 640, 327 S.E.2d 515 (1985); People v. Johnson, 97 Ill. App.3d 1055, 423 N.E.2d 1206 (1981), *cert. denied*, 455 U.S. 951 (1982); Caccavallo v. State,

436 N.E.2d 775 (Ind. 1982); State v. Acliese, 403 So.2d 665 (La. 1981); Commonwealth v. King, 387 Mass. 464, 441 N.E.2d 248 (1982); Hicks v. State, 441 So.2d 1359 (Miss. 1983); State v. Graham, 641 S.W.2d 102 (Mo. 1982); State v. Gillette, 102 N.M. 695, 699 P.2d 626 (N.M. App. 1985); Commonwealth v. Robinson, 316 Pa. Super. 152, 462 A.2d 840 (1985); Koffell v. State, 710 S.W.2d 796 (Tex. App.), *rehearing denied*, 714 S.W.2d 151 (1986).

(b) Cases admitting subsequent similar sexual activities with the same non incestuous minor partner to prove intent, plan or design and identity through modus operandi. Hammes v, State, 417 So.2d 594 (Ala. Crim. App. 1982); McMichael v. State, 94 Nev. 184, 577 P.2d 398 (1978) *overruled on other grounds*, 101 Nev. 765,770, 711 P.2d 852,856 (1985) (oral copulation of 13 year old boy); Johnson v. State, 709 S.W.2d 345 (Tex. App. 1986); Moore v. Commonwealth, 222 Va. 72, 278 S.E.2d 822 (1978) (subsequent touching of victim's private parts).

(c) Cases admitting prior similar sexual activities with a different non incestuous minor partner to prove intent, plan or design and identity through modus operandi. People v. Moon, 165 Cal. App.3d 1074, 212 Cal. Rptr. 101 (1985); Cooper v. State, 256 Ga. 141,

345 S.E.2d 600 (1986), *cert. denied*, 108 S.Ct. 1083 (1988); People v. Esterline, 159 Ill. App.3d 164, 512 N.E.2d 358 (1987); Hobson v. State, 495 N.E.2d 741 (Ind. App. 1986); Commonwealth v. Lamory, 14 Mass. App. 925, 436 N.E.2d 992 (1982), *review denied*, 387 Mass. 1108, 440 N.E.2d 21 (1983); State v. V__. C__., 734 S.W.2d 31 (Mo. App. 1987) (prior sodomy on daughter); State v. Koster, 684 S.W.2d 488 (Mo. App. 1984) (inmates of juvenile detention center); State v. Tecca, 220 Mont. 168, 714 P.2d 136 (1986) (nine year course of conduct); State v. Cusick, 219 N.J. Super. 452, 530 A.2d 806 (1987); State v. Champagne, 422 N.W.2d 840 (S.D. 1988) (members of same household); State v. Bennett, 36 Wash. App. 176, 672 P.2d 772 (1983). But see Bolden v. State, 720 P.2d 957 (Alaska App. 1986) (evidence of other statutory rapes inadmissible when neither intent nor identity at issue); State v. Davis, 54 Or. App. 133, 634 P.2d 279 (1981) (evidence of prior assault too inflammatory when neither identity nor consent at issue).

(d) Cases admitting subsequent similar sexual activities with a different non incestuous minor partner to prove intent, plan or design, identity through modus operandi and as an interwoven crime. People v. Fuller, 117 Ill. App.3d 1026, 454 N.E.2d 334

(1983) (part of res gestae); State v. Thomas, 381 N.W.2d 232 (S.D. 1986) (plan or design). *But see* State v. Ibraimor, 187 Conn. 348, 446 A2d 382 (1982) (evidence of subsequent assault on 16 year old when identity not established by signature).

364. For similar acts, see Pounds v. United States, 529 A.2d 791 (D.C. App. 1987); Covington v. State, 703 P.2d 436 (Alaska App. 1985); People v. Stewart, 181 Cal. App. 3d 300, 226 Cal. Rptr. 252 (1986); Worth v. State, 183 Ga. App. 68, 358 S.E.2d 151 (1987) (1½ year sequence of abuse); State v. Schwartzmiller, 107 Idaho 89, 685 P.2d 830 (1984); People v. Tannahill, 152 Ill. App.3d 882, 504 N.E.2d 1283 (1987); Maynard v. State, 513 N.E.2d 641 (Ind. 1987) (also to show depraved sexual instinct); Hatcher v. State, 510 N.E.2d 184 (Ind. App. 1987); State v. Munz, 355 N.W.2d 576 (Iowa 1984); Commonwealth v. Brenner, 18 Mass. App. 930, 465 N.E.2d 1229, *review denied*, 343 Mass. 1106, 469 N.E.2d 830 (1984); People v. Scobey, 153 Mich. App. 82, 395 N.W.2d 247 (1986); White v. State, 520 So.2d 497 (Miss. 1988); State v. Mankiller, 104 N.M. 461, 722 P.2d 1183 (App. 1984); People v. Hudy, 134 A.D.2d 626, 521 N.Y.S.2d 521 (1987); People v. Young, 99 A.D.2d 373, 472 N.Y.S.2d 802 (1982); State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (N.C. App. 1988); Lafayette v. State, 694

P.2d 530 (Okla. Crim. 1985); State v. Loop, 422 N.W.2d 420 (S.D. 1988); State v. Seiler, 397 N.W.2d 89 (S.D. 1986); Meyers v. State, 737 S.W.2d 6 (Tex. App. 1987). But see Getz v. State, Del. Supr., 538 A.2d 726 (1988) (prior child molesting incident inadmissible to show plan or design when intent is not an issue); Hosford v. State, 525 So.2d 789 (Miss. 1988) (child beating incident irrelevant); State v. Bowen, 48 Wash. App. 187, 738 P.2d 316 (1987) (intent no issue, held inadmissible). For dissimilar acts, see Wilson v. State, 515 So.2d 1181 (1987) (capital rape case: prior child molesting of victim by defendant admissible).

365. *See, e.g.*, Calloway v. State, 520 So.2d 665 (Fla. App. 1988); Mannie v. State, 738 S.W.2d 751 (Tex. App. 1987). See also State v. Lucas, 364 S.E.2d 12 (W.Va. 1987) (similar prior molestations admissible to show why victim did not resist defendant).

366. *See, e.g.*, Oswald v. State, 715 P.2d 276 (Alaska App. 1986); State v. Crum, 150 Ariz. 244, 722 P.2d 971 (1986); Moon, 165 Cal. App.3d 1074, 212 Cal. Rptr. 101; Heuring v. State, 513 So.2d 122 (Fla. App. 1987); Johns v. State, 181 Ga. App. 510, 352 S.E.2d 826 (1987); Schwartzmiller, 107 Idaho 89, 685 P.2d 830; People v. Partin, 156 Ill. App.3d 365, 509 N.E.2d 662, *cert. denied*, 116 Ill.2d 571, 515 N.E.2d 121 (1987); Altmeyer

v. State, 519 N.E.2d 138 (Ind. 1988); State v. Spaulding, 313 N.W.2d 878 (Iowa 1981); State v. Haala, 415 N.W.2d 69 (Minn. App. 1987); State v. Holden, 414 N.W.2d 516 (Minn. App. 1987); Crenshaw v. State, 520 So.2d 131 (Miss. 1988); State v. Long, 223 Mont. 502, 726 P.2d 1364 (1986); State v. Tecca, 220 Mont. 168, 714 P.2d 136 (1986); Little v. State, 752 P.2d 806 (Okl. Crim. 1986); Beavers v. State, 709 P.2d 702 (Okla. Crim. 1985); State v. Bernier, 492 A.2d 1000 (R.I. 1985); Champagne, 422 N.W.2d 840; Friederich, 135 Wis.2d 1, 398 N.W.2d 763; State v. Fishnick, 127 Wis.2d 247, 378 N.W.2d 272 (1985). *See also* Calloway, 520 So.2d 665 (admissible to corroborate victim's story). *But see* Bolden v. State, 720 P.2d 957 (Alaska App. 1986); Pieczywki v. State, 516 So.2d 1048 (Fla. App. 1987) (prior admission to sexual misconduct with friend's 3 year old inadmissible to prove plan to batter own child sexually); State v. Rodgers, 293 S.C. 305, 362 S.E.2d 7 (1987) (ten year old episode of sexual touching inadmissible); Cruz v. State, 737 S.W.2d 74 (Tex. App. 1987) (prior molesting of step daughter inadmissible unless defendant denies act or undermines victim's credibility); State v. Ramirez, 46 Wash. App. 223, 730 P.2d 98 (1986).

367. See, e.g., People v. Adrian, 744 P.2d 768 (Colo. Ct. App. 1987), *aff'd*, 770 P.2d 1243 (Colo. 1988) (15 to 19 year old episodes admissible to prove plan); Beasley v. State, 518 So.2d 917 (Fla. 1988) (sister, victim was step daughter); Heuring, 513 So.2d 122 (1987) (20 year old child molesting episode admissible to corroborate victim); Hill v. State, 183 Ga. App. 404, 359 S.E.2d 190 (1987) (11 year old sexual assault); Whithead v. State, 173 Ga. App. 435, 326 S.E.2d 803 (1985) (16 year old child molesting conviction); Harp v. State, 518 N.E.2d 497 (Ind. App. 1988); State v. Shamp, 422 N.W.2d 520 (Minn. App. 1988) (molesting sister relevant to molesting daughter). *But see* Butler v. State, 500 So.2d 470 (Ala. Crim. App. 1987) (12 or 13 year old abuse of daughter irrelevant to abuse of son); Elmore v. State, 510 So.2d 127 (Miss. 1987) (remote instances of child molesting excluded).

368. *See, e.g.*, Bloodsworth v. State, 136 Ga. App. 686, 327 S.E.2d 756 (1985); Brown v. State, 173 Ga. App. 640,327 S.E.2d 515 (1985) (also plan or design); Gaskin v. State, 166 Ga. App. 586, 295 S.E.2d 549 (1983) (prior statutory rape conviction admissible); State v. Schwartzmiller, 107 Idaho 89, 685 P.2d 830 (1984);State v. Graham, 641 S.W.2d 102 (Mo. 1982); State v. Carver, 37 Wash. App. 122, 678 P.2d 842 (1982).

369. 8 N.Y.2d 183, 203 N.Y.S.2d 809, 168 N.E.2d 641 (1968).

370. *Id.* at 8 N.Y.2d 185, 203 N.Y.S.2d 811, 160 N.E.2d 644.

371. 69 N.Y.2d 321, 514 N.Y.S.2d 205, 506 N.E.2d 915 (1987).

372. *Id.* at 69 N.Y.2d 322, 514 N.Y.S.2d 207, 506 N.E.2d 917.

373. *Id.*

374. *Id.* at 69 N.Y.2d 323, 514 N.Y.S.2d 208, 506 N.E.2d 918.

375. *Id.* at 69 N.Y.2d 323, 514 N.Y.S.2d 209, 506 N.E.2d 919.

376. *Id.* at 69 N.Y.2d 324, 514 N.Y.S.2d 209, 506 N.E.2d 920.

377. *See, e.g.*, People v. Fuller, 138 App. Div. 2d 966, 526 N.Y.S.2d 298 (1988) (prior episodes of incest relevant to prove "amorous designs").

378. 135 A.D.2d 555, 521 N.Y.S.2d 777 (1987).

379. *Id.* at 135 A.D.2d 558, 521 N.Y.S.2d 779.

380. *See, e.g.*, People v. Chandley, 89 A.D.2d 740, 453 N.Y.S.2d 919 (1982) (other instance of sexual assault relevant to prove intent, modus operandi and common design). When the defendant raised the defense of consent, the prosecution is allowed to prove the defendant engaged in other sexual assaults against other victims. People v. Tas, 51 N.Y.2d 915, 434 N.Y.S.2d 978, 415 N.E.2d 967 (1980).

381. Chandley, 89 A.D.2d at 743, 453 N.Y.S.2d at 921. In addition, New York allows proof of other similar sexual misconduct to prove intent in child abuse cases

in which the defendant claims an innocent purpose in touching the victim's genitals. People v. Young, 99 A.D.2d 373, 472 N.Y.S.2d 802 (1984). The prosecution may also rebut a claim of abandonment under §40.10[3] of the Penal Law with uncharged similar conduct between the defendant and victim. People v. Gilmore, 134 A.D.2d 653, 520 N.Y.S. 2d 962, 963 (1987).

382. Illinois admits evidence of prior sexual misconduct between the victim and defendant in rape cases to prove identity through modus operandi, or intent by plan or design. People v. Burgin, 74 Ill. App.3d 58, 392 N.E.2d 251 (1979); People v. Osborn, 53 Ill. App.3d 312, 368 N.E.2d 608, *cert. denied*, 439 U.S. 837 (1977); People v. Oliver, 50 Ill. App.3d 665, 365 N.E.2d 618 (1977). Illinois also admits evidence of prior sexual misconduct between victim and defendant in incest and child molesting cases to prove identity through modus operandi and intent through plan or design. People v. Wendt, 184 Ill. App.2d 192, 244 N.E.2d 384 (1968) (indecent liberties); People v. Sanders, 2 Ill. App.3d 82, 275 N.E.2d 750 (1971) (incest). Subsequent sexual misconduct between victim and defendant is also admissible to show intent through plan or design, and identity through modus operandi. People v. Kimbrough,

138 Ill. App.3d 481, 485 N.E.2d 1292, *appeal denied*, 94 Ill. Dec. 446, 488 N.E.2d 272 (1985). In a number of sexual assault cases, where identity is an issue, Illinois courts allow proof of similar acts of uncharged sexual misconduct to prove identity through modus operandi. People v. Vilt, 139 Ill. App.3d 868, 488 N.E.2d 580, *cert. denied*, 479 U.S. 864 (1985); People v. Walls, 87 Ill. App.3d 256, 408 N.E.2d 1056 (1980). When the defendant in a rape case claims the victim consented, Illinois permits the prosecution to prove other acts of forcible misconduct between the victim and defendant to show lack of consent. People v. Mangiaracina, 98 Ill. App.3d 606, 424 N.E.2d 860 (1981); People v. Lighthart, 62 Ill. App.3d 720, 379 N.E.2d 403 (1978). Finally, Illinois allows the victim to testify to other sexual misconduct perpetrated on her by defendant to corroborate her story. People v. Johnson, 104 Ill. App.3d 572, 432 N.E.2d 1232 (1982).

383. See Thacker v. Commonwealth, 816 S.W.2d 660 (Ky. App. 1991), in which the court questioned Pendleton's holding and affirmed the defendant's incest conviction over objection to admission of prior, similar incidents with the victim's older sisters occurring many years prior to the attack on the victim. The court characterized Pendleton as a merely verbal change and

not a substantive change of law for Kentucky, since the only "plan or design" that the prior incests exhibited was a predisposition to commit incest.

384. *See, e.g.*, People v. Herman, 97 Cal. App.2d 272, 217 P.2d 440, 443 (1950); People v. Boyd, 95 Cal. App.2d 831, 213 P.2d 724, 726 (1950) (lewd and lascivious intent); People v. Jewett, 84 Cal. App.2d 276, 279, 190 P.2d 330 (1950) (disposition to commit act and probability of his having committed it); People v. Owen, 68 Cal. App.2d 617, 620, 157 P.2d 432, 433 (1945); People v. Knight, 62 Cal. App. 143, 146, 216 P. 96, 97-98 (1923); People v. Gasser, 34 Cal. App. 541, 542, 168 P. 157, 158-59 (1917)(approving limiting instruction admitting other sexual acts only to prove lewd and lascivious disposition).

385. *See, e.g.*, People v. Smith, 144 Cal. App.2d 745, 748, 301 P.2d. 609, 611 (1956) (Molineux rule list of exceptions: exclusionary rule relaxed); People v. Zabel, 95 Cal.App. 2d 486, 213 P.2d 60,61 (1950) (similar incestuous acts admissible to show intent).

386. 249 Cal. App.2d 81, 57 Cal. Rptr. 220 (1967), *overruled on other grounds*, 20 Cal.3d 457, 461, 143 Cal. Rptr. 215, 220, 573 P.2d 433, 438 (1978).

387. *Id.* at 249 Cal. App.2d 83, 57 Cal. Rptr. 223.

388. 255 Cal. App.2d 65, 62 Cal. Rptr. 770 (1967).

389. *Id.* at 225 Cal. App.2d 65, 62 Cal. Rptr. 773.

390. 259 Cal.App.2d 846, 66 Cal.Rptr. 654 (1968).

391. *Id.* at 259 Cal. App.2d 848, 66 Cal. Rptr. 656.

392. *Id.*

393. 65 Cal.2d 603, 55 Cal. Rptr. 902, 422 P.2d 590 (1967).

394. 74 Cal. App.3d 806, 141 Cal. Rptr. 742 (1977).

395. *Id.* at 74 Cal. App.3d 810, 141 Cal. Rptr. 746.

396. *Id.*

397. 67 Cal.2d 126, 50 Cal. Rptr. 230, 429 P.2d 582 (1967).

398. *Id.* at 67 Cal.2d 129, 50 Cal. Rptr. 233, 429 P.2d 586.

399. 67 Cal.2d 812, 63 Cal. Rptr. 825, 433 P.2d 913 (1967).

400. *Id.* at 67 Cal.2d 814, 63 Cal. Rptr. 828, 433 P.2d 916.

401. 11 Cal.3d. 738,114 Cal. Rptr. 467, 523 P.2d 267, *cert. denied*, 420 U.S. 924 (1974).

402. *Id.* at 11 Cal.3d 756, 114 Cal. Rptr. 477, 523 P.2d 273.

403. *Id.* at 11 Cal.3d 757, 114 Cal. Rptr. 479, 523 P.2d 288.

404. 25 Cal.3d 371, 158 Cal. Rptr. 343, 599 P.2d 649 (1979).

405. *Id.* at 25 Cal.3d 376,158 Cal. Rptr. 346, 599 P.2d 652.

406. *Id.* at 25 Cal.3d 378, 158 Cal. Rptr. 349, 599 P.2d 655. However, a caveat to this conclusion must be entered due to the Supreme Court's handling of People v. Thomas, 20 Cal.3d 457, 143 Cal. Rptr. 215, 573 P.2d 433

(1978). Thomas was charged with committing lewd and lascivious acts against his step daughter, aged 12, and against his natural daughter, aged 9. At trial, the prosecution introduced evidence of a third series of lewd acts allegedly committed on defendant's 24 year old stepdaughter, who testified that her step father fondled her private parts at age 6, and had sexual intercourse with her from age 12 to 14. The Supreme Court reversed Thomas' conviction, finding that Thomas' earlier escapades with his 24 year old step daughter were evidence of a design or plan to commit incest or lewd acts, but that evidence of a criminal plan or design was relevant only to prove identity, and identity was not at issue in the case. The court further held that the prior episodes with the 24 year old were evidence of intent, but the defendant did not make an issue of his intent at trial. Further, the Court extended the reach of its holding in People v. Stanley that prior conduct with the prosecuting witness could not be admitted to show lewd intent in child molesting and incest cases. The Thomas court held that prior sexual misconduct with witnesses other than the complaining witness were not freely admissible, overruling People v. Kazee, 47 Cal. App.3d 583, 121 Cal. Rptr. 221 (1977), which had held that

such conduct was freely admissible to corroborate the complaining witness. In so doing, however, the Thomas court did not rule out the admissibility of uncharged sexual misconduct to prove the defendant's lewd disposition, when lewd disposition established proof of intent.

407. *See, e.g.*, People v. Salazar, 144 Cal. App.3d 799, 193 Cal. Rptr. 1 (1983) (rape: prior sexual misconduct offered to prove intent and to rebut lack of consent); People v. Barney, 143 Cal. App.3d 490, 192 Cal. Rptr. 172 (1983); People v. Martinez, 135 Cal. App.3d 819, 185 Cal. Rptr. 610 (1982) (lewd & lascivious conduct: long series of similar offenses admissible); People v. Gonzales, 91 Cal. App. 3d 853, 154 Cal. Rptr. 442 (1979) (lewd & lascivious acts with a child).

408. 36 Cal.3d 77, 201 Cal. Rptr. 567, 679 P.2d 1 (1984).

409. *Id.* at 36 Cal.3d 79, 201 Cal. Rptr. 570, 679 P.2d 3.

410. *Id.* at 36 Cal.3d 80, 201 Cal. Rptr. 571, 679 P.2d 3.

411. *Id.* at 36 Cal.3d 82, 201 Cal. Rptr. 577, 679 P.2d 8.

412. *See* §1101(b) Cal. Evid. Code. The amendment to the evidence code made a special exception for rebuttal of claims of consent in sexual assault cases to "clarify People v. Tassel which reads as follows: (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong,

or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

The legislature's clarification appears to authorize admission of similar uncharged sexual conduct in sex offender cases when the defendant claims the victim consented, in order to rebut the claim of consent by showing prior violent forcible sexual activity with the same victim or other victims.

413. 39 Cal. 3rd 120, 215 Cal. Rptr. 855, 701 P.2d 1173 (1985).

414. *Id.* at 39 Cal.3rd 122, 215 Cal. Rptr. 857, 701 P.2d 1175.

415. *Id.* at 39 Cal.3rd 122, 215 Cal. Rptr. 858, 701 P.2d 1176.

416. Imwinkelreid & Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 PACIFIC L. J. 1005 (1992). Subsection (d) of Article I of Proposition 8 stated that:

Except as provided by statute hereafter enacted by

> a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . Noting in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103.

Imwinkelreid and Mendez argue that after ten years' time, the degree of appellate supervision over criminal evidence issues is yet to be worked out. the authors noted that the California appellate courts do not always use a plain meaning approach to Proposition 8 issues, but try to carry out what the court perceives as the legislative intent behind the initiative.

417. *Id.* at 1013, 1020-21. The authors reviewed People v. Castro, 38 Cal.3d 301, 211 Cal. Rptr. 719, 696 P.2d 111 (1985) and People v. Harris, 47 Cal.3d 1047, 255 Cal. Rptr. 352, 767 P.2d 619 (1989). They found that the California Supreme Court used section 352 of the Evidence Code as a rational for bypassing the blanket restriction on review of evidence in criminal prosecutions. Castro involved Proposition 8's blanket permission to impeach a criminal defendant on any prior criminal conviction without regard to probative value. The court construed that part of Proposition 8 as an

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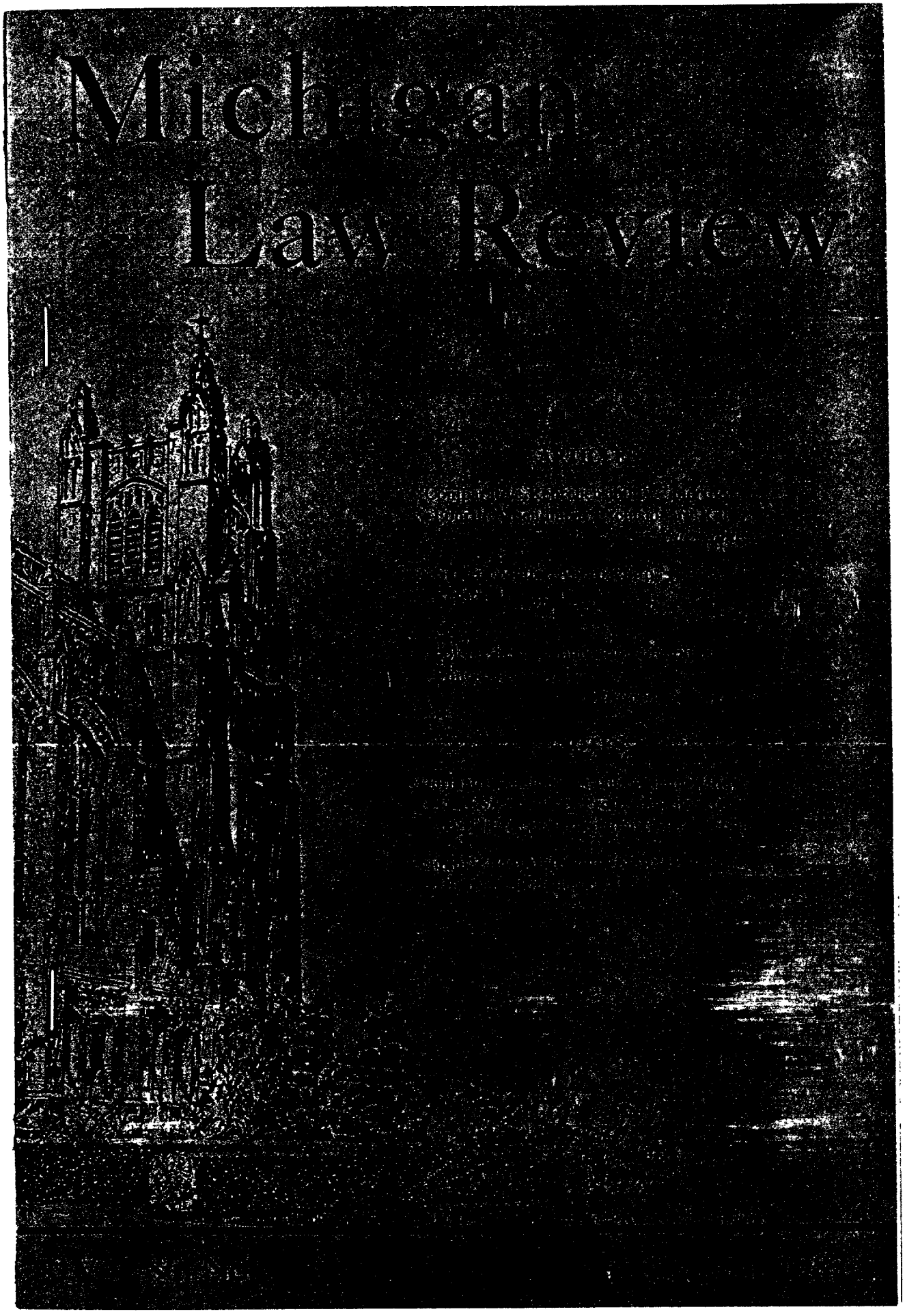

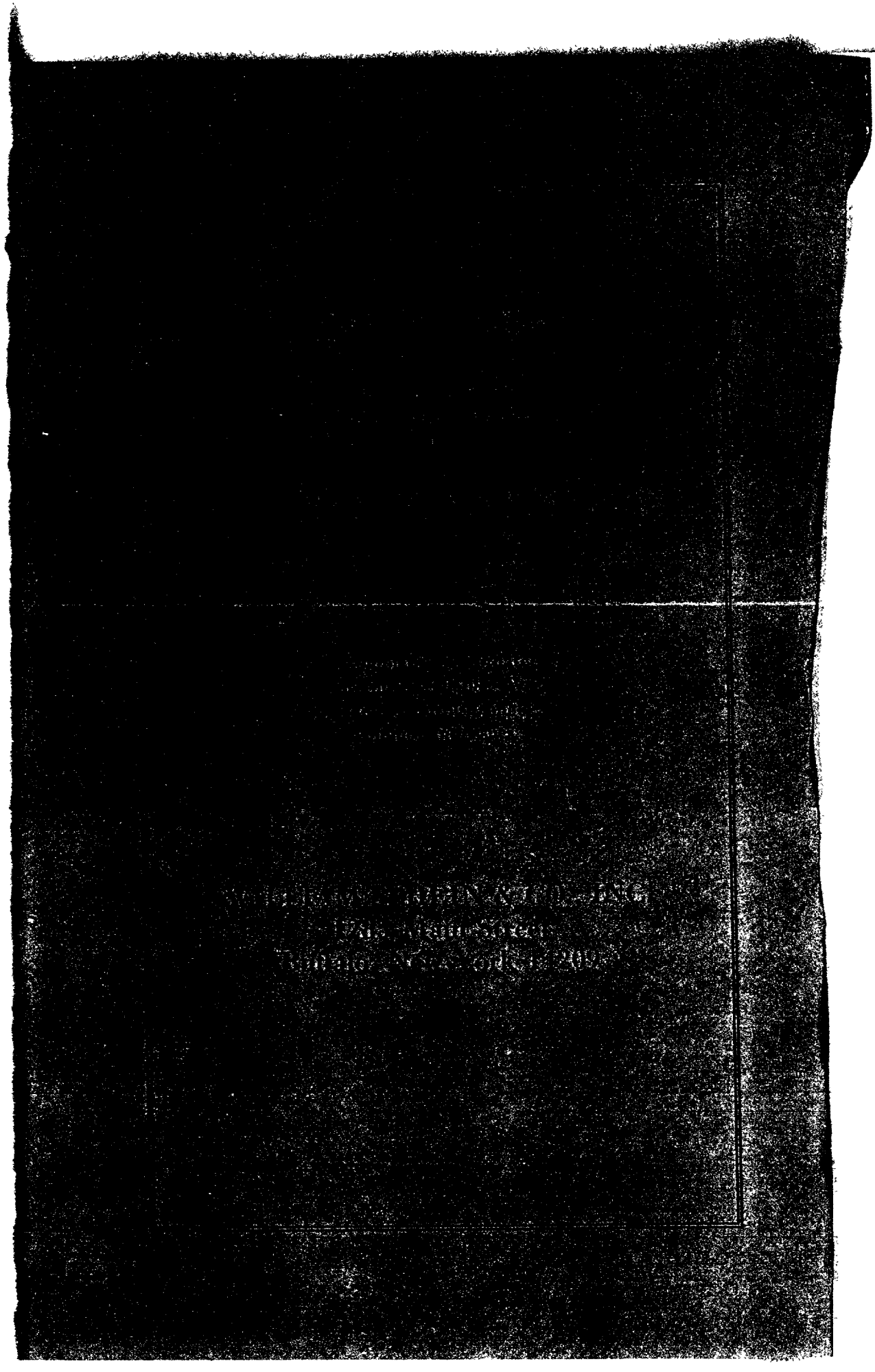

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3 *See* 2 J. WIGMORE, A T
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4. *Id*

5 *See id* § 519. Wigmore
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A SUBJECT MATTER APPROACH TO HEARSAY REFORM

*Roger Park**

INTRODUCTION

Abolition of the hearsay rule would be another step in what might be termed the Benthamite revolution in the law of evidence. Whether or not they can be traced to his influence, many of the developments of the last hundred years have been consistent with Bentham's position

> [t]hat, merely with a view to rectitude of decision . . . no species of evidence whatsoever, willing or unwilling, ought to be excluded: for that although in certain cases it may be right that this or that lot of evidence, though tendered, should not be admitted, yet, in these cases, the reason for the exclusion rests on other grounds; viz. avoidance of vexation, expense, and delay.[1]

While exclusionary rules based upon extrinsic policy have survived and sometimes flourished,[2] those that exclude testimony as flawed by human weakness have decayed or disappeared. The past century has seen the end of rules making parties,[3] interested persons,[4] and felons[5]

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1. 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 1 (London 1827). On Bentham's influence, see Keeton & Marshall, *Bentham's Influence on the Law of Evidence*, in JEREMY BENTHAM AND THE LAW 79 (1948).

Bentham himself may not have followed the full implications of the quoted passage in his prescription for hearsay reform. He did not advocate complete abolition of the rule against hearsay, but rather a rule of preference, under which hearsay would be admitted if the declarant was unavailable. *See* Chadbourn, *Bentham and the Hearsay Rule — A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV 932, 939 (1962); W TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 40 (1985).

2. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (expanding protection of privilege against self-incrimination); Mapp v. Ohio, 367 U S. 643 (1961) (rule excluding evidence seized in illegal search applied to states); *cf.* Upjohn Co. v United States, 449 U S. 383 (1981) (adopting broad view of attorney-client privilege in corporate context), Schwartzstein, *The Accountant-Client Privilege*, in TESTIMONIAL PRIVILEGES 205, 205-06, 218 (S Stone & R. Liebman eds 1983); Morse & Zucker, *The Journalist's Privilege*, in *id.* at 407, 423-24 (noting that many states have recognized new privileges for journalists and accountants). *But see* Harris v. New York, 401 U.S. 222 (1971) (illegally obtained confessions admissible to impeach); Trammel v United States, 445 U.S 40 (1980) (placing limits on marital privilege).

3 *See* 2 J WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 576-577 (3d ed. 1940) [hereinafter WIGMORE ON EVIDENCE]

4. *Id.*

5. *See id.* § 519. Wigmore specifically gave Bentham's "irresistible" attack credit for the movement that led to the disappearance of the disqualification for persons who had been convicted of a crime *Id.* at 610.

incompetent; more recently, in many jurisdictions, the principle has swept away the dead man's statute[6] and the incompetency of insane persons, infants, and intoxicated persons.[7] The testimony has been admitted on the principle, often regarded as virtually self-evident, that it is better to admit flawed testimony for what it is worth, giving the opponent a chance to expose its defects, than to take the chance of a miscarriage of justice because the trier is deprived of information.

Academic commentators have generally supported this principle, and have sought to use it as a basis for admitting hearsay more freely. While a newcomer to hearsay might suppose that the hearsay rule was the creation of a law professor in search of tricky classroom hypotheticals, in actuality the legal scholars of this century have tended to be supporters of simplification or abolition,[8] while the practicing bar has tended to defend the rule and tolerate its intricacies.[9] In 1942, the

6. Dead man's statutes prohibit testimony by an interested party about transactions with a deceased person in an action initiated or defended by the executor or administrator of the decedent's estate. They are intended to prevent fraud by the survivor. Twenty states repealed their dead man's statutes in conjunction with adoption of the Federal Rules of Evidence, *see* Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV 1315, 1336-37 (1985), and others have mitigated the effect of the statute by substituting a requirement of corroboration for an absolute rule of incompetency, *see* C. MCCORMICK, MCCORMICK ON EVIDENCE § 65, at 160 (E. Cleary 3d ed. 1984) [hereinafter MCCORMICK ON EVIDENCE].

7. Under the Federal Rules of Evidence, insane persons, children, and intoxicated persons are competent as witnesses; their conditions go to the weight, not the admissibility, of their testimony. *See* FED R. EVID. 601. At least 19 states have adopted rule 601's position on competency, but a number of others retain disqualifications for persons whose mental state or immaturity render them unable to testify accurately *See* Wroth, *supra* note 6, at 1336-37; MCCORMICK ON EVIDENCE, *supra* note 6, § 62

8. *See, e.g.*, 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 8(c), at 642-45 (Tillers rev. ed. 1983) [hereinafter WIGMORE (Tillers ed)]; 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1427, 1576 (Chadbourn rev ed. 1974) [hereinafter WIGMORE (Chadbourn ed)]; Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV 331, 334-35 & nn 71-87 (1961), C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 300-305 (1954), J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 147-65 (1947), Morgan, *Foreword* to MODEL CODE OF EVIDENCE 36-50 (1942); *id.* at 217-24 (introductory note to hearsay chapter), Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV L REV. 909, 918-22 (1937).

However, scholars who have written of hearsay as an aspect of the constitutional right to confrontation have often taken a different attitude, advocating interpretations that would lead to substantial exclusion of hearsay *See* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV L. REV. 1378 (1972); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L BULL 99, 129 (1972); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH L REV. 76, 91-92 (1971), *The Supreme Court, 1967 Term*, 82 HARV. L REV. 63, 236-38 (1968); Note, *Constitutional Law — Confrontation Clause — Admission at Trial of Slain Informant's Prior Grand Jury Testimony Against Defendants Does Not Violate Confrontation Guarantee Despite Lack of Cross-Examination*, 31 VAND L REV. 682, 694 (1978) Other confrontation clause commentators have advocated a relatively strict attitude toward hearsay when the declarant is available *See* Westen, *The Future of Confrontation*, 77 MICH. L. REV 1185 (1979), *cf.* Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN L REV 665 (1986) (considers types of hearsay that should be exempt from the unavailability requirement)

9. *See* authorities cited at notes 27, 31, 43 & 45 *infra*.

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American Law Institute's Model Code of Evidence proposed a sweeping change, under which hearsay would have been freely admitted when the declarant was unavailable.[10] The Model Code was never adopted in any state, partly because of its radical attitude toward hearsay reform.[11] The fate of the 1953 Uniform Rules of Evidence, which offered a more limited version of hearsay reform,[12] was almost as dismal.[13] In 1973, the Supreme Court sought to use its rulemaking power to accomplish a limited relaxation of restrictions on admission of hearsay,[14] but Congress prevented the Court's Rules from going into effect and subsequently rewrote them. The Federal Rules of Evidence emerged from Congress in 1975 with most of the traditional limitations on the reception of hearsay intact, though Congress permitted the Rules to contain residual exceptions, hedged with limitations, that may have given courts greater freedom to admit hearsay that does not fall under traditional exceptions.[15] Thus, while we have seen steps toward freer admissibility, radical reform has fallen short of the goals set by its proponents, and it has fallen far short of the

10. Rule 503 of the Model Code of Evidence provided that "[e]vidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination." MODEL CODE OF EVIDENCE Rule 503 (1942).

11 *See* 21 C. WRIGHT & K GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5005, at 88-89 (1977); Chadbourn, *supra* note 1, at 945 and authorities cited therein.

12 Rule 63(4)(c) of the Uniform Rules provided an exception, applicable when the declarant was unavailable as a witness, for

> a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action

UNIF R EVID. 63(4)(c) (1953) (superceded 1974).

13. *See* 21 C. WRIGHT & K GRAHAM, *supra* note 11, § 5005, at 89-91 (reporting that in the 15 years after they were approved, the Uniform Rules were adopted in only two states).

14. In the version of the Federal Rules of Evidence originally promulgated by the Supreme Court, the residual exceptions to the hearsay rules were more liberal in scope than the ones that eventually emerged from Congress. They contained no notice provision or requirement that the evidence be superior to other means of proof; the residual exceptions required only that a statement have guarantees of trustworthiness that were "comparable" to those of the established exceptions. *See* FED R EVID 803(24), 804(b)(6) (Supreme Court Proposed Draft 1973), *reprinted in* 2 J BAILEY & O TRELLES, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, Doc 7, at 32-33 (1980) [hereinafter BAILEY & TRELLES]. For the more limited residual exception that emerged from Congress, see text at note 15 *infra*. The Supreme Court proposal also provided that statements of recent perception of unavailable declarants be admitted. FED. R. EVID. 804(b)(2) (Supreme Court Proposed Draft 1973), *reprinted in* BAILEY & TRELLES, *supra*, at 33 This exception was eliminated by Congress.

15 The residual exceptions now provide for the reception of

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence However, a statement may not be admitted under [the residual exceptions] unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the

changes in other areas where evidence was once excluded to protect juries from their own mistakes.

None of the three major reform proposals — the Model Code, the Uniform Rules, or the original Federal Rules — incorporated a systematic distinction between civil and criminal cases. The thesis of this article is that this distinction should be adopted. This article will explore the reasons for excluding hearsay, and conclude that they support different sets of rules in civil and criminal cases. In civil cases, rules excluding hearsay should be curtailed. Hearsay that fits under an established exception should be admitted, and other hearsay, without discretionary screening by the trial judge, should be admitted on proper notice. In criminal cases, however, the conventional reasons for excluding hearsay apply more strongly, and the hearsay rules serve the additional function of shielding the accused against misuse of governmental power. The principal features of the present rules should be retained, and rulemakers should consider codifying incremental changes that tailor the rules so that they deal more particularly with issues that arise in criminal cases.

I. Justifications For Admitting or Excluding Hearsay

The primary argument for admitting hearsay is simple and powerful: hearsay can be convincing evidence, and it is the sort of evidence on which we routinely rely in the most important affairs of home, state, and business.[16] This argument has its greatest force when the hearsay declarant is unavailable, and the choice is between admitting the hearsay declaration or having nothing at all. In such circumstances, the proponents of free admission argue, doubts about the reliability of hearsay should go to its weight, not its admissibility, and the trier of fact should be trusted to give the evidence its proper value.[17]

adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant FED R. EVID 803(24), 804(b)(5)

The specific recognition of residual exceptions may have encouraged reception of hearsay that does not fall under traditional exceptions However, some courts had already recognized a common-law power to admit reliable hearsay that did not fit the traditional exceptions *See, e.g.*, Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961). The residual exceptions, by including limitations such as notice, may have restricted this power rather than enlarging it.

16 *E.g.*, J FRANK, COURTS ON TRIAL 123 (1949), A. OSBORN, THE MIND OF THE JUROR AS JUDGE OF THE FACTS, OR, THE LAYMAN'S VIEW OF THE LAW 51-52 (1937); McCormick, *The New Code of Evidence of the American Law Institute*, 20 TEXAS L REV. 661, 671 (1942) *See also* Davis, *Hearsay in Administrative Hearings*, 32 GEO WASH L. REV 689 (1964)

17 *See, e.g.*, James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 ILL. L REV. 788, 794-95 (1940); Note, *The Theoretical Foundations of the Hearsay Rules*, 93 HARV L REV 1786, 1804-07 (1980).

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Even when the declarant is available, however, use of hearsay may be the most convenient method of producing testimony, and the opportunity of the opponent to call the declarant for cross-examination gives the opponent a means of ensuring that the facts are adequately explored.

Even beyond this principal argument for receiving hearsay, there are worthy secondary arguments. The Anglo-American tradition of oral proceedings is arduous for witnesses, who would be saved vexation, expense, and inconvenience if their testimony could be taken in the form of affidavit or deposition. Moreover, the exclusion of hearsay can encourage the intimidation of witnesses, or at least deprive the courts of means of countering it. For example, a criminal defendant may use threats or violence against a witness who has given a statement to the prosecution, and if the witness recants or disappears, the hearsay rule will frequently prevent the statement from being used in evidence.[18] Finally, abolition of the hearsay rule, with its many exceptions and complicated quiddities, would greatly simplify the law of evidence.[19] It would also allow witnesses to tell their stories in a more natural fashion, and prevent them from being confused by admonitions from the bench.[20]

While the arguments for admitting hearsay are relatively simple, arguments for excluding it tend to be subtle and procedurally complex. The conventional explanation for the exclusion of hearsay centers on the danger of admitting evidence whose reliability has not been tested. Courtroom witnesses testify under oath, in the presence of the trier, and subject to cross-examination. Hearsay declarants avoid these courtroom safeguards, which both encourage witnesses to be accurate and expose defects in their credibility. Cross-examination is especially valuable for testing credibility because it explores weaknesses in a declarant's memory, perception, narrative ability, and sincerity. Thus, hearsay's fundamental evidentiary flaw is the absence of an opportunity to reveal an out-of-court declarant's weaknesses through

18. *See* M. GRAHAM, WITNESS INTIMIDATION xi-xii, 125-27 (1985).

19 Comment, *Abolish the Rule Against Hearsay*, 35 U PITT. L REV 609, 628 (1974). *Cf* P MURPHY & D BARNARD, *Evidence and Advocacy*, 19 (1984):

> There should probably be an organisation called "Hearsay Anonymous." Membership would be open to those judges, practitioners and students (not to mention occasional law teachers) to whom the rule against hearsay has always been an awesome and terrifying mystery. Like its partner in terror, the rule against perpetuities, the rule against hearsay ranks as one of the law's most celebrated nightmares To many practitioners, it is a dimly remembered vision, which conjures up confused images of complex exceptions and incomprehensible and antiquated cases

20 LAW REFORM COMMITTEE, THIRTEENTH REPORT, ¶ 40 (1966), *cf* 5 WIGMORE (Chadbourn ed), *supra* note 8, § 1427, at 264 (arguing for flexibility in use of the hearsay rule in combination with rigorous cross-examination to expose weaknesses in the testimony)

cross-examination.[21]

Wigmore, a leading exponent of this explanation, tried to show that the lack of opportunity to test reliability with cross-examination was the *sole* basis for the hearsay ban.[22] He disparaged jurists who said that hearsay statements should be excluded because the in-court witness might report them inaccurately, or because admission of hearsay might lead to fraud, by cataloguing quotes from their opinions under the label "Spurious Theories of the Hearsay Rule."[23] Other scholars have expressly or implicitly supported this view.[24]

This "untested declarant" theory of hearsay does not tell the whole story about why hearsay is excluded. The history of the hearsay rule indicates that lawmakers had a number of other concerns,[25] and these concerns are reflected in the structure of the hearsay rule and its exceptions.[26]

The first of these additional concerns is the danger that the in-court witness will inaccurately report the out-of-court statement. This raises different considerations than does concern about the accuracy of the out-of-court declarant. The witness reporting the declarant's out-of-court statement is in court, under oath, and subject to cross-examination. These safeguards are supposed to encourage accurate reporting and, in any event, give the trier ample basis for deciding whether the witness is describing the hearsay statement accurately. Nonetheless, lawyers and judges have often supported exclusion on grounds that the in-court witness may be inaccurate.[27] This view is in con-

21. *See, e.g.*, G LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 159-60 (1978); 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1362, at 7

22 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1362, at 7. Though Wigmore offered this explanation for excluding hearsay, he himself ultimately became an advocate of reform that would have given trial judges much more leeway in receiving hearsay *See id.* § 1427

23. *Id* § 1363.

24. *See, e g.*, Tribe, *Triangulating Hearsay*, 87 HARV. L REV. 957 (1974); G LILLY, *supra* note 21, at 159-60

25. *See* text at notes 27-56 *infra.*

26 *See* text at notes 67-152 *infra.*

27. *See, e.g., Report of Committee on Administration of Justice on Model Code of Evidence*, 19 CAL ST. B J 262, 274 (1944) [hereinafter *Report*]. After first noting that the accuracy of hearsay statements cannot be tested by cross-examination, the Committee wrote.

> But the real objection goes even deeper If cross-examination were to be done away with entirely and the truth of an issue were to be determined wholly upon the direct examination of witnesses produced by each party, still we would be as strongly opposed to the proposed rule We believe that experience has shown that, laying aside entirely questions of perjury, corrupt motives or interest in one party or the other, that one of the most common occurrences is for one man to misunderstand the statements or declarations of another We believe that few days pass that any lawyer or layman, if he will search his mind, will not recall some instance in which an associate or member of his family has attributed to him statements that were inaccurate We do not believe there is a trial lawyer of any great experience who has not learned that in a majority of cases when a client asserts that John Jones was present and will fully corroborate him, the client, and recites what Jones will bear witness

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30. *Cf. id.* at 520-21:

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formity with the layperson's notion of the dangers of hearsay — exemplified by the maxim "a tale twice told is a tale altered" — so it is not surprising that it is reflected in the law as well.

This justification for excluding hearsay depends upon the belief that a witness describing an out-of-court statement is likely to be less reliable than a witness describing nonverbal events, or at least that cross-examination will be less effective on a witness to a statement. This belief may arise from a sense that human memory does not record verbal information as accurately as visual information.[28] Speech is often difficult to perceive, and people tend to hear what they want to hear. Moreover, as Lempert and Saltzburg point out,[29] minor mistakes in perceiving statements can radically change the meaning of what was said — as would be the case, for example, if a witness believed that the declarant had said "does" when in fact the declarant said "doesn't."

The danger that the in-court witness will distort or fabricate a statement is increased by the difficulty of detection. Under a condition of free admissibility of hearsay, the person who wanted to concoct a hearsay statement would be free to choose a time and place at which no one was present but the witness and the supposed declarant, and thus it would be difficult to show that the statement was never made, especially if the declarant was no longer available.[30] Moreover, it is

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to, that when John Jones is interviewed he gives an entirely different version from that of the client.

See also authorities cited in note 31 *infra*.

Some academic commentators have accepted the danger of misreport by the in-court witness as one of the bases for excluding hearsay. *See* MCCORMICK ON EVIDENCE, *supra* note 6, § 245, at 727; R LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 520-21 (2d ed 1982).

28. For a commentator who advances this theory, see Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L REV 1, 19. Stewart states that "[p]eople generally retain verbal discriptions [sic] of events less accurately than they do visual perceptions," and cites G. ALLPORT & L. POSTMAN, THE PSYCHOLOGY OF RUMOR 59-60 (1947) However, the Allport and Postman distinction between "individual memory" (the report of a person with first-hand knowledge) and "social memory" (reports transmitted through a group) provides, at best, only indirect support for this hypothesis Allport and Postman noted errors in serial reproduction of drawings, *id.* at 57-59, as well as in serial reproductions of oral statements, and they did not directly compare the accuracy or retrieval of visual and verbal information Compare P Miene, Memory for Verbal Statements vs Memory for Visual Observations 3 (1986) (unpublished manuscript on file at University of Minnesota Law School Library), which reviews the literature and concludes. "In general, there appears to be no empirical validation of the assumption that the encoding and retrieval of out-of-court visual observations is more accurate than for out-of-court statements."

29. R. LEMPERT & S SALTZBURG, *supra* note 27, at 520

30. *Cf. id.* at 520-21:

> Significant statements are often directed at just one person, while significant events are often observed by many Thus the possibility of questioning a misreported statement through the testimony of other witnesses will generally be less than the possibility of questioning an erroneous observation through the testimony of others Furthermore, it will be particularly hard to prove perjury when statements are attributed to an anonymous or unavailable declarant, so the temptation to perjury may increase.

difficult to cross-examine someone who is only reporting another's out-of-court statement. As Chief Justice Kent wrote,

> A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.[31]

The two risks I have mentioned — inaccuracy of a declarant's out-of-court statement and inaccurate testimony by an in-court witness about another's out-of-court statement — create a danger that unreliable evidence will be presented to the trier. Mere unreliability, however, is a weak basis for exclusion; after all, evidence of doubtful reliability is routinely admitted in modern courts, on the assumption that the trier can recognize the infirmities in the testimony and take them into account in evaluating it. Thus, testimony of an interested party, even one who is a convicted perjurer, is received though it may be less reliable than the hearsay statement of a disinterested observer. Mere unreliability might be a sufficient basis for a rule of preference, which excludes hearsay when better evidence is available in the form of in-court testimony by the declarant. It cannot, however, explain our present hearsay rule, which often excludes hearsay even when the declarant is unavailable and the choice is between admitting hearsay or hearing nothing on the point at all. When the declarant is unavailable, unreliability cannot be a sufficient basis for exclusion unless we

31. Coleman v. Southwick, 9 Johns 45, 50 (N Y Sup Ct 1812) (quoting source not indicated). *See also* R LEMPERT & S SALTZBURG, *supra* note 27, at 520 ("Cross-examination is less likely to be effective in testing reports of statements than in testing reports of more complex events"),*id* at 520 n 38

> If a witness claims to have heard but a single statement, he may plausibly claim that was all that was said to him . . . . While the examiner may question the witness about his surroundings, a failure to closely observe one's surroundings does not necessarily suggest inattention to matters overheard The witness must, of course, convince the jury that he was in a position to overhear, but usually this will only involve establishing his distance from the conversation The attorney who investigates the scene is unlikely to find barriers to sound which would render certain versions of how a statement was heard suspect Unreliable aspects of visual observations are much more susceptible to exposure through cross-examination If a witness remembers only a single aspect of an event, that in itself is suspect

For other expressions of fear about fabrication by the in-court witness, see, for example, Ellicott v. Pearl, 35 U S (10 Pet) 412, 436 (1836) (Story, J) (besides lacking oath and cross-examination, the fault of hearsay is "that it is peculiarly liable to be obtained by fraudulent contrivances"), Mima Queen v Hepburn, 11 U S (7 Cranch) 290, 296 (1813) (Marshall, J) (speaking of the "frauds which might be practiced" in the absence of the hearsay rule); Englebretson v. Industrial Accident Commn , 170 Cal 793, 798, 151 P 421, 423 (1915) (Shaw, J) (same), *Report*, *supra* note 27, at 274-75 ("[W]hen the self-interest which actuates parties to litigation and their friends and witnesses is considered, the chance of perpetration of actual fraud by either or both parties equals, if it does not exceed, the chance of inaccuracy that would be inherent in hearsay testimony of truthful witnesses"). *Cf.* Morgan, *Foreword* to MODEL CODE OF EVIDENCE 6 (1942) (prevention of perjury "is the notion that is constantly urged against the expansion of exceptions to the hearsay rule")

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assume that the jury[32] is likely to overvalue the testimony. Moreover, we must assume that the jury will overvalue the testimony to such an extent that it is better to exclude the testimony than to admit it and to have it be given too much respect. In other words, we must suppose not only that the jury will overvalue the testimony, but that the discrepancy between the value that the jury assigns to the testimony and its true value will be so great that it is better not to hear the testimony at all.

The validity of this supposition has remained a matter of fireside induction. Perhaps it would be possible to test its validity by social science methods, but so far hearsay experiments have focused on matters such as the validity of particular exceptions, not upon the question whether jurors overvalue hearsay testimony.[33] The lack of empirical data, however, has not foreclosed debate. The view that the jury is not qualified to assess hearsay evidence has frequently been attacked, either on grounds that the jury can accurately assess the testimony,[34] or that any error it makes is likely to be minor in comparison to the value of the testimony.[35] Proponents of free admission draw tempting comparisons between the use of hearsay in ordinary life and its use in

32 In this article, the fact finder is usually assumed to be the jury, since the hearsay rule, while theoretically applicable in both bench trials and jury trials, has far less force in bench trials In bench trials, the judge who erroneously admits hearsay is unlikely to be reversed because of the doctrine that if the verdict is supported by admissible evidence, the judgment will not be reversed because the judge received evidence that was inadmissible. This doctrine has led to a more relaxed attitude toward hearsay in nonjury cases. *See* Davis, *Hearsay in Nonjury Cases,* 83 HARV L. REV. 1362 (1970).

33 *See generally* Stewart, *supra* note 28, and authorities cited therein. My own review of the literature has failed to reveal any direct study of jury overvaluation of hearsay. *Cf.* Kelman, *Trashing,* 36 STAN L. REV. 293, 319 (1984) (using hearsay evaluation as an example of a subject on which experiments are possible but will never be carried out). It is possible that research on fundamental attribution error will provide some insights into jurors' tendencies to overrate the sincerity of declarants who have not been contradicted or cross-examined, but it is difficult to generalize from current research to conclusions about the use of hearsay *Cf.* Jones, *The Rocky Road from Acts to Dispositions,* 34 AM PSYCHOLOGIST 107 (1979) (arguing that the functional effects of attributional error are unclear).

34. *See* Weinstein, *supra* note 8, at 335; Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts,* 98 HARV. L. REV 1357, 1372 (1985).

35. *See* Comment, *supra* note 19, Note, *supra* note 17, at 1789-90, 1815. The latter Note attempts to quantify the point that jury error is minor, and to show that it is unlikely that jury mistakes in evaluating testimony will be serious enough to justify exclusion. The Note appears to take the position that exclusion is not justified unless the jury mistakenly assigns an item of evidence a value that is at least twice its real value. Otherwise, the evidence should be admitted, since the "gap" between real value and assessed value is less than the real value of the evidence. Thus, if on a scale of 100 the real value of the evidence is 51, the evidence should never be excluded since, even if the jury assigns it a value of 100, the "gap" between real value and assigned value is only 49, which is less than the real value of the evidence *Id.* at 1789-90 This seems wrong, at least if the numbers are taken as representing probabilities, and it is hard to see what else they could be Suppose, for example, that in a criminal case the only evidence of guilt is a hearsay statement, and the jury considers the statement to be absolutely reliable proof that the defendant committed the crime, while actually the evidence establishes a 51% probability that defendant committed the crime. Since the standard of proof is guilt beyond a reasonable

the courtroom. McCormick noted that if the hearsay rule were applied out of court, it would "bring all business to a standstill."[36] Writing from a layperson's point of view, a former juror has put the case well:

> The jurors who are new observers to these proceedings are astonished at some of the things that are done here but are more astonished at some of the things that are not permitted. One of the more intelligent members calls attention in a most emphatic manner to the fact that in investigations anywhere out of court, everybody connected with the affair in any way, directly or remotely, would without restraint be asked to tell everything about it that would throw any light on the problem.
>
> A manufacturer or business man, or special investigator or arbitrator, who seeks to discover all the facts in any matter under inquiry, does not tie his own hands by certain of these artificial rules formulated by those dead and gone to their reward years and years ago.
>
> To admit any tinge of hearsay, we learn is a positive error that is not negligible, and there seems to be a special antipathy to this sort of testimony when, as a matter of fact, in the ordinary affairs of life hearsay is a well-recognized source of information, not of course to be implicitly depended upon but often helpful as one of the steps in an investigation.
>
> Some of these rules apparently are based on the assumption that those who listen to the evidence, our jury for example, are of very low mentality and cannot distinguish between the force of what one himself knows and what he heard said with the information as to who said it.[37]

To many, Bentham's more general point about the law of evidence — that in finding the truth, the sages of the law have displayed less wisdom than the illiterate peasant doing justice within the circle of his family — must seem particularly applicable to the hearsay rule.[38]

Perhaps, however, there is more to be said about the risk of misvaluation that one finds in the literature advocating radical reform of the hearsay rule. Jurors may use hearsay intelligently in ordinary life, but a trial is not ordinary life. They must judge the motives and truth-

doubt, justice would be served by excluding the evidence, even though the jury's assessment of it (100%) creates a gap (49%) that is smaller than its real value (51%).

36 McCormick, *The New Code of Evidence of the American Law Institute*, 20 TEXAS L REV 661, 671 (1942).

37 A OSBORN, *supra* note 16, at 51-52. *See also* J. FRANK, *supra* note 16, at 123:

> Now doubtless hearsay should often be accepted with caution. But 90% of the evidence on which men act out of court, most of the data on which business and industry daily rely, consists of the equivalent of hearsay. Yet, because of distrust of juries — a belief that jurors lack the competence to make allowance for the second-hand character of hearsay — such evidence, although accepted by administrative agencies, juvenile courts and legislative committees, is (subject, to be sure, to numerous exceptions) barred in jury trials. As a consequence, frequently the jury cannot learn of matters which would lead an intelligent person to a more correct knowledge of the facts.

See also Davis, *supra* note 16 (arguing that probative value, and not hearsay, should be the rule for admissibility).

38 1 J BENTHAM, *supra* note 1, at 5-6. Bentham added: "The peasant wants only to be *taught*, the lawyer to be *untaught*: an operation painful enough, even to ordinary pride, but to pride exalted and hardened by power, altogether unendurable." *Id.* at 8 (emphasis in original).

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fulness of persons whom they would ordinarily never meet, in a formal, ritualized proceeding unlike anything in their ordinary affairs, a proceeding in which finding the truth may require an understanding of institutional practices with which they have little or no dealings. The problem is particularly sharp in criminal cases.[39]

Moreover, it is misleading to write about the valuation of hearsay as if the trial involved only a single piece of evidence. The jury is not usually confronted with a single hearsay statement that it must, in isolation, decide to credit or not. Hearsay evidence often must be weighed against other evidence, including testimony by in-court witnesses. Weighing a hearsay statement against contradictory testimony that has been subjected to courtroom cross-examination is, obviously, unnecessary in ordinary life.

In assessing hearsay statements, jurors may also be faced with unfamiliar tasks in determining whether the statement, as reported to them, fully and accurately portrays the declarant's observations. They may be unfamiliar with ways in which professional statement-takers, with an eye to litigation, can twist and distort without actually lying.[40]

Fabricated statements in criminal cases raise a special problem. The trier of fact may be quite aware that witnesses in criminal cases often fabricate. It is, however, sometimes a heroic task to decide that a particular witness has fabricated a particular statement, especially since cross-examination may be less effective in revealing outright fabrication than in revealing other testimonial defects.[41] This problem cuts both ways. A jury may be quite willing to believe that a defen-

39. *See* text at notes 181-209 *infra*.

40 The problem is exacerbated in situations where one of the attorneys has had the opportunity to prepare the out-of-court declarant, as when the proffered statement is an affidavit prepared by the attorney and signed by the witness Here, both sides have "sandpapered" their witnesses, but only one has had the opportunity to expose the sandpapering through cross-examination. Jurors may not be familiar with sophisticated ways of implying something without actually saying it, or of omitting information in a way that makes the affidavit literally true but false in its implications For example, an affidavit saying that ballistics tests were "consistent" with the proposition that the bullet came from the defendant's pistol might mean only that the bullet could have come from the defendant's pistol or any other pistol Yet the statement could be interpreted by the jury to mean that the tests proved that the bullet came from the defendant's pistol *Cf.* Morgan, *The Hearsay Rule*, 12 WASH L REV. 1, 5 (1937) (describing ballistics testimony in the Sacco-Vanzetti case) Similarly, an affidavit stating that the driver applied the brakes "at the approximate point of impact" could mean that the driver applied the brakes only after running down the pedestrian, but might not be taken in that sense.

41 *See, e.g.*, Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L REV 177, 186 (1948):

> [I]f a witness is willing to commit perjury and counsel is willing to co-operate, neither oath nor cross-examination will be of much avail to expose the willful falsehood unless either witness or counsel is unusually stupid. . Although the exposure of willful falsehood is the most dramatic function of skillful cross-examination, it is very rarely demonstrated.

Accord Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L REV 682, 690-91 and authorities cited in n 22 (1962)

dant would fabricate evidence to escape conviction. Yet when that evidence, if believed, establishes a complete defense, it may raise a reasonable doubt despite skepticism about defendants in general — particularly when the jury has been told time and again to ignore the fact that the defendant has been arrested and charged and to give him the presumption of innocence.[42]

The danger that the trier of fact will give too much weight to the evidence is not the only reason for excluding hearsay. Bar groups and others have advanced a variety of additional concerns. In particular, bar groups have repeatedly expressed the fear that if hearsay were freely admitted, trial preparation would become more difficult, and the danger of unfair surprise at trial would increase.[43]

The danger of unfair surprise cannot be dismissed lightly. The unitary nature of the American trial makes surprise a greater danger than in other systems, where adjournments and continuances can mitigate its effect. Attorneys need time and preparation to be ready to impeach witnesses, to contradict them with the testimony of others, and to construct arguments dealing with their testimony. The attorney may be prepared to impeach or contradict the witness on the stand, but not to do so for declarants whose out-of-court statements come in unexpectedly through the mouth of the witness. Of course, surprise can be avoided or made less likely by discovery and pretrial notice, but those safeguards add to the burden and expense of pretrial preparation.

42. The problem has arisen in cases involving witnesses who testify that third parties have confessed to the crime with which defendant is charged. Of course, juries reject complete-defense evidence every day, as when they refuse to believe alibi witnesses. When witnesses report in detail on their own observations of nonverbal conduct, however, the cross-examiner may be able to do more to undermine the testimony than when a witness reports an out-of-court statement. In the latter case, the witness who has testified to a perfect opportunity to hear the statement can then entrench himself in the assertions of the out-of-court declarant, without resolving any difficulties. *See* text at note 31 *supra*.

43. *See Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., 74 (1973) [hereinafter *House Evidence Rules Hearings*] (statement of American College of Trial Lawyers asserting that broad admissibility of hearsay will "make it impossible for a trial counsel adequately to prepare the case for trial since he will not and cannot know what evidence he will have to meet until it faces him in the courtroom"), *reprinted in* 3 BAILEY & TRELLES, *supra* note 14, Doc. 12, at 74; *id.* at 290 (statement of the Study Committee on the Federal Rules of Evidence of the District of Columbia Bar Association asserting that unfairness may result from surprise and a "novel offer" of hearsay evidence); HOUSE COMM. ON THE JUDICIARY, FED. RULES OF EVIDENCE, H.R. REP. NO. 650, 93d Cong., 1st Sess., 5-6 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7079 *and in* 4 BAILEY & TRELLES, *supra* note 14, Doc. 13, at 5-6 (explaining Committee's deletion of residual exceptions on grounds that they would have the effect of "injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial"). *Cf.* Coleman v. Southwick, 9 Johns. 45, 50 (N.Y. 1812) (holding that the omission of hearsay testimony could result in unfairness). The final version of the residual exceptions sought to meet the surprise objection by putting in a requirement that notice be given before trial of intent to offer evidence under the exceptions. *See* FED. R. EVID. 803(24), 804(b)(5).

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Also, if radical reform takes the form not of abolishing the hearsay rule but of making the exclusion of hearsay discretionary, surprise can operate in the other direction: the attorney who expected his evidence to be admissible may be surprised by a discretionary exclusion, and unprepared to offer substitute evidence.

Bar groups have also raised the specter of misuse of judicial discretion. Most advocates of hearsay reform would not make hearsay admissible without limit, but would give trial judges discretion to admit or exclude in appropriate cases.[44] The fear of unbridled discretion has been one of the bar's primary reasons for opposing these proposals for broader admission of hearsay.[45]

Radical change in the hearsay rule could have other undesirable effects. For example, the free admission of hearsay might hamper pretrial dismissal of weak cases. Rule 56 provides that affidavits submitted in support of or opposition to summary judgment motions must be based on personal knowledge and present evidence that would be admissible at trial. Sometimes proponents fail because their affidavits offer nothing but hearsay evidence on an essential element.[46] If the hearsay rule were abolished, a plaintiff resisting a motion for summary judgment would only have to aver that someone had told him that he had observed the crucial fact. In a period of concern about expanding litigation, one might question whether hearsay evidence that is too weak to be received under the existing exceptions ought to be strong enough to allow a party to proceed to trial.

Next, free admission might encourage jury lawlessness. This concern materializes when hearsay evidence enables its proponent to overcome a motion for a directed verdict. The jury, in reaching its decision, may appreciate the unreliability of the hearsay but nonetheless award a verdict in favor of the proponent because it rejects or

44. *See, e.g.*, Younger, *Reflections on the Rule Against Hearsay*, 32 S.C L REV 281 (1980), Weinstein, *supra* note 8; FED R. EVID 803(a) (Advisory Comm. Prelim. Proposed Draft 1969), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc. 5, at 173.

45. *See, e.g.*, C. WRIGHT & K GRAHAM, *supra* note 11, at 88 ("[I]t is now part of the lore that the [Model] Code failed because lawyers objected to the power left in the trial judge While scholars and appellate court judges may be comfortable with the idea, most practicing lawyers are not 'Big Pots' who can count on the trial judge to be benign in his discretion "), *House Evidence Rules Hearings*, *supra* note 43, at 70 (statement of American College of Trial Lawyers opposing broad admissibility of hearsay and condemning increased judicial discretion); *id* at 91 (statement of Washington State Bar Association opposing proposed residual exceptions on grounds of increased judicial discretion); *id.* at 356 (Statement of Colorado Bar Association opposing residual exceptions on grounds that they inject too much uncertainty and discretion into the law of evidence.); *id.* at 337 (resolution of American Bar Association House of Delegates)

46 *See, e.g.*, Celotex Corp. v. Catrett, 477 U.S 317, (1986), Dyer v. MacDougall, 201 F 2d 265 (2d Cir. 1952), *In re* "Agent Orange" Prod. Liab. Litig , 611 F. Supp. 1267 (S D.N Y 1985), *affd.*, 818 F 2d 187 (2d Cir 1987).

misunderstands the applicable law.[47] Free admissibility of unreliable evidence gives the jury a peg on which to hang a verdict even if it does not believe the unreliable evidence.

Admitting hearsay can also encourage fabrication. This concern about fabrication is often expressed as a concern about misleading the jury, but it deserves to be considered in a broader light; its effect upon accuracy is not its only effect. Suppose that two cases arise in a jurisdiction that has abolished the hearsay rule. In the first, the jury accurately evaluates all the evidence, and correctly awards judgment to the plaintiff on the basis of hearsay evidence. Justice has been done because the hearsay rule was abolished. In the second case, the jury overvalues fabricated hearsay evidence, and as a result incorrectly awards judgment for the plaintiff. An analysis of this situation could conclude that the injustice perpetrated in the second case is evenly balanced by the just result in the first case. Thus, abolition produces the same number of just results as enforcement of the hearsay rule, so nothing has been lost. But this view disregards the basis for each result. An incorrect result is more offensive if it is based upon false proof than if it is based on failure of proof, and the witnesses who have committed perjury are themselves degraded. In short, fabrication is wrong even when it does not lead to an inaccurate verdict.

The hearsay rule has been defended on grounds that it promotes economy and speed in litigation.[48] Impeachment of a hearsay declarant can be more time-consuming than impeachment of a live witness. For example, the live witness may make concessions on cross-examination that render extrinsic impeachment evidence unnecessary. Of course, one can argue that excluding any species of evidence would

47 *Cf.* Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 930-40 (1971) (raising similar considerations in discussion of dangers of using demeanor evidence as sole basis for surviving directed verdict).

48 *See* Weinstein, *supra* note 8, at 336. Although he favors liberalization of the hearsay rule, Weinstein recognizes that exclusion of hearsay arguably promotes speed and economy at trial.

> The second factor [aside from the danger that the jury will misvalue hearsay] is one of trial convenience. Where credibility is assessed primarily on the basis of demeanor, an opposing attorney can see a witness for the first time and cross-examine solely on the basis of trial observation, hints from his client or expert, and what he believes about the witness's background and the facts of the case. It is better if he is prepared in advance, of course — and all the tactics books warn against the danger of unprepared cross-examination. But the trial can go on without any extensive before-trial examination of the witness's background or preparation for proof and disproof of his credibility by other witnesses and documents. This permits cheaper preparation and a shorter trial, and by avoiding the need for continuances to permit investigation it makes the present form of dramatic jury trial more practicable.

See also T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 46 (Boston 1826), *quoted in* James, *supra* note 17:

> [S]ince everything would depend upon the character of the party who made the assertion, and the means of knowledge which he possessed, the evidence, if admitted, would require support from proof of the character and respectability of the asserting party; and every question might branch out into an indefinite number of collateral questions

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save time, but hearsay seems a particularly good candidate for exclusion because of the other strikes against it. While the matter might be handled by invoking the trial judge's discretion to exclude evidence that is cumulative or a waste of time, it is not always possible to predict how much time will be consumed in impeachment, rebuttal, and counterattacks by the proponent if the door is opened to a given item of hearsay.

The utility of the hearsay rule as time-saver, however, is uncertain. When the rule has the effect of entirely excluding a line of evidence, as when the declarant is unavailable, it may save time and money. When it operates as a rule of preference, requiring the proponent to call the declarant instead of introducing an out-of-court statement, then it may have the opposite effect. The declarant must then endure the inconvenience and vexation of a court appearance. The examination of the declarant at trial may take longer than would introduction of an out-of-court statement incorporated in another witness' testimony, particularly if the opposing party has no extrinsic impeachment evidence.

The hearsay rule has also been defended as a protector of the litigation underdog. Lempert and Saltzburg write that:

> [T]he balance of advantage lies with the state in criminal cases and with wealthy organizations in civil actions. Organizations, unlike most individuals, usually have substantial resources available for the generation of evidence and often have the further advantage that litigation and the anticipation of litigation is, for them, routine. This means that organized parties are likely to have access to more hearsay evidence than the individuals they oppose.[49]

This generalization may not apply to all cases. The presentation of live testimony is often more expensive than the presentation of hearsay, and allowing litigants to submit affidavits instead of live testimony might help the underdog in some cases. However, one can hardly quarrel with the position that complete abolition of the hearsay rule would fundamentally change the method of preparation for the American trial, and that the changes would advantage some categories of litigants — particularly the state in criminal cases — more than others.

A related concern involves the possibility that abolition of the hearsay rule would encourage abuse of governmental power in criminal cases. For example, government investigators would have greater

49 R. LEMPERT & S. SALTZBURG, *supra* note 27, at 521-22 (footnotes omitted) *Cf. House Evidence Rules Hearings, supra* note 43, at 92-93 (statement of Frederick D. McDonald); *Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong , 2d Sess 278 (1974) [hereinafter *Senate Hearings*] (testimony of Professor Paul F Rothstein), *reprinted in* 4 BAILEY & TRELLES, *supra* note 14, Doc 14, at 278.

incentive to coerce witnesses or distort statements if out-of-court statements became freely admissible.[50] This concern about abuse of power, which alone might justify distinguishing between the admission of hearsay in civil and criminal cases, will be discussed more fully in Part III of this article.[51]

In a recent article, Professor Charles Nesson suggested still another explanation for the exclusion of hearsay.[52] Professor Nesson rejects the conventional rationale for exclusion, stating that jurors are capable of assessing the reliability of hearsay evidence and "they would undoubtedly be given this task if reliability alone were at stake."[53] He believes that "there must be another, distinct rationale for the hearsay rules."[54] He finds that rationale in the enhancement of the social acceptability of verdicts by protecting them from subsequent attack. After considering and discarding the view that exclusion of hearsay enhances the *immediate* acceptability of verdicts, he decides that the hearsay rules "may be grounded on the legal system's concern for *continuing* acceptance of the verdict."[55] In his view, hearsay and confrontation rules

> prevent jurors from basing a verdict on the statement of an out-of-court declarant who might later recant the statement and discredit the verdict. Cross-examination of a declarant minimizes the risk that a verdict will be undercut by ensuring that the declarant cannot easily recant his statement. During cross-examination, the declarant commits his integrity to the accusation; subsequent recantation of the statement would constitute an admission of perjury.[56]

A number of objections can be made to this argument.[57] One is that the stability of verdicts, if affected by the hearsay rule at all,

50 *See Rules of Evidence, Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess 244 (1973) [hereinafter *House Special Subcomm. Hearings*] (statement of Frederick D. McDonald), *reprinted in* 3 BAILEY & TRELLES, *supra* note 14, Doc 11, at 244, *House Evidence Rules Hearings, supra* note 43, at 92-93 (statements suggesting that power of government investigators would be unduly enhanced by substantive admission of prior inconsistent statements, and that investigators, civil and criminal, would be aware of their increased power and less likely to conduct fair investigations); *Senate Hearings, supra* note 49, at 302, 317 (testimony of Herbert Semmel, Washington Council of Lawyers)

51. *See* text at notes 208-09 *infra*

52. Nesson, *supra* note 34, at 1372-75. Professor Nesson's article offers helpful insights on much broader topics; his discussion of the hearsay rule is merely presented as one example of the degree to which the desire to produce acceptable verdicts has influenced the development of legal doctrine

53 *Id.* at 1372

54 *Id.*

55 *Id* at 1373 (emphasis in original).

56. *Id.*

57 *See* Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057 (1986)

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63. *See* authorities cited in

64 *See* P CALAMANDREI

would seem to be threatened as much by the exclusion as by the admission of hearsay. When hearsay is excluded, there is a danger that declarants whose statements were excluded as hearsay might appear, affirm their statements, and offer to testify at a new trial. Their challenge to the acceptability of the verdict would be more serious than that of recanting declarants whose testimony was admitted, because their position about the facts would have been completely consistent.

Whatever one may think of these specific views, however, a certain degree of skepticism about the professed reasons for excluding hearsay is bound to arise in any thoughtful observer. After reading the legislative history of the Federal Rules of Evidence and the published articles on hearsay reform, one cannot help but be impressed by the degree to which the professional status of commentators seems to have influenced their positions on hearsay. Academicians[58] and student commentators[59] have tended to favor drastic reform leading to much freer admission of hearsay (except for those who have written of hearsay as an aspect of the constitutional right to confrontation, a context in which scholars are more likely to see exclusion as an essential protection for criminal defendants).[60] Judges have tended to favor judicial discretion in admitting and excluding hearsay.[61] Prosecutors have supported receiving more hearsay, citing, among other things, problems caused by intimidation of witnesses who have given prior statements.[62] Bar groups have tended to be procedurally conservative, supporting existing exceptions and opposing creation of drastic new ones.[63] While it is not hard to explain the attitude of judges and prosecutors, the reason for the split between bar groups and academicians is less obvious. If complicated rules of procedure are motivated by distrust,[64] then perhaps the answer is that lawyers oppose discretionary hearsay rules more than scholars because their trial experience has taught

58 *See* note 8 *supra.*

59 *See, e.g.*, Note, *supra* note 17, at 1804-07; Comment, *supra* note 19.

60 *See* note 8 *supra.*

61. This statement must be qualified to some extent, because judicial opinions have often set limits upon the admission of hearsay However, at the hearings on the Federal Rules of Evidence, the Judicial Conference of the United States favored supporting the retention of broad residual exceptions that would have the effect of conveying substantial discretion *See House Evidence Rules Hearings, supra* note 43, at 296-97 (statement of the Judicial Conference of the United States, Committees on Rules of Practice and Procedure, and on Rules of Evidence).

62 *See, e.g., House Evidence Rules Hearings, supra* note 43, at 350-52 (statement of Department of Justice); *Senate Hearings, supra* note 49, at 111-14 (statement of W Vincent Rakestraw on behalf of Department of Justice), *id.*, at 381 (statement of District Attorney, County of Los Angeles) *Cf.* M. GRAHAM, *supra* note 18, at 125-209

63 *See* authorities cited in notes 27, 31, 43 & 45 *supra.*

64. *See* P. CALAMANDREI, PROCEDURE AND DEMOCRACY 83 (1956)

them to doubt the impartiality of judges.[65] The lawyer's sense of professionalism, of possessing a rare and difficult skill, no doubt plays a role as well. The courtroom rituals produced by the rules of evidence are hard to learn and cherished once learned; abolition of the hearsay rule would make a hard-won element of the trial lawyer's training obsolete. It would alter the lawyer's professional life in other ways. There would be less opportunity to display forensic skills in cross-examining witnesses, and trials would lose drama and excitement when documentary evidence was received in lieu of live testimony.

Of course, the possibility that opponents of hearsay reform have been motivated by professional status should not preclude us from giving fair consideration to their explicit rationales in defense of the status quo. There are five major themes present in lawyers' arguments against hearsay reform. First, the conventional academic rationale for excluding hearsay — lack of cross-examination of the declarant — appears frequently in the discourse of lawyers, and must be counted as a major reason for exclusion. Second, concern has frequently been voiced about the danger of misreport and fabrication by the in-court witness. Third, lawyers have often alluded to the danger of surprise at trial. Fourth, lawyers have been concerned that hearsay reform would leave admission or exclusion to the uncontrolled discretion of the trial judge. Finally, concern has been expressed that the relaxation of hearsay rules will facilitate abuse of governmental power in criminal cases. In Part III of this article, I will argue that these five themes apply differently in civil and criminal cases, and that for this reason drastic liberalization of the hearsay rules is justified in civil, but not criminal, cases. First, however, I turn to the existing structure of the hearsay rule itself.

II. Relationship of Justifications for Excluding Hearsay to the Structure of the Hearsay Rules

Having outlined the multiple reasons for excluding hearsay by re-

65 Of the attitude of the bar, Morgan wrote.

> [I]t is the disheartening truth that the bar of this country is emphatically antagonistic to any measure which involves any expansion of the authority of the trial judge . . There seems to be a settled conviction that the average trial bench of the states contains too many judges of poor education and unsound judgment, to say nothing of instability of character or plain dishonesty

E. Morgan, *The Outlook for Reform*, in The Law of Evidence 67 (1927).

For examples of the attitude of scholars who have advocated evidence reform, see Ladd, *A Modern Code of Evidence*, 27 Iowa L. Rev 213, 219-20 (1942) ("A rational code must be built upon the assumption that cases are tried before a trial judge of reasonable ability and highest integrity "), Morgan, *Foreword* to Model Code of Evidence 10 (1942) ("The [Model] Code of Evidence . proceeds upon the theory that it is to be administered by an honest and intelligent judge ").

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ferring to statements by lawmakers and commentators, and by drawing inferences from the general effect of exclusion, I will now examine specific provisions of the hearsay rule and its exceptions to see what light they throw upon reasons for admitting and excluding hearsay.

Under the untested declarant theory of hearsay exclusion,[66] exceptions to the hearsay rule are justified when circumstances reduce the danger that the trier will give too much weight to a statement that has not been tested by cross-examination. Under this theory, it is the possible unreliability of the out-of-court statement, not any other consideration, that leads to the exclusion of hearsay. The fact that the declarant was not subject to cross-examination (and, secondarily, that the declarant was not under oath and subject to observation by the trier) makes it difficult to assess the declarant's credibility, so hearsay is generally excluded. However, if circumstances surrounding the making of the statement provide a guarantee of trustworthiness, then the need for cross-examination is reduced and an exception may be justified. The case for an exception is bolstered if, in addition, cross-examination is impossible because the declarant is unavailable, so that the choice is between taking the declarant's untested statement or having nothing at all.

Wigmore was a systematic advocate of this view.[67] He wrote that "[t]he purpose and reason of the Hearsay rule is the key to the Exceptions to it." His theory of the "purpose and reason of" the hearsay rule was that "the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination."[68] Sometimes, though, hearsay statements are so trustworthy that cross-examination would serve little purpose; and sometimes cross-examination is impossible, as when the declarant is dead. It is then necessary to take the evidence in its "untested shape" if it is to be heard at all. These two principles — trustworthiness and necessity — justify the creation of hearsay exceptions, especially when the two are combined.[69] In his treatment of each exception, Wigmore first attempted to show that it was justified by the

66 *See* text at notes 21-25 *supra*.

67 Wigmore recognized that other theories had influenced lawmakers, but regarded the untested declarant rationale as the key to a true understanding of the hearsay rule. In a section devoted to the question whether one reason for excluding hearsay might be the risk that the in-court witness might inaccurately describe the out-of-court statement, he labeled this justification for excluding hearsay as "spurious." 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1363, at 8. *Cf. id* § 1477, at 288-89 (claiming that limiting to civil cases the exception for statements of fact against interest cannot be justified on policy grounds).

68 *Id.* § 1420, at 202.

69. *Id.* §§ 1420-1422.

principles of necessity and trustworthiness. The "trustworthiness" that Wigmore was concerned with was the trustworthiness of the *declarant's* statement, not that of the in-court witness reporting the hearsay; the in-court witness, after all, was subject to cross-examination.[70]

A more recent example of this approach may be found in a well-known article by Professor Laurence Tribe.[71] To Tribe, hearsay is suspect because the trier must rely upon the credibility of a person whose statement has not been made in court, under oath and observation, and subject to immediate cross-examination.[72] The exceptions apply to situations in which concern about absence of in-court cross-examination of the declarant is for some reason mitigated. They fall into three categories: Group I, where there is an adequate procedural substitute for in-court cross-examination (*e.g.,* the former testimony exception);[73] Group II, where the party is deemed to have no right to cross-examination (*e.g.,* admissions);[74] and Group III, the largest group, where "specific attributes of the out-of-court act or utterance . . . are thought to reduce the [credibility] weaknesses so substantially that the balance of untrustworthiness and likelihood of probative value favors admissibility of the evidence."[75] Tribe further classifies the potential weaknesses in credibility as "left-leg" weaknesses (insincerity, ambiguity) and "right-leg" weaknesses (poor perception or memory). When circumstantial guarantees of trustworthiness reduce these declarant credibility weaknesses, a hearsay exception is justified. In fact, Tribe declares that "[o]ne major unifying theme suggested by the subgroups is that, in order to overcome a hearsay objection, *one good leg is enough.*"[76]

The exclusive focus of Tribe, Wigmore, and others[77] upon the untested declarant theory provides an incomplete picture of the reasons for the hearsay exceptions. While concern about the untested declarant has played an important role, the hearsay rules do, and should, reflect other concerns.[78]

70 Wigmore recognized that not all of the rules labeled by others as "exceptions" could be explained by saying that circumstantial guarantees of trustworthiness existed For that reason, he classified admissions not as an exception to the hearsay rule but as an instance in which the hearsay rule was inapplicable because the declarant "does not need to cross-examine himself" 4 WIGMORE (Chadbourn ed), *supra* note 8, § 1048, at 4-5 (emphasis omitted)

71. Tribe, *supra* note 24.

72 *Id.* at 958

73. *Id* at 961-63

74 *Id.* at 963-64

75 *Id* at 964-69.

76 *Id* at 966 (emphasis in original)

77. *See, e.g.*, G LILLY, *supra* note 21, at 157-60.

78. Of course, the influence of a particular consideration may not always have been acknowl-

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For example, the existence of hearsay exceptions that manifest a preference for recorded statements suggests concern about the danger of misreport and fabrication by the in-court witness. To be sure, oral statements are not excluded categorically by the rule against hearsay, but many of the exceptions to the hearsay rule apply only to documentary or other recorded hearsay.[79] Moreover, even when oral statements pass the hurdle of the hearsay rule, they do not necessarily become admissible. A variety of other rules, not labeled as hearsay, function to create a preference for recorded utterances. Examples include the parol evidence rule,[80] the statute of frauds,[81] rules requiring

edged or consciously considered. The hearsay rule and its exceptions have developed over centuries, with each exception taking its own peculiar course Choices about limiting or expanding an exception may have been more palatable to lawyers and judges for reasons that were not recognized or expressed. The absence of an objectionable feature (such as surprise) is not always as obvious as its presence, yet that absence may partly explain why some hearsay exceptions have been acceptable to lawmakers who otherwise oppose admission of hearsay

79 Using the Federal Rules of Evidence as a guide, we find exceptions applicable only to recorded statements in rule 803(5) (recorded recollection), rules 803(6) and (7) (business records), rule 803(9) (vital statistics), rule 803(10) (absence of public record), rule 803(11) (records of religious organizations), rule 803(12) (marriage, baptismal, and similar certificates), rule 803(13) (family records), rules 803(14) and (15) (documents affecting an interest in property), rule 803(16) (ancient documents), rule 803(17) (published compilations), and rule 803(18) (learned treatises). At common law, the public records exception applied only to written hearsay, *see* 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1633, at 623-24, but rule 803(8) refers to "statements" as well as "records," and hence could be interpreted to allow the reception of oral statements. However, the advisory committee's note contains no indication of intent to broaden the exception in this respect, and its reference to "the unlikelihood that [the public official] will remember details independently of the record" as a justification for the exception suggests that the committee was envisioning recorded hearsay. FED. R. EVID 803(8) advisory committee's note

Other exceptions could possibly involve nonrecorded statements but are highly likely to involve statements that at least have recorded counterparts. *See* FED R. EVID 804(b)(1) (former testimony), 803(22) (judgments), 803(23) (judgments)

The rules that display no preference for recorded evidence are 803(1) (present sense impression), 803(2) (excited utterances), 803(3) (present physical or mental state), 803(4) (statements for medical diagnosis or treatment), 804(b)(2) (dying declarations), 804(b)(3) (statements against interest), 804(b)(4) (statements of personal or family history) The residual exceptions, rules 803(24) and 804(b)(5), also contain no express preference for recorded statements, though their language is flexible enough to allow recordation to be taken into account in deciding whether to receive a statement

At times, courts administering exceptions that permit the reception of oral hearsay have imposed a preference for documentary hearsay when both documentary and oral statements are available *See* 5 WIGMORE (Chadbourn ed), *supra* note 8, § 1450, at 315-16, and authorities cited therein

80 Broadly speaking, the parol evidence rule excludes (subject to many exceptions) oral evidence that is offered to vary the terms of a written contract *See* C MCCORMICK, *supra* note 8, §§ 210-222, at 426-54 Time and again, evidence and contract writers have insisted that the rule is a rule of substantive law, not a rule of evidence In a characteristically emphatic passage, Wigmore wrote that "[f]irst and foremost, *the rule is in no sense a rule of Evidence*, but a rule of Substantive Law It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved." 9 WIGMORI ON EVIDENCE, *supra* note 3, § 2400, at 3 (emphasis in original). *Cf.* A. CORBIN, CORBIN ON CONTRACTS 535 (one vol ed. 1952) (parol evidence rule "is not a rule as to the admissibility of testimony") It seems unlikely, however, that the rule is completely untarnished by the desire to exclude unreliable testimony. While there are other reasons for giving primacy to written agree-

written testaments,[82] the best evidence rule,[83] and, in some jurisdictions, the dead man's statute.[84] But for these other rules, the hearsay rule would no doubt exemplify an even more marked preference for recorded statements.

To some extent, this preference for documentary hearsay can be reconciled with the untested declarant rationale.[85] However, the preference also reflects concern about misreport and fabrication by the in-court witness. It is harder to forge a document than to fabricate an oral statement, and if a document is authentic, there is absolutely no danger that the in-court witness will accidentally or intentionally misstate the hearsay declarant's utterance.

The preference for documentary statements probably also reflects a concern for unfair surprise at trial. Documentary evidence, or at least documentary evidence that is to be introduced as an exhibit in the case in chief, is more likely to be discovered by the opponent before trial

ments, the rule is at least partly based upon the danger that jurors will overvalue testimony about oral agreements. As Murray has written,

> [T]here is a tendency to neglect what has been called the *procedural* function which the rule also serves. . In determining whether a writing prevails over an oral expression of agreement, a jury may fail to adequately consider the relative unreliability of the oral expression. The writing is unchanged at the time of trial, but the recollection of the party who is urging the choice of the oral agreement is subject to a favorable modification of the actual oral expression, and such a modification may occur quite unconsciously. Judges recognized the general lack of sophistication in juries when it came to making a choice between the written and oral manifestations of agreement. Thus, they reserved to themselves the determination of the question of fact involved, to wit, was there really an oral agreement and, if so, did the parties intend to abandon it when they expressed themselves in writing?

J. MURRAY, MURRAY ON CONTRACTS 228 (1974) (emphasis in original) (footnote omitted); *accord* C MCCORMICK, *supra* note 8, § 210, at 427-29 (jury unlikely to take sufficient account of unreliability of witness' memory of oral contract; parol evidence rule protects against "the sympathetic, if not credulous, acceptance by juries of fabricated or wish-born oral agreements.").

81 Virtually every state has a "statute of frauds" requiring certain types of contracts to be in writing. *See* J. MURRAY, *supra* note 80, at 640 As the name suggests, the primary purpose of the statute of frauds is to prevent fraudulent claims based upon alleged oral agreements. *See* A CORBIN, *supra* note 80, at 371-72

82 Rules requiring that wills be in writing and that statutory formalities be observed serve two functions: a ritual function designed to ensure that the testator has acted deliberately, and the function of insuring that evidence of the testator's intent is "cast in reliable and permanent form." Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L J 1, 6 (1941).

83 In essence, the best evidence rule prohibits oral testimony about the contents of a writing unless an adequate excuse has been presented for failure to offer the original *See* FED. R. EVID 1001-1008.

84. A "dead man's statute" typically provides that a party may not testify about a communication with a person since deceased in a suit prosecuted or defended by the decedent's estate *See* MCCORMICK ON EVIDENCE, *supra* note 6, at 159 The purpose of the statute is to prevent fraudulent claims by survivors against estates of persons whose mouths have been closed by death. *Id.* The Federal Rules of Evidence do not contain a dead man's statute, but a number of state jurisdictions that have adopted the federal rules have retained their dead man's statutes. *See* Wroth, *supra* note 6, at 1336-37

85. The person who prepares a document may be more careful about what he states, because the document will be preserved and may be checked by others This is true, for example, of business records

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than oral hearsay.[86] If the documentary evidence is to be used for purposes other than presentation in the case in chief, then it is likely that it will not be fully admissible as substantive evidence anyway[87] and possibly the hearsay rule erects this barricade against substantive use partly because of fear of surprise.

Concern about surprise and fabrication may also help explain why lawmakers have not created a general exception for statements of unavailable declarants. If the unreliability of the declarant were the only concern, lawmakers might have been more willing to say that when the declarant is unavailable, hearsay evidence should be admitted for what it is worth, since it cannot be replaced by the declarant's in-court testimony. However, if perjury by the in-court witness is an independent concern, then the exclusion of this evidence makes more sense. The danger of perjury is increased by the unavailability of the declar-

86 Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure gives the defendant a right to inspect and copy documents that "are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant." Admittedly, rule 16(a)(2) places limits upon the discovery of "internal government documents" and statements of government witnesses Statements of government witnesses are not discoverable as a matter of right until after the witness has testified on direct examination. Jencks Act, 18 U.S C. § 3500(a) (1982). However, the types of evidence admissible under the documentary exceptions to the hearsay rule (*e.g.*, business records) generally would not fall within the witness statement protection of the Jencks Act and would be discoverable before trial by the defense. If the defense makes a request for discovery under rule 16(a)(1)(C), then the government acquires a corresponding right to discover defense documents under rule 16(b)(1)(A), subject to similar restrictions applicable to internal documents and statements of witnesses *See* FED. R CRIM. P. 16(b)(2).

In civil cases, parties may inquire about the existence of relevant documents through interrogatories, FED. R CIV. P. 33, or depositions, FED. R. CIV. P 30, and may request documents from the other party by designating either an item or a "category" of documents. FED. R CIV. P 34 The rule requires that categories of documents be designated with "reasonable particularity," but generalized designations are often permitted when they do not impose an undue burden on the opposing party *See* 8 C WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2211 (1970). A party whose request is rejected on grounds that it is insufficiently specific can, of course, use other discovery devices to learn more about what documents are available and sharpen the request. *See* United States v. National Steel Corp , 26 F R D 607, 611 (S.D. Tex. 1960) Documents may be obtained from nonparties by subpoena duces tecum in conjunction with a deposition. *See* FED R. CIV P 45(d)(1) Rule 16 of the Federal Rules of Civil Procedure also gives trial judges authority to require lists of documentary exhibits intended to be offered at trial

Rule 26(b)(3) of the Federal Rules of Civil Procedure provides qualified work product protection to documents containing witness statements obtained in preparation for litigation, but documents admissible under the documentary exceptions to the hearsay rule are not ordinarily prepared for litigation and hence are discoverable as a matter of course despite rule 26(b)(3)

87 For example, a document containing a prior inconsistent statement that is used to impeach a witness' testimony will ordinarily be admissible only for the light it throws upon the witness' credibility, and not for the truth of the matter asserted in the document. *See* MCCORMICK ON EVIDENCE, *supra* note 6, § 251 The Federal Rules do establish a limited category of prior inconsistent statements that may be used as substantive evidence, but this category applies only to statements made under oath at a "trial, hearing, or other proceeding, or in a deposition." FED. R. EVID 801(d)(1)(A)

ant.[88] Thus, the hearsay rule may reflect in part the policies that were served by the dead man's statutes.[89] (In a well-known but rarely imitated statute creating a broad exception for statements of deceased persons, Massachusetts lawmakers included a requirement that the judge make a preliminary determination that the out-of-court statement was *in fact made,* a requirement that suggests fear of perjury by the in-court witness.[90])

The concern about surprise is, of course, also reflected in provisions that require notice of intent to produce hearsay — for example, in the residual exceptions to the Federal Rules of Evidence,[91] and in the comprehensive reform accomplished by the English Civil Evidence Act of 1968.[92] Although hearsay scholars have tended to overlook surprise prevention as a possible goal of the traditional exceptions, codifiers are willing to embrace it as a goal when crafting broad new hearsay exceptions.

The existence of what I will call "transaction exceptions" to the hearsay rule probably also reflects concerns about surprise and fabrication. By "transaction exceptions" I mean to refer to exceptions that admit out-of-court statements that are part of the same general transaction or occurrence as independently admissible nonverbal conduct. Examples include the present sense impression and excited utterance exceptions (in most of their applications),[93] and statements

88 *Cf.* FED R EVID 803(b)(4) advisory committee's note to original rule (emphasis added) (citation omitted):

> The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, *enhanced in either instance by the required unavailability of the declarant.*

89 *See* note 84 *supra* and accompanying text

90 Since 1898, Massachusetts has had a statute making statements of decedents broadly admissible in civil actions. The current version of the statute reads as follows

> In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith and upon the personal knowledge of the declarant

MASS. ANN. LAWS ch 233, § 65 (Michie/Law Co-op 1986) *Cf.* R.I GEN LAWS § 9-19-11 (1985) (making declarations of a deceased person admissible if made in good faith, prior to the commencement of the action and with actual knowledge)

The Massachusetts approach has not spread, though a few states have enacted much more limited statutes for cases involving suits by or against the estates of decedents. *See* 5 WIGMORE (Chadbourn ed), *supra* note 8, § 1576

91 *See* FED. R EVID 803(24), 804(b)(5).

92 For a description of the British reform, see note 237 *infra.*

93 *See* FED R. EVID. 803(1), 803(2). The present sense impression exception, which requires that the statement be made while the declarant was perceiving the event that the statement describes or "immediately thereafter," virtually insures temporal and spatial unity between the event and the statement FED R EVID 803(1) The excited utterance exception receives statements made while still under the influence of excitement caused by the event, and hence permits a greater lapse of time *See, e g*, Cestero v. Ferrara, 57 N.J 497, 273 A 2d 761 (1971) (statement

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497, 273 A 2d 761 (1971) (statement

that creep in under the nonhearsay rubric of "verbal act" or "verbal part of an act."[94] Evidence scholars will recognize these as being part of what was once admitted under the vague label "res gestae."[95] Now, some of these exceptions can be justified on grounds of declarant reliability — the present sense impression exception is an example.[96] The excited utterance exception, however, can hardly be defended on this ground — indeed, the better view seems to be that excited utterances are *less* reliable than unexcited ones.[97] The best reason that the advisory committee, which was wedded to the untested declarant theory, could give for retaining the excited utterance exception was that it had the sanction of precedent.[98] Yet the excited utterance and the other "res gestae" utterances have some features that make them easy to accept even if they lack indicia of reliability. They are connected with the principal transactions that formed the basis for the lawsuit; hence, if we use a notice approach to hearsay that mimics "transactional" approaches in other procedural contexts (such as relation back of amendments)[99] where the goal is avoidance of surprise, then the "res gestae" exceptions make more sense. When investigating the suit, the opponent would be likely to discover information about statements

by injured person made approximately half an hour after the event causing injury admissible; excitement had persisted) Usually, however, excited utterances will be made at the same time and place as the event causing the excitement.

94 Examples of such statements include words accompanying the transfer of money, that designate it as a gift, loan, payment, or the like. *See* MCCORMICK ON EVIDENCE, *supra* note 6, § 249, at 732-33 These words are legally operative language that should be admissible under the traditional untested declarant rationale, since they have value regardless of the declarant's reliability However, because of the inviting vagueness of the terms "verbal act" and "verbal part of an act," some courts have extended their reach to language that, though contemporaneous with admissible nonverbal conduct, is not legally operative and involves dangers of declarant unreliability *See* Park, McCormick on Evidence *and the Concept of Hearsay,* 65 MINN. L. REV 423, 441-49 & n 80 and authorities cited therein (1981)

95 *See* Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae,* 31 YALE L J 229, 238-39 (1922); 6 WIGMORE (Chadbourn ed), *supra* note 8, §§ 1766-1768.

96 The advisory committee's note to rule 803(1) states that the underlying theory of the present sense impression exception is that "substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation " FED R EVID 803(1) advisory committee's note. Contemporaneity also reduces the danger that defects of memory will render the assertion unreliable

97 *See* Stewart, *supra* note 28, at 27-29, and authorities cited therein; Hutchins & Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations,* 28 COLUM L REV 432 (1928)

98 The committee wrote that "[w]hile the theory of [the excited utterance exception] has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, . . . it finds support in cases without number." FED. R. EVID 803(2) advisory committee's note (citations omitted)

99. *See* FED R CIV. P. 15(c) (amendments relate back to the original pleading when they arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading") *See generally* Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision,* 85 MICH L. REV. 1507 (1987)

that were part of the same transaction or occurrence as the principal events that formed the basis for the claim or prosecution. Evidence about them would not come as a surprise, and the opponent would be armed with witnesses who could explain, rebut, or contradict them, or testify that they were fabricated. Also, since "res gestae" statements have to occur at the same time and place as other relevant conduct, the chance for fabrication by the in-court witness is less; the witness does not have freedom to choose a convenient time and place to hear a fictional declarant or statement, and therefore the witness' fabrication might be exposed by other witnesses or by circumstantial evidence.[100]

The relative absence of dangers of surprise and in-court fabrication may also have contributed to the continuing vitality of the dying declaration exception. This exception, like the excited utterance exception, does not readily admit to modern justification under a declarant reliability rationale. Possibly there is something to be said for the idea that a dying person will tell the truth. Yet decay in belief in the afterlife has certainly weakened that theory, and modern knowledge about perception weakens the idea that the statement, even if made in good faith, will be accurate.[101] But the substantive use of the dying declaration does not raise the same problems of fabrication and surprise that the substantive use of other victim statements might raise. The lawyer in a homicide case knows to look for and expect a dying declaration. Moreover, the dying declaration must be given within a certain temporal and spatial framework, thus limiting the opportunities for fabrication by the in-court witness (who cannot always choose a convenient time and place to have heard a statement that no one else

100 The following passage from Professor Morgan suggests that these considerations may have influenced courts that applied the "exception" that later was to evolve, with Wigmore's help, into the excited utterance exception.

> As in the preceding class [of utterances contemporaneous with independently admissible nonverbal acts], the utterance is offered for its truth and is hearsay Its sole guaranty of trustworthiness lies in its spontaneity. . In this country but few cases prior to 1880 gave weight directly to the element of spontaneity, and fewer still to the fact that spontaneity was insured by the startling nature of the event Indeed *contemporaneousness rather than spontaneity was emphasized,* although the latter was clearly recognized as highly important Thereafter such cases are somewhat more numerous; but it is only since the publication of Dean Wigmore's work that this exception to the hearsay rule has gained wide recognition It is, however, by no means universally accepted, and nowhere is the theory of the exception applied with logical completeness. If spontaneity of itself is to be accepted as a guaranty of trustworthiness, then the subject matter of the declaration should not be limited to the startling event which operated to still the reflective faculties. Yet it is everywhere so limited There is also a marked tendency in many cases to assume that contemporaneousness of utterance and event is a requisite of admissibility, and to argue that it is satisfied where the facts show the utterance unreflective, instead of using lapse of time between event and utterance merely as evidence of lack of spontaneity. *Likewise there is frequent insistence that the utterance be made at the place of the event*

Morgan, *supra* note 95, at 238-39 (emphasis added) (footnotes omitted)

101. *See* Nesson, *supra* note 34, at 1374 & n 55.

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heard). Moreover, dangers associated with interrogation methods and police influence are reduced by the circumstances. The dying (or apparently dying) person is unlikely to be subjected to the trickery, threats, and promises that may occur during station-house interrogation.[102]

Another feature of the exceptions for dying declarations and excited utterances may make them more palatable to those who are concerned about misreport by the in-court witness. Statements that are admissible under these exceptions are likely to be short and memorable. Thus, there is less danger of unintentional misreport by the in-court witness. (Indeed, while there are admittedly exceptions to this generalization,[103] the exceptions for oral out-of-court statements apply in circumstances in which statements are likely to be brief and simple,[104] while those for documentary statements permit the introduction of longer narrative statements filled with hard-to-remember figures and details. This difference supplies further evidence that a reduction in dangers of misreport often makes hearsay more acceptable.)

Another reason to doubt the validity of reductionist explanations for the exclusion of hearsay may be found by considering the rule against substantive use of prior inconsistent statements. This rule is virtually irrational if one adheres strictly to the untested declarant rationale — *i.e.*, to the theory that the sole reason for excluding hearsay is concern that the declarant's reliability has not been tested by cross-examination in court.[105] Prior inconsistent statements are admissible to impeach the witness, but not for the truth of the matter asserted (subject to modern qualifications to be discussed later).[106] This rule seems ludicrous under the untested declarant rationale, because the declarant *is* in court and *is* subject to cross-examination. It has been feebly defended on grounds that in-court cross-examination comes too late,[107] a point that has been ably refuted.[108]

102 "The narrow subject-matter scope of the [dying declarations] Rule affords built-in safeguards against abuse." *Senate Hearings*, *supra* note 49, at 70 (Statement of Judicial Conference of the United States)

103 One example of an exception to this generalization is rule 803(4), statements made for medical diagnosis and treatment These statements may be lengthy and detailed However, the statements are usually made to a member of the medical profession, and professional standards of accuracy and the likelihood of contemporaneous recordation reduce the dangers of misreport.

104 *See, e.g.*, the exceptions created by rules 803(1) (present sense impression), 803(2) (excited utterances), and 803(3) (then existing mental, emotional, or physical condition).

105 *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 6, § 251

106 *See* FED. R. EVID 801(d)(1)(A), text at notes 111-16 *infra*.

107 *See* State v Saporen, 205 Minn 358, 362, 285 N.W 898, 901 (1939), which argues that The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony Its principal virtue is in its immediate applica-

The prior inconsistent statement rules, if they are not simply arbitrary or accidental, must be explained by some justification other than the untested declarant rationale. Probably a combination of factors explain the persistence of these rules. First, the prior inconsistent statement is not a "transactional" statement; the opposing lawyer would not necessarily learn of it in the investigation of the nonverbal events that give rise to the lawsuit. Nor is it one that the opposing attorney would be entitled to discover before trial as a matter of right.[109] Also, the in-court witness who wishes to concoct a prior inconsistent statement can pick the time and place at which the purported statement was made. Thus, there are dangers of surprise and of fabrication by the in-court witness. Moreover, giving substantive effect to the prior inconsistent statement would have systemic effects on the criminal justice system. When investigators obtained a statement from an accomplice incriminating a defendant, they would have courtroom evidence, not merely an investigative lead. If the accomplice changed his story at trial, the statement could be used as substantive evidence of guilt. This would put a further premium upon vigorous interrogation of accomplices, attempts to extract statements with tricks and with offers of immunity or leniency, slanting of statements by statement-takers, and outright fabrication. Because of the rule against substantive use, however, the prior statement may only be used for the lesser purpose of impeachment, and sometimes not even for that.[110]

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108 In response to the argument set forth in the preceding footnote, McCormick wrote: Yet the fact in the case was that the witness did change his story very substantially; rather than hardening, his testimony yielded to something between the giving of the statement and the time of testifying. This appears to be so in a very high proportion of the cases, and the circumstances most frequently suggest that the "something" which caused the change was an improper influence.

MCCORMICK ON EVIDENCE, *supra* note 6, at 745. McCormick also added that the prior statement is likely to be more reliable than the courtroom testimony because it was made nearer to the event than the testimony. Finally, the trier does have the opportunity to observe the demeanor of the witness. As Judge Learned Hand stated in a much-quoted passage, "If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court." Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). *See also* 3A WIGMORE (Chadbourn ed.), *supra* note 8, § 1018, at 996.

109. *See* FED. R. CRIM. P. 16(a)(1)(A); FED. R. CIV. P. 26(b)(3).

110 Although the Federal Rules permit anyone, including the party who has called the witness, to impeach a witness, *see* FED. R. EVID. 607, the prevailing view is that a prosecutor may not call a witness solely to put a prior inconsistent statement before the jury, when the prosecutor does not expect to get any helpful courtroom testimony from the witness and when the inconsistent statement is not admissible for substantive purposes under rule 801(d)(1)(A). *See* United States v. Hogan, 763 F.2d 697 (5th Cir. 1985), and authorities cited therein. In such a case, the prosecutor would merely be hoping that the jury would (improperly) use the statement for the

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about fabrication by investigators and systemic criminal justice concerns played as much a role in limiting the use of prior inconsistent statements as did the orthodox concern about immediate cross-examination of the declarant. The version of the rule proposed by the advisory committee and transmitted by the Supreme Court to Congress would have permitted the substantive use of any prior inconsistent statement.[111] Opponents of the rule argued that the liberalization would give too much power to investigators, and would encourage fabrication and other misconduct.[112] Influenced by the danger of fabrication by in-court witnesses,[113] the House amended the bill so that it gave substantive effect only to inconsistent statements given under oath, subject to cross-examination, at a trial or hearing or in a deposition.[114] After further revision later in the legislative process, the rule's cross-examination requirement was dropped. In its final form, the rule permits the substantive use of prior inconsistent statements that were "given under oath subject to the penalty of perjury at a trial,

truth of what it asserts, and hence the statement should be excluded as prejudicial under rule 403 FED R EVID 403

111 FED R EVID 801(d)(1)(A) (Supreme Court Proposed Draft 1973), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc. 7, at 27

112 This concern is reflected in the reasons that the House Committee on the Judiciary gave for amending the prior inconsistent statement rule *See* note 113 *infra* *See also House Special Subcomm Hearings, supra* note 50, at 244 (statement of Frederick D McDonald); *House Evidence Rules Hearings, supra* note 43, at 92-93 (statement of Frederick D. McDonald). McDonald argued that if prior inconsistent statements were admissible for substantive purposes, "[t]he power of investigators will be unduly enhanced." *Id.* When an investigator takes a statement, McDonald noted, he will have created admissible evidence even if the witness later makes an inconsistent statement This power is subject to abuse An investigator represents only one side, and hence will overlook or fail to uncover facts favorable to the other side Also, "[t]he proposed rule will place excessive power in the hands of governmental agencies and other organizations whose work includes court use The rule will tip the scales of justice much more toward agencies, organizations and those few individuals who can afford investigators and away from the less affluent" *Id* He also stated that

> The [proposed] rule [making prior inconsistent statements admissible for substantive purposes] means that investigators, government and otherwise, can — out of court, and out of the presence of anyone — take a statement from anyone and that statement, even be it unsworn, becomes substantive evidence to prove the case if the witness later varies from it. It will make it possible for investigators to create airtight cases long before trial or indictment.

House Special Subcomm. Hearings, supra note 50, at 244 *See also Senate Hearings, supra* note 49, at 302 (statement of Herbert Semmel, Washington Council of Lawyers) *Cf.* State v Spadafore, 220 S E 2d 655, 664 (W. Va 1975)

113 *See* H R. REP NO 650, *supra* note 43, at 13 This report gave two reasons for the Committee's proposed compromise version of the prior inconsistent statement rule

> (1) *unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made;* and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement.

Id (emphasis added). The second reason, insofar as it refers to cross-examination, does not apply to the final version of rule 801(d)(1)(A), but the first reason is still fully applicable

114 *See* M GRAHAM, *supra* note 18, at 138-39

hearing, or other proceeding, or in a deposition."[115] This rule permits substantive use of grand jury testimony, which need not be under cross-examination. The best explanation for permitting this use of grand jury testimony, while precluding substantive use of informal witness statements, is not that grand jury witnesses are trustworthy, but that witness testimony in a grand jury proceeding is likely to be accurately recorded and will not be fabricated by the in-court witness.[116] To some degree, the testimony is also insulated from the dangers of station-house interrogation, and hence its acceptability is enhanced by the fact that it does not raise the same degree of concern about abuse of power by interrogators as does the reception of informal witness statements.

The admissions exception — or exemption[117] — is also difficult to explain under the untested declarant thesis.[118] Under that thesis, exceptions to the hearsay rule are justified when circumstantial guarantees of trustworthiness compensate for the absence of cross-examination. Yet admissions are not required to be trustworthy. An admission need not have been against interest or have any other indicia of reliability.[119] Commentators have noted this anomaly, and have tended to treat the admissions exception as *sui generis.* The advisory committee, noting that "[n]o guarantee of trustworthiness is required in the case of an admission," stated that "[its] admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule."[120] Other commentators have said that the exception is based upon the notion that a party cannot complain about the party's own unreliability,[121] or that admissions are received

115. FED R EVID. 801(d)(1)(A)

116 *See* note 113 *supra* and accompanying text.

117 Following Wigmore, the advisory committee decided to classify admissions as nonhearsay, instead of classifying them as hearsay admissible under an exception The committee reasoned that "[a]dmissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." FED. R EVID. 801(d)(2) advisory committee's note

118. For a more extended treatment of this topic, *see* R PARK, THE RATIONALE OF PERSONAL ADMISSIONS (forthcoming)

119 *See* FED R. EVID 801(d)(2) advisory committee's note (commenting that "[n]o guarantee of trustworthiness is required in the case of an admission") *See also* Morgan, *Admissions.* 12 WASH L REV. 181, 182 (1937), 4 WIGMORE (Chadbourn ed), *supra* note 8, § 1048

120. FED. R. EVID. 801(d)(2) advisory committee's note.

121. *See* E MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (1962), C. MCCORMICK, *supra* note 8, § 239, at 503 ("This notion that it does not lie in the opponent's mouth to question the trustworthiness of his own declarations is an expression of feeling rather than logic but it is an emotion so universal that it may stand for a reason ").

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as a judicial punishment for inconsistency.[122]

The assertion that admissions are received as a "result of the adversary system" does not, standing alone, justify anything. It amounts to nothing more than saying "that's the way the system operates."[123] The other theories, which are based upon the idea that "you said it and you're stuck with it," do help explain why the exception is emotionally appealing. It seems likely, however, that the exception has maintained its remarkable appeal partly for other reasons, which include the relative absence of problems of surprise, discretion, and abuse of governmental power. Ordinarily, the party against whom an admission is offered will not be surprised by it because the statement came from the party's own mouth. By questioning the client, the lawyer should be able to learn of the admission and prepare to rebut or explain it. Even the totally fabricated admission should not be a surprise to a diligent lawyer; the lawyer would routinely be entitled to know about alleged admissions of the client through discovery, even in criminal cases.[124] Moreover, the rule receiving personal admissions raises no problems of judicial discretion. It is clear and categorical. Finally, the concern in criminal cases that reception of hearsay evidence may lead to abuse of government power has been mitigated by the operation of doctrines other than the hearsay rule. When an admission is offered against the defendant in a criminal case, fifth amendment rules governing confessions serve to regulate the conduct of statement-takers and protect against the reception of evidence created by government coercion.[125]

A related "exception" to the hearsay rule is one that James McElhaney, in a humorous treatment of courtroom oddities, has called the "Cleveland Exception."[126] Under the "Cleveland Exception," any-

122. *See* Lev, *The Law of Vicarious Admissions — An Estoppel,* 26 U. CIN. L. REV. 17, 29 (1957)

123. Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing,* 12 HOFSTRA L. REV. 393, 419 (1984)

124. Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure gives the defendant the right, on discovery, to a copy of any written or recorded statement made by the defendant, and to "the substance of any oral statement [by the defendant] which the government intends to offer in evidence " In civil cases, statements by a party are freely discoverable by the party who made them through interrogatories and requests for documents. The work product doctrine does not require a showing of special need for the discovery of the party's own statement. *See* FED. R. CIV. P. 26(b)(3)

125. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966) (accused must be informed of rights to counsel and to refuse to answer questions); Jackson v. Denno, 378 U.S. 368 (1964) (reception of involuntary confessions violates due process). In applying these constitutional safeguards, the courts have not distinguished between admissions that are confessions (statements directly conceding that the defendant committed the crime) and other admissions offered by the prosecution. *See* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 413 (1982)

126. McElhaney, *The Cleveland Exception to the Hearsay Rule and Other Courtroom Oddi-*

thing said in the defendant's presence is admissible against the defendant.[127] This is, of course, a rule of thumb and not formal hearsay doctrine. The presence of the defendant *may* be relevant to admissibility (for example, the presence of the defendant is necessary if a statement is being offered as an adoptive admission), but the presence of the defendant is not conclusive. For example, if the defendant is accused of a bad act and *denies* the accusation, then the statement is not admissible. Yet the persistence of the notion among some trial lawyers that whatever is said in the presence of the defendant is admissible suggests an intuitive feeling that it is fair to admit such statements. The defendant has been put on notice of the accusation or other statement and can take the stand to rebut or explain it. Without defending the purported "rule," I offer its remarkable courtroom vitality as evidence that notice and absence of surprise are considered, consciously or not, to be significant factors favoring the admission of hearsay.

Further evidence of multiple reasons for exclusion may be found in the law regarding declarations against penal interest. The concern about fabrication by the in-court witness explains, in part, the long judicial reluctance to accept declarations against penal interest as an exception to the hearsay rule. At common law, statements against pecuniary or proprietary interest were admissible if the declarant was unavailable; statements against penal interest were not. Thus, the utterances "I gave away my tiara to my oldest daughter" or "I owe Hanson $500" were admissible under the exception, but "I am the Boston strangler" was not (although of course it could come in as the admission of a party-opponent when the declarant was a party). This result seems at first anomalous under the untested declarant rationale, since a concession that the declarant committed a crime would usually subject the declarant to greater danger than a declaration against financial interest, and therefore would not likely be said unless it was true.

In fact, however, the circumstances under which penal interest statements were made often gave rise to doubts about both the sincerity of the declarant and the truthfulness of the in-court witness. The statement against penal interest often became crucial when it was offered by the defendant as the confession of a third person to the crime with which the defendant was charged. The third person might be

ties, 1 REV LITIGATION 93, 112-13 (1980) *Cf.* McDaniels, *Rule 801 More Than a Definition*, LITIGATION, Fall 1975, at 17 (referring to the same rule as the "Philadelphia Exception")

127. *See, e.g.*, Di Carlo v. United States, 6 F 2d 364, 366 (2d Cir 1925) (Hand, J) ("It is a common error to suppose that everything said in the presence of a defendant is ipso facto admissible against him "). For evidence that this rule of thumb has overseas adherents, see Strachan, *Hearsay — Statements Made Before Defendant*, 120 NEW L J 1185, 1185-86 (1970) (complaining about automatic admission of such statements in English magistrates' courts).

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131 *See* FED. R EVID 80
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132 *Id.*

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unavailable, and there might be great doubt about whether the statement was made, whether it was made voluntarily, and if made voluntarily, whether it was true. Courts were reluctant to admit these statements because of doubts about both the declarant and the in-court witness. McCormick ascribed judicial reluctance to accept the statements to "fear of opening a door to a flood of witnesses testifying falsely to confessions that were never made . . . ."[128] Wigmore recognized that "[t]he only plausible reason of policy that has ever been advanced for such a limitation [excluding statements against penal interest from the exception for declarations against interest] is the possibility of procuring fabricated testimony to such an admission if oral." Typically, he condemned this justification, which does not fit his untested declarant theory, saying that

> This is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of evidence, viz., the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies. The truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent.[129]

The Revised Draft of the Federal Rules of Evidence submitted to the Supreme Court by the advisory committee in 1971 contained an exception that would have received declarations against penal interest freely, even when used to exonerate the accused.[130] The advisory committee recognized that the decisional law manifested a distrust of evidence of confessions by third parties "arising from suspicions of fabrication either *of the fact of the making of the confession* or in its contents, enhanced in either instance by the required unavailability of the declarant."[131] However, it expressed the view that questions of fabrication should be "trusted to the competence of juries."[132] After receiving comments from Senator McClellan criticizing this rule, the Supreme Court added a provision that "[a] statement tending to exculpate the accused is not admissible unless corroborated."[133]

The advisory committee revised its note to reflect the change. It noted again the concern about fabrication "either of the fact of the

128 MCCORMICK ON EVIDENCE, *supra* note 6, at 823

129 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1477, at 358-59 (footnote omitted).

130. FED R. EVID 804(b)(4) (Supreme Court Proposed Draft 1973), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc 6.

131 *See* FED R EVID. 804(b)(4) advisory committee's note to proposed rule, *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc 6 (emphasis added)

132 *Id.*

133 *See* 4 J WEINSTEIN & M BERGER, WEINSTEIN'S EVIDENCE ¶¶ 804-12, 804-140 (1985)

making of the confession or in its contents" but maintained that penal interest statements often have the required degree of trustworthiness. It concluded by stating that the corroboration requirement had been added to "effect an accommodation between these competing considerations."[134] Subsequently the House Judiciary Committee proposed an amendment to the rule that would require that an exonerating confession be "clearly" corroborated, expressing a concern that otherwise the defendant's testimony alone would be enough to corroborate the statement.[135] The amendment was accepted by Congress and is contained in the present rule.

This treatment of declarations against penal interest in criminal cases reflects concern for fabrication both by the in-court witness and by the out-of-court declarant, and a distrust of the jury's ability to detect this fabrication. In civil cases, by contrast, declarations against penal interest are freely admissible without any requirement of corroboration. This rule does in this context what I will later argue should be done generally: it creates a distinction between civil and criminal cases, based upon the different institutional considerations and the differences in the type of judgment the trier is required to make.

Throughout this section, I have tried to illustrate that the untested declarant theory is an incomplete explanation of the structure of the hearsay rules. It must be conceded, however, that the untested declarant theory has been a powerful force in shaping the hearsay rules. The theory explains the absence of any restriction on the admission of statements that are not offered for the truth of the matter asserted.[136] The fact that they are admitted freely suggests that once concerns about the reliability of the declarant are removed,[137] other concerns are not strong enough to bar admission. This inference from the admission of statements not offered for their truth is strongest if we focus solely upon rules labeled by current doctrine as "hearsay" and ignore other rules governing the admission of out-of-court statements. Concededly the predominant concern of the hearsay rules is the reliability of the out-of-court declarant; though important, problems with the in-court witness are secondary considerations. However, if we look gen-

134 FED R EVID 804(b)(3) advisory committee's note

135 H.R. REP NO 650, *supra* note 43, at 16

136. Under the conventional definition, a statement is not hearsay if it is not offered to prove the truth of the matter asserted *See, e.g.*, FED R EVID 801(c)

137 Generally, when statements are not offered for the truth of the matter asserted, they do not depend for value on the credibility of the declarant, and hence there is no reason for concern about the declarant's reliability For examples of special situations in which a statement not offered for the truth of the matter asserted will depend to some degree upon the declarant's credibility, see Park, *supra* note 94, at 426-35

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erally to rules about the reception of out-of-court verbal utterances, then we find a good deal of concern about the in-court witness. The best evidence rule, for example, is a rule of preference based upon the idea that the in-court witness may mistakenly transmit the contents of a document or other recorded utterance.[138] In jurisdictions where they survive, the dead man's statutes reflect concern about fabrication of out-of-court statements.[139] "Substantive" rules about the formalities required for contracts, wills, and other legal acts are partly based upon the idea that ritual informs judgment, and partly upon the idea that oral utterances may be fabricated or erroneously reported.[140] The statute of frauds is expressly aimed at fabricated utterances.[141] Were it not for these other rules governing the admissibility of out-of-court verbal utterances, the hearsay rule would most likely reflect concerns of mistake and fabrication in these areas. Of course, there is nothing inherently wrong with doctrinal classification, if it could be done, of evidence rules into those concerned with the untested declarant (hearsay rules) and those concerned with the flawed in-court witness (best evidence rule, dead man's statute, statute of frauds, etc.). Perhaps doctrinal purity would be served by systematically restricting the hearsay rule to situations in which a single concern (the untested declarant) justifies exclusion. Yet this division in principle is a difficult one to maintain in application, since multiple concerns often converge in the context of a single type of statement — such as the confession of a third party offered to exonerate the defendant in a criminal case. Thus, when exclusion of a statement is based in any degree upon concerns about the reliability of the out-of-court declarant, it is convenient to classify that type of statement as "hearsay" and to modify the structure of the rule to reflect additional concerns about witness fabrication.

In this Part, I have attempted to describe how the structure of the hearsay rule is consistent not only with the untested declarant rationale, but also with concerns about surprise and witness unreliability. The fourth concern listed in Part I, the concern about judicial discretion, also permeates the structure of the hearsay rules. The retention of class exceptions, in lieu of adoption of a single broad rule (*e.g.*, that reliable hearsay is admissible), is largely attributable to concern about judicial discretion. The class exceptions limit judicial discretion to exclude hearsay by setting forth specific categories that are not pro-

138 *See* FED R EVID. 1001-1008 and corresponding advisory committee's notes

139 *See* note 84 *supra.*

140 *See* notes 80-82 *supra* and accompanying text

141. *See* note 81 *supra.*

scribed by the hearsay ban. They also limit discretion to admit hearsay — either by setting forth specific rules of exclusion, as in the case of police records,[142] or by restricting the scope of the residual exceptions by negative implication.[143] Moreover, the conditions with which Congress hedged the residual exceptions were intended to limit the discretion of judges to receive hearsay that does not fall under conventional exceptions.[144]

Finally, the structure of the rules excluding hearsay reflects a degree of appreciation of the need for greater protection in criminal cases. As briefly noted above, some exceptions contain express distinctions between civil and criminal cases. One of the most important of these is the public records exception, which became a subject of controversy in Congress because it initially failed to provide adequate protection for defendants in criminal cases. Originally, the Supreme Court transmitted a public records rule recommended by the advisory committee that would have permitted the firsthand observations of police officers to be proven by their police reports, though it would have forbidden the use of public-record "factual findings" by the government in criminal cases.[145] The Federal Rules were amended on the floor of the House to prohibit as well the reception "in criminal cases [of] matters observed by police officers and other law enforcement personnel."[146]

142. *See* text at notes 145-46 *infra.*

143. One can infer by negative implication that hearsay failing to fit a class exception designed to cover the situation presented should also be excluded when offered under the residual exceptions *See* Zenith Radio Corp v. Matsushita Elec Indus. Co , 505 F. Supp 1190, 1262-64 (E D. Pa 1980), *revd on other grounds sub nom. In re* Japanese Elec. Prods Antitrust Litig , 723 F 2d 238 (3d Cir. 1983), *revd on other grounds,* 475 U S 574 (1986), *cert. denied,* 107 S Ct 1955 (1987), Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule. Two Exceptions in Search of a Rule,* 57 N.Y U. L. REV. 867, 885-88 (1982)

144 *See, e.g ,* REPORT OF SENATE COMM. ON THE JUDICIARY, S. REP NO. 1277, 93d Cong , 2d Sess. 18-20 (1974), *reprinted in* 1974, U S CODE CONG & ADMIN NEWS 7051, 7065-66.

145 *See* FED R. EVID. 803(8) (Advisory Comm Revised Draft 1971), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc 6, at 106; FED. R EVID. 803(8) (Supreme Court Proposed Draft 1973), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc 7, at 29.

146 FED R EVID 803(8)(B). *See* 120 CONG REC H2387-89 (daily ed Feb. 6, 1974) The bill's legislative history indicates that the representatives who offered the House amendment were concerned about the lack of cross-examination of the absent police officer *See id.* at 2387 (remarks of Representatives Holtzman and Dennis), *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 134 (West 1984). Opponents of the amendment objected that police officers were just as reliable as other public servants *See* 120 CONG REC , *supra,* at 2388 (remarks of Rep Smith), *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 135 (West 1984) The Report of the Senate Committee on the Judiciary characterized the basis for the House amendment as being "that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases " S REP NO. 1277, *supra*

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152 *See* text at notes 111-

The Federal Rules also distinguish between civil and criminal cases in their treatment of declarations against interest,[147] judgments of previous conviction,[148] dying declarations,[149] and former testimony.[150] Like the public records exception, these exceptions are uniformly more liberal in receiving hearsay evidence in civil cases than in criminal cases. Moreover, whatever the specific content of the hearsay rules, the judicial attitude toward exclusion appears to be stricter in criminal cases. Admission of hearsay is more frequently found to be reversible error in criminal cases, indicating that for practical purposes the degree of discretion accorded trial judges is less than in civil cases.[151]

Special concerns about criminal cases have also played a role in the shaping of hearsay rules that do not make an express distinction between civil and criminal cases. One such rule has already been discussed: the provision allowing limited substantive use of prior inconsistent statements. The Court's proposed version of the rule would have allowed unlimited substantive use of these statements, and Congress' decision to limit the exception was apparently based upon concerns about its effect in criminal cases.[152]

In short, the structure of the hearsay rules, as supplemented by other rules excluding out-of-court statements, reflects all of the concerns enumerated in Part I of this article. The development of rules excluding out-of-court statements has been influenced not only by concerns about the untested declarant, but also by concerns about witness

note 144, at 17, *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 137 (West 1984)

147 *See* FED R EVID 804(b)(3) (even if it meets the other requirements of a statement against interest, a statement "tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement")

148 Rule 803(22) excludes judgments against persons other than the accused when they are offered by the government in a criminal proceeding for purposes other than impeachment This provision is a codification of Kirby v United States, 174 U S. 47 (1899) (in prosecution for possessing stolen postage stamps, confrontation clause prohibits introduction of conviction of another for purposes of proving that the stamps were stolen)

149 FED R EVID 804(b)(2) permits dying declarations to be used in civil cases, but limits their use in criminal cases to prosecutions for homicide

150 In criminal cases, the former testimony exception applies only if the party against whom the testimony is now offered had motivations and opportunities in a prior action similar to those in the present action to offer the testimony. in civil cases, it also applies if a predecessor in interest had such motivations and opportunities in a prior action FED R EVID 804(b)(1)

151 *See* J WEINSTEIN & M BERGER, *supra* note 133, ¶ 800[03], at 800-18 Among the reasons mentioned by Weinstein and Berger for this different attitude are the greater chance of prejudice, the influence of the right to confrontation, the limits on the use of extrajudicial statements of accused imposed by the privilege against incrimination and the right to counsel, and the more limited discovery in criminal cases *Id* Elsewhere, Weinstein and Berger mention "the frequent in-custody status of witnesses" as a reason for being more chary of hearsay in criminal cases than in civil cases *Id* ¶ 800[04], at 800-19.

152 *See* text at notes 111-16 *supra*.

fabrication, the danger of surprise, problems raised by judicial discretion, and the effect of reception of hearsay upon the criminal justice system. In the next section, I will argue that these concerns justify a more broadly-based distinction between civil and criminal cases.

III. A Subject Matter Approach to Hearsay Reform

A. *Reasons for a Subject Matter Approach*

In this Part of the article, I will argue that hearsay reform should be approached by subject matter, and that civil and criminal cases should be treated differently. I will describe the different considerations raised by admission of hearsay in civil and criminal cases, and propose changes in the Federal Rules of Evidence to take account of differences in the two types of cases.

1. *Hearsay and the Confrontation Clause*

One reason to treat criminal and civil cases differently is that confrontation clause precedent impedes drastic liberalization of the hearsay rules in criminal cases. Any legislative attempt, at either the state or federal level, to make radical changes would invite appellate court litigation defining the extent to which evidence now excluded by hearsay doctrine must be excluded under the confrontation clause. The benefits of codification would be lost. While the confrontation clause could be reinterpreted to clear the way for drastic changes, that process would require an extended period of litigation and the overruling of a substantial body of Supreme Court precedent.

The confrontation clause of the sixth amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[153] The language of the amendment does not provide clear guidance about hearsay issues. It is susceptible to a variety of plausible textual interpretations. Under one interpretation, all hearsay declarants whose statements are offered by the prosecution would be considered "witnesses against" the defendant, and therefore the Constitution would require that the defendant be confronted by them at trial. This interpretation would lead to the exclusion of all hearsay, even hearsay that fell under an exception established at the time of the adoption of the amendment. Alternatively, one could interpret the amendment to require merely that the defendant be confronted with whatever witnesses the prosecution chose to produce at trial. Under this interpretation, trial witnesses could testify

153 U.S Const amend. VI.

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155 *See* California v. Green
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about hearsay declarations, and the confrontation clause would impose no limits upon the creation of new hearsay exceptions. It would merely require the presence of the defendant when evidence was presented to the trier of fact.[154] The amendment could also be construed so that "witnesses against" the defendant referred only to persons who were available to testify. Under this interpretation, the prosecution would be required to produce declarants for cross-examination when possible, but the statements of unavailable declarants could be freely admitted.[155]

The historical background of the amendment does not provide clear guidance in choosing between these or other interpretations. As Justice Harlan suggested, the confrontation clause "comes to us on faded parchment."[156] The confrontation clause was included in the Bill of Rights without congressional debate about its meaning,[157] and speculation about the scope of the clause has centered upon the legal and political climate at the time rather than upon statements made in debate.[158] One tradition holds that the clause was a reaction to the abuses that occurred at the trial of Sir Walter Raleigh in 1603.[159] Unfortunately, even if Raleigh's trial did have a major impact upon the

154 *See* Dutton v Evans, 400 U S. 74, 94 (1970) (Harlan, J., concurring); 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1397, at 131, 134 (confrontation clause should be construed so that it merely requires cross-examination of witnesses who are required to testify in court by the hearsay rules in effect at the time of trial; nothing in the clause should be construed to inhibit revision and extension of hearsay exceptions).

155 *See* California v. Green, 399 U.S 149, 174 (1970) (Harlan, J , concurring), Westen, *supra* note 8, at 1188-89; Younger, *Confrontation and Hearsay: A Look Backward, a Peek Forward,* 1 HOFSTRA L REV 32 (1973)

156 *Green,* 399 U.S. at 174 (Harlan, J , concurring). Justice Harlan's historical inquiry led him to the following conclusion:

> From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses That the Clause was intended to ordain common law rules of evidence with constitutional sanctions is doubtful, notwithstanding English decisions that equate confrontation and hearsay. Rather, having established a broad principle, it is far more likely that the Framers anticipated it would be supplemented, as a matter of judge-made common law, by prevailing rules of evidence

399 U S at 179

157 Justice Harlan noted that "[i]t is common ground that the historical understanding of the clause furnishes no solid guide to adjudication " Dutton v. Evans, 400 U.S 74, 95 (1970) (Harlan, J , concurring) *See also Green,* 399 U S at 176 & n.8 (citing 1 ANNALS OF CONG (1789-1790)) (Justice Harlan noted "the prevailing view" that "the usual primary sources and digests of the early debates contain no informative material on the confrontation right ")

158 In support of his position in *Green* that the confrontation clause excludes only the testimony of available witnesses, Justice Harlan found a "glimmer" of illumination in a brief statement made during the debate on the sixth amendment's companion provision giving the defendant the right to compulsory process. The glimmer is, however, a very faint one *See Green,* 399 U S at 177 (quoting statement in debate indicating that the compulsory process clause was understood by one debater as requiring only that defendant be able to compel the attendance of witnesses who are available at the scheduled time of trial).

159 *See, e.g.,* F HELLER, THE SIXTH AMENDMENT 106-07 (1951)

framers of the amendment, it provides little guidance about the scope of the amendment in cases of less flagrant abuse. If the amendment was intended to prohibit the type of conduct that took place at Raleigh's trial, all that we know is that patently unreliable accusations made by an accomplice while in custody should not be admitted (at least when the accomplice is readily available for testimony),[160] and perhaps that anonymous rumors from declarants without personal knowledge should be excluded as well.[161] The hearsay rule could be radically revamped without infringing upon the principle that such testimony must be excluded. Of course, the fact that the framers to some extent may have had Raleigh's trial in mind does not mean that they intended to prohibit only the specific abuses that occurred at that trial.

Other historical evidence suggests that the framers may have been reacting to a more recent event: the use of vice-admiralty courts by the Crown to prosecute colonists for trade offenses.[162] The vice-admiralty courts were criticized by colonial leaders for substituting civil law procedure for the common-law adversarial system. The right to confront witnesses was possibly intended to protect against perceived abuses of these courts, including the practice of examining witnesses in closed chambers. Again, this hypothesis does not provide clear guidance to contemporary interpretation of the confrontation clause: the framers may have intended to protect only the essentials of common-law adversarial procedure, without necessarily preventing hearsay from being introduced under evolving exceptions.[163]

In an illuminating recent article, Professor Lilly advanced the "tentative hypothesis" that the clause may have done more: it may

160 Raleigh was accused of treason against Queen Elizabeth The principal evidence against him was the statement of Lord Cobham, an alleged coconspirator, who had incriminated Raleigh in a sworn statement made before trial Cobham himself was in custody Raleigh unsuccessfully demanded that Cobham be produced for live testimony, claiming that "he is in the house hard by, and may soon be brought hither" J PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 158 (1850)

161 The evidence against Raleigh also included testimony by one Dyer, a pilot, who testified that

> Being at Lisbon, there came to me a Portugal gentleman, who asked me how the King of England did, and whether he was crowned? I answered him, that I hoped our noble King was well, and crowned by this, but the time was not come when I came from the coast of Spain "Nay," said he, "your King shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned"

Id at 162 To this Raleigh replied, "This is the saying of some wild Jesuit or beggarly priest, but what proof is it against me?" *Id*

162. *See* Lilly, *Notes on the Confrontation Clause and* Ohio v Roberts, 36 U FLA L REV 207, 210-12 (1984), Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM L BULL 99, 104 n 23 (1972)

163 *See* Lilly, *supra* note 162, at 211-12

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have given constitutional status to contemporaneous common-law doctrine excluding hearsay statements of available declarants.[164] Certainly this is one plausible interpretation of the historical record, though hardly a conclusive one. It rests not on the expressed intent of the framers, but upon the existence of common-law doctrine of which they might have been aware, and which they might have intended to constitutionalize. As Professor Lilly recognizes, the historical record is hardly conclusive, and could even be interpreted to support Wigmore's thesis that the confrontation clause does not apply when hearsay is received under an exception recognized by the rules of evidence in effect at the time of trial.[165]

Viewed as an original matter, the language and history of the sixth amendment do not pose an insuperable barrier to radical alteration of the hearsay rule. Its text is susceptible to an interpretation that would liberate the hearsay rule from constitutional constraints. Even assuming the propriety of a strict intentionalist perspective, the history of the amendment does not provide a clear basis for rejecting such an interpretation. Nonetheless, the sixth amendment is an obstacle to radical reform given the established body of judicial precedent that interprets the amendment as putting substantial restrictions on the admission of hearsay.

The Supreme Court has never adopted either of the extreme interpretations of the confrontation clause. In its first case interpreting the clause, it rejected the absolute exclusion view by recognizing that dying declarations were admissible, despite the fact that the defendant had never confronted the declarant.[166] Four years later, the Court effectively rejected the view that the confrontation clause allows unlimited legislative creation of new hearsay exceptions, by holding unconstitutional a federal statute that permitted a third party's conviction to be used, in a prosecution for receiving stolen goods, as evidence against the receiver that the goods were in fact stolen.[167] Subsequent cases steered between the two extremes of absolute exclusion of hearsay and absolute deference to hearsay exceptions. It is difficult to generalize about these cases, because they dealt with particular situations

164. *Id.* at 213-14

165. *Id* at 209-10

166 Mattox v United States, 156 U S 237, 243-44 (1895) (dictum) *See also* Kirby v United States, 174 U S 47, 61 (1899) (dictum) ("[T]he admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the Constitution, and was not intended to be abrogated")

167 Kirby v United States, 174 U S. 47 (1899) The actual statute made the conviction *conclusive* evidence that the goods were stolen, but the Court did not rest its decision on this ground Instead, it made clear that merely admitting the third party's conviction into evidence was a violation of the confrontation clause. 174 U.S. at 55-56, 61.

without establishing a general principle.[168] In the 1980 case of *Ohio v. Roberts,*[169] however, the Court found majority support for an opinion that outlined a general approach to resolving confrontation issues. The *Roberts* Court established a two-pronged test for determining whether the introduction of hearsay violated the confrontation clause.

The first prong of the *Roberts* test requires that the prosecution produce the hearsay declarant or demonstrate that the declarant is unavailable.[170] The scope of this prong is limited, however. It only applies in the "usual" case;[171] the prosecution need not demonstrate unavailability in cases in which the utility of confrontation is "remote."[172]

The second prong of the *Roberts* test requires that the hearsay have "adequate 'indicia of reliability.' "[173] In some cases, this prong requires "a showing of particularized guarantees of trustworthiness." However, the Court recognized that the need for certainty in criminal trials requires more specific guidance.[174] It indicated that deference should be given to established hearsay exceptions, saying that reliability could be inferred "without more" when evidence fell under a

168 *See* Pointer v. Texas, 380 U.S 400 (1965) (introduction of testimony from preliminary hearing at which defendant was not represented, and at which he did not cross-examine the witness, violates sixth amendment as applied to states), Douglas v Alabama, 380 U S 415 (1965) (allowing prosecutor to, in effect, use accomplice's statement as evidence against defendant is unconstitutional in circumstances of case), Barber v Page, 390 U S 719 (1968) (introducing declarant's former testimony against defendant, without sufficient attempt to produce declarant for trial, violates confrontation clause), Bruton v. United States, 391 U S 123 (1968) (admitting codefendant's confession implicating both defendants violates confrontation clause, despite limiting instruction), California v. Green, 399 U S. 149 (1970) (receiving witness' prior inconsistent statement as substantive evidence permissible under circumstances of case), Dutton v Evans, 400 U.S 74 (1970) (receiving coconspirator's prior statement to cellmate permissible under circumstances of case).

In a concurring opinion, in California v Green, 399 U S at 182, Justice Harlan advocated a general theory — that the confrontation clause required the production of available witnesses, but had no application when the witness was unavailable — but the majority did not adopt it and he soon afterward abandoned it himself *See* Dutton v. Evans, 400 U S at 95-100 (Harlan, J., concurring) Justice Harlan changed his views because he had come to believe that requiring the production of available declarants in every case would be unduly inconvenient and of little utility His later view was that the confrontation clause should be construed only to guarantee the right to be present at trial and cross-examine the witnesses there presented In flagrant cases, however, the misuse of hearsay might constitute a violation of due process 400 U S at 98

169 448 U.S 56 (1980).

170. 448 U S. at 65

171. "In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant " 448 U S. at 65

172 448 U S at 65 n 7

173 448 U S at 66.

174 *See, e.g.*, 448 U.S. at 66 (referring to the "need for certainty in the workaday world of criminal trials" as one reason why, in past cases, the Court had concluded that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection' ")

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"firmly rooted" hearsay exception.[175]

The *Roberts* analysis appears to remain intact, though shifting majorities and the Court's checkered record on confrontation issues may be reason to doubt the longevity of any theory about the scope of the clause. In the course of holding that *Roberts'* unavailability requirement does not apply to statements received as admissions of a coconspirator,[176] a later majority showed some inclination to limit *Roberts* to its facts.[177] But both majority and dissent in the Court's most recent confrontation clause cases seem to have taken *Roberts* at its word and to have assumed that it states the general framework of analysis.[178]

Whatever the wavering course of its doctrine, the Supreme Court has consistently adhered to the view that the confrontation clause does more than guarantee that the defense has a right to confront only those witnesses the prosecution cares to produce. Judicial interpretation of the clause has given it a substantial role in preventing the free reception of hearsay.[179] While the Court has deferred to firmly established hearsay exceptions,[180] its opinions indicate that novel ones will be subjected to greater scrutiny. This approach is not an inevitable consequence of either the text or history of the confrontation clause, but it manifests an established judicial attitude. Legislation that attempts radical change at either the state or federal level would inevitably meet constitutional challenge — challenge that would, judging

175 448 U S. at 66 The Court indicated in a footnote that dying declarations fell under a "firmly rooted" hearsay exception, and implied that hearsay falling under the business records and public records exceptions would also pass confrontation clause scrutiny, at least where those exceptions were "properly administered." 448 U.S at 66 n 8 Subsequently, in Bourjaily v United States, 107 S. Ct 2775 (1987), the Court held that no particularized showing of reliability need be made when evidence meets the requirements of FED R EVID 801(d)(2)(E) (statements of coconspirators).

176 United States v. Inadi, 475 U.S 387 (1986). *Inadi* reasoned that the coconspirators' statements had an evidentiary significance that could not be duplicated by in-court testimony 475 U S at 395.

177 The Court stated that "*Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts All of these indicate that *Roberts* simply reaffirmed a longstanding rule that applies unavailability analysis to prior testimony." 475 U S at 394 (citations omitted)

178. *See* Lee v Illinois, 106 S. Ct 2056, 2064-65 (1986); Bourjaily v United States, 107 S Ct 2775 (1987) For a useful analysis of the current status of *Roberts*, see United States v Bernard S , 795 F.2d 749, 753-56 (9th Cir 1986)

179 *See Lee*, 106 S Ct 2056 (1986); cases cited in note 168 *supra*.

180 *See* Ohio v Roberts, 448 U S 56, 66 (1980) (dictum) (confrontation clause does not require additional showing of reliability when case falls within a "firmly rooted hearsay exception"); G LILLY, *supra* note 21, at 277-78 ("If the statements in question fall within a hearsay exception and thus have the imprimatur of judicial and legislative experience, this fact should weigh heavily in favor of a determination that the right to confrontation has been satisfied ")

from past practice, often succeed. That fact alone provides one reason for not attempting radical reform in criminal cases.

The confrontation clause is not, however, a complete answer to those who advocate liberalizing the hearsay rule in criminal cases. If there are strong functional justifications for relaxing the hearsay rule, then the appropriate legislative course might still be to seek broad reform, and hope that in the long run courts would cooperate by interpreting the confrontation clause to permit such reform to stand. Nothing in the history or text of the clause would render such an interpretation illegitimate. While judicial precedent under the clause is an obstacle to broad reform, ultimately the issue of reform must be judged on its merits. Therefore, I will examine functional considerations that justify maintaining a more restrictive attitude toward hearsay in criminal cases than in civil cases.

2. *Unreliability and Misvaluation*

Several differences between civil and criminal cases justify different treatment of hearsay evidence. One major difference lies in the sources of the statements that would become admissible under a liberal view of the admissibility of hearsay. Criminal cases often turn upon the evidence of accomplices and informers. The evidence of accomplices has always been considered suspect because of the motive to shift blame, curry favor, or retaliate against an unfaithful partner.[181] Moreover, accomplice statements that are not admissible under traditional hearsay exceptions[182] are often those given in response to police interroga-

181 *See, e.g., Lee*, 106 S Ct at 2056, 2062 (describing dangers of accepting accusations of accomplices), State v. Spadafore, 159 W Va 236, 251, 220 S E 2d 655, 664 (1975) ("Frequently witnesses in criminal cases are implicated in the criminal activity at issue . . . and the prosecutorial authorities can induce fear, a sense of guilt, and panic, in such a way as to cause distortion of the facts"). Suspicion of accomplices has led to judicial instructions admonishing the jury to use caution in evaluating their testimony and, in some jurisdictions, to requirements that testimony of accomplices be corroborated. *See* 7 WIGMORE (Chadbourn ed.), *supra* note 8, § 2056

182 Some of the existing exceptions and exemptions are tailored so that they do not provide a basis for receiving statements of accomplices given in response to police interrogation. For example, the rule exempting coconspirator's declarations requires that the statement be made in furtherance of and during the course of the conspiracy, in effect preventing the reception of statements obtained by station house interrogation. *See* FED R EVID 801(d)(2). The rule permitting substantive use of prior inconsistent statements would, as originally proposed, have permitted the reception of statements obtained during interrogation when the witness testified inconsistently on the stand, *see* text at note 111 *supra*, but the rule was amended in Congress so that it now applies only to statements given under oath in a trial or other proceeding. *See* FED R EVID 801(d)(1)(A). The statements may still be usable for impeachment, but not if the prosecutor's sole purpose in calling the witness is to put the statement before the jury. *See* note 110 *supra*. The declaration against interest rule does not, however, contain any express prohibition of use of accomplice statements or use of statements obtained during interrogation. A provision that would have attempted to codify the doctrine of Bruton v. United States, 391 U.S. 123 (1968), by providing that the exception did not cover "a statement or confession offered against

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tion, with the police interrogators playing on the subject's desire to shift blame.[183] Informers, by the nature of their work, lead lives of pretension and duplicity and are often susceptible to pressures to incriminate others.

The unreliability of informers and accomplices would not be a reason for excluding their hearsay statements if the jury could assess them accurately. Yet the problem of assessment is quite different from that presented by the ordinary witness in a civil case. It is easy to understand, for example, how the interest of a party in a civil case might influence the party. The assessment of reliability of an informer or accomplice requires an understanding of institutional practices with which jurors have had little experience. Jurors must take into account methods of police interrogation, the character of someone far outside their usual circles, and the effect of offers of immunity or leniency.[184]

A second source of evidence in criminal cases is police officers and other law enforcement personnel. Here the adversarial nature of their work creates a problem of reliability.[185] However, even if one assumes

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the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused," appeared in the advisory committee's 1971 Proposal and in the House version of rule 803(b)(3), *see* note 228 *infra*, but was eliminated from the final version of the rules after having been stricken in the Senate. The conference committee reasoned that omitting this provision reflected "the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles." H R CONF REP No. 1597, 93d Cong., 2d Sess. 12, *reprinted in* 1974 U S CODE CONG & ADMIN NEWS 7051, 7106, *and in* 4 BAILEY & TRELLES, *supra* note 14, Doc 16, at 12. Limits on use of statements against penal interest for purposes of incriminating an accomplice of the declarant have therefore been left to case law development under the confrontation clause For a case in which a declaration against interest was held inadmissible on confrontation clause grounds, see *Lee*, 106 S Ct 2056 (1986)

183. For interrogation manuals that describe shifting-the-blame techniques, see R ARTHER & R CAPUTO, INTERROGATION FOR INVESTIGATORS 44-45, 83-84 (1959), A AUBRY, JR & R CAPUTO, CRIMINAL INTERROGATION 121-22 (1980)

184 For example, suppose a case in which the principal witness for the government is an informer who was once part of a drug ring, and who now is testifying for the prosecution in return for leniency Examination of the witness may reveal bias caused by the offer of leniency, a prior record, a history of drug abuse, participation in the crimes charged, inexplicable lapses of memory, and other defects. It is true that these points could be made, in a less vivid fashion, by impeachment of the witness' out-of-court statement if he did not testify but the impeachment is likely to lose some of its force. On the stand, the witness' lapses of memory and inconsistencies will be more vivid, and demeanor clues may include nervousness, dullness of affect, unresponsiveness, and even signs of drug use The jury may not be able to foresee all of these things in its review of an out-of-court statement

185 While it is difficult to substantiate claims that police perjury is widespread (or that it is not), a number of observers have regarded it as a significant problem in criminal cases *See* R LEMPERT & S SALTZBURG, *supra* note 27, at 513 & n 28 ("The policymaker cannot ignore a growing body of evidence that perjury is not an uncommon aspect of police work"), Younger, *Constitutional Protection on Search and Seizure Dead?*, 3 TRIAL 41, 41 (Aug-Sep 1967) ("[A]s every lawyer knows who practices in the criminal courts, police perjury is commonplace"), *Police Perjury An Interview with Martin Garbus*, 8 CRIM L BULL 363, 364-65 (1972) ("[I]n some thirteen years of practice I have handled perhaps 150 drug cases I cannot recall a single case — not one — where I was not convinced that to a greater or lesser degree the police witness shaped his testimony"), Grano, *A Dilemma for Defense Counsel*, 1971 U ILL L F 405, 409

as a general matter that police officers are just as reliable as anyone else, the danger that jurors would misvalue their statements would still be a serious concern. If the out-of-court reports and other statements of police officers were to become freely admissible, jurors would often be faced with the naked choice of accepting them or rejecting them. A police report that claims personal knowledge and recounts detailed facts that incriminate a defendant cannot, in the absence of cross-examination, be effectively impeached. The question of impeachment implicates the jury's entire view of the reliability of law enforcement personnel, and its faith in the criminal justice system. Cross-examination is necessary so that individual defects in perception and opportunity to observe can be explored, and can provide grounds for the jury to discount the testimony even if it is unwilling to believe that the testimony is consciously false.

Other dangers would be created by admission of in-court testimony by police officers about the statements of nonpolice declarants. First, this testimony would substitute an experienced professional witness for one who might be more vulnerable to impeachment. Second, the dangers of undetected misreport or fabrication are greater than with other witnesses. As I have argued earlier, it is often difficult to use cross-examination to expose problems of perception and opportunity to observe when the witness is recounting a statement made in private.[186] The confident witness who testifies to certainty about the accuracy of his reporting of a statement forces the trier to decide, not whether he might be mistaken, but whether he is fabricating — either about the degree of certainty or about the statement itself. Cross-examination is probably less useful in exposing fabrication than in exposing defects in memory and perception.[187] Police officers who could freely testify about the statements of others would be tempted to fabricate or exaggerate, with little fear of exposure. The mantle of legiti-

("[T]he threat of police perjury is much greater than most courts are willing to acknowledge"), A DERSHOWITZ, THE BEST DEFENSE xxi (1982), Oteri & Perratta, *"Dropsy" Evidence and the Viability of the Exclusionary Rule*, 1 CONT DRUG PROB 35 (1971); S TERKEL, WORKING 138 (1974); Wolchover, *Police Perjury in London*, 136 NEW L J 181-83 (1986) (survey of barristers indicates that 75% agree with estimate that police perjury occurs in three out of ten trials in London criminal courts). For judicial expressions of concern about the possibility of widespread police perjury, see Briscoe v LaHue, 460 U S 325, 365 (Marshall, J., dissenting), Veney v United States, 344 F 2d 542, 543 (D C. Cir.), *cert. denied*, 382 U S 852 (1965), People v McMurty, 64 Misc 2d 63, 64, 314 N Y S 2d 194, 196 (N Y City Crim. Ct 1970) (Younger, J.)

186 *See* text at notes 30-31 *supra*

187 *See* Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN L REV 682, 690-91 & n 22 (1962) (citing 3 F BUSCH, LAW AND TACTICS IN JURY TRIALS 527 (1960), C FRICKE, PLANNING AND TRYING CASES 367 (rev ed 1957), and F WELLMAN, THE ART OF CROSS-EXAMINATION 53 (3d ed 1924)), Morgan, *supra* note 41, at 186

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macy that comes with the office is a difficult one to penetrate if the jury is presented only with the polar alternatives of believing the officer to be completely truthful or a liar.

A third source of evidence in criminal cases is the defendant himself. Of course, statements by the defendant offered by the prosecution are freely admissible under existing law, unless the statement is a confession obtained by illegal methods.[188] The effect of abolition of the hearsay rule would be to make a defendant's statements admissible on his own behalf. This would encourage defense tactics designed to deprive the jury of the opportunity to observe the cross-examination of the defendant. The defendant is always available for testimony in a criminal case, with the rare exception of cases tried *in absentia* because the defendant has fled after the commencement of trial.[189] Yet, in contrast to civil cases, the defendant cannot be compelled by the opposing party to submit to cross-examination.[190] Abolition of the hearsay rule would allow the defendant to tell his or her story through other witnesses without ever having to submit to cross-examination.

A fourth potential source of evidence is associates of the defendant who are prepared to testify that another person has confessed to the crime charged. Lawmakers have long recognized that this testimony is likely to be unreliable because of fabrication by the in-court witness or the out-of-court declarant.[191] Because of this concern, a provision requiring corroboration of confessions offered to exonerate was included in the Federal Rules of Evidence.[192] The question whether

188. *See* FED R. EVID 801(d)(2); MCCORMICK ON EVIDENCE, *supra* note 6, § 144.

189 *See, e.g.*, FED R. CRIM. P 43 (trial cannot take place in defendant's absence, unless the defendant has voluntarily absented himself after the trial has commenced, or unless the defendant is removed for disruption after having been warned) *See generally* Cohen, *Can They Kill Me if I'm Gone· Trial by Absentia in Capital Cases*, 36 U. FLA L REV 273 (1984).

190 In criminal cases, the defendant has the right not to take the stand at all, and the prosecution may not comment upon the defendant's refusal to testify *See* W LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 882-86 (1985), Griffin v California, 380 U S 609 (1965) In civil cases, either party may call the opponent as a witness for cross-examination, *see* MCCORMICK ON EVIDENCE, *supra* note 6, § 121, FED. R EVID 611(c), and if the opponent claims a privilege against self-incrimination, the jury may draw inferences from his refusal to testify and the party calling him may comment upon the refusal *See* 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2272, at 439 (McNaughton rev ed 1961) [hereinafter WIGMORE (McNaughton ed.)]; Baxter v Palmigiano, 425 U.S 308, 318-19 (1976) Moreover, a number of jurisdictions permit sanctioning a party who refuses to testify with dismissal of the party's case. *See* Christenson v. Christenson, 281 Minn. 507, 162 N.W 2d 194 (1968), and authorities cited therein

191 *See* text at notes 128-35 *supra*. *Cf* CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, ¶ 229 (1972) (citing danger of manufactured evidence by defendant as reason for more stringent rule governing reception of hearsay in criminal cases) *Cf House Special Subcomm. Hearings*, *supra* note 50, at 252-53, 264-65 (testimony of Hon. Henry J. Friendly supporting traditional rule excluding declarations against penal interest).

192 *See* FED R. EVID. 804(b)(3), text at notes 130-35 *supra*.

such evidence should be freely admitted is not an easy one,[193] but it must at least be conceded that the circumstances give rise to greater dangers of abuse than exist in civil cases.

Another source of evidence in criminal cases is the victim of the crime. It is risky to generalize about the reliability of victim statements because they cover a broad range. They include the dispassionate statement of the merchant identifying stolen merchandise, the vindictive accusation of the victim of a two-way fight, statements of identification made under a variety of circumstances, and others. It can be said, however, that abolition of the hearsay rule would let in a variety of victim statements that are likely to be unreliable in a way

193 Because of dangers of declarant unreliability and witness fabrication, it seems clear that such statements should be excluded when the declarant is available for testimony. The out-of-court statement may have been the product of intimidation by the defendant or other improper influence. On the stand, subject to penalties of perjury and (in some cases) to enhanced possibility of punishment for the crime with which defendant is charged, the witness may tell a quite different story. Moreover, the danger that intimidation will influence the testimony is diminished. Violent pretrial intimidation serves a rational preventive purpose — it may cause the witness to give an exonerating statement. Post-trial violence against a witness who has turned against the defendant cannot cure the harm done, and is more dangerous to the defendant, who is a very natural suspect. The witness may realize this and be more forthcoming at trial than in the circumstances in which the pre-trial statement was given.

Even if the declarant is unavailable, substantial arguments can be made for exclusion. First, there is the danger that the declarant is not really unavailable, but is merely being kept out of the way. Secondly, in the case of an indisputably unavailable declarant, the opportunity for in-court fabrication is enhanced because there is no danger that the declarant will appear and withdraw the statement. Once again, the confident witness can confront the trier with the flat alternative of either accepting the testimony or labeling the witness a liar, cross-examination as to perception and memory is likely to be ineffective. *See* text at notes 30-31 *supra*. Moreover, the danger of out-of-court fabrication is greater: the declarant may know at the time that he confesses to the crime with which the defendant is charged that he will not be around to take responsibility, and hence may feel little compunction to tell the truth.

Misgivings about declarant and witness reliability would not be a sufficient basis for excluding exonerating statements were the jury able to evaluate them properly. Certainly, however, there are obstacles to evaluation, especially when the statement lacks the sort of corroboration now required by the Federal Rules of Evidence. The jury is typically faced with a statement which, if both the in-court witness and the declarant are believed, requires a not guilty verdict. The declarant cannot be cross-examined or observed; there may be a wealth of impeaching material that cannot be explored at all, and other material that cannot be explored vividly. The in-court witness can be cross-examined, but the examination is hampered in important respects. The standard of proof is reasonable doubt. Lawmakers believe experience teaches that uncorroborated statements do not generally raise a reasonable doubt. The jury, however, does not deal with the generality of cases, but freshly with the one before it, under strict instructions to resolve doubts in favor of the defendant. If the statement is admitted, it must form a conception of the circumstances under which it was offered, including, for example, the dangers of coercion in settings with which the jury is not familiar, including prisons in which inmates hold as much power as officials. Moreover, the jury must come to a decision without a broad-ranging investigation of all the situational forces at work. If the accumulated experience of lawmakers is that these statements are virtually worthless, then the hearsay rule may be an appropriate way of passing on that experience, at least in cases where the statement is uncorroborated.

Nonetheless, it is difficult to avoid the appeal of Wigmore's argument that "the truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent." 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1477, at 289.

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that could be illuminated by cross-examination. This is certainly the case with identification statements, which are notoriously unreliable and in need of full exploration.[194] Moreover, incomplete abolition, if it turned upon the discretion of the trial judge, would allow that discretion to be exercised over a wide range of reliable and unreliable statements.

Another feature of criminal cases applies to all of the types of witnesses that I have been describing. Generally, out-of-court statements relevant to criminal cases are made, in the broadest sense, with a view to litigation, or at least with knowledge that the legal process may be brought to bear on the matter being described. This is true whether the statement is a pre-crime statement by someone with knowledge of the alleged plan, or a post-crime statement by an informer, accomplice, police officer, or victim. Statements that fall outside of this category often concern rather unmemorable matters (for example, the appearance of a person who bought an airline ticket) and themselves carry problems of trustworthiness. Moreover, many of the declarants' statements are taken by police, often under interrogation — a process essential in producing investigative leads but not calculated to elicit spontaneous statements that spring from a spirit of candor.

Attempting to draw a general contrast with civil cases is a risky venture. Civil cases fall across a broad range, from complex antitrust litigation to simple personal injury cases, and the persons with knowledge of relevant facts are similarly diverse. Nevertheless, it is fair to note the absence, or at least greatly diminished role, of declarants who are informers, accomplices, or prisoners. Police officers sometimes have relevant knowledge, but the outcome of a case does not normally affect their professional status. The parties may call each other to the stand for cross-examination if self-serving out-of-court statements are introduced by an available opponent. New trials may be granted on behalf of either party if the jury is sufficiently misled by hearsay evidence. Impeachment material is likely to be less rich than in criminal cases, diminishing the need for observation of witnesses as they are confronted with evidence undermining character and credibility. Moreover, achieving a settlement that satisfies the parties may be as important as any other goal. Giving the parties freedom to offer the same evidence that they would use in resolving disputes in ordinary life should promote, not detract from, achieving that goal.

194 *See* State v. Chapple, 135 Ariz. 281, 660 P 2d 1208 (1983) (exploring dangers of eyewitness identification and allowing expert testimony on the subject) *See generally* E LOFTUS, EYEWITNESS TESTIMONY (1979)

3. *The Element of Surprise*

In Parts I and II of this article, I described the five principal concerns of the hearsay rule. So far, I have mainly focused in this Part upon the first two concerns: the possible unreliability of an untested declarant, and the possibility of undetected fabrication or misreport by the in-court witness. I now turn to a third concern: the danger of unfair surprise at trial.

The Federal Rules of Civil Procedure provide many techniques by which a litigant may seek to obtain information about hearsay testimony that may be offered by the opposing party. Depositions can be used to explore the knowledge of witnesses, including knowledge obtained by hearsay.[195] The opposing party may be questioned through written interrogatories.[196] Pretrial lists of witnesses and of documents that will be offered in evidence may be required by the court.[197] Prior statements of witnesses may be obtained upon a showing of need,[198] and in some jurisdictions without any showing.[199] In criminal proceedings, the rules of discovery are much more restrictive.[200] For example, under the Federal Rules of Criminal Procedure, depositions are permitted only upon a showing of exceptional circumstances; their purpose is to preserve testimony for use at trial, not to provide discovery.[201] The defendant is not entitled to a transcript of grand jury testimony as a matter of right,[202] and prior statements of prosecution witnesses may be obtained of right only after the direct testimony of the witness.[203]

Of course, in a reform aimed at making hearsay freely admissible in criminal cases, the problem of notice could be handled by making specific notice a precondition for the admission of hearsay, or at least a precondition for admission of hearsay that did not fall under a traditional exception. Yet the influences that now limit criminal discovery would affect this notice provision, either making the reform more limited than what is desired, or making the notice provision partially ineffective. In criminal cas
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195 *See* FED R CIV P 26, 30

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197 Rule 16 of the Federal Rules of Civil Procedure gives trial judges authority to require lists of witnesses and documents to be offered at trial, though they are not required to exercise this authority FED R CIV P 16; 6 C WRIGHT & A MILLER, *supra* note 86, § 1525, at 589 & Supp (1987), at 316

198 *See* FED R CIV. P 26(b)(3)

199 *See, e.g.*, MINN. R CIV P. 26.02(3)

200 *See generally* W LAFAVE & J ISRAEL, *supra* note 190, at 725-64.

201 *See* FED R CRIM P 15(a)

202 *See* FED R CRIM P 16(a)(3)

203 *See* FED R CRIM P 16(a)(2); Jencks Act, 18 U.S.C § 3500 (1982)

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fective. In criminal cases, discovery from the prosecution is restricted because of fear of intimidation and fabrication by the defendant. Discovery from the defense is restricted because of concerns about self-incrimination and a feeling that if discovery from prosecution files is limited, reciprocity requires that discovery from defense files also be limited.[204] Witnesses who report hearsay declarations are as vulnerable to intimidation as any other, and defendants can fabricate evidence to counter hearsay declarations as easily as they can fabricate any other evidence. Prosecutors would be reluctant to give notice for the same reason that they are now reluctant to give discovery. Moreover, the uncertainty of a criminal trial, with its turncoat witnesses and surprise testimony, would discourage pretrial notice; parties often do not know that certain evidence is needed before seeing what actually happens at trial.[205] For this reason, the federal courts have shown a marked tendency to ignore the requirement of pretrial notice that is now embodied in the residual exceptions.[206] I am not saying that hearsay reform based upon notice would be totally futile in criminal cases. Certainly a provision making evidence freely admissible upon notice would result in the admission of some evidence that is now excluded. However, there would still be temptations to forego notice in hopes that a traditional exception could be stretched to cover the case[207] or that the judge would ignore the notice requirement. Finally, notice alone would not put the criminal defendant in the same position as a civil litigant. The civil discovery rules provide an opportunity for pretrial examination of available declarants. Armed with information from depositions or discovery of witness statements, the civil litigant is in a better position to decide whether to combat the opponent's hear-

204. *See* W LAFAVE & J ISRAEL, *supra* note 190, at 725-28

205 Moreover, the desire for a speedy determination — and, in many jurisdictions, the use of a twelve-person jury — makes it more difficult to give continuances during trial than is the case in civil actions

206. Both residual exceptions provide that

> a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant

FED R EVID 803(24), 804(b)(5) Several circuits have declined to follow the literal language of the rules *See* United States v Parker, 749 F 2d 628, 633 (11th Cir 1984), United States v Heyward, 729 F 2d 297, 299 n.1 (4th Cir 1984) (dictum), Piva v Xerox Corp , 654 F 2d 591, 595 (9th Cir 1981), United States v Carlson, 547 F 2d 1346, 1355 (8th Cir 1976), *cert. denied*, 431 U S 914 (1977), United States v Leslie, 542 F 2d 285, 291 (5th Cir 1976), United States v Bailey, 581 F 2d 341, 348 (3d Cir 1978) *But see* United States v Ruffin, 575 F 2d 346 (2d Cir 1978) (notice requirement interpreted strictly), United States v Atkins, 618 F 2d 366, 372 (5th Cir 1980) (same, in alternative holding)

207 This argument assumes that the traditional exceptions would be retained as a supplement to a notice system For a discussion of the impracticality of a pure notice system that did not retain traditional exceptions, see Part III B 2 a.(3) *infra*.

say evidence by calling the declarant for cross-examination. Without such information, calling the declarant is a risky proposition, and trial lawyers are notoriously reluctant to step onto untested ground. To call a witness for cross-examination and then fail to accomplish anything can be a dramatic setback — whatever the judge may have told the jury about the adverse nature of the examination.[208]

The comparisons that I have made between civil and criminal cases describe some particular problems that are created by unreliable declarants, unreliable witnesses, and unfair surprise. A full evaluation of the effect of hearsay exclusion in criminal cases requires a broader perspective, one that considers these particular problems in the context of the role of the hearsay rule in controlling the exercise of governmental power, and that considers as well the systemic effect of the exclusion upon the criminal justice system.

4. *Hearsay and Government Power*

The hearsay rule contributes to achieving two important goals in the criminal justice system: individualization of the determination of guilt, and independence of the decisionmaker. The goal of individualization is achieved when the trier's decision is not a vote of confidence for or against the government, but a unique determination about the guilt of the particular defendant. Independence is achieved when the fact finder is protected from external pressure, free of prejudgment, and capable of rendering a final decision that will be respected.

The hearsay rule, by requiring the production of live testimony, serves both of these goals. At the most basic level, a rule preferring live testimony helps keep a trial from becoming a show trial, in which hesitant or inarticulate witnesses are kept offstage, and things move smoothly to a preordained conclusion of guilt. Yet even putting aside the dangers of show trials, the hearsay rule contributes to individualization and independence. Prejudgment is more difficult, and outside pressure is reduced, because no one has the full facts before trial; the results of confrontation, cross-examination, and observation of de-

208 *Cf* United States v Inadi, 475 U S 387, 409-10 (1986) (Marshall, J., dissenting) In the course of arguing that the confrontation clause required exclusion of the coconspirator's statements if the declarant was available, Justice Marshall stated

> Even when a defendant is in as good a position as the prosecution to subpoena available declarants, a rule requiring him to call those declarants as his own witnesses may deny the defendant certain tactical advantages [I]f the defendant chooses to call the declarant as a defense witness, defendant risks bolstering in the jury's eyes the very conspiracy allegations he wishes to rebut That the witness is viewed as hostile by the defendant, and has possibly been certified as such by the trial judge, does not necessarily mean that his relationship to the defendant will be so perceived by the jury, unless defense counsel chooses to dramatize the antagonism with hyperbole that might lose him the sympathy of the jury

475 U S at 409-10

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meanor cannot be known beforehand. The jury is witnessing a unique event. It is charged with determining the credibility of the individuals before it, not the credibility in general of government agents or other classes of absent witnesses. When live testimony is offered in lieu of hearsay, the trier can resolve conflicts of evidence with a legitimacy that cannot be claimed by outsiders. The idea that deference should be given to the body that saw and heard the witnesses is a powerful one. The experience of the jury cannot be described beforehand or duplicated afterwards.

The requirement of live testimony also has an influence upon the government's data gathering. Dossiers are prepared for investigation, not for trial. Statement-takers have less power, and less reason to abuse it. There is less incentive to obtain statements by coercion when those statements will not be admissible, and when the coerced or maltreated witness may, on the stand, reveal what was done. There is less reason to induce witnesses to sign statements that have been distorted by statement-takers. If a witness' statement does not conform to his later live testimony, the statement-taker's distortion may be self-defeating.

Of course, even if the hearsay rule were abolished (and the confrontation clause reinterpreted to permit its abolition), the defendant's right to subpoena witnesses would give the defendant an opportunity to obtain live testimony. Yet the hearsay rule has an independent effect. It discourages the prosecution from keeping witnesses out of the way. Also, the state is much more able to track down witnesses — who can often be elusive in criminal cases — so the hearsay rule shifts a significant practical burden to the party best able to bear it. Furthermore, the defendant has good reason to hesitate before calling a witness for cross-examination when the witness' testimony may be damaging, especially since the defendant does not have the aid of state compulsion in obtaining a pretrial statement from a reluctant or hostile witness.

Finally, the hearsay rule reinforces standard of proof rules that allocate the risk of mistake in criminal cases. Liberalization of hearsay rules could result in an increased number of decisions in which guilt is found despite the presence of a reasonable doubt. To be sure, reasonable doubt instructions will be given whether or not hearsay is admitted, but the admission of evidence that cannot easily be evaluated raises the danger that a mistaken or prejudiced trier will find guilt where an objective observer would find a reasonable doubt.[209] Protec-

209 To use a quantitative example, suppose that the proponent of hearsay bears the burden of persuasion, the evidence on a crucial element is hearsay, and that an objective educated guess

tion of the values underlying the reasonable doubt standard may require not only that the reasonable doubt instruction be given, but that courts be chary of admitting evidence that could lead to erroneous or lawless determinations of guilt beyond a reasonable doubt.

From both a short- and long-term perspective, the risks of declarant unreliability, witness unreliability, surprise, and discretion are greater in criminal cases than in civil cases. Furthermore, the danger of harmful systemic effects is greater. These considerations justify a different attitude toward hearsay in civil and criminal cases.

B. *Evaluation of Reform Possibilities*

1. *Introduction*

In the foregoing pages, I have attempted to show that the concerns that justify excluding hearsay apply much more strongly in criminal than in civil cases. This section discusses reforms which would implement the view that hearsay should be more freely admitted in civil cases than in criminal cases.

One preliminary question must be addressed: Whether it is wise, even if one recognizes that there are significant differences between civil and criminal cases, to attempt to codify different rules for the two subject matter areas. Such a codification might be objected to on the grounds that it would sacrifice uniformity, thereby making it more difficult for judges and lawyers to perform effectively in both types of cases.

The first answer to this objection is that we already have different rules in criminal and civil cases. To some extent the differences are specifically recognized in the Federal Rules of Evidence,[210] and in confrontation clause case law that supplements the hearsay rule.[211] To some extent they are embodied in the attitude of appellate judges in according less discretion to trial judges who admit or exclude hearsay in criminal cases.[212] Codification of different rules would, in part,

would place its probative value at 50. Translating standards of proof into rough numerical terms, suppose that the evidence must be given a value of 51 to meet the civil standard, and a value of 95 to meet the criminal standard. If the trier of fact prejudicially overvalues the hearsay by assigning a value of 95, then it will find for the proponent in either a civil or criminal case. In the civil case it will have reached a result that is not far wrong, and that may well be right, given the uncertainties of even an objective guess. In a criminal case, it has reached an unjust result, if we accept as valid the underlying premises of the reasonable doubt standard. The standard of proof in criminal cases gives the trier a larger range over which to overvalue, and hence a greater chance of reaching a patently unjust result.

210 *See* text at notes 145-51 *supra*.

211 *See* text at notes 154-80 *supra*.

212 *See* note 151 *supra* and accompanying text.

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213 *Cf.* Lewis, *supra* note

214 *See* authorities cited

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The second answer is that the benefit of attempting to encourage joint civil and criminal practices by maintaining a superficially uniform hearsay code is dubious. Substantial obstacles already exist to the achievement of a high level of competence on both the civil and criminal sides of litigation. Not only is the substantive law completely different, but there are two different sets of codified procedural rules. Moreover, the additional knowledge needed to accommodate two sets of hearsay rules pales beside the many and changing details that the competent criminal lawyer must keep up with, such as local variations in sentencing practices, in administrative rules of parole and probation, and in rules and practices governing plea bargaining. In any event, codification might clarify differences and make it easier, not harder, to achieve competence in both fields.

Another objection to codification of different sets of rules might rest upon the belief that case law development is preferable to a comprehensive code. Under this view, one might urge that the codified hearsay rules should be simple and permissive, and that they should apply to both criminal and civil cases. Constitutional doctrine under the confrontation clause would then provide additional protections to criminal defendants. The problem with this approach is twofold. First, common-law development of evidence rules left a corpus of law that was fragmentary, confusing, and increasingly ossified. The Supreme Court's sporadic forays into confrontation clause doctrine have not led to any better result. Rules of evidence that must be applied instantaneously in the courtroom need to be as clear and specific as possible. While perfect clarity cannot be achieved by any means, a code offers better chances than case law development.[213] Although no code can completely free the law from the uncertainty of constitutional litigation — the courts must still decide whether hearsay admitted under a code violates the confrontation clause — it can provide substantially greater guidance. Courts are likely to defer to considered legislative judgments that take confrontation values into account.[214] A code that makes an attempt to do so — especially one that seeks to go beyond the minimum protection provided by the Constitution — will provide better guidance than one that turns its back on these values and expressly leaves them to the courts for protection.[215] More-

213 *Cf.* Lewis, *supra* note 99

214 *See* authorities cited in note 180 *supra.*

215 In their present form, the Federal Rules of Evidence provide substantial guidance. Many of the confrontation problems considered by the Supreme Court have arisen in review of

over, a code that liberalized the hearsay rule for both criminal and civil cases, leaving the protection of criminal defendants to constitutional doctrine, would simply not provide enough protection for criminal defendants. The reasons for excluding hearsay are strong enough in criminal cases to justify legislative recognition. They should not be ignored in favor of an approach that left the protection of confrontation values to whatever the current Supreme Court majority believes is the minimum requirement of the confrontation clause.

Finally, the quest for superficial uniformity in the codified version of the hearsay rules has impeded needed reforms on the civil side. For example, a rule permitting unlimited substantive use of prior inconsistent statements is innocuous in civil cases, and eliminates the need for confusing limiting instructions.[216] Yet because of perceptions about what the rule might lead to in criminal cases, Congress limited it significantly in a fashion that affects both civil and criminal cases.[217] Reform in civil cases deserves to be considered on its merits, without being weighed down with baggage carried over from criminal cases.

2. *Reform in Criminal Cases*

Radical reform should not be attempted in criminal cases. The existing hearsay rules provide needed protection for defendants in criminal cases, and their existence cuts down on the volume of uncertain litigation under the confrontation clause. However, certain interstitial changes might clarify the law, provide additional protection, and bet-

state court cases in which hearsay was received that would not be admissible under the Federal Rules, absent an expansive interpretation of the residual exceptions *See* Pointer v Texas, 380 U S 400 (1965) (confrontation clause violated where state courts admitted former testimony that would not have been admissible under federal rule 804(b)(1), the former testimony exception to the hearsay rule); Barber v Page, 390 U.S 719 (1968) (same); California v Green, 399 U S 149 (1970) (no confrontation clause violation with respect to state court's admission of statement from preliminary hearing admissable under current federal rule 801(d)(1)(A) as substantive evidence, remand for further fact-finding regarding reception of statement given to police which would not be admissable under rule 801(d)(1)(A)), Dutton v Evans, 400 U S 74 (1970) (no violation where state court admitted coconspirator's statement that would not have been admissible under federal rule 801(d)(2)(E) because it was made after termination of conspiracy) (4-1-4 decision) *Cf.* Kirby v United States, 174 U S. 47 (1899) (confrontation clause violated where trial judge admitted judgment of conviction of third person as evidence that goods were stolen, in federal prosecution for receiving stolen goods current federal rule 803(22) would not permit reception of the evidence) *But cf.* Lee v. Illinois, 106 S Ct 2056 (1986) (state court's reception of accomplice's confession incriminating both defendant and accomplice violates confrontation clause). The confession in *Lee* might meet the requirements stated in the federal declarations against interest exception, FED R. EVID. 804(b)(3) Congress decided not to attempt to limit rule 804(b)(3) to meet the requirements of confrontation clause case law *See* note 228 *infra* *Cf* United States v Inadi, 475 U S 387 (1986) (no confrontation clause violation where reception of coconspirator's statement met the requirements of federal rule 801(d)(2)(E), confrontation clause does not impose additional requirement that prosecution show that declarant is unavailable)

216 *See* text at notes 106-08 *supra.*

217 *See* text at notes 111-16 *supra.*

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ter inform counsel how to prepare their cases. By crafting the existing hearsay rules in a fashion designed specifically to address the problems raised by admission of evidence in criminal cases, rulemakers might elicit decisions giving the Federal Rules of Evidence the degree of presumptive constitutional validity now accorded to the Federal Rules of Civil Procedure,[218] thereby removing much of the uncertainty that now attends the reception of hearsay evidence in criminal cases.[219]

One topic that could be addressed in codifying criminal hearsay rules is whether and when the unavailability of the declarant is a prerequisite for admission of a hearsay statement. The Federal Rules of Evidence currently require a showing of unavailability as a precondition of admission only when the proponent seeks to invoke one of the five exceptions listed in rule 804. The twenty-four exceptions in rule 803 and the provision admitting co-conspirators' statements contain no express requirement of unavailability. Superficially, it would seem that prosecutors could freely offer evidence under those exceptions even if the declarant were available for live testimony. Yet cases interpreting the confrontation clause have created uncertainty about whether a constitutional requirement of unavailability supplements the requirements of the Federal Rules.[220]

The code should not establish a general unavailability requirement. Clearly, some hearsay should be admissible in criminal cases even if the declarant is available to testify. It would not make sense to require testimony from each person who forms a link in the chain that leads to the creation of a business record,[221] or to exclude the record of a witness' prior conviction on grounds that the trier in the prior case was

218 *See* Hanna v Plumer, 380 U.S 460, 471-74 (1965)

219. Courts already give substantial deference to exceptions established in the Federal Rules of Evidence *See* note 180 *supra.* Exceptions to this pattern of deference may arise, however, where broad rules covering both civil and criminal cases have been adopted, with the expectation that courts will apply confrontation clause analysis to narrow them in criminal cases For example, had *Lee,* 106 S Ct 2056, involved review of a federal criminal trial, the Court would have been faced with the question whether the reception of evidence falling within the exception created by rule 804(b)(3) violates the confrontation clause. Presumably, the answer would have been that the confrontation clause had been violated. Congress courted this conflict by deciding not to "codify constitutional evidentiary principles" in its final version of rule 804(b)(3) *See* note 228 *infra.*

220 In Ohio v Roberts, 448 U.S 56, 65 (1980) (dictum), the Supreme Court indicated that "[i]n the usual case . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant " The *Roberts* Court indicated, however, that production of the declarant would not be required where the utility of cross-examination was "remote " 448 U S at 65 n 7 Subsequently, in United States v Inadi, 475 U S 387 (1986), the Court held that this requirement does not apply to statements offered under federal rule 801(d)(2)(E) as statements of a coconspirator. Its application in other contexts, however, remains unsettled.

221 *See* Dutton v Evans, 400 U S 74, 96 (1970) (Harlan, J , concurring), Kirkpatrick, *supra* note 8, at 698-99.

available to testify under cross-examination about the basis for the verdict.[222] Yet the greater need for protection against hearsay in criminal cases justifies a higher unavailability requirement than that observed in civil cases. Out-of-court statements directly accusing the defendant of a crime should not, for example, be admissible if the declarant is available to testify — though the present hearsay rules, taken apart from the confrontation clause, leave this possibility open.[223] Existing scholarship, though directed at courts interpreting the confrontation clause, could profitably be used by codifiers in attempting to make the unavailability requirement more clear. Possibilities for clarity include general provisions requiring a showing of unavailability when the prior statement is accusatory[224] or when one might reasonably expect that cross-examination would serve a purpose.[225] Alternatively, one might seek greater specificity by examining the exceptions individually, and determining whether an unavailability requirement ought to be imposed upon hearsay admitted under particular exceptions.[226]

The special problems raised by accomplices' and informers' statements could also be dealt with specifically if criminal hearsay rules were codified separately. Specific exclusionary rules could address the problem of statements made while in custody or under interrogation. These statements are generally excluded under existing law,[227] but the residual exceptions and the exception for declarations against penal interest leave open some possibilities for admission.[228]

The hearsay rules could also attempt to address the problem of

222 *See* Kirkpatrick, *supra* note 8, at 692-93

223 *See* United States v Barnes, 586 F.2d 1052, 1055-56 (5th Cir. 1978) (accusatory prior inconsistent statement of accomplice may be admissable under residual exception as substantive evidence against accused) (dictum). Among the exceptions that could be construed to admit accusatory statements despite the declarant's availability are rules 803(1) (present sense impression), 803(2) (excited utterance), 803(6) (business records), and 803(8) (public records)

224 *Cf* Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEXAS L REV 151 (1978)

225 *Cf* Westen, *supra* note 8, at 1195

226 *See* Kirkpatrick, *supra* note 8 Kirkpatrick advocates different treatment of different exceptions, and sometimes different treatment of types of statements admissible under the same exception *See id* at 697-701 (discussing business records exception)

227 *See* note 182 *supra*

228 The version of the Proposed Rules of Evidence transmitted by the Judicial Conference of the United States to the Supreme Court in 1971 contained a provision that would have excluded "a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused " Fed R Evid 804(b)(4) (advisory comm revised draft 1971), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc. 6 The Supreme Court omitted this provision from the version of the Rules transmitted to Congress *See* FED R EVID 804(b)(4) (Supreme Court Proposed Draft 1973) *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc 7 The advisory committee's limitation was reinstated in the House, but deleted in the Senate, *see* H R CONF. REP NO 1597, *supra* note 182, at 12, and was not enacted as part of the Federal Rules of Evidence *See* FED R EVID 804(b)(3) The Conference Report stated that "[t]he Conferees agree to delete the provision regarding statements by a

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230. *See* text at note 255 *in*

witness intimidation in criminal cases. Possible reforms include receiving depositions taken under conditions supplying an adequate substitute for cross-examination.[229]

3. *Reform in Civil Cases*

In civil cases, problems of declarant unreliability and witness fabrication are probably less serious than in criminal cases because of the different sources from which evidence is derived. Even where these problems exist, the jury is probably in a better position to evaluate the testimony dispassionately and accurately. In any event, the danger of overvaluation of hearsay, while it can never be wholly eliminated, can be reduced by use of procedural devices other than exclusion.[230] Moreover, a relaxed attitude toward reception of hearsay would not undermine the policies served by the reasonable doubt standard in criminal cases, nor is the hearsay rule needed to serve as a shield against misuse of governmental power. Problems of unfair surprise are less serious in civil cases because of the availability of more extensive discovery, and can be further reduced because requirements of notice of intent to introduce hearsay are more feasible in civil than in criminal cases. Finally, problems raised by abuse of judicial discretion can be avoided by adopting a reform that avoids giving judges a general mandate to screen hearsay for reliability.

The balance of this article considers specific means by which broader reform might be accomplished in civil cases.

a. Reforms that eliminate class exceptions

i. Pure abolition. The prospect of completely abolishing the hearsay rule in civil cases has some attractive features. It would minimize judicial discretion and give the fact finder access to a greater quantity of relevant evidence. The danger that proponents would favor second-best evidence would be mitigated to some extent by the fact that the opposing party could ask the trier to draw adverse inferences from the proponent's failure to produce the witness, and, in some cases, by the opponent's own capacity to call the missing witness for cross-examination. The danger that juries would overvalue hearsay would be mitigated by the trial judge's ability to grant a new trial.

However, complete abolition, without any new procedural safe-

co-defendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles." H R CONF. REP. NO. 1597, *supra* note 182.

229. For a proposal of this nature, see M GRAHAM, *supra* note 18, at 263-80.

230. *See* text at note 255 *infra*

guards, would raise dangers of surprise, fabrication, and jury overvaluation, and would impede the speedy disposition of weak cases. In any event, it is not a politically acceptable solution at this time. The strength of the opposition to lesser measures proposed in the Model Code[231] and in the original Federal Rules of Evidence[232] suggests that complete abolition may be a long way away, even in civil cases.

ii. A pure reliability rule. One seemingly simple and effective solution to the hearsay problem in civil cases would be to substitute a single rule for the present system of class exceptions: Hearsay is admissible if it is reliable evidence.[233]

To assess this proposal, one must first ask whether the reliability standard is intended merely to be flexible, or flexible and also discretionary. If the standard is intended merely to promote *flexibility* — that is, to allow trial and appellate judges to take into account *all* of the factors that bear upon the value of evidence, without being restricted to considering the ones identified in particular hearsay exceptions — then appellate courts would be entitled to review trial court

231. The Model Code was never adopted in any state. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5005, at 88-89 (1977). The Code would have admitted hearsay freely when the declarant was unavailable, MODEL CODE OF EVIDENCE Rule 503 (1942), and much of the opposition to the Code centered on this aspect. *See, e.g.*, Chadbourn, *supra* note 1, at 945, and authorities cited therein.

232. The 1971 revised draft of rule 804(b)(2) of the Federal Rules of Evidence provided an exception applicable to unavailable declarants that was much more limited than rule 503 of the Model Code. It provided that if the declarant was unavailable as a witness, the hearsay rule did not exclude

> [a] statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

FED. R. EVID. (Advisory Comm. Revised Draft 1971), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc. 6. This limited rule of preference was rejected by Congress. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 133, ¶ 804(b)(5)[04]. A similar rule limited to civil cases might, however, prove more palatable. Weinstein and Berger report:

> Probably the most controversial aspect of what was a controversial proposed rule was its extension to criminal cases. Although this was the approach of the Uniform Rules [as well], it is contrary to the practice in most jurisdictions having some form of a recent perception rule. The wisdom of this extension has been questioned by a number of legal authorities who fear that overreaching and unscrupulous prosecutors could take advantage of such an exception to obtain unjustified convictions.

Id. at 804-199, 804-200 (citations omitted). *Cf.* Chadbourn, *supra* note 1, at 951 (expressing qualms about the applying of a similar provision in the Uniform Rules to criminal cases); Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 223 (1960) (same).

233. For commentary favoring a general reliability standard, see Younger, *supra* note 44, at 293; McCormick, *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 219 (1956). Professor Younger, noting that hearsay is usually admitted, proposes that the rule be reformulated to read as follows:

> Hearsay is admissible unless the court decides as a preliminary question that the hearsay could not reasonably be accepted by the finder of fact as trustworthy. The finder of fact remains free to disbelieve admitted hearsay.

Younger, *supra* note 44, at 293.

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decisions without giving them special deference, just as they now review personal jurisdiction decisions under a flexible test without giving special deference. If, however, the standard is intended to promote flexibility *and* discretion, then the role of the appellate courts would be minimal, just as it is now in reviewing trial court decisions to grant a new trial because the verdict was against the weight of the evidence.

If the reliability rule was flexible without being discretionary, then it might not have the effect of cutting down on the number and complexity of exceptions, but merely of decodifying them. Case law would once again be the primary source of information about when hearsay could be received. And whatever the value of a multi-factor "balancing test" administered by appellate courts in other contexts, its effect would be chaotic when applied to evidence decisions that need to be made in the heat of trial. Trial judges and lawyers need rules of thumb. Thus, the application of a general reliability standard, after its case law elaboration, would neither clarify nor necessarily liberalize the hearsay rule; it would simply return it to the process of case law development, with the attendant disadvantages of uncertainty and inconsistency. The appellate cases construing the present reliability-based residual exceptions are certainly as much of a hodgepodge as any list of standard exceptions has ever been.[234]

Suppose, however, that a discretionary reliability standard were adopted, one that gave trial judges a great deal of freedom in deciding whether to admit or exclude. An ancient but powerful objection may be made to this approach. Discretion to exclude or admit vital evidence raises dangers of judicial partisanship, corruption, and plain bad judgment. Even with the fairest of judges, it raises the danger that each judge will develop his or her own hearsay "rules," so that to learn how to practice in a given locality would even more than now be a matter of learning how to practice before each particular judge. Also, even if (as would not be the case) litigants could inform themselves during the discovery process about all the items of hearsay the other party would offer, there would still be substantial difficulties in preparing for trial. One would not know whether to prepare to meet, perhaps at great expense, evidence that will be offered by the other party and that might or might not be excluded. One would not know whether to develop alternative sources of proof for one's own evidence that might or might not be admitted. To the degree that disputes about the reception of important evidence are foreseeable, motions in

234 *See generally* Sonenshein, *supra* note 143 (Professor Sonenshein illustrates that courts have not interpreted the residual exceptions consistently with their purposes or terms and that courts are divided on the interpretation of the exceptions.).

limine might provide partial relief from uncertainty; but these motions are another procedural complication, and are likely to come only after substantial pretrial preparation has already taken place.

The codified exceptions do, at a minimum, create a core definition of what *is* admissible.[235] For example, admissions of a party-opponent are received without question, as are statements of injured persons about their present symptoms. Under a general reliability test, uninformed by past rules or past practice, there might be some doubt about these propositions.[236] The arbitrary exclusion of hearsay can be as much a danger as the arbitrary admission of hearsay.

If the general reliability test were interpreted as a discretionary standard which permitted the trial judge to freely admit *or* exclude, and to exclude even when evidence formerly fell within a conventional exception, the trial judge would be given extremely broad discretion. The power to exclude crucial evidence is the power to defeat a claim. It would be a discretionary power that allowed the trial judge to terminate a meritorious claim or frustrate a valid defense, without review, often without an effective means of foreseeing the action or avoiding it by careful planning.

iii. A pure notice system. Under a pure notice system, hearsay would be admissible if the proponent gave notice before trial of intent to offer it. The notice provision could include a requirement that the location of the declarant be given or, if the location was unknown, that the proponent explain why he was unable to locate the declarant. One might also provide a means for allowing the opponent to require that the proponent either produce a declarant for cross-examination or

235 *See* United States v DiMaria, 727 F.2d 265, 270-72 (2d Cir. 1984) (Friendly, J.) The *DiMaria* case holds that statements that fall under the class exceptions to the hearsay rule are admissible even if the trial judge believes them to be untrustworthy.

> [T]he scheme of the Rules is to determine [credibility] by categories, if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge, save for the "catch-all" exceptions of Rules 803(24) and 804(b)(5) and the business records exception of Rule 803(6) . . .

727 F.2d at 272. *But cf.* Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 272-74 (1984) (The question of whether trial judges may exclude statements that fall under class exceptions on rule 403 grounds because judges believe hearsay dangers exist is unsettled.)

When evidence is offered against a defendant in a criminal case, the confrontation clause may require an additional showing of indicia of reliability, *DiMaria*, 727 F.2d at 272 n.6, though even in a criminal case the Supreme Court has suggested that "[r]eliability can be inferred without more in a case where evidence falls within a firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. 56, 66 (1980) (dictum).

236. Admissions are not required to be against interest or otherwise accompanied by indicia of trustworthiness, *see* text at notes 117-25 *supra*, and hence might sometimes be excluded under a general reliability test. Similarly, the statements of injured persons about their present symptoms, while clearly admissible under federal rule 803(3), can be self-serving when personal injury claims are contemplated, and hence might sometimes be excluded under a general reliability test.

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The pure notice system has its attractive points. It would address the problem of surprise directly and effectively. It would reduce judicial discretion, at least if it were rigidly applied to require that all hearsay be admitted where notice had been given and all hearsay be excluded where notice had not been given. There would still be dangers of jury overvaluation and lawlessness, but those could be controlled to some extent by the trial judge's power to grant a new trial when the verdict was against the weight of the evidence.

However, the pure notice system, if rigidly followed, could lead to injustices of its own. Its exclusionary impact would be much too great in cases in which notice was overlooked or in which the attorney did not learn of the availability of (or the need for) the testimony until after the period for giving notice had expired. In fact, it would be burdensome even for the most diligent lawyer to give notice of all hearsay that will be offered at trial, including hearsay that is routinely admitted under the current exceptions. A litigant should not be required, for example, to give notice that after the accident (1) the plaintiff complained about pain, (2) then described his symptoms to a doctor who (3) relied upon specified passages from learned treatises in

237. The British have adopted a notice system for civil trials, though the actual system is more complicated than the one I have described The notice provisions operate as a residual exception to the hearsay rule; certain class exceptions are retained and evidence is admissible under them even in the absence of notice. Civil Evidence Act, 1968, § 9 If evidence does not fall under a class exception, then it is admissible if the proponent gives notice of intent to offer the evidence Civil Evidence Act, 1968, §§ 2(1), 8(2). The opponent of the evidence may, however, give counternotice requiring that the person named in the proponent's notice be called as a witness unless shown to be unavailable. Civil Evidence Act, 1968, § 8(3). The notice exception does not apply to second-hand oral hearsay, that is, it does not apply to "evidence other than direct oral evidence by the person who made the statement or any other person who heard or otherwise perceived it" except when the statement was made in a document. Civil Evidence Act, 1968, § 2(3) (The exception for documents may be subject to a requirement that the person making or adopting the document have first-hand knowledge of the matter asserted therein *See* R CROSS & C. TAPPER, CROSS ON EVIDENCE 488-89 (6th ed 1985).) When the notice requirements of the Act have been satisfied, the court has no discretion to exclude the hearsay, *see* Civil Evidence Act, 1968, § 8(3); J. BUZZARD, R. MAY & M HOWARD, PHIPSON ON EVIDENCE § 17-12, at 355-56 (13th ed. 1982) [hereinafter PHIPSON ON EVIDENCE], but the court has discretion to admit hearsay even if notice has not been given *See* Civil Evidence Act, 1968, § 8(3), PHIPSON ON EVIDENCE, *supra*, § 17-14, at 356-57

This liberal attitude toward reception of hearsay in civil cases may in part stem from the fact that jury trial is extremely rare in English civil cases. *See* P DEVLIN, TRIAL BY JURY 130-32 (1966) (noting that jury trial of right is limited to libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise to marry, and fraud cases, and estimating that the proportion of civil jury trials in Britain is two or three percent of all civil cases); *Cf* D CASSON & I DENNIS, MODERN DEVELOPMENTS IN THE LAW OF CIVIL PROCEDURE 6 (1982) (noting limits on jury trial as of right), P MURPHY & D BARNARD, *supra* note 19, at 39 (attributing liberality of hearsay rule in British civil cases to circumstance that "the issues of fact are decided by a judge, who is well able to make the proper allowance, when giving judgment, for the fact that some of the evidence has not been subjected to cross-examination"). However, the Civil Evidence Act does not limit the liberalization of the hearsay rule to nonjury cases.

forming an opinion about the plaintiff's condition. An all-embracing notice requirement would be burdensome and frequently overlooked. Stipulating that failure to give notice could be excused if it caused no prejudice would not completely relieve this burden; the careful lawyer, anticipating a claim of prejudice, would still need to submit a detailed and exhaustive list. A notice system ought to be supplemented with a system of class exceptions, under which some hearsay would be routinely admitted even in the absence of notice.

iv. A pure rule of preference. If hearsay were treated as a pure rule of preference, then hearsay would be excluded if the declarant were available and admitted if the declarant were not available. The rule would thus give preference to the best evidence (live testimony) but would not stand in the way of admission of evidence when the best was not available.

In its exclusionary aspect, the rule would be too broad unless supplemented with at least a reduced list of class exceptions designed to admit hearsay statements of available declarants when the utility of cross-examination is outweighed by the cost of producing live witnesses. It would be wasteful to require the testimony of every available declarant — for example, every declarant in the chain of information represented by a business record.

A pure rule of preference would also be too broad in its other aspect, that of receiving hearsay not previously admissible. The idea that hearsay should be admitted if the declarant is unavailable is a powerful one if one takes into account only the untested declarant theory, since the choice is between admitting the testimony for what it is worth or losing the benefit of it altogether, and the fact finder ought to be trusted to weigh the evidence for what it is worth. However, when one also considers problems of witness fabrication and surprise, the rule becomes less attractive. The unavailability of the declarant, while it increases the need for admitting the testimony in hearsay form, also increases the danger that the opponent will be surprised by fabricated testimony. The very fact that the declarant is unavailable makes it easier to attribute statements to the declarant that were never made. No one is in a position to contradict the witness' assertion that the declarant made the statement. Therefore, a rule of preference ought to be supplemented with a requirement that the declarant give notice that the statement will be offered. This would allow the opponent to prepare on the question whether the statement was made, whether the declarant was reliable, and whether the declarant is in fact unavailable. In the final part of this article, I will evaluate the possibility of adopting a rule of preference in the context of a system that retains a

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238 *See* text at notes

239 FED R EVID 8

list of class exceptions and that supplements the rule of preference with a notice requirement.[238]

b. *Reforms that retain class exceptions*

Probably the best, or at least most feasible, reform under current conditions would be a mixture of those described above, coupled with retention of the class exceptions.

I have tried to demonstrate that, in the absence of complete abolition, retention of the class exceptions would be a useful feature even if the hearsay rule were radically reformed. The class exceptions reduce surprise (the opponent can foresee, and prepare to meet, the types of hearsay that fall under the class exceptions) and curtail trial court discretion (by defining types of hearsay that must be admitted). Retention of the class exceptions as a supplement to a notice system would also reduce pretrial paperwork (no notice need be given when hearsay is admissible under the class exceptions) and prevent reliable hearsay from being excluded for failure to give notice.

But the class exceptions need improvement. Some, like the excited utterance exception, treat a category of hearsay as automatically admissible when its trustworthiness may be no greater than that of ordinary hearsay. Perhaps by broadening the residual exception so that it admits hearsay more freely, pressure could be taken off the class exceptions so that they could be restricted to hearsay that truly deserves automatic admission.

i. A reliability-based residual exception. The current Federal Rules of Evidence set forth a system of class exceptions supplemented by a reliability-based residual exception. Rule 803(24), and its twin, rule 804(b)(5), provide:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is not excluded by the hearsay rule], if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.[239]

238 *See* text at notes 250-55 *infra.*

239. FED. R. EVID 803(24), 804(b)(5)

This approach is a reasonable compromise. However, it has two defects that limit its utility in civil cases.

First, the notice provision is far too strict. Notice before trial is not always feasible;[240] in any event, a harmless failure to give notice before trial should not result in the exclusion of worthwhile evidence. Good faith failure to give notice should not be grounds for exclusion, unless the other party has been prejudiced by the failure. Even then, a continuance or a rearrangement of the order of proof should be the ordinary remedy. Some courts have reached this result without the aid of any amendment to the rule,[241] but only at the cost of ignoring the rule's plain language. The notice requirement should be liberalized in civil cases.

Second, the rule of preference stated in 803(24) is unduly vague and misconceived in its focus. I am referring to the passage requiring that the hearsay statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."[242] The rule makes no express distinction between available declarants and unavailable ones. When the residual exception is invoked as a basis for introducing the testimony of an available declarant, then the opponent should have the option of requiring the proponent to produce the declarant and elicit the testimony on direct examination. Provision could be made for shifting costs to the opponent if such demands are motivated by a desire to create delay or increase expense.

On the other hand, if the declarant is unavailable, there should be no requirement that the evidence be "more probative" than any other evidence, so long as it meets the test of reliability and is not merely cumulative. If witness *A* testifies that the light was red, and witness *B* testifies that the light was green, then hearsay declarant *C*, who is unavailable, should be heard to say that the light was green, even though we might consider the declarant's evidence not to be "more probative" than that of the in-court witnesses.

These specific defects could, of course, be cured. The residual exception could be revised (in civil cases) so that it provided that upon notice sufficient to prevent unfair surprise (before or during trial),

240. Even with diligent efforts, it may not always be possible to give notice before trial. The use of hearsay evidence may become necessary because of unanticipated evidence offered by the opponent, because of the unexpected failure of a witness to testify, or because of discovery of new evidence during trial. For examples of cases in which courts circumvented or ignored the pretrial notice provision of the residual exceptions because notice was not practical under the circumstances, see note 206 *supra*.

241. *See* note 206 *supra* and cases cited therein.

242. FED. R. EVID. 803(24), 804(b)(5).

hearsay would be admissible when it was reliable enough to be a fair means of proof. This interstitial reliability test would be a useful reform, but its provision for judicial determination of reliability is troublesome and unnecessary. A pure notice-based residual exception would be superior.

In nonjury cases, there is virtually no practical difference between a notice-plus-reliability rule and a pure notice rule. The judge who excludes hearsay evidence as unreliable under a reliability standard would admit it but disregard it under a pure notice standard. So the real question is whether, in civil jury cases, an interstitial reliability test is superior to an interstitial notice rule without reliability screening. The latter approach is preferable for the following reasons:

(a) Reliability screening involves either vesting too much discretion in the trial judge or, as seems to have been the case under the existing residual exception, unnecessary appellate litigation leading to a hodgepodge of appellate precedent that gives little guidance about what is admissible and what is not.[243]

(b) The screening function given to the judge does not take advantage of any qualifications that are peculiar to judges (and not to juries). Unlike other rules that have prophylactic goals, that protect confidential relationships, or that otherwise require a long view of the law, the screening of hearsay merely involves a judgment of its probative value in the case at bar. The jury, if it can be trusted with the testimony of interested parties, convicted felons, and other unreliable witnesses, ought to be trusted with screening hearsay for reliability. Reliability screening makes sense in civil jury trials only if one assumes that juries will fatally overvalue hearsay testimony, and that overvaluation cannot be controlled by other procedural devices. I will argue later that it can be controlled, and that reliability screening is therefore unnecessary.[244]

ii. A residual exception embodying a rule of preference. A residual exception embodying a rule of preference would, in its purest form, take the form of a rule that hearsay is admissible when the declarant is unavailable. If the declarant is available, then hearsay would be admissible only if it fell within one of the class exceptions.

The ill-fated Model Code cast the hearsay rule as a rule of preference supplemented by a reduced list of class exceptions.[245] It was never adopted in any state, and its proposed hearsay reform stirred

243. *See generally* Sonenshein, *supra* note 143 (analyzing the residual exceptions to the hearsay rule against the backdrop of confused and varying appellate cases)

244. *See* text at notes 254-58 *infra.*

245. Rule 503 of the Model Code of Evidence provided that "a hearsay declaration is admis-

vehement opposition.[246] Nevertheless, it may be time to reconsider whether the rule of preference might be a valuable reform if limited to civil cases. Even if a pure rule of preference proved unacceptable, compromise models of it are available that meet some of the objections based upon declarant unreliability or witness fabrication. The existing Massachusetts statute[247] and rejected rule 804(b)(2)[248] are examples of limited rules of preference. If broader reform proves unfeasible, these rules could provide a model for more moderate reform in civil cases.[249]

The rule of preference has advantages over current law, but it is not the best solution to the hearsay problem in civil cases. In cases in which the declarant is unavailable, it raises the danger of unfair surprise by omitting any requirement of notice. Notice should be required both to allow the opponent to prepare to impeach or contradict the out-of-court declarant, and to prepare evidence to contest the unavailability of the declarant. A notice system that incorporated a rule of preference that could be invoked only by counter-notice would both allow the opponent to prepare on these points and encourage the parties to agree to the admission of hearsay prior to trial.

Moreover, even if supplemented with class exceptions, a rule of preference would sometimes exclude evidence when the opponent has

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sible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination." MODEL CODE OF EVIDENCE Rule 503 (1942).

Other rules provided class exceptions admitting hearsay even when the declarant was available and not present at trial. *See, e.g.*, MODEL CODE OF EVIDENCE Rules 506 (admissions), 512 (contemporaneous or spontaneous statements), 514 (business records), 515 (public records) (1942)

246. *See* note 231 *supra.*

247 *See* note 90 *supra.*

248. Rule 804(b)(2) in the form promulgated by the Supreme Court provided an exception, applicable only when the declarant was unavailable, for

> [a] statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

FED R. EVID. 804(b)(2) (Supreme Court Proposed Draft 1973), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc. 7.

The House Committee on the Judiciary eliminated the rule as "creating a new and unwarranted hearsay exception of great potential breadth," one which, in the Committee's opinion, applied to statements that did not bear "sufficient guarantees of trustworthiness to justify admissibility" H R REP NO 650, *supra* note 43, at 6. The rule was not revived and did not appear in the version enacted by Congress

249. A more comprehensive approach was advocated by Professor James Chadbourn in Chadbourn, *supra* note 1 Professor Chadbourn, though sympathetic with the Model Code's unqualified rule of preference, recognized that it was not likely to be adopted. He proposed a compromise position that distinguished between civil and criminal cases. He proposed adoption of a residual exception providing that "[i]n civil cases a statement by a declarant [is admissible] if the judge finds that such declarant is unavailable and the statement would have been admissible if made by the declarant as a witness" *Id.* at 951.

no actual need for cross-examination and when acquiring the testimony of the witness would be unduly expensive or burdensome. A less categorical preference for live testimony can be built into a notice-based residual exception. The next section of this article advocates such an exception.

iii. A notice-based residual exception with no reliability screening. A notice-based residual exception in civil cases would make no provision for reliability screening by judges, but would depend upon other procedural safeguards to reduce the impact of unreliable evidence. Such an exception has great promise when judged in light of the principal objections to radical reform of the hearsay rule. These objections have been based upon fear that free reception of hearsay would cause surprise at trial, that reform would increase judicial discretion, and that reform would lead to the reception of unreliable evidence.

Objections based upon surprise and discretion do not apply to a pure-notice residual exception. Notice would eliminate surprise, and the trial judge would have no discretion to exclude evidence on grounds that it raised hearsay dangers. Judges would, admittedly, have some discretion in deciding whether late notice was sufficient, but litigants could usually avoid this exercise of discretion by careful planning.

The principal remaining objection to free admissibility is the unreliability of hearsay evidence. This objection can be met by incorporating procedural safeguards into a notice system.

The substitution of hearsay for more reliable live testimony could be avoided by combining a notice system with a rule of preference. The notice of intent to introduce hearsay under the exception should state whether the declarant is available or unavailable. The opponent should have the option of demanding that the declarant be produced at trial and examined, first by the proponent and then by the opponent.[250] If the opponent made such a demand, the proponent should be required either to demonstrate unavailability, produce the declarant, or forego use of the residual exception and attempt to find a basis for admission under a conventional class exception. This procedure recognizes that it is generally appropriate to place the burden of producing a witness upon the party who benefits from the witness' testimony. In cases in which this generalization does not apply, or in which frivolous claims of availability are advanced, the trial judge

250 The provision that the declarant be examined first by the proponent, rather than merely being offered for cross-examination, would be designed to prevent the proponent from achieving an undeserved tactical advantage *Cf* text at note 208 *supra.*

could be authorized to shift costs to the opponent.[251]

Upon notice, hearsay statements of declarants who are unavailable, or who are available and produced for testimony, would be freely admissible. This provision would allow the introduction of prior consistent and inconsistent statements for substantive purposes in civil cases. The right to cross-examine the witness on the stand, coupled with the absence of considerations that make one hesitate to admit such statements in criminal cases,[252] provide an adequate justification for admitting such statements upon proper notice. Of course, the trial judge's power to regulate the taking of testimony under rule 611 and to exclude evidence that is cumulative or a waste of time under rule 403 could be exercised to prevent the witness from taking the stand to read a prepared statement in lieu of ordinary direct examination. The trial judge could, for example, provide that the statement not be admitted until after the completion of the direct examination of the witness on the facts in issue, and then only if the statement was not cumulative or a waste of time.[253]

With this provision, the opponent of the hearsay would be deprived of the opportunity to cross-examine only in cases in which the declarant was unavailable. These cases present the strongest instance for admission of hearsay evidence. The choice is between admitting the untested evidence for what it is worth or having nothing at all. The argument for exclusion rests on the assumption that the jury will fatally overvalue the testimony and that it is better not to hear it at all than to take the chance of overvaluation.[254] This argument is based upon a highly questionable view of the jury's capacities, and in any event to handle the problem by exclusion is to overlook less drastic methods of dealing with the danger of overvaluation. These include argument by counsel about the unreliability of hearsay, judicial instructions about the weight to be given hearsay, judicial comment upon the evidence, and, when things have gone drastically wrong, the use of the judge's power to grant a new trial on grounds that the verdict is against the weight of the evidence.[255]

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251 Both would be subject to the provisions of rule 11 of the Federal Rules of Civil Procedure, which provides for the award of sanctions, including attorney's fees, for the filing of papers that are not well grounded or that are interposed for purposes such as delay.

252. *See* text at notes 109-10 *supra.*

253. *Cf.* Civil Evidence Act, 1968, § 2(2) (giving judge discretion whether to admit an out-of-court statement of a person being called as a witness).

254. *See* text at notes 32-42 *supra.*

255. On the use of these procedural devices to mitigate the possibly prejudicial effect of hearsay, see generally Weinstein, *supra* note 8; 3 J BENTHAM, *supra* note 1, at 553.

> [T]he assumption is, that, if the jury were suffered to hear the evidence, they would be sure to be deceived by it. Experience, had judges but patience to consult her, would have super-

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supra note 237, at 488

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Reliance upon the new trial remedy to correct hearsay-induced miscarriages of justice might, at first, seem to reintroduce all the disadvantages of reliability screening at a later stage, since it does involve a discretionary decision by the trial judge on the basis of an assessment of reliability. However, the new trial approach has advantages over the exclusion approach. First, it allows deliberate consideration of the probative value of the evidence after the reception of all the evidence and of the jury's verdict. Second, it does not finally terminate the case by excluding crucial evidence. It protects the opponent of the evidence against an idiosyncratic first jury, but leaves the proponent, in the absence of settlement, with the opportunity to try the case before a second jury. If the second jury returns a verdict in favor of the proponent, it is highly unlikely that the trial judge will grant a third trial.[256]

Even with these safeguards, the specter of free admissibility of *all* hearsay in civil cases will make this proposal unattractive to many lawyers. The proposal could be limited by restricting the application of the notice-based residual exception to first-hand hearsay from declarants with personal knowledge.[257] This provision would prevent the admission of anonymous rumors and other particularly objectionable hearsay without relying upon discretionary screening. When reliable, double hearsay could still come in under the conventional exceptions to the hearsay rule. A requirement of first-hand hearsay would also limit the impact of the notice-based residual exception upon pretrial disposition of frivolous cases. It would not be possible, if the requirement were imposed and properly tailored, to avoid a motion for summary judgment by alleging facts on information and belief. Rather, a specific hearsay declarant would have to be identified, and the basis for personal knowledge shown.

Finally, rule 403 of the Federal Rules[258] would serve to limit the

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seded the demand for this rash suspicion Will they be deceived by it? [S]tay and see. Should their decision prove erroneous, then, and not till then, it may be proper to take measures for obtaining a new one.

256 *See* Frank v. Atlantic Greyhound Corp., 177 F. Supp 922 (D D C. 1959), *affd.*, 280 F 2d 628 (D C Cir. 1960) (trial judge should defer to second jury, in absence of exceptional circumstances), 11 C WRIGHT & A. MILLER, *supra* note 86, § 2803, at 35.

257 *Cf* Civil Evidence Act, 1968, § 2(3) (establishing a general requirement that hearsay testimony about oral out-of-court statement, when admissible under notice-based exception, must be in the form of "direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made") The goal of this section is to ensure that only first-hand hearsay is admissible under the notice-based exception. *See* R CROSS & C. TAPPER, *supra* note 237, at 488.

258 Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

admission of hearsay that would be prejudicial, confusing, or a waste of time. In administering rule 403 under a notice-based residual exception, however, trial judges should be required to assume the credibility of declarants in the same way that they must now assume the credibility of live witnesses, and make decisions about confusion, prejudice, and waste of time on the assumption that the declarant's statement is true. Otherwise, rule 403 would become merely another way of adding reliability screening to the decision whether to admit hearsay.

CONCLUSION

In criminal cases, the currently existing strictures against hearsay should be retained. In civil cases, however, further liberalization of the hearsay rule is justified. The Federal Rules of Evidence should be amended to include a notice-based residual exception that permits hearsay to be admitted in civil cases without being screened for reliability by the trial judge. This approach would eliminate problems of surprise and discretion that have been features of other proposed reforms. The danger of jury overvaluation of hearsay could be adequately met by procedural devices other than exclusion of evidence.

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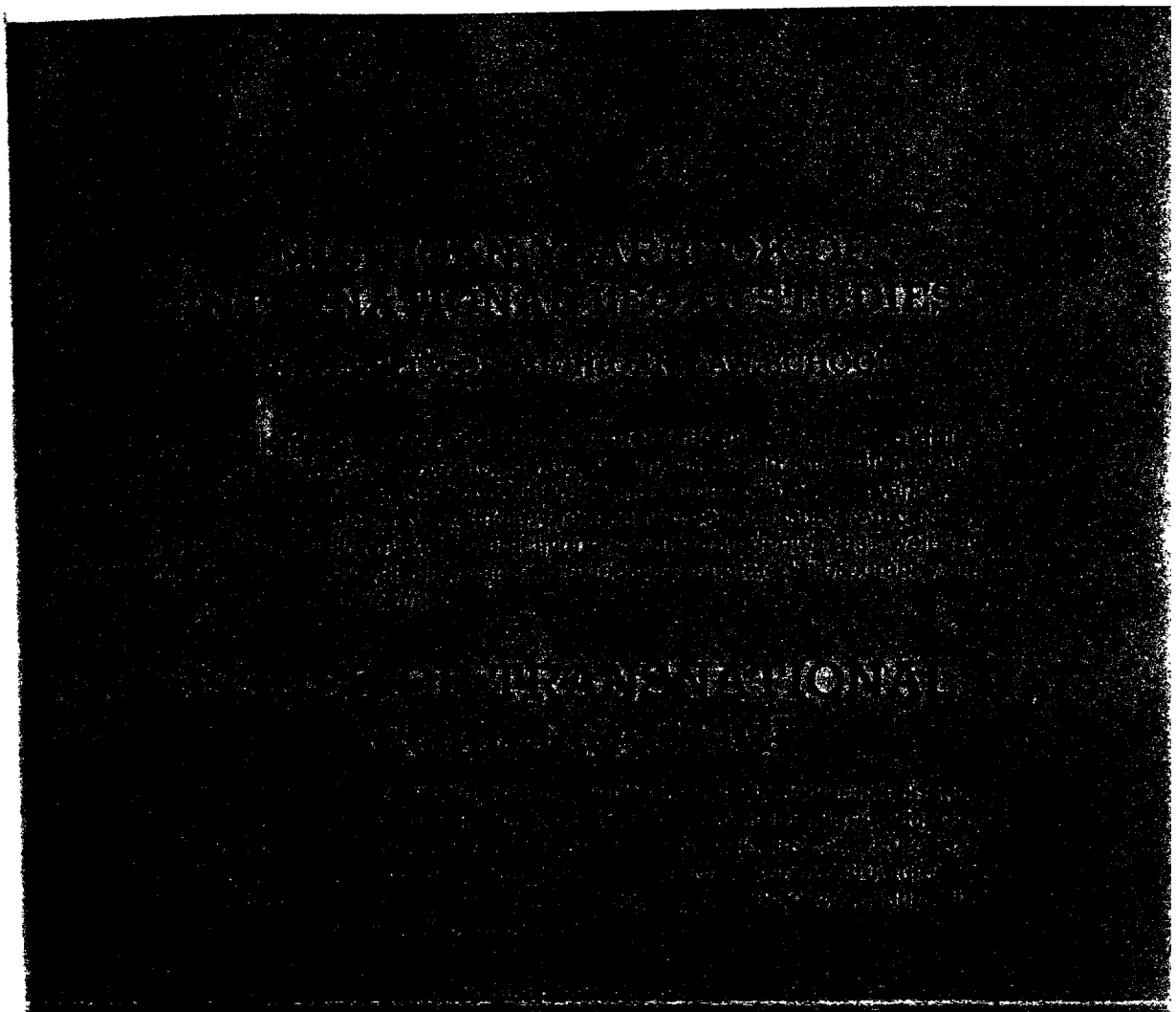

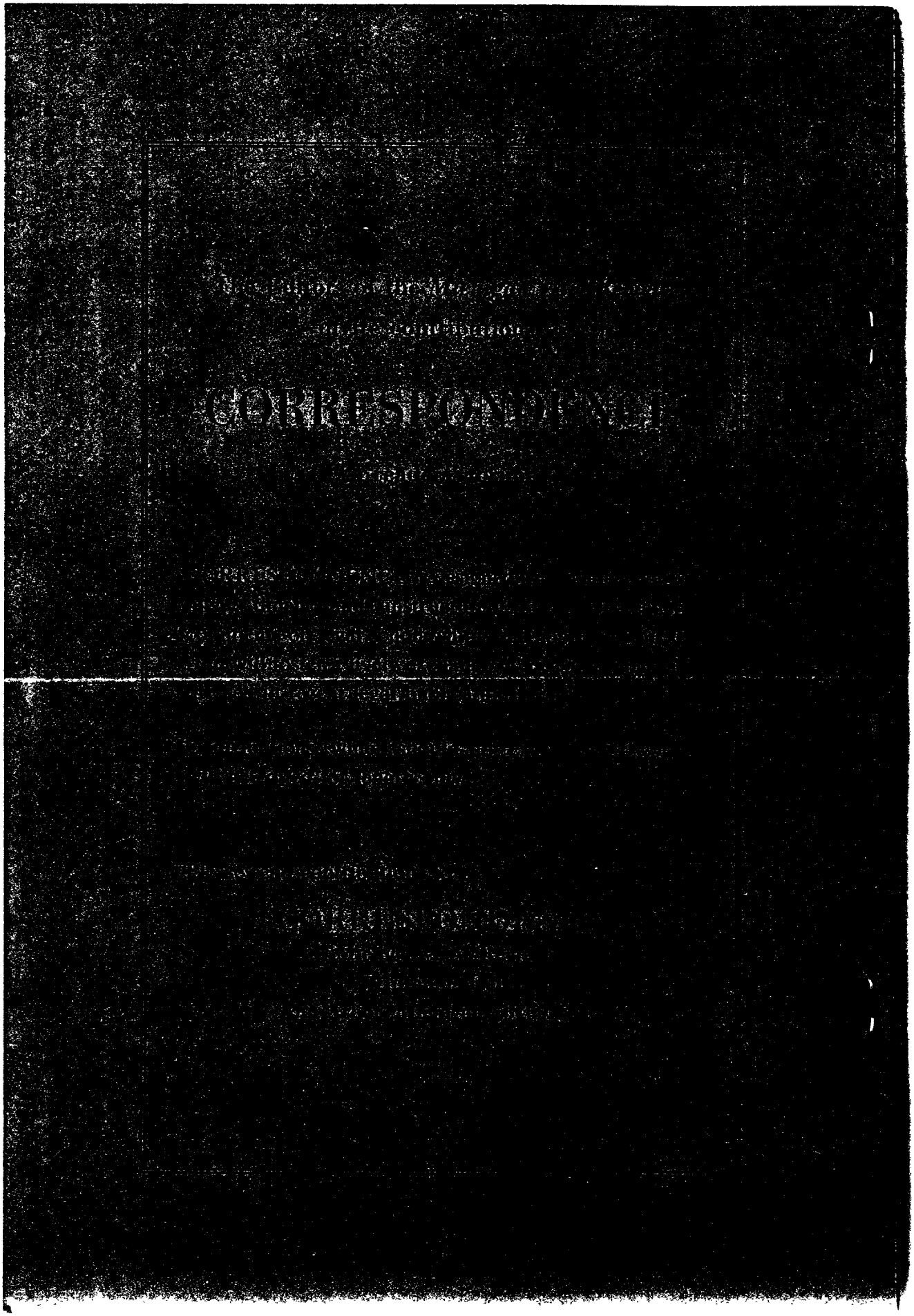

Advisory Committee on Evidence Rules
New York City, New York
May 9-10, 1994

File Copy

I. Opening Remarks of the Chair

II. Approval of Minutes of September 30-October 2, 1993 meeting in New Orleans, Louisiana

III. Old Business

A. Consideration of Supreme Court's Action Regarding Proposed Amendments to Rule 412

B. Rule 404(b) - Character Evidence

C. Rule 405 - Methods of Proving Character

D. Rule 407 - Subsequent Remedial Measures

E. Rule 408 - Compromise and Offers to Compromise

F. Rule 607 - Who May Impeach

G. Rule 611 - Mode and Order of Interrogation and Presentation

H. Rule 613 - Prior Statements of Witnesses

I. Rule 614 - Calling and Interrogation of Witnesses by Court

J. Rule 103 - Rulings on Evidence

K. Rule 104(a) - Questions of Admissibility Generally

L. Rule 104(b) - Relevancy Conditioned on Fact

IV. New Business

A. Article VII: Opinions and Expert Testimony

B. Article VIII: Hearsay

V. Next Meeting

ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of September 30 - October 2, 1993

New Orleans, Louisiana

The Advisory Committee on the Federal Rules of Evidence met September 30, October 1 and 2 in the Courthouse for the Fifth Circuit Court of Appeals in New Orleans, Louisiana. The following members of the Committee were present:

Circuit Judge Ralph K. Winter, Jr., Chairman

Circuit Judge Jerry E. Smith

District Judge Fern M. Smith

District Judge Milton I. Shadur

Federal Claims Judge James T. Turner

Chief Justice Harold G. Clarke

Professor Kenneth S. Broun

Gregory P. Joseph, Esq.

John M. Kobayashi, Esq.

Dean James K. Robinson

Magistrate Judge Wayne D. Brazil

Professor Stephen A. Saltzburg

Roger Pauley, Esq.

Professor Margaret A. Berger, Reporter

The following persons also attended all or a part of the meeting:

Hon. Alicemarie H. Stotler

Dean Daniel R. Coquillette

Irvin B. Nathan, Esq.

William B. Eldridge, Esq.

John K. Rabiej

Judge Winter called the meeting to order at 8:30 a.m. on September 30, 1993. He suggested that the Committee discuss policy issues at this meeting and leave specific redrafting issues for the next meeting of the committee. A copy of the Agenda for the meeting is attached.

Carnegie Committee Report and Rules of that Management.

The Committee first considered a number of proposals that might have an impact on the Rules of Evidence: the Carnegie Commission Report, and Rules of Trial Management. A number of suggestions were made that in light of the Daubert opinion more thought should be given to Rule 706 and its interrelationship with the special master rule in the Federal Rules of Civil Procedure, as well as commentary to Rule 706 explaining how court-appointed experts could be used in connection with pre-trial proceedings. Professor Saltzburg suggested taking up the Carnegie report in connection with Article VII. Judge Winter said he would put Article VII on the agenda at the next meeting. He also asked that the liaison members ask their committees whether any problems exist.

Judge Winter stated that undertaking to draft Rules of Trial Management without input from the other Advisory Committees would be impossible, and questioned whether the ABA's proposal really amounted to rules. Judge Stotler volunteered to talk to the other committees about the desirability of continuing further with this project. Professor Saltzburg felt that this might be a

subject that the Federal Judicial Center could handle. Judge Shadur suggested the possibility of moving toward a proposal for a standardized pretrial order. Professor Broun, however, thought that orders should be thought of in the context of problems with a particular rule such as the Article VII rules. Judge Winter expressed a good deal of skepticism about drafting Rules of Trial Management.

Sentencing Guidelines.

The Committee then discussed whether the Committee should consider the advisability of drafting evidentiary rules that would apply at the sentencing phase. Judge Winter explained that prior to the Sentencing Guidelines judges were free to disregard any evidence they wished to ignore whereas now they must take into account certain factors spelled out by the guidelines. Judge Winter repeated the jurisdictional argument that appears on p. 6 of his memorandum of June 22, 1993, which is attached. He also cautioned that if the Sentencing Commission does not like proposals by the Evidence Committee, the Commission will go to Congress and get a statute passed.

Roger Pauley explained that §18 U.S.C. 3661 was in effect before the Sentencing Guidelines were developed and that the note to the statute states that there was no intent to modify the original approach which allows otherwise inadmissible evidence such as hearsay to be used. Consequently, it cannot be said that Congress disregarded this issue when it enacted the Sentencing Guidelines.

Judge Shadur pointed out that a judge never had to make factual findings prior to the Sentencing Guidelines. Once factual findings have to be made it becomes essential to define appropriate rules of evidence. Professor Saltzburg stated that this was an extremely important issue that the Evidence Committee could approach but that it was not only an evidentiary issue. One should assume that the Sentencing Commission would have to be a partner in any endeavor to consider evidentiary rules. Mr. Nathan agreed that the issue of evidentiary rules for the sentencing process is extremely important and that he thinks that the Committee has jurisdiction.

Judge Shadur pointed out that no one is suggesting that all evidentiary rules would apply in sentencing. Professor Saltzburg questioned whether evidentiary rules can solve the problems created by making relevant conduct admissible. Professor Broun suggested an inquiry into whether issues and problems exist that could be dealt with in evidentiary terms.

Mr. Eldridge offered to have the Federal Judicial Center gather information about sentencing. The Committee debated at some length whether it should solicit views from knowledgeable persons. The Committee agreed that the Chair of the Committee should send a request that would make no promises about redrafting Rule 1101 but that would merely solicit suggestions about whether problems exist.

Updating rules. The Committee discussed whether it can update notes without amending rule. Mr. Pauley explained that

the Sentencing Commission has taken the position that it can change commentary without changing rules. The Criminal Rules Committee has refused to take such an approach. Mr. Pauley suggested that perhaps one could republish rule without making a change and then amend the notes. The Committee agreed to revisit this issue in the context of a concrete rule like Rule 404.

The Department of Justice Proposal. Mr. Pauley proposed adoption of the Department of Justice proposal set forth in his memorandum of June 15, 1993, which is attached. This proposal would make admissible an expert's report of an analysis of a substance, object or writing. Mr. Joseph pointed out that the proposed rule is one of admissibility rather than a new hearsay exception. Judge Fern Smith objected that the provision does nothing more than can be achieved through a stipulation; defense counsel will object to such a rule because they will be afraid that even if one drafts a very narrow exception, lawyers will start to insert all kinds of imaginative material into the report. Magistrate Judge Brazil noted that the provision would apply to civil cases as well, and would be inconsistent with the proposed amendments to Rule 26 in terms of notice and timing requirements.

Mr. Pauley responded that perhaps one would wish to limit the rule to the DEA and ballistics reports and make the provision part of Rule 803(8). He stated that the DEA finds such a rule useful and few defense counsel object. Dean Robinson responded that this was really a rule that made something presumptively

admissible and that defense counsel might fear being labeled as obstructionist. Judge Shadur found a real problem because the report, pursuant to the draft, would get into the jury room; one might want to have it read but not admitted. Professor Broun was concerned that it was premature to take up this proposal which ought to be considered in connection with Articles 7-9. Mr. Nathan agreed that the proposal needed to be fine-tuned.

Judge Winter then proposed working through particular articles of the Rules, beginning with Article IV, to identify particular problems that the Committee wish to have the reporter address.

ARTICLE IV.

Rules 401-403. The Committee had no problems with Rules 401-403.

Rule 407. The Committee then turned Rule 407, the subsequent remedial measures rule on which the Reporter had prepared a memorandum that was distributed with the agenda for the meeting. It pointed out that there is a split in the circuits since the 10th Circuit views the issue as raising Erie concerns that should be resolved in terms of the forum's substantive law. The memorandum also pointed out that although the other federal circuits, to the extent that they have addressed the issue, bar subsequent remedial measures evidence in products liability cases regardless of the particular cause of action, a majority of the states allow such evidence to be admitted at least in certain types of products liability actions.

This federal-state dichotomy obviously produces some forum shopping by plaintiffs and the removal of state instituted actions to federal court by defendants.

Judge Fern Smith observed that were the Committee to require deference to state law, it would become even more difficult to settle or try a products liability action with plaintiffs from a number of different states. Mr. Joseph suggested not amending the rule, but Mr. Kobayashi objected to the forum-shopping that exists in the 10th circuit. The Committee took a straw vote on four possible resolutions:

1. To leave the circuit split - 3 votes

2. To adopt the 10th circuit rule - 0

3. To adopt the majority state rule and allow the evidence - 0

4. To amend Rule 407 so that the bar would apply in products liability cases, with perhaps some exceptions for recall letters - 5

The Reporter was directed to consider redrafting the rule to add "culpable conduct, defectiveness of a product, or unreasonableness of a design." It was also agreed that the Note should point out the low probative value of the evidence (because changes may be made for other reasons) and the prejudicial impact of this type of evidence, and that the Note should be careful to take into account that state law may allow in evidence on issue of feasibility if the substantive rule is that a defendant is liable when a better alternative exists.

The Committee agreed not to vote on the amendment but to consider what the appropriate language should be in light of tort law issues at the next meeting. Dean Robinson raised the question of whether the rule should be clarified as to meaning of "the event."

Rule 404. Sex crimes. There was no sentiment in the Committee for amending Rule 404 to allow evidence of defendant's prior sexual behavior in a prosecution for a sexual offense against an adult or child. Among the sentiments expressed was that this was not a federal problem, a concern about prejudice, and that action by the Committee would be unlikely to affect Congress. The Committee was advised by John Rabiej that a bill now pending before the Senate Committee on the Judiciary that would amend Rule 404 with regard to sex crimes is unlikely to pass. According to Roger Pauley, however, it is still too early to make predictions about the bill's passage.

Civil cases. The Committee next considered whether the Rule 404(a) exceptions should be extended to civil cases. Although members of the Committee discussed a number of hypothetical situations in which it would not be unreasonable to treat civil cases like criminal cases, the Committee ultimately decided that it was too difficult to draw a line and too much of a waste of time. Accordingly Rules 404(a)(1) and Rules 404(a)(2) should remain unchanged.

As there have been a few cases in which courts extended the exceptions to civil cases, the Committee also considered the

desirability of clarifying the rule by adding "in criminal cases" at the beginning of each exception. Rule 404(a)(2) also should contain a phrase "except as provided in Rule 412." The Committee discussed whether these are technical amendments that therefore would not have to go through public hearings. On the other hand, Judge Winter pointed out that the full rule-making process could be used as there are a few aberrant cases, and no great need for hurry in clarifying the rule.

The Huddleston standard. The Committee discussed whether either Rule 404(b) or Rule 104(a) should be redrafted so as to overrule the Supreme Court's holding in Huddleston v. United States, 485 U.S. 681 (1988) holding that the proof of "other crimes" evidence is governed by Rule 104(b) and not by Rule 104(a). Although Mr. Pauley questioned whether the Committee could change the burden of proof, the Committee unanimously agreed that changing the standard of proof for the admissibility of evidence is a different issue than changing the ultimate burden of proof, and that the former question is within the authority of the Committee.

Three different suggestions were made as to how to overcome the Huddleston holding, and it was agreed that the Reporter would prepare a draft on all three variations together with an accompanying Advisory Committee Note for consideration at the next meeting of the Committee. The three possible solutions were:

1. To make Rule 404(b) subject to Rule 104(a) by amending

Rule 104(a).

2. To require a "clear and convincing" standard for the admission of Rule 404(b) evidence.

3. To require that in the case of Rule 404(b) evidence the usual balance required by Rule 403 would be reversed so that the burden would be on the prosecution to demonstrate that the evidence must be more probative than prejudicial.

If controverted. The Committee also decided that it would take up at the next meeting a redraft of Rule 404(b) that would deal with the issue of limiting the prosecution's ability to put in evidence on an issue that the defendant has conceded. A possible way of doing this would be to add "if controverted" to the rule. Other possibilities might be to limit the change to "stipulations read to the jury" or "unless conceded by the defendant." The Reporter will draft a number of variations.

Rule 410. The Department of Justice brought to the Committee's attention a recent decision in the Ninth Circuit, United States v. Mazzonata, which held that the government may not impeach the defendant with statements that fall within Rule 410 after he failed to abide by a cooperation agreement. Most circuits have allowed impeachment under these circumstances. The Committee agreed that this was a matter for the Criminal Procedure Committee in the first instance since the text of Rule 410 also appears in the Criminal Procedure Rules as Rule 11(e)(6).

Rule 405. The Committee agreed that the rule had to be

changed by making it subject to Rule 412. It was decided not to alter the rule otherwise as the rule was not causing problems. It was also agreed not to add cross-references to other rules that might be implicated for fear of causing problems.

Rule 408. A number of members of the Committee raised a number of issues that they wish to have explored for the next meeting: timing issues, i.e. when does a dispute arise that triggers the rule? (the Committee wants the Rule to apply as quickly as possible); to what extent does Rule 408 apply in a second lawsuit? should there be a different rule for admissibility and discoverability and should the rule refer to this issue? if there was a dispute as to liability only does this mean that a statement may not be admitted to show the parties' agreement about a floor with regard to the amount in dispute? to what extent can one use for impeachment statements from settlement negotiations that break down? if one party perceives that there is a problem and begins talking to an agency such as the SEC, will a third party be able to get these statements?

The Committee wishes to consider a series of hypotheticals next time in the context of two questions: 1. Does Rule 408 now cover this situation; 2. Should Rule 408 cover this situation?

ARTICLE VI

Rules 601-606. The Committee did not identify any articular problems with these rules.

Rule 607. The Committee requested the Reporter to look at the cases to determine whether any particular problems were

arising with respect to impeaching one's own witness.

Rule 608. The Committee agreed that the Rule had been badly drafted but concluded that it should not be amended as the language has acquired a recognized meaning as the result of use. Because evidentiary rules have to be reacted to quickly in a courtroom they should not become too wordy or too different.

Rule 609. The Committee agreed that although issues exist about specific crimes that may be used for impeachment and about whether the prosecution may inquire into the nature of the crime, the Rule has caused such controversy in Congress in the past that one should not open a Pandora's box by recommending changes to Rule 609.

Rule 611. A number of suggestions were made with respect to clarifying the rule. One suggestion was to amend subdivision (c) so as to clarify that the examination that occurs after an adverse witness is examined by the proponent should not be in the nature of cross-examination. One possibility is to rephrase the rule in terms of who "adduces" the testimony. The Note should also be clarified to explain that "impeachment may, of course, require leading questions." The Committee decided not to revisit the proper scope of cross-examination.

Rule 612. Should one make it clearer that if the opponent chooses to introduce the evidence used for refreshing, the evidence is being admitted for impeachment purposes only? The Reporter will look at the cases to determine if such a change would amount to more than an academic exercise. Mr. Robinson

agreed to send the Reporter a copy of the Michigan rule that accomplishes this.

Rule 613. The Committee wants to look further at whether the rule makes sense in light of the lack of correspondence that now exists between impeachment and substantive use because of Congressional changes to the hearsay exemption for prior statements.

Rule 614. The Committee discussed the advisability of adding a provision relating to questioning by jurors and whether such a provision should contain limitations such as requiring the questions to be in writing and giving the lawyers an opportunity to object. Instead of specific questions might the jurors indicate subject matter as to which they want more information and why? The Committee was concerned that the problems might not be the same in criminal and civil cases. The Reporter was requested to report further on these issues and to consider the possibility of model jury instructions.

Rule 615. The Committee did not find any serious problems with Rule 615.

ARTICLE I.

Rule 103. Should one rewrite the rule to deal separately with bench-tried and jury tried cases? Should there be a procedure for referring in limine motions to a judge other than the one who will preside at trial? The Committee decided that it wished to revisit at its next meeting the Supreme Court's decision in Luce v. United States, 469 U.S. 38 (1984) which holds

that a defendant waives an objection to a trial judge's pretrial ruling refusing to exclude defendant's prior convictions unless the defendant testifies at trial.

Rule 104. Should one revise subdivision (a) to add that rulings on the admissibility of hearsay are governed by this provision? Are there any other categories of evidence that should be added to the subdivision or to the Note?

With regard to subdivision (b) the Reporter was directed to consider whether a problem exists because the rule states "admit" even though it is intended to be subject to Rule 403.

Rule 105. The rule states that a court, "upon request," shall restrict evidence, etc. The Committee wished further inquiry into whether a court may do so on its own and whether the rule as written cause problems..

ARTICLE II

Rule 201. Members of the Committee observed that the rule was not used sufficiently and that there is a conflict between subdivisions (f) and (g) if the court takes judicial notice on appeal.

ARTICLE III

After discussion, the Committee agreed that it would not be desirable to add a rule on criminal presumptions.

Miscellaneous matters. The Committee approved Rule 84(b) on technical amendments which will become subdivision (b) of Rule 1102.

The Committee discussed at various times the importance of

leaving a record of its decisions including its decisions not to amend particular provisions. One possibility that was suggested was to write a report to be published in F.R.D. Another recurring issue during the meeting was the extent to which the Advisory Committee Notes should be updated. It was agreed that if a rule is changed, the commentary could be updated -- as by adding a relevant Supreme Court holding -- even if the rule was not changed with regard to the matter updated. The majority of the Committee did not favor updating a Note in the absence of a revision to the rule.

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

Via Fax
May 5, 1994

MEMORANDUM TO ADVISORY COMMITTEE ON EVIDENCE RULES

SUBJECT: Meeting Schedule and Material on Rule 412

Judge Winter has advised me that the committee meetings on May 9-10 will begin at 8:30 a.m. in Room 317 of the United States Courthouse and will recess for lunch at 12:30 p.m. each day. The meetings will reconvene at 2:00 p.m. and end at 5:00 p.m. each day. Please note that the courthouse cafeteria, which is located on the fifth floor, opens at 7:30 a.m.

For your information, I am also sending to you a copy of section 3252 of the Senate-passed H.R. 3355, "The Violent Crime Control and Law Enforcement Act." The bill is now scheduled for conference. The House has designated its conferees, but the Senate has not done so.

Section 3252 adds a new Evidence Rule 412B that would extend the protections of Rule 412 to civil cases. (The bill would also create a new Evidence Rule 412A extending Rule 412 protections to all criminal cases.)

Please call me if you have any questions concerning this material or the meeting arrangements.

John K. Rabiej

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

relevance, and (B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence is amended by inserting after the item relating to rule 412 the following new item:

"412A. Evidence of victim's past behavior in other criminal cases:
"(a) Reputation and opinion evidence excluded.
"(b) Admissibility.
"(c) Procedures.".

SEC. 3252. SEXUAL HISTORY IN CIVIL CASES.

(a) RULE.—The Federal Rules of Evidence, as amended by section 3251, are amended by adding after rule 412A the following new rule:

"Rule 412B. Evidence of past sexual behavior in civil cases

"(a) REPUTATION AND OPINION EVIDENCE EXCLUDED.—Notwithstanding any other law, in a civil case in which a defendant is accused of actionable sexual misconduct, reputation or opinion evidence of the plaintiff's past sexual behavior is not admissible.

"(b) ADMISSIBLE EVIDENCE.—Notwithstanding any other law, in a civil case in which a defendant is accused of actionable sexual misconduct, evidence of a plaintiff's past sexual behavior other than reputation or opinion evidence may be admissible if—

"(1) it is admitted in accordance with the procedures specified in subdivision (c); and

"(2) the probative value of the evidence outweighs the danger of unfair prejudice.

"(c) PROCEDURES.—(1) If the defendant intends to offer evidence of specific instances of the plaintiff's past sexual behavior, the defendant shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the plaintiff.

"(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If necessary, the court shall order a hearing in chambers to determine if such evidence is admissible. At the hearing, the parties may call witnesses, including the plaintiff and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence that the defendant seeks to offer in the trial depends upon the fulfillment of a condition of

fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for the purpose, shall accept evidence on the issue of whether the condition of fact is fulfilled and shall determine such issue.

"(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence the defendant seeks to offer is relevant and not excluded by any other evidentiary rule, and that the probative value of the evidence outweighs the danger of unfair prejudice, the evidence shall be admissible in the trial to the extent an order made by the court specifies evidence that may be offered and areas with respect to which the plaintiff may be examined or cross-examined. In its order, the court should consider—

"(A) the chain of reasoning leading to its finding of relevance; and

"(B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.

"(d) DEFINITIONS.—For purposes of this rule, a case involving a claim of actionable sexual misconduct, includes sexual harassment or sex discrimination claims brought pursuant to title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000(e)) and gender bias claims brought pursuant

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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

VIA FAX
May 5, 1994

MEMORANDUM TO JUDGE RALPH K. WINTER AND DEAN MARGARET A. BERGER

SUBJECT: Agenda

Consideration of the proposed amendment to Evidence Rule 1102(b) needs to be considered at the meeting. The proposed amendment was published for public comment in October 1993. No comments were submitted on it.

The proposed amendment to Rule 1102 was identical to proposed amendments to Appellate, Bankruptcy, Civil, and Criminal Rules. At their respective spring meetings, the Advisory Committees on Appellate and Criminal Rules approved the amendment and have transmitted it to the Standing Committee. The Advisory Committees on Bankruptcy and Civil Rules rejected the amendment.

John K. Rabiej

John K. Rabiej

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

By Fax

April 29, 1994

MEMORANDUM TO MEMBERS OF THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF EVIDENCE

SUBJECT: Proposed Amendments to Rule 412 as Transmitted by the Supreme Court to Congress

I am attaching the proposed amendments to Rule 412 of the Federal Rules of Evidence as they were transmitted by the Supreme Court to Congress. Please note that the Supreme Court has withheld approval of that portion of the proposed amendments to Rule 412 that would apply the Rule to civil cases. The reasons for the Court's action are set out in the attached letter from the Chief Justice to Judge Gerry.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler

fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for the purpose, shall accept evidence on the issue of whether the condition of fact is fulfilled and shall determine such issue.

"(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence the defendant seeks to offer is relevant and not excluded by any other evidentiary rule, and that the probative value of the evidence outweighs the danger of unfair prejudice, the evidence shall be admissible in the trial to the extent an order made by the court specifies evidence that may be offered and areas with respect to which the plaintiff may be examined or cross-examined. In its order, the court should consider—

"(A) the chain of reasoning leading to its finding of relevance; and

"(B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.

"(d) DEFINITIONS.—For purposes of this rule, a case involving a claim of actionable sexual misconduct, includes [illegible]

consent or by the prosecution; and

(3) evidence the exclusion of which would violate the constitutional rights of the defendant.

(c) Procedure to Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

SUPREME COURT OF THE UNITED STATES

FRIDAY, APRIL 29, 1994

ORDERED:

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein an amendment to Evidence Rule 412.

[See infra., pp. _____ _____ _____.]

2. That the foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 1994, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 29, 1994

The Honorable John F. Gerry
Chair
Executive Committee
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Gerry:

I would like to express the Court's appreciation for the Judicial Conference's submission of the proposed amendments to the Federal Rules of Appellate Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence. I am writing to inform you that the court has approved and forwarded the proposed changes to the Congress, with one exception.

We have withheld approval of that portion of the proposed amendments to Rule of Evidence 412 which would apply that Rule to civil cases, and make evidence of the sexual behavior or predisposition of an alleged victim admissible only if "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Proposed Rule of Evidence 412(b)(2).

Some members of the Court expressed the view that the amendment might exceed the scope of the Court's authority under the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). This Court recognized in *Meritor Saving Bank v. Vinson*, 477 U.S. 57, 69 (1986), that evidence of an alleged victim's "sexually provocative speech or dress" may be relevant in workplace harassment cases, and some Justices expressed concern that the proposed amendment might encroach on the rights of defendants.

We think the Conference or its committee may wish to consider this proposal again in the future, in light of the comments and concerns identified in this letter.

Sincerely,

ccc: Mr. L. Ralph Mecham
Conference Secretary

The Honorable Alicemarie H. Stotler
Chair, Committee on Rules of Practice and Procedure

file copy

United States Court of Appeals

SECOND CIRCUIT

(203) 773-2353

CHAMBERS OF
RALPH K. WINTER
U.S. CIRCUIT JUDGE
55 WHITNEY AVENUE
NEW HAVEN, CT 06510

September 22, 1993

To: **Advisory Committee, Federal Rules of Evidence:**

Hon. Jerry E. Smith	Hon. Fern M. Smith
Hon. Milton I. Shadur	Hon. James T. Turner
Hon. Harold G. Clarke	Prof. Kenneth S. Broun
Gregory P. Joseph, Esq.	James K. Robinson, Esq.
John M. Kobayashi, Esq.	Prof. Margaret A. Berger
Hon. Wayne D. Brazil	Prof. Stephen Saltzburg

From: Ralph K. Winter, Chairman

Re: Agenda for September 30 - October 2 Meeting

The following is the agenda for our meetings on Thursday, September 30 through Saturday, October 2, 1993. The meetings on Thursday and Friday will begin at 8:30 a.m. and adjourn around 5:00 p.m. The Saturday meeting will begin at 8:30 a.m. and adjourn no later than 11:30 a.m.

A memorandum with accompanying materials was sent to you on June 22. You should bring both the memorandum and the materials to the meeting. Additional materials are included with this memorandum and agenda. The agenda is as follows:

1. **Carnegie Commission Report.**

This item was discussed in the June 22 memo, and materials relating to it accompanied that memo.

2. **Rules of Trial Management.**

This item was discussed in the June 22 memo, and materials relating to it accompanied that memo.

3. **Rules of Evidence and Sentencing Proceedings: Rule 1101.**

This item was discussed in the June 22 memo. No accompanying materials were sent.

4. **Updating or Modifying Commentaries.**

This item was discussed in the June 22 memo. No accompanying materials were sent. Professor Berger's memo on Rule 404 issues, which is included in this package, provides a concrete issue concerning the updating or modifying of Commentaries.

5. **Rule 803(6).**

This matter was raised in a letter to the Chair from Roger Pauley. That letter is among the materials accompanying this memo and agenda. Whether we should take up the merits of Roger's proposal at this meeting or hold it in abeyance until we address Article VIII is a threshold issue.

6. **Article IV: Rules 401-412.**

This item includes any outstanding policy or drafting issue regarding these rules. Accompanying this memo and agenda are memoranda from Professor Berger on Rules 404, 405, and 407. Also accompanying it is a draft law review article by Professor Reed

of Widener University School of Law that is waiting publication in the Texas Law Review. You will be receiving a draft of another law review article from John Rabiej. That article is by Professor Park of Minnesota Law School and will be published in the Minnesota Law Review.

7. Other Items of Business.

Other matters of business will be discussed at this time.

8. Article VI: Rules 601-615.

If we get to this item, it will include all policy and drafting issues regarding these rules.

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

JUN 15 1993

Honorable Ralph K. Winter, Jr.
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511

Dear Judge Winter:

I am writing on behalf of the Department of Justice to request inclusion on the agenda of the Advisory Committee on the Federal Rules of Evidence at its upcoming meeting of a proposal to create a new Rule of Evidence under which an expert's report of the analysis of a substance, object, or writing would be admissible as a kind of business record, unless either party wished to call the expert.

The proposal, which originated with the Drug Enforcement Agency (DEA), was inspired by a provision in Chapter 33 of the District of Columbia Code relating to controlled substance violations. The DEA is responsible for analyzing all drug evidence seized by the Washington, D.C. Metropolitan Police Department. Because of the nature and volume of the seizures and subsequent prosecutions, DEA encouraged the enactment some years ago of what is now D.C. Code § 33-556, which provides as follows:

> In a proceeding for a violation of this chapter, the official report of chain of custody and of analysis of a controlled substance performed by a chemist charged with an official duty to perform such analysis, when attested to by that chemist and by the officer having legal custody of the report and accompanied by a certificate under seal that the officer has legal custody, shall be admissible in evidence as evidence of the facts stated therein and the results of that analysis. A copy of the certificate must be furnished upon demand by the defendant or his or her attorney in accordance with the rules of the Superior Court of the District of Columbia or, if no demand is made, no later than 5 days prior to trial. In the event that the defendant or his or her attorney subpoenas the chemist for examination, the subpoena shall be without fee or cost and the examination shall be as on cross-examination.

The constitutionality of this provision under the Confrontation Clause has been upheld by the District of Columbia Court of Appeals. See Howard v. United States, 473 A.2d 835 (1984). The court described the provisions of D.C. Code § 33-556 as "within the ambit of the business records exception" to the hearsay rule. 473 A.2d at 838. In discussing whether evidence admitted pursuant to the provision bore sufficient indicia of reliability to satisfy the purpose of the Confrontation Clause, the court noted that identifying a controlled substance is determined by a well recognized chemical procedure and the reports thus produced contain objective facts rather than opinions. Moreover, chemists who conduct such examinations do so routinely, generally have little interest in the outcome of a case, and are under a duty to make accurate reports. Finally, D.C. Code § 33-556 does not preclude the defendant from inquiring into the reliability of the test, since he may subpoena the chemist and subject him to crossexamination.

The same or similar factors are present with respect to other expert examinations such as ballistics and handwriting examinations: recognized standards exist for the analyses which therefore result in reports that contain objectively obtained facts, and such experts normally have no interest in or reason to falsify the outcome of a particular analysis. Most important, the amendment we are suggesting has a provision allowing the defendant in a criminal case to subpoena the expert and subject him or her to cross-examination.

The practical significance of the District of Columbia statute on which our proposal is modeled is that DEA chemists -- unless subpoenaed -- do not have to appear personally in court to testify to the results of their tests of controlled substances, thereby saving not only their time but that of the parties and the courts. No witness is even required to authenticate the report because the D.C. Code provision has been interpreted as "extend[ing] admissibility of a chemist's report from the business records exception to a business records-type subset of the official records exception to the hearsay rule." Giles v. District of Columbia, 548 A.2d 48, 54 (D.C. App. 1988). Thus, in cases where a defendant has no desire to contest the chemist's report, but for tactical reasons does not want to stipulate to its conclusions, the D.C. Code provision sets out an efficient way to introduce the evidence. [1]

The same is true with similar reports of other experts. Frequently in federal trials the results of expert analyses are not contested. Our proposal would allow the introduction, by either side, of the expert's testimony in such a situation without the necessity (but preserving the opportunity) of calling the expert,

---

[1] Of course, there may also be situations in which the government does not wish to introduce the evidence by stipulation but would prefer not to take the time to call the chemist.

a saving of time for both the court and the expert. Since the rationale for the amendment does not depend on whether the expert is employed by the government, our proposal would allow such an uncontested introduction in cases of tests by private sector experts as well.

We think that the best way to accomplish this is to amend Rule 803(6) of the Federal Rules of Evidence. Specifically, we recommend that the current Rule 803(6) be redesignated 803(6)(a), and that new subsections (b), (c), and (d) be added as follows:

> (b) An official report of chain of custody and of an analysis of a substance, object, or writing, performed by an expert with an official duty to perform such analysis, shall, when attested to by that expert and by another person (if any) having legal custody of the report, be admissible as evidence of the facts stated therein and the results of that analysis. Authentication of an official report offered under this subsection may be made pursuant to Rule 902.
>
> (c) A report of chain of custody and of an analysis of a substance, object, or writing, performed by an expert who performed such analysis in the course of a regularly conducted business activity, shall, when attested to by that expert and by another person (if any) having custody of the report, be admissible as evidence of the facts stated therein and the results of that analysis.
>
> (d) If a party plans to offer a report pursuant to subsections (b) or (c), a copy of the report shall be furnished to every other party or his attorney not later than five days prior to trial. If the expert is subpoenaed for examination, the expert must be found qualified as such before the introduction of the report. If the expert or custodian is subpoenaed for examination, the subpoena shall be without fee or cost and the examination shall be as on cross-examination.

We note that the final sentence of subsection (b) of our proposal, which states that authentication of such an official report may be accomplished pursuant to Rule 902, is to make clear that such a report, although allowed into evidence under the "business records" exception to the hearsay rule, is to be treated as if it were admitted under exception 8 (public records), and self-authenticated, such as with an official seal, rather than by calling a witness. This is consistent with the court's statement in Giles, quoted above with respect to reports admitted under the D.C. rule, that the rule is really a subset of the official records exception.

Your and the other Committee members' consideration of this matter is deeply appreciated.

Sincerely,

Roger A. Pauley, Director
Office of Legislation
Criminal Division

cc: Margaret A. Berger

TO: Members of the Advisory Committee on Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

RE: Rule 405

DATE: September 21, 1993

Rule 405 contains a number of ambiguities, some of which are the result of rules changes since its enactment.

1. Relationship to Rule 404. Rule 405's placement after Rule 404 and some of the language in the rule and accompanying note suggest to the casual reader that Rule 405's coverage parallels that of Rule 404 -- that is, that Rule 405 deals with proving the different categories of evidence explicitly made admissible by Rule 404. That of course is not the case. The only evidence specifically treated in Rule 404 to which Rule 405 relates is evidence that falls into the two exceptions stated in subdivisions (a)(1) and (a)(2). Rule 405 also relates to evidence not made inadmissible by Rule 404 -- i.e. character evidence not being used with a propensity inference -- and does not apply to the other crimes evidence treated in Rule 404(b). Suggestions for amending Rule 404 to make the relationship between the two rules clearer are contained in the memorandum on Rule 404 issues.

2. Problems with subdivision (a).

a. The failure to mention Rule 412. Rule 412 currently states in both subdivisions (a) and (b) that opinion and reputation evidence are not admissible "notwithstanding any other provision of law." The Committee's proposed amendment to Rule 412 limits reputation evidence to a civil case and then only "if it has been placed in

controversy by the alleged victim." The proposed Rule 412(b)(2) exception for evidence of prior sexual behavior between the victim and the accused to prove consent authorizes use of prior sexual behavior for a propensity inference; it is therefore an instance in which it is no longer correct to state, as Rule 405(a) does, that reputation and opinion evidence are always admissible to prove character. Louisiana has recognized this problem by placing "Except as provided in Article 412" at the beginning of Rule 405(a).

b. Reputation and opinion evidence are not admissible with regard to all forms of impeachment. Rule 404(a)(3) states correctly that evidence of a witness' character may be admissible despite the propensity rule as provided in Rules 607, 608 and 609. Certainly reputation and opinion evidence are inapplicable when impeachment proceeds pursuant to Rule 609 -- another instance in which the sweeping statement in Rule 405(a) is not correct.

3. Subdivision (b). Problems with regard to the "essential element" language have already been discussed in connection with Rule 404. See pp. 17-18.

4. The Advisory Committee Note. The Note suggests somewhat tangentially that expert opinion evidence is admissible. Should the note be expanded to explain how the courts have treated this type of evidence, and to discuss Rule 405's interrelationship with Rule 704(b) which bars expert proof with regard to ultimate mental states of an accused. Rule 704(b) was added after the enactment of Rule 405.

TO: Members of the Advisory Committee on Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

RE: Rule 407

DATE: September 21, 1993

There is a conflict among the circuits as to how Rule 407, which bars evidence of subsequent remedial measures, should be applied in strict liability litigation.[1] The problem arises because the rule provides for exclusion when the evidence is used to prove "negligence or culpable conduct." In deciding whether and how to amend Rule 407 to deal explicitly with strict liability claims, the rule's underlying rationale, the impact of substantive doctrine, and the desirability of uniformity in the federal courts versus conformity with state law all bear on possible choices.

Current law and incentives for forum shopping. Although the majority of the circuits have extended Rule 407 to apply to all strict liability causes of action,[2] the

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[1] Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

[2] Raymond v. Raymond Corp., 958 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong, 995 F.2d 343, 345 (2d Cir. 1993); Cann v.

Tenth Circuit resolves this issue in terms of state law which is often to the contrary.[3] The positions of the Eighth[4] and Eleventh[5] circuits are not clear, but at least some opinions in those circuits indicate a willingness to admit evidence of some post-accident remedial measures in strict liability actions.

With the exception of the Tenth Circuit, the federal courts have rejected Erie concerns in interpreting Rule 407. They assume that the Supreme Court's opinion in Hanna v. Plummer authorizes federal courts to apply an arguably procedural rule.[6] They classify Rule 407 as dealing with the ascertainment of truth rather than with furthering a forum's substantive tort law policies.[7]

Since a majority of state courts permit the introduction of subsequent remedial

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Ford Motor Company, 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelley v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn, 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).

[3] Moe v. Avions Marcel Dassault Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984); Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 553 (10th Cir. 1983), cert. denied, 466 U.S. 958 (1984).

[4] Compare DeLuryea v. Winthrop Labs, 697 F.2d 222 (8th Cir. 1982) (bars subsequent remedial measures evidence in a failure to warn case involving a drug) with R.W. Murray Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th 1985); Unterburger v. Snow Co, 630 F.2d 599, 603 (8th Cir. 1980); Robbins v. Farmers Union Grain Terminal Association, 552 F.2d 788 (8th Cir. 1977) (all assuming that evidence of subsequent remedial measures may be admissible).

[5] Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716 (11th Cir. 1982) (applies Rules 401 and 403).

[6] 380 U.S. 460, 472 (1965).

[7] See the extensive discussion in Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984) (Posner, J.).

measure evidence in strict liability cases,[8] the extension of Rule 407 to strict liability claims frequently affords defendants an incentive to remove to federal court. The split in the circuits may also inspire horizontal forum-shopping by defendants who are within the federal system. Transfers pursuant to 28 U.S.C. §1404 may result as defendants in product liability actions are often amenable to personal jurisdiction in more than one forum. Because circuits other than the Tenth view Rule 407 as procedural, the transferee court will apply its circuit's interpretation of Rule 407 to strict liability claims.

Rationale. Rule 407, like the other special relevancy rules in Article IV, rests on two grounds: that the barred evidence has low probative value with regard to a particular inference, and that public policy dictates exclusion of the evidence. Evidence of post-accident remedial measures offered to prove negligence or culpable conduct is inadmissible partly because of relevancy concerns, but primarily so as not to discourage

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[8] 1 Trial Evidence Committee, Section of Litigation, American Bar Association, Evidence in America: The Federal Rules in the States § 17.5 (1992). The leading case holding that the traditional remedial measure rule should not be applied in strict liability cases is Ault v. International Harvester Co., 528 P.2d 1148 (1974). Some states have reached this result by statute or rule, see e.g., Me. R. Evid. 407 and R.I. R. Evid. 407 (both states allow evidence of subsequent measures in all types of cases); Alaska R. Evid. 407 and Hawaii R. Evid. 407 (specifically providing that evidence is admissible to prove defect in products liability actions) and others by case law interpreting a rule substantially similar to FRE 407, see, e.g., Jeep Corp. v. Murray, 708 P.2d 297 (Nev. 1985); Hallmark v. Allied Product Corporation, 646 P.2d 319 (Ct. App. Ariz. 1982), or by commentary to the rule (see Committee Comment to Colo. R. Evid. 407).

defendants from making repairs after an accident occurred.[9] How these grounds operate in product liability cases is a subject of dispute.

a. Relevancy concerns. Advocates of extending the exclusionary policy of Rule 407 to products liability cases contend that the probative value of the evidence is too low to meet a Rule 403 balancing test: "[C]hanges in design or manufacturing process might be made after an accident for a number of reasons: simply to avoid another injury, as a sort of admission of error, because a better way has been discovered, or to implement an idea or plan conceived before the accident."[10] They further argue that the introduction of evidence of subsequent remedial measures would confuse the jury. In a product liability action, the jury is to determine if the product or design was defective at the time that the product was made and sold, and the jury's

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[9] The Advisory Committee Note to Rule 407 provides:

> The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.

[10] Grenada Steel v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983).

attention should be directed to this time period.[11]

On the other hand, proponents of admissibility assert that a blanket rule of exclusion is over-inclusive -- that there will be contexts in which the evidence is relevant, and that the issue should be handled pursuant to Rules 401 and 403 rather than by extending Rule 407's scope to product liability actions.[12]

b. Promoting repairs. The majority of federal courts has determined that the reasons for excluding the evidence as proof of negligence apply equally in strict liability actions. These courts reason, whatever legal theory applies, that defendants will be less likely to undertake remedial measures if they know that evidence of their actions will be admitted because of fear that jurors will draw an adverse inference about the cause of the accident. On the other hand, courts that admit this evidence have pointed out that a manufacturer is not likely to forego repairs to avoid liability in one case when the failure to act could expose the manufacturer to liability in many other lawsuits.[13]

c. The inter-relationship with substantive doctrine. A number of courts have resolved the admissibility of subsequent repair evidence by analyzing the differing causes of action that pertain in product liability litigation. The New York state courts, for

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[11] S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 181 (3d ed. 1982). See also Grenada, 695 F.2d at 887.

[12] See discussion in Herndon v. Seven Bat Flying Services, Inc., 716 F.2d 1323, 1327 (10th Cir. 1983).

[13] Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1323, 1327 (10th Cir. 1983) ("It is unrealistic to think a tort feasor would risk innumerable additional lawsuits by foregoing necessary design changes simply to avoid the possible use of those modifications as evidence by persons who have already been injured.").

instance, have concluded that failure to warn and design defect cases really sound in negligence, and that only manufacturing defect cases rest on a true strict liability analysis in which evidence of subsequent repairs should be admissible.[14] The Eighth Circuit's cases suggest a similar approach.

Some courts have a special rule of admissibility for recall letters sent by manufacturers to owners of their product on the ground that the arguments for admitting this type of evidence are particularly compelling.[15] When the plaintiff seeks recovery because of the very defect that is the subject of the letter, the evidence has considerable probative value as an admission that the product was defective. Further, the policy of encouraging defendants to make repairs is not implicated as a recall order usually issues from a third party or is mandated by statute.[16]

Possible Solutions.

1. The initial question is whether the present situation with regard to Rule 407 has become intolerable? Should the rule be rewritten because it invites vertical and horizontal forum shopping? Should the rule be more responsive to Erie concerns? Do the majority of the circuits reach an inappropriate result by extending the rule to all

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[14] See Cover v. Cohen, 473 N.Y.S.2d 378 (1984); Rainbow v. Albert Elia Bldg. Co., 449 N.Y.S.2d 967 (1982); Caprara v. Chrysler Corp., 436 N.Y.S.2d 251 (1981).

[15] Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978); Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977).

[16] See, e.g., Farner v. Paccar, Inc., 562 F.2d at 527 (8th Cir. 1977) (it would be unreasonable "to assume that the manufacturers will risk wholesale violation of the National Traffic and Motor Vehicle Safety Act and liability for subsequent injuries caused by defects known by them to exist in order to avoid the possible use of recall evidence as an admission against them.").

strict liability actions? A "yes" answer to any of these questions suggests the need for an amendment.

2. If Rule 407 is revised, should the rule defer to applicable state law?[17] Two arguments favor such a choice. In the first place, some states view the admission of subsequent remedial measures in products liability actions as integral to their substantive policies with regard to these types of actions. If the consequence of admitting evidence of subsequent remedial measures is to tip the scales somewhat in plaintiffs' favor, then this choice should perhaps be honored in diversity litigation. Second, a federal rule that provides incentives for removing actions based on state law to the federal courts may well be undesirable. These reasons lose some of their strength if product liability law is likely to be federalized in the near future, or if the trend in the states is towards greater protection of defendants with regard to Rule 407-type evidence in strict liability actions.[18]

Rule 407 could be amended to require conformity to state law by adding a new second sentence. For example:

> **When evidence of subsequent measures is offered in connection with a claim based on strict liability in tort, or breach of warranty, the admissibility of the evidence shall be determined in accordance with State law.**

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[17] Three evidentiary rules -- Rule 302 (presumptions); Rule 501 (privileges) and Rule 601 (competency, e.g. the applicability of a Deadman's Act) -- now require a determination in accordance with state law.

[18] The American Law Institute is working on a restatement of product liability law. The Reporter, Aaron Twerski, advised me that the issue of subsequent remedial measures evidence will ultimately be addressed but not before 1995 at the earliest. He has previously recommended extending the subsequent measures exclusion at least to design defect and failure to warn cases.

or

> When evidence of subsequent measures is offered in connection with a products liability claim, the admissibility of the evidence shall be determined in accordance with State law.

or

> When evidence of subsequent measures is offered to prove strict liability, the admissibility of the evidence shall be determined in accordance with the law of the State governing the strict liability claim.

3. If the Committee chooses to opt for federal uniformity rather than conformity to state law, it has three choices: 1) to extend Rule 407 explicitly to all strict liability cases; 2) to make Rule 407 inapplicable to all strict liability cases; or 3) to make Rule 407 selectively applicable in strict liability cases. This choice is obviously dictated by an assessment of the consequences.

a. Exclude all subsequent measure evidence. The easiest rule to apply is to exclude all subsequent measure evidence in all strict liability cases, the current majority approach. The first sentence of Rule 407 could be amended as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove strict liability, negligence or culpable conduct in connection with the event.

(Tenn. R. Evid. 407)

b. Make Rule 407 inapplicable in the strict liability case. On the other hand, the guiding principle of the Federal Rules of Evidence is a disposition in favor of admitting all relevant evidence. In negligence cases, the probative value of subsequent measures evidence as proof of defendant's prior culpability is deemed so low that the policy of liberal admissibility is abandoned lest defendants be deterred from making

essential repairs. The crucial question is whether the probative value of subsequent measures evidence is sufficiently high in strict liability cases when offered to prove the existence of a defect so that the usual general preference for admissibility stated in Rule 401 should apply, subject to case specific exclusion via Rule 403. This solution would make Rule 407 inapplicable to strict liability claims. Admissibility would not, however, always follow because application of the balancing test in Rule 403 might result in exclusion.

Texas makes Rule 407 inapplicable in strict liability cases by adding a new third sentence to the rule:

> Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

Iowa reaches this result by adding the underlined language to the second sentence of Rule 407:

> This rule does not require the exclusion of evidence of subsequent measures when offered <u>in connection with [a] claim based on strict liability in tort or breach of warranty or</u> for another purpose, such as proving ownership, control, or feasibility or precautionary measures, if controverted, or impeachment.

c. <u>Selective admissibility</u>. Instead of admitting evidence of subsequent measures on a case-by-case basis when probative value is sufficiently high, the third alternative is to authorize admissibility (subject of course to Rule 403) only in those instances in which probative value is generically high. The two most likely candidates for special treatment are subsequent measures offered to prove a manufacturing defect and evidence of recall letters. In both of these instances the evidence relates to the defect that is at issue.

One possible way of making subsequent measures evidence admissible in manufacturing defect cases is to add the following language to the first sentence of Rule 407:

> **or to prove that the product was defective in design or that a warning or instruction should have accompanied the product at the time of the manufacture.**

Another possibility would be to add to the second sentence:

> **such as proving the existence of a defect in a product liability action based on strict liability.**

TO: Members of the Advisory Committee on Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

RE: Rule 404

DATE: September 21, 1993

I. Organization of discussion. After a brief overview of the scope of the rule, its rationale, and the central criticisms that it has provoked, this memorandum turns to possible amendments to Rule 404 that have been grouped into three categories:

A. Altering the Scope of Rule 404(a). Should the prohibited propensity inference incorporated in Rule 404(a) continue to apply in all criminal and civil cases subject to the three specific exceptions contained in subdivision (a)(1)-(3)? Three possible changes are considered: 1. modifying the propensity rule in cases in which defendant has been charged with a crime of a sexual nature; 2. modifying the rule or the exceptions to the rule in civil cases; 3. eliminating the bar on propensity evidence when defendant seeks to show another person's propensity to commit the crime with which defendant is charged.

B. Making Procedural Changes in Rule 404(b). Discussed are possible changes affecting the second sentence of subdivision (b): 1. altering the standard of proof that now applies to Rule 404(b) evidence as a result of the Supreme Court's decision in Huddleston v. United States, 485 U.S. 681 (1988); 2. clarifying that the issue to which the other crimes evidence is directed must be controverted; 3. miscellaneous changes.

C. Making Plainer the Current Meaning of Rule 404 and the Advisory Committee Note. Should an attempt be made to clarify the language of the rule even if the Committee chooses not to undertake any substantive changes? To what extent, if

any, may the Committee Note be revised if no changes are made in the text of the rule?

II. General Background: The Scope and Rationale of the Rule.

Rule 404(a) restates the traditional propensity rule: evidence of a person's character, whether manifested through convictions, uncharged misconduct, or specific characteristics, is not admissible when it is offered solely so that the fact finder may infer that the person acted in conformity with his or her character on the occasion in question. Character evidence does not fall within the prohibition of Rule 404 if it is offered pursuant to an evidential hypothesis that does not entail drawing a propensity inference. See Rule 404(b). Rule 404 is subject to three exceptions stated in subdivision (a): 1. an accused may, subject to limitations, introduce evidence of good character to show that he could not have committed the charged act, and the prosecution may respond to this evidence; 2. under some circumstances evidence of a victim's character may be introduced; 3. evidence of a witness' character for veracity is at times admissible subject to the rules in Article VI of the Federal Rules.

Rule 404, like the other quasi-privilege rules in Article IV, rests on relevancy and policy considerations: 1. doubt about the probative value of past acts in predicting the future;[1] and 2. concern that prejudice is inevitable once the jury becomes aware that a party has committed similar acts in the past. In criminal cases -- in which the danger of prejudice is most acute -- Rule 404 promotes constitutional objectives. The

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[1] Edward J. Imwinkelreid, The Evolution of the Use of the Doctrine of Chances as Theory of Admissibility for Similar Fact Evidence, Anglo-American Review 73, 76 (1993) ("The psychological literature indicates that character is a relatively poor predictor of conduct.").

evidentiary rule works in tandem with the privilege against self-incrimination to ensure that the accused must be proven guilty. Rule 404 assumes that once a defendant's criminal past becomes known, the jury will either punish him for prior transgressions, or will be distracted from properly assessing the evidence relating to the charged crime.[2]

The chief general criticisms voiced about the propensity rule are: 1. Rule 404(a) exacts too high a price by excluding highly probative evidence of the type on which we act in our every day lives. The strength of this argument varies somewhat depending on the particular act sought to be proved. See discussion infra. 2. Rule 404(a) is ineffectual because jurors undoubtedly draw a propensity inference even when evidence is admitted, as it often is, pursuant to a hypothesis that does not rest on a relationship between character and conduct.[3] Consequently, as the prohibited inference frequently creeps in anyway, the propensity rule is not worth keeping, particularly since it generates more reported cases than any other provision in the Federal Rules of Evidence. 3. Although the propensity rule exists in all Anglo-American jurisdictions, studies of reported opinions indicate a pronounced tendency to avoid the rule's prohibition in particular types of cases, such as those involving sexual misconduct or narcotics prosecutions. Inconsistencies of this sort breed contempt for the law.

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[2] See id. at 73 (empirical studies indicate that trier more likely to find adversely to the defendant once it learns about prior misconduct).

[3] Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases 7 (manuscript dated 6/25/93) ("instructing a jury to follow only the permitted thought-path is like telling someone to ignore every taste in a Hershey bar except the nuts.").

III. Possible Amendments

A. Changing the Scope of Rule 404.

1. Sex Crime Prosecutions.

a. Background. As reported out of committee in May 1993, S.11, the Violence Against Women Act contains a provision directing the Judicial Conference, within 180 days after enactment, to complete a study and make "recommendations for amending Federal Rule of Evidence 404 as it affects the admission of evidence of a defendant's prior sex crimes in cases . . . involving sexual misconduct." As of this writing, no further action has been taken with regard to S.11.

The commentary that follows is not the study mandated by the bill, (see Attachment A) since such a study would obviously be premature at this time. The discussion below does not survey the admissibility of prior similar sexual misconduct under state and federal evidentiary rules, and does not consider all of the specific issues commanded by S.11. Analyses of state practices and the desirability of changing the propensity rule in sex crimes cases are considered in two articles now awaiting publication which are included as Appendix A to provide additional background information. The authors have agreed to make them available to the Committee at this time.

The discussion below focuses on the central question of whether the propensity rule should be modified to permit evidence of a defendant's prior sexual misconduct in a sex crime prosecution. This inquiry, already a topic of considerable debate because of heightened attention to crimes of rape and child sexual abuse, has heated up even more

because of recent events involving celebrities, such as the highly publicized rape trials of William Kennedy Smith and Mike Tyson, and the charges against Woody Allen. Furthermore, legal commentators have long observed that in these kinds of cases some jurisdictions employ special rules to admit propensity evidence, and that courts tend to interpret overly expansively the categories pursuant to which prior acts evidence is admitted on a non-propensity inference.[4] See The Admission of Criminal Histories at Trial, 22 U. Mich. J.L.Ref. 713, 723-24 (1989) (reprint of paper prepared by the Office of Legal Policy, U.S. Dep't of Justice). Most of the relevant decisions have, of course, been rendered in state courts, as relatively few cases of sexual assault or child molestation are heard in federal courts.

S.6, which has been introduced in Congress and referred to the Judiciary Committee, would add Rules 413, 414, and 415 to the Federal Rules of Evidence. (see Attachment B) These proposed new rules provide that in sexual assault cases, child molestation cases, and civil cases concerning sexual assaults or child molestation, evidence that the party accused of these acts has previously committed a similar act is admissible whenever relevant. In a rape prosecution, for instance, Rule 413 would admit evidence that defendant had committed an uncharged sexual offense as making it more probable that he committed the charged crime.

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[4] The same argument -- that Rule 404(b) is cited to admit other crimes evidence mechanically, without analysis -- has been made with regard to conspiracy cases and narcotics prosecutions. See, e.g., J. Weinstein & M. Berger, Weinstein's Evidence par. 404[09] at pp. 404-58-59 and par. 404[12] at pp. 404-74-404-75. See also the discussion of narcotics prosecutions in United States v. Gordon, 987 F.2d 902 (2d Cir. 1993).

The proposed rules raise a number of serious issues which are discussed below. Some of these objections apply to any modification of the propensity rule in sexual assault cases, but others pertain more particularly to the pending version and could be mitigated.

b. The slippery slope. If the probative value of, and need for, propensity evidence in other criminal cases is of the same magnitude as it is in sexual offense cases, then carving out an exception for sexual offense cases will undermine the continued viability of the propensity rule in general. Although proponents of proposals to admit uncharged acts in sex offense cases argue that this evidence is particularly probative -- that the likelihood of a sexual offender committing another similar crime is remarkably high -- the empirical evidence supporting this conclusion is problematic.[5] Despite anecdotal evidence, the argument does not even seem particularly convincing in the case of certain kinds of sexual offenders such as pedophiles.[6] Furthermore, whether the rate of recidivism for sexual offenders is higher than for certain types of professional criminals is debatable.[7]

If the federal rules are amended to authorize the admission of uncharged sexual

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[5] Blackshaw, Furby & Weinrott, Sexual Offender Recidivism: A Review, 105 Psychological Bulletin, No.1 (1989) (concludes that despite large number of studies of sex offender recidivism we know little about it because of methodological flaws that enable one to "conclude anything one wants.").

[6] Romero & Williams, Recidivism Among Convicted Sex offenders: A Ten Year Follow Up Study, 49 Federal Probation 58, 62 (reported that rearrest rate for sexual assaulters is 10.4% and for pedophiles 6.2%).

[7] Id. (researchers found that non-sex offenders had a consistently higher rearrest rate than sex offenders).

offenses because of their allegedly high probative value, the door will be opened to overturning the propensity rule in other types of cases in which probative value is arguably high. Whether such a fundamental change in American jurisprudence is desirable needs to be considered. Whether the federal system should encourage such a shift by amending Rule 404 to deal with a kind of case rarely found in the federal courts is questionable. It should also be noted that some very recent state decisions have refused to admit uncharged misconduct evidence in sex offense prosecutions. See Getz v. State, 538 A.2d 726 (Del. 1988); State v. Zyback, 93 Ore.App. 218, 761 P.2d 1334 (1988), rev'd on other grounds, 308 Or. 96, 775 P.2d 318 (1989); Lannan v. State, 600 N.E.2d 1334 (1992).

c. The ease with which the uncharged act can be established. In Huddleston v. United States, 485 U.S. 681 (1988), the Supreme Court held that in order for evidence of uncharged offenses to be admissible under Rule 404(b), the trial judge must only find, pursuant to Rule 104(b), that a jury could reasonably conclude by a preponderance of the evidence that the defendant had committed the prior act. This standard may not adequately protect the defendant from evidence that jurors tend to overvalue, particularly if the definition of what constitutes a prior sexual assault is as broad as proposed in S.6. While it may be difficult to prove sexual offenses, it is also difficult to counter false accusations. When an alleged victim is willing to testify, or has made a statement that overcomes hearsay objections, the test of Huddleston is probably met. Of course, if Huddleston is abandoned in favor of a higher standard (see discussion infra), this objection will not apply.

Furthermore, Huddleston should perhaps not apply. The Supreme Court in Huddleston was concerned with non-propensity evidence admitted pursuant to subdivision (b). Evidence of prior sexual misconduct would be admitted as an exception to the propensity prohibition in subdivision (a). The existing exceptions to subdivision (a) offer no guidance about the appropriate burden because Rule 405 allows proof by reputation or opinion only. Presumably, given all the problems with evidence of prior sexual misconduct, one could require a preliminary determination by the court pursuant to Rule 104(a) as a condition to admitting such evidence. Whether a standard higher than the usual preponderance of the evidence should be required would also have to be decided.

Another possible solution would be to limit the use of prior misconduct to instances in which there has been a conviction. This modification would relieve jurors of having to cope with the collateral issue of whether defendant committed the uncharged act, and defendant of having to mount a defense with regard to uncharged crimes. Of course, such a limitation would cut down enormously on the cases in which evidence of prior sexual misconduct would be usable. It must also be remembered that some acts of sexual misconduct are so unique that they are properly admissible pursuant to Rule 404(b) even under the present rule.

d. The interaction with Rule 412. Although the propensity rule incorporated in Rule 404 is probably not constitutionally required, constitutional difficulties might arise were propensity evidence relating to the defendant's prior sexual conduct proffered in a case in which the prosecution invoked Rule 412 to bar the same

kind of evidence against the complainant. A judge might well find that under these circumstances, the evidence offered against the complainant "is constitutionally required to be admitted" pursuant to Rule 412(b)(1) of the Federal Rules of Evidence.[8] Allowing the prosecution to make use of an evidentiary principle while simultaneously restraining the defendant from introducing probative evidence is constitutionally suspect. Cf. Chambers v. Mississippi, 410 U.S. 284 (1973).

If, in order to avoid constitutional difficulties, judges permit defendants to introduce evidence of complainants' past sexual behavior, the result may well be that which Rule 412 seeks to avoid -- an unwillingness on the part of victims of sexual assaults to bring charges. Aside from undermining the rationale of Rule 412, this outcome would be directly contrary to the objective sought by those who advocate elimination of the propensity rule in sexual misconduct prosecutions in the hope of obtaining more convictions.

2. Civil Cases. By stating without any limitation that "evidence of a person's character or a trait of character is not admissible" to prove propensity, Rule 404(a) makes the prohibition applicable to all cases including civil cases. In contrast, the word "accused" in subdivisions (a)(1) and (a)(2) indicates that the exceptions apply only in criminal cases. This reading of Rule 404(a) is supported by the Advisory Committee Note which states quite clearly that evidence of conduct may not be used for a propensity inference in civil cases and that the exceptions stated in subdivisions (a)(1)

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[8] Our pending amendment to Rule 412 provides in subdivision (b)(1)(C) for the admission in criminal cases of "evidence the exclusion of which would violate the constitutional rights of the defendant."

and (a)(2) do not apply, The Advisory Committee defended its extension of the propensity rule to civil cases because of character evidence's low probative value and tendency to cause prejudice; it was unwilling to extend the defendant's option to introduce evidence of good character for fear of opening the door to psychological evaluations and testing.

Despite the clear mandate of Rule 404(a), an occasional federal court has indicated a willingness to extend the exceptions to a civil case if the conduct at issue is criminal. See, e.g., Bolton v. Tesoro Petroleum Corp., 871 F.2d 1267 (5th Cir.) (civil RICO; evidence admissible in a trial raising quasi-criminal allegations), cert. denied, 110 S.Ct. 83 (1989); Perrin v. Anderson, 784 F.2d 1040, 1044 (10th Cir. 1986) ("Although the literal language of the exception to Rule 404(a) applies only to criminal cases, . . .when the central issue involved in a civil case is in nature criminal the defendant may invoke the exceptions to Rule 404(a)."); Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1253-54 & n. 7 (5th Cir. 1982) (action on accidental death policy where insured had been shot by woman who claimed he raped her; beneficiary allowed to introduce evidence of insured's good character; court affirmed "when evidence would be admissible under Rule 404(a) in a criminal case, we think it should also be admissible in a civil suit where the focus is on essentially criminal aspects, and the evidence is relevant, probative, and not unduly prejudicial;" alternative holding).

The Committee might wish to reconsider the original Advisory Committee's conclusion, taking into account whether legal developments since 1975 justify a recasting of the propensity rule in civil cases. For instance, does the increased reliance on quasi-

criminal measures such as civil RICO and forfeiture proceedings make a difference, or an increase in intentional tort actions which furnish the closest analogy to criminal misconduct?

A number of the states have revised Rule 404(a) to deal specifically with problems posed by civil cases. See 1 Trial Evidence Committee, Section of Litigation, American Bar Association, Evidence in America: The Federal Rules in the States § 14.2 at pp. 4-5 (1992). The Texas rule broadens the (a)(1) exception to allow proof of good character in all instances involving accusations of moral turpitude whether in a civil or criminal case. and extends the (a)(2) exception to the character of victims of assaultive conduct in civil actions:

> (1) **Character of party accused of conduct involving moral turpitude.** Evidence of a pertinent trait of his character offered by a party accused of conduct involving moral turpitude, or by the accusing party to rebut the same;
> (2) **Character of alleged victim of assaultive conduct.** Evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct or evidence of peaceable character to rebut the same.

3. A Third Party's Propensity. Read literally, Rule 404(a) excludes evidence relating to any person's character when offered for a propensity inference. See United States v. McCourt, 925 F.2d 1229, 1235 (9th Cir. 1991) (rule applies "to any person, and to any proponent"). In a criminal case, when the accused wishes to introduce character evidence to suggest that someone else was the perpetrator of the charged crime, concerns that propensity evidence will undermine defendant's presumption of innocence obviously are inapplicable. Rather, strict utilization of Rule 404 will deprive the accused of exculpatory evidence regardless of its probative value

even though it might engender a reasonable doubt. Few cases have dealt with this issue; sometimes the evidence proffered by defendant is found to satisfy Rule 404(b). See, e.g., United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984) (defendant who claimed that he had been duped into smuggling by his cousins wanted to show that his cousins had duped others; court found that evidence satisfied Rule 404(b) but not Rule 403). Should the propensity bar be removed when an accused seeks to introduce character evidence relating to a third person so that admissibility will be governed by Rules 401 and 403 rather than Rule 404?

B. Amendments to Rule 404(b).

1. Changing the burden of proof. Until the Supreme Court's decision in Huddleston v. United States, 485 U.S. 681 (1988), there was a conflict in the circuits as to the height of the prosecution's burden in proving the other crime, and as to whether Rule 104(a) or (b) applied. The Supreme Court resolved the issue by holding that the trial judge need not make a finding with regard to other crimes evidence; rather, pursuant to Rule 104(b), the court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . .by a preponderance of the evidence."

There are critics who argue that the Huddleston standard does not afford the accused sufficient protection. The American Bar Association's Criminal Justice Section has urged abandonment of Huddleston in favor of a clear and convincing standard, and its position has been endorsed by the A.B.A.'s House of Delegates.[9] A number of states

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[9] See E.J. Imwinkelreid, Uncharged Misconduct Evidence § 2:08 (1993 Supplement).

have refused to adopt Huddleston in construing their own versions of Rule 404. See, e.g., State v. Faulker, 314 Md. 630 (1989). The Court of Appeals of Maryland, Standing Committee on Rules of Practice and Procedure has recently stated that it "intends to make no change in Maryland Law." Report at 37 (1993). Minnesota added a sentence to its Rule 404 after Huddleston:

> In a criminal prosecution, such evidence shall not be admitted unless the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence.

Congress, however, may well wish to retain the status quo. Whether Huddleston should be extended to proof of prior sexual misconduct if such evidence is allowed as an exception to the propensity rule is discussed supra.

2. Clarifying whether the evidence must relate to a disputed issue. The courts are divided about the extent to which a consequential fact must be controverted in order for other crimes evidence to be admissible to prove that fact. A subsidiary issue on which courts disagree is whether the defendant has the right to preclude the prosecution from proffering other crimes evidence by offering to stipulate to the consequential fact to which the evidence is relevant. The Supreme Court by-passed the opportunity to clarify the stipulation issue when it dismissed its writ of certiorari in United States v. Hadley, 918 F.2d 848 (9th Cir. 1990) as improvidently granted. The stipulation issue is extensively discussed in E. Imwinkelreid, supra at §§ 8:10-8:15.

The words "if controverted" do not presently appear in Rule 404, although they do in Rule 407. Consequently, it is arguable that the plain-meaning of Rule 404(b) does not condition the admissibility of other crimes evidence on the defense having created an

actual dispute -- through evidence or other means such as an opening statement -- about the consequential fact to which the evidence is offered. The differences in the circuits is most apparent in connection with the issue of intent. Some courts allow other crimes evidence whenever specific, as compared to general intent, is a required element. See, e.g., United States v. Briscoe, 896 F.2d 1476 (7th Cir.), cert. denied, 111 S.Ct. 173 (1990); United States v. Engelman, 648 F.2d 473, 478 (8th Cir.1981). However, the nature of some crimes is such that no genuine issue of intent exists because of the inference that arises from the criminal act itself. Allowing other crimes evidence in such circumstances invites a propensity inference. See, United States v. Kramer, 955 F.2d 479, 492-93 (7th Cir. 1992) (Cudahy, J. concurring) (criticism of specific intent distinction). Other courts require the issue of intent to be seriously disputed and refuse to allow other crimes evidence when, for example, the defendant claims that he did not commit the charged act. See, e.g., United States v. Figueroa, 618 F.2d 934, 940 (2d Cir. 1980)..

The Supreme Court's opinion in Estelle v. McGuire, 112 S.Ct. 475 (1991), a habeas corpus challenge to a California conviction, contains dictum that provides some ammunition for concluding that the prosecutor is free to introduce other crimes evidence even when the defendant has failed to raise an issue concerning the fact which the evidence seeks to prove. In a prosecution charging defendant with the murder of his infant daughter, the prosecution offered evidence that she was a battered child. The Court of Appeals had ruled that this evidence should have been excluded because defendant did not raise a defense of accidental death. The Supreme Court disagreed:

> [T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. In the federal courts "[a] simple plea of not guilty...puts the prosecution to its proof as to all elements of the crime charged." Matthews v. United States, 485 U.S. 58, 64-65 (1988).

Id. at 475.

Is this an issue we wish to address? For instance, the words "if controverted" could be added to Rule 404(b) after the words "mistake or accident."

Tennessee requires that upon request the judge must hold a hearing outside the jury's presence and at that hearing

> The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

Tenn R. Evid. 404(b)(2).

3. Other suggestions. Should one add a ten year limitation to Rule 404(b) analogous to that contained in Rule 609(b) regarding the use of convictions for impeachment? Should the rule add language aimed at distinguishing between "other" or "extrinsic" acts versus the "same" or "intrinsic" acts. Some recent codifications have attempted to deal with this issue. Louisiana has added the following language at the end of Rule 404(b):

> , or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Kentucky has added a second subdivision to Rule 404(b) that deals with this issue somewhat differently:

> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

C. Amendments Aimed at Clarification of the Existing Rule. This section considers whether any changes should be made in the text of Rule 404 or the Committee Note to make them more comprehensible even if the Committee does not wish to affect the current meaning of the rule. Since the Committee has never had an opportunity to discuss the costs and benefits of revising rules in the interest of intelligibility, I have proceeded in the following manner. Rather than redrafting Rule 404 before knowing the Committee's views on when clarification is worth the risk of inadvertently creating unanticipated problems, I have instead categorized different kinds of possible changes so that we can consider general principles as well as specific changes. The sample amendments to Rule 404 which are set forth are intended more as illustrations of issues than as recommendations about specific language that should be adopted if the Committee determines to resolve the difficulty in question.

1. Enhancing plain-meaning. Into this category I have slotted possible changes that would make the intended plain-meaning of the rule plainer. Law professors would perhaps agree that the scope of Rule 404, and its interrelationship with Rule 405, often elude the casual reader.

a. Should the rule deal more comprehensively with character? Would lawyers better understand the scope of Rule 404 if the rule dealt with character evidence more comprehensively. Rule 404 prohibits the inferential or circumstantial use of evidence to prove conduct in conformity with character except in three specified circumstances. Subdivision (b) explicitly acknowledges that this general prohibition is inapplicable when evidence is offered to prove something other than character so that no

inference from character to conduct is entailed, The text of Rule 404 does not, however, explicitly state that the rule is equally inapplicable when a person's character is directly relevant without an inference about his or her conduct. Whether this is adequately clear is problematic despite being mentioned in the current Committee Note.

Oregon has changed the title of its Rule 404 to read: Character Evidence: Admissibility. It then adds a new first subdivision:

> (1) **Admissibility generally.** Evidence of a person'scharacter or trait of character is admissible when it is an essential element of a charge, claim or defense.[10]

A more ambitious undertaking would be to redraft Rule 404 to make clearer the difference between inferential and non-inferential use, and to tie the methods of proof more directly to the various ways in which evidence relating to a defendant's character may be used.[11]

b. Is the rule sufficiently clear as to when character evidence is admissible? Advisory Committee Note to Rule 404 (a) states:

> Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting

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[10] Montana has adopted a similar provision as the last subdivision in Rule 404 but without a change in the caption of the rule to indicate that it is dealing with character evidence in general.

[11] See Glen Weissenberger, Character Evidence Under the Federal Rules: A Puzzle with Missing Pieces, 48 Cincinnati L. Rev. 1, 12 (1979). Professor Weissenberger's proposal which combines Rules 404 and 405 is attached. See Attachment C.

a motor vehicle to an incompetent driver.[12]

The Note further states that allowable methods of proof are dealt with in Rule 405. That rule refers to "cases in which character, or a trait of character of a person is an essential element of a charge, claim or defense." (emphasis added)

Is this language misleading? The formulation of "essential elements" in Rule 405 and the illustrations in the Rule 404 Note about formal "elements" of causes of action, suggest that something more is intended than character being a "fact that is of consequence." See Rule 401. Although reported opinions do not indicate that courts insist on anything other than a showing of relevancy, the departure from the language of Rule 401 may suggest that something more is required of a proponent. The Bar's discomfort with the meaning of an "essential elements" test was apparent when we discussed Rule 412.

If the Committee wishes to make Rule 404's treatment of character evidence more comprehensive by adding a provision that character evidence offered to prove something other than propensity is admissible (see a. supra), the formulation must be coordinated with Rule 405. Consequently, the "essential claims" phrase would have to be retained if Rule 405 is not amended.

c. Is Rule 404's treatment of civil cases adequate? This discussion is concerned with the clarity of the rule with regard to civil cases rather than with its wisdom which is discussed supra. Rule 404 makes two somewhat indirect statements

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[12] The terminology, "character in issue," is also used in connection with the very different situation codified in subdivision (a)(1) when the accused is allowed to introduce evidence of his good character.

about the inferential use of character evidence in civil cases. The Advisory Committee's intent is clearly expressed in the accompanying Note. By stating without any limitation that "evidence of a person's character or a trait of character is not admissible" to prove propensity, the Rule makes the general prohibition applicable to civil cases. By using the word "accused" in subdivisions (a)(1) and (a)(2), it limits the two exceptional circumstances in which the propensity inference is usable to criminal cases. One could make both of these points explicitly. Adding "in a criminal case" to the exceptions (if that is the desired rule) would eliminate arguments that "accused" means the defendant in a civil case.

d. Is the relationship between subdivision (a) and subdivision (b) sufficiently clear? Is it helpful that the first sentence of subdivision (b) restates the general rule of subdivision (a)? One consequence is that courts at times quote this sentence and cite subdivision (b) when they are they are solely concerned with analyzing the scope of the propensity rule. The case is then classified in annotations, etc. as a Rule 404(b) case. Furthermore, the repetition in (b) perhaps obscures the difference between a propensity and non-propensity inference, and promotes the erroneous impression that subdivision (b) is an exception to subdivision (a).

2. Codifying Supreme Court holdings. There is precedent for amending the Evidence Rules to incorporate Supreme Court holdings; both the Civil and Criminal Rules of Procedure have at times been amended to codify a Supreme Court holding.[13]

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[13] For instance, the work product rule in Fed.R.Civ.P. 26 has its genesis in Hickman v. Taylor, 329 U.S. 495 (1947) and Criminal Rule 26.2 was in part a response to United States v. Nobles, 422 U.S. 225 (1975).

Most evidence courses now teach evidence as a code subject, and the multi-state bar exam is based on the Federal Rules of Evidence. Failing to incorporate a significant decision of the Supreme Court that is essential to understanding and using a particular rule may therefore mislead the advocate who expects to find everything in the Rules. On the other hand, additional codification will make the rules more prolix.

Possible candidates for codification are Huddleston v. United States, 485 U.S. 681 (1988), see supra and Dowling v. United States, 493 U.S. 342 (1990) (evidence of crimes of which defendant has been acquitted may be admitted pursuant to Rule 404(b). Huddleston is the far more significant opinion since its holding applies in every case in which Rule 404(b) evidence is proffered, and a number of states interpret identical versions of Rule 404 differently. See discussion supra and see 1 Trial Evidence Committee, Section of Litigation, American Bar Association, Evidence in America: The Federal Rules in the States § 14.2 (1992). A sentence with a cross-reference to Rule 104(b) could be added to the end of subdivision (b), or a comment could be added to the Note. The need to codify Dowling is considerably less.

3. Adding cross-references. Rule 404 currently contains cross-references to Rules 607, 608 and 609 in subdivision (a)(3). Subdivision (a)(2) should perhaps state that it is subject to Rule 412 since it clearly is. See Iowa and Texas Rule 412. A cross-reference to Rule 405 might also be desirable to clarify the relationship between Rules 404 and 405. See discussion of Rule 405.

4. Revising the notes. In a previous memorandum I questioned whether we are free to issue new notes if we make no changes in a rule. Assuming that we may make

changes (either in conjunction with amendments to the text of the Rule or otherwise), we need to consider the type of changes we would wish to undertake.

a. Correcting errors. The third paragraph of the Note is clearly wrong in light of Rule 412 in the example it gives of evidence of the character of the victim being admissible on the issue of consent in a rape case.

b. Updating case law developments. The extent to which one should update references in the Committee Note is particularly troublesome with a rule like 404 which has engendered so much commentary both in the courts and legal literature. For instance, an entire treatise is devoted solely to Rule 404(b). Do we want to include references to helpful secondary materials? even if their authors are members of the Evidence Committee?

SEC. 611 REPORT ON FEDERAL RULE OF EVIDENCE 404

(a) STUDY. – Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall complete a study of, and shall submit to Congress, recommendations for amending Federal Rule of Evidence 404 as it affects the admission of evidence of a defendant's prior sex crimes in cases brought pursuant to chapter 109A or other cases involving sexual misconduct.

(b) SPECIFIC ISSUES. – This study shall include, but is not limited to, consideration of the following issues: (1) a survey of existing law on the introduction of prior similar sex crimes under state and federal evidentiary rules; (2) a recommendation about whether Rule 404 should be amended to introduce evidence of prior sex crimes and, if so, (a) whether such acts could be used to prove the defendant's "propensity" to act therewith and (b) whether prior similar sex crimes should be admitted for purposes other than to show character; (3) a recommendation about whether similar acts, if admitted, should meet a threshold of similarity to the crime charged; (4) a recommendation about whether similar acts, if admitted, should be confined within a certain time period, (e.g. 10 years); and (5) the effect, if any, of the adoption of any proposed changes on the admissibility of evidence under Rule 412, the rape shield law.

ATTACHMENT A

new baby, or an aging parent with a serious medical problem. That worker's presence in the home for the time it takes to get the family through the situation will make a difference not only in the worker's peace of mind during the crisis, but in her or his ability to do their job well for months and years after they return to work.

Mr. President, as much as I have been proud and pleased to support family and medical leave legislation for the past several years, I will be even more happy to see this bill with a public law number assigned to it. Those Members or Congress and organizations who have put in yeomans' service in this effort can then move on to other pressing issues facing American families. Thank you, Mr. President.●

Mrs. BOXER. Mr. President, it has been a long difficult fight, but today we stand a few short steps from victory. We now have a Congress that will pass the Family and Medical Leave Act and a President who has agreed to sign it into law. I am proud to be an original cosponsor of this legislation.

The Family and Medical Leave Act, which provides families with job security at a time when they most need it, is long overdue. No worker should be subject to termination for taking time off to care for a sick child. I believe that not only will this bill institute more humane workplace policies, it will make workers more productive by eliminating the prospect that they would leave to choose between their families and their jobs.

I urge my colleagues to join me in working for fast action on the Family and Medical Leave Act.

By Mr. DOLE (for himself, Mr. THURMOND, Mr. SIMPSON, Mr. MCCAIN, Mr. SPECTER, and Mr. COVERDELL):

S. 6. A bill to prevent and punish sexual violence and domestic violence, to assist ad protect the victims of such crimes, to assist State and local effects, and for other purposes; to the Committee on the Judiciary.

SEXUAL ASSAULT PREVENTION ACT OF 1993

Mr. DOLE. Mr. President, as I stated earlier, I am joined today by several of my Republican colleagues in introducing the Sexual Assault Prevention Act of 1993.

As is my right as Republican leader, I have asked that this bill be designated as "S. 6," symbolizing the fact that this bill is a top priority of Senate Republicans. This legislation is also being introduced in the House by Congresswoman SUSAN MOLINARI of New York.

I first introduced legislation similar to S. 6 in February of 1991—nearly 2 years ago. I reintroduced the legislation last fall. I know that Senator BIDEN is also very interested in this issue, and hope we can work together to write legislation that will protect women from crime in the streets and crime in their own home.

The bill contains three titles. Title I is concerned with violent sex crimes. Subtitle A of title I increases penalties for sexual violence and strengthens the rights and remedies available to victims of sexual violence.

Subtitle B contains changes in rules of evidence, practice, and procedure to facilitate effective prosecution of violent sex offenders, and to prevent abuse of victims and increase the rights of victims.

Subtitle C addresses the problem of sexual assaults at colleges and universities.

Subtitle D contains new justice assistance measures to enhance State and Local efforts against sexual violence.

Title II of the bill concerns domestic violence, stalking, and offenses against the family. It strengthens the Federal response to domestic violence, stalking, and noncompliance with child support obligations in cases with interstate elements, requires reports on a number of issues of importance to protecting the victims of domestic violence, and establishes a new justice assistance program to enhance State and local efforts to combat domestic violence and stalking, and to enforce child support obligations.

Title III of the bill establishes a national task force on violence against women. The task force would carry out a comprehensive examination of violent crime against women and recommend additional reforms and improvements.

I look forward to working with the distinguished chairman of the Judiciary Committee in finding common ground in our legislative proposals, and seeing them adopted into law.

I ask unanimous consent that the text of the bill and any additional statements be printed in the CONGRESSIONAL RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 6

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sexual Assault Prevention Act of 1993".

SEC. 2. TABLE OF CONTENTS.

TITLE I—SEXUAL VIOLENCE

SUBTITLE A—PENALTIES AND REMEDIES

SEC. 101. PRE-TRIAL DETENTION IN SEX OFFENSE CASES.

Section 3156(a)(4) of title 18, United States Code, is amended by striking ", or" at the end of subparagraph (A) and inserting a semicolon, by striking the period at the end of subparagraph (B) and inserting "; or", and by adding after subparagraph (B) the following new subparagraph:

"(C) any felony under chapter 109A or chapter 110 of this title."

SEC. 102. DEATH PENALTY FOR MURDERS COMMITTED BY SEX OFFENDERS.

Title 18 of the United States Code is amended—

(a) by adding the following new section at the end of chapter 51:

"§ 1118. Capital Punishment for Murders Committed by Sex Offenders

"(a) OFFENSE.—Whoever—

ATTACHMENT B

"(1) causes the death of a person intentionally, knowingly, or through recklessness manifesting extreme indifference to human life, or

"(2) causes the death of a person through the intentional infliction of serious bodily injury;

shall be punished as provided in subsection (c) of this section.

"(b) FEDERAL JURISDICTION.—There is Federal jurisdiction over an offense described in this section if the conduct resulting in death occurs in the course of another offense against the United States.

"(c) PENALTY.—An offense described in this section is a Class A felony. A sentence of death may be imposed for an offense described in this section as provided in subsections (d)–(l), except that a sentence of death may not be imposed on a defendant who was below the age of eighteen at the time of the commission of the crime.

"(d) MITIGATING FACTORS.—In determining whether to recommend a sentence of death, the jury shall consider whether any aspect of the defendant's character, background, or record or any circumstance of the offense that the defendant may proffer as a mitigating factor exists, including the following factors:

"(1) MENTAL CAPACITY.—The defendant's mental capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired.

"(2) DURESS.—The defendant was under unusual and substantial duress.

"(3) PARTICIPATION IN OFFENSE MINOR.—The defendant is punishable as a principal (pursuant to section 2 of this title) in the offense, which was committed by another, but the defendant's participation was relatively minor.

"(e) AGGRAVATING FACTORS.—In determining whether to recommend a sentence of death, the jury shall consider any aggravating factor for which notice has been provided under subsection (f), including the following factors—

"(1) KILLING IN COURSE OF DESIGNATED SEX-CRIMES.—The conduct resulting in death occurred in the course of an offense defined in chapter 109A, 110, or 117 of this title.

"(2) KILLING IN CONNECTION WITH SEXUAL ASSAULT OR CHILD MOLESTATION.—The defendant committed a crime of sexual assault or crime of child molestation, as defined in subsection (x), in the course of an offense on which federal jurisdiction is based under subsection (b).

"(3) PRIOR CONVICTION OF SEXUAL ASSAULT OR CHILD MOLESTATION.—The defendant has previously been convicted of a crime of sexual assault or crime of child molestation as defined in subsection (x).

"(f) NOTICE OF INTENT TO SEEK DEATH PENALTY.—If the government intends to seek the death penalty for an offense under this section, the attorney for the government shall file with the court and serve on the defendant a notice of such intent. The notice shall be provided a reasonable time before the trial or acceptance of a guilty plea, or at such later time before trial as the court may permit for good cause. If the court permits a late filing of the notice upon a showing of good cause, the court shall ensure that the defendant has adequate time to prepare for trial. The notice shall set forth the aggravating factor or factors set forth in subsection (e) and any other aggravating factor or factors that the government will seek to prove as the basis for the death penalty. The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

"(g) JUDGE AND JURY AT CAPITAL SENTENCING HEARING.—A hearing to determine whether the death penalty will be imposed for an offense under this section shall be conducted by the judge who presided at trial or accepted a guilty plea, or by another judge if that judge is not available. The hearing shall be conducted before the jury that determined the defendant's guilt if that jury is available. A new jury shall be impaneled for the purpose of the hearing if the defendant pleaded guilty, the trial of guilt was conducted without a jury, the jury that determined the defendant's guilt was discharged for good cause, or reconsideration of the sentence is necessary after the initial imposition of a sentence of death. A jury impaneled under this subsection shall have twelve members unless the parties stipulate to a lesser number at any time before the conclusion of the hearing with the approval of the judge. Upon motion of the defendant, with the approval of the attorney for the government, the hearing shall be carried out before the judge without a jury. If there is no jury, references to "the jury" in this section, where applicable, shall be understood as referring to the judge.

"(h) PROOF OF MITIGATING AND AGGRAVATING FACTORS.—No presentence report shall be prepared if a capital sentencing hearing is held under this section. Any information relevant to the existence of mitigating factors, or to the existence of aggravating factors for which notice has been provided under subsection (f), may be presented by either the government or the defendant. The information presented may include trial transcripts and exhibits. Information presented by the government in support of factors concerning the effect of the offense on the victim and the victim's family may include oral testimony, a victim impact statement that identifies the victim of the offense and the nature and extent of harm and loss suffered by the victim and the victim's family, and other relevant information. Information is admissible regardless of its admissibility under the rules governing the admission of evidence at criminal trials, except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The attorney for the government and for the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in that case of imposing a sentence of death. The attorney for the government shall open the argument, the defendant shall be permitted to reply, and the government shall then be permitted to reply in rebuttal.

"(i) FINDINGS OF AGGRAVATING AND MITIGATING FACTORS.—The jury shall return special findings identifying any aggravating factor or factors for which notice has been provided under subsection (f) and which the jury unanimously determines have been established by the government beyond a reasonable doubt. A mitigating factor is established if the defendant has proven its existence by a preponderance of the evidence, and any member of the jury who finds the existence of such a factor may regard it as established for purposes of this section regardless of the number of jurors who concur that the factor has been established.

"(j) FINDING CONCERNING A SENTENCE OF DEATH.—If the jury specially finds under subsection (i) that one or more aggravating factors set forth in subsection (e) exist, and the jury further finds unanimously that there are no mitigating factors or that the aggravating factor or factors specially found under subsection (i) outweigh any mitigating factors, then the jury shall recommend a sentence of death. In any other case, the jury shall not recommend a sentence of death. In any other case, the jury shall not recommend a sentence of death. The jury shall be instructed that it must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factors in its decision, and should make such a recommendation as the information warrants.

"(k) SPECIAL PRECAUTION TO ASSURE AGAINST DISCRIMINATION.—In a hearing held before a jury, the court, before the return of a finding under subsection (j), shall instruct the jury that, in considering whether to recommend a sentence of death, it shall not be influenced by prejudice or bias relating to the race, color, religion, national origin, or sex of the defendant or any victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for such a crime regardless of the race, color, religion, national origin, or sex of the defendant or any victim. The jury, upon the return of a finding under subsection (j), shall also return to the court a certificate, signed by each juror, that the race, color, religion, national origin, or sex of the defendant or any victim did not affect the juror's individual decision and that the individual juror would have recommended the same sentence for such a crime regardless of the race, color, religion, national origin, or sex of the defendant or any victim.

"(l) IMPOSITION OF A SENTENCE OF DEATH.—Upon a recommendation under subsection (j) that a sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, that is authorized by law.

"(m) REVIEW OF A SENTENCE OF DEATH.—The defendant may appeal a sentence of death under this section by filing a notice of appeal of the sentence within the time provided for filing a notice of appeal of the judgment of conviction. An appeal of a sentence under this subsection may be consolidated with an appeal of the judgment of conviction and shall have priority over all non-capital matters in the court of appeals. The court of appeals shall review the entire record in the case including the evidence submitted at trial and information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under subsection (i). The court of appeals shall uphold the sentence if it determines that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, that the evidence and information support the special findings under subsection (i), and that the proceedings were otherwise free of prejudicial error that was properly preserved for and raised on appeal. In any other case, the court of appeals shall remand the case for reconsideration of the sentence or imposition of another authorized sentence as appropriate, except that the court shall not reverse a sentence of death on the ground that an aggravating factor was not supported by the evidence and information if at least one aggravating factor set forth in subsection (e) which was found to exist remains and the court, on the basis of the evidence submitted at trial and the information submitted at the sentencing hearing, finds no mitigating factor or finds that the remaining aggravating factor or factors which were found to exist outweigh any mitigating factors. The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

"(n) IMPLEMENTATION OF SENTENCE OF DEATH.—A person sentenced to death under this section shall be committed to the custody of the Attorney General until exhaus-

tion of the procedures for appeal of the judgment of conviction and review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States Marshal. The Marshal shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed, or in the manner prescribed by the law of another State designated by the court if the law of the State in which the sentence was imposed does not provide for implementation of a sentence of death. The Marshal may use State or local facilities, may use the services of an appropriate State or local official or of a person such an official employs, and shall pay the costs thereof in an amount approved by the Attorney General.

"(o) SPECIAL BAR TO EXECUTION.—A sentence of death shall not be carried out upon a woman while she is pregnant.

"(p) CONSCIENTIOUS OBJECTION TO PARTICIPATION IN EXECUTION.—No employee of any State department of corrections, the Federal Bureau of Prisons, or the United States Marshals Service, and no person providing services to that department, bureau, or service under contract shall be required, as a condition of that employment or contractual obligation, to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subjection, the term 'participate in any execution' includes personal preparation of the condemned individual and the apparatus used for the execution, and supervision of the activities of other personnel in carrying out such activities.

"(q) APPOINTMENT OF COUNSEL FOR INDIGENT CAPITAL DEFENDANTS.—A defendant against whom a sentence of death is sought, or on whom a sentence of death has been imposed, under this section, shall be entitled to appointment of counsel from the commencement of trial proceedings until one of the conditions specified in subsection (v) has occurred, if the defendant is or becomes financially unable to obtain adequate representation. Counsel shall be appointed for trial representation as provided in section 3005 of this title, and at least one counsel so appointed shall continue to represent the defendant until the conclusion of direct review of the judgment, unless replaced by the court with other qualified counsel. Except as otherwise provided in this section, the provisions of section 3006A of this title shall apply to appointments under this section.

"(r) REPRESENTATION AFTER FINALITY OF JUDGMENT.—When a judgment imposing a sentence of death under this section has become final through affirmance by the Supreme Court on direct review, denial of certiorl by the Supreme Court on direct review, or expiration of the time for seeking direct review in the court of appeals or the Supreme Court, the government shall promptly notify the court that imposed the sentence. The court, within 10 days of receipt of such notice, shall proceed to make a determination whether the defendant is eligible for appointment of counsel for subsequent proceedings. The court shall issue an order appointing one or more counsel to represent the defendant upon a finding that the defendant is financially unable to obtain adequate representation and wishes to have counsel-appointed or is unable competently to decide whether to accept or reject appointment of counsel. The court shall issue an order denying appointment of counsel upon a finding that the defendant is financially able to obtain adequate representation or that the defendant rejected appointment of counsel with an understanding of the consequences of that decision. Counsel appointed pursuant to this subsection shall be different from the counsel who represented the defendant at trial and on direct review unless the defendant and counsel request a continuation or renewal of the earlier representation.

"(s) STANDARDS FOR COMPETENCE OF COUNSEL.—In relation to a defendant who is entitled to appointment of counsel under subsections (q)-(r), at least one counsel appointed for trial representation must have been admitted to the bar for at least 5 years and have at least three years of experience in the trial of felony cases in the Federal district courts. If new counsel is appointed after judgment, at least one counsel so appointed must have been admitted to the bar for at least 5 years and have at least 3 years of experience in the litigation of felony cases in the Federal courts of appeals or the Supreme Court. The court, for good cause, may appoint counsel who does not meet these standards, but whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration of the seriousness of the penalty and the nature of the litigation.

"(t) CLAIMS OF INEFFECTIVENESS OF COUNSEL IN COLLATERAL PROCEEDINGS.—The ineffectiveness of incompetence of counsel during proceedings on a motion under section 2255 of title 28, United States Code, shall not be a ground for relief from the judgment or sentence in any proceeding. This limitation shall not preclude the appointment of different counsel at any stage of the proceedings.

"(u) TIME FOR COLLATERAL ATTACK ON DEATH SENTENCE.—A motion under section 2255 of title 28, United States Code, attacking a sentence of death under this section, or the conviction on which it is predicated, must be filed within 90 days of the issuance of the order under subsection (r) appointing or denying the appointment of counsel for such proceedings. The court in which the motion is filed, for good cause shown, may extend the time for filing for a period over all non-capital matters in the district court, and in the court of appeals on review of the district court's decision.

"(v) STAY OF EXECUTION.—The execution of a sentence of death under this section shall be stayed in the course of direct review of the judgment and during the litigation of an initial motion in the case under section 2255 of title 28, United States Code. The stay shall run continuously following imposition of the sentence and shall expire if—

"(1) the defendant fails to file a motion under section 2255 of title 28, United States Code, within the time specified in subsection (u), fails to make a timely application for court of appeals review following the denial of such a motion by a district court;

"(2) upon completion of district court and court of appeals review under section 2255 of title 28, United States Code, the Supreme Court disposes of a petition for certiorari in a manner that leaves the capital sentence undisturbed, or the defendant fails to file a timely petition for certiorari; or

"(3) before a district court, in the presence of counsel and after having been advised of the consequences of such a decision, the defendant waives the right to file a motion under section 2255 of title 28, United States Code.

"(w) FINALITY OF THE DECISION ON REVIEW.—If one of the conditions specified in subsection (v) has occurred, no court thereafter shall have the authority to enter a stay of execution or grant relief in the case unless—

"(1) the basis for the stay and request for relief is a claim not presented in earlier proceedings;

"(2) the failure to raise the claim is the result of governmental action in violation of the Constitution or laws of the United States, the result of the Supreme Court's recognition of a new Federal right that is retroactively applicable, or the result of the fact that the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence in time to present the claim in earlier proceedings; and

"(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the determination of guilt on the offense or offenses for which the death penalty was imposed.

"(x) DEFINITIONS.—For purposes of this section—

"(1) 'crime of sexual assault' means a crime under Federal or State law that involved—

"(A) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(B) contact, without consent, between the genitals or anus of the defendant and any part of the body of another person;

"(C) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(D) an attempt or conspiracy to engage in any conduct described in paragraphs (A)-(C);

"(2) 'crime of child molestation' means a crime under Federal or State law that involved—

"(A) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(B) contact between the genitals or anus of the defendant and any part of the body of a child;

"(C) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(D) an attempt or conspiracy to engage in any conduct described in paragraphs (A)-(C); and

"(3) 'child' means a person below the age of 14"; and

(b) by adding the following at the end of the table of sections for chapter 51:

"1118. Capital Punishment for Murders Committed by Sex Offenders.".

SEC. 103. INCREASED PENALTIES FOR RECIDIVIST SEX OFFENDERS.—

(a) Section 2245 of title 18, United States Code, is redesignated section 2246.

(b) Chapter 109A of title 18, United States Code, is amended by inserting the following new section after section 2244:

"2245. Penalties for subsequent offenses.

"Any person who violates a provision of this chapter after a prior conviction under a provision of this chapter or the law of a State (as defined in section 513 of this title) for conduct proscribed by this chapter has become final is punishable by a term of imprisonment up to twice that otherwise authorized.".

(c) The table of sections for chapter 109A of title 18, United States Code, is amended by—

(1) striking "2245" and inserting in lieu thereof "2246"; and

(2) inserting the following after the item relating to section 2244:

"2245. Penalties for subsequent offenses.".

SEC. 104. INCREASED PENALTIES FOR SEX OFFENSES AGAINST VICTIMS BELOW THE AGE OF 16.—

Paragraph (2) of section 2245 of title 18, United States Code, is amended—

(1) in subparagraph (B) by striking "or" after the semicolon;

(2) in subparagraph (C) by striking "; and" and inserting in lieu thereof "; or"; and

(3) by inserting a new subparagraph (D) as follows:

"(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;".

SEC. 105. SENTENCING GUIDELINES INCREASE FOR SEX OFFENSES.

The United States Sentencing Commission shall amend the sentencing guidelines to increase by at least 4 levels the base offense level for an offense under section 2241 (aggravated sexual abuse) or section 2242 (sexual abuse) of title 18, United States Code, and shall consider whether any other changes are warranted in the guidelines provisions applicable to such offenses to ensure realization of the objectives of sentencing. In amending the guidelines in conformity with this section, the Sentencing Commission shall review the appropriateness and adequacy of existing offense characteristics and adjustments applicable to such offenses, taking into account the heinousness of sexual abuse offenses, the severity and duration of the harm caused to victims, and any other relevant factors. In any subsequent amendment to the sentencing guidelines, the Sentencing Commission shall maintain minimum guidelines sentences for the offenses referenced in this section which are at least equal to those required by this section.

SEC. 106. HIV TESTING AND PENALTY ENHANCEMENT IN SEXUAL OFFENSE CASES.

(a) Chapter 109A of title 18, United States Code, is amended by inserting at the end the following new section:

"§ 2247. Testing for Human Immunodeficiency Virus; Disclosure of Test Results to Victim; Effect on Penalty

"(a) TESTING AT TIME OF PRE-TRIAL RELEASE DETERMINATION.—In a case in which a person is charged with an offense under this chapter, a judicial officer issuing an order pursuant to section 3142(a) of this title shall include in the order a requirement that a test for the human immunodeficiency virus be performed upon the person, and that follow-up tests for the virus be performed six months and twelve months following the date of the initial test, unless the judicial officer determines that the conduct of the person created no risk of transmission of the virus to the victim, and so states in the order. The order shall direct that the initial test be performed within 24 hours, or as soon thereafter as feasible. The person shall not be released from custody until the test is performed.

"(b) TESTING AT LATER TIME.—If a person charged with an offense under this chapter was not tested for the human immunodeficiency virus pursuant to subsection (a), the court may at a later time direct that such a test be performed upon the person, and that follow-up tests be performed six months and twelve months following the date of the initial test, if it appears to the court that the conduct of the person may have risked transmission of the virus to the victim. A testing requirement under this subsection may be imposed at any time while the charge is pending, or following conviction at any time prior to the person's completion of service of the sentence.

"(c) TERMINATION OF TESTING REQUIREMENT.—A requirement of follow-up testing imposed under this section shall be canceled if any test is positive for the virus or the person obtains an acquittal on, or dismissal of, all charges under this chapter.

"(d) DISCLOSURE OF TEST RESULTS.—The results of any test for the human immunodeficiency virus performed pursuant to an order under this section shall be provided to the judicial officer or court. The judicial officer or court shall ensure that the results are disclosed to the victim (or to the victim's parent or legal guardian, as appropriate), the attorney for the Government, and the person tested.

"(e) EFFECT ON PENALTY.—The United States Sentencing Commission shall amend existing guidelines for sentences for offenses under this chapter to enhance the sentence if the offender knew or had reason to know that he was infected with the human immunodeficiency virus, except where the offender did not engage or attempt to engage in conduct creating a risk of transmission of the virus to the victim.".

"(b) CLERICAL AMENDMENT.—The table of sections for chapter 109A of title 18, United States Code, is amended by inserting at the end thereof the following new item:

"2247. Testing for Human Immunodeficiency Virus; Disclosure of Test Results to Victim; Effect on Penalty".

SEC. 107. PAYMENT OF COST OF HIV TESTING FOR VICTIMS IN SEX OFFENSE CASES.

Section 503(c)(7) of the Victims' Rights and Restitution Act of 1990 is amended by inserting before the period at the end thereof the following: ", the cost of up to two tests of the victim for the human immunodeficiency virus during the twelve months following the assault, and the cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of the human immunodeficiency virus to the victim as the result of the assault".

SEC. 108. INCREASED PENALTIES FOR DRUG DISTRIBUTION TO PREGNANT WOMEN.

Section 405 of the Controlled Substances Act (21 U.S.C. 859) is amended by inserting ", or to a woman while she is pregnant," after "to a person under twenty-one years of age" in subsection (a) and subsection (b).

SEC. 109. EXTENSION AND STRENGTHENING OF RESTITUTION.

Section 3663 of title 18, United States Code, is amended—

(1) in subsection (b), by inserting "or an offense under chapter 109A or chapter 110" after "an offense resulting in bodily injury to a victim" in paragraph (2);

(2) in subsection (b), by striking "and" at the end of paragraph (3), by redesignating paragraph (4) as paragraph (5), and by inserting after paragraph (3) the following new paragraph:

"(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and"; and

(3) in subsection (d), by inserting at the end the following: "However, the court shall issue an order requiring restitution of the full amount of the victim's losses and expenses for which restitution is authorized under this section in imposing sentence for an offense under chapter 109A or chapter 110 unless the government and the victim do not request such restitution.".

SEC. 110. ENFORCEMENT OF RESTITUTION ORDERS THROUGH SUSPENSION OF FEDERAL BENEFITS.

Section 3663 of title 18, United States Code, is amended—

(1) by redesignating subsections (g) and (h) as subsections (h) and (i), respectively; and

(2) by inserting after subsection (f) the following new subsection:

"(g)(1) If the defendant is delinquent in making restitution in accordance with any schedule of payments or any requirement of immediate payment imposed under this section, the court may, after a hearing, suspend the defendant's eligibility for all Federal benefits until such time as the defendant demonstrates to the court good-faith efforts to return to such schedule.

"(2) For purposes of this subsection—

"(A) the term 'Federal benefits'—

"(i) means any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or appropriated funds of the United States; and

"(ii) does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility; and

"(B) the term 'veterans benefit' means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.".

SEC. 111. CIVIL REMEDY FOR VICTIMS OF SEXUAL VIOLENCE.

(a) CAUSE OF ACTION.—Whoever, in violation of the Constitution or laws of the United States, engages in sexual violence against another, shall be liable to the injured party in an action under this section. The relief available in such an action shall include compensatory and punitive damages and any appropriate equitable or declaratory relief.

(b) DEFINITION.—For purposes of this section, "sexual violence" means any conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurs in the special maritime and territorial jurisdiction of the United States or in a Federal prison.

(c) ATTORNEY'S FEES.—The Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. 1988) is amended by striking "or" after "Public Law 92-318" and by inserting after "1964" the following: ", or section 111 of the Sexual Assault Prevention Act of 1993,".

SUBTITLE B—RULES OF EVIDENCE, PRACTICE, AND PROCEDURE

SEC. 121. ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

"(d) For purposes of this Rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

"Rule 414. Evidence of Similar Crimes in Child Molestation Cases

"(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

"(d) For purposes of this Rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

"(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(4) contact between the genitals or anus of the defendant and any part of the body of a child;

"(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

"Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

"(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these Rules.

"(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule."

SEC. 122. EXTENSION AND STRENGTHENING OF RAPE VICTIM SHIELD LAW.

(a) AMENDMENTS TO RAPE VICTIM SHIELD LAW.—Rule 412 of the Federal Rules of Evidence is amended—

(1) in subdivisions (a) and (b), by striking "criminal case" and inserting "criminal or civil case";

(2) in subdivisions (a) and (b), by striking "an offense under chapter 109A of title 18, United States Code," and inserting "an offense or civil wrong involving conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurred in the special maritime and territorial jurisdiction of the United States or in a Federal prison,";

(3) in subdivision (a), by striking "victim of such offense" and inserting "victim of such conduct";

(4) in subdivision (c)—

(A) by striking in paragraph (1) "the person accused of committing an offense under chapter 109A of title 18, United States Code" and inserting "the accused"; and

(B) by inserting at the end of paragraph (3) the following: "An order admitting evidence under this paragraph shall explain the reasoning leading to the finding of relevance, and the basis of the finding that the probative value of the evidence outweighs the danger of unfair prejudice notwithstanding the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased inferences."; and

(5) in subdivision (d), by striking "an offense under chapter 109A of title 18, United States Code" and inserting "the conduct proscribed by chapter 109A of title 18, United States Code,".

(b) INTERLOCUTORY APPEAL.—Section 3731 of title 18, United States Code, is amended by inserting after the second paragraph the following:

"An appeal by the United States before trial shall lie to a court of appeals from an order of a district court admitting evidence of an alleged victim's past sexual behavior in a criminal case in which the defendant is charged with an offense involving conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurred in the special maritime and territorial jurisdiction of the United States or in a Federal prison."

SEC. 123. INADMISSIBILITY OF EVIDENCE TO SHOW PROVOCATION OR INVITATION BY VICTIM IN SEX OFFENSE CASES.

The Federal Rules of Evidence are amended by adding after Rule 415 (as added by section 121 of this Act) the following:

"Rule 416. Inadmissibility of evidence to show invitation or provocation by victim in sexual abuse cases.

"In a criminal case in which a person is accused of an offense involving conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurred in the special maritime and territorial jurisdiction of the United States or in a Federal prison, evidence is not admissible to show that the alleged victim invited or provoked the commission of the offense. This Rule does not limit the admission of evidence of consent by the alleged victim if the issue of consent is relevant to liability and the evidence is otherwise admissible under these Rules.".

SEC. 124. RIGHT OF THE VICTIM TO FAIR TREATMENT IN LEGAL PROCEEDINGS.

The following rules, to be known as the Rules of Professional Conduct for Lawyers in Federal Practice, are enacted as an appendix to title 28, United States Code:

"RULES OF PROFESSIONAL CONDUCT FOR LAWYERS IN FEDERAL PRACTICE

"Rules 1. Scope

"(a) These rules apply to the conduct of lawyers in their representation of clients in relation to proceedings and potential proceedings before federal tribunals.

"(b) For purposes of these rules, 'federal tribunal' and 'tribunal' mean a court of the United States or an agency of the federal government that carries out adjudicatory or quasiadjudicatory functions.

"Rule 2. Abuse of Victims and Others Prohibited

"(a) A lawyer shall not engage in any action or course of conduct for the purpose of increasing the expense of litigation for any person, other than a liability under an order or judgment of a tribunal.

"(b) A lawyer shall not engage in any action or course of conduct that has no substantial purpose other than to distress, harass, embarrass, burden, or inconvenience another person.

"(c) A lawyer shall not offer evidence that the lawyer knows to be false or attempt to discredit evidence that the lawyer knows to be true.

"Rule 3. Duty of Enquiry in Relation to Client

"A laywer shall attempt to elicit from the client a truthful account of the material facts concerning the matters in issue. In representing a client charged with a crime or civil wrong, the duty of enquiry under this rule includes—

(1) "attempting to elicit from the client a materially complete account of the alleged criminal activity or civil wrong if the client acknowledges involvement in the alleged activity or wrong; and

"(2) attempting to elicit from the client the material facts relevant to a defense of alibi if the client denies such involvement.

"Rule 4. Duty to Expedite Litigation

"(a) A lawyer shall seek to bring about the expeditious conduct and conclusion of litigation.

"(b) A lawyer shall not seek a continuance or otherwise attempt to delay or prolong proceedings in the hope or expectation that—

"(1) evidence will become unavailable;

"(2) evidence will become more subject to impeachment or otherwise less useful to another party because of the passage of time; or

"(3) an advantage will be obtained in relation to another party because of the expense, frustration, distress, or other hardship resulting from prolonged or delayed proceedings.

"Rule 5. Duty to Prevent Commission of Crime

"(a) A lawyer may disclose information relating to the representation of a client to the extent necessary to prevent the commission of a crime or other unlawful act.

"(b) A lawyer shall disclose information relating to the representation of a client where disclosure is required by law. A lawyer shall also disclose such information to the extent necessary to prevent—

"(1) the commission of a crime involving the use or threatened use of force against another, or a substantial risk of death or serious bodily injury to another; or

"(2) the commission of a crime of sexual assault or child molestation.

"(c) For purposes of this rule, 'crime' means a crime under the law of the United States or the law of a State, and 'unlawful act' means an act in violation of the law of the United States or the law of a State.".

SEC. 125. RIGHT OF THE VICTIM TO AN IMPARTIAL JURY.

Rule 24(b) of the Federal Rules of Criminal Procedure is amended by striking "the Government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges" and inserting "each side is entitled to 6 peremptory challenges."

SEC. 126 VICTIM'S RIGHT OF ALLOCUTION IN SENTENCING.

Rule 32 of the Federal Rules of Criminal Procedure is amended—

(1) by striking "and" at the end of subdivision (a)(1)(B);

(2) by striking the period at the end of subdivision (a)(1)(C) and inserting "; and";

(3) by inserting after subdivision (a)(1)(C) the following:

"(D) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement and to present any information in relation to the sentence.";

(4) in the penultimate sentence of subdivision (a)(1) by striking "equivalent opportunity" and inserting "opportunity equivalent to that of the defendant's counsel";

(5) in the last sentence of subdivision (a)(1) by inserting "the victim," before ", or the attorney for the Government."; and

(6) by adding at the end the following new subdivision:

"(f) DEFINITIONS.—For purposes of this rule—

"(1) 'crime of violence or sexual abuse' means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code; and

"(2) 'victim' means an individual against whom an offense for which a sentence is to be imposed has been committed, but the right of allocution under subdivision (a)(1)(D) may be exercised instead by—

"(A) a parent or legal guardian if the victim is below the age of 18 years or incompetent; or

"(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated,

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present.

SEC. 127. VICTIM'S RIGHT OF PRIVACY.

(a) FINDINGS.—The Congress finds that—

(1) the crime of rape is underreported to law enforcement authorities because of its traumatic effect on victims and the stigmatizing nature of the crime;

(2) rape victims may be further victimized by involuntary public disclosure of their identities;

(3) rape victims should be encouraged to come forward and report the crime without fear of being revictimized through involuntary public disclosure of their identities; and

(4) any interest of the public in knowing the identity of a rape victim notwithstanding the victim's wishes to the contrary is outweighed by the interest of protecting the privacy of rape victims and encouraging rape victims to report the crime and assist in prosecution.

(b) SENSE OF CONGRESS.—It is the sense of Congress that news media, law enforcement personnel, and other persons should exercise restraint and respect a rape victim's privacy by not disclosing the victim's identity to the general public or facilitating such disclosure without the consent of the victim.

SUBTITLE C—SAFE CAMPUSES

SEC. 131. NATIONAL BASELINE STUDY ON CAMPUS SEXUAL ASSAULT.

(a) STUDY.—The Attorney General shall provide for a national baseline study to examine the scope of the problem of campus sexual assaults and the effectiveness of institutional and legal policies in addressing such crimes and protecting victims. The Attorney General may utilize the Bureau of Justice Statistics, the National Institute of Justice, and the Office for Victims of Crime in carrying out this section.

(b) REPORT.—Based on the study required by subsection (a), the Attorney General shall prepare a report including an analysis of—

(1) the number of reported allegations and estimated number of unreported allegations of campus sexual assaults, and to whom the allegations are reported (including authorities of the educational institution, sexual assault victim service entities, and local criminal authorities);

(2) the number of campus sexual assault allegations reported to authorities of educational institutions which are reported to criminal authorities;

(3) the number of campus sexual assault allegations that result in criminal prosecution in comparison with the number of non-campus sexual assault allegations that result in criminal prosecution;

(4) Federal and State laws or regulations pertaining specifically to campus sexual assaults;

(5) the adequacy of policies and practices of educational institutions in addressing campus sexual assaults and protecting victims, including consideration of—

(A) the security measures in effect at educational institutions, such as utilization of campus police and security guards, control over access to grounds and buildings, supervision of student activities and student living arrangements, control over the consumption of alcohol by students, lighting, and the availability of escort services;

(B) the articulation and communication to students of the institution's policies concerning sexual assaults;

(C) policies and practices that may prevent or discourage the reporting of campus sexual assaults to local criminal authorities, or that may otherwise obstruct justice or interfere with the prosecution of perpetrators of campus sexual assaults;

(D) the nature and availability of victim services for victims of campus sexual assaults;

(E) the ability of educational institutions' disciplinary processes to address allegations of sexual assault adequately and fairly;

(F) measures that are taken to ensure that victims are free of unwanted contact with alleged assailants, and disciplinary sanctions that are imposed when a sexual assault is determined to have occurred; and

(G) the grounds on which educational institutions are subject to lawsuits based on campus sexual assaults, the resolution of these cases, and measures that can be taken to avoid the likelihood of lawsuits and civil liability;

(6) an assessment of the policies and practices of educational institutions that are of greatest effectiveness in addressing campus sexual assaults and protecting victims, including policies and practices relating to the particular issues described in paragraph (5); and

(7) any recommendations the Attorney General may have for reforms to address campus sexual assaults and protect victims more effectively, and any other matters that the Attorney General deems relevant to the subject of the study and report required by this section.

(c) SUBMISSION OF REPORT.—The report required by subsection (b) shall be submitted to the Congress no later than September 1, 1995.

(d) DEFINITION.—For purposes of this section, "campus sexual assaults" includes sexual assaults occurring at institutions of postsecondary education and sexual assaults committed against or by students or employees of such institutions.

(e) AUTHORIZATION OF APPROPRIATION.—There is authorized to be appropriated $200,000 to carry out the study required by this section.

SUBTITLE D—ASSISTANCE TO STATES AND LOCALITIES

SEC. 141. SEXUAL VIOLENCE GRANT PROGRAM.

(a) PURPOSE.—The purpose of this section is to strengthen and improve State and local efforts to prevent and punish sexual violence, and to assist and protect the victims of sexual violence.

(b) AUTHORIZATION OF GRANTS.—The Attorney General, through the Bureau of Justice Assistance, the Office for Victims of Crime, and the Bureau of Justice Statistics, may make grants to support projects and programs relating to sexual violence, including support of—

(1) training and policy development programs for law enforcement officers and prosecutors concerning the investigation and prosecution of sexual violence;

(2) law enforcement and prosecutorial units and teams that target sexual violence;

(3) victim services programs for victims of sexual violence;

(4) educational and informational programs relating to sexual violence;

(5) improved systems for collecting, keeping, and disseminating records and data concerning sexual violence and offenders who engage in sexual violence;

(6) background check systems that enable employers to determine whether employees and applicants for employment have criminal histories involving sexual violence, in relation to employment positions for which a person may be unsuitable on the basis of such a history, such as child care positions and positions involving access to people's homes;

(7) registration systems which require persons convicted of sexual violence to keep law enforcement authorities informed of their addresses or locations;

(8) security measures in parks, public transportation systems, public buildings and facilities, and other public places which reduce the risk that acts of sexual violence will occur in such places;

(9) programs addressing campus sexual assaults, as defined in section 131 of this Act;

(10) programs assisting runaway and homeless children or other persons who have been subjected to or are at risk of sexual violence or sexual exploitation, including sexual exploitation through prostitution or in the production of pornography;

(11) training programs for judges in relation to cases involving sexual violence; and

(12) treatment programs in a correctional setting for offenders who engage in sexual violence, which may include aftercare components, and which shall include an evaluation component to determine the effectiveness of the treatment in reducing recidivism.

(c) FORMULA GRANTS.—Of the amount appropriated in each fiscal year for grants under this section, other than the amount set aside to carry out subsection (d)—

(1) 0.25 percent shall be set aside for each participating State; and

(2) the remainder shall be allocated to the participating States in proportion to their populations;

for the use of State and local governments in the States.

(d) DISCRETIONARY GRANTS.—Of the amount appropriated in each fiscal year, 20 percent shall be set aside in a discretionary fund to provide grants to public and private agencies to further the purposes and objectives set forth in subsections (a) and (b).

(e) APPLICATION FOR FORMULA GRANTS.—To request a grant under subsection (c), the chief executive officer of a State must, in each fiscal year, submit to the Attorney General a plan for addressing sexual violence

in the State, including a specification of the uses to which funds provided under subsection (c) will be put in carrying out the plan. The application must include—

(1) certification that the Federal funding provided will be used to supplement and not supplant State and local funds;

(2) certification that any requirement of State law for review by the State legislature or a designated body, and any requirement of State law for public notice and comment concerning the proposed plan, has been satisfied; and

(3) provisions for fiscal control, management, recordkeeping, and submission of reports in relation to funds provided under this section that are consistent with requirements prescribed for the program.

(f) CONDITIONS ON GRANTS.—

(1) MATCHING FUNDS.—Grants under subsection (c) may be for up to 50 percent of the overall cost of a project or program funded. Discretionary grants under subsection (d) may be for up to 100 percent of the overall cost of a project of program funded.

(2) DURATION OF GRANTS.—Grants under subsection (c) may be provided in relation to a particular project or program for up to an aggregate maximum period of four years.

(3) LIMIT ON ADMINISTRATIVE COSTS.—Not more than 5 percent of a grant under subsection (c) may be used for costs incurred to administer the grant.

(4) PAYMENT OF COST OF FORENSIC MEDICAL EXAMINATIONS.—It is a condition of eligibility for grants under subsection (c) that a State pay the cost of forensic medical examinations for victims of sexual violence.

(5) POLICIES AGAINST CAMPUS SEXUAL ASSAULTS.—For an institution of postsecondary education seeking a grant under subsection (d), it is a condition of eligibility that the institution articulate and communicate to its students a clear policy that sexual violence will not be tolerated by the institution.

(g) EVALUATION.—The National Institute of Justice shall have the authority to carry out evaluations of programs funded under this section. The recipient of any grant under this section may be required to include an evaluation component to determine the effectiveness of the project or program funded that is consistent with guidelines issued by the National Institute of Justice.

(h) COORDINATION.—The Attorney General may utilize the Office of Justice Programs to coordinate the administration of grants under this section. The coordination of grants under this section shall include prescribing consistent program requirements for grantees, allocating functions and the administration of particular grants among the components that participate in the administration of the program under this section, coordinating the program under this section with the Domestic Violence and Family Support Grant Program established by section 208 of this Act, and coordinating the program under this section with other grant programs administered by components of the Department of Justice.

(i) DEFINITION.—For purposes of this section, "sexual violence" includes non-consensual sex offenses and sex offenses involving victims who are not able to give legally effective consent because of age or incompetency.

(j) REPORT.—The Attorney General shall submit an annual report to Congress concerning the operation and effectiveness of the program under this section.

(k) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated, in each of fiscal years 1994, 1995, and 1996, $250,000,000 to carry out this section, and such sums as may be necessary in each fiscal year thereafter.

SEC. 142. SUPPLEMENTARY GRANTS FOR STATES ADOPTING EFFECTIVE LAWS RELATING TO SEXUAL VIOLENCE.

(a) SUPPLEMENTARY GRANTS.—The Attorney General may, in each fiscal year, authorize the award to a State of an aggregate amount of up to $1 million under the Sexual Violence Grant Program established by section 141 of this Act, in addition to any funds that are otherwise authorized under that program. The authority to award additional funding under this section is conditional on certification by the Attorney General that the State has laws relating to sexual violence that exceed or are reasonably comparable to the provisions of federal law (including changes in federal law adopted by this Act) in the following areas:

(1) Authorization of pre-trial detention of defendants in sexual assault cases where prevention of flight or the safety of others cannot be reasonably assured by other means, and denial of release pending appeal for persons convicted of sexual assault offenses who have been sentenced to imprisonment.

(2) Authorization of severe penalties for sexual assault offenses.

(3) Pre-trial testing for the human immunodeficiency virus of persons charged with sexual assault offenses, with disclosure of test results to the victim.

(4) Payment of the cost of medical examinations and the cost of testing for the human immunodeficiency virus for victims of sexual assaults.

(5) According the victim of a sexual assault the right to be present at judicial proceedings in the case.

(6) Protection of victims from inquiry into unrelated sexual behavior in sexual assault cases.

(7) Rules of professional conduct for lawyers that protect victims from unwarranted cross-examination and impeachment, dilatory tactics, and other abuses in sexual assault cases.

(8) Authorization of admission and consideration in sexual assault cases of evidence that the defendant has committed sexual assaults on other occasions.

(9) Authorization of the victim in sexual assault cases to address the court concerning the sentence to be imposed.

(10) Authorization of the award of restitution to victims of sexual assaults as part of a criminal sentence.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated in each fiscal year such sums as may be necessary to carry out this section.

TITLE II—DOMESTIC VIOLENCE, STALKING, AND OFFENSES AGAINST THE FAMILY

SEC. 201. INTERSTATE TRAVEL TO COMMIT SPOUSE ABUSE OR TO VIOLATE PROTECTIVE ORDER; INTERSTATE STALKING.

(a) OFFENSE.—Part 1 of title 18, United States Code, is amended by inserting after chapter 110 the following:

"CHAPTER 110A—DOMESTIC VIOLENCE AND STALKING

"Sec.
"2261. Domestic violence and stalking.

"2261. Domestic violence and stalking

(a) OFFENSE.—Whoever causes or attempts to cause bodily injury to, engages in sexual abuse against, or violates a protective order in relation to, another shall be punished—

"(1) if death results, by death or by imprisonment for any term of years or for life;

"(2) if permanent disfigurement or life-threatening bodily injury results, by imprisonment for not more than 20 years;

"(3) if serious bodily injury results, or if a firearm, knife, or other dangerous weapon is possessed, carried, or used during the commission of the offense, by imprisonment for not more than 10 years; and

"(4) in any other case, by imprisonment for not more than five years.

If, however, the defendant engages in sexual abuse and the penalty authorized for such conduct under chapter 109A exceeds the penalty which would otherwise be authorized under this subsection, then the penalty authorized for such conduct under chapter 109A shall apply.

"(b) MANDATORY PENALTIES.—A sentence under this section shall include at least three months of imprisonment if the offense involves the infliction of bodily injury on or the commission of sexual abuse against the victim. A sentence under this section shall include at least six months of imprisonment if the offense involves the violation of a protective order and the defendant has previously violated a protective order in relation to the same victim.

"(c) JURISDICTION.—There is Federal jurisdiction to prosecute an offense under this section if the defendant traveled in interstate or foreign commerce, or transported or caused another to move in interstate or foreign commerce, with the intention of committing or in furtherance of committing the offense, and—

"(1) the victim was a spouse or former spouse of the defendant, was cohabiting with or had cohabited with the defendant, or had a child in common with the defendant; or

"(2) the defendant on two or more occasions—

"(A) has caused or attempted or threatened to cause death or serious bodily injury to or engaged in sexual abuse in relation to the victim; or

"(B) has engaged in any conduct that caused or was intended to cause apprehension by the victim that the victim would be subjected to death, serious bodily injury, or sexual abuse.

"(d) DEFINITIONS.—For purposes of this section—

"(1) 'protective order' means an order issued by a court of a State prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person;

"(2) 'sexual abuse' means any conduct proscribed by chapter 109A of this title, whether or not the conduct occurs in the special maritime and territorial jurisdiction of the United States or in a Federal prison;

"(3) 'serious bodily injury' and 'bodily injury' have the meanings given in section 1365(g); and

"(4) 'State' has the meaning given in section 513(c)(5).".

"(b) CLERICAL AMENDMENT.—The analysis for Part 1 of title 18, United States Code, is amended by inserting after the item for chapter 110 the following:

"110A. Domestic violence and offenses against the family ..... 2261",

"(c) MANDATORY RESTITUTION.—Section 3663 of title 18, United States Code, as amended by section 109 of this Act, is further amended by striking "or chapter 110" and inserting ", chapter 110, or section 2261" in each of subsection (b)(2) and subsection (d).

"(d) INTERIM PROTECTION.—Section 3156(a)(4)(C) of title 18, United States Code, as added by section 101 of this Act, is amended by striking "or chapter 110" and inserting ", chapter 110, or section 2261".

"(e) DEATH PENALTY PROCEDURES.—Section 1118 of title 18, United States Code, as enacted by section 102 of this Act, is amended in paragraph (1) of subsection (e) by inserting "or section 2261" after "117".

SEC. 202. FULL FAITH AND CREDIT FOR PROTECTIVE ORDERS.

"(a) REQUIREMENT OF FULL FAITH AND CREDIT.—Chapter 110A of title 18, United States Code, as enacted by section 201, is amended by adding at the end the following:

"§ 2262. Full Faith and Credit for Protective Orders

"(a) A protective order issued by a court of a State shall have the same full faith and credit in a court in another State that it would have in a court of the State in which issued, and shall be enforced by the courts of any State if it were issued in that State.

"(b) For purposes of this section—

"(1) 'protective order' means an order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person; and

"(2) 'State' has the meaning given in section 513(c)(5).".

(b) CLERICAL AMENDMENT.—The analysis for chapter 110A of title 18, United States Code, as enacted by section 201, is amended by inserting at the end of the following:

"§ 2262. Full Faith and Credit for Protective Orders.".

SEC. 203. NON-COMPLIANCE WITH CHILD SUPPORT OBLIGATIONS IN INTERSTATE CASES.

Chapter 11A of title 18, United States Code, is amended to read as follows:

"CHAPTER 11A—CHILD SUPPORT

"Sec.

"228. Non-compliance with child support obligations.

"§ 228. Non-compliance with child support obligations

"(a) OFFENSE.—Whoever—

"(1) leaves or remains outside a State with intent to avoid payment of a child support obligation; or

"(2) fails to pay a major child support obligation, as defined in subsection (e), with respect to a child who resides in another State, despite having the financial resources to pay the obligation or the ability to acquire such resources through reasonable diligence;

shall be punished as provided in subsection (c).

"(b) PRESUMPTION.—In relation to an offense charged under paragraph (1) of subsection (a), the absence of the defendant from the State for an aggregate period of six months without payment of the child support obligation shall create a rebuttable presumption that the intent existed to avoid payment of the obligation.

"(c) PENALTY.—A person convicted of an offense under this section shall be punished by imprisonment for up to six months, and on a second or subsequent conviction, by imprisonment for up to two years.

"(d) RESTITUTION.—In addition to any restitution that may be ordered pursuant to section 3663, a sentence for an offense under this section shall include an order of restitution in an amount equal to the past due support obligation as it exists at the time of sentencing. Subsections (e)–(1) of section 3663 shall apply to an order of restitution pursuant to this subsection.

"(e) DEFINITIONS.—For purposes of this section—

"(1) 'child support obligation' means an amount determined under a court order or an order of an administrative process pursuant to the law of a State to be due from a person for the support of a child or of a child and the parent with whom the child is living;

"(2) 'major child support obligation' means a child support obligation that has remained unpaid for a period exceeding one year, or that is greater than $5,000;

"(3) 'past due support obligation' means a child support obligation that is unpaid at the time of sentencing for an offense under this section; and

"(4) 'State' has the meaning given in section 513(c)(5).".

SEC. 204. PRESUMPTION AGAINST CHILD CUSTODY FOR SPOUSE ABUSERS.

(a) The Congress finds that—

(1) courts fail to recognize the detrimental effects of having as a custodial parent an individual who physically abuses his or her spouse, insofar as they do not hear or weigh evidence of domestic violence in child custody litigation;

(2) joint custody forced upon hostile parents can create a damaging psychological environment for a child;

(3) physical abuse of a spouse is relevant to the likelihood of child abuse in child custody disputes;

(4) the effects on children of physical abuse of a spouse include—

(A) traumatization and psychological damage to children resulting from observation of the abuse and the climate of violence and fear existing in a home where abuse takes place;

(B) the risk that children may become targets of physical abuse when they attempt to intervene on behalf of an abused parent; and

(C) the negative effects on children of exposure to an inappropriate role model, in that witnessing an aggressive parent may communicate to children that violence is an acceptable means of dealing with others; and

(5) the harm to children from spouse abuse may be compounded by award of exclusive or joint custody to an abuser because further abuse may occur when the abused spouse is forced to have contact with the abuser as a result of the custody arrangement, and because the child or children may be exposed to abuse committed by the abuser against a subsequent spouse or partner.

(b) SENSE OF CONGRESS.—It is the sense of the Congress that, for purposes of determining child custody, evidence establishing that a parent engages in physical abuse of a spouse should create a statutory presumption that is detrimental to the child to be placed in the custody of the abusive spouse.

SEC. 205. REPORT ON BATTERED WOMEN'S SYNDROME.

(a) REPORT.—The Attorney General shall prepare and transmit to the Congress a report on the status of battered women's syndrome as a medical and psychological condition and on its effect in criminal trials. The Attorney General may utilize the National Institute of Justice to obtain information required for the preparation of the report.

(b) COMPONENTS OF REPORT.—The report described in subsection (a) shall include—

(1) a review of medical and psychological views concerning the existence, nature, and effects of battered women's syndrome as a psychological condition;

(2) a compilation of judicial decisions that have admitted or excluded evidence of battered women's syndrome as evidence of guilt or as a defense in criminal trials; and

(3) information on the views of judges, prosecutors, and defense attorneys concerning the effects that evidence of battered women's syndrome may have in criminal trials.

SEC. 206. REPORT ON CONFIDENTIALITY OF ADDRESSES FOR VICTIMS OF DOMESTIC VIOLENCE.

(a) The Attorney General shall conduct a study of the means by which abusive spouses may obtain information concerning the addresses or locations of estranged or former spouses, notwithstanding the desire of the victims to have such information withheld to avoid further exposure to abuse. Based on the study, the Attorney General shall transmit a report to Congress including—

(1) the findings of the study concerning the means by which information concerning the addresses or locations of abused spouses may be obtained by abusers; and

(2) analysis of the feasibility of creating effective means of protecting the confidentiality of information concerning the addresses and locations of abused spouses to protect such persons from exposure to further abuse while preserving access to such information for legitimate purposes.

(b) The Attorney General may utilize the National Institute of Justice and the Office for Victims of Crime in carrying out this section.

SEC. 207. REPORT ON RECORDKEEPING RELATING TO DOMESTIC VIOLENCE.

Not later than 1 year after the date of enactment of this Act, the Attorney General shall complete a study of, and shall submit to Congress a report and recommendations on, problems of recordkeeping of criminal complaints involving domestic violence. The study and report shall examine—

(1) the efforts that have been made by the Department of Justice, including the Federal Bureau of Investigation, to collect statistics on domestic violence; and

(2) the feasibility of requiring that the relationship between an offender and victim be reported in Federal records of crimes of aggravated assault, rape, and other violent crimes.

SEC. 208. DOMESTIC VIOLENCE AND FAMILY SUPPORT GRANT PROGRAM.

(a) PURPOSE.—The purpose of this section is to strengthen and improve State and local efforts to prevent and punish domestic violence and other criminal and unlawful acts that particularly affect women, and to assist and protect the victims of such crimes and acts.

(b) AUTHORIZATION OF GRANTS.—The Attorney General, through the Bureau of Justice Assistance, the Office for Victims of Crime, and the Bureau of Justice Statistics, may make grants to support projects and programs relating to domestic violence and other criminal and unlawful acts that particularly affect women, including support of—

(1) training and policy development programs for law enforcement officers and prosecutors concerning the investigation and prosecution of domestic violence;

(2) law enforcement and prosecutorial units and teams that target domestic violence;

(3) model, innovative, and demonstration law enforcement programs relating to domestic violence that involve pro-arrest and aggressive prosecution policies;

(4) model, innovative, and demonstration programs for the effective utilization and enforcement of protective orders;

(5) programs addressing stalking and persistent menacing;

(6) victim services programs for victims of domestic violence;

(7) shelters that provide services for victims of domestic violence and related programs;

(8) educational and informational programs relating to domestic violence;

(9) resource centers providing information, technical assistance, and training to domestic violence service providers, agencies, and programs;

(10) coalitions of domestic violence service providers, agencies, and programs;

(11) training programs for judges and court personnel in relation to cases involving domestic violence; and

(12) enforcement of child support obligations, including cooperative efforts and arrangements of States to improve enforcement in cases involving interstate elements.

(c) FORMULA GRANTS.—Of the amount appropriated in each fiscal year for grants under this section, other than the amount set aside to carry out subsection (d)—

(1) 0.25 percent shall be set aside for each participating State; and

(2) the remainder shall be allocated to the participating States in proportion to their populations, for the use of State and local governments in the States.

(d) DISCRETIONARY GRANTS.—Of the amount appropriated in each fiscal year, 20 percent shall be set aside in a discretionary fund to provide grants to public and private agencies to further the purposes and objectives set forth in subsections (a) and (b).

(e) APPLICATION FOR FORMULA GRANTS.—To request a grant under subsection (c), the chief executive officer of a State must, in each fiscal year, submit to the Attorney General a plan for addressing domestic violence and other criminal and unlawful acts that particularly affect women in the State, including a specification of the uses to which funds provided under subsection (c) will be put in carrying out the plan. The application must include.—

(1) certification that the Federal funding provided will be use to supplament and not supplant State and local funds;

(2) certification that any requirement of State law for review by the State legislature of a designated body, and any requirement of State law for public notice and comment concerning the proposed plan, has been satisfied; and

(3) provisions for fiscal control, management, recordkeeping, and submission of reports in relation to funds provided under this section that are consistent with requirements prescribed for the program.

(f) CONDITIONS ON GRANTS.—

(1) MATCHING FUNDS.—Grants under subsection (c) may be for up to 50 percent of the overall cost of a project or program funded. Discretionary grants under subsection (d) may be for up to 100 percent of the overall cost of a project or program funded.

(2) DURATION OF GRANTS.—Grants under subsection (c) may be provided in relation to a particular project or program for up to an aggregate maximum period of four years.

(3) LIMIT ON ADMINISTRATIVE COSTS.—Not more than 5 percent of a grant under subsection (C) may be used for costs incurred to administer the grant.

(g) EVALUATION.—The National Institute of Justice shall have the authority to carry out evaluations of programs funded under this section. The recipient of any grant under this section may be required to include an evaluation component to determine the effectiveness of the project or program funded that is consistent with guidelines issued by the National Institute of Justice.

(h) COORDINATION.—The Attorney General may utilize the Office of Justice Programs to coordinate the administration of grants under this section. The coordination of grants under this section shall include prescribing consistent program requirements for grantees, allocating functions and the administration of particular grants among the components that participate in the administration of the program under this section, coordinating the program under this section with the Sexual Violence Grant Program established by section 141 of this Act, and coordinating the program under this section with other grant programs administered by components of the Department of Justice.

(i) DEFINITION.—For purposes of this section, "domestic violence" includes any act of criminal violence in which the offender and the victim are members of the same household or relatives, or in which the offender and the victim are present or former spouses or cohabitors or have a child in common.

(j) REPORT.—The Attorney General shall submit an annual report to Congress concerning the operation and effectiveness of the program under this section.

(k) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated, in each of fiscal years 1994, 1995, and 1996, $250,000,000 to carry out this section, and such sums as may be necessary in each fiscal year thereafter.

TITLE III—NATIONAL TASK FORCE ON VIOLENCE AGAINST WOMEN

SEC. 301. ESTABLISHMENT.

Not later than 30 days after the date of enactment of this Act, the Attorney General shall establish a task force to be known as the "National Task Force on Violence Against Women" (referred to in this title as the "task force").

SEC. 302. DUTIES OF TASK FORCE.

(a) GENERAL PURPOSE OF TASK FORCE.—The task force shall recommend Federal, State, and local strategies aimed at protecting women against violent crime, punishing persons who commit such crimes, and enhancing the rights of victims of such crimes.

(b) DUTIES OF TASK FORCE.—The task force shall perform such functions as the Attorney General deems appropriate to carry out of the purposes of the task force, including—

(1) considering the reports and recommendations of past Federal and State studies of violent crime, family violence, and the treatment of crime victims, including the Report of the Attorney General to the President on Combating Violent Crime (1993), the Report of the Attorney General's Task Force on Family Violence (1984), the Report of the President's Task Force on Victims of Crime (1982), and the reports and recommendations of the task forces and commissions established by the States of Alabama, Alaska, Arkansas, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Minnesota, Nebraska, New Mexico, New York, North Carolina, Rhode Island, Virginia, Texas, and Wyoming;

(2) developing strategies for Federal, State, and local law enforcement designed to protect women against violent crime, and to prosecute those responsible for such crime;

(3) evaluating the adequacy of rules of evidence, practice, and procedure to ensure the effective prosecution and conviction of violent offenders against women and to protect victims from abuse in legal proceedings, and making recommendations for the improvement of such rules;

(4) evaluating the adequacy of pre-trial release, sentencing, incarceration, and post-conviction release in relation to violent offenders against women, and making recommendations designed to ensure that such offenders are restrained from causing further harm to the victim and others and receive appropriate punishment, including means of ensuring that the efficacy of criminal sanctions will not be undermined by parole or other early release mechanisms;

(5) assessing the issuance, formulation, and enforcement of protective orders, whether or not related to a criminal proceeding, and making recommendations for the effective use of such orders to protect women from violence;

(6) assessing the problem of stalking and persistent menacing of women, and recommending effective means of response to the problem;

(7) assessing the problem of sexual exploitation of women and youths through prostitution and in the production of pornography, and recommending effective means of response to the problem; and

(8) generally evaluating the treatment of women as victims of violent crime in the criminal justice system, and making recommendations designed to improve such treatment.

SEC. 303. MEMBERSHIP.

(a) IN GENERAL.—The task force shall consist of up to 10 members, who shall be appointed by the Attorney General not later than 60 days after the date of enactment of this Act. The Attorney General shall ensure that the task force includes representatives of State and local law enforcement, the State and local judiciary, and groups dedicated to protecting the rights of victims.

(b) CHAIRMAN.—The Attorney General or the Attorney General's designee shall serve as chairman of the task force.

SEC. 304. PAY.

(a) NO ADDITIONAL COMPENSATION.—Members of the task force who are officers of employees of a governmental agency shall receive no additional compensation by reason of their service on the task force.

(b) PER DIEM.—While away from their homes or regular places of business in the performance of duties for the task force, members of the task force shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under sections 5702 and 5703 of title 5, United States Code.

SEC. 305. EXECUTIVE DIRECTOR AND STAFF.

(a) EXECUTIVE DIRECTOR.—

(1) APPOINTMENT.—The task force shall have an Executive Director who shall be appointed by the Attorney General not later than 30 days after the task force is fully constituted under section 303.

(2) COMPENSATION.—The Executive Director shall be compensated at a rate not to exceed the maximum rate of the basic pay payable under GS-18 of the General Schedule as contained in title 5, United States Code.

(b) STAFF.—With the approval of the task force, the Executive Director may appoint and fix the compensation of such additional personnel as the Executive Director considers necessary to carry out the duties of the task force.

(c) APPLICABILITY OF CIVIL SERVICE LAWS.—The Executive Director and the additional personnel of the task force appointed under subsection (b) may be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

(d) CONSULTANTS.—Subject to such rules as may be prescribed by the task force, the Executive Director may procure temporary intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals not to exceed $200 per day.

SEC. 306. POWERS OF TASK FORCE.

(a) *Hearings.*—For the purpose of carrying out this title, the task force may conduct such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the task force considers appropriate. The task force may administer oaths before the task force.

(b) DELEGATION.—Any member or employee of the task force may, if authorized by the task force, take any action that the task force is authorized to take under this title.

(c) ACCESS TO INFORMATION.—The task force may secure directly from any executive department or agency such information as may be necessary to enable the task force to carry out this title, to the extent access to such information is permitted by law. On request of the Attorney General, the head of such a department or agency shall furnish such permitted information to the task force.

(d) MAIL.—The task force may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

SEC. 307. REPORT.

Not later than 1 year after the date on which the task force is fully constituted under section 303, the Attorney General shall submit a detailed report to the Congress on the findings and recommendations of the task force.

SEC. 308. AUTHORIZATION OF APPROPRIATION.

There is authorized to be appropriated for fiscal year 1994, $500,000 to carry out the purposes of this title.

SEC. 309 TERMINATION.

The task force shall cease to exist 30 days after the date on which the Attorney General's report is submitted under section 307. The Attorney General may extend the life of the task force for a period of not to exceed one year.

Mr. MCCAIN. Mr. President, I am very pleased to again be a cosponsor of the Sexual Assault Prevention Act, and I commend the Republican leader for his zeal and expedience in reintroducing this bill early in this session of Congress.

The phrase "increased crime in America" is no longer met with wide-eyed surprise. There was a time when law-abiding citizens reacted with skepticism at the idea that our Nation could be so riddled with crimes committed in our cities, our streets, and our homes. Now, the American people have become so accustomed to hearing over and over again that crime is on the rise that they no longer respond with surprise, but instead cry out in anger and frustration.

This outrage is especially strong against the cruel, perverse crimes committed against women. One of the most disturbing crimes infecting our society is that of sexual assault and forcible rape. These acts of violent, demented, bald-faced aggression are tantamount to terrorism against women, and the number of forcible rapes in this country is staggering. There were approximately 106,593 rapes reported in 1991, 4 percent higher than that in 1990. In my State of Arizona alone 1,590 rapes were reported.

We cannot, and must not, tolerate violence of this nature. Women in this country are singled out for this kind of violent aggression by criminals who know that our legal system is bogged down with loopholes which only succeed in keeping criminals from serving time behind bars. It is abhorrent to me that women live in fear of rape, and the victims of rape and sexual assault experience the fear and frustration of knowing that their assailant walks the streets freely where law-abiding citizens cannot.

Women in this country face distinct types of crime which need to be addressed specifically. For this reason, I believe that it is imperative that Congress enact the Sexual Assault Prevention Act. This legislation would address the crimes facing women in several ways. First, it authorizes the death penalty for murders committed by sex offenders. Second, the bill would double the maximum penalty for repeat offenders of sexual assaults. Third, it would require the testing of those accused of sexual assaults for the acquired immune deficiency syndrome [AIDS] virus, and disclosing the results of those tests to the victim. Fourth, it authorizes the admission of evidence of prior sexual assault offenses by the defendant in sexual assault trials. Fifth, it designates spousal abuse, including violation of protective orders, and "stalking," as a Federal crime. Finally, the bill would establish a comprehensive grant program to assist State and local efforts to combat sexual violence and domestic violence, and to enforce child support obligations.

Crimes against women are rampant, and this legislation would send a clear, strong message: Those who commit sexual assaults against anyone will be met with swift, stiff penalties.

Mr. President, it is untenable that the greatest democracy in the world should also suffer from this kind of cruel violence. We must use our democratic system as a tool to turn this trend around and make our lives safe again.

By Mr. DOLE (for himself, Mr. MCCONNELL, Mr. PACKWOOD, Mr. LOTT, Mr. GORTON, Mr. THURMOND, Mr. DOMENICI, Mr. LUGAR, Mr. D'AMATO, Mr. SIMPSON, Mr. STEVENS, Mr. NICKLES, and Mr. CHAFEE):

S. 7. A bill to amend the Federal Election Campaign Act of 1971 to reduce special interest influence on elections, to increase competition in politics, to reduce campaign costs, and for other purposes; to the Committee on Rules and Administration.

COMPREHENSIVE CAMPAIGN FINANCE REFORM ACT

Mr. MCCONNELL. Mr. President, the distinguished Republican leader this morning in his remarks made reference to S. 7, the Republican campaign finance bill.

Mr. President, the Republican leader and I believe that this proposal is clearly in the best interests of the country as we seek to improve how elections are handled in the United States.

Mr. President, in 1992 voter turnout increased. Electoral competition increased. Congressional turnover increased. And campaign spending increased.

Most objective observers would say these are indications of a thriving political system. Less objective participants will twist it to fit their objective—partisan revision of campaign finance laws.

All indications are that campaign finance reform is on a fast-track—seemingly easily achievable. Something for the President and Congress to have to show for the next 100 days.

Keeping in mind that the reverberations of whatever passes likely will extend far beyond 100 days, I urge my colleagues to take great care in putting a final bill together.

Mr. President, we should not pass something that is reform in name only just for the sake of passing something "Change" and "reform" are terms used rather loosely around here. They are not interchangeable, not synonymous. To change is to alter. To reform is to improve.

Democratic campaign finance bills based on spending limits and taxpayer financing do indeed constitute change. They do not, however, reform. They do not improve the electoral process.

The democratic bills we have seen in the past were good public relations, but lousy legislation. Spending limits have been totally discredited in the Presidential system. Mandatory spending limits are unconstitutional. A taxpayer funded congressional campaign system to provide inducements, or penalties, is not palatable to American taxpayers. In fact, the Presidential Election Campaign Fund is on the verge of bankruptcy, because taxpayers have resoundingly voted no on their annual tax returns.

In the most extensive poll we ever take in this country, every April 15 taxpayers get a chance to vote on how they feel about the public funding of elections. In overwhelming numbers, they are increasingly voting no.

Mr. President, the Democratic campaign finance bills that passed in the last two Congresses were unconstitutional. If the majority goes down that road again and the President signs such a bill into law, then my colleagues can be assured that final disposition will rest with the Supreme Court.

Republicans will not stand by while the first amendment is sacrificed for a facade of reform.

Mr. President, campaign finance reform need not be unconstitutional, partisan, bureaucratic, or taxpayer-funded.

The minority leader and I, joined by Republican colleagues, have today introduced the Comprehensive Campaign Finance Reform Act—the most extensive and effective reform bill before this Congress, bar none.

It bans PAC's, the epitome of special interest influence and a major incumbent protection tool. Our bill bans soft money. All soft money—party, labor, and that spent by tax exempt organizations. It cuts campaign costs. Provides seed money to challengers, paid for not by taxpayers, but by the political parties. It constricts the millionaire's loophole; restricts and regulates independent expenditures; fights election fraud; and restricts gerrymandering.

Real reform. In stark contrast to the Democrats' bill, the Republican bill puts all the campaign money on top of the table where voters can see it. Nothing would have a more cleansing effect on the electoral process.

Mr. President, I ask unanimous consent that at this point in the RECORD S.7 appear in its entirety. I am intro-

PROPOSED AMENDMENTS

Glen Weissenberger, *Character Evidence Under The Federal Rules: A Puzzle with Missing Pieces*, 48 Cincinnati Law Review 1, 12 (1979).

Rule 404

a) **Noninferential use of character evidence; character in issue.** Evidence of a person's character or a trait of a character is admissible when the issue of a person's character is substantially required by a charge, claim or defense such that the person's character or trait of a character is not used as a basis for inferring other facts.

b) **Inferential use of character evidence to prove inferred facts other than conforming conduct.** Evidence of a person's character or a trait of a character is admissible for proving inferred facts other than conduct which conforms to such person's character or trait of character.

c) **Inferential use of character evidence to prove conforming conduct.** Evidence of a person's character or his trait of a character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

1) **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

3) **Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

d) **Method of proving character.**

1) Where evidence of character or a trait of character is admissible pursuant to subdivisions (a), (b), (c)(1) or (c)(2) of this rule, proof may be made by testimony as to reputation or

by testimony in the form of opinion. On cross-examination, inquiry is allowed into specific instances of conduct.
2) Where evidence of character or a trait of character is admissible pursuant to subdivision (a) of this rule, proof may also be made of specific instances of the person's conduct.
3) Except as provided in rules 608 and 609, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. Such evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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Fax No. 718-780-0375

TO: Members of the Advisory Committee on the Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter MAB

DATE: April 26, 1994

RE: Materials for May Meeting

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Enclosed is a memorandum on Rule 407 incorporating the amendment for product liability cases that we tentatively agreed on at our previous meeting. It also discusses some other issues that we did not resolve. I am also enclosing a memorandum on Rule 103 which discusses the Luce problem as well as broader questions relating to motions in limine.

In the next few days, you will also be receiving from me memoranda on Rules 408, 404(b), and a discussion of issues that we might wish to address in Article VII with regard to expert testimony. I also plan to send you a memorandum that will discuss a number of miscellaneous questions which I was asked to consider.

I do not know whether we will reach the hearsay rules in Article VIII at our forthcoming meeting. If we do, I propose addressing three preliminary questions first: 1) are we satisfied with the general trans-substantative nature of the hearsay rules, or do we think that criminal and civil cases should be handled differently? 2) are we satisfied with the definition of hearsay? 3) are we satisfied with how the hearsay rule and its exceptions are working in practice? In order to deal with these questions, I think that it would be helpful if the Committee familiarize itself somewhat with the enormous recent literature about the hearsay rule. I do not think that summaries by me about the articles would serve much of a purpose, because the theories and conclusions need to be viewed in the context of fact patterns. Accordingly, I have selected a number of articles that I think shed light on the three issues stated above, and I am enclosing them for background reading. Even if we do not reach hearsay at this meeting, hearsay issues will have to be considered in connection with Article VII. I was fortunate

in obtaining reprints from all of the authors except Professor Fenner who no longer had any available. I hope that not having to read photocopies will make the task of reading this formidable, but fascinating, material somewhat easier. My suggestion is to start with the Fenner article -- not because I find his solutions particularly compelling -- but because it is very accessible and even funny at times, and it is illustrated with an enormous number of cases that will plunge you right into the perplexities of the hearsay rule.

I look forward to seeing you soon in the Big Apple.

/ga
Enc.

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TO: Members of the Advisory Committee on the Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

DATE: May 2, 1994

RE: **RULE 404(b)**

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When the Committee discussed Rule 404 at our fall meeting, some of the participants expressed concern that too much highly prejudicial "other crimes" evidence is admitted against defendants pursuant to subdivision (b). Rule 404(b) restates the traditional propensity rule, that evidence of a person's character, whether manifested through convictions, uncharged misconduct, or specific characteristics, is not admissible when offered solely so that the factfinder may infer that the person acted in conformity with his or her character on the occasion in question. The second sentence, however, permits evidence of "prior acts" if offered for a "proper purpose" including, but not limited to motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b) seeks to strike a delicate balance. It authorizes courts to admit relevant evidence in accordance with

the Rules' general policy of liberal admissibility,[1] but simultaneously seeks to safeguard the accused's entitlement to a presumption of innocence, consistent with the "guilty beyond a reasonable doubt" constitutional standard. The problem for this Committee is to determine whether the balance has shifted too much in the prosecution's favor. Is evidence being admitted indiscriminately for a "proper purpose" when it is relevant only to propensity, or when it raises enough of a propensity inference to pose a danger of prejudice to the defendant that outweighs any legitimate probative value the evidence may have? If so, can amendments to Rule 404(b) rectify this situation?

The Reporter was asked to consider three possible solutions: 1. to override the Supreme Courts holding in Huddleston v. United States by converting preliminary questions regarding defendant's commission of the prior act or crime into a Rule 104(a) determination rather than an issue of conditional relevancy pursuant to Rule 104(b), and by possibly heightening the standard of proof as well; 2. to amend Rule 404(b) so as to provide explicitly that other crimes evidence must be relevant to a "controverted" issue in order to be admissible; 3. to provide additional protection for defendant by making the admissibility of Rule 404(b) evidence subject to a balancing test that places a burden on the prosecutor to show that probative value

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[1] See Susan Marlene Davies, Evidence of Character to Prove Conduct: A Reassessment of Relevancy, 27 Crim.L.Bull. 504 (1991) (examination of current social psychology literature leads author to conclude that prior specific acts have considerable predictive value).

substantially outweighs prejudice.

Before turning to these solutions, this memorandum first briefly examines a number of problems that occur when the prosecution offers other crimes evidence. It then examines the proposed solutions in relation to the other rules on character evidence, and considers ways in which these solutions could be tailored so as to be responsive to the problems previously discussed.

A. Problems. Appellate opinions indicate that some prosecutors offer highly prejudicial other crimes evidence that trial courts sometimes admit, although few reversals occur because of the harmless error rule.[2] In addition to this general lack of restraint, the overbroad use of other crimes evidence strikes some commentators as particularly troublesome in a number of specific situations: 1) when the evidence is offered to prove intent; 2) when the evidence is offered in a conspiracy prosecution; 3) when the evidence is offered to prove an element

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[2] See, e.g., United States v. Royal, 972 F.2d 643, 645 (5th Cir. 1992) (government could have established defendant's intention to pass drug business to Hernandez without offering evidence that Hernandez' death resulted from bad cocaine supplied by defendant; "the evidence was completely unnecessary to the government's case and we discern no purpose other than prosecutorial overkill"), cert. denied, 113 S.Ct. 1258 (1993); United States v. Church, 955 F.2d 688, 702 (11th Cir.) (tape admitted in which defendant indicated willingness to kill prosecutor; court found evidence "likely to incite jury to irrational decision" as well as cumulative and remote), cert. denied, 113 S.Ct. 233 (1992); United States v. Lehdeer-Rivas, 955 F.2d 1510, 1516 (11th Cir.) (court found prejudicial evidence of illegitimate child, partying, pornography, and one defendant's admiration for Hitler and his plan to mark cocaine with swastikas), cert. denied, 113 S.Ct. 347 (1992).

that defendant is willing to concede, or that can be inferred from the facts relating to the charged crime. Although these three categories are discussed separately, some of the issues are intertwined. It should also be noted that some have concluded that the overbroad use of Rule 404(b) evidence is particularly acute in narcotics prosecutions.[3]

1. Intent. a. The nature of the inference. On the one hand, intent may be the most difficult element of a crime to prove; although witnesses can observe a person's acts they can only surmise the actor's state of mind. The prosecution's need suggests that courts should use a liberal standard of admissibility when evidence is offered as relevant to intent. On the other hand, the line between intent and propensity is hard to discern. See United States v. Beechum II, 582 F.2d 898, 921 (5th Cir. 1978) (Goldberg, J., dissenting) ("since propensity is largely a concept of a person's psychological bent or frame of mind, it seems extreme to have so much turn on so little, if any, of a distinction."); United States v. Pollack, 926 F.2d 1044, 1048 (11th Cir.) ("what appears to one person as propensity may be intent to another; the margin between is not a bright line.").

Some evidence offered to prove intent can be assessed without resorting to the forbidden inference that defendant acted in conformity with his character. For example, when a defendant is charged with possession of narcotics with intent to

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[3] Cf. United States v. Gordon, 987 F.2d 902, 910 (2d Cir. 1993).

distribute, the possession of weapons makes it more likely that defendant intended to distribute because we know that drug traffickers need to protect themselves. United States v. Picklesimer, 585 F.2d 1199, 1204 (3d Cir. 1978) (weapons may be tools of an ongoing illegal enterprise and therefore evidence of possession of weapons was relevant and admissible to prove intent). But when evidence of prior narcotics offenses is offered to prove defendant's intent to distribute on this occasion, the purported inference that a person who had a similar intent before is more likely to have a similar intent now comes dangerously close to an inference about defendant's predisposition or propensity to act. The risk is great that the jurors will decide defendant's guilt via the prohibited route of reaching conclusions about his character -- they will assume that he acted in conformity with his criminal state of mind.[4]

b. When is intent in issue. If a plea of not guilty suffices to put intent in issue, the intent "exception" will

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[4] Evidence offered to demonstrate motive may also produce differing inferences. Sometimes the charged crime is committed because of the prior crime as when the eyewitness to a prior crime is murdered. But some courts also admit other crimes evidence in the name of motive to identify the defendant by showing that the motive for the two crimes is the same, as, for instance, when evidence that defendant committed other crimes against a certain group is admitted to show that he had a motive to commit the current crime against this victim who belongs to that group. See , Richard O. Lempert and Stephen A. Saltzburg, A Modern Approach to Evidence, 226 (2d ed.1982).("Where the defendant has assaulted a murder victim several times in the past, evidence of other crimes might be allowed in to show that defendant "hated" the victim...[T]his connection . . .is but propensity evidence under a different name. All that has been shown is the propensity of the defendant to attack the victim."). See generally Imwinkelried, Uncharged Misconduct §§3:15 to 3:18.

swallow the propensity rule because intent is almost always an element of a criminal offense.[5] Consequently, it has been suggested that proof of other crimes to prove intent should be limited to instances in which defendant's theory of the case rests on a lack of intent defense, such as innocent intent, entrapment, coercion, or mistake or accident. See Abraham P. Ordover, Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a), 38 Emory L.J. 135, 151-53, 157 (1989) (arguing that "evidence of an unconnected prior crime is always evidence of propensity and never evidence of a specific intent to commit the crime charged. Though an inference of general from the prior crime to the offense charged can be made, such an inference is based upon propensity.").

The risks attendant on other crimes evidence offered to prove intent are increased by some circuits' insistence that a prosecutor may always offer Rule 404(b) evidence in its case-in-chief to prove intent when intent is a specified element of the statutory definition of the charged crime, regardless of the nature of the crime, the defense asserted, or the availability of other evidence. See, e.g., United States v. Hudson, 884 F.2d 1016, 1022 (7th Cir. 1989) ("intent is never merely a formal issue where the defendant is charged with a specific intent crime"; evidence relating to three prior bank robberies admitted

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[5] See Edward J. Imwinkelried, The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition, 51 Ohio St. L.J. 575, 577 (1990).

despite defendant's offer to concede intent); United States v. Shackleford, 738 F.2d 776 (7th Cir. 1984); United States v. Engleman, 648 F.2d 473, 478 (8th Cir. 1981).

A per se rule assumes that the legislature's addition of a specified mens rea element was purposefully chosen to make the prosecution prove intent whenever that crime is charged, so that the court must allow the prosecution to present evidence on this issue. This approach has been criticized as allowing the prosecution far too much leeway in automatically being able to introduce other crimes evidence just because the crime is one of specific intent. See United States v. Kramer, 955 F.2d 479, 492-93 (7th Cir. 1992), cert. denied, 113 S.Ct. 595 (1992) (Cudahy, J. concurring). The Seventh Circuit is the prime advocate of the per se approach.

2. Conspiracy. It has been observed that "[s]ome courts appear to give the prosecution especially broad leeway in the use of other crimes evidence when a conspiracy has been charged." Weinstein & Berger, supra at 404-58. See also, Edward J. Imwinkelried, Uncharged Misconduct: What Would Irving Younger Have Done? 16 Litigation 6 (1989). Central to the evidentiary problem in conspiracy cases is the definition of conspiracy.[6] Acts in furtherance of the conspiracy which occur during the pendency of the conspiracy are part of the conspiracy itself

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[6] Note, Limiting the Unfairly Prejudicial Impact of Bad Acts Evidence on Conspiracy Defendants, 59 Temple L.Q. 83, 98 (1986) ("the inchoate nature of the crime blurs the tenuous distinction between criminal propensity and the defendant's predisposition to commit the charged crime.").

rather than other acts. In addition, courts admit considerable other evidence as inextricably intertwined with the conspiracy, as providing necessary background for the conspiracy,[7] or as probative of intent. The issue of how to classify intent, which is troublesome in the non-conspiracy case, becomes even more complex in the context of conspiracy because two levels of intent are arguably in issue: the defendant's intent to conspire, and his intent to commit the substantive crime. The consequence is that a non guilty plea to a conspiracy charge often results in an open sesame of other crimes evidence in the name of intent or knowing participation. See, e.g., United States v. Parziale, 947 F.2d 123, 129 (5th Cir. 1991) ("in a conspiracy case the mere entry of a not guilty plea raises the issue of intent sufficiently to justify the admissibility of extrinsic offense evidence.") (quoting United States v. Prati, 861 F.2d 82, 86 (5th Cir. 1988).

3. Is there a disputed issue if defendant offers to remove an issue or an element can be inferred from proof of the charged act?

a. Concessions and stipulations. Courts disagree on whether a defense offer to concede the existence of a material fact removes the issue from the case so that other crimes

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[7] See, e.g., United States v. Pitre, 960 F.2d 1112 (2d Cir. 1992) (background and relationship of coconspirators); United States v. Leary, 739 F.2d 135, 136-37 (3d Cir. 1984) (same) cert. denied, 469 U.S. 1107 (1985).

evidence directed to that issue is no longer admissible.[8] Courts willing to allow defendants to remove an issue from a case do not necessarily insist on a formal stipulation. The defendant must make some statement of sufficient clarity to indicate that the issue will not be contested. See United States v. Figueroa, 618 F.2d 934 (2d Cir. 1980) (stating test). In accord: United States v. Garcia, 983 F.2d 1160 (1st Cir. 1993).

The Supreme Court had granted certiori to resolve this split of authority, but dismissed the writ as improvidently granted after oral argument. United States v. Hadley, 918 F.2d 848 (9th Cir. 1990), cert. granted, 112 S. Ct. 1261 (1992), cert. dismissed, 113 S. Ct. 486 (1992). During oral argument, the government conceded that an offer to stipulate should at least be considered a factor in balancing pursuant to Rule 403.[9]

b. Inferring intent from the act itself. To what extent should the prosecution be permitted to introduce other

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[8] Compare United States v. Breitkreutz, 8 F.3d 688, 690 (9th Cir. 1993) ("[r]egardless of the [defendant's] willingness to stipulate, the Government [is entitled to prove the [crime] by introduction of probative evidence.")(quoting United States v. Gilman, 684 F.2d 616, 622 (9th Cir. 1982); United States v. Williams, 612 F.2d 735, 740 (3d Cir. 1979) ("we perceive no authority for counsel or the court to modify a criminal statute enacted by Congress by eliminating through stipulation one of the elements of the crime."), cert. denied, 445 U.S. 934 (1980); United States v. Brickey, 426 F.2d 680, 686 (8th Cir. 1970) ("A cold stipulation can deprive a party 'of the legitimate moral force of his evidence . . .'") with United States v. Mohel, 604 F.2d 748 (2d Cir. 1979) ("an unequivocal offer of stipulation or concession serves to remove intent and knowledge as issues in the case); United States v. Tarricone, 996 F.2d 1414 (2d Cir. 1993) (evidence is not relevant to an issue in the case if that issue has been removed from the dispute).

[9] 51 Crim. L. Rep. 2008 (1992).

crimes evidence to prove intent when the nature of the act is such that the jury may easily infer the requisite intent? It is difficult to see why proof of intent through other crimes evidence is needed in a bank robbery when the perpetrator vaulted over a counter and pointed a gun at the cashier's head. But see United States v. Maholias, 985 F.2d 869, 879 (7th Cir. 1993) (although large quantity of narcotics permitted an inference of intent to distribute as opposed to mere possession, court would not permit the inference to remove the issue because the crime was one of specific intent).

B. Suggested Solutions. As stated above, the Committee wished to explore 1. changing the Huddleston outcome; 2. adding a requirement that the issue to which the evidence is directed is "controverted," 3. adopting a special balancing test.

1. Rationale and Comparison with Rules 608 and 609.

These three categories of possible solutions are not mutually exclusive. Each furthers a different objective, and each of these three approaches has been utilized to some extent with regard to the other rules dealing with character evidence -- Rules 608 and 609.

The first suggestion -- making evidence of the other crime subject to a Rule 104(a) determination by the court--recognizes that the potential prejudice of other crimes evidence is so high that preliminary fact questions should be allocated to the court, so as to shield jurors from this evidence until a judge agrees

that it is admissible.[10] Such an approach provides the court with additional control and is consistent with the treatment of initial determinations pursuant to Rules 609 and 608.

Although the record of a conviction eliminates factual disputes about whether defendant committed the act when impeachment is sought pursuant to Rule 609, controversy over the occurrence of a prior act and defendant's connection to it may arise in connection with Rule 608 impeachment by "prior bad acts." Congress amended Rule 608(b) to add the phrase "in the discretion of the court" so as "to emphasize the discretionary power of the court in permitting such testimony." Report of the Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess., No. 93-650, at 10 (1993). In the Rule 608 context, accordingly, the judge seems to be empowered to make a Rule 104(a) determination. In applying Rule 609, it is the court that makes the final determination as to whether the prior conviction involved "dishonesty or false statement" so as to make it automatically admissible pursuant to Rule 609(a)(1). Some courts reach this determination by looking at the facts underlying the conviction rather than by relying solely on the elements of the

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[10] Analogous issues are raised by hearsay exceptions which require the establishment of foundational facts. See, e.g., the dying declaration exception in Rule 804(b)(2). How to handle coconspirators statements was finally resolved by the Supreme Court's decision in Bourjaily v. United States, 483 U.S. 171 (1987)(applying Rule 104(a)). When the Federal Rules were first adopted, the Circuits disagreed on whether courts were bound by Rule 104(a) or (b) in determining whether the statement was made (1) during the course and (2) in furtherance (3) of a conspiracy (4) of which declarant is a member. See Jack B. Weinstein & Margaret A. Berger, 1 Weinstein's Evidence ¶104[05].

offense.[11]

The second category of suggestions -- geared at excluding other crimes evidence when its capacity to prove a legitimate other purpose is dubious -- also has counterparts in Rule 608 and 609. Unlike the common law rule which allowed all felony convictions to be used for impeachment, Rule 609 narrowed the automatic category by the definition in Rule 609(a)(2) in recognition that not all past criminal behavior bears on veracity. Rule 608 limits the use of prior acts evidence for impeachment both by limiting the subject matter of the admissible evidence -- it must be relevant to truthfulness -- and by restricting the mode of impeachment to questions on cross-examination. A number of suggestions are made below for narrowing the use of Rule 404(a) evidence through procedural devices so as to ensure that defendant's prior act will not be utilized for a propensity inference.

The third suggestion - shifting the burden to the prosecutor to show that the evidence is more probative than prejudicial -- recognizes that a defendant needs special protection against evidence that can easily be used for a propensity inference despite its relevance for another purpose. Indeed the Advisory Committee's Note on the 1990 amendment to Rule 609 acknowledges that when the witness is the accused it is the risk of substantive misuse by the jury that justifies placing the burden on the prosecutor to show that "the probative value" of the

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[11] See 3 Weinstein's Evidence, supra, at ¶609[04].

conviction" outweighs its prejudicial effect to the accused." Clearly, in the case of Rule 404(b) evidence the danger exists that a jury will draw a propensity inference instead of using the evidence for the limited purpose for which it has been proffered. Rule 608 impeachment evidence is subject to the ordinary Rule 403 test.

Applying any or all of these suggested approaches to Rule 404(b) would make the rule more consistent with the treatment of character evidence in Rules 608 and 609. See Abraham P. Ordover, Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a), 38 Emory L.J. 135 (1989) (his proposals for a new Rule 104(a) and 403(b) that afford uniform treatment to all three character rules are discussed infra). Of course, in the case of impeachment evidence, the special protections built into the rules, particularly the special balancing test in Rule 609, may be viewed as inducements to persuade the defendant to testify. No comparable objective is possible with regard to Rule 404(b) evidence other than providing the defendant with some additional protection against the admission of other crimes evidence if he concedes an element of the prosecution's case. Amendments to Rule 404(b) must be justified on the ground that the present text of the rule as interpreted by the courts undercuts the rationale of the propensity prohibition in a manner that offends our notion of criminal justice.

2. Specific Solutions.

a. Overcoming Huddleston. The *Huddleston* Test.

Until the Supreme Court's decision in Huddleston v. United States, 485 U.S. 681 (1988), a majority of the courts treated the admissibility of other crimes evidence as a preliminary question governed by Rule 104(a), although one commentator suggests that a trend toward resolving the issue pursuant to Rule 104(b) was evolving. See Edward J. Imwinkelried, Uncharged Misconduct Evidence §2:06 (1992).

In Huddleston, the defendant was charged with selling stolen videotapes in interstate commerce. In order to prove that the defendant knew that the tapes were stolen, the prosecution introduced evidence that the defendant had previously disposed of stolen television sets and refrigerators. The trial court admitted this evidence without making a preliminary finding that the government had shown that the other items were stolen. The Supreme Court held that the trial judge need not make a finding. Rather, pursuant to Rule 104(b) the trial court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." Id. at 689-90.

Huddleston's adoption of a Rule 104(b) test for Rule 404(b) evidence means that the trial judge need only listen to the prosecutor's evidence before ruling on the objection. The evidence is admissible if the prosecution has presented "evidence sufficient to support a finding of the fulfillment of the condition." Rule 104(b). Defendant's contrary evidence is then submitted to the jury. Only if no reasonable juror could find by

a preponderance of the evidence that the crime was committed or that it was committed by the defendant will the court strike the evidence and instruct the jury to disregard it.

A Rule 104(a) standard would instead require the court to hear both sides' evidence before making a preliminary ruling. Furthermore, although the Supreme Court has generally mandated a preponderance of the evidence standard with regard to Rule 104(a) determinations,[12] the prevailing view prior to Huddleston was that the prosecution's proof had to meet some variation of a clear and convincing standard. See Imwinkelried, supra at §2:08. Accordingly if the admissibility of Rule 404(b) evidence is reclassified as a preliminary question pursuant to Rule 104(a), a further choice has to be made about the appropriate standard of proof.

Proposals to overcome Huddleston. The American Bar Association's Criminal Justice Section has endorsed reversing Huddleston and the adoption of a clear and convincing standard. See Committee on the Rules of Criminal Procedure and Evidence, Federal Rules of Evidence: A Fresh Review and Evaluation 27-28 (1987). This proposal was endorsed by the A.B.A. House of Delegates.[13]

Some of the states have rejected Huddleston by judicial opinion. See Gregory P. Joseph & Stephen A. Saltzburg, The

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[12] See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993); Bourjaily v. United States, 483 U.S. 171 (1987).

[13] 44 Crim.L.Rep. 2376 (1987).

Federal Rules in the States §14.3 (1987 and 1994 cum. supp.) Minnesota has amended its version of Rule 404(b) to add as a third sentence:

> In a criminal prosecution, such evidence shall not be admitted unless the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence.

Professor Ordover has suggested a new Rule 104(a) that would apply to all the character rules:

> In all matters concerning the admissibility of evidence against the defendant in criminal cases pursuant to Rule 404(b) or the propriety of cross-examination of the defendant in criminal cases pursuant to Rules 608(b) or 609(a), the court shall make a preliminary determination that the act offered or cited by the prosecution actually occurred and was committed by the defendant. Such determination must be made on the basis of a preponderance of the evidence. The admissibility of the evidence or the propriety of the cross-examination shall be within the discretion of the court subject to the provisions of Rule 403(b).

Ordover, supra at 140. His suggestion for a new Rule 403(b) balancing test is discussed below.

Evaluating the solution. In deciding whether and how the Huddleston test should be revised, one must consider whether changing the Huddleston rule is likely to have much of an effect on the most prevalent perceived abuses in the admission of evidence pursuant to Rule 404(b). Do defendants suffer inappropriate prejudice because Huddleston makes it too easy to admit evidence against them of crimes or acts that were never committed or not committed by them?[14] Would a trial court

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[14] Reversals are still possible now, despite Huddleston's low standard. See, e.g., United States v. Bradley, 5 F.3d 1317 (9th Cir. 1993) (in prosecution for conspiracy to kill a witness,

applying a Rule 104(a) preponderance of the evidence standard reach different results than under a Rule 104(b) test? Would a clear and convincing standard make a difference in any appreciable number of cases? Is the prosecution's burden met under either or both of these standards when it offers testimony by co-defendants or informants about defendant's acts, or offers statements about the defendant's prior acts that satisfy the hearsay rule? It is evidence of this sort that is the most problematic in establishing defendant's commission of the prior act.

An amendment rejecting Huddleston may not be particularly responsive to the problems Rule 404(b) evidence creates. If courts would find a new higher standard satisfied in virtually all cases, then abolishing the Huddleston ruling is not going to make much of a difference. An amendment will have no effect on cases in which defendant was convicted of the uncharged acts or abundant documentary evidence exists. In such cases, the overbroad use of the evidence to prove intent or conspiracy or to prove an issue not in controversy, or to provide highly prejudicial details will still cause problems.

On the other hand, if changing the outcome in Huddleston would prevent prosecutors from proving defendant's connection to the prior act in a significant number of cases, then obviously

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reversible error to admit evidence of uncharged killing; court noted that there was almost no evidence connecting one of the defendants to the other killing and the link between the two killings was extremely weak showing that the first killing was carried out to keep a witness from testifying).

such an amendment would have a real impact on the application of Rule 404(b). In addition, making all preliminary determinations about the admissibility of other crimes evidence subject to a Rule 104(a) analysis would tie in well with procedural suggestions discussed below. Finally, abandoning Huddleston may have a symbolic effect as a signal of dissatisfaction with the application of Rule 404(b) that might causes some judges to rethink their willingness to admit evidence pursuant to an alleged non-propensity inference.

b. Requiring issue to be "controverted." Rule 404(b), unlike Rule 407, does not state that an issue must be in controversy before other crimes evidence may be introduced. Cf. Advisory Committee's Note to Rule 401 ("The fact to which the evidence is directed need not be in dispute.") Nevertheless, the lack of an "if controverted" requirement does not signify that the plain-meaning of Rule 404(b) authorizes the admission of other crimes evidence on non-disputed issues. Such a result would be at odds with the central objective of the propensity rule --to make the defendant's presumption of innocence meaningful -- and inconsistent with the basic principle that evidence is not probative unless it relates to a material fact. Indeed, federal courts agree in theory that they will not admit other crimes evidence on issues that are not contested. Imwinkelried, supra §8,10 at p. 22 ("If it is unrealistic to assume that the defendant will contest the issue and the issue is only technically in dispute and not in substance, most courts exclude

the prosecution's uncharged misconduct. The issue is a mere phantom.").

In practice, however, applying this principle is troublesome with regard to Rule 404(b) evidence. Determining when an issue is not in dispute is complicated by defendant's constitutional right not to offer a defense and the non-specificity of a not guilty plea. The prosecution may not know whether defendant will put on a defense or the nature of the defense.

Courts disagree on the extent to which other crimes evidence should be admitted under these circumstances. Some believe that a not guilty plea puts the prosecution to its proof on all essential elements of the case. Dictum in the Supreme Court's opinion in Estelle v. McGuire, 112 S.Ct. 475 (1991) provides some ammunition for this argument, though the opinion's precedential value is limited because the Court held that the court below had exceeded the scope of federal habeas corpus review of state convictions, which is limited to deciding whether the conviction violated the laws, Constitution or treaties of the United States.[15] Some courts handle specific intent and general intent

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[15] McGuire was charged with the second degree murder of his 6-month old child. At trial, two physicians testified that the baby's physical injuries indicated that she was a battered child. Under a grant of transactional immunity, defendant's wife recanted earlier statements blaming her husband and testified that she had beaten the child on the day of her death. The court below granted habeas corpus because no evidence linked defendant to the prior injuries and no claim of accident was made at trial. The Court first explained that the battered child evidence was relevant because it proved that the child's death "was the result of an intentional act by someone, and not an accident," such as falling off a couch. Turning to the court's finding below that admitting the battered child evidence amounted to a lack of due

crimes differently (see supra), and some find that when defendant denies having committed the act that general mens rea is not in issue and Rule 404(b) evidence may not be admitted for the purpose of proving intent. See United States v. Powell, 587 F.2d 443 (9th Cir. 1978) (where key issue was whether defendant had supplied marijuana, general denial removed issue of intent from dispute) In a series of cases, the Second Circuit has proposed techniques to sharpen the issues in dispute and to protect the accused against having the prosecution offer other crimes evidence in its case-in-chief when it is not yet clear whether defendant will raise a lack of intent defense.[16] Taken together these cases draw a distinction between evidence offered to prove that defendant committed the charged act and evidence offered to prove one of the mens rea elements, such as intent or knowledge.[17] Unless the defendant concedes that he committed the

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process because of the failure to claim accident at trial, the Court stated: "This ruling ignores the fact that the prosecution must prove all the elements of a criminal offense beyond a reasonable doubt...[T]he prosecution was required to demonstrate that the killing was intentional...By eliminating the possibility of accident, the evidence regarding battered child syndrome was clearly probative of that essential element...[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense."

[16] See United States v. Colon, 880 F.2d 650 (2d Cir. 1989); United States v. Figueroa, 618 F.2d 934, 941 (2d Cir. 1980); United States v. Mohel, 604 F.2d 748 (2d Cir. 1979); United States v. Danzey. 594 F.2d 905 (2d Cir.), cert. denied, 441 U.S. 951 (1979).

[17] See Edward G. Mascolo, Uncharged Misconduct Evidence and the Issue of Intent: Limiting the Need for Admissibility, 67 Conn. Bar J. 281, 302-303 (1993) ("Deferring a determination of admissibility until after the government's case-in-chief and the

act, other crimes evidence will be admissible in the prosecution's case in chief to prove that defendant committed the act. But evidence of intent or knowledge must await the prosecution's rebuttal case if the court does not yet know what kind of defense, if any, the defendant will raise so that the court cannot determine which issues will be in dispute or the prejudicial impact of the evidence. Sometimes the court will know the nature of the defense from notice of affirmative defenses, pretrial conferences, opening statements, cross-examination of witnesses, or concessions and attempts to stipulate. In such a case the court may be able to make an earlier determination.[18]

Because the real problem is how to sharpen issues so that the trial judge will have a better grasp of when an issue is in dispute, codifying the Second Circuit approach is likely to have more of an effect than adding an "is controverted" requirement which begs the question of when an issue is actually in dispute.

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defendant's response is especially important when other-crimes evidence is relevant to intent, because proof of intent may be inferable from the act itself. In this situation, unless the defendant specifically raises lack of intent as a defense, the resulting prejudice to the defendant of admitting evidence of similar acts may outweigh its probative value. But even when the offense charged requires specific intent not readily inferable, the defendant may elect not to raise lack of intent as a defense, or he may stipulate to the existence of intent if the jury finds the other elements of the offense. Therefore, the admissibility of similar-acts evidence to establish intent should be reserved to rebut the defendant's case."

[18] See, e.g., United States v. Hernandez, 975 F.2d 1035 (4th Cir. 1992) (other crimes evidence would be readily admissible if the defendant claimed he was present but innocent, that he acted but did not know the purpose of the act, that intent was a "key issue" because the defendant 'sharply contested.').

I offer the following suggestion for discussion purposes:

> (b)(1) Other crimes, wrongs, or acts. [Keep the present language through "absence of mistake or accident"]
>
> (2) Upon request of the accused, the prosecution in a criminal case must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial **and the purpose for which it is being offered. If the court finds, subject to Rule 104(a) [and subdivision (3) of this rule] that the evidence is admissible to prove that the defendant committed the charged act or participated in a charged conspiracy, the court may permit the government to introduce the evidence in its case-in-chief. Otherwise, the court must defer its decision on the admissibility of the evidence until the government presents its rebuttal case or the defendant rests without introducing evidence -- unless the defendant has**
>
> **raised a defense which makes such evidence admissible.**
>
> **(3) [Special balancing test].** See discussion infra.

Less radical versions of this proposal would require the prosecution merely to give notice of purpose and/or for the court to make a Rule 104(a) determination. The determination could be subject to Rule 403 instead of providing for a special balancing test.

c. Recasting the balancing test. The Committee's final suggestion was to consider a balancing test that would place the burden on the prosecutor to show that the probative value of other crimes evidence substantially outweighed its prejudicial effect. A balancing test not only recognizes the risk to the defendant, but also enables the trial judge to evaluate the dangers in terms of case specific factors. Placing the burden on the prosecution provides additional protection to the defendant. In addition, since the prosecutor who is presenting

the case is obviously familiar with the evidence and prepared to present the case, shifting the burden could potentially result in a more thorough articulation of the relevant factors than occurs when defense counsel has to demonstrate inadmissibility.

Professor Ordover proposed a new Rule 403(b) that would apply to all character rules:

> In all matters concerning the admissibility of evidence against the defendant in criminal cases pursuant to Rule 404(b), or the propriety of cross-examination of the defendant in criminal cases pursuant to Rules 608(b) and 609(a)(1), the burden shall be on the prosecution to show that the probative value of the evidence exceeds the danger of unfair prejudice to the defendant. In making this determination, the court shall consider whether the jury is likely to be able to restrict the evidence to the purpose for which it was offered or whether it is more likely that the jury will use the evidence for an improper purpose. If the court concludes that the jury will likely use the evidence for an improper purpose, it shall exclude the evidence.

Ordover, supra at 140-141.

A specialized balancing test could be added to Rule 404(b) instead of to Rule 403. In addition, the protection to defendant could be increased even further by providing that the evidence will be inadmissible unless "the court determines that the probative value of admitting this evidence substantially outweighs its prejudicial effect to the accused." Professor Ordover would require the judge to assess the effect on the jury. I do not know how such a determination would be reviewable.

Another possibility might be to guide the trial court's

discretion by specifying factors that must be considered.[19] A recent article that surveys the existing psychological literature suggests that the following factors might bear on the probativeness of other crimes evidence:

> the specificity of the description of the subject's prior conduct, the similarity between that conduct and the surrounding circumstances in which it occurred and the conduct in question, the number of provable prior instances of similar conduct by the defendant, the period over which the prior conduct occurred, and whether the conduct is inherently likely to be repeated.[20]

Other possible factors that might be included in a balancing test are defendant's willingness to stipulate to an element of the crime, the availability of other evidence on the issue, the nature of the other crimes evidence, the possibility of redacting particularly prejudicial details.

Finally, procedural requirements could be integrated with the hearing suggested in proposal b., above and/or a balancing test. For example, Tennessee's Rule 404(b) provides:

> The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue

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[19] Such a rule would resemble the judicially created rules that existed prior to the enactment of the Federal Rules of Evidence for handling the impeachment of a criminal defendant. See, e.g., the factors articulated by the Luck-Gordon line of cases in the District of Columbia: the nature of the crime; the time of conviction and the witness's subsequent history; the similarity between the past crime and the charged crime; importance of defendant's testimony; centrality of the credibility issue. See 3 Weinstein & Berger at par. 609[03].

[20] Davies, supra note 1, at 535-36.

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TO: Advisory Committee on the Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter MAB

DATE: April 26, 1994

RE: Amending Rule 103

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1. Prior Committee action. At its fall meeting, the Committee expressed interest in further exploration of problems posed by the Supreme Court's opinion in Luce v. United States, 469 U.S. 38 (1984). Luce prohibits a defendant from raising on appeal a claim pursuant to Rule 609 unless the defendant testified and raised the objection at trial. Luce means that a defendant who is unsuccessful in having a prior conviction excluded through a motion in limine cannot have that determination reviewed on appeal unless he takes the stand. The Committee agreed that any modification of Luce's policy should be accomplished via Rule 103 rather than Rule 609 because opening Rule 609 to Congressional review might well be counter-productive.

Rule 103 does not presently contain any provision dealing with in limine motions. Drafting such a section requires the resolution of a number of issues that lie beyond the scope of the

Luce opinion itself. Accordingly, this memorandum first discusses Luce and the Supreme Court's rationale. It then considers the extent to which Luce has been applied outside the Rule 609 context, the contemporaneous objection rule, and possible changes to Rule 103.

2. Luce. In Luce v. United States, 469 U.S. 38, 43 (1984), the Court held "that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." The Court justified its holding by stressing the difficulty a reviewing court encounters in ruling "on subtle evidentiary questions outside a factual context." Id. at 41. This is particularly a problem in view of the balancing test the court must apply pursuant to Rule 609(a)(1) to determine the admissibility of a prior conviction. The court needs to know the precise nature of the defendant's testimony which is, however, unknowable at the motion in limine stage before the defendant testifies. The Court found speculative any possible harm flowing from a district court ruling allowing impeachment and voiced concern that appellate review without requiring the accused's testimony would encourage defendants to make in limine motions "to 'plant' reversible error in the event of conviction." Furthermore, the Court expressed concern that allowing appeals from adverse rulings on motions in limine would promote a windfall of automatic reversals, since error which presumptively kept the defendant from testifying could not logically be called harmless.

Critics of Luce have pointed primarily to the decision's effect in keeping defendants off the stand for fear that they will be convicted once the jury hears of their prior convictions. That fear, coupled with the appellate courts' extensive reliance on harmless error, means that a defendant may conclude that the lesser danger is to forgo testifying in his own behalf. Consequently, if the trial court was wrong in its in limine determination, or refuses to make one, the defendant forfeits the protection of Rule 609(a) which was specifically drafted to protect defendant against the danger that prior crime evidence offered to impeach will be misused on a propensity inference. See Advisory Committee Note to 1990 Amendment ("the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice").

Critics have also argued that appellate courts can take into account the fact that defendant's proffer may be self-serving and can still apply a harmless error test even if they assume that the erroneous ruling caused defendant not to take the stand. Furthermore, exclusion of a conviction may be conditioned on defendant's trial testimony being consonant with the terms of a proffer made at the in limine hearing.

The states are split on adopting the Luce approach. See Annot., 88 A.L.R. 4th 1028. Some states that do not follow Luce have added special provisions to their rules of evidence (see below); others have reached this result via court decisions. The

opinions indicate some disagreement about the record that defendant must make at the in limine hearing.

3. Extensions of Luce. Justice Brennan's concurring opinion in Luce stated: "I do not understand the Court to be deciding broader questions of appealability vel non of in limine rulings that do not involve Rule 609(a)." The Second, Sixth and Eleventh Circuits have, however, extended Luce to impeachment pursuant to Rule 608(b). See United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (per curiam) (defendant failed to testify), cert. denied, 479 U.S. 831 (1986); United States v. Sanderson, 966 F.2d 184, 189-90 (6th Cir. 1992); United States v. DiMatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam) (witness failed to testify), cert. denied, 474 U.S. 860 (1985). The First Circuit has refused to review a Rule 403 determination in the absence of testimony by the accused (United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987), cert. denied, 484 U.S. 844 (1987). And the Eighth Circuit has stated that Luce applies to a Rule 404(b) determination, and refused to review a claimed error pursuant to that rule when defendant failed to testify. See United States v. Johnson, 767 F.2d 1259 (8th Cir. 1985) (court ruled that evidence would be usable for rebuttal and cross-examination).

4. The contemporaneous objection rule. Rule 103(a)(1) provides that rulings admitting evidence cannot be assigned as error on appeal unless "a timely objection or motion to strike appears of record." Does this rule require a party to renew its objection at trial when the evidence is offered if the court

previously denied the party's motion in limine to exclude the evidence? See Catherine Young, Should a Motion in Limine or Similar Preliminary Motion Made in the Federal Court System Preserve Error on Appeal Without a Contemporaneous Objection? 74 Ky. L. J. 177 (1990) (reporting a split among the circuits).

In the case of prior conviction evidence, the contemporaneous exception rule intersects with the Luce rule and may cause additional problems for the defendant. If the defendant testifies at trial, thereby satisfying Luce, a rigid view of Rule 103(a) precludes appellate review if the defendant brings out the conviction on direct, as permitted by Rule 609, in order to remove its sting. See Williams v. United States, 939 F.2d 721, 723-25 (9th Cir. 1991).

5. Possible amendments to Rule 103.

a. Should a motion in limine provision be added with an exception to the contemporaneous objection rule? A number of different solutions are possible.

1) Do not add a motion in limine provision. This resolution does not mean that a failure to renew an objection at trial after an adverse in limine determination will always be fatal to appellate review. Some of the circuits have carved out limited exceptions. See, e.g., United States v. Mejia-Alarcon, 996 F.2d 982 (10th Cir. 1992) (defendant brought out conviction on direct after judge found at in limine hearing that defendant's prior conviction for the unauthorized acquisition and possession of food stamps involved dishonesty or false statement and was

therefore automatically admissible pursuant to Rule 609(a)(2); appellate court found that under these circumstances the motion in limine preserved the objection because it satisfied a three-part test: 1. the issue was fairly presented to the district court at the time of the pre-trial hearing; 2. the issue could be finally determined at the hearing, a requirement which was met because a Rule 609(a)(2) question is essentially a question of law; and 3. the judge ruled unequivocally).[1] Courts have also sometimes excused the need for a contemporaneous objection when it obviously would have been useless. See United States v. Lui, 941 F.2d 844 (9th Cir. 1991) (court threatened defendant with sanctions for moving in limine to exclude drug courier profile evidence).

The disadvantage with this approach is that the party who fails to object can never be sure that the circuits' various exceptions will apply in a particular case. Consequently, a number of suggestions have been made for codifying the circumstances in which a prior motion in limine will excuse further objection at trial.

2) Amend the rule to require the judge to specify at the in limine motion whether a further objection must be made at trial. One possible version of such an addition to Rule 103 was proposed by the ABA Criminal Justice Section, Committee on

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[1] For other cases in which courts applied a similar test see Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986); Greger v. International Jensen, Inc, 820 F.2d 937 (8th Cir. 1987); Palmerin v. City of Riverside, 794 F.2d 1409 (9th Cir. 1986) (thoroughly explored and definitive ruling).

Rules of Criminal Procedure and Evidence, Federal Rules of Evidence: A Fresh Review and Evaluation, 120 F.R.D. 299 (1987). It suggested adding to Rule 103(a)(1):

> (a) A ruling on a motion in limine that evidence subject to the motion is admissible shall be sufficient to preserve the issue for appeal without any further objection by the losing party during trial, unless the court specifically notifies the parties that its ruling is tentative and the motion should be renewed at trial.
>
> (b) During trial, the court can change any in limine ruling for good cause shown.

It would of course also be possible to draft such a rule in the reverse, eliminating the need to make an objection at trial if the court advises the losing party that it need not renew the objection. The advantage of either approach is that the losing party will know when to renew the objection at trial. It will not, however, always allow a defendant to preserve his right to raise the issue on appeal when he introduces evidence on direct of a conviction which the court admitted pursuant to Rule 609(a)(1).

3) Amend the rule to eliminate the need for an objection at trial if the issue was explored fully at the in limine hearing. Kentucky added a subdivision (d) to its version of Rule 103 that not only makes contemporaneous objections unnecessary under some circumstances but also simultaneously overcomes Luce when the provision applies:

> (d) Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. the court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A

> motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.

The Commentary to the provision first explains the value of motions in limine and expresses the hope that the provision will encourage more widespread use of the device. The Commentary then discusses the second and last sentence of subdivision (d):

> The second sentence is intended to recognize that such motions might frame issues which can only be resolved properly in the context of developments at trial and that the trial judge must be given great latitude to make or refuse to make advance rulings on admissibility.
>
> In some jurisdictions the case law leaves doubt about the extent to which motions in limine may be used to preserve errors for review. . . Subdivision (d) eliminates this doubt by providing that motions in limine resolved by order of record are sufficient to preserve error for appellate review. By requiring that such motions be resolved by "order of record," an adequate record for the appeals court should be assured. it should be noted that a motion in limine would not be sufficient to preserve errors for appellate review unless it provided the trial court with the type of information which would be required to preserve errors raised at trial (i.e. information sufficient to satisfy the requirements of subdivision (a) --the specific ground for any objection being made and the substance of any evidence being offered).
>
> The last sentence of the provision merely recognizes aa right in the trial court to reconsider advance rulings on evidence issues in the light of developments at trial. the provision does not attempt to define the circumstances under which reconsideration would be appropriate. But it could be expected that reconsideration would only be necessary in unusual situations, for a trial judge should not provide advance rulings on admissibility in situations which might call for reconsideration at trial.

Kentucky's formulation leaves somewhat uncertain when defendant can risk not making an objection at trial. See

discussion of United States v. Mejia-Alarcon, supra. The rule does not indicate when the record will be adequate to overcome the timely objection requirement and the Luce ruling. Must the defendant proffer his testimony at the in limine hearing?

4) Other formulations. The ABA Criminal Justice Section's Committee suggested a number of additions to Rule 103 specifically responsive to the Luce opinion. See discussion infra. The proposal also preserves the right to an appeal if the defendant brings out the evidence of his prior conviction on direct provided certain conditions are met. Such a provision could be drafted independently of provisions aimed at overruling Luce.

One might also seek to codify the test in Mejia-Alarcon. The result would be a provision stressing both an explicit ruling by the trial court and an adequate exploration of the issue at the limine hearing, i.e. somewhat of a cross between the ABA Criminal Section's proposed subdivision(a)(1) and Kentucky's subdivision (d).

b. Overruling Luce. Instead of, or in addition to, dealing with motions in limine in general, the Committee might wish to address the issues posed by the Court's holding in Luce. State judicial decisions which have declined to follow Luce can be divided into two broad categories: 1. defendant need not testify at trial in order to preserve for appeal an adverse ruling that admits a prior criminal conviction for impeachment; 2. defendant's failure to testify at trial preserves for appeal

an adverse ruling concerning the admissibility of prior convictions only if the defendant created an adequate record to permit appellate review. Compare State v. Whitehead, 517 A.2d 373 (N.J. 1986) (found that appellate court could review the trial court's decision without requiring a proffer from defendant and that requiring a proffer exposes the defendant to the tactical disadvantage of prematurely disclosing his testimony) with State v. McClure, 692 P.2d 579 (Ore. 1984) (in order to preserve issue for appeal defendant must establish on record that he will in fact take the stand and testify if convictions are excluded, and must outline sufficiently the nature of his testimony so that appellate court can effectively balance). These solutions and others are discussed below.

1) Restricting Luce's impact to the facts of the case. Courts have gone beyond the specific holding of Luce: 1. by extending the ruling to rules of evidence other than rule 609; 2. by foreclosing the non-testifying defendant from raising the propriety of the trial judge's ruling with regard to the admissibility of prior convictions even when the court finds the conviction automatically admissible pursuant to Rule 609(a)(2) so that it does not have to engage in any balancing; 3. in Luce, the defendant had made no proffer as to what his testimony would be 469 U.S. at 462. A provision could be drafted requiring defendant to testify in order to raise a Rule 609(a)(1) issue on appeal unless he made an adequate proffer at the motion in limine, and providing that other situations would be handled by some version

of a motion in limine rule as suggested above.

2) Requiring defendant to make an adequate proffer of evidence at the motion in limine in order to preserve the right to appellate review. A provision that relieves defendant from testifying at trial but conditions appellate review on the adequacy of defendant's proffer is consistent with the Luce opinion's basic premise that appellate courts cannot review the trial court's balancing in the absence of an adequate record. The Kentucky provision quoted above is one example of a rule that would require defendant to offer some information, although it is very vague as to what is required.

A more detailed provision was suggested by the ABA Criminal Justice Section's Committee. It proposed that the following two sections be added to Rule 103 (in addition to the general provision on motions in limine set forth above):

> (2)(a) If the in limine motion concerns impeachment of the criminal defendant, the court shall rule (and the ruling shall be made subject to later evidentiary considerations) as early as practicable, and no later than when the defendant is called as a witness. (b) Any ruling made at the time the defendant is called as a witness shall be subject to change only if he or she testifies in a manner so differently from that indicated to the court at the time of the ruling that it would have affected the ruling.
>
> (3) if the ruling in limine admits impeachment concerning a criminal defendant's wrongdoing or conviction of crime, the merits of the evidentiary issue shall be preserved for appeal even if the witness-defendant personally testifies to the impeaching facts on direct examination, or does not testify at all, as a result of the ruling, if he or she:
>
> (a) indicated to the court an intention to testify at trial; and
> (b) made known the substance of his or her

proposed testimony on the record before the court ruled on the admissibility of the impeachment.

c. Relieving defendant of any obligation to testify at trial or to make a proffer in order to preserve for appellate review a ruling that admits evidence of a prior conviction. As indicated above, some state courts have rejected the Luce rationale that an appellate court cannot properly review the trial court's decision absent testimony or a proffer of testimony by the accused. See also Commonwealth v. Richardson, 500 A.2d 1200 (Pa. 1985); State v. Ford, 381 N.W.2d 534 (Minn. 1986). This had been the rule in some federal circuits prior to Luce.

Tennessee has incorporated this approach into its version of Rule 609:

> (a)(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. if the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

See also Kentucky's Rule 103(d) discussed at 5.a.(3), supra.

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TO: Members of the Advisory Committee on Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

DATE: May 3, 1994

RE: MISCELLANEOUS RULES

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1. Rule 405. We agreed to make this rule "subject to Rule 412." I have not drafted a Note because I thought it might be useful to say something about Rule 412, but obviously we don't know yet about the contents of Rule 412.

2. Rule 607. I have looked at recent cases construing Rule 607 when parties impeach their own witnesses, and it appears to me that the rule is not causing problems. The courts are asking appropriately whether the person calling the witness had a legitimate reason for doing so other than providing an opportunity for impeachment. Every now and then there is a case in which there is a reversal because the appellate court finds that the trial court erred in allowing the prosecution to call the witness. See e.g. United States v. Gomez-Gallardo, 915 F.2d 533 (9th Cir. 1990).

3. Rule 611. One suggestion at our fall meeting was to amend subdivision (c) of Rule 611 so as to clarify that the examination that occurs after an adverse witness is examined by

the proponent should not be in the nature of cross-examination. Louisiana has a unique subdivision (c) that is of interest:

> **C. Leading questions.** Generally, leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony and in examining an expert witness on his opinions and inferences. However, when a party calls a hostile witness, a witness who is unable or unwilling to respond to proper questioning, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. Generally, leading questions should be permitted on cross-examination. However, the court ordinarily shall prohibit counsel for a party from using leading questions when that party or a person identified with him is examined by his counsel, even when the party or a person identified with him has been called as a witness by another party and tendered for cross-examination.

A number of the states such as Tennessee specifically provide that the cross-examination of a party that had been called by the opponent may be by leading questions.

> **(d) Calling adverse party.** When a party in a civil action calls an adverse party (or an officer, director, or managing agent of a public or private corporation or of a partnership, association, or individual proprietorship which is an adverse party), interrogation on direct examination may be by leading questions. The scope of cross-examination under this paragraph shall be limited to the subject matter of direct examination, and cross-examination may be by leading questions.

4. Rule 612. I was asked to consider whether the federal rule should be amended in conformity with Michigan's Rule 612 which provides that when portions of a writing are introduced into evidence they are introduced "for their bearing on creditability only unless otherwise admissible under these rules for another purpose." I certainly agree that Michigan's statement of the rule is preferable to the present federal rule

and more appropriate. Whether it is needed, however, is a somewhat different issue. A statement virtually identical to what the Michigan rule requires has appeared in the Weinstein and Berger evidence treatise for the past twenty years.[1] No annotations appear to this sentence.

5. Rule 614. At our last meeting we discussed whether a provision should be added to the rule permitting jurors to question witnesses. I was surprised to discover an extensive literature dealing with the issue. I am not persuaded, however, that a formal rule is needed. Courts seem to handle this matter well as an inherent power. Precisely how and when the questioning should be allowed seems to depend very much on the particular circumstances of each case. I think that a rule that is anything but so broad as to be meaningless could well cause unintended mischief.

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[1] "This provision must be understood as allowing the jury to examine the writing: (1) as a guide to assessing the credibility of the witness and (2), to the extent that it would otherwise have been admissible, for its normal evidential value." Weinstein's Evidence ¶612[05] at 612-50.

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TO: Members of the Advisory Committee on Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter MAB

DATE: April 26, 1994

RE: RULE 407

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At our last meeting, after a discussion of Rule 407, the Committee took a straw vote on four possible resolutions. The result was a tentative agreement to amend Rule 407 so that the exclusionary bar would apply to product liability litigations. The Reporter was directed to redraft the rule accordingly and to prepare accompanying commentary. Left open for further consideration was the question of whether an exception should be created for recall letters. In addition, Jim Robinson inquired whether the rule needed to be amended so as to clarify when "the event" occurs that triggers application of the rule. This memorandum deals first with recall letters and how the courts have interpreted "the event." It concludes with a draft of an amended Rule 407 and commentary.

Repairs Required by a Governmental Agency; Recall Letters. Even if one were to exclude evidence of subsequent remedial measures in all products liability cases, one might possibly wish to carve out an exception for remedial measures that defendant

undertakes in response to a governmental agency's demand, recommendation or requirement.[1] Examples are label changes ordered by the FDA,[2] airworthiness directives of the FAA,[3] or recall letters issued in response to a National Highway Traffic Safety Administration requirement. The issue has arisen most frequently with regard to motor vehicle recall letters.[4] An exception could be drafted in terms of the manufacturer's written notification of a defect in its product (see Maine and Texas Rule 407, infra), or in terms of the manufacturer having been ordered by a governmental agency or "superior authority" to take a remedial measure in connection with the product.[5] The Maine and Texas version does not hinge on the requirement having been imposed by a third party (although of course that will be the usual context). The governmental agency alternative would encompass measures other than a written notification to a purchaser.

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[1] See Note, The "Superior Authority Exception" to Federal Rule of Evidence 407: The "Remedial Measure" Required to Clarify a Confused State of Evidence, 1991 U. Ill. L. Rev. 843 (1991).

[2] See, e.g., Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980) (court held that Rule 407 applied and excluded evidence), cert. denied, 449 U.S. 1080 (1981). Compare Kociemba v. G.D. Searle & Co., 683 F.Supp. 1579, 1581 (D. Minn. 1988).

[3] See, e.g., Herndon v. Seven Bar Flying Service, 716 F.2d 1322 (10th Cir. 1983) (dictum), cert. denied, 466 U.S. 958 (1984).

[4] See Annot., Products Liability: Admissibility Against Manufacturer of Product Recall Letter, 85 A.L.R.3d 1220 (1978).

[5] See Note, The "Superior Authority Exception", supra note 1.

Courts have not reached consistent results in either federal or state court in applying the present text of Rule 407 to recall letters. The Fifth,[6] and Eighth,[7] circuits have admitted evidence of recalls. The Fourth,[8] Sixth,[9] and Ninth[10] circuits have excluded such evidence.

The arguments for and against a governmental agency or product recall letter exception are as follows:

1. Rule 407 ordinarily does not apply when a third-party takes remedial measures. Repairs ordered by a governmental agency or pursuant to governmental requirements, as is the usual case when a manufacturer sends out a notification of defect, can be viewed as an extension of a repair by a third-party. The remedial measure is the result of a third party's demand rather than the defendant's choice, although defendant carries out the action. Consequently, the underlying policy of the rule -- that defendants will forego repairs for fear that jurors will draw an adverse inference -- does not operate. Furthermore, the defendant has no alternative but to comply; it is "unreasonable

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[6] Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978).

[7] Bizzle v. McKesson Corp., 961 F.2d 719 (8th Cir. 1992) (court indicated that recall letter evidence would generally not be barred because circuit permitted subsequent repair evidence in strict product liability cases, but upheld district court's exclusion pursuant to Rule 403).

[8] Chase v, General Motors Corp., 594 F.2d 1283 (9th Cir. 1979).

[9] Calhoun v. Honda Motor Co., 738 F.2d 126 (6th Cir. 1984).

[10] Longnecker v. General Motors Corp., 594 F.2d 1283 (9th Cir. 1979).

to assume that manufacturers will risk wholesale violation of the National Traffic and Motor Vehicle Safety Act . . . in order to avoid the possible use of recall evidence as an admission against them." Farner v. Paccar, Inc., 562 F.2d 518, 527 (8th Cir. 1977). See Herndon v. Seven Bar Flying Service, 716 F.2d 1322, 1331 10th Cir. 1983) ("a tortfeasor cannot be discouraged from voluntarily making repairs if he must make repairs in any case"), cert. denied, 466 U.S. 958 (1984).

The argument to the contrary is that recalls or other governmentally mandated measures do not operate well without the cooperation of the defendant. Ensuring needed cooperation requires an exclusionary rule.

2. It has also been suggested that when the defendant takes action because of a particular defect that the evidence is more probative than in the usual subsequent remedial situation. For instance, evidence that a particular model car has been recalled because of a particular defect may be highly relevant if the lawsuit involves that very make of car and defect. Other commentators and courts nevertheless believe that when jurors are faced with recall evidence they will be distracted from central questions of when the defect occurred and the manufacturer's legal responsibility just as they are when other remedial measures evidence is introduced.

Maine and Texas have adopted a subdivision (b) to Rule 407 which provides:

> **(b) Notification of Defect.** A written notification by a manufacturer of any defect in a

product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.

The Advisor's Note to Maine's subdivision (b) states:

> Subdivision (b) is aimed at the increasingly common situation where a manufacturer sends a "recall letter" to purchasers notifying them of a defect in a product and asking its return for corrective measures. This is relevant as an admission of existence of the defect and would be receivable against the manufacturer under Rule 801(d)(2) unless excluded by reasons of policy. There appear to be no such reasons. A manufacturer of motor vehicles or tires is now required by statute to give notification of any safety-related defect. 15 U.S.C. §1402. Manufacturers of other products would almost certainly give a similar notification. It would be in their enlightened self-interest to do so.
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> The problem has sufficient similarity to proof of subsequent remedial measures to warrant making it a separate subdivision of the rule. Actually the difference is substantial. Proof of subsequent remedial measures is not an admission of anything. Repairs made after damage related to the very property or chattel involved in an accident may warrant the inference of negligence. Similarly a change in design may warrant the inference that the previous design was faulty. A recall letter is an out-and-out admission of the existence of a defect. The case for allowing it in evidence is much stronger.
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> The recall letter should not of itself suffice to establish causation. For instance, if there is evidence that the steering gear in an automobile suddenly failed, the recall letter would be admissible as to the existence of a defect. If, however, there is no evidence the steering gear failure caused the accident, the claim would fail for lack of proof of causation.
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> It would also seem that proof that a plaintiff received and did not heed the warning of a defect would be admissible on the question of his due care.

"The Event". Virtually all courts agree that "the event" means the accident, and not the time of manufacture of the

product or creation of the hazard.[11] The Third Circuit, however, has relied on Rule 407 to exclude as well evidence of measures that a defendant took after manufacture but before the injury of the plaintiff. See, e.g., Kelly v. Crown Equipment Co., 970 F.2d 1273, 1276 (3d Cir. 1992) ("the Rule 407 policy of encouraging people to take steps to make their products safer was equally as supportive of exclusion of evidence of safety measures taken before someone is injured by a newly manufactured product, even if those measures are taken in response to experience with an older product of the same or similar design;" court acknowledged that language of the rule might be to the contrary but that it was not free as a panel to disregard precedent); Petree v. Victor Fluid Pallet, Inc., 831 F.2d 1191, 1197-98 (3d Cir. 1987).

Kentucky has sought to eliminate any doubt about the meaning of "the event" by adding the following words before those words appear in the first sentence: "an injury or harm allegedly caused by". If we wish uniformity on this issue, such an addition to the federal rule would presumably lead to different results in the Third Circuit. Adoption of the Third Circuit view requires a further amendment to the rule.

Redraft of Rule 407. The materials in bold are possible additions to Rule 407. In addition, I have bracketed those changes on which we had not reached a consensus at our prior

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[11] The rule uses the term "event" rather than "accident" because Rule 407 applies in non-accident situations as well. See, e.g., Specht v. Jensen, 863 F.2d (9th Cir. 1988) (in action against city for illegal search, district court properly excluded press release by city about planned disciplinary action).

meeting. I have also provided a redraft of the present rule (incorporating the products liability extension) that attempts to follow Bryan Garner's Guidelines for Drafting Court Rules, dated March 1994.

(a) Subsequent remedial measures. When after [an injury or harm allegedly caused by] an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in the product or its design, or that a warning or instruction should have accompanied the product.

Drafting alternative more consonant with Drafting Guidelines:

(a) Subsequent remedial measures. When, after an event that causes injury or harm, a defendant takes a measure which if taken previously might have made the event less likely to occur, evidence of the measure is not admissible to prove:

(1) negligence or culpable conduct;

(2) a defect in the product or its design; or

(3) that a warning or instruction should have accompanied the product.

[(b) When a manufacturer notifies a purchaser in writing about a defect in a product it has produced, evidence of the notification is admissible against the manufacturer to prove the existence of that defect.]

Alternative to (b):

[(b) When, at the direction of a governmental agency, a manufacturer takes a measure with regard to a product it has produced, evidence of the measure is admissible to prove a defect in the product.]

Advisory Committee's Note on Amendment:

The amendment to Rule 412 makes a number of changes in the rule. The ban against using evidence of post-accident remedial measures in actions based on negligence has been extended to actions founded on strict liability. The evidence may not be used to prove "a defect in the product or its design, or that a warning or instruction should have accompanied the product." This amendment adopts the interpretation which a majority of the circuits had endorsed in applying Rule 407 to products liability actions. See Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc., 995 F.2d 343 (2d Cir. 1993); Cann v. Ford Motor Company, 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelley v. Crown Equipment Corp., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn, Inc., 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).

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TO: Members of the Advisory Committee on the Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

DATE: May 2, 1994

RE: **RULE 408**

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The comments of the Committee at our previous meeting indicated some uneasiness and uncertainty about the operation of Rule 408. Consequently the Reporter was asked to provide the Committee with hypotheticals that would facilitate exploration of how statements are handled in a variety of different situations. The Committee wished to consider both when statements are currently within the ambit of Rule 408, and whether the Rule ought to be changed.

Part of the problem with the rule may be that it is difficult to assess how the stated rationale for the rule would best be furthered in the various complex factual contexts that arise. According to the original Advisory Committee, evidence is excluded pursuant to Rule 408 not because of a lack of relevancy -- the Committee viewed probative value as widely different depending on the case -- but rather because of the public policy favoring compromise and settlement of disputes. When the

admission of certain evidence would not interfere with that policy, the Rules' liberal approach to admissibility expressed in Rules 102 and 401 should presumably govern, subject of course to Rule 403. Courts differ, however, in their appraisal of when settlement would be deterred. As the discussion below indicates, some courts tend toward viewing the rule as one of absolute exclusion. On the other hand, the tension between excluding relevant evidence and the general policy of the Rules favoring admissibility leads some courts to construe the last sentence of the rule very broadly so as to admit evidence of settlement discussions as relevant to a purpose other than proving liability or amount, or to allow unrestricted discovery with regard to settlement negotiations. Before embarking on any changes in the rule, therefore, the Committee must decide under what circumstances it thinks the rule should require exclusion, and whether the current deterrence rationale is adequate.

Rule 408 is litigated frequently, Some of the commentary concludes that the rule has the potential to act as a trap for the unwary. See Jane Michaels, Rule 408: A Litigation Mine Field, 19 Litigation 34 (1992). This memorandum explores a number of problem areas, and tries to answer three questions: 1. To what extent are difficulties with the rule attributable to differences of opinion about the policy of the rule? 2. Does the uncertainty about the operation of Rule 408 lead to too much undesirable manipulation by knowledgeable attorneys at the expense of unsophisticated lawyers' clients? 3. Are solutions available to

ameliorate the identified problems?

1. When does a dispute arise that triggers the rule? Rule 408 excludes evidence of offering or accepting a valuable consideration "in compromising or attempting to compromise a claim which was disputed as to either validity or amount." It also excludes "[e]vidence of conduct or statements made in compromise negotiations." Courts agree that this language means that the rule does not apply until there is an "actual" dispute about validity or amount. But it is not always easy to discern whether the proffered evidence relates to a time when there was an "actual" dispute, or whether it reflects a dispute about validity or amount. These questions are so intertwined that they will be discussed together. See Pierce v. F.R. Tripler & Co., 955 F.2d 820, 827 (2d Cir. 1992) ("It is often difficult to determine whether an offer is made 'in compromising or attempting to compromise a claim.' See Brazil, Protecting the Confidentiality of Settlement Negotiations, 39 Hastings L.J. 955, 960-66 (1988). Both the timing of the offer and the existence of a disputed claim are relevant to the determination."). This memorandum first looks at a number of representative cases, and then makes some suggestions.

a. A letter by the party that eventually sues to potential defendants. Suppose A sends B a letter stating: "You are infringing my patent. I hereby offer to license you for $X." Is the potential plaintiff's unilateral belief that a dispute exists sufficient to immunize the statement pursuant to Rule 408?

According to Judge Kimba Wood in Alpex Computer Corp. v. Nintendo Co., 1994 WL 139423 (S.D.N.Y. March 18, 1994), the test to be applied is whether the offerer had a "reasonable belief that a dispute exists." After an evidentiary hearing she concluded that letters sent by Alpex to 73 companies were not excludable pursuant to Rule 408 because Alpex did not as yet have sufficient information to develop claims of infringement.[1] The judge found erroneous her prior opinion to the contrary at 770 F. Supp. 161 (S.D.N.Y. 1991). In the 1994 opinion the judge adhered to that part of her previous opinion which found that Rule 408 barred admission of Alpex's letter in instances in which the recipients' responses indicated their interest in pursuing a settlement. "[A] reasonable belief may be based on the opposing party's statements or actions signalling an apparent difference of opinion." Id. at *2. This conclusion means that the unilateral offer to settle an as yet uncertain claim is transformed into an actual dispute about validity or amount because of the recipient's response.[2] (It should be noted that the judge also found that the letters which were not barred by Rule 408 were nevertheless inadmissible under Rule 403 for reasons that

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[1] See also Deere & Co. v. International Harvester Co., 710 F.2d 1551, 1556-57 (Fed. Cir. 1983) (when Deere first offered to license the patent, there was no "claim" over which the parties disagreed even though "an eventual court battle . . . was an acknowledged possibility or even probability.").

[2] Cf. Citibank, N.A. v. Citytrust, 1988 WL 88437 at *1 (E.D.N.Y. 1988) (corporate resolution authorizing settlement subject to Rule 408; Rule 408 not limited to direct communications between parties).

presumably would also apply to the evidence barred by Rule 408 so that the Rule 408 rulings had no impact on the ultimate decision).[3]

b. A conditional offer by the eventual defendant to a potential plaintiff at the moment the cause of action arises. Suppose A terminates B, an employee, and at the same time tenders a payment in return for a general release. If B refuses to accept the payment and subsequently brings an employment discrimination action, may evidence of A's actions be admitted? The Ninth Circuit in Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338 (9th Cir. 1987), cert. denied, 484 U.S. 1047 (1988), held that Rule 408 does not apply in this situation because it involved the termination itself and not a possible settlement. Judge Wood in Alpex, supra, cites Cassino in support of her conclusion that no dispute existed as yet when the 73 letters were sent to possible infringers. In Cassino, however, in contrast to Alpex, it is the potential defendant who is proffering an offer. Should this distinction matter if one is applying a "reasonable belief" test?

c. An unconditional offer by the eventual defendant to

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[3] The scope of the Rule 408 protection is of interest as well. The judge extended the Rule 408 ban to newspaper publicity and Alpex's press releases about the settlements reached with companies that sought licenses in response to the letters. The judge found that admitting the publicity "would defeat the purpose of Rule 408." The judge also would not permit experts to rely on the newspaper articles or on correspondence about the licensing in reaching conclusions about damages; otherwise the rules on expert testimony would eviscerate Rules 408 and 403. 1994 WL 139423 at *6.

the plaintiff after the dispute arose. Suppose A fires B. After B files a complaint with the EEOC, A and B's attorney exchange letters and phone conversations in which A offers B a different job. A variety of possible scenarios are discussed in the Michaels article cited above:

> If an offer does not require Ms. Reliable to release her legal claim against the employer, then it seeks no compromise within the meaning of Rule 408, and there is no exclusion. In other words, offers not requiring a release are not excluded by Rule 408. See Rathemacher v. International Business Mach. Corp., No. Civ. 88-3463 (AET), 1992 WL 41719, (D.N.J. Feb. 28, 1992).
>
> Such offers are not excluded even if made during compromise negotiations. See Thomas v. Resort Health Facility, 539 F. Supp. 630 (E.D.N.Y. 1982). Presenting Ms. Reliable with an offer that does not require a release would be easy. But the company wants to have it both ways: It wants to create evidence of the reinstatement offer to cut off backpay damages, but not have to pay additional salary should Ms. Reliable accept the offer.
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> During the settlement negotiation, opposing counsel makes an offer of reinstatement in unclear terms. You cannot tell whether your client is required to release her claim. You press for specificity. You tell opposing counsel that "If the offer does not require Ms. Reliable to release her claim, she will consider it." The ex-employer's Director of Human Resources merely says: "The job might already have been offered to someone else, but I can check."
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> By now, as a Rule 408 veteran, you see exactly what is happening. The employer plans to circumvent the Rule 408 exclusion by resorting to ambiguity. If the terms of the offer are ambiguous, Ms. Reliable will be uncertain as to whether acceptance requires her to waive her legal claim. The former employer wants to make the terms of the offer vague, but just clear enough to convince a judge that Ms. Reliable was not being asked to release her claim, so that the offer will not be excluded under Rule 408.
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> Fortunately, you have just read a case holding that offers presented during compromise negotiations are inadmissible, unless the offering party can prove

> that the offer did not require a release of claims. See Pierce v. F.R. Tripler & Co., 955 F.2d 820 (2nd Cir. 1992). The burden of clarifying ambiguity should fall on your adversary. You inform opposing counsel of the Pierce case.
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> Your opponent is not easily deterred, however. Later in the negotiations, she says "We are making a reinstatement offer without prejudice." This time, opposing counsel has skillfully used the language of Rule 408, creating admissible evidence that could limit the damages awarded to your client. Because the offer was made "without prejudice," its acceptance would not have required Ms. Reliable to waive her claim against the employer. Falling outside the purview of Rule 408, the offer is admissible.

19 Litigation at 38.

d. When is a letter a business discussion? Suppose a dispute arises between two corporations and before any action is filed there is an exchange of letters in which A claims trademark protection and B responds that were the plaintiff to sue the case would be in litigation long enough for B to obtain all the benefits it needed from the disputed mark. The Tenth Circuit found that the correspondence remained mere "business communications" because the "discussions had not crystallized to the point of threatened litigation, a clear cut-off point." Big O Tire Dealers, Inc. v. Goodyear Tire and Rubber Co., 561 F.2d 1365, 1373 (10th Cir. 1977).

e. When is a statement an offer as compared to a bill? In Winchester Packaging, Inc. v. Mobil Chemical Co., 14 F.3d 316 (7th Cir. 1994), Mobil had entered into a contract with a subcontractor. The contract provided that in the event of early termination Mobil would reimburse the contractor for contractual commitments made for the purpose of performing the services

called for by the contract, to the extent that termination made them no longer necessary. The contract also provided for a $250,000 termination fee. Mobil terminated the contract after five months. The subcontractor had taken out almost $800,000 in bank loans to buy equipment needed to perform the contract. Mobil claimed that the "contractual commitment" language in the contract applied to one particular contract. After termination and before the lawsuit was instituted, the subcontractor had written to Mobil saying "I would prefer to get this resolved without getting the lawyers involved." Mobil replied that it had been waiting for a settlement statement which the court interpreted at meaning a "bill." The subcontractor responded stating "I hope that we will be able to come up with a settlement that the attorneys can approve." The memo included a proposed "settlement" that listed points on which agreement was needed. The total amount claimed was only $300,000, and one of the items was the $250,000 agreed upon termination fee. When the subcontractor sued Mobil, it claimed the outstanding bank loans as part of its damages. The trial judge excluded the correspondence between the parties under Rule 408 and the jury awarded the plaintiff more than half a million dollars. The appellate court affirmed, although it stated in its opinion that "the question is so close that had the judge admitted it we would uphold that opinion as readily." Id. at 319.

The court explained:

> [A] bill that itemizes what the sender thinks the recipient owes him and demands -- even under threat of legal action -- payment is not an offer in settlement or a document in settlement negotiations and hence is not excludable by force of Rule 408. [citations omitted] Dunning a deadbeat by threatening to sue is not the same thing as making an offer or demand in the context of a settlement negotiation. . . The settlement of legal disputes out of court would be discouraged if settlement offers and other documents in settlement negotiations were admissible in evidence. [citation omitted] For although parties typically are willing to settle for less than they would demand at trial, in order to avoid the expenses and uncertainty of a full-blown litigation, this strategy might be difficult to make credible to a jury, which might treat settlement offers as the party's highest true estimate of its damage. . .
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> It is far from clear, however, that any of [the] letters . . . contain a settlement offer in the sense of an offer lower than the offeror reasonably hoped to obtain at trial if he were prepared to shoulder the risk and expense of a trial. Were it not for the reference to lawyers, the letters, especially the one that specified an amount claimed to be owed to Winchester by Mobile, would be little if anything more than bills; and as we said earlier a bill is not a settlement offer, and it does not become one merely because the billing party threatens suit if the bill isn't paid.
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> Although a reference to lawyers is not decisive on the issue of characterization, we know that in this case the reference was not merely a sign of impatience or the making explicit of what is after all implicit in every bill for a substantial amount of money. Winchester had already engaged lawyers, and from this . . . we can infer that [Winchester's principal] envisaged a substantial likelihood of legal action when he sent the first letter from which we quoted. It is speculative but not implausible that. . .he was groping for a sum to charge Mobil that would be low enough to induce Mobil to pay rather than fight; so viewed, the letters were indeed settlement offers and not merely computations of the bill owed by Mobil.

Id. at 319-20.

f. Possible solutions. These cases indicate that whether "an actual dispute" exists is a fact-sensitive

determination. As presently worded, Rule 408 does not contain a "bright-line" test that determines when a claim is in dispute. See Kleen Laundry & Dry Cleaning Services, Inc. v. Total Waste Management Corp., 817 F.Supp. 225 (D.N.H. 1993). The involvement of lawyers often seems to make a difference.

One could possibly reword Rule 408 to make it operate more like Rule 407 -- having the event that gives rise to the claim for relief also trigger application of the rule. The rule would then make inadmissible any evidence of statements or conduct between the parties about the event offered to prove liability for or invalidity of the claim or its amount other than an unconditional offer. In terms of timing, such a solution would be easy to apply in employment discrimination and tort cases and perhaps even in patent infringement cases. Determining precisely when the claim arose might be more difficult with regard to commercial transactions, although presumably one could look to decisions involving statutes of limitation.

Such a change would presumptively bar evidence of all communications between the parties, relevant to liability or amount, after a legal claim is created except unconditional offers and subject to the exceptions now stated in the last sentence. Do we want to extend the scope of Rule 408 protection this far? Would such an amendment result in increased efforts to avoid the Rule 408 bar by offering the evidence "for another

purpose" as provided in the last sentence of Rule 408?[4] Would the end result be more manipulation by attorneys and even more litigation about the meaning of Rule 408?

2. Evidence offered by the offeror. There is some disagreement as to whether Rule 408 should bar evidence of an offer when it is the offeror who is seeking to introduce the evidence. In their treatise Professors Wright and Graham state: "Where the person who makes the offer wants to introduce evidence of his own offer, there is no policy reason to exclude the evidence." 23 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE §5303. They believe that the deterrence rationale of the rule is not implicated when a party to the settlement negotiations is offering the evidence. Furthermore, to the extent that Rule 408 can be analogized to a quasi-privilege, offering the statement can be viewed as a waiver. Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1075 (5th Cir. 1986) ("In light of its purpose of promoting settlement, Rule 408 requires exclusion only when evidence of a settlement is offered against a party to the settlement.") (Thornberry, J. dissenting)

In 1985 the Eighth Circuit found that Rule 408 does not apply to admissions of compromises against the offeree. "The rule is concerned with excluding proof of compromise to show liability

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[4] The last sentence of the rule provides:
This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

of the offeror." Crues v. KFC Corp., 768 F.2d 230, 233 (8th Cir. 1985). Now, however, some courts have seemingly concluded that an easier rule to apply is to bar the evidence of the compromise regardless of which party is offering the evidence. See Pierce v. F.R. Tripler and Co., 955 F.2d 820, 827-28 (2d Cir. 1992) ("admission into evidence of settlement offers, even by the offerer, could inhibit settlement discussions and interfere with the effective administration of justice"; could lead to motions to disqualify counsel who would become witnesses at trial).

If the Committee concludes that Rule 408 should not apply when the offerer seeks to introduce evidence of a settlement, then the rule should say so specifically.

3. Agreements with third parties. Rule 408 speaks of not admitting evidence of offers to compromise a claim "to prove liability for or invalidity of the claim." (emphasis added) The federal courts have, however, construed the rule to exclude evidence of third party and prior settlements offered against the settling party. See Annot. Evidence Involving Compromise or Offer of Compromise as Inadmissible Under Rule 408 of Federal Rules of Evidence, 72 A.L.R. Fed. 592, 618-622 (1985). Whether the rule should also apply when the evidence is offered against a party who was not a participant in the settlement is not clear. An appendix to American Society of Composers v. Showtime, 912 F.2d 563, 580-81 (2d Cir. 1990), contains a lengthy discussion by the magistrate judge. After affirming that Rule 408's rationale is the encouragement of settlements, the magistrate upheld the

admission of a settlement offer the plaintiff had received from a non-party to the litigation. The court explained: "The implication of this policy for our case is that settlement offers or agreements are not automatically inadmissible -- even as to liability or the amount of damages -- if they are offered against a party who was not a participant in the settlement discussions or agreement." The determination is governed by Rule 403.

The chief problem with third party settlements, however, is determining whether evidence of a particular agreement will be excluded under the general rule or admitted under its exceptions. Particularly in actions sounding in tort, courts at times admit evidence of plaintiff's settlements with other tortfeasors because they fear that otherwise the jury will compensate the parties unfairly. Evidence of related agreements with third parties are admitted as providing needed background, as relevant to bias, or as relevant to impeachment.[5] In non-tort actions as

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[5] See, e.g., Belton v. Fibreboard Corp., 724 F.2d 500, 505 (5th Cir. 1984) (plaintiffs had settled with all other defendants; judge advised jury of fact of settlement to reduce jury confusion, but then additionally advised it of amount of settlement after they arrived at substantially lower amount than reached in settlements; held not error to advise jury of settlement to dispel confusion, but evidence of amount did not fall into any Rule 408 exception and violated Rule 408). Compare John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 634-35 (3d Cir. 1977) (court permitted defendant to introduce terms of earlier settlement with one of named defendants for $10 and permission to use the settling defendant's employee as witness; relevant to bias of employee-witness). But see Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1069-70 (5th Cir. 1986) (error for judge to inform jury the nominal amount of settlement between plaintiff and co-defendants as this suggested that remaining defendants were truly responsible); McInnis v. A. M. F., Inc., 765 F.2d 240 (1st Cir. 1985) (reversible error to have allowed evidence of settlement agreement between a litigant and a third

well, courts have admitted evidence of prior settlements by one of the parties.[6]

The Uniform Rules revised the end of the first sentence of Rule 408 to clarify its applicability to third party settlements and prior settlements by providing:

> is not admissible to prove liability for, invalidity of, or any amount of the claim or any other claim.

A number of states have adopted this formulation. See Joseph & Saltzburg, Evidence in America §18.2. In addition, New Hampshire has a special rule for tort cases that seeks to ensure proper compensation for parties without revealing the settlement agreement to the jury. Such a rule reduces the pressure to find exceptions to Rule 408 pursuant to the last sentence. The rule provides that any offers or acceptances of settlement

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party); Reichenbach v. Smith, 528 F.2d 1072 (5th Cir. 1976)(affirming trial judge's refusal to inform jury of plaintiff's settlement with other defendants).

[6] See, e.g., Ensing v. Vulcraft Sales Corp., 830 F. Supp. 1017 (W.D. Minn. 1993)(plaintiff claimed that he was fired because of a handicap resulting from a work-related injury; court permitted defendant to introduce settlement agreement between plaintiff and a third party relating to this prior injury which provides monthly compensation to plaintiff for the rest of his life; needed background); Haynes v. Manning, 717 F.Supp. 730, 733 (D.Kan. 1989), rev'd on other grounds, 917 F.2d 455 (10th Cir. 1990) (in action under federal odometer statute no error in admitting evidence that plaintiff had settled with three of the prior owners; needed background to save jurors from confusion); County of Hennepin v. AFG Industries, Inc., 726 F.2d 149, 152-53 (8th Cir. 1984) (plaintiff's settlement with insurer of builder for storm damages admitted to impeach plaintiff in suit against manufacturer of allegedly defective glass). See also Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) (en banc) (in action claiming racially motivated harassment in public facility, prior consent decree and defendant's failure to implement all of its provisions were properly admitted to show motive and intent).

> with one or more persons liable in tort for the same injury to person or property or for the same wrongful death shall not be introduced in evidence in a subsequent trial of an action against any other tortfeasor to recover damages for the injury or wrongful death. Upon the return of a verdict, the court shall inquire of the attorneys for the parties the amount of the consideration paid for any settlement, release or covenant not to sue, and shall reduce the verdict by that amount.

Adding a provision to Rule 408 about how tort settlements should be handled would presumably pass muster under Hanna v. Plummer, 380 U.S. 460 (1965) as a procedural rule, and would therefore eliminate the need for courts to decide whether a state's treatment of tort settlements must be characterized as substantive for purposes of Erie.[7] First, of course, we must decide whether we think a uniform rule of exclusion is desirable with regard to tort settlements, and whether third-party tort settlements should be handled differently than other third-party settlements.

4. What are compromise negotiations? Does the rule apply only to statements that relate to issues of validity or amount, or does the rule apply to any statements made in the course of negotiations in which the parties disagree about validity or amount? Suppose for instance that an action has been commenced and a procedural dispute arises between the parties, such as a privilege claim at a deposition. If one side offers to settle

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[7] See, e.g., Carota v. Johns Manville Corp., 893 F.2d 448, 450 (1st Cir. 1990) (court did not err in admitting evidence of plaintiff's settlement with other parties because Massachusetts has a substantive policy to have jurors hear out of court settlement evidence when determining damage awards, and state substantive law applies in a diversity action).

this dispute in a particular way may the opponent thereafter disclose the terms of the proposal?

This issue arises because of the ambiguity of the second sentence of Rule 408 which provides: "Evidence of conduct or statements made in compromise negotiations is likewise not admissible." Does the "likewise" mean simply "also inadmissible" or does it connote as well that the evidence is inadmissible if used to prove liability for, invalidity of, or any amount of the claim. Although the drafting may be confusing to the reader, "rule 408 does not preclude admission of offers of compromise, or statements made in negotiations, when admitting the evidence would serve any purpose other than directly proving or disproving liability for or the amount of the claim." Wayne D. Brazil, Protecting the Confidentiality of Settlement Negotiations, 39 Hast.L.J. 955, 966 (1988). If the rule is redrafted in any respect, the language of the second sentence should be clarified.

5. When are settlement agreements discoverable? A recent commentary on this topic states that "the protection from discovery afforded such information is minimal." The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond, 12 Rev. of Litigation 665 (1993). Wayne Brazil writing at a somewhat earlier time had concluded that "some courts are sympathetic with the need to preserve confidentiality even as against discovery, while many others have ruled that settlement communications are discoverable despite the policies that inform rule 408." Brazil, supra at 987.

There is general agreement that Rule 408 does not create a broad discovery privilege. Settlement communications may be discoverable pursuant to Fed.R.Civ.P. 26(b) "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." If the parties were denied all discovery they might not be aware of the existence of evidence that might be admissible pursuant to the last sentence of Rule 408. Courts differ, however, in whether discovery is automatic, or whether the party seeking discovery must make a particularized showing.

The different emphasis in the two approaches is reflected in the following excerpts. In Bennet v. La Pere, 112 F.R.D. 136, 138 (D.R.I. 1986), the court granted discovery:

> If there is some legitimate relevance to the requested information and if no cognizable privilege attaches, it ought to be discoverable -- at least in the absence of some countervailing consideration, e.g., that production would be disproportionately onerous or burdensome, that unfair prejudice would result, or the like.

In Bottaro v. Hatton Associates, 96 F.R.D. 158, 160 (E.D.N.Y. 1982), the court voiced considerably more sympathy for furthering the policy underlying Rule 408 and denied discovery:

> The question in this case, however, is whether an inquisitor should get discovery into the terms of the agreement itself based solely on the hope that it will somehow lead to admissible evidence on the question of damages. Given the strong public policy of favoring settlements . . . we think the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by [discovery].

The Committee could handle the discovery issue in a number of different ways: 1. if Rule 409 were recast as a rule of privilege (see infra) it would bar discoverability as well as

admissibility; 2. if Rule 408 is redrafted, the Committee might wish to add some comments to the Committee Note about discovery even if the rule is not amended with regard in this respect, although the effect of such a note is questionable; 3. we could request the Civil Rules Committee to add a cross-reference to Rule 408 in Rule 26(c), dealing with protective orders, or to add a comment to its note.

6. Other suggestions. Recasting Rule 408 as a rule of qualified privilege might affect decisions somewhat. Instead of merely demonstrating that the evidence was relevant for another purpose as the last sentence now provides, the proponent would presumably have to demonstrate as well that the probative value of the evidence outweighed the dangers that might stem from overriding the privilege. Such a balancing test, which would look to the policies underlying the rule, would differ from the balancing that presently occurs when the court looks to Rule 403 after concluding that Rule 408 does not compel exclusion. Rule 403 places the burden on the opponent, whereas the burden would be on the proponent of evidence subject to a qualified privilege. Furthermore, the prejudice specified in Rule 403 should probably be construed as meaning prejudice to the party against whom the evidence would be admitted, rather than to the policy underlying Rule 408.

Rule 408 is not drafted in a very user-friendly way. It might be more comprehensible (and therefore presumably less of a trap) if it were completely redrafted even if we do not want to

change its meaning. At our previous meetings, we decided not to undertake such efforts with regard to other ambiguous rules. Although there is undoubtedly more litigation involving Rule 408, this may well be due to the nature of the evidence that the rule keeps out than to problems with the language of the rule that would disappear were the rule rewritten. Furthermore, I fear that any redrafting attempts might lead to new unanticipated problems.

Nevertheless, as the discussion above indicates, it is not clear whether the rule should apply to evidence offered by the offeror or to evidence offered against a non-settling party. We need to discuss whether we wish to adopt a more objective bright-line test for when the rule begins to operate.

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TO: Members of the Advisory Committee on the Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

DATE: May 3, 1994

RE: Article VII

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Since the Committee has not as yet discussed Article VII, I thought it might be useful to sketch broadly a number of issues that we might wish to consider. First, however, I will deal very briefly with the proposed amendment that was stayed when this Committee was appointed, and the Supreme Court's opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993).

1. Background.

a. Proposed Amendments. In 1991, the Advisory Committee on Civil Rules prepared an amendment to Rule 702:

> If the court finds [1] (1) that reliable [2] scientific, technical, or other specialized ~~knowledge~~ information will substantially [3] assist the trier of fact to understand the evidence or determine a fact in issue; and (2) that a witness is qualified [4] as an expert by knowledge, skill, experience, training, or education to provide such assistance, [5] it may permit [6] the witness to testify thereto in the form of an opinion or otherwise. Except with leave of court for good cause shown, the witness shall not testify on direct examination in any civil action to any opinion or inference or reason or basis therefore, that has not been seasonably disclosed as required under the proposed

amendments to Rules 26(a)(2) and 26(e)(1) of the Federal Rules of Civil Procedure. [7].

Advisory Committee on Civil Rules of the Judicial Conference of the United States, Proposed Amendments to Federal Rules of Civil Procedure and the Federal Rules of Evidence 702-1 (June 1991).

The bracketed numbers represent "points of comment" made by Judge Weinstein in an article disagreeing with the proposed amendment.[1] His objections highlight some modifications that we

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[1] "[1] The use of the word "finds" would require an explicit finding under Rule 104(a). The judge would have to justify admission on the record. This would slow trials and provide an additional basis for appeals and motion practice.

[2] The word "reliable" emphasizes that the court must decide initially on reliability, greatly expanding the judicial role of today where the primary issue is whether a reasonable jury could find the testimony helpful and reliable.

[3] The words "substantially assist" would turn around Rules 401 to 403 of the Rules which require only relevancy - i.e., assistance to the trier. Presently admission is assumed unless possible prejudice overwhelms possible probative force under Rule 403. Under the proposal, more than probative force under Rules 401 and 402 must be shown by the proponent before possible prejudice is weighed.

[4] The word "is" emphasizes the court's obligation to become more deeply involved in the decision on qualification.

[5] The words "such assistance" means that the judge must find that the witness's expertise is directed to providing the substantial assistance in the expert's particular field of expertise. The testimony of a general medical practitioner would arguably not suffice if a medical specialist usually dealt with the matter in question.

[6] The use of the words "may" together with "permit" means that the court has discretion to admit or not even if the other prerequisites of the proposed rule were met. Under the present Rule the court must or should admit if the Rule's conditions are satisfied.

[7] This new sentence would require disclosure of the expert's background and proposed testimony in long detail *before* he can testify. This requirement is, as I have suggested, a sound aid to effective functioning of the adversarial system, but it is presently standard practice without the need for a change in Rule 702." Jack B. Weinstein, Rule 702 of the Federal Rules of Evidence

might still wish to consider; the discussion of Daubert below indicates, however, that the Court found that some of the changes sought by the proposed amendment are consistent with the present text of Rule 702 as interpreted by the Court.

The Standing Committee on Rules of Practice and Procedure redrafted the rule to provide:

> ~~If~~ Testimony providing scientific, technical, or other specialized ~~knowledge~~ information, in the form of an opinion or otherwise, may be permitted only if (1) the information is reasonably reliable [1] and will substantially [2] assist the trier of fact to understand the evidence or determine a fact in issue, and (2) the ~~a~~ witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony. [3] ~~may testify thereto in the form of an opinion or otherwise.~~ Except with leave of court for good cause shown, the witness shall not testify on direct examination in any civil action to any opinion or inference or reason or basis therefor, that has not been seasonably disclosed as required by Rules 26(a)(2) and 26(e)(1) of the Federal Rules of Civil Procedure. [4].[2]

Committee on Rules of Practice and Procedure on the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence 16-17 (Aug. 1991), 137 F.R.D. 53, 156 (1991). Subsequently the Civil Rules Committee in May 1992 produced yet another version of Rule 702, which provided that expert evidence "may be received if (1) it is reasonably reliable

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is Sound: It Should Not be Amended, 138 F.R.D. 631 (1991).

[2] In the article noted in note 1, Judge Weinstein found that changes [1] and [2] make the rule more restrictive than it is currently, and that the effect of change [3] is "somewhat unclear." Weinstein, supra at 639. He also objected to cross-references to another set of rules. Id. at 637. See also Daniel J. Capra, Recent Developments in Federal Rules, NYLJ, Jan 10, 1992, at 3 (criticizing proposed amendment as imposing too rigorous a reliability requirement).

and will, if credited, substantially assist the trier of fact."[3]

b. The Daubert Case. In early 1993, this Committee was appointed, and in June, the Supreme Court decided the Daubert case. In Daubert, the Court expressed confidence in the jury's ability to handle complex scientific testimony, while it simultaneously acknowledged the Court's power to exclude unreliable scientific testimony pursuant to Rule 104(a).[4] The Court rejected the Frye "general acceptance" test as an "austere" standard incompatible with the liberal admissibility policy of the federal rules.[5] It directed the trial court making a preliminary determination about the admissibility of proffered scientific expert proof to focus on the methodology underlying the expert's opinion, and not to concern itself with the expert's conclusions.[6] It cautioned that the expert opinion is not relevant unless it "fits" the facts of the case.[7] The Court also mentioned, without discussion, that Rules 703 and 403 bear as well on the admissibility of expert testimony.[8]The Court stressed:

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[3] See Kenneth R. Kreiling, Expert and Opinion Evidence in Vermont: Developments, Profiles and Emerging Concerns for Reliability of Scientific Evidence, 17 Vt. L. Rev. 109 (1992).

[4] "[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 113 S.Ct. at 2795.

[5] Id. at 2794.

[6] 113 S.Ct. at 2797.

[7] 113 S.Ct. at 2795-96.

[8] 113 S.Ct. at 2797-98.

> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity -- and thus the evidentiary relevance and reliability -- of the principles that underlie a proposed submission.[9]

In explaining what is meant by methodology, the Court pointed to a number of non-exclusive factors that a Court might consider. Chief among them seems to be (1) whether the theory or technique can be and has been tested. The Court also mentioned: (1) whether theory or technique has been subjected to peer review and publication; (2) the known or potential rate of error or the existence of standards; and (3) whether the theory or technique used has been generally accepted.[10]

The Court stated that its discussion was "limited to the scientific context because that is the nature of the expertise offered here." 113 S. Ct. at 2795 n.8. Furthermore, the Court indicated that its reasoning would apply whenever scientific evidence was offered, and not just novel scientific evidence. Daubert was of course a civil case.

The discussion in Daubert suggests that amending Rule 702 to stress "reliability" and "substantial assistance" would be redundant. At least with regard to scientific evidence in a civil case, the Court's analysis of crucial factors that bear on scientific validity seeks to ensure that the jury will not be permitted to hear an opinion unless it is relevant and reliable. Although the Court is construing the present "assist the trier of

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[9] 113 S.Ct. at 2797.

[10] 113 S.Ct. at 2796-97.

fact" standard in Rule 702, testimony that meets the Court's standard would sure surely "substantially" assist the jury.

2. Basic Article VII Issues.

a. Do the Rules Achieve Appropriate Objectives? The rules on expert testimony express a preference for oral testimony that is congruent with our system's reliance on this type of evidence at trial. It is the contents of experts' oral opinions and their demeanor that jurors evaluate. The rule against hearsay will often prevent the data on which the expert is basing his or her opinion from being admitted into evidence. Does this make sense in complex cases? Does the preference for the oral opinion cause the underlying hard data to get swamped? Does the very structure of the rules encourage jurors to make decisions on the basis of the expert's personality, as critics of expert testimony often charge? Does the exclusion of the data make sense in light of Daubert's requiring the expert's theory to be scientifically valid?

Minnesota has added a subdivision (b) to its Rule 703 which provides:

> (b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying data when inquired into on cross-examination.

Minnesota's rule is limited to civil cases. Kentucky's Rule 703(b), is somewhat different, contains a final sentence that I

question and applies in both civil and criminal cases. It states:

> If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

A rule such as that found in Minnesota and Kentucky, also avoids some of the vagaries of the hearsay rule. Joseph Sanders recently wrote an article about interviewing jurors who found for plaintiffs in a Bendectin case. When asked why the jury ignored published articles that stated that animal studies did not support plaintiff's position, a juror responded that the articles were not in the jury room (see Rule 803(18), and that it was hard to remember what had been read in the court room. See Joseph Sanders, Jury Deliberation in a Complex Case: Havner v. Merrell Dow Pharmaceuticals, 16 Justice System J. 55. On the other hand, hospital records of the plaintiff which stated that the mother had taken Bendectin were admitted as business records and went into the jury room.

b. Do the Rules Proceed in a Logical Sequence? As the Supreme Court acknowledges in Daubert, Rule 702 is a rule that deals with the admissibility of expert testimony. But what is the function of Rule 703? The Court's comment in Daubert -- that expert opinions are to be admitted only if the test in Rule 703's second sentence is satisfied -- acknowledges that Rule 703 also operates as a rule of admissibility. Other aspects of Rule

703, however, have nothing to do with admissibility.[11] Would it make more sense to put all of the admissibility issues into one rule? Should the function of each of the rules be made clearer.

c. Does a Trans-substantive Approach to Expert Testimony Make Sense? As written, the Article VII rules apply evenhandedly in criminal and civil cases. There are, however, considerable differences between criminal and civil litigation that have an impact on expert testimony. When expert testimony is crucial in a civil case, the plaintiff will have an expert witness; otherwise the plaintiff will be out of court. A criminal defendant, however, often has no experts on his behalf because judges are loathe to pay for expert witnesses. See Paul C. Giannelli, "Junk Science": The Criminal Cases, 84 J. Crim L. & Criminology 105, 125 (1993). Discovery is much more limited in criminal cases since depositions of experts are not available. The expert testimony offered against the defendant is often developed by the prosecution. Do these differences mean that defendants need additional protection when scientific evidence, or other expert evidence is offered against them? Furthermore, in criminal cases the fact that Rule 703 allows experts to rely on inadmissible hearsay poses issues that raise confrontation clause concerns. See, e.g., Paul C. Giannelli, Expert Testimony

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[11] One function was to expand the common law bases for an expert's opinion by authorizing experts to base their opinions on reliable inadmissible data. Controversy exists over whether Rule 703 authorizes experts to testify on direct to the hearsay basis for their conclusions or whether the basis of an expert's opinion may only be brought out on the cross-examiner's option pursuant to Rule 705.

and the Confrontation Clause, 22 Cap.U L. Rev. 45 (1993). The Supreme Court has, however, been weakening confrontation clause protection, and accordingly defendant may need more evidentiary safeguards.

d. Unanswered Daubert Questions. Daubert purports to speak only of scientific and technological experts. Does Daubert extend to the social sciences? Should Daubert's endorsement of empirical testing and sound methodological underpinnings be expanded to expert testimony in general? A recent report of the American College of Trial Lawyers recommends "that there be a single conceptual framework for evaluating the admissibility of all types of expert evidence." Standards and Procedures for Determining the Admissibility of Expert Evidence After Daubert 11.

e. Procedural Issues. As I have argued in an article about to be published in the Minnesota Law Review, Daubert is not self-executing. The courts will have to make numerous procedural decisions about how Daubert should be applied, such as who has the burden of raising a Daubert issue, whether the burden should be the same in criminal and civil cases, the inter-relationship between the new discovery rules and the Daubert test, the procedure for in limine hearings conducted to determine whether expert testimony will be admitted? It is true of course that we are a Committee on Evidence and not on rules of procedure. But the irony of Daubert is that the Court's decision means that many of the most important decisions regarding expert testimony will

now be relegated to the pre-trial stage. Should this committee at least work with the other rules committees in order to arrive at solutions that are consistent with evidentiary values and goals?

3. The Rules Themselves.

a. Rule 702. Do we like the Daubert test? Should this rule be redrafted to state clearly that an expert must be qualified, must testify to a theory that is supported by a valid methodology, and must rely on reliable data. In Daubert, the Supreme Court stated that the "assist the trier of fact" language in Rule 702 requires the expert's testimony to be relevant to an issue in the case. The Court termed this relationship as one of "fit." Perhaps this concept should be stated more explicitly in the rule as well.

b. Rule 703. There is a good deal of disagreement about the meaning of Rule 703 which needs to be discussed.

c. Rule 706. The Court mentioned Rule 706 in the course of its opinion as another rule to be remembered when dealing with expert testimony. If it is utilized more frequently in the future, this use is likely to occur more frequently at the pre-trial stage rather than at trial. The rule probably needs to be rethought if it is going to be used in such a manner. For instance, in a complex multi-party litigation, where the court appointed expert is assisting the Court in understanding methodological issues, it may be more important for the parties to have access to the Rule 706 expert's reports rather than being

afforded the opportunity to take the expert's deposition. If there are numerous parties, such a deposition may prove costly and time consuming, and convince reputable experts that they want no part of the judicial process. The court appointed expert procedure needs to be integrated with the procedure for special masters provided for in the civil rules. In complex cases, special masters and court appointed experts may need to work together. One of the problems in using court appointed experts is that the court may not know enough to pose the appropriate specific questions to the expert on which it needs help. A special master, usually a lawyer with special expertise, or a law professor, could assist the court in framing questions.

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THE EFFECT OF THE CATCHALLS ON CRIMINAL DEFENDANTS: LITTLE RED RIDING HOOD MEETS THE HEARSAY WOLF AND IS DEVOURED

MYRNA S. RAEDER

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THE EFFECT OF THE CATCHALLS ON CRIMINAL DEFENDANTS: LITTLE RED RIDING HOOD MEETS THE HEARSAY WOLF AND IS DEVOURED

*Myrna S. Raeder**

Asking whether "evidence law matters" ultimately depends upon a variety of considerations, not the least of which is whether evidentiary rules should be written without regard to any disparate effect they may have on the parties. While some rules immediately come to mind as reflecting policy choices which favor one party or another,[1] seemingly neutral rules can also produce winners and losers. This Essay focuses on the unintended effect that the catchall hearsay exceptions, Federal Rules of Evidence 803(24) and 804(b)(5), have had on criminal defendants. The thesis of this Essay is that ordinary run-of-the-mill hearsay, even if reliable,[2] should not be routinely admitted against criminal defendants pursuant to the catchalls. Several revisions to the catchalls are proposed which would remedy their overuse by prosecutors.

I. THE PATH TO GRANDMOTHER'S HOUSE

A. Finding the Path

The catchalls were quite controversial when originally enacted but reflected an underlying philosophy about the broad admissibility of hearsay which existed from the inception of the rulemaking process. Indeed, the original drafters of the Federal Rules would have permitted all hear-

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1. *See, e.g.*, FED. R. EVID. 404(a) (allowing accused in criminal trial to offer evidence of his or her character but only allowing prosecution to rebut such evidence); FED. R. EVID. 412 (preventing admission of reputation or opinion evidence of past sexual behavior of rape victim); FED. R. EVID. 609(a)(1) (restricting use of evidence of prior conviction to attack credibility of accused unless probative value outweighs prejudicial impact).

2. Throughout this Essay the terms "reliable" and "trustworthy" are used interchangeably. Both refer to the inherent quality of the hearsay, which is determined from the "totality of circumstances that surround the making of the statement and render the declarant particularly worthy of belief," without reference to any outside corroboration by other evidence at trial. Idaho v. Wright, 110 S Ct. 3139, 3149 (1990).

say "if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available,"[3] or if there were "strong assurances of accuracy and the declarant is unavailable as a witness."[4] Hearsay exceptions were listed solely by way of illustration and not limitation. Practicing attorneys viewed this discretionary approach to hearsay as too radical, giving judges almost unlimited power to determine hearsay issues.[5]

While this hearsay methodology was quickly rejected by the drafters, the desire for flexibility and the growth of hearsay law resulted in the drafting of proposed hearsay exceptions in Rules 803(24) and 804(b)(6), whose identical language permitted judges to admit statements "not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."[6] Judge Friendly described proposed Rule 803(24) as "the Chancellor's foot with a vengeance."[7] Congress had great difficulty with this version of the residual clauses. The House of Representatives deleted these provisions from the Rules proposed by the Supreme Court because they injected too much uncertainty into evidence law.[8] The Senate bill included a narrower version, and the Conference Committee reached a compromise that was intended to restrict the scope of the exceptions and require notice for their use.

The debate in Congress concerning the catchalls pitted those who believed that the catchalls would engulf the hearsay rule, abandon the values underlying it, encourage forum shopping and result in unpredict-

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3. Proposed Fed. R. Evid. 8-03(a), 46 F.R.D. 345 (1969), *reprinted in* JAMES F. BAILEY, III & OSCAR M. TRELLES, II, 2 THE FEDERAL RULES OF EVIDENCE LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, Doc. 5, at 173 (1980).

4. Proposed Fed. R. Evid. 8-04(a), 46 F.R.D. 377 (1969), *reprinted in* 2 BAILEY & TRELLES, *supra* note 3, Doc. 5, at 205.

5. *See, e.g.*, Roger C. Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057, 1060 n.11 (1986).

6. Revised Draft of Proposed Rules of Evidence For the United States Courts and Magistrates, 51 F.R.D. 315, 422, 439 (1971), *reprinted in* 2 BAILEY & TRELLES, *supra* note 3, Doc. 6, at 108, 125. Proposed Rules 803(24) and 804(b)(6) provide: "Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." Revised Draft of Proposed Rules of Evidence For the United States Courts and Magistrates, 51 F.R.D. at 315, 422, 439.

7. *Proposed Rules of Evidence: Hearings Before the Subcomm. of Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 264 (1973) (statement of Henry J. Friendly, Chief Judge, United States Court of Appeals for the Second Circuit), *reprinted in* 3 BAILEY & TRELLES, *supra* note 3, Doc. 11, at 239, 264.

8. SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, PROPOSED CHANGES TO H.R. 5463, 93D CONG., 1ST SESS. 30, 32 (Comm. Print June 28, 1973), *reprinted in* 3 BAILEY & TRELLES, *supra* note 3, Doc. 12, at 174, 176.

able outcomes against those who viewed the catchalls as necessary to prevent judges from distorting the specific hearsay exceptions when faced with reliable statements that were not otherwise admissible. While Rule 102 required that the rules be construed to secure fairness and to promote the growth and development of evidence law, with the goal of ascertaining truth, Congress believed that an escape clause was necessary to provide for exceptional circumstances and was consistent with the power already exercised by federal judges at common law.

Little thought was given during the Congressional Hearings to the potential problems that such provisions would pose in criminal cases. Indeed, the prepared testimony of a representative of the Department of Justice, while favoring the catchalls, indicated that such flexibility was "probably much more important for civil litigation than for criminal cases."[9] The sole voice protesting the use of such exceptions against criminal defendants was that of Professor Paul Rothstein, who testified that the Rule should provide greater solicitude for the criminal accused's right to confrontation than the Constitution demanded; he urged that "extreme caution and reluctance be used" in admitting such hearsay against criminal defendants.[10] Professor Rothstein also suggested prohibiting the catchalls from being used against the accused in a criminal case.[11]

The legislative history clearly reflects that the residual clauses were not designed as a back door through which run-of-the-mill hearsay would enter trials. The Advisory Committee note states that the exceptions in Rules 803(24) and 804(b)(5) "do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations."[12] The Senate Committee Report referenced "certain exceptional circumstances" justifying admission under the catchalls, such as those found in *Dallas County v. Commercial Union Assurance Co.*,[13] a civil case which admitted a copy of a local newspaper

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9. *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 105, 114 (1974) [hereinafter *Senate Hearings*] (statement of W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs), *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 14, at 114.

10. *Senate Hearings*, *supra* note 9, at 273 (testimony of Paul F. Rothstein, Professor of Law, Georgetown University Law Center), *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 14, at 123. Professor Rothstein's prepared statement included two of his law review articles that discussed this issue. *See id.* at 234-35, 266-67.

11. *Id.* at 273.

12. FED. R. EVID 803(24) advisory committee's note, *reprinted in* 2 BAILEY & TRELLES, *supra* note 3, Doc. 6, at 123.

13. 286 F.2d 388 (5th Cir. 1961).

published over fifty years earlier,[14] and the only case which had been cited in the Advisory Committee's note.[15] The Senate Committee Report indicated that it had narrowed the scope of the Supreme Court version of the residual clauses to avoid emasculating the hearsay rule and clearly stated its views about their limited applicability: "It is intended that the residual hearsay exceptions will be used very rarely and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions . . . ."[16] The Conference Report did not repeat the rationale underlying the Rule, but noted that it was adopting the Senate amendment which was narrower than the provision rejected by the House, with the addition of a notice requirement.[17]

B. Straying from the Path

From their inception, the catchalls established the same criteria for admission of evidence against criminal defendants as for any other party. The only criminal case mentioned in the legislative history is *United States v. Barbati*,[18] which is cited in the Senate Report[19] without any discussion. *Barbati* was a decision by Judge Weinstein[20] concerning the identification of a defendant who passed a counterfeit bill to a barmaid. At trial the barmaid could not identify the defendant but testified that she had pointed him out to the police in the bar shortly after the offense. A police officer identified the defendant as the person who the barmaid pointed out. Two things should be noted about *Barbati*: (1) the hearsay at issue was separately codified in the Federal Rules as prior identification, an exception which was recognized in a number of states at the time

14. S. REP. NO. 1277, 93d Cong., 2d Sess. 19 (1974), *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 15, at 19.

15. FED. R. EVID. 803(24) advisory committee's note, *reprinted in* 2 BAILEY & TRELLES, *supra* note 3, Doc. 6, at 123.

16. S. REP. NO. 1277, *supra* note 14, at 20, *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 15, at 20.

17. H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 11 (1974), *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 16, at 11.

18. 284 F. Supp. 409 (E.D.N.Y. 1968).

19. S. REP. NO. 1277, *supra* note 14, at 19, *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 15, at 19.

20 Judge Weinstein advocated a discretionary approach to hearsay admission balancing probative force against prejudice. *See* Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338 (1961).

Barbati was decided;[21] and (2) the declarant testified at trial.[22]

Interestingly, a computerized search for federal cases citing *Barbati* and *Dallas County* prior to the enactment of the Federal Rules of Evidence revealed only one criminal case of the forty-eight cases located which referred to *Dallas County* in dicta as supporting the admission of hearsay in criminal proceedings.[23] Perusing these cases for citations to other decisions revealed only five criminal cases arguably on point. One concerned prior identifications made by a witness at a grand jury and at a former trial which were inconsistent with his trial testimony.[24] Another reversed the district court's admission of prior inconsistent statements as substantive evidence.[25] The third did not rely on any expansive hearsay theory, but eloquently stated the rationale for enacting the catchalls in dicta:

> We are loath to reduce the corpus of hearsay rules to a straitjacketing, hypertechnical body of semantical slogans to be mechanically invoked regardless of the reliability of the proffered evidence. Instead, "we should indeed welcome," as Judge Learned Hand once wrote, "any efforts that help disentangle [sic] us from the archaisms that still impede our pursuit of truth."[26]

The fourth case was one in which the defense, rather than the prosecu-

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21. *See, e.g.*, CAL. EVID. CODE § 1238 (West 1966); HAWAII EVID. CODE § 802.1 (1985); MONTANA R. EVID. 801; OHIO EVID. RULE 801 (1980); Gilbert v. California, 388 U.S. 263, 272 n.3 (1967).

22. *Barbati*, 284 F. Supp. at 409.

23 La Porte v. United States, 300 F.2d 878, 881-82 (9th Cir. 1962). The court in *La Porte* admitted a Selective Service Form 153 under 28 U.S.C. § 1733 and as an official record. The supervisor who testified had no independent recollection of the case but described the office procedure concerning the form's creation. The only case citing *Barbati* prior to 1976 was Chubbs v. City of New York, 324 F. Supp. 1183 (E.D.N.Y. 1971), also a Weinstein decision. Chubbs, who had been convicted of first degree sodomy and burglary and second degree assault, brought a habeas corpus challenge to the testimony of a police officer who testified about the victim's identification of Chubbs. The court dismissed the habeas corpus petition, holding that it did not raise a constitutional issue. *Id.* at 1187, 1194.

24. United States v. De Sisto, 329 F.2d 929, 933 (2d Cir. 1964). In United States v. Nuccio, 373 F.2d 168, 172 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967), the Second Circuit refused to extend *De Sisto* to require the admission of inconsistent statements of a witness made at a trial of other defendants as substantive evidence.

25. United States v. Schwartz, 390 F.2d 1, 3-4 (3d Cir. 1968). The district court had relied on *De Sisto* in admitting the evidence. The appellate court did not decide whether it would follow *De Sisto* because it found that the statement lacked the guarantees of trustworthiness that had been found in the *De Sisto* case. *Schwartz*, 390 F.2d at 5-6.

26. United States v. Castellana, 349 F.2d 264, 276 (2d Cir. 1965) (quoting United States v. Allied Stevedoring Corp., 241 F.2d 925, 934 (2d Cir.), *cert. denied*, 353 U.S. 984 (1957)). The *Castellana* court found that the statement at issue, which was made in deposition testimony, either met the co-conspirators exception or was harmless error. *Id.* at 275-77.

tion, introduced evidence which would have met the criteria of the proposed former testimony exception.[27]

The final case was the only one that raised confrontation concerns. In *United States v. Kearney*[28] a statement was made by a dying officer to a detective approximately twelve hours after he was shot, and one hour after awakening from the anaesthetic administered in his first of two operations. The statement consisted of a description of his assailant and of what happened. The officer died during the second operation. The court stated that it need not decide if this was either an excited utterance, as labeled by the trial judge, or a dying declaration because it could not find error in the trial judge's decision that the evidence was "fundamentally reliable."[29] The court in *Kearney* considered the statement to be in the "penumbra" of both exceptions. In an extended footnote, the court discussed how the statement related to both exceptions and would have been admitted as such by some courts.[30] It is likely that the introduction of the statements would have been harmless error, if any error at all under traditional hearsay analysis.

As the preceding discussion shows, the drafters had no reason to believe that the catchalls would have any significance in criminal cases, let alone in cases in which the declarant did not testify. This premise is reinforced by examining then-existing Confrontation Clause[31] analysis in connection with the decision not to codify confrontation law in the evidence rules. In 1975 the explosion of Confrontation Clause cases in the Supreme Court was barely in its infancy. The Court had only hinted that the clause would permit the use of critical hearsay of nontestifying declarants who had not been subjected to cross-examination in circumstances other than those exemplified by such rarities as dying declarations.[32] For example *Douglas v. Alabama*[33] and *Pointer v. Texas*[34] could be interpreted as forbidding admission of any statement

27. United States v. Brown, 411 F.2d 1134, 1137 (10th Cir 1969) (holding that trial court's refusal to admit evidence was prejudicial error).

28. 420 F.2d 170, 174-75 (D.C. Cir. 1969).

29. *Id.* at 175.

30. *Id.* at 175 n.11. In relation to a different asserted error, the court indicated that as to the issue of the assailant's identity, "the possibility of mistaken identity is strongly negatived—if indeed it is not eliminated beyond reasonable doubt—by the scientific evidence." *Id.* at 174. There was also an eyewitness who testified and the statements were used as corroboration.

31. "In all criminal prosecutions the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ." U.S. CONST amend VI.

32. Mattox v. United States, 156 U.S. 237, 243-44 (1895).

33. 380 U.S. 415 (1965).

34. 380 U.S. 400 (1965).

that is not subject to cross-examination at trial.[35] The focus in *California v. Green*[36] was directed to out-of-court statements of the witness, some of which were given in a preliminary hearing. Only *Dutton v. Evans*[37] pertained to hearsay of a declarant who did not testify at trial. Yet the rationale of that plurality decision was so confusing that *Idaho v. Wright*[38] recently confirmed what commentators had long argued—that the case ultimately rested on harmless error.

Congress declined to import constitutional requirements into the evidence rules because to the extent the rules conflicted with the Constitution they would be invalid. This philosophy was specifically described as follows: "[T]he basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise."[39]

Given the state of confrontation law in 1975, however, few recognized the threat to criminal defendants implicit in an expansive interpretation of the catchalls. Confrontation was clearly an ongoing congressional concern in relation to other proposed rules, including Rules 804(b)(2)[40] and 804(b)(4),[41] yet it was only at the very moment before voting on the entire set of Rules that any outcry was made about the potential of the catchall enacted as Rule 804(b)(5) to adversely impact criminal defendants. When the Conference Report was presented to

35. In New Mexico v. Earnest, 477 U.S. 648, 649 (1986), four Justices noted that "to the extent that *Douglas v. Alabama* interpreted the Confrontation Clause as requiring an opportunity for cross-examination prior to the admission of a co-defendant's out-of-court statement, the case is no longer good law." *See also Pointer*, 380 U.S. at 403-05 (fundamental right of confrontation includes right of cross-examination).

36. 399 U.S. 149, 153 (1970).

37. 400 U.S. 74, 77 (1970).

38. 110 S. Ct. 3139, 3150-51 (1990).

39. *See* S. REP. NO. 1277, *supra* note 14, at 22 (commentary concerning statements against penal interest), *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 15, at 22.

40. *See* RULES OF EVIDENCE: HEARINGS BEFORE THE SPECIAL SUBCOMM. ON REFORM OF FEDERAL CRIMINAL LAWS OF THE COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 93d Cong., 1st Sess. 513, 541 (Mar. 15, 1973) (dialogue between Mr. Hungate and Mr. Cleary), *reprinted in* 3 BAILEY & TRELLES, *supra* note 3, Doc. 11, at 541. Ultimately this rule, which would have permitted statements of recent perception of unavailable declarants, was not adopted.

41. Proposed Fed. R. Evid. 8-04(b)(4), 46 F.R.D. 377 (1969), *reprinted in* 3 BAILEY & TRELLES, *supra* note 3, Doc. 5, at 206. The House version of declarations against interest which was ultimately enacted as Federal Rule of Evidence 803(b)(3) would have codified its understanding of Bruton v. United States, 391 U.S. 123 (1968). The Senate deleted the provision.

the House, Representative Holtzman protested that proposed Rule 804(b)(5):

> [B]asically abolishes the rules against hearsay and leaves it to the discretion of every judge to let in any kind of hearsay that he wants. This is true for criminal as well as civil cases.
>
> One of the basic assumptions in our system of jurisprudence is that the defendant in criminal trials has the right to confront his accuser. To abolish all prohibitions against hearsay really abridges our concept of a fair trial, aside from creating some Sixth Amendment problems.[42]

Her concerns were echoed by Representatives Eckhardt and Danielson.[43] Representative Dennis responded for the Conference Committee by stating that "I prefer to leave this 'catchall' provision out, but I do think it is not really as bad as has been made out here; and certainly in a criminal case if there is anything unconstitutional about it it cannot be done, of course."[44] He continued by asserting that "I am supporting it as a reasonable compromise which really does not add a whole lot"[45] because common law courts already could and occasionally did graft new exceptions onto the hearsay rule. Ms. Holtzman was not satisfied, and asked whether police reports could be admitted under the catchall without any officer testifying, although specifically excluded elsewhere.[46] Mr. Dennis answered that "I cannot see how anybody could suggest that introducing such a report is possible."[47]

Representative Mayne then gave an impassioned plea that two years of congressional review and seven years of work by the Advisory Committee would be wasted if the report was voted down. He contended that due to changes in membership of the Judiciary Committee, "this very complicated subject would have to be taken up from scratch by new members having no familiarity with it."[48] The combination of downplaying any significance of the catchalls in criminal prosecutions and threatening that the Rules might never be enacted led to their approval in the House.[49] Ultimately, if the only function of the catchalls was to provide a rarely used safety valve, primarily in civil cases, there was no reason to derail the enactment of the Rules to impose criteria limiting

42. 120 CONG. REC. 40,892 (1974).
43. *Id.* at 40,893-94.
44. *Id.* at 40,894.
45. *Id.*
46. *Id.* at 40,895.
47. *Id.*
48. *Id.*
49. *Id.* at 40,896-97 (by a vote of 363 to 32, with 39 not voting).

their use against criminal defendants, particularly when such hearsay would likely be rejected anyway as impinging on confrontation values.

Given this legislative history and the then-existing confrontation case law, only a doomsayer would have prophesied how successful prosecutors would later become in convicting defendants by introducing statements of absent declarants pursuant to the judge's discretion to admit trustworthy hearsay. It is ironic that when the catchalls were enacted no one even thought to raise the specter of Sir Walter Raleigh being sent to his death based on the affidavit of an alleged co-conspirator who recanted his torture-procured testimony, and on the testimony of a pilot relating the opinion of a Portuguese gentleman.[50]

II. THE HEARSAY WOLF

A. *The Hearsay Wolf Arrives Dressed in Sheep's Clothing*

The past sixteen years have underscored the naiveté of permitting lawyers to argue that judges should use their discretion to admit "trustworthy" hearsay without providing any significant restrictions in the catchall language. Although Congress praised the restraint that common law judges had shown in developing hearsay policy, in reality lawyers and judges were citing *Dallas County v. Commercial Union Assurance Co.*[51] regularly as support for expansive evidentiary interpretations, with at least ten of the nearly fifty decisions directed at otherwise inadmissible hearsay. It was only natural that codifying the catchalls would lead to their ever-increasing popularity. From their enactment in 1975 to July 1991, more than 400 decisions have considered the admissibility of hearsay pursuant to the catchalls,[52] or roughly eight times the entire number of cases that cited *Dallas County* in a comparable timeframe. In a complete turnaround, however, approximately sixty percent of the catchall cases are criminal, in contrast to the negligible references to expansive hearsay interpretation in criminal proceedings prior to 1975.[53] In fact,

50. *See, e.g.*, 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 333-36 (London, MacMillan 1883); Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 99-101 (1972).

51. 286 F.2d 388 (5th Cir. 1961).

52. Cases are included in the study if the catchall is used as the basis of the decision as well as if the catchall is cited as an alternative reason justifying the decision. The catchall study is on file with the author. *See* Myrna S. Raeder, *Confronting the Catch-Alls*, 6 CRIM. JUST. 31, 31 (1991) [hereinafter Raeder, *Catch-Alls*]; Myrna S. Raeder, *Comments Concerning Professor Swift's Paper: Has the Hearsay Rule Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. (forthcoming 1992) (manuscript at 8, on file with author) [hereinafter Raeder, *Comments*].

53. Raeder, *Comments*, *supra* note 52 (manuscript at 2 n.2, on file with author).

more than forty percent of all hearsay sought to be introduced under the catchalls is proffered by prosecutors.[54]

While the catchalls affect both civil and criminal litigation, their use as a prosecutorial weapon in the war against crime, a role never envisioned, raises a number of concerns. Of the roughly 250 catchall criminal cases, almost seventy percent are attempts by prosecutors to admit hearsay whose admission is doubtful under the specific exceptions.[55] Not only are prosecutors prolific catchall users, but they are quite successful in persuading judges to admit such hearsay in district courts and then having the admission upheld on appeal. Close to eighty-one percent of the prosecutor's catchall hearsay is ultimately admitted.[56] Appellate review of catchall hearsay for abuse of discretion and harmless error ultimately diminishes the likelihood that criminal defendants can obtain reversals of their convictions. Approximately twenty-five percent of the appellate cases which affirmed catchall criminal convictions referred to harmless error.[57] An even more troubling concern is the asymmetry of success rates between prosecutors and defendants trying to use the catchalls. Criminal defendants succeed only in fifteen percent of their attempts to affirmatively use the catchalls.[58] Even if one were to subtract appeals won by prosecutors in cases which refer to harmless error, there is still an overall sixty-four percent prosecutorial success rate in district and appellate courts.[59]

B. The Hearsay Wolf Knocks on Grandmother's Door

It is difficult to imagine that the trustworthiness of prosecutorial hearsay is so far superior to that of defense hearsay to warrant such different results. It is unlikely that the inability of prosecutors to appeal from acquittals accounts for this discrepancy, given the low percentage of acquittals and the significant disparity of success between prosecutors and defendants in district court.[60] Moreover, prosecutors can appeal from adverse pretrial evidentiary rulings.[61] Nor is it probable that de-

54. *Id.* (manuscript at 2 n.2, on file with author).

55. Raeder, *Catch-Alls*, *supra* note 52, at 31.

56. Raeder, *Comments*, *supra* note 52 (manuscript at 4, on file with author).

57. Of 118 appellate cases in which the prosecutor's use of catchall hearsay was affirmed, 29 contained a reference to harmless error. Raeder, *Comments*, *supra* note 52 (manuscript at 4, on file with author).

58. Raeder, *Comments*, *supra* note 52 (manuscript at 4, on file with author); *see* Raeder, *Catch-Alls*, *supra* note 52, at 31.

59. Raeder, *Comments*, *supra* note 52 (manuscript at 4-5, on file with author).

60. *Id.* (manuscript at 5, on file with author).

61. 28 U.S.C. § 3731 (1988); *see* United States v. Mokol, 939 F.2d 436, 437 (7th Cir. 1991) (interlocutory appeal by government from adverse catchall ruling).

fense catchall hearsay is often admitted, but does not surface on appeal, since the ever present discussion of defense evidence in harmless error analyses would reveal such admissions.

As I have argued in another article, the catchalls undermine the structure of the hearsay rules, resulting in a discretionary approach to hearsay to the detriment of fixed rules.[62] Their existence permits judges and lawyers to be sloppy because difficult hearsay questions do not have to be carefully analyzed if the catchall provides a ready escape clause. There is even a tendency to cite the catchalls for simple hearsay problems because their criteria may be easier to satisfy than those of specific hearsay exceptions. Moreover, the expansive nature of catchall offers has not been curbed at the appellate level because of the combined effect of harmless error and abuse of discretion on reversals.

The lack of predictability in catchall application is debilitating to litigators who must evaluate whether or not to settle the case. In the criminal arena, the discretionary aspect of the catchalls is particularly troubling. It has been posited that discretionary rulings rarely benefit criminal defendants.[63] If this is true, the present catchalls preordain that most prosecutorial hearsay will be admitted simply because Federal Rules 803(24) and 804(b)(5) have few restrictions other than trustworthiness, despite the intent to limit the catchalls to exceptional cases.[64]

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62. Raeder, *Comments*, *supra* note 52 (manuscript at 7-12, on file with author).

63. *See* Eleanor Swift, *Has the Hearsay Rule Been Abolished De Facto By Judicial Decision*, 76 MINN. L REV. (forthcoming 1992); J. Alexander Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 865 (1989).

64. Federal Rule of Evidence 803(24) provides that the following documents are not excluded by the hearsay rule even though the declarant is available as a witness:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24).

Federal Rule of Evidence 804(b)(5) provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception

The catchalls do not require findings of fact, nor clear and convincing evidence of trustworthiness or necessity. The materiality requirement is synonymous with relevance, which is required for all evidence. Serving the "interests of justice" has been construed as affirming the discretionary nature of the judge's decision to admit catchall statements.[65] Even the meaning of "equivalent circumstantial guarantees of trustworthiness" has remained elusive, since the twenty-seven categorical exceptions used for comparison have widely varying rationales for justifying the admission of hearsay.

The catchall notice provision has not provided a sufficient opportunity to challenge the hearsay evidence because of the flexible approach taken by many courts that have permitted notice at trial.[66] In addition, notice is an illusive protection in criminal cases because the defense is not entitled to depose witnesses. Thus, the declarant as well as the prosecutor's potential witnesses can refuse to talk to the defense.

The only restriction that may have stemmed the catchall tide is the requirement that the statement be more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable means. The Senate intended this "to insure that only statements which have high probative value and necessity"[67] would be admitted. However, this provision has rarely been viewed as imposing any additional condition on the catchalls. This is best demonstrated by the large number of decisions finding the admission of catchall hearsay to be harmless error.[68] If catchall evidence is only cumulative, it should never have been admitted in the first place. All catchall errors which do not result in reversals merely confirm that the exceptions have become a dumping ground for the discretionary admission of ordinary reliable hearsay.

Today the catchalls routinely permit "near misses" to be introduced against criminal defendants.[69] A "near miss" just falls short of a recog-

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unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b)(5).

65. Raeder, *Catch-Alls*, *supra* note 52, at 32.

66. *See, e.g.*, United States v. Doe, 860 F.2d 488, 492 (1st Cir. 1988) (not receiving notice before trial does not constitute grounds for denying hearsay evidence when defendant does not object), *cert. denied*, 490 U.S. 1049 (1989). See also Raeder, *Catch-Alls*, *supra* note 52, at 34-36, for a more detailed discussion of this problem.

67. S. REP. NO. 1277, *supra* note 14, at 18, *reprinted in* 4 BAILEY & TRELLES, *supra* note 3, Doc. 15, at 19.

68. Raeder, *Catch-alls*, *supra* note 52, at 32-33.

69. *See id.* (discussing near-miss theory popularized in Zenith Radio Corp. v. Matsushita

nized hearsay exception, and may encompass a category of hearsay that was rejected from inclusion as an exception. Thus, if the catchalls did not exist, grand jury testimony of an unavailable witness could not be introduced.[70] Testimony of child witnesses that are not excited utterances or statements for medical diagnosis or treatment would be inadmissible. Quasi-business records that cannot meet the foundation required by Rule 803(6) would not be permitted. Official records that violate Rule 803(8)(B) because they reflect the observations of law enforcement personnel would not have an alternative route to admission. Prior consistent and inconsistent statements not meeting the criteria of Rule 801 would not be admitted substantively. Yet current catchall interpretation gives the judge discretion to admit hearsay evidence under all of these hidden categories.[71]

Do so many more categories of reliable hearsay exist today than previously which warrant admission? Or have the catchalls turned what were once considered police and prosecutorial investigative tools into evidence?[72] In other words, are law enforcement personnel now obtaining and recording more statements than before or are prosecutors merely attempting, often successfully, to introduce more of these statements? Certainly the evidence rules encourage prosecutors to routinely dispatch witnesses to the grand jury, since prior inconsistent statements are only admitted substantively if given under oath in some proceeding. Thus, the logical way to protect against a turncoat witness also creates an opportunity under the catchall when the declarant becomes unavailable. One commentator suggests that the reason prosecutors must turn to the catchalls is because the specific exceptions reflect the historical suspicion of government-created hearsay.[73]

Pressure points in the criminal justice system appear to drive prosecutors to the catchalls, with drug cases providing approximately one-third of the criminal catchall citations in the last five years. Child abuse cases have recently become more prevalent in federal court, raising

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Elec. Indus. Co., 505 F Supp. 1190, 1262-64 (E.D. Pa. 1980), *rev'd sub nom. In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986)).

70. Raeder, *Catch-Alls*, *supra* note 52, at 33; *see* Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 445 (1985).

71. *See* Raeder, *Catch-Alls*, *supra* note 52, at 33.

72 See Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 94-104 (1987), for an insightful analysis of the difficulties which would arise if the hearsay rule were abolished in criminal cases, including encouraging abuse of governmental power.

73. Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485, 495 (1987).

catchall issues concerning frightened, inarticulate witnesses as well as children who do not testify at all.[74] A number of state catchall cases regarding child witnesses are also being reviewed in federal court on constitutional grounds in habeas corpus actions.

Quasi-business and official records often appear to be offered pursuant to the catchalls because of sloppy trial preparation or as an end-run against the ban on statements made by law enforcement personnel found in Rule 803(8).[75] Statements to law enforcement officials by a variety of declarants are proffered for several reasons. First, too few people have a sense of responsibility about being a good citizen that includes participation in trials that do not directly affect them. Second, our criminal justice system often severely inconveniences witnesses, discouraging those who do not want to make numerous futile appearances. Third, due to the restricted discovery in criminal cases, prosecutors do not always prepare their cases until shortly before trial, at a time when it may be too late to do additional investigation or obtain a witness. Finally, prosecutors sometimes prefer presenting the hearsay of unsympathetic declarants, such as informers and accomplices, through the testimony of credible police officers.

One might also ask what effect the catchalls have on the number of criminal trials. Even without the catchalls, the Sentencing Guidelines[76] have undoubtedly resulted in more cases being tried,[77] because a defendant's sentence is not likely to be substantially lower if a plea is entered

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74. *See, e.g.*, United States v. Ellis, 935 F.2d 385, 394-95 (1st Cir.), *cert. denied*, 112 S. Ct. 210 (1991) (holding admissible social worker's testimony relating child's statements concerning play with anatomically correct dolls pursuant to Rule 803(24) where court found child too young to testify); United States v. St. John, 851 F.2d 1096, 1098-99 (8th Cir. 1988) (holding admissible statements made by child to social worker and clinical psychologist pursuant to Rule 803(24) where child's testimony at trial was hindered by his age, developmental problems and inability to verbalize the delicate nature of the offense); United States v. Azure, 801 F.2d 336, 342 (8th Cir. 1986) (questioning admissibility of out-of-court statement by child to social worker under catchall exceptions).

75. Federal Rule of Evidence 803(8) provides that the following documents are not excluded by the hearsay rule even though the declarant is available as a witness:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(8).

76. 18 U.S.C. § 3553 (1988 & Supp. 1991).

77. *See, e.g.*, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1989, tbl. 5.21, at 498 (Timothy Flanagan & Kathleen Maguire eds., 1990).

unless the prosecutor reduces the charges in a way that materially affects the maximum penalty that the defendant can receive. As a result, prosecutors may be forced to try more troublesome cases, which would have been disposed of by generous plea bargains in prior years. Such cases place additional pressure on prosecutors to resort to the catchalls. Prosecutors who use the catchalls are simply taking advantage of the evidence rules to meet their high burden of proof. The existence of the catchalls, however, encourages them to take risks and the discretionary character of the rulings gives them a significant advantage over criminal defendants.

While the Confrontation Clause is still the ultimate barrier to trial by untested hearsay, such protection is much less expansive than at the time the Federal Rules were drafted. This is not to imply that all hearsay will survive a Confrontation Clause challenge. *Lee v. Illinois*[78] and *Idaho v. Wright*[79] demonstrate that some life still lingers in confrontation jurisprudence. But, if the catchalls did not exist, courts would never reach the confrontation question because the evidence simply would not be admissible under any evidentiary theory. Moreover, in cases where the declarant testifies, the catchall trumps because the Confrontation Clause is not ordinarily implicated.[80] Therefore, when asked if the catchalls matter, the answer for criminal defendants is yes—with a vengeance.

III. SHOULD LITTLE RED RIDING HOOD BE SAVED?

Merely uncovering the continued prosecutorial use of the catchalls is not enough. The real question is: should we care? What values, if any, are threatened by the overuse of the catchalls against criminal defendants? Does the nation's preoccupation with crime, drugs and child abuse justify the unforeseen expansion of the catchalls to ensure that society is better protected than it would be without them? Certainly, the admission of most so-called "trustworthy" hearsay does make it easier for the prosecution to convict defendants by providing the fact finders with additional relevant evidence as well as corroboration for existing evidence. Indeed, if one believes the storytelling model of jury decision-

78. 476 U.S. 530 (1986).

79. 110 S. Ct. 3139 (1990).

80. *See* United States v. Owens, 484 U.S. 554, 559 (1988) (Steven, J., concurring) (witness's out-of-court identification of accused admissible and does not violate Confrontation Clause where witness cannot recall identification at trial); *cf.* Maryland v. Craig, 110 S. Ct. 3157, 3167 (1990) (permitting testimony of child via closed circuit television upon specific finding that child's testimony in courtroom in presence of defendant would result in child suffering serious emotional distress such that child could not reasonably communicate).

making,[81] such hearsay may act as the glue that cements together the prosecutor's theory of the case. If so, the government's case is considerably strengthened by the admission of reliable hearsay, which considered by itself might not be regarded as critical. Even speculative gossip can sound believable; otherwise why would someone repeat it? Similarly, "trustworthy" hearsay is likely to be deemed credible, unless shown otherwise.

Ultimately, the rationale favoring catchall admission focuses on necessity. By loosely interpreting the catchalls, courts produce more guilty verdicts that are saved on appeal because cases are not reversed unless trial courts abuse their discretion, and the resulting error is not harmless. On appeal, gauging the prejudice to the defendant is particularly daunting because one can never know whether the absence of the catchall information would have negated the theory of the case adopted by the jury.

A. Should the Hearsay Wolf Be Tamed?

Hearsay theory, Confrontation Clause analysis and other process concerns must be evaluated in determining the proper response to the overuse of the catchalls by prosecutors. Whether one views the hearsay rule as the child of the adversary system or the child of the jury system, it is an exclusionary rule setting boundaries on what jurors can consider. The dangers posed by the inability to evaluate the sincerity, perception, memory and narration of the out-of-court declarant underly the hearsay rule. The justifications for not liberalizing the hearsay rule in criminal cases include concerns about: (1) distortion of testimony; (2) providing a tactical advantage to the prosecutors in criminal actions, who are likely to have more access to hearsay; (3) providing a tactical advantage to prosecutors because hearsay makes it easier to establish a prima facie case; (4) distrust of judges; and (5) systemic effects resulting in less firsthand testimonial accounts, which may threaten the integrity of the trial process.[82] The dangers of fabrication and perjury are particularly troubling when the declarant is unavailable.[83]

Professor Swift's analysis of the problems associated with abolishing the hearsay rule raises similar concerns.[84] She identifies the following

81. *See, e.g.*, Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 396-406 (1991); *see generally* Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986).

82. RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 520-25 (2d ed. 1982).

83. Park, *supra* note 72, at 73-74.

84. *See* Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495 (1987) [hereinaf-

problems: (1) jurors will have fewer facts about the testimonial qualities of declarants who are not identified;[85] (2) more cases will be submitted to the jury that require hard choices between conflicting inferences concerning statements made by "risky" self-interested declarants;[86] and (3) the hearsay proponent will obtain a tactical advantage by not being required to provide a witness who is knowledgeable about the contents of documents, while adding a burden to the opponent to discredit the document.[87] Even if one can adequately evaluate hearsay not fitting into the categorical exceptions, its admission should be suspect because the advantage is shifted to the prosecutor who is provided with additional evidence to help meet the burden of production and persuasion.

Undoubtedly, some will argue that we should trust the common sense of jurors more than we do, and claim that judges are no better suited to determine trustworthiness than jurors. The hearsay rule admittedly is rooted in a distrust of jurors. In contrast, the catchalls manifest a total belief in the ability of jurors to sort the wheat from the chaff so long as the judge considers it trustworthy. What does trustworthiness mean? Many of the exceptions assume that the circumstances surrounding the statement ensure that the statement was reliable when made. Yet cross-examination of declarants concerning such statements could reveal their feet of clay. Indeed, changing psychological and religious beliefs undermine some of the assumptions supporting some exceptions. Is a person more likely to be correct when excited? Is someone who is dying always motivated to be truthful?

The manner in which courts determine catchall trustworthiness is currently in flux. Many courts have relied on corroboration to support admission of such catchall categories as grand jury testimony.[88] The Court in *Idaho v. Wright*,[89] however, recently held that for confrontation purposes trustworthiness must be determined by the totality of the circumstances surrounding the making of the statement that render the declarant's statement particularly worthy of belief. Thus, physical or other confirming evidence from witnesses is not to be considered in the constitutional trustworthiness analysis. It is unclear whether courts will uniformly adopt this standard for determining the evidentiary admissibility of catchall hearsay. If they do not, however, the catchall trustworthiness

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ter Swift, *Abolishing Hearsay*], Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339 (1987).

85. Swift, *Abolishing Hearsay*, *supra* note 84, at 499.

86. *Id.* at 510-12.

87 *Id.* at 514.

88. Raeder, *Catch-Alls*, *supra* note 52, at 36-37.

89. 110 S. Ct. 3139, 3148 (1990).

standard will be meaningless in cases where the declarant is unavailable because the standard would permit hearsay by relying on the very corroboration that must be excluded for Confrontation Clause purposes. Moreover, as the court in *Wright* noted, "[t]here is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement."[90]

When the confrontation issue is not implicated or raised, or is incorrectly decided by the trial court, injecting corroboration into the trustworthiness analysis effectively merges harmless error doctrine with evidence law. There may be benefits of such a merger. For example, if the defendant is not promised a perfect trial, why decide difficult evidence issues that are ultimately not important to the outcome of the case? On the other hand, this approach devalues the role of cross-examination in criminal trials. Furthermore, as previously mentioned, catchall hearsay is not intended to encompass unimportant information.

While it is too soon to tell if *Wright*'s trustworthiness criteria will result in more careful catchall rulings, at least one recent case reversed the admission of grand jury testimony based on the new standard.[91] Obviously, if judges exclude corroboration from their original assessments of whether the hearsay is reliable enough to meet the Confrontation Clause, less hearsay will be admitted than if corroboration were considered in the trustworthiness analysis. On appeal, of course, such corroboration will be examined in determining the existence of harmless error.[92]

The routine admission of catchall hearsay should not be permitted regardless of whether the evidence is reliable by virtue of the circumstances surrounding its creation or by reference to corroboration. In either event, cross-examination often has more than marginal utility. The fact that a statement has some reliability is not the same as saying that it is free from doubt. For example, cross-examination of a declarant could reveal the presence of bias or stress or reveal mistaken assumptions that are not obvious on the face of the statement.

Moreover, it is much more difficult to contest the validity of a statement when the witness in court is an authoritative or sympathetic person who has no or few testimonial disadvantages. For example, compare a police officer testifying about a statement made by one of the defendant's cohorts with the testimony of the declarant. The police officer will usually be a good witness, one to whom the jurors can relate—articulate,

90. *Id.* at 3151.

91. United States v. Gomez-Lemos, 939 F.2d 326, 327 (6th Cir. 1991).

92. *Wright*, 110 S. Ct. at 3150-51.

confident and usually not in possession of information that discredits the hearsay.

The declarant, in contrast, is usually not a good witness and will likely be viewed as trying to exculpate himself or herself. The declarant's appearance and testimony will often put off the jury, and at best, will result in the impression that he or she is either biased or evasive. Similarly, if an officer testifies to the statements of the defendant's estranged wife, her mixed motives cannot be presented to the jury as forcefully by presenting her impeachment through the officer's testimony as by cross-examining her. A child witness may give contradictory or coached testimony or be manipulated by parents or other authority figures. Such infirmities are less likely to be exposed when the medical doctor or teacher testifies to statements made by that child than if the child were to testify. Countervailing arguments based on the cost or inconvenience of producing declarants scarcely provide enough justification to warrant foregoing the protections of the hearsay rule in criminal cases.

B. Confronting the Hearsay Wolf

Beyond hearsay theory, what if any protection does the Confrontation Clause offer from overuse of the catchalls? In 1975 the strict interpretation of the Confrontation Clause led Congress to assume that there would be relatively few attempts to rely on the catchalls when the declarants were unavailable for trial. The constitutional revolution that has occurred in the past ten years has frustrated this expectation by substituting a minimalist approach to confrontation and other individual liberties.

As a result, the United States Constitution must currently be viewed as providing a floor rather than a ceiling for such rights. Both confrontation and due process analysis are viewed as balancing tests which weigh the competing interests of effective law enforcement and accurate factfinding.[93] The United States Supreme Court is primarily concerned with confrontation as a functional right that promotes reliability in criminal trials. In particular, the Sixth Amendment now acts as a virtual rubber stamp for traditional hearsay exceptions.[94] Even statements ad-

93. *See* Ohio v. Roberts, 448 U.S. 56, 64 (1980) (confrontation analysis); Manson v. Brathwaite, 432 U.S. 98, 111-13 (1977) (due process analysis).

94. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 183-84 (1987) (holding that Confrontation Clause does not require court to independently inquire into reliability when evidence falls within firmly rooted hearsay exception, such as Rule 801(d)(2)(E), which allows out-of-court statements by co-conspirators to be admitted); *Roberts*, 448 U S. at 66 (particularized search for indicia of reliability unnecessary when prior testimony at preliminary hearing was subject to cross-examination, even though declarant now unavailable for trial).

White v. Illinois, 112 S. Ct. 736, 742 n.8 (1992), recently embraced this approach when it

mitted pursuant to the catchalls, which do not otherwise fall within a firmly rooted hearsay exception, may be sufficiently trustworthy to satisfy the Confrontation Clause,[95] because cross-examination is not the exclusive means of determining if hearsay has particularized guarantees of trustworthiness.[96]

The focus of confrontation has shifted from the right to cross-examine declarants of out-of-court statements to the right to prohibit unreliable hearsay.[97] This approach confers constitutional status on Wigmore's analysis of hearsay logic. Wigmore believed that when it is sufficiently clear that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, "cross-examination would be a work of supererogation."[98] *Idaho v. Wright*[99] interpreted this to mean that hearsay is permitted when "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility."[100] In a sleight of hand, *Wright* then transformed this explanation into a test for determining whether the Confrontation Clause has been violated. First, the Court asserted that " 'firmly rooted' hearsay exception[s] are so trustworthy that adversarial testing would add little to their reliability."[101] Second, the Court required that other hearsay, which must demonstrate " 'particularized guarantees of trustworthiness' . . . [be] so trustworthy that adversarial testing would add little to their reliability."[102]

Wright does limit the search for reliability to the inherent trustworthiness of the statement, thereby excluding reference to other evidence at trial.[103] However, this restriction is also grounded in the quest for reliability, since such corroboration "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement

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noted that spontaneous declarations and statements made for purposes of medical diagnosis or treatment were both firmly rooted. As a result, the Court held that no showing of unavailability of the declarant is necessary to survive a Confrontation Clause challenge. *Id.* at 743. Thus, any statement which is admitted pursuant to either of these exceptions automatically passes the Confrontation Clause analysis. *Id.*

95. *See* Idaho v. Wright, 110 S. Ct. 3139, 3147 (1990).

96. Lee v. Illinois, 476 U.S. 530, 543 (1986).

97. *See* JoAnne A. Epps, *Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?*, 77 KY. L.J. 7, 46 (1988-89).

98. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1420, at 251 (Chadbourn rev. 1974).

99. 110 S. Ct. 3139 (1990).

100. *Id.* at 3149.

101. *Id.*

102. *Id.*

103. *Id.* at 3150.

that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility."[104]

Even the dissenters in *Wright*, who would rely on corroboration, do so by analogy to Fourth Amendment cases that are "premised upon the idea that corroboration is a legitimate indicator of reliability."[105] While *Wright* held that introduction of a particular statement of an unavailable child pursuant to Idaho's catchall violated the Confrontation Clause, it rejected a rule which would per se exclude any statements of child declarants as frustrating the truth-seeking purpose of the Confrontation Clause and hindering states in developing their law of evidence.[106] Thus, confrontation is now viewed primarily as preventing convictions based on unreliable out-of-court evidence.

C. Should Live Testimony Vanquish the Hearsay Wolf?

The pursuit of reliability downplays confrontation as a constitutional preference for live testimony. The United States Supreme Court has repeatedly made clear that the word "confront" does not prohibit the admission of all accusatory hearsay statements made by an absent declarant.[107] When the declarant is unavailable, necessity dictates that the hearsay be admitted if it is trustworthy.[108] In other words, the public's "strong interest in effective law enforcement," may tip the balance against the interests of the accused.[109] The Court has further devalued the benefits of cross-examination by eliminating any requirement for a showing of unavailability when evaluating co-conspirators' statements.[110] Yet permitting the defendant to call the declarant for impeachment purposes does not provide the same opportunity to discredit a witness as requiring the prosecution to present the declarant's direct testimony subject to cross-examination. In dissent, Justice Marshall has protested that " '[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the great-

104. *Id.*

105. *Id.* at 3156 (Kennedy, J., dissenting). Rehnquist, C.J., White & Blackmun, JJ. joined in the dissent.

106. *Id.* at 3151-52.

107. Maryland v. Craig, 110 S. Ct. 3157, 3164-65 (1990).

108. Ohio v. Roberts, 448 U.S. 56, 65 (1980).

109. *Id.* at 64.

110. *See* United States v. Inadi, 475 U.S. 387, 399-400 (1986).

est safeguard of American trial procedure.' "[111]

On the other hand, the Court acknowledges that " 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' "[112] even though it " 'must occasionally give way to considerations of public policy and the necessities of the case.' "[113] Thus, it has not entirely forsaken other values inherent in a trial with live witnesses. The Court in *Maryland v. Craig*[114] quoted extensively from *Mattox v. United States*,[115] a seminal Confrontation Clause case which defined the nature of the right as follows:

> "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."[116]

Nevertheless, much of what is being admitted pursuant to the catchalls appears to be exactly what *Mattox* would prohibit. For example, admitting grand jury testimony and statements made to law enforcement personnel is contrary to the spirit of *Mattox*.

Similarly, *Craig* recognized that confrontation has other benefits. Confrontation:

> (1) [I]nsures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defend-

111. *Id.* at 410 (Marshall, J., dissenting) (quoting New York Life Ins. Co. v. Taylor, 147 F.2d 297, 305 (D.C. Cir. 1945)).

112. Maryland v. Craig, 110 S. Ct. 3157, 3165 (1990) (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

113. *Id.* (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

114. *Id.* at 3163-65.

115. 156 U.S. 237, 242-43 (1895).

116. *Craig*, 110 S. Ct. at 3163 (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)).

> ant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[117]

The preference for face-to-face accusation has been considered a basic political commitment to shared responsibility for criminal outcomes, which emphasizes the moral responsibility of witnesses as accusers and of juries as decision makers.[118] Discarding this preference for live testimony reduces the solemnity of trials, since no oath is taken, and the declarant is not required to face the accused or to be cross-examined. The overuse by prosecutors of the catchalls denigrates such process goals that are implicit in confrontation but are not addressed by decisions that look primarily at whether hearsay is reliable.

Moreover, if the criminal justice system reflects the shared values of our society concerning the preservation of individual rights against the power of the government, we should be wary of evidentiary rules that effectively lessen the prosecutor's obligation to prove each element of an offense beyond a reasonable doubt, even when such rules do not actually violate constitutional norms. Justice Harlan saw confrontation as providing a check against "flagrant abuses, trials by anonymous accusers, and absentee witnesses."[119] The Court recently reiterated that the "jury acts as a vital check against wrongful exercise of power by the State and its prosecutors."[120] Yet the shift towards reliability ignores the role of confrontation as a shield between the accuser and the accused.[121]

The focus on reliability also ignores broader societal goals. As the Court noted in a different context, "[t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."[122] In *Coy v. Iowa*[123] the Court acknowledged that confrontation " 'contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.' "[124] The Court has also recognized:

> To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's in-

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117. *Id.* (quoting California v. Green, 399 U.S. 149, 158 (1970)).

118. Swift, *Abolishing Hearsay*, *supra* note 84, at 512 n.45.

119. California v. Green, 399 U.S. 149, 179 (1970) (Harlan, J., concurring).

120. Powers v. Ohio, 111 S. Ct. 1364, 1371 (1991).

121. *See* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 580 (1988).

122. *Powers*, 111 S. Ct. at 1372 (exclusions of black jurors can be raised by white defendant as violating Equal Protection Clause).

123. 487 U.S. 1012 (1988).

124. *Id.* at 1019 (quoting Lee v. Illinois, 476 U.S. 530, 540 (1986)).

> terest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.[125]

Similarly, the Court appreciates that it is more difficult to tell a lie about a person to his face than behind his back.[126] " '[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." ' "[127] Even a commentator whose review of the empirical literature led him to believe that transcripts were more reliable than live testimony, concluded that "[l]ive testimony may be essential to perceptions of fairness, regardless of the real relation between live testimony and accuracy of outcomes."[128]

Thus, we should care about the type of evidence used to convict a defendant in terms of the public perception of the fairness of the criminal justice system. We do not want to foster the perception that there are two systems of justice: one for affluent defendants who have high visibility or are accused of white collar crimes, in which live witnesses are the rule and the record on appeal is painstakingly reviewed for error; and another for the poor and minorities who are charged with violent crimes, in which courts appear to care less about the type of evidence which is adequate for conviction and rely heavily on harmless error.

Ultimately, our society must determine how much worse it is to convict an innocent defendant than to acquit a guilty one. The admonition of *In re Winship*[129] that it is "far worse to convict an innocent man than to let a guilty man go free,"[130] has been revised to read "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[131] We are constantly reminded that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one."[132] It is time to recognize that the Con-

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125. Lee v. Illinois, 476 U.S. 530, 540 (1986).

126. Maryland v. Craig, 110 S. Ct. 3157, 3164 (1990) (quoting Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988)).

127. *Id.* (quoting Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965))).

128. Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1092 (1991).

129. 397 U.S. 358 (1970).

130. *Id.* at 372 (Harlan, J., concurring).

131. Patterson v. New York, 432 U.S. 197, 208 (1977).

132. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); *see also* United States v. Hasting, 461 U.S. 499, 508-09 (1983) (recognizing that "there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial"); Bruton v. United

frontation Clause may be an unreliable way to protect the criminal justice system against the onslaught of "trustworthy" hearsay.

Rather than criticizing the Supreme Court for its narrow reading of confrontation law, we should view this as an opportunity to enact evidentiary rules that exceed constitutionally required standards and incorporate criteria reflecting concerns about fairness in the adversary process.[133] In a universe of shrinking constitutional protections, evidence law becomes very important to criminal defendants. Without any evidentiary response, the overuse of the catchalls in criminal cases may ultimately affect the very character of criminal trials. To preserve trials in their current form where live witnesses are the rule rather than the exception, the catchalls should be revised. Only if trial courts must follow stringent criteria will they be less likely to let in ordinary or questionable hearsay pursuant to the catchalls.

D. Should Red Riding Hood Take Advantage of the Hearsay Wolf?

While the focus of this Essay has been on the use of the catchalls against criminal defendants, it is necessary to briefly discuss use of the catchalls by the defense to determine how the exceptions should be revised in criminal cases. Given the existing catchall jurisprudence, it is important for defense counsel to fashion arguments to obtain as favorable treatment from courts as is currently being enjoyed by prosecutors.[134] However, revising the catchalls to encourage use by criminal defendants raises many of the same concerns about devaluing the preference for live witnesses. Moreover, the risks of fabrication must always be considered in evaluating such defense evidence. Even without any modification of the catchalls, in some cases the defendant's right to due process will require admission of hearsay barred by the evidence rules.[135] Similarly, the United States Supreme Court has agreed that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment the Constitution guarantees criminal defendants 'a meaningful opportunity

States, 391 U.S. 123, 135 (1968) (" 'A defendant is entitled to a fair trial but not a perfect one.' ") (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)).

133. States that have enacted the catchalls can also interpret their own constitutions as providing greater protection for such rights as confrontation than does the United States Constitution.

134. See Raeder, *Catch-Alls*, *supra* note 52, at 39-40, for a detailed analysis of how to structure such arguments.

135. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 301-02 (1973).

to present a complete defense.' "[136] Thus, it is ultimately more important to limit the prosecutor's use of the catchalls than to expand the defendant's use of them.

IV. PROPOSALS

The following proposals offer several approaches to revising the catchalls.[137]

A. Alternative 1

OTHER EXCEPTIONS. *A statement whose trustworthiness is demonstrated by clear and convincing evidence based on the totality of circumstances that surround the making of the statement, if the court specifically finds that: (A) exceptional circumstances exist for its admission into evidence; (B) it is not specifically excluded by any of the foregoing exceptions; and (C) the proponent of the statement provides reasonable notice of its intention to offer the statement and its particulars in advance of trial, or during trial if the court excuses pretrial notice on good cause shown. Such notice shall include the name and address of the declarant, if known, unless the proponent establishes good cause for not revealing this information.*

This alternative makes no distinction between criminal and civil cases. It also treats prosecutors and criminal defendants identically. Such a revision would severely limit the casual use of the catchalls for all parties and probably reflects the original intention of the rule. It clearly prohibits the use of the catchall as a way to admit hearsay specifically prohibited by Rule 803(8). It should also meet any confrontation concerns in criminal cases.

B. Alternative 2

OTHER EXCEPTIONS. *In a civil action or when introduced by a criminal defendant, a statement which has circumstantial guarantees of trustworthiness if: (A) the proponent of the statement has made a reasonable effort to produce all more probative admissible evidence to establish the fact to which the proffered statement relates; and (B) the proponent of the statement provides reasonable notice of his or her intention to offer the statement and its particulars in advance of trial, or during trial if the court excuses pretrial notice on good cause shown. Such notice shall include the*

136. Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citations omitted) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

137. These proposals as well as others are currently being studied by the ABA Criminal Justice Section's Committee on Federal Rules of Evidence and Criminal Procedure which I chair. The opinions expressed in this Essay are solely my own.

name and address of the declarant, if known, unless the proponent establishes good cause for not revealing this information.

This proposal eliminates the use of the catchall against criminal defendants but permits a fairly expansive use in civil trials and when offered by criminal defendants, subject to Rule 403. It retains the preference for live testimony by requiring a reasonable effort be made to produce the other evidence concerning the issue but permits the hearsay to be introduced in addition to or in lieu of that testimony if the condition is satisfied. The rule does not limit trustworthiness determinations to circumstances surrounding the making of the statement.

C. *Alternative 3*

OTHER EXCEPTIONS. *In a civil action or when introduced by a criminal defendant, a statement which has circumstantial guarantees of trustworthiness, if the proponent of the statement has made a reasonable effort to produce all more probative evidence to establish the fact to which the proffered statement relates. In a criminal action, when introduced by the prosecutor, a statement whose trustworthiness is demonstrated by clear and convincing evidence based on the totality of circumstances that surround the making of the statement shall be admissible if the court specifically finds: (A) exceptional circumstances exist for its admission into evidence; and (B) it is not specifically excluded by any of the foregoing exceptions. The proponent of any statement offered pursuant to this rule must provide reasonable notice of its intention to offer the statement and its particulars in advance of trial, or during trial if the court excuses pretrial notice on good cause shown. Such notice shall include the name and address of the declarant, if known, unless the proponent establishes good cause for not revealing this information.*

This alternative would result in the catchall being available against criminal defendants in extremely limited circumstances, while substituting the standard proposed in the second alternative in civil cases and by criminal defendants. Other rules have made similar distinctions between criminal defendants and other witnesses, for example Rule 609.[138]

D. *Other Alternatives*

Eliminate Rule 803(24) and revise Rule 804(b)(5) as suggested in the first, second and third alternatives. This would prohibit any catchall hearsay in cases where the declarant testifies. These are undoubtedly the

138. *See* FED. R. EVID. 609 (allowing evidence of criminal defendant's prior conviction to impeach credibility only if probative value outweighs prejudicial effect to accused).

most restrictive approaches to the catchalls, and it may be unnecessary to include such a restriction in the first alternative which already is limited to exceptional circumstances. Arguably, the first criteria of the second alternative already accomplishes this result. However, as written, the second alternative would permit the court to admit the hearsay in addition to the other admissible evidence. In contrast, this alternative would only permit the hearsay when the declarant of the statement is unavailable.

Conversely if any of the first three alternatives are adopted they can be codified as Rule 803(24), and Rule 804(b)(5) could be eliminated. Rule 804(b)(5) is unnecessary because Rule 803(24) always provides a method to admit the same evidence.

V. CONCLUSION

Continued resort to the catchalls by prosecutors raises the specter of "reliable" hearsay being regularly introduced against the accused in criminal trials. Such a result was unintended when the catchalls were drafted, and may exacerbate the tendency to downplay the importance of live witnesses as a key ingredient of criminal trials. It is time to reaffirm the value of evidentiary rules by rewriting the catchalls in order to reduce their routine invocation, instead of continuing to rely on constitutional barriers to their use.

THE HEARSAY RULE AT WORK: HAS IT BEEN ABOLISHED DE FACTO BY JUDICIAL DISCRETION?

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The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?

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Professor Swift's work is extremely valuable for its insights into how judges actually apply the hearsay rules when evaluating categorical exceptions. Too often we make assumptions without examining their factual underpinnings. Professor Swift pierces the mist of commonly held beliefs to report that while Rules 803(1)-(4) and 803(6) of the Federal Rules of Evidence are generally being interpreted rigorously in federal court to exclude statements made by risky declarants, judges are liberally admitting statements of crime victims, particularly children, when offered by federal prosecutors. In addition, judges sometimes rely on trustworthiness to admit evidence pursuant to exceptions which have no discretionary criteria. Prosecutors are the most prolific as well as the most successful hearsay users. Criminal defendants, and to a lesser extent civil plaintiffs, appear to be the hearsay losers, while civil defendants seem hardly to be playing the game at all.[1] This Comment focuses on some of Professor Swift's findings and their place in the larger hearsay picture.

I. WHY ARE CIVIL DEFENDANTS UNDER-REPRESENTED?

Professor Swift's study—identifying that civil defendants

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1. *See* Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 481 tbls. III and IV (1992).

are substantially under-represented as users of Rule 803(1)-(4) hearsay and trail both prosecutors and civil plaintiffs in offers of Rule 803(6) hearsay—may provide important lessons about trial lawyers' evaluation of hearsay and how hearsay reform will affect trial practice. Professor Swift's discovery mirrors a trend I noted in a study of cases involving the Rule 803(24) and 804(b)(5) catchall hearsay exceptions.[2] Civil defendants' under-representation is partially a function of the burden of proof which encourages the introduction of evidence by civil plaintiffs and prosecutors. However, civil defendants made substantially fewer offers of Rule 803(1)-(4) hearsay than any other party, including criminal defendants, in both Professor Swift's study[3] and my ongoing catchall study.[4] Moreover, while intuitively civil defendants, which include corporations, would appear to

2. My study entailed a search on Westlaw from January 1, 1975 to July 1, 1991 for criminal and civil cases referencing Federal Rules 803(24) or 804(b)(5)—the hearsay catchall exceptions. District court cases which resulted in appellate decisions were eliminated. I included in the study catchall references which were cited as alternative reasons for admission, even though it might be argued that such references are superfluous. It is my opinion that such references make it easier for a judge to admit the evidence without having to make hard decisions concerning admissibility and therefore are significant.

The results of the study will be discussed throughout this Comment and are summarized below for reference.

	Number of cases where the party offered catchall evidence	Percent of offers	Number of cases where the party was successful	Success rate
Prosecutors	171	42%	138	81%
Civil Plaintiffs	113	28%	49	43%
Criminal Defendants	75	18%	11	15%
Civil Defendants	49	12%	24	49%
Total	408	100%	222	54%

These statistics cannot be considered definitive, given the small number of cases in some categories and the fact that the cases studied only include hearsay rulings which are available on Westlaw. The number of cases represented and the statistics derived from them, however, establish relative patterns of usage and success which provide insight into catchall exception interpretation.

For an earlier study of criminal cases applying the Rule 803(24) and 804(b)(5) hearsay catchall exceptions, see Myrna S. Raeder, *Confronting the Catch-Alls*, 6 A.B.A. SEC. CRIM. JUST. 31 (1991).

3. *See* Swift, *supra* note 1, at 481 tbl. III.

4. In the catchall study, civil defendants offered hearsay in only 49 cases. In comparison, prosecutors offered hearsay in 171 cases, over three times more

have more access to business records than any other party, only criminal defendants made fewer offers of Rule 803(6) hearsay.[5]

There is no reason to suppose that hearsay is generally more helpful to criminal defendants than to civil defendants, particularly since some civil suits could be brought as criminal actions. It is also unlikely that the relative absence of civil defendants as hearsay users is based upon their failure to appeal from adverse verdicts; civil defendants usually have both the resources and the financial motivation to appeal. Nor can all civil defense hearsay so clearly fit into an exception that it simply is not objected to at trial. Indeed, Professor Swift noted that when civil defendants introduce business records, they are less successful than civil plaintiffs in getting the records admitted.[6]

The most probable reason for the disparity is that parties who do not have to use hearsay would rather not do so. Since civil defendants often have control over the major witnesses who favor their position and can ensure that they testify, they do not need to rely on hearsay. Discovery permits civil parties to learn virtually all of the information which will be proffered at trial. Therefore, the civil defendant can effectively determine which live witnesses will obviate the need to offer hearsay.

In contrast, criminal defendants may need to offer more hearsay than civil defendants because they have fewer financial resources and because witnesses in criminal cases may be unavailable as a result of asserting their Fifth Amendment privilege. In other words, for all of the reasons underlying the hearsay rule, defendants who can would rather present live testimony. While it might be risky to subject some civil defense witnesses to cross-examination, counsel may be fearful that jurors will discount any favorable hearsay if they expect to hear live testimony.

Similarly, civil defense counsel do not want to justify losing a case because of a hearsay dispute, when the point could have been established by a witness who has personal knowledge of the event. The comparatively few appeals concerning exclusion of defense hearsay in civil cases is understandable if such hearsay is usually not critical. Moreover, when the hearsay dispute

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often than civil defendants. Criminal defendants offered hearsay in 75 cases, about 50% more often than civil defendants. *See supra* note 2.

5. *See* Swift, *supra* note 1, at 481 tbl. IV.

6. *Id.*

is significant, it is likely to be resolved prior to trial because many judges require the attorneys to raise objections concerning documents, depositions, and exhibits, as well as other significant evidentiary issues, well before the jury is sworn. Therefore, defense counsel who are faced with adverse rulings on pivotal issues may be settling those cases rather than betting the client's company on disputed hearsay questions.

The low incidence of civil defense hearsay is a fact that must be considered whenever significant liberalization of the hearsay rule is suggested in the civil arena. If civil defendants resist offering hearsay unless they have no other alternative, it is doubtful that the mere relaxation of the hearsay ban will encourage them to drastically increase their reliance on hearsay. Therefore, as Professor Swift notes, the real winner of any liberalization of the hearsay rule in the civil context will be civil plaintiffs.[7]

II. WHY ARE PROSECUTORS OVER-REPRESENTED?

Undoubtedly, the high burden of proof in criminal cases is partially responsible for the prolific use of hearsay exceptions by prosecutors. The need to demonstrate proof beyond a reasonable doubt encourages prosecutors to introduce every shred of relevant evidence.

Factors other than the high burden of proof, however, may be equally important to the prosecutor's high use of hearsay exceptions. First, the absence of effective discovery in federal criminal cases affects prosecutors as well as defense counsel. Discovery aids the effective preparation of cases. Given high case loads, prosecutors often do not learn about statements until the day of the trial, a time when it is too late to obtain additional live witnesses. Second, the defendant's Fifth Amendment privilege against self-incrimination similarly hinders the prosecutor's ability to predict the defense case accurately. Therefore, hearsay may be easier to produce than live testimony in response to a newly raised defense theory. Third, even if prosecutors may have more resources than criminal defendants, this hardly suggests that their resources are unlimited. Thus, prosecutors may prefer hearsay to locating and preparing additional witnesses. Fourth, despite the threat of subpoenas, some witnesses do not want to testify or may tire of repeatedly appearing in court only to be rescheduled. Finally,

7. *Id.* at 502-03.

prosecutors may affirmatively choose to offer hearsay when the declarant is less appealing than the in-court witness, as in the case where a police officer testifies to an informer's statements. If the hearsay rule is relaxed, these forces will continue to exert pressure on prosecutors to present even more hearsay, which will be tested only by the Confrontation Clause.

III. WHY ARE CRIMINAL DEFENDANTS LOSING THE HEARSAY BATTLE?

Professor Swift's conclusion that criminal defendants have less success than any other party in admitting hearsay, while prosecutors fare best,[8] repeats the pattern which also exists in cases using the catchall hearsay exceptions. Prosecutors were successful in federal appellate and district courts in eighty-one percent of their attempts to use catchall hearsay, compared to criminal defendants who were successful in only fifteen percent of their attempts.[9] At the appellate level, prosecutors had a sixty-three percent success rate, even subtracting the appellate cases favoring prosecutors which held that the error was harmless or that no error existed.[10] Such results cannot be explained by the inability of prosecutors to appeal from acquittals. There simply are not that many acquittals in federal court, the rate is at best in the twenty percent range.[11] Because a large number of the criminal cases which result in convictions are appealed,[12] it is likely that the cases available on Westlaw are representative of disputes about contested catchall hearsay.

It is possible that trial judges are admitting defense hear-

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8. *Id.* at 482-83.

9. Of 171 attempts to introduce catchall hearsay, prosecutors were successful in 138 (81%) cases—118 appellate cases and 20 district court cases. Of 75 attempts to introduce catchall hearsay, criminal defendants were successful in 11 (15%) cases—appellate courts admitted the catchall hearsay (and reversed the district courts' decision to exclude the hearsay) in six cases, district courts admitted the catchall hearsay offered by the criminal defendants in five cases. *See supra* note 2.

10. Of the 171 appellate and district court cases in which prosecutors offered catchall hearsay, *see supra* note 2, 142 cases represent appellate court decisions. Of the 142 appellate court decisions, prosecutors were successful in 118 cases. Of the 118 successful cases, the court admitted the hearsay holding that the error was harmless or that no error existed in 29 cases. The remaining 89 successful cases constitute 63% of the total 142 appellate court cases.

11. *See* U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1989, at 498 tbl. 5.21 (Timothy J. Flanangan & Kathleen Maguire eds., 1989) (listing past statistics).

12. *See id.* at 527 tbl. 5.52.

say, but defendants are convicted despite such evidence, resulting in appeals which do not reflect their true success rate. Such over-admission of defense hearsay, however, would likely be discussed in a way not currently reflected by the ubiquitous harmless error analyses undertaken by appellate courts. Furthermore, district court decisions in the catchall context also reflect a substantial disparity between the success rate of prosecutors and defense counsel.[13] At best, criminal defendants may be effectively introducing inconsequential hearsay. Ultimately, however, one must wonder why prosecutors fare so much better than civil plaintiffs when introducing hearsay, as well as why civil defendants are much more successful than criminal defendants, results mirrored in the catchall cases.[14]

Professor Swift explains the plight of criminal defendants by referring to their reliance on risky declarants.[15] While her introduction of the risky declarant is a genuine contribution to hearsay analysis, the catchall results do not clearly support this interpretation. Admittedly, defendants attempted to introduce their own statements or those of potentially biased witnesses, but so did prosecutors—and with better success.[16] Nor does the risky declarant analysis explain why courts often admit statements by the defendant's cohorts or accomplices which are introduced by prosecutors under the catchall exceptions, but usually exclude such statements as untrustworthy when offered by the defense.[17] As Professor Swift points out, courts also admitted statements of children in sexual abuse cases, de-

13. *See* Raeder, *supra* note 2, at 31.

14. Civil plaintiffs using catchall hearsay were successful in 49 of 113 (43%) attempts. Civil defendants using catchall hearsay were successful in 24 of 49 (49%) attempts. *See supra* note 2. Success in civil cases includes district court admissions, appellate affirmances of admitted catchall hearsay, and appellate reversals of excluded catchall hearsay.

15. *See* Swift, *supra* note 1, at 486-90; *see also* Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 508-13 (1987).

16. *Compare* United States v. Chapman, 866 F.2d 1326, 1329-32 (11th Cir.) (upholding admission of hearsay of disaffected spouse offered by prosecutor), *cert. denied*, 493 U.S. 932 (1989) *with* United States v. Fredericks, 599 F.2d 262, 264-66 (8th Cir. 1979) (upholding exclusion of hearsay uttered by defendant's brother's girlfriend which was offered by the defense).

17. *Compare* United States v. Doerr, 886 F.2d 944, 953, 956 (7th Cir. 1989) (upholding admission of an accomplice's grand jury testimony offered by prosecutors after accomplice refused to testify despite grant of immunity) *and* United States v. Workman, 860 F.2d 140, 143-44 (4th Cir. 1988) (upholding admission of taped statement of deceased codefendant offered by prosecutor), *cert. denied*, 489 U.S. 1078 (1989) *with* United States v. Colson, 662 F.2d 1389, 1392 (11th Cir. 1981) (upholding exclusion of evidence of taped conversation

spite the children being risky declarants.[18]

Professor Swift's alternative hypothesis that discretionary rulings in criminal cases usually benefit the prosecutor deserves consideration, with the caveat that rulings will favor the defense when a judge believes that the defendant is innocent or that the prosecution's evidence is overwhelming.[19] This premise is supported by her finding that judges were more willing to reverse in civil cases than in criminal cases,[20] which was also true in the catchall context. Arguably, the Confrontation Clause should resolve any doubt against admitting prosecutorial hearsay in favor of exclusion, while the defendant's right to due process should resolve any doubt against admitting defense hearsay in favor of admission. However, district court judges generally do not appear to give criminal defendants the benefit of such doubts, and appellate judges often appear to be less concerned about criminal defendants than civil litigants. Thus, any relaxation of the hearsay rule in the criminal context will permit defendants to introduce more of their hearsay, but is also likely to result in prosecutors deluging the trial with hearsay, subject only to shrinking constitutional constraints.[21] Even to the extent constitutionally permitted, such wholesale use of hearsay would change the way criminal trials look and might lower public acceptance of verdicts.[22]

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between police and twice convicted felon concerning attempts to procure false testimony against the defendant offered by defense).

In 27 catchall cases in which prosecutors offered accomplice evidence, they were successful in 20 (74%) cases. In comparison, in 19 catchall cases in which criminal defendants offered accomplice evidence, they were successful in only three (16%) cases. *See supra* note 2 (providing background on the study). Most accomplice hearsay offered by prosecutors were argued alternatively as Rule 801(d)(2)(E) co-conspirator statements, or as Rule 804(b)(3) statements against interest.

18. *See* Swift, *supra* note 1, at 490.

19. *Id.* at 483.

20. *Id.* at 479-80.

21. *See generally* Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 88-104 (1987) (advocating that rules excluding hearsay in civil cases should be curtailed while rules excluding hearsay in criminal cases should not be curtailed because they serve the additional function of shielding the accused from misuse of government power).

22. *Compare* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1372-75 (1985) (arguing that hearsay rules promote the stability of verdicts because the rules protect the public's immediate and continuing acceptance of jury verdicts) *with* Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057, 1062-72 (1986) (arguing that Pro-

IV. HAS THE HEARSAY RULE BEEN ABOLISHED BY JUDICIAL DISCRETION?

I question whether the hearsay rule still functions as an effective barrier to out-of-court statements which do not fit the traditional exceptions. By providing pieces of the puzzle which must be integrated into the larger hearsay picture, Professor Swift's findings actually support, rather than challenge, my belief. The categorical hearsay exceptions currently appear to act as a security blanket; a judge's careful analysis of these hearsay exceptions is often an academic exercise which masks the erosion of the hearsay ban under the guise of the discretionary catchall exceptions. Under the present structure of the Federal Rules of Evidence, it makes sense for judges to interpret the specific exceptions as written. Given the highly discretionary approach to hearsay employed in the catchall exceptions, there is no need to distort the specific exceptions. In other words, the catchall exceptions always provide a safety valve when tough decisions must be made.

Since the enactment of the Federal Rules of Evidence, there have been more than 400 decisions which discuss admission under the catchall exceptions,[23] a number which is clearly high given that the exception was intended to cover the "exceptional" case.[24] Fifty-four percent of the hearsay offered under the catchall exceptions is being admitted.[25] If criminal cases alone are considered, sixty-one percent of catchall hearsay is being admitted.[26] Moreover, since the enactment of the Federal Rules of Evidence, slightly more than 100 cases cited the catchall exceptions as an alternative to Rule 803(6)-(10), of which approximately seventy were references to Rule 803(6).[27] Roughly eighty cases cited the catchall exceptions as an alter-

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fessor Nesson's thesis that hearsay rules protect the stability of verdicts is flawed).

23. *See supra* note 2.

24. *See* S. REP. NO. 1277, 93d Cong., 2d Sess. 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066.

25. Of 408 cases available on Westlaw involving catchall hearsay, the offering party was successful in 222 (54%) cases. *See supra* note 2.

26. One hundred forty-nine of 246 (61%) criminal cases were successful. *See supra* note 2.

27. This is based on a Westlaw search from January 1975 through August 1991 for federal cases citing the catchall exception 803(24) or 804(b)(5) and the specific exception 803(6)-(10). District court cases which resulted in appellate court decisions were eliminated.

native to Rule 803(1)-(4).[28] In criminal cases, the catchall exceptions were cited about sixty times in decisions as an alternative to declarations against penal interest, and more than twenty times as alternatives to both former testimony and co-conspirators statements.[29] The current pressure points in the criminal justice system are reflected by eleven child abuse cases citing the catchall exceptions[30] and the numerous "war on drugs" cases which provide about thirty percent of the criminal catchall citations since 1985.[31] These latter statistics reflect citations, not admissions, and may simply demonstrate caution on the part of litigators who are attempting to be overly inclusive when arguing the admission of hearsay. However, the citation of the catchall exceptions implies that in a fair number of cases it is considered risky to cite only a traditional hearsay exception, arguably because it is doubtful that the hearsay fits comfortably into the categorical criteria. At a minimum, such citation indicates that litigators in the hearsay trenches view the catchall exceptions seriously and believe that judges are willing to apply them.

Undoubtedly, the mere existence of the catchall exceptions encourages litigants to introduce hearsay that is problematic under the traditional exceptions. Highly dubious business records have become grist for the catchall exceptions.[32] While the absolute number of cases admitting evidence clearly violating 803(6) is small, more decisions admit hearsay referring to both 803(6) and 803(24) to avoid answering hard questions about whether the hearsay fits into the traditional rule at all. Similarly, Rule 803(24) is being used to avoid the ban on prosecutorial records found in 803(6).[33]

The catchall exceptions also mask the introduction of other types of hearsay which defy admission under the specific excep-

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28. The same methodology employed in *supra* note 27 was used to identify criminal and civil cases citing the catchall exceptions as an alternative to Rule 803(1)-(4).

29. The same methodology employed in *supra* note 27 was used to identify criminal cases citing the catchall exceptions as an alternative to Rules 804(b)(3), 804(b)(1), and 801(d)(2)(E).

30. These cases were derived from the study described in *supra* note 2.

31. Drug cases were located by a Westlaw search for criminal cases referencing "drug!, heroin, cocaine, or marijuana" from January 1985 through August 1991 and comparing this number to the total number of criminal catchall cases during the same time frame.

32. *See* Raeder, *supra* note 2, at 33.

33. *See, e.g.*, United States v. Simmons, 773 F.2d 1455, 1458-59; (4th Cir. 1985); cf. Swift, *supra* note 1, at 492 n.57.

tion categories. Prosecutors attempted to introduce grand jury testimony in thirty-seven cases pursuant to the 804(b)(5) catchall exception.[34] In twenty-nine of these cases, the court admitted the hearsay.[35] Another hidden catchall category encompasses written and oral statements made to law enforcement officials which are prior consistent or inconsistent statements not fitting the Rule 801 criteria.[36] A growing number of cases appear to include statements to law enforcement officials by declarants not present at trial.[37] Such declarants have ranged from accomplices to spouses, victims, and truly disinterested individuals.[38]

Professor Swift found patterns indicating consistency of application by judges in interpreting the categorical exceptions. Even within the hidden catchall categories, however, admissibility of any particular catchall statement is quite difficult to predict. Such erosion of the hearsay rule is probably the worst of all worlds for litigators who must decide which cases to try by evaluating the potentially admissible evidence. Trials occur when one party believes that the evidence supports a very different result than that offered by opposing counsel. In determining whether to settle, litigators analyze their own evidence as well as that of their opponent. The catchall exceptions blind-side litigators from rationally making such decisions. While the notice provision of the catchall exceptions should alert the litigator that the rules of the game have changed, notice is sometimes forgiven due to the exigencies of trial practice.[39] Therefore, the catchall exceptions frustrate the certainty

34. *See supra* note 2 (discussing the study of catchall hearsay).

35. It is possible that Idaho v. Wright, 110 S. Ct. 3139 (1990), will reduce the admission of grand jury testimony based on the Confrontation Clause. *Id.* at 3147-48 (holding catchall hearsay evidence violates the Confrontation Clause unless it contains "particularized guarantees of trustworthiness" based on circumstances that surround the making of the statement). *See* United States v. Gomez-Lemos, 939 F.2d 326, 327, 332 (6th Cir. 1991) (holding that the admission of grand jury testimony violated the Confrontation Clause because *Wright* prohibited corroboration from being used to determine reliability).

36. *See* Raeder, *supra* note 2, at 33.

37. *Id.* at 37.

38. *Id.*

39. *See, e.g.*, United States v. Doe, 860 F.2d 488, 492 (1st Cir. 1988) (notice impractical and opponent did not contemporaneously object to lack of pre-trial notice or request a continuance), *cert. denied*, 490 U.S. 1049 (1989); *see also* United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978) ("requirement of fairness to an adversary contained in the advance notice requirement of Rule 803(24) and Rule 804(b)(5) [is] satisfied when . . . the proponent of the evidence is without fault in failing to notify his adversary prior to trial and the

that litigators depend upon in analyzing whether to try or settle a case.

The catchall exceptions permit the total erosion of the hearsay rule by judicial discretion, a result originally suggested when the Federal Rules were first drafted, but quickly rejected.[40] As currently interpreted, hearsay may be admitted under the catchall exceptions whenever a party has a good argument that the statements being introduced have equivalent circumstantial guarantees of trustworthiness.[41] Professor Swift even found that trustworthiness is being used to support the admission of otherwise inadmissible hearsay pursuant to categorical exceptions.[42] Obviously, not every catchall reference or exhortation to trustworthiness results in the admission of evidence. However, the perpetual citation of the catchall exceptions has taken its toll, and the appellate decisions are not offering an effective stopgap, in part, because they review the admission of such hearsay for abuse of discretion and harmless error.

More disturbing, the abuse of discretion standard has infected the review of evidentiary issues concerning questions of law which should be determined de novo.[43] Both Professor Swift's findings and my catchall review[44] confirm that most trial court decisions will be upheld on appeal, regardless of

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trial judge has offered sufficient time, by means of granting a continuance, for the party against whom the evidence is to be offered to prepare to meet and contest its admission").

40. *See* Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. L. REV. 925, 926-27 (forthcoming April 1992).

41. *See* Raeder, *supra* note 2, at 37-39; Raeder, *supra* note 40, at 935-37.

42. *See* Swift, *supra* note 1, at 491.

43. *See, e.g.*, United States v. Cherry, 938 F.2d. 748, 757 (7th Cir. 1991) (holding court did not abuse its discretion by admitting testimony about statements relayed by patient to doctor about the circumstances of her rape); Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144, 1149 (10th Cir.) (stating that appellate court will not disturb trial courts' conduct at trial proceedings, including rulings on motions and objections, unless it appears from the record that the trial court abused its discretion), *cert. denied*, 439 U.S. 862 (1978); *see also*, Stull v. Fuqua Indus., Inc., 906 F.2d 1271, 1274 (8th Cir. 1990) (finding that district court acted within its discretion when it excluded hospital record under 803(4)); Miller v. Keating, 754 F.2d 507, 512 (3d Cir. 1985) (finding that district court did not abuse its discretion when it admitted a statement under the excited utterance exception of 803(2)); United States v. Iron Shell, 633 F.2d 77, 85 (8th Cir. 1980) (finding that district court did not abuse its discretion when it admitted doctor's testimony under 803(4)), *cert. denied*, 450 U.S. 1001 (1981).

44. *See* Swift, *supra* note 1, at 478-79; Raeder, *supra* note 2, at 31.

which party cites the hearsay exception or which exception they cite. Thus, even without the catchall exceptions, a party who convinces the trial court to adopt its position on any given exception has a significant chance of being upheld on appeal. One reason this occurs is because appellate courts seem to have more difficulty holding that district court judges abused their discretion than holding that they made errors of law. Although this reflects the reality that appellate judges do not review discretionary decisions de novo, but simply determine whether the trial court's action exceeded its bounds, another factor must be considered. Finding an abuse of discretion is an indictment of the trial judge's behavior which is absent from an abstract pronouncement that the judge misapplied the law. Judges do not want to chastise their colleagues and are not currently required to do so.

Indeed, the Supreme Court has not encouraged judges to engage in rigorous appellate review, even for issues subject to the de novo standard. Instead, it recently blurred the difference between de novo, clearly erroneous, and abuse of discretion standards in a procedural context, noting that a "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."[45] Thus, we should not be surprised that courts often do not distinguish the nature of review for Confrontation Clause challenges or evidentiary issues which raise questions of law from that of discretionary evidentiary rulings.

The harmless error doctrine further deters careful appellate review by erecting another hurdle which must be overcome in order to win a reversal. Professor Swift reported that slightly more cases were saved by harmless error than reversed.[46] Are all such errors really harmless? Harmless error should be an oxymoron in the catchall context where the evidence is supposed to be the most probative on the issue, yet that does not stop its frequent invocation. Judge Posner has analogized the expansive code of constitutional criminal procedure to "the grapes of Tantalus, since the equally expansive harmless error rule in most cases prevents a criminal defendant from obtaining any benefit from the code."[47] Similarly,

45. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461 (1990).
46. *See* Swift, *supra* note 1, at 478 tbl. I.
47. United States v. Pallais, 921 F.2d 684, 691 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 134 (1991).

harmless error coupled with the ever expanding catchall exceptions have hastened the demise of the hearsay ban. Hearsay reformers need to consider the reality of what judges are currently doing in order to determine whether further change is desirable, the nature of such change, and the likely winners and losers in the new hearsay regime.

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Hearsay reformers should be interested in how the hearsay rule works in practice. Various proposals to abandon current hearsay policy are put forth in this symposium. A study of how the rule actually works may significantly affect these proposals. If, for example, we knew that judicial rulings in the nation's trial courts already amount to de facto abolition of the hearsay rule, some reformers might argue that the law ought to be relaxed to conform to current practice, while others might conclude that we should retrench and reform the law to control this judicial behavior. Whatever the posture, more information about how the hearsay rule works in practice—who uses hearsay, what kind, how often, and with what results—should enlighten a reformer's efforts.

In this Article, I report on the results of my research into what is happening to hearsay,[1] bearing in mind that the answer is elusive. Extensive data about the behavior of trial judges toward hearsay is not available. There simply is no record of most day-to-day rulings on evidence questions. Those rulings that are recorded in pre-trial orders and in trial transcripts are not easily accessible. Hotly contested evidence rulings can be questioned on appeal, but many rulings are not contested and many cases are not appealed. Thus, published judicial opinions present only a small sample of what is happening to hearsay. Other research techniques to investigate daily courtroom be-

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1. In this Article I focus on what is happening in summary judgments, bench trials, and jury trials. I have not taken as my topic those judicial actions to which the rigors and technicalities of evidence law do not apply—for example, sentencing and probable cause hearings. Nor have I investigated the vast array of administrative proceedings in which administrative law judges treat the use of hearsay under a "reasonable reliance" standard rather than the categorical admission process of the common law.

havior, such as courtroom observation, interviews, and surveys, would provide only anecdotal information and would be costly.

The inaccessibility of trial court actions regarding hearsay is a frustrating fact of life. However, published opinions do tell us something about how the hearsay rule works in practice. They present a fair sample of the hearsay that is contested and they obviously influence the subsequent behavior of trial judges. Valuable information can be gleaned from an extensive reading of published opinions, even without making claims of statistical significance for any particular finding.

This Article is an initial effort to report on the hearsay rule at work—who tries to use hearsay, what kind, and with what success—recognizing the limitations of available data. The resulting description sheds new light on existing commentary about judicial treatment of hearsay, and on predictions about what would happen if the hearsay rule were substantially liberalized or abolished.[2]

I. DESCRIPTION OF THE FEDERAL COURT CASE SAMPLE

Research for this Article included a reading of all of the federal district and appellate court opinions published in the LEXIS database that deal with Federal Rules of Evidence 803(1), (2) and (4) from January 1981 to July 1991, Rule 803(3) from January 1986 to July 1991, and all reported federal appellate opinions dealing with Rule 803(6) from January 1987 to July 1991.[3] Only those opinions that presented a clear decision either to admit or exclude an item of hearsay under one of the exceptions were counted.[4]

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2. *See, e.g.*, RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 520-25 (2d ed. 1982); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 800[03], at 800-16 to 800-19 & at Supp. 7 (1991 & Supp. 1991); Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 88-122 (1987); Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 498-518 (1987).

3. The term "published" opinion or case refers to publication on the LEXIS system, not just in the *Federal Reporter* or *Federal Supplement*. The search called up cases mentioning the particular Federal Rule 803 subsection within 50 words of the word "hearsay." Because the number of reported cases citing Rule 803(3) and (6) was much greater than the other exceptions, I limited my search for Rule 803(3) and (6) opinions to the more recent years, and for Rule 803(6) to appellate cases only.

4. I did not count those cases in which the court cited the Federal Rule but did not actually use the rule to decide a hearsay issue. A few cases dealt with habeas corpus petitions from state prisoners claiming Confrontation

The categories of admissible hearsay selected for study—Rule 803(1)-(4) and Rule 803(6)—present interesting contrasts. Hearsay statements governed by Rule 803(1)-(4)[5] (present sense impressions, excited utterances, statements of state of mind, and statements made for medical purposes—the common law's *res gestae*) typically involve oral rather than written evidence, and are not usually generated in the declarant's routine out-of-court conduct. In addition, these hearsay categories are important in tort and criminal cases because they usually relate the facts that are most sharply contested.[6]

Hearsay statements governed by Rule 803(6)[7] (business

Clause violations. I counted only those cases in which the federal court indicated its resolution of the hearsay issue decided by the state court.

5. These Rule 803 exceptions read as follows:

> (1) Present sense impressions. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
>
> (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

FED. R. EVID. 803(1)-(4).

6. Professor Park also notes the centricity of the Rule 803(1)-(4) categories and refers to them as the "transaction exceptions" which admit statements "that are part of the same general transaction or occurrence as independently admissible nonverbal conduct." Park, *supra* note 2, at 74.

7. Rule 803(6) reads as follows:

> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

records), on the other hand, must be written and must be the product of a "regular" out-of-court practice. They often do not report hotly disputed facts. In addition, the Rule 803(1)-(4) exceptions are strictly categorical and do not refer to "trustworthiness," whereas Rule 803(6) permits the court to consider trustworthiness as a basis for exclusion.

For purposes of comparison with the federal decisions, I also read all reported opinions involving these same hearsay exceptions in two state jurisdictions—Michigan and Florida—that had adopted a version of the Federal Rules of Evidence.[8] The number of such opinions published from January 1981 to July 1991 in both states was small. It was therefore not possible to analyze patterns of hearsay use, but Part IV of this Article contains a discussion of these states' judicial interpretations of the Rule 803(1)-(4) exceptions in cases of alleged sexual abuse of children.

The fact that a large percentage of federal circuit court opinions (and in some circuits a majority of the opinions) are not officially published necessarily limits our ability even to describe what appellate judges, let alone trial judges, are doing with hearsay.[9] In general, official publication means that some

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8. Both states have modified the Federal Rules of Evidence in interesting ways. For example, "Michigan Rule 803(4) is narrower than Federal Rule 803(4), restricting the exception to the treatment situation by including the phrase in connection with 'treatment' after 'diagnosis' and changing the word 'pertinent' to 'necessary.'" WEINSTEIN & BERGER, *supra* note 2, ¶ 803(4)[02], at 803-154 to 803-155.

The Florida statute contains more variation. Florida Rule 803(1) restricts the admission of a statement "made under circumstances that indicate its lack of trustworthiness." FLA. STAT. ANN. § 90.803(1) (West 1979). Florida also modified its versions of Rule 803(3) and (4), but not in ways important to this Article.

It is significant that both Michigan and Florida omitted residual provisions similar to the Federal Rules 803(24) and 804(b)(5). In 1985, Florida enacted a special residual exception for statements of abused children. *See infra* note 94 and accompanying text.

9. At present, no systematic studies exist which even permit us to reliably estimate how many decisions were unpublished in each of the years since 1964. . . . In 1984, [Administrative Office] data suggest that the rate of nonpublication varied from a low of 33.6 percent in the Eighth Circuit to a high of 79.2 percent in the Third.

Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990). Michigan publishes relatively few state appellate court opinions. In 1990, for example, of 4,190 opinions, the Michigan Court of Appeals published only 348 opinions, and released another 128 opinions at the request of the parties. Telephone Interview with Carole Bryde, Deputy Clerk, Michigan Court of Appeals (Sept. 27, 1991).

legal issues, but not necessarily the hearsay issues, had precedential value under criteria that differ from circuit to circuit and from state to state.[10] If unpublished opinions were studied, new insights into the hearsay rule might indeed emerge.[11]

Parts II through IV of this Article report the major descriptive insights into the hearsay rule at work that I gained from study of the federal, Michigan, and Florida opinions. Part V reports on a small survey of state prosecutors concerning judicial competence with hearsay. Part VI analyzes how the reported trends in hearsay practice might influence our thinking about hearsay reform.

II. WHAT IS HAPPENING TO HEARSAY UNDER RULES 803(1)-(4) AND 803(6)?

Table I reports basic information from the published cases about federal district court admission of hearsay.

A. DISTRICT COURTS SEE MORE CRIMINAL CASES RAISING HEARSAY ISSUES, DO NOT JUST ROUTINELY ADMIT HEARSAY, AND ARE SELDOM REVERSED

Table I shows first that for every hearsay exception but Rule 803(4), criminal prosecutions raise more of the contested hearsay issues than do civil cases. This is true even though civil cases preponderate on the trial and appellate dockets in federal court.[12] Second, district courts certainly have not abolished the

10. While "each circuit continues to operate under its own criteria for determining whether a decision merits publication . . . the main thrust of the rules in each circuit is that only decisions with precedential value will be published." Songer, *supra* note 9, at 308. Michigan provides more precise guidelines for mandatory publication, such as those cases that establish a new rule of law, alter or modify an existing rule of law, criticize existing law, or raise legal issues affecting the public interest. MICH. CT. R. 7.215(B).

11. A study of all unpublished opinions in three federal circuits for 1986 suggests that "there are important reasons to include at least a sample of unpublished decisions in most future studies of the courts of appeals." Songer, *supra* note 9, at 313. Songer's study reports that these decisions did not uniformly affirm the decisions of the court or agency below, that the political values of the judges appeared to affect their votes in a nontrivial number of unpublished opinions, that individual judges participated in published opinions at significantly different rates, and that different circuits may attribute significance to appeals based on the status of appellants. *Id.* at 311-13.

12. Sixty percent of the appellate opinions read for this Article involved criminal prosecutions. In contrast, only 31% of all federal cases terminated on the merits during the year ending June 30, 1990 involved criminal cases. ADMINISTRATIVE OFFICE OF THE UNITED STATES, 1990 REPORT OF THE DIRECTOR: ACTIVITIES OF THE ADMINISTRATIVE OFFICE 106 (1990) [hereinafter ADMINIS-

TABLE I

GENERAL INFORMATION ON FEDERAL DISTRICT COURT

ADMISSION OF HEARSAY

Federal Rule of Evidence	Total Cases	Civil	Criminal	Total Court Admits	Trial Court Excludes	% Admits	Total Appeals	Total Errors	Total Reversible Errors
803(1)	37	16	21	24	13	65%	26	6	2
803(2)	31	10	21	22	9	71%	27	7	3
803(3)	60	19	41	30	30	50%	45	14	8
803(4)	27	18	9	16	11	59%	18	5	5
Subtotal	155	63	92	92	63	59%	116	32	18
803(6)	82	34	48	67	15	82%	82	19	7
Total	237	97	140	159	78	67%	198	51	25

hearsay rule under these five exceptions by admitting hearsay whenever it is offered. In fact, Table I shows that in the reported cases dealing with Rule 803(1)-(4), district courts have excluded the hearsay in forty-one percent of the cases.[13]

Finally, whether federal district courts admit or exclude the hearsay, appellate courts usually uphold the district courts' decision on appeal. Table I shows that twenty-six percent[14] of the district courts' decisions were found erroneous but in only thirteen percent[15] of the cases did the errors cause reversal. This rate of reversal corresponds with overall reversal rates for civil and criminal cases,[16] but the impression is unmistakable that many federal appellate courts do not think it is their role

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TRATIVE OFFICE REPORT]. These figures exclude prisoner petitions, bankruptcy cases, administrative appeals, and original proceedings, which, if included, would tip the caseload even more strongly toward civil cases. *Id.* During the same year, courts completed 11,502 civil trials as compared to 8931 criminal trials. *Id.* at 161. Other researchers have also noted that criminal cases disproportionately involve evidentiary issues. *See* Mark M. Dobson, *Evidence, 1987 Survey of Florida Law*, 12 NOVA L. REV. 463, 464 n.4 (1988) (During 1987, 67% of criminal appellate cases in the Florida state courts discussed evidentiary issues, while only 33% of the civil opinions did so.).

13. District courts admitted hearsay in 59% of the cases, *see* tbl. I, and excluded hearsay in the remaining 41% of the cases.

14. Fifty-one of 198. *See supra* tbl. I.

15. Twenty-five of 198. *See supra* tbl. I.

16. Overall, the circuit courts reversed in 13% of appeals terminated on the merits during the year ending June 30, 1990. ADMINISTRATIVE OFFICE REPORT, *supra* note 12, at 121. (Again, this figure excludes prisoner petitions, bankruptcy cases, administrative appeals, and original proceedings.) *But see* David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 966 n.129 (1990) (citing authorities suggesting that reversal rates for evidentiary errors in federal courts are disproportionately low).

to review district court admission and exclusion decisions carefully. The deferential "abuse of discretion" standard of review[17] produces a low rate of trial court error. Sometimes, appellate courts decline to decide the question of error at all.[18] And, when error is found, the harmless error doctrine reduces even further the rate of actual reversal, as the next table shows.[19]

B. Reversible Error is More Frequent in Civil than in Criminal Cases

Table II reports the number of errors that were found to require reversal compared with the total number of errors committed in admitting hearsay on behalf of each party. Table II shows that prosecutors are very successful in having admission of hearsay upheld. While making ten findings of error in criminal cases under Rule 803(1)-(4), appellate courts reversed only one case. And while making six findings of error under 803(6), appellate courts reversed only two cases. Overall, appellate courts reversed only three of the sixteen (19%) criminal cases.

Reversals in civil cases for the improper admission of hear-

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17. Many federal circuit courts recite variations of the following litany prior to deciding evidence issues:

> Before turning to appellants' specific claims, we recognize 'the long held view of this Circuit that the trial judge is in the best position to weigh competing interests in deciding whether or not to admit certain evidence. Absent an abuse of discretion, the decision of the trial judge to admit or reject evidence will not be overturned by an appellate court.'

United States v. Scarpa, 913 F.2d 993, 1015 (2d Cir. 1990) (citations omitted).

Circuit courts do, however, recognize that correct construction of the Federal Rules is a question of law to be reviewed *de novo*. United States v. Lai, 934 F.2d 1414, 1419, 1421 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 947 (1992).

18. *See, e.g.*, United States v. Bentley, 875 F.2d 1114, 1118 (5th Cir. 1989) ("Thus, even if the admission of the records violated the hearsay rules or the confrontation clause, an issue we do not decide, such error was harmless beyond a reasonable doubt.").

19. Whether appellate courts are abusing the harmless error doctrine is an important topic that is beyond the scope of this Article. In the cases read for this Article, harmless error was often found because the declarant also testified. The hearsay item was then "merely cumulative," even if erroneously admitted. This analysis ignores the powerful impact that a prior consistent hearsay statement can have. In three Florida cases, the courts recognized the harmful effect of improperly admitting a victim's prior consistent hearsay statement when charges of sexual abuse boiled down to a credibility contest between the victim and the accused. *See* Kopko v. State, 577 So. 2d 956, 962 (Fla. Dist. Ct. App. 1991); Lazarowicz v. State, 561 So. 2d 392, 394 (Fla. Dist. Ct. App. 1990); Bradley v. State, 546 So. 2d 445, 447 (Fla. Dist. Ct. App. 1989).

TABLE II

REVERSIBLE ERRORS BY PARTY

Federal Rule of Evidence	Civil Plaintiff		Civil Defendant		Prosecutor		Criminal Defendant	
	Reversible Errors	Total Errors	Reversible Errors	Total Errors	Reversible Errors	Total Errors	Reversible Errors	Total Errors
803(1)	0	1	1	1	1	3	0	0
803(2)	0	0	2	4	0	4	0	0
803(3)	3	3	0	0	0	3	0	0
803(4)	0	0	1	2	0	0	0	0
Sub Total	3	4	4	7	1	10	0	0
803(6)	3	4	2	6	2	6	0	0
Total	6	8	6	13	3	16	0	0

say are far more frequent.[20] Table II shows that of twenty-one errors found in civil cases, appellate courts reversed twelve (57%) decisions. This higher rate of reversal in civil cases contradicts the generally held view that courts strictly enforce the exclusion of hearsay in *criminal* cases.[21] Possible explanations include judicial reluctance to expend governmental resources in new criminal trials, better preparation of criminal cases through police work, or tolerance of error in criminal cases when judges believe that the defendant is guilty.

C. In the Published Cases, Plaintiffs and Prosecutors Use More Hearsay

Table III shows, for each respective party, the number of published attempts to offer hearsay under Rule 803(1)-(4), the number of successful admissions (after "correction" by the appellate court where applicable), and the resulting rate of successful hearsay use. The figures in Table III reveal a consistent level of attempted use of hearsay by plaintiffs and prosecutors across all exceptions, a lower level of attempted use by civil defendants, and with the exception of Rule 803(3), an even lower

20. Overall reversal rates in federal courts support this finding generally, but do not reveal the comparative numbers of harmful versus harmless errors. In the year ending June 30, 1990, the circuit courts reversed twice as often in civil cases than in criminal cases (eight percent of criminal appeals and 16% of civil appeals—excluding prisoner petitions, bankruptcy cases, and administrative appeals). ADMINISTRATIVE OFFICE REPORT, *supra* note 12, at 121.

21. Professor Park states that "the judicial attitude toward exclusion appears to be stricter in criminal cases." Park, *supra* note 2, at 87. Park relied on the proposition asserted by Judge Weinstein and Professor Berger that "[r]eversible error is found considerably more frequently in criminal cases where hearsay is improperly admitted against a defendant." WEINSTEIN & BERGER, *supra* note 2, ¶ 800[03], at 800-18. The published cases summarized in Table II do not support this proposition.

TABLE III

SUCCESSFUL USE OF HEARSAY BY PARTY

Federal Rule of Evidence	Civil Plaintiff			Civil Defendant			Prosecutor			Criminal Defendant		
	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits
803(1)	11	5	45%	5	3	60%	18	10	83%	5	0	0%
803(2)	7	3	43%	3	1	33%	18	13	72%	3	0	0%
803(3)	15	10	67%	4	4	100%	16	12	75%	25	6	24%
803(4)	13	7	54%	5	3	60%	8	8	100%	1	1	100%
Total	46	25	54%	17	11	65%	58	43	74%	34	7	21%

level of use by criminal defendants. What explains this? Perhaps plaintiffs and prosecutors pursue those cases in which at least some of the transactional hearsay (hearsay that follows closely on the litigated events) supports their claim. Then, they try to use this hearsay because they bear the burdens of proof in civil and criminal cases.

It is surprising, however, that civil defendants are underrepresented as hearsay users even in the cases dealing with business records, as is shown in Table IV.

TABLE IV

SUCCESSFUL USE OF BUSINESS RECORDS BY PARTY

Federal Rule of Evidence	Civil Plaintiff			Civil Defendant			Prosecutor			Criminal Defendant		
	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits	Total Offers	Correct Admits	% Admits
803(6)	20	11	55%	14	5	36%	44	36	82%	4	1	25%

The figures in Table IV show that civil defendants were proponents of hearsay in only fourteen of the eighty-two (17%) total business records cases. This is somewhat counter-intuitive. Professors Lempert and Saltzburg have written that wealthy organizations "are likely to have access to more hearsay evidence than the individuals they oppose."[22] Business records exemplify the type of hearsay that civil defendants, which are large organizations in most of the published cases, can create and utilize to their advantage.[23]

Perhaps civil defendants show up less frequently in the published cases because the hearsay they offer is more clearly admissible and thus contested less frequently. There is, how-

22. LEMPERT & SALTZBURG, *supra* note 2, at 521.

23. "Where the information is recorded in files, it may have been recorded selectively by agents who elicited information by leading questions or who included only what they thought their superiors most wanted to hear, and it may include statements by individuals of doubtful credibility." *Id.* at 522.

ever, a high rate of error in civil defendants' use of business records (five errors found in fourteen attempts by civil defendants, plus two findings that admission of the evidence was "harmless" whether erroneous or not). Another possible explanation, suggested by Professor Raeder in her Comment to this Article, is that tactical trial considerations motivate civil defendants to present live witnesses whenever possible and to avoid the use of hotly disputed hearsay.[24]

D. Certain Parties Seem To Have More Success Getting Their Hearsay Admitted and Upheld

Tables III and IV also show the rate of success in securing admission of hearsay by the respective parties. Prosecutors are the most successful: Seventy-four percent of their attempts resulted in admission under the Rule 803(1)-(4) exceptions, and eighty-two percent were successful under Rule 803(6). Criminal defendants, on the other hand, found the *exclusion* of their hearsay upheld in more than seventy-five percent of their attempts.[25]

In civil cases, plaintiffs were successful in getting their hearsay admitted in approximately fifty-five percent of the attempts decided under both Rule 803(1)-(4) and Rule 803(6). Civil defendants were more successful under Rule 803(1)-(4)

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24. *See* Myrna S. Raeder, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion*, 76 MINN. L. REV. 507, 509-10 (1992).

25. These figures do not include criminal acquittals since prosecutors cannot appeal such cases. In those cases we might expect to find more exclusion of prosecutors' hearsay and more admission of defendants' hearsay, thus changing the prosecutors' and defendants' success rates. Although the government can appeal certain types of final orders and certain interlocutory rulings, including suppression of evidence pursuant to 18 U.S.C. § 3731 (1988), the government cannot appeal evidentiary rulings after jeopardy has attached. *See* Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 53 (1990). In several reported Michigan cases, the pre-trial suppression of prosecutors' hearsay that had led to dismissal of the criminal charges was reversed on appeal. *See, e.g.*, People v. Edgar, 317 N.W.2d 675, 677-78 (Mich. Ct. App. 1981). Nevertheless, the published criminal appeals are a fair sample of how courts resolve contested hearsay issues in criminal cases. Only 20% of criminal cases tried in federal court result in acquittal, so 80% of criminal trials are subject to appellate review. *See* ADMINISTRATIVE OFFICE REPORT, *supra* note 12, at 196. During the reported period, there were 56,519 total criminal defendants. Of these criminal defendants, 8193 obtained a dismissal and 40,452 pled guilty or nolo contendere. Of the remaining 7874 criminal defendants, judges convicted 14%, juries convicted 66%, and the remaining 20% were acquitted. *Id.* It is also claimed that most convicted defendants do appeal and do raise any possibly significant legal issue. *See* Stith, *supra*, at 13 n.39.

than Rule 803(6), getting hearsay admitted in sixty-five percent of their attempts under the former, but in only thirty-six percent under the latter.

There may or may not be statistical significance in the comparative success rates in these published cases, but a rough pattern does emerge. With Rule 803(1)-(4) hearsay, prosecutors are far more successful than all other parties, and civil defendants may be slightly more successful than plaintiffs.

A common sense explanation of these comparative success rates would be that prosecutors are better at securing admissible hearsay, given their resources at the crime scene and the repetitive nature of the cases they try. Plaintiffs need to use more contested hearsay than do defendants to fulfill their production burden, and more of their hearsay (indeed, about fifty percent of it) may be questionable.

A critic of the justice system might say, however, that social, political, and economic values affect judicial decision-making—even decisions about the admission of hearsay. Such a critic would hypothesize that outcomes are influenced by who is offering the hearsay. In a system where the perception of being soft on crime can be politically damaging for the court, prosecutors may get almost any hearsay admitted and are then successful on appeal. Courts may also treat civil defendants (who generally represent more established economic and societal interests) generously, while treating civil plaintiffs (underdogs seeking to change the status quo in their favor) grudgingly and with suspicion. Criminal defendants, particularly in the drug and organized crime cases that inhabit the federal courts, get nowhere with hearsay. According to these explanations, judges have not abolished the hearsay rule de facto, but they may be discriminating in their application of it *sub rosa*.

Some commentators suggest that judges do exhibit bias against criminal defendants when they make decisions as a matter of "judicial discretion" in other contexts.[26] However,

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26. *See* J. Alexander Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 838, 864-65 (1989). Professor Tanford reports that a random sample of opinions reviewing the admissibility of prejudicial evidence demonstrates that "appellate courts systematically rule against criminal defendants when making prejudice rule decisions." *Id.* at 865. Others suggest that judicial bias may be class-based. *Id.* at 865 n.229. If so, judges could be predisposed against some civil plaintiffs.

The study of unpublished federal appellate decisions, discussed by Songer, *supra* note 9, reports that "the Eleventh Circuit was more than twice as likely as the Fourth Circuit to publish opinions in cases with underdog appellants and all of the differences were [statistically] significant." *Id.* at 313.

the trial court's decision to admit or exclude hearsay is supposed to be categorical, not discretionary. The categorical structure of the rule is intended to control the effects of judicial bias or favoritism.[27] So if the admission or exclusion of hearsay favors certain parties and disfavors others, this might be evidence that judges are inserting a more subjective and discretionary criterion of trustworthiness into the categorical rules.[28] A closer look at the Rule 803(1)-(4) cases, however, suggests another explanation for the pattern of overall rulings that operates irrespective of alleged discretionary biases of current federal judges.

E. Differences in the Types of Hearsay Declarants Offered by the Parties Under Rule 803(1)-(4) May Explain Prosecutors' Comparative Success

There is a certain degree of consistency in the types of contested declarants' statements offered by prosecutors, criminal defendants, and civil plaintiffs. Less consistency exists in the hearsay offered by civil defendants. Moreover, the Rule 803(1)-(4) exceptions seem to operate consistently in favor of the types of statements prosecutors offer, and against the types of statements criminal defendants and civil plaintiffs offer. This suggests an explanation for the comparative success rates of the parties that is rooted in hearsay policy.

In the cases represented in Table III, forty-five percent of the hearsay statements offered by prosecutors (twenty-six of fifty-eight) were made by crime victims, and courts admitted these statements primarily under the exceptions for excited utterances and statements made for medical purposes. Forty-three percent of the hearsay statements offered by plaintiffs (twenty of forty-six) were plaintiffs' own out-of-court statements about the accident or other injury. Eighty-eight percent of the hearsay statements offered by criminal defendants

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Songer concludes that judges in the Fourth Circuit were much less likely than their counterparts on the Eleventh Circuit to attribute significance to appeals brought by lower status appellants. "Nothing in the official criteria for publication of the two circuits suggests that such a difference should exist and thus the difference is most likely attributable to value preferences of the judges." *Id.*

27. Indeed, this is one of the principal arguments favoring the categorical process of admitting hearsay over a discretionary approach. *See* LEMPERT & SALTZBURG, *supra* note 2, at 523.

28. For cases that reflect this trend see *infra* notes 57, 69 and accompanying text.

(thirty of thirty-four) were defendants' own out-of-court statements, expressing the defendants' innocent state of mind after the alleged crime, and even after arrest. Civil defendants offered statements made by a variety of declarants.[29]

If we ask why prosecutors, plaintiffs, and criminal defendants offer these recurring types of declarants' statements, the answer is simple: They have access to them and they need them. Prosecutors need the statements of victims to prove the crime and the perpetrator. If the victim does not testify, the prosecutor may still use evidence of the victim's previous out-of-court statements. If the victim does testify, these hearsay statements are useful to corroborate the in-court testimony. Similarly, civil plaintiffs, particularly tort victims, need their own statements to prove the tort or other civil wrong, and to prove damages. If the plaintiff does not testify (usually because he or she is deceased), the plaintiff's own prior hearsay statement may be available. Again, the plaintiff's own hearsay is potent corroboration even if the plaintiff does testify. Criminal defendants often do not testify in their own defense, but they would like to present their own exculpatory story to the trier of fact. Thus, criminal defendants resort to statements they made outside of court, primarily using the Rule 803(3) exception for "state of mind."[30]

Common sense may explain why these types of hearsay statements are consistently offered, but why there is something of a consistent judicial response to them in the published opinions must still be examined. Is there over-exclusion of the hearsay offered by criminal defendants and civil plaintiffs that amounts to judicial "revision" of the hearsay rule? Is there over-admission of the hearsay offered by prosecutors that amounts to judicial "abolition?"

The answers to these questions, arrived at in Parts III and IV of this Article, can be briefly stated. It does not appear that judges are revising the Federal Rules to over-exclude the hearsay statements of civil tort plaintiffs and criminal defendants;

29. Civil defendants offered statements made by their own employees in only three cases. They also offered observations made by third parties under Rule 803(1) and 803(2), and medical records that incorporated information previously related by plaintiffs under Rule 803(4).

30. One district attorney wrote in response to a written survey conducted for this Article that when defendants get this type of hearsay admitted, "this tactic helps defendant's attorneys get in defendant's defense without having to put their client on the stand." *See infra* note 97 and accompanying text (discussing how the written survey was conducted).

the decisions are justifiable textbook applications of the categorical exceptions. Expansive treatment of the exceptions does occur, however, when judges admit the hearsay statements of crime victims. The comparative utility of the Rule 803(1)-(4) exceptions for admitting the statements of crime victims versus the statements of civil tort victims is striking.

III. CURRENT HEARSAY POLICY UNDER RULES 803(1)-(4) OPERATES AGAINST "RISKY DECLARANTS"

Criminal defendants and civil plaintiffs appear to have two things in common: They seek to admit their own statements as hearsay and they do not fare well in getting them admitted. Why? Simply put, the out-of-court statements of these parties illustrate the types of circumstantial sincerity risks that the hearsay rule has always sought to exclude.[31] One circumstantial risk of the declarant's insincerity results from the fact that such statements are typically made after the events that gave rise to the litigation. Another arises because these statements are usually self-serving; the civil plaintiff's statement attributes cause or fault; the criminal defendant's statement expresses the defendant's innocence.

In a previous article, I described the paradigm "risky declarant" who demonstrated these classic sincerity risks.[32] The paradigm was a civil tort plaintiff injured in an industrial acci-

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31. Professor Imwinkelried traces the history of what he calls the common law "obsession" with sincerity risks, an obsession shared by generations of evidence rule drafters. Edward J. Imwinkelried, *The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt—and Quickly Forgotten*, 41 FLA. L. REV. 215, 219-22 (1989). The emphasis on sincerity remains in the Federal Rules, although the Rules also stress the problem of the declarant's memory. *Id.* at 228-29.

32. Swift, *supra* note 2, at 495-98. Three paradigm declarants described in the article represent three of the principal problems addressed by the hearsay rule. My purpose was to analyze whether other rules of admission and exclusion and the rules evaluating sufficiency would exert any limits on the use of hearsay spoken by these three declarants if the hearsay rule was abolished. I also examined what effect free admission would have on the factfinder, the parties, and the adversary system. The three paradigm declarants were the:

1. Abstract declarant, presenting the problem of evaluating the reliability of a hearsay statement with only minimal information about its source;
2. Risky declarant, presenting the problem of evaluating hearsay motivated by self-serving interests; and
3. Burden-shifting declarant, presenting the problem of trial "by affidavit" or "by business record" which shifts the burden onto the opponent to impeach a wholly documentary case.

dent. The circumstances in which she spoke outside of court gave her a motive to blame the accident on the malfunctioning of the machine, rather than on herself.[33]

In the recent federal cases, similar risky declarants—civil tort plaintiffs[34] and criminal defendants[35]—offered self-serving out-of-court statements. These "risky" hearsay statements, which supposedly bear an unacceptable risk of insincerity, are being excluded from trials, thus showing that the hearsay rule has not been abolished. My reading of most of the cases suggests that the courts carefully applied the categorical exceptions. Thus, judges excluded the "present sense impressions" of civil plaintiffs that were not contemporaneous with the perceived event under Rule 803(1).[36] They excluded "excited ut-

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Id. at 498-518.

In the recent federal cases discussed in this current Article, courts exclude the statements made by the abstract and risky declarants. The documentary burden-shifting declarant did not appear, but an additional type did appear—the child victim of alleged sex abuse. *See infra* part IV.

33. The paradigm case was Land v. American Mut. Ins. Co., 582 F. Supp. 1484, 1485-86 (E.D. Mich. 1984). The plaintiff sued the manufacturer of the machine that she had been operating, but she died before trial from unrelated causes and thus was not available to testify about what happened to her. She made the hearsay statement eight days after the accident to an adjustor for her employer's unemployment insurance company. In granting the defendant's motion for summary judgment, the district court held that Mrs. Land's statement did not fall within any hearsay exception. *Id.* at 1486, 1489.

34. *See, e.g.*, Rock v. Huffco Gas & Oil Co., 922 F.2d 272, 277-283 (5th Cir. 1991) (statement by seaman afflicted with a twisted ankle attributing fall to hole in deck); Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 889-90 (9th Cir. 1991) (statement by victim of a biking accident that "the brakes failed"); Gong v. Hirsch, 913 F.2d 1269, 1272-74 (7th Cir. 1990) (statement by plaintiff suing for medical malpractice reporting the cause of ulcer); Williams v. Wal-Mart Stores, Inc., 922 F.2d 1357, 1359-61 (8th Cir. 1990) (statement by plaintiff suing for negligence reporting details of accident); Clemente v. Espinosa, 749 F. Supp. 672, 680-81 (E.D. Pa. 1990) (statement by plaintiff suing for slander); Ramrattan v. Burger King Corp., 656 F. Supp. 522, 530 (D. Md. 1987) (statement by plaintiff passenger in a car hit by a delivery truck reporting which vehicle ran the red light).

35. Thirty of the 38 attempts by criminal defendants to use hearsay involve their own statements. *See supra* tbls. III and IV. *See, e.g.*, United States v. Schwartz, 924 F.2d 410, 423-24 (2d Cir. 1991) (exculpatory conversations with informer three months after conspiracy terminated excluded under 803(3)); United States v. Elem, 845 F.2d 170, 174 (8th Cir. 1988) (post-arrest exculpatory statement excluded under 803(2)); United States v. Bancroft, No. 86-1554, 1987 U.S. App. LEXIS 12191, at *4-5 (6th Cir. Sept. 11, 1987) (defendant's letter to his wife describing the alleged crime, written two weeks after the crime, excluded under 803(1)).

36. *See Huffco Gas*, 922 F.2d at 280-81 (excluding accident report filed by plaintiff two days after the accident); *Pau*, 928 F.2d at 890 (excluding utterance made two days after the accident).

terances" by plaintiffs due to an insufficient showing of "stress" caused by a startling event.[37] They excluded statements of plaintiffs' state of mind as irrelevant or as impermissible statements of belief to prove a past fact remembered.[38] And judges excluded plaintiffs' statements to physicians as not "reasonably pertinent to diagnosis or treatment" under Rule 803(4) when the statements contained specific descriptions of cause or attributed fault.[39] Some trial courts viewed medical histories offered by injured plaintiffs as too self-serving (too "risky") to be reliable when offered by the plaintiff at trial, but if the statements contained historical facts about pain and treatment, the appellate courts *required* admission.[40] Plaintiffs' statements contained in medical records were admitted as admissions, whether risky or not, when offered by defendants.[41]

The post-crime, and usually post-arrest, exculpatory state-

37. *See, e.g., Pau*, 928 F.2d at 889-90. *But see* Morgan v. Foretich, 846 F.2d 941, 945 (8th Cir. 1988) (reversing exclusion of statements made by a three-year-old sexual abuse victim and providing an expansive interpretation of the Rule 803(2) excited utterance exception). *Morgan* is discussed in the text accompanying *infra* notes 63-69.

38. *See Huffco Gas*, 922 F.2d at 279 (finding plaintiff's statements of pain caused by twisted ankle not relevant to the dispute); Mayoza v. Heinold Commodities, Inc., 871 F.2d 672, 675-76 (7th Cir. 1989) (excluding plaintiff's expressions of shock after being told that he held worthless investments in silver as an improper statement of "belief" to prove a fact remembered—that he had not authorized the investment).

39. *See Huffco Gas*, 922 F.2d at 277-78 (admitting plaintiff's statements that he twisted his ankle, but excluding statements regarding the specific cause of the accident—falling through a rusted-out step or slipping in some grease); Gong v. Hirsch, 913 F.2d 1269, 1272-74 (7th Cir. 1990) (excluding plaintiff's statement that defendant's administration of prednisone caused his ulcer); Roberts v. Hollocher, 664 F.2d 200, 204-05 (8th Cir. 1981) (stating that if the doctor's conclusion that plaintiff's injuries were caused by "excessive force . . . were based on Roberts' statements to the doctor, we would have none of the guarantees of proper motive and trustworthiness"); Ramrattan v. Burger King Corp., 656 F. Supp. 522, 530 (D. Md. 1987) (excluding statements in hospital record as to which vehicle ran the red light and caused the accident).

40. *See* Williams v. Wal-Mart Stores, Inc., 922 F.2d 1357, 1362-63 (8th Cir. 1990); Wooldridge v. Bowen, 816 F.2d 157, 159-60 (4th Cir. 1987); *see also* Elmer v. Tenneco Resins, Inc., 698 F. Supp. 535, 544-45 (D. Del. 1988); Harrigan v. New Eng. Mut. Life Ins. Co., 693 F. Supp. 1531, 1532 (S.D.N.Y. 1988).

41. *See* Navarro de Cosme v. Hospital Pavia, 922 F.2d 926, 933 (1st Cir. 1991) (admitting notes of social worker written directly on plaintiff's medical record because the notes were recorded for the purpose of obtaining treatment); Onujiogu v. United States, 817 F.2d 3, 4-6 (1st Cir. 1987) (admitting hospital record as an admission that four-year-old pulled pot of hot water onto himself and mother, but ignoring issue of whether the emergency room nurse would record such a specific statement of cause as part of her regular medical practice); Harrell v. Fibreboard, No. 85-4604, 1989 U.S. Dist. LEXIS 14196, at *22-26 (E.D. Pa. Nov. 27, 1989) (admitting medical records under a combination

ments of criminal defendants were excluded as not being sufficiently contemporaneous with any relevant perceived event under Rule 803(1);[42] as not proved to be made while "excited" by anything under Rule 803(2);[43] as not describing any relevant then existing state of mind under Rule 803(3);[44] or as attempting to use state of mind simply to prove past facts.[45] The federal courts seem to apply the "state of mind" doctrine with great care.[46] When criminal defendants made statements that reflected an innocent state of mind *before* the crime occurred, these statements were admitted under Rule 803(3).[47]

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of the Rule 803(6) business records exception and Rule 803(4) medical records exception).

42. *See, e.g.*, United States v. Bancroft, No. 86-1554, 1987 U.S. App. LEXIS 12191, at *4-5 (6th Cir. Sept. 11, 1987) (excluding letter written two weeks after the crime); United States v. Tucker, No. 90 CR 651, 1991 U.S. Dist. LEXIS 2790, at *5-6 (N.D. Ill. Feb. 12, 1991) (excluding the exculpatory statement made to defendant's lawyer at the time of a prior plea, that defendant did not know the gun was in the car, because the statement was not made in response to a perception of a condition).

43. *See* United States v. Elem, 845 F.2d 170, 173-74 (8th Cir. 1988) (excluding defendant's exculpatory statement to police during custody that defendant did not own the gun because the statement was not made while excited).

44. In some cases, statements of then existing state of mind were excluded as irrelevant to any disputed issue. *See, e.g.*, United States v. Grant, No. 90-1159, 1991 U.S. App. LEXIS 13709, at *6-11 (6th Cir. June 24, 1991) (finding taped statements concerning personal life and relation to co-defendant not exculpatory and therefore irrelevant), *cert. denied*, 111 S. Ct. 1628 (1991); United States v. French, 900 F.2d 1300, 1302-03 (8th Cir. 1990) (finding statement of intent to sell gun on day of arrest irrelevant because the gun was indisputably still in defendant's possession during drug sale and subsequent arrest).

In other cases, statements by defendants recalling their past state of mind of innocence were excluded as not contemporaneous with the state of mind sought to be proved. *See, e.g.*, United States v. Schwartz, 924 F.2d 410, 423-24 (2d Cir. 1991) (excluding defendant's statement recorded three months after conspiracy ended); United States v. Carter, 910 F.2d 1524, 1530 (7th Cir. 1990) (excluding defendant's statement to his mother that he had confessed one hour earlier to save his girlfriend).

45. Several cases apply "the fact remembered" exclusionary clause of 803(3) very accurately. *See, e.g.*, United States v. Scrima, 819 F.2d 996, 1000 (11th Cir. 1987) (holding defendant's statement to a friend that he had ample funds to invest irrelevant in proving his belief and inadmissible if offered to prove the fact remembered—that he actually had the money).

46. This was also true in the civil cases decided under Rule 803(3). When civil plaintiffs offered hearsay statements made by customers or potential customers to prove beliefs about products, or statements by employers to prove motivation for job terminations, courts made sure that the declarants' state of mind was relevant, and that their statements were not being used to prove the truth of facts believed. *See e.g.*, Kassel v. Gannett Co. Inc., 875 F.2d 935, 945-46 (1st Cir. 1989); Ocean Bio-Chem, Inc. v. Turner Network Television, 741 F. Supp. 1546, 1551-61 (S.D. Fla. 1990).

47. *See* United States v. Peak, 856 F.2d 825, 832-34 (7th Cir.) (statement

An avowed purpose of the traditional hearsay rule has been to winnow out hearsay statements bearing unacceptable sincerity risks. The Rule 803(1)-(4) exceptions operate to exclude self-serving statements made by parties after the occurrence of the litigated events. If we assume that such statements bear unacceptable risks, the published cases show that the hearsay rule is working.

IV. ADMISSION OF STATEMENTS BY CHILD VICTIMS ARE EXPANDING THE EXCITED UTTERANCE AND MEDICAL STATEMENT EXCEPTIONS

Prosecutors are far more successful in using the hearsay statements of crime victims, also made after the occurrence of the litigated events, under the Rule 803(1)-(4) exceptions. Ninety-two percent of the statements of crime victims admitted by district courts (twenty-two of twenty-four offered) were upheld on appeal[48]—one under Rule 803(1); nine of eleven under Rule 803(2),[49] three of four under Rule 803(3), and all eight under Rule 803(4). Allegedly sexually abused children made nine of the victim statements.

In these cases, federal courts used three primary techniques to expand the admission of hearsay. While this judicial behavior does not amount to abolition of the hearsay rule, it does expand the categories of admission beyond the more traditional view of hearsay risks still imposed in civil tort cases and threatens to subvert what remains of the categorical structure of the Federal Rules.[50]

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made to defendant's brother, also a co-defendant, during planning stages of the crime), *cert. denied*, 488 U.S. 969 (1988); United States v. Dempsey, No. 89 CR 666, 1990 U.S. Dist. LEXIS 15181, at *2-3 (N.D. Ill. Sept 17, 1990) (taped statement on phone to informant).

48. The 24 cases in which prosecutors offered hearsay statements by crime victims represent a subset of the study's 58 cases in which prosecutors offered hearsay under the Rule 803(1)-(4) exceptions. *See supra* tbl. III.

49. In *United States v. Ellis*, the court held that the statements were harmless, if erroneously admitted. 935 F.2d 385, 392-93 (1st Cir.) (statements of child victim describing past assaults made to mother over a period of several hours), *cert. denied*, 112 S. Ct. 201 (1991). In *United States v. Sherlock*, the court held that the statements were inadmissible, but that the error was harmless. 865 F.2d 1069, 1083 (9th Cir. 1989) (statements by victims of sexual assault one hour or more after the attack, and after victims had already told several other people about it).

50. Professor Jonakait has demonstrated that judicial interpretation of the residual exceptions to admit grand jury testimony not only stretches the boundaries of the specific exceptions but threatens to override the categorical

First, courts have made explicit new interpretations of the terms of the categorical exceptions to respond to recurring fact patterns that generate useful, and often necessary, hearsay for the prosecution.[51] Second, courts have liberally applied the standard categorical terms to justify wider admission of victims' statements. This is a process driven by the imperatives of the adversary system and the doctrinal dynamic of the broad and ambiguous terms used in the Federal Rules. As parties make creative arguments, judges will creatively apply these flexible terms to a large number of varied fact situations. The initial restrictive meanings of the terms may be lost. The process resembles erosion more than outright abolition of the hearsay rule.[52]

Finally, discretionary judicial admission of "trustworthy" hearsay—explicitly rejected by the Advisory Committee for the overall structure of the Rules[53]—is appearing in cases decided under Rule 803(1)-(4). Judges make what sounds like their own assessment of the credibility of the hearsay declarant. They then justify admission of the hearsay under categorical exceptions that do not include a trustworthiness test, asserting that "circumstantial guarantees of trustworthiness" surround the out-of-court statement.[54] This is a radical departure from traditional hearsay policy. Courts correctly refuse to consider factors related to the declarant's untrustworthiness to *exclude* hearsay that falls within a categorical exception.[55] Thus, im-

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structure. "As a result, the fundamental hearsay framework adopted in the Federal Rules of Evidence is being subverted." Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 433 (1986).

51. Interpretation usually includes a discussion of the doctrinal terms and a restatement of their meaning, often resulting in a judicial gloss added to the exception. For an example, see *infra* text accompanying note 76, discussing the "same household" test applied in child sexual abuse cases. This type of rule interpretation is usually controlled by appellate courts under the de novo or plenary standard of review accorded to questions of law.

52. Appellate courts review these fact-contingent applications of doctrine with great deference. The United States Supreme Court held in Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990), that these "fact-specific" rulings should be reviewed under the "abuse of discretion" test. *Id.* at 2460.

53. FED. R. EVID. art. VIII advisory committee's note (Introductory Note: The Hearsay Problem).

54. For a discussion of these cases, see *infra* note 57, text accompanying note 68, and note 69.

55. *See* United States v. Moore, 791 F.2d 566, 573-74 (7th Cir. 1986). *But see* Overton v. State, 429 So. 2d 722, 723 (Fla. Dist. Ct. App. 1983) (using lack of trustworthiness to exclude under 803(2) by importing the test of 803(1)); Solo-

portation of the trustworthiness factor into exceptions where it is not mentioned is a doctrinal dynamic that functions in one direction: for admission, but not for exclusion. As judges import this discretionary trustworthiness factor into more and more exceptions, the categorical structure of the hearsay rule is subverted.[56] These three judicial techniques are illustrated in the published cases involving the exceptions for excited utterances and for statements made for medical purposes.[57]

A. EXCITED UTTERANCES

The victim statements admitted in the published cases as excited utterances under Rule 803(2) are typically made after the alleged crime, identify the perpetrator, and are spoken to the police, neighbors or, when children are involved, parents. The ultimate question posed in applying the exception is

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mon v. Shuell, 457 N.W.2d 669, 680-82 (Mich. 1990) (importing the trustworthiness test of 803(6) into 803(8) in order to justify exclusion).

56. Evaluations of trustworthiness are, obviously, highly fact-contingent judgments. If the trial court makes an evaluation of credibility/trustworthiness, it is reviewed under the "abuse of discretion" standard, the most deferential standard. But it is appellate courts, not just trial courts, that are importing the trustworthiness factor into admission decisions. For examples of such appellate court decisions see *infra* note 57, text accompanying note 68, and note 69.

57. The techniques also appeared in cases involving statements of observers of litigated events offered under Rule 803(1). In United States v. Parker, 936 F.2d 950 (7th Cir. 1991), the court justified admission by reinterpreting Rule 803(1) to add the gloss of "substantial contemporaneity" to the doctrinal requirement of "immediately thereafter." *Id.* at 954. In addition, the *Parker* court invoked the trustworthiness factor, finding its conclusion about contemporaneity "buttressed by the intrinsic reliability of the statements" even though the categorical exception makes no reference to trustworthiness. *Id.* In First State Bank of Denton v. Maryland Casualty Co., 918 F.2d 38 (5th Cir. 1990), the court took a further step toward integrating the trustworthiness factor into the categorical structure by referring to the Rule 803(24) catch-all exception to admit the hearsay item, "even assuming it did not meet the precise contours of rule 803(1)." *Id.* at 42.

The only consistent technique used to expand admission of the documentary records in criminal cases was the courts' application of Rule 803(6) over the arguably pertinent public records exception of Rule 803(8). In several cases, the prosecutor offered police, Federal Bureau of Investigation, and other law enforcement records under Rule 803(6). Under the reasoning of United States v. Oates, 560 F.2d 45 (2d Cir. 1977), these records should have been excluded as public records used by the prosecution under Rule 803(8)(B) or (C). *Id.* at 66-68. In United States v. Hayes, 861 F.2d 1225 (10th Cir. 1988), the only case in which this problem of overlap was mentioned, the court held that the reasoning of *Oates* did not apply when the author of the report testifies, thus eliminating the Confrontation Clause problem. *Id.* at 1229-30. In the other Rule 803(6) cases, it is doubtful that the author testified, thus leaving the overlap problem unsolved.

whether the statement is "a spontaneous reaction to the [startling] occurrence or event and not the result of reflective thought."[58]

In addressing statements made by adult victims of violent crimes, courts narrowly apply the doctrinal requirement that the declarant be "under the stress of excitement." They reason that pain reduces the capacity to fabricate,[59] and they look for evidence of the kind of stress that minimizes the declarant's time and opportunity to reflect consciously on what happened.[60]

In cases involving victims of non-violent crimes, the courts substantially reduce the physical stress requirement. At least in the reported cases, however, the time elapsed between startling event and statement was also much shorter, a matter of a few minutes.[61] This may have increased the courts' confidence that the declarants' statements were not the product of reflection. We cannot be sure, however, because there is little doctrinal analysis in these cases; in their opinions, the appellate courts rely on the trial courts' factual finding that the categorical condition of stress was satisfied.[62]

When the crime victim is a child who makes an out-of-court statement about sexual abuse, courts have responded by

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58. CHARLES MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 297, at 854-55 (3d ed. 1984).

59. *See* Smith v. Fairman, 862 F.2d 630, 636 (7th Cir. 1988), *cert. denied*, 490 U.S. 1008 (1989).

60. *See* United States v. Scarpa, 913 F.2d 993, 1017 (2d Cir. 1990) (statement by severely beaten victim who was "very nervous" and who spoke approximately five hours after the attack, just after his sister screamed when he entered the emergency room); Jones v. Greer, 627 F. Supp. 1481, 1492 (C.D. Ill. 1986) (statement by victim of gunshot wound to police fifteen minutes after attack). In *Smith v. Fairman*, the court approved admission of declarant's statement made shortly after he was punched in the face, but disapproved admission of a second statement made to police after the declarant "had time to reflect on the events . . . and organize them." 862 F.2d at 636.

61. *See* United States v. Reich, No. 85-1993, 1987 U.S. App. LEXIS 5289, at *6-7 (6th Cir. Apr. 22, 1987) (victim's statement, regarding defendant impersonating a federal employee, made to neighbor "at the time of the defendant's startling request" when victim appeared "very upset and nervous"); United States v. Bailey, No. 87-1023, 1987 U.S. App. LEXIS 15727, at *26-29 (1st Cir. Dec. 3, 1987) (juror's statement, regarding defendant's proposition to change her vote, made to neighbor within three minutes of the incident when juror appeared "nervous [and] upset").

62. Two other appellate opinions explicitly relied on the discretionary nature of the trial court's ruling to uphold the finding of adequate stress. *See* United States v. Lawrence, 699 F.2d 697, 703-04 (5th Cir.), *cert. denied*, 461 U.S. 935 (1983); United States v. Golden, 671 F.2d 369, 371 (10th Cir.), *cert. denied*, 456 U.S. 919 (1982).

using the three techniques discussed above to expand the excited utterance exception. A civil case that relies on precedent from federal criminal cases involving child victims best illustrates the court's use of a new interpretation of categorical terms, of a liberal application of the terms to the facts, and of the trustworthiness factor in an exception that makes no reference to trustworthiness at all. In *Morgan v. Foretich*,[63] the child victim's mother sued the child's father for damages on behalf of her daughter. The district judge excluded all of the hearsay statements about the father's abuse that Morgan's daughter Hilary had made to her mother. The court excluded the statements under Rule 803(2) primarily because the child was incompetent as a witness at the time she made the statements. As a result, the defendant secured a jury verdict in his favor. Morgan appealed and obtained a reversal by the Fourth Circuit on the basis of several evidence rulings.[64]

First, to justify admission of Hilary's statements as excited utterances, the Fourth Circuit relied on a new doctrinal test introduced in criminal cases.[65] This new test allows the categorical requirement of being "under stress" to cover a child who does not report the startling events for hours or days. Under this new doctrinal gloss on the categorical term, the lapse of time is not measured from the event itself but rather from the time of the "first real opportunity" to report the events to a care-taker, usually a relative. The *Morgan* court adopted this "first real opportunity" test of spontaneity on grounds that children's lack of understanding of abusive events, and the fear and guilt they experience, cause them to delay reporting.[66] Of course, this justification addresses only the sincerity risks, not the increased memory risks that also result from delay, a problem overlooked in the opinion.

Second, the Fourth Circuit applied the new categorical requirement of "first opportunity" to the facts surrounding Hilary's statements in a liberal way, inasmuch as the child waited several hours after being reunited with the mother to speak with her. This additional delay in reporting, fatal to most "excited utterances," was justified by Hilary's tender years and her nearly hysterical condition. It is "virtually inconceivable," the

63. 846 F.2d 941 (4th Cir. 1988).

64. *Id.* at 945-47.

65. *See* United States v. Iron Shell, 633 F.2d 77, 85-86 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979).

66. *Morgan*, 846 F.2d at 947.

Morgan court held, that the child, less than four years old, would have the desire to lie required to fabricate her story.[67]

Finally, the *Morgan* court also invoked the discretionary trustworthiness factor by relying on the circumstantial guarantees of the trustworthiness of Hilary's statements that had nothing to do with whether the statements were excited utterances. Hilary's method of speaking—touching herself and use of vocabulary—and her physical condition "lead to the conclusion that . . . [the statements] are trustworthy and should have been admitted into evidence."[68] By so explicitly relying on other "guarantees" of trustworthiness to admit Hilary's statements under a categorical exception, the court's opinion erodes the categorical limits of the current hearsay rule. When this pro-admission technique is combined with new interpretations and liberal applications of the exceptions, one can see how the imperatives of the prosecutor's need for evidence and the doctrinal dynamic of the Federal Rules contribute to this erosion.[69]

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67. *Id.* at 948. Several state cases also illustrate the liberal application of the doctrinal requirement of stress in cases involving children. In People v. White, 555 N.E.2d 1241 (Ill. App. Ct. 1990), *aff'd sub nom.* White v. Illinois, 112 S. Ct. 736 (1992), the child victim underwent two periods of questioning by a babysitter and her mother before making a statement to the police, 45 minutes after the event. The trial court held that the statement was spontaneous. *Id.* at 1250. The appellate court relied on a generalization that "it is unlikely that a child of tender years will have any reason to fabricate stories of sexual abuse." *Id.* at 1249. *See also* State v. Plant, 461 N.W.2d 253, 264 (Neb. 1990) (upholding admission of an "excited utterance" made by a four-year-old two days after the alleged events and after police questioning).

68. *Morgan*, 846 F.2d at 948.

69. Prosecutors' use of statements made by accomplices or undercover agents that implicate the criminal defendant also stretch the doctrinal limits of excited utterances under Rule 803(2). In United States v. Vazquez, 857 F.2d 857 (1st Cir. 1988), the declarant was an accomplice being questioned in a United States customs office after cocaine had been found in his luggage. The alleged "startling event" was a statement by his colleague, also being questioned in the same room, "I don't know you." *Id.* at 859. The declarant, according to the testimony of the customs officer, responded angrily "[y]ou know me. . . . I'm going to get all the blame and you guys are going to get out." *Id.* In United States v. Obayagbona, 627 F. Supp. 329 (E.D.N.Y. 1985), the declarant was an undercover police officer who described a drug delivery almost fifteen minutes after receiving the contraband and a few minutes after making the arrest. *Id.* at 334. The court describes the "successful arrest" and "pent-up tension of his performance" as the necessary startling event. *Id.* at 339. Under this approach, every police statement made after a "somewhat chaotic arrest" would qualify as an excited utterance. This would result in the de facto abolition of the hearsay rule.

In a Minnesota state case (not counted in this survey because the state evidence ruling was not approved by a federal court), the declarant, an accomplice to murder, returned to his apartment 90 minutes after the crime and told

B. Statements Made for Medical Purposes

Most statements offered by prosecutors under Rule 803(4) involved statements made by child victims of sexual abuse. When the child victim's statements identified the abuser—a clear attribution of guilt that would be impermissible under the exception as it is applied in the typical civil personal injury case[70]—courts found ways to admit the identifications as being reasonably pertinent to diagnosis or treatment.[71]

The Eighth Circuit, the locus of many federal prosecutions for child abuse, has developed a new interpretation of Rule 803(4) under its doctrine of "same household" to justify admission of child identifications of the alleged abuser.[72] This doctrine is premised on the theory that the nature and extent of the child's psychological problem will depend upon the identity of the abuser and thus may be essential ("reasonably perti-

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his neighbor that "Scott" (the defendant) got carried away. The evidence of stress was that he looked "unnerved" and threw or slid a cup in frustration. State v. Berrisford, 361 N.W.2d 846, 850 (Minn. 1985). It is doubtful that this declarant lacked the time or opportunity to reflect on the event or organize his thoughts.

One federal and one state reviewing court introduced the discretionary trustworthiness factor to justify admission when the categorical limits of Rule 803(2) were strained. *See* United States v. Vasquez, 857 F.2d at 864 (finding that declarant's statement "has sufficiently substantial guarantees of trustworthiness to allow its admission as an exception to the hearsay rule"); State v. Berrisford, 361 N.W.2d at 850 ("This basis of trustworthiness allows the admission of the statements in the discretion of the trial court as excited utterance exceptions to the hearsay rule. The corroborating evidence also provides circumstantial guarantees of trustworthiness."). It bears repeating that the categorical structure of admission/exclusion decisions is undermined if the more discretionary term "general trustworthiness" is equated to "stress."

70. *See supra* note 39 and accompanying text.

71. In contrast to statements by child victims, courts hold statements by adult victims to a stricter standard. *See, e.g.*, United States v. Iron Thunder, 714 F.2d 765, 773 (8th Cir. 1983) (admitting adult victim's description of rape only because it "did not point to the persons responsible for her condition").

72. Several cases raising hearsay issues under Rule 803(4) involve federal prosecutions for crimes committed on Native American lands. *See* United States v. Provost, 875 F.2d 172, 177 (8th Cir.), *cert. denied*, 493 U.S. 859 (1989); United States v. Spotted War Bonnet, 882 F.2d 1360, 1363-64 (8th Cir. 1989), *vacated and remanded*, 110 S. Ct. 3267 (1990), *affirmed on remand*, 933 F.2d 1471 (1991), *cert. denied*, 112 S. Ct. 1187 (1992); United States v. Shaw, 824 F.2d 601, 608-09 (8th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988); United States v. Renville, 779 F.2d 430, 435-39 (8th Cir. 1985).

Two habeas corpus cases upheld the admission of statements under a similar "same household" test when applying state hearsay rules and the Confrontation Clause. *See* Gregory v. State of North Carolina, 900 F.2d 705, 706 (4th Cir.), *cert. denied*, 111 S. Ct. 211 (1990); Nelson v. Farrey, 874 F.2d 1222, 1224-26 (7th Cir. 1989), *cert. denied*, 493 U.S. 1042 (1990).

nent") to treatment under Rule 803(4).[73] This interpretation has opened the door, at least in child abuse cases, to accusatory statements against members of the victim's household made months after the alleged abuse[74] under conditions of direct and insistent questioning,[75] and has even been broadened to include identification of relatives who do not share the "same household" with the child.[76]

Other courts have also broadly applied the requirement that the statement be for "medical diagnosis or treatment." Justice Lewis Powell (sitting by designation and concurring in *Morgan v. Foretich*) noted the absence of any finding by the district court that the child victim believed that her discussions with a doctor had a "treatment" or "helping" purpose.[77] Justice Powell acknowledged the loss of trustworthiness resulting from the expanded application of Rule 803(4) to statements made to physicians consulted only as expert witnesses. He reasoned that in such circumstances the professional objectivity of the doctor is reduced and the veracity of the declarant's statements is less certain.[78] Thus, he argued for application of the Rule 403 balancing test where no real treatment motive existed.

The most expansive new interpretation or liberal application of Rule 803(4) appears in the recent opinion of the United States Supreme Court in *White v. Illinois*.[79] There, Justice Rehnquist upheld admission of a statement of identification made by a child sex abuse victim to an examining nurse and doctor as being "made in the course of receiving medical care."[80] This reading of the exception appears to eliminate any

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73. *See Renville*, 779 F.2d at 436-37.

74. *See Shaw*, 824 F.2d at 608-09 (statement made to doctor one year after the initial report).

75. *See Spotted War Bonnet*, 882 F.2d at 1366-67 (Lay, C.J., dissenting) (alleging a government social worker employed manipulative interview tactics).

76. *See Provost*, 875 F.2d at 176-77 (expanding same household doctrine to include "same immediate family" in the case of the victim's half brother who did not share the same household but "at times" resided at victim's house).

77. Morgan v. Foretich, 846 F.2d 941, 952 (4th Cir. 1988) (Powell, J., concurring).

78. *Id.* In United States v. Renville, 779 F.2d 430, 435-39 (8th Cir. 1985), the court emphasized that the motive to speak truthfully about the perpetrator's identity depends on the physician making clear that the identity is important to the diagnosis and treatment. *Id.* at 438. *See also* Nelson v. Farrey, 874 F.2d 1222, 1224-25 (7th Cir. 1989) (testifying therapist had seen the child victim for 59 treatment and evaluation sessions), *cert. denied*, 493 U.S. 1042 (1990).

79. 112 S. Ct. 736 (1992).

80. *Id.* at 742.

requirement of treatment motive, and makes no mention of any treatment-related purpose of the identification itself.

These expansive readings of Rules 803(2) and 803(4), combined with the liberal use of the Rule 803(24) catch-all exception, create the sense that much of what a child victim says outside of court about being sexually abused will be admitted in federal trials. When the child victim does not also testify at trial, the criminal defendant is burdened with impeaching a case built on victim hearsay.[81] In criminal cases, when no showing is made that the child is unable to testify, fairness issues rise to the constitutional level.[82] Cases involving child victim hearsay fully bear out the prediction of Professors Lempert and Saltzburg that liberalization of the hearsay rule will make the prosecutor's task easier.[83]

C. THE ADMISSION OF CHILD VICTIM STATEMENTS IN MICHIGAN AND FLORIDA

Many of the published cases decided under the Rule 803(2) and 803(4) exceptions in Michigan involved the statements of child victims of alleged sexual abuse.[84] The Michigan Supreme Court has issued landmark opinions carefully interpreting each

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81. The child witness thus creates a new type of burden-shifting declarant. *See supra* note 32. Presentation of hearsay always reduces the risks for the proponent and imposes more risks on the opponent. *See* Swift, *supra* note 2, at 514-16. Specifically, young children who could not withstand the courtroom tests of oath and competency may "testify" as hearsay declarants. *Id.* at 515. *See also Morgan*, 846 F.2d at 948-50.

82. The United States Supreme Court addressed the question whether a child's unavailability is required by the Confrontation Clause in White v. Illinois, 112 S. Ct. 736 (1992). The Court held that the Confrontation Clause did not require the prosecution to produce the four-year-old child victim of a sexual assault at trial or find the victim unavailable before the child's out-of-court statements could be admitted under the spontaneous declaration exception or medical examination exception. *Id.* at 742-43. When not required to justify the use of hearsay with the declarant's unavailability, the prosecution is free to employ all the tactical advantages of choosing hearsay over the live witness. It is unfortunate that the Confrontation Clause is not being read to limit such adversarial advantage-taking by the government. *See*, Eileen A. Scallen, *Constitutional Dimension of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992).

83. LEMPERT & SALTZBURG, *supra* note 2, at 522.

84. From January 1981 to July 1991, the Michigan Appellate Courts and Supreme Court made 39 published rulings under Michigan's Rule 803(2) exception. Thirty-eight of these rulings were made in criminal prosecutions; of these, 17 concerned statements of child victims reporting sexual abuse.

From January 1981 to July 1991, the Michigan courts made 21 published rulings under the Rule 803(4) exception. Eleven involved criminal cases, and of these, 10 involved child victim statements.

of these exceptions. In *People v. Kreiner*,[85] the court required the laying of a specific foundation under Rule 803(2) regarding the amount of time between the alleged sexual trauma and the child's report.[86] In *People v. LaLone*,[87] the court held that a child's statement identifying the perpetrator to a psychologist was not relevant to diagnosis or treatment and therefore should not have been admitted under Rule 803(4).[88] The court rejected the "same household" rule adopted in earlier appellate opinions, stating that the drafters of the rule did not intend that the naming of an assailant be considered a description of the general character of the cause or external source of injury,[89] and that action to protect the child from the abuser was not part of medical treatment.[90] The court stated that any broadening of the doctrinal terms to admit specific statements of fault should be accomplished through legislative amendment.[91]

Similarly, many cases decided by the Florida courts under Rules 803(2) and 803(4) involve statements by child victims.[92] The Florida courts have taken a very restrictive view of Rule 803(2), declining to admit child statements made even as little

85. 329 N.W.2d 716 (Mich. 1982) (per curiam).

86. *Id.* at 720. The court rejected Michigan's common law "tender years" exception (which permitted excusable delay in reporting) as not surviving the adoption of Rule 803(2). In cases subsequent to *Kreiner*, the Michigan courts have rejected child statements as not "excited" when made after long delays, or after prior opportunities to report, or in response to questioning. *See, e.g.*, People v. Straight, 424 N.W.2d 257, 258-261 (Mich. 1988); People v. McConnell, 358 N.W.2d 895, 896 (Mich. 1984).

87. 437 N.W.2d 611 (Mich. 1989).

88. *Id.* at 613-16.

89. *Id.* at 614. The court also reasoned that statements made in the course of psychological treatment were less reliable than those made for medical treatment. *Id.* at 613.

90. *Id.* at 614-15.

91. *Id.* at 616. The Michigan appellate courts have followed *LaLone* in excluding statements of identification, but have expressed reluctance in so doing. One court held that an identification was pertinent to medical care in order to protect the victim from sexually transmitted diseases. *See* People v. Meeboer, 449 N.W.2d 124, 127 (Mich. Ct. App. 1989), *appeal granted, in part*, 461 N.W.2d 484 (Mich. 1990). In other cases, the error in admitting an identification was held harmless. *See, e.g.*, People v. Hackney, 455 N.W.2d 358, 363-65 (Mich. Ct. App. 1990).

92. All 15 rulings published from January 1981 to July 1991 under Florida's equivalent of 803(2) were in criminal cases. Of the 15, six involved child victim statements.

Of 16 rulings published from January 1981 to July 1991 under Florida's equivalent to 803(4), 13 were in criminal cases. Of the 13, eight involved child victim statements.

as one hour after the alleged abuse. Although noting the special circumstances that generate delays in child abuse cases, the Florida Supreme Court has held that the limits of its version of 803(2) could not be stretched to accommodate delayed reports.[93] Part of the reason for the court's rigor in applying Rule 803(2) may be that in 1985 the Florida legislature adopted a special residual exception, Rule 803(23). Under this exception, statements of children under the age of eleven that describe child or sexual abuse may be admitted after the trial court makes a finding of "reliability."[94]

Until 1991, Florida courts had also consistently rejected the use of Rule 803(4) to admit statements identifying the perpetrator, even in cases of child abuse.[95] In one very recent case,

93. State v. Jano, 524 So. 2d 660, 662-63 (Fla. 1988). In only one published case did a statement made one hour after the alleged abuse qualify as an excited utterance; the victim-declarant in that case was suffering from vaginal bleeding. Jackson v. State, 419 So. 2d 394, 395-96 (Fla. Dist. Ct. App. 1982).

94. Florida's Evidence Code provides:

> (23) Hearsay exception; statement of child victim.
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
>
> 2. The child either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

FLA. STAT. ANN. § 90.803(23) (West 1992).

95. *See, e.g.*, Kopko v. State, 577 So. 2d 956, 960 n.8 (Fla. Dist. Ct. App. 1991) (per curiam). Courts occasionally mitigated the rigorous application of the exception with harmless error rulings, but have refused to adopt broadly the "same household" exception or other expansive interpretation in the published cases. One court has even held that a report of rape, with no identification, was not pertinent to a pregnancy examination. Bradley v. State, 546 So. 2d 445, 447 (Fla. Dist. Ct. App. 1989).

however, a Florida appellate court adopted the "same household" rule, permitting the admission of identifications made by abused children during medical treatment when the abuse took place within the home.[96]

V. STATE DISTRICT ATTORNEY SURVEY RESULTS: SOME VIEWS OF JUDICIAL COMPETENCE WITH HEARSAY

I conducted a brief and modest survey of 169 state district prosecutors on the question of judicial competence with hearsay.[97] The purpose of the survey was to gain insight into whether trial judges are abolishing the hearsay rule in practice, and to test the survey method for its usefulness in the future.

In brief, the prosecutors reported their perception that state court trial judges significantly misunderstand the hearsay rule and fail to apply it correctly.[98] This perception was shared equally between those who practice in federal rules and non-federal rules jurisdictions.[99] Interestingly, there was no consensus that judges are "abolishing" the hearsay rule by over-admitting hearsay. The prosecutors were split fairly evenly between those who believe that when judges err they over-admit, and those who believe that judges over-exclude; indeed, a slightly higher percentage of the respondents cited error of over-exclusion.[100] This result may be affected by partisanship, but some of the cited judicial mistakes worked in favor of the state and against the defense. At the least, the survey indicates that trial judges do not simply admit anything and everything out of frustration with the hearsay rule.

The survey also asked the prosecutors to cite particular problems of over-admission that could amount to abuse of the rule. Sixty-one percent of those answering (thirty of forty-

96. *See* Flanagan v. State, 586 So. 2d 1085, 1093 (Fla. Dist. Ct. App. 1991) (en banc).

97. These prosecutors provided a convenient sample for the simple reason that they had attended a National College of District Attorneys' Career Prosecutor Course in the summer of 1991 and the address list was made available to me through the help of Professor Ed Imwinkelried, who lectured at the course.

98. I received 68 responses to the survey. Forty-six (68%) responded that in their view trial judges do not understand the hearsay rule and fail to apply it correctly either "frequently" or "about 50/50."

99. Twenty-two of the 46 district attorneys who responded "frequently" or "about 50/50" practiced in federal rules jurisdictions.

100. Fifty-two percent (33 of 64) responded that judges tend to over-exclude when they do not apply the hearsay rule correctly.

nine) stated that the criminal defendant's own statements, usually self-serving, made to the police upon arrest or to others, were widely admitted when offered by defense counsel in abuse of the hearsay rule. Some respondents mentioned that judges perceived these statements as admissions, even though offered on behalf of the defendant. Others thought that trial courts exhibit a general leniency with regard to hearsay offered by defendants. Some prosecutors indicated their belief that judges are lenient with the defendant when they believe that the defendant is innocent or that the state's case is extremely strong.

In federal court, by contrast, leniency does not appear to extend to defendants' self-exonerating statements. As discussed earlier, federal courts frequently and rigorously apply Rule 803(3) to exclude self-serving statements made outside of court by criminal defendants.[101] A study of United States attorneys would be needed to test their perceptions of federal trial court leniency toward defendants against these published cases.

VI. THE EFFECTS OF HEARSAY PRACTICE ON HEARSAY REFORM

Several findings from this study are useful for hearsay reformers. First, civil plaintiffs have difficulty using their own "risky" hearsay statements. Second, civil defendants appear to use contested hearsay less frequently than plaintiffs. Third, criminal defendants cannot secure admission of their own self-exonerating statements, at least in federal court. Finally, prosecutors are successful hearsay users, particularly when offering statements of crime victims.

The abolition of the hearsay rule in civil cases advocated by some reformers would permit plaintiffs to use their own "risky" statements at trial. Likewise, under the notice-based liberalization of the rule proposed by Professor Park, the self-serving statements of unavailable plaintiffs (tort plaintiffs who die before trial) would be admitted.[102] The only other restriction on admission that Professor Park envisions would be a required showing that the plaintiff-declarant had first-hand knowledge of the events spoken about.[103]

It is certainly reasonable to assume that fact-finders can as-

101. *See supra* note 44 and accompanying text.

102. Park, *supra* note 2, at 119-22.

103. *Id.* at 121. Professor Park noted that Rule 403 should not be used to winnow out such statements on the basis of hearsay risks. *Id.* at 122. *See also* Swift, *supra* note 2, at 501-02, 509.

sess the reliability of these risky declarants.[104] What follows from this study of the published cases, however, is that abolition and notice-based liberalization of the hearsay rules would affect the civil parties differently. A deceased plaintiff's own statement, excluded under the current rule, would suffice to make a prima facie case,[105] or would at least be helpful corroboration. If it is true that civil defendants use contested hearsay in fewer cases than do plaintiffs, then liberalizing the rule would have more immediate benefits to the whole class of plaintiffs.[106] Professor Park acknowledges that liberalization could benefit "underdog" litigants,[107] but more extensive study of such differential effects is needed.

The frequent unsuccessful attempts by criminal defendants to use their own post-arrest statements illustrate what would happen if the admissibility of hearsay was governed by a general test of probative value versus prejudice—the test once advocated by Judge Weinstein and rejected by the Federal Rules Advisory Committee.[108] Judges would be faced with the unappealing task of determining the credibility of criminal defendants as part of the process of admitting evidence. To decide that the accused's post-crime assertion of an innocent state of mind is not trustworthy, thus not probative, and thus not admissible, smacks of a prejudgment of guilt. The result might be, of course, the wide-scale admission of criminal defendant statements, similar to what state prosecutors currently perceive to be the practice in state courts. But judges, as a group, may already be suspicious of the criminal defendant;[109] to encourage wide latitude in excluding statements on grounds of untrustworthiness might be undesirable. The use of trustworthiness to admit hearsay, however, surfaces in the successful use by prosecutors of the Rule 803(1)-(4) exceptions. The discretionary trustworthiness factor is imported into exceptions where its use

104. *See* Swift, *supra* note 2, at 509.

105. *See* Rock v. Huffco Gas, 922 F.2d 272, 283 (5th Cir. 1991) (affirming summary judgment for defendant because plaintiff's hearsay statements excluded); Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 889-90 (9th Cir. 1991) (same).

106. Professors Lempert and Saltzburg also predicted that abolition would "change the balance" on the burden of proof, making it "easier to introduce the evidence necessary to establish a prima facie case." LEMPERT & SALTZBURG, *supra* note 2, at 522.

107. Park, *supra* note 2, at 65.

108. *See* Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338-39 (1961).

109. *See supra* note 26.

is not literally sanctioned,[110] and thus it erodes the categorical limits. Moreover, as has been pointed out,[111] the catch-all exceptions are in danger of becoming just that—useful to catch and admit all of the hearsay excluded at the margins of the categorical exceptions.

If we extrapolate from these admittedly limited observations, a radical change in how the hearsay rule works may be well under way. The rule is not being abolished de facto, but hearsay practice may be at an important turning point. The categorical structure of the admission/exclusion decision may be giving way to a more flexible process that openly acknowledges the trustworthiness factor. Further study is needed to test the validity of this hypothesis, but several possible repercussions for hearsay reform are already clear.

First, to the extent that the transformation of the categorical structure is under way, it may be impossible to control. As stated earlier, appellate courts do not see themselves as being in the business of policing trials for evidentiary errors. The use of "circumstantial guarantees of trustworthiness" triggers the most deferential standard of review, and the appellate courts themselves are using this phrase to justify findings of harmless error at the margins of the exceptions.[112]

Although the trustworthiness standard may strike some as sound hearsay policy, it does deprive the litigants of whatever degree of predictability the categorical approach provided, and it seems to favor the hearsay used by some parties more than others. Moreover, the trustworthiness issue that judges import into the categories operates in only one direction—in favor of admission—whereas the trustworthiness standard that was drafted into certain exceptions permits exclusion if judges make a finding of *un*trustworthiness. Admission, not exclusion, thus becomes the dynamic force in current judicial decision-making about hearsay.

Finally, hearsay reformers should pay special attention to the types of declarants and the types of cases that put intense

110. *See supra* note 57, text accompanying note 68, and note 69.

111. *See* Jonakait, *supra* note 50, at 461-62; Raeder, *supra* note 24, at 514-17 (commentary to this Article).

112. It will be interesting to see how courts apply the constitutionalized test of "trustworthiness" under the Confrontation Clause, as explicated in Idaho v. Wright, 110 S. Ct. 3139, 3149-51 (1990). *See, e.g.*, United States v. Spotted War Bonnet, 933 F.2d 1471, 1473-74 (8th Cir. 1991) (majority sidesteps "trustworthiness" test because declarants also testified and were cross-examined at trial), *cert. denied*, 112 S. Ct. 1187 (1992).

pressure on the categorical structure of the hearsay rule. This study found that the cases involving child victims presented repetitive hearsay issues, litigated over and over in each jurisdiction by essentially the same proponent, the prosecutor. The results indicate that arguments of need are a powerful force in the dynamic of hearsay doctrine. There are three observed responses to this type of intense pressure. First, the categorical exceptions themselves are transformed through new judicial interpretations and increasingly liberal applications, as has happened in federal court under Rules 803(2) and (4). Second, as is also happening, problematic hearsay spills over into the generic catch-all exceptions and is admitted. Finally, the specific balance between the prosecution's interest in admitting child victim hearsay and the defense's interest in exclusion is addressed in specific residual exceptions, such as Florida's Rule 803(23), aimed directly at the problem. Recognizing the alternatives permits reformers to consider where to aim their efforts.

This study of how the hearsay rule works in practice has identified important trends that can now be used to inform judges of the changes they are working, and to illuminate the process of reform.

1-4-94

LAW PROFESSOR REVEALS SHOCKING TRUTH ABOUT HEARSAY

Professor Berger: I hope you find this useful and perhaps even enjoyable. I may be a terrible year for you. Mike Fenner

by G. Michael Fenner*

In this booke there is nothing mentioned . . . but that which is of truth: and what mine own Eies haue perfectly seene.[1]

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* Professor of Law, Creighton University School of Law. B.A., University of Kansas, 1966; J.D., University of Missouri-Kansas City, 1969. For their assistance on this article I wish to thank Mr. Dale Cottam, class of 1993, Ms. Virginia Albers, class of 1995, and Ms. Linda Thompson, class of 1993. My thanks also to my colleague at Creighton, R. Collin Mangrum, who read a late draft of this article, and to Kerstin VanDervoort. I also acknowledge my appreciation to the Faculty Research Fund of the Creighton University School of Law for financial assistance in completing this article.

1. EDWARD WEBBE, THE RARE AND MOST WONDERFUL THINGS WHICH E. WEBBE HATH SEENE IN HIS TRAVAILES 13 (1590), *quoted in* THE OXFORD ENGLISH DICTIONARY 436 (1971).

This article exposes shocking, never-before-revealed truths about hearsay. I take no credit for discovering these amazing secrets: They have been long known, and carefully guarded, by many people. I do take credit for the courage to divulge them.[2]

I. THEORY—THE PREFACE

> Theorie without Practice will serve but for little.[3]

Before I astonish you with the truth, some theory. Since it is not theory I am after, consider Part I a preface to, rather than a part of, the article.

A. Hearsay Is Inadmissible, Except Sometimes

Hearsay is inadmissible, except . . . well, in exceptional cases.[4] This is the theory of approximately one-half of many evidence courses and nearly one-third of the law of evidence.[5] Were this theory truth, the first

2. The late Irving Younger revealed some of the truth in Irving Younger, *Reflections on the Rule Against Hearsay*, 32 S.C. L. REV. 281 (1980). He did it in far fewer pages than I.

3. SIR WILLIAM HOPE, THE COMPLEAT FENCING-MASTER 164 (2d ed. 1692), *quoted in* THE OXFORD ENGLISH DICTIONARY 278 (1971).

4. Authority in a moment, but first—don't put that in your notes; it may not be true. Authority: FED. R. EVID. 802: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

5. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 800[01] (1992).

piece of business would be to define hearsay. The second piece would be to identify the exceptions.

B. Hearsay Defined

Hearsay is a concept of many parts.

1. Person

There must be a statement by a person.[6] Hearsay does not apply to a clock telling time,[7] a bloodhound barking up a tree at a suspect,[8] a radar device depicting speed,[9] or a declaration by a stop sign telling a driver to "STOP"![10]

2. Statement

The evidence must constitute a statement.[11] For purposes of hearsay analysis there are three different ways to make statements: (1) an oral assertion, (2) a written assertion, and (3) assertive conduct.[12]

The first two, oral and written assertions, are pretty clear and usually easy to spot. The use of words gives them away.[13]

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6. FED. R. EVID. 801(a)-(c).

7. *See* Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1145 (1935). *But see* text accompanying note 130 *infra*.

8. This takes care of complicated common law problems such as that in Buck v. State, 138 P.2d 115 (Okla. Crim. App. 1943) (where the court devoted much time and effort to discussing the testimonial safeguards of admitting the out-of-court declaration of the un-cross-examinable bloodhound that had treed the defendant) and in People v. Centolella, 305 N.Y.S.2d 279, 282 (Oneida Co. Ct. 1969) (where the court devoted less time and effort, essentially just noting "it is the handler who is the witness [not the dog]."") *See also* the Montana Supreme Court's views on "[d]ogs and other dumb animals . . . as witnesses in the courts of this state," State v. Storm, 238 P.2d 1161, 1176 (Mont. 1952), discussed *infra* text accompanying notes 525-27. The real witness is the handler. The dog's barking cannot be introduced into evidence without the testimony of the handler to lay the appropriate foundation. It is the handler who proves what the dog meant by its declaration at the bottom of the tree, and the handler can be cross examined.

On a related matter, one of my research assistants, Dale Cottam, asks "What about this? On the issue of chicken rustling, the evidence is that when the chickens in question got the chance they marched from the alleged thief's henhouse to the henhouse from which they were allegedly stolen." He assures me it is a real case, but he just cannot put his finger on it right this minute. Perhaps that's for the best.

9. This takes care of the hearsay part of common law cases like City of Webster Groves v. Quick, 323 S.W.2d 386 (Mo. Ct. App. 1959) where the in-court declarant was the police officer, the out-of-court declarant was the electric timer that registered defendant's speed and the objection was hearsay. It makes these issues not hearsay problems, but relevance and expert opinion problems, as they should be. *See also infra* text accompanying note 134.

10. *See, e.g.*, R. Collin Mangrum, *The Law of Hearsay in Nebraska*, 25 CREIGHTON L. REV. 499, 505 (1992) [hereinafter *Mangrum*].

Sometimes the court recognizes an inscribed chattel as hearsay, recognizes it as a written out-of-court statement by a person. *Infra* text accompanying notes 145-49 and note 502.

11. FED. R. EVID. 801(c).

12. Or, two kinds: (1) assertions by words (oral and written) and (2) assertions by conduct. (This points up one of the difficulties of categorization, which, in turn, points up one of the difficulties with hearsay.)

13. The use of words gives them away . . . almost always. *But see* the "non-assertive oral conduct" cases discussed *infra* text accompanying notes 77 and 441-80.

The third, assertive conduct, can be troublesome.[14] Not always—a witness testifies that a particular location had been "pointed out" by someone else; "'pointing out' constitutes assertive conduct"[15]—but it can be troublesome.

Under the Federal Rules, and in those states that have adopted this part of the federal rules, the key is this: If a person intends his or her conduct to be an assertion, then for hearsay purposes, it is.[16] The key is what was in the mind of the "person," the actor. Any act intended to assert can be hearsay.

The theory seems to be that a person not intending to make an assertion cannot be lying. The question is: Was the assertion intended? Under this theory, intention is an element of lying. This definition seems to be aimed at conduct that is a lie. Only coincidentally does it pick up conduct that is mistaken, conduct that is taken out of context, conduct that reacts to faulty perception or lousy memory and all of the other problems that could be addressed if we could cross-examine the actor.[17]

What about suicide offered as a statement of the deceased's knowledge of his or her own guilt of some other crime?[18] Hearsay or not? Did the actor intend the suicide to be an assertion? If so, it is a statement. If not, it is not a statement.

It is not that this federal rule journey into the mind of the actor is always so easy.[19] It is instead that for those who care to find an answer, the federal rules precisely locate where to look.[20]

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14. A sub-set of the cases involving assertive conduct are the cases involving assertive non-conduct, or assertive silence. In Silver v. New York Cent. R.R. Co., 105 N.E.2d 923 (Mass. 1952), the plaintiff claimed it got so cold on defendant's train that she was injured. The defendant offered the testimony of the porter from the plaintiff's car that there were 11 other passengers in that car and none of them complained of the cold. The lack of assertion that it was cold was offered to prove that it was not cold.

15. United States v. Caro, 569 F.2d 411, 416 n.19 (5th Cir. 1978). *See also, e.g.*, State v. Bawdon, 386 N.W.2d 484, 487 (S.D. 1986) (six-year-old victim of sexual abuse nodded head in response to doctor's question regarding the nature of the abuse).

16. Throughout this article, the terms "Rule(s)" and "Federal Rule(s)" will refer to the Federal Rules of Evidence.

17. "[I]t seems self-evident that in general the risks of ambiguity and misinterpretation are much greater when an out-of-court declarant's belief is inferred from nonverbal conduct rather than from verbal assertion." Olin G. Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 62 (1982) [hereinafter *Wellborn*].

The common law rule on the admissibility of assertive conduct had more to do with all of the testimonial infirmities. (Rather than just the one: Was the out-of-court declarant lying?) It was much more difficult to understand and to apply. The difficulty with the common law rule is, in truth, what led the drafters of the Federal Rules to throw up their hands in surrender. This is one of those truths that everyone seems to know, but no one writes down. I have plenty of oral assertions in support of this part of this footnote, but none written. Everything has to start somewhere: From now on people can cite me. Here is as close as I can come to a supporting citation: "The best reason for leaving nonassertive conduct out of the hearsay definition is the manifest and understandable difficulty that lawyers and judges have had in recognizing and dealing with it with any consistency." *Id.* at 67.

It strikes me that this reason for doing away with nonassertive conduct as hearsay supports equally well doing away with hearsay altogether—"the manifest and understandable difficulty that lawyers and judges have had in recognizing and dealing with it with any consistency"—but I am getting ahead of myself. *Id.*

18. *See* Daniel Webster's prosecution of John Francis Knapp, in Commonwealth v. Knapp, VII American State Trials 395 (S. Jud. Ct. Mass. 1830), *cited in* JOHN KAPLAN ET AL., EVIDENCE CASES AND MATERIALS 104-05 (7th ed. 1992).

19. Let me paraphrase an example offered by Professor Wellborn: Man is on trial for having

3. Out-of-Court Statement

The statement must be made out-of-court. But, of course, this is not true. Even a statement made in court can be hearsay. Former testimony, for example, can be hearsay.[21]

The truth (if I may be allowed a bit of truth in these prefatory materials) is that we must be dealing with evidence of a statement, made other than in this courtroom, as a part of this proceeding.

Is a witness testifying to what someone *said* at a time and place other than right now in this courtroom, or is a witness testifying to *assertive conduct* that occurred at a time and place other than right now in this courtroom, or is a witness authenticating a *written statement* made at a time and place other than right now in this courtroom?

4. Offered to Prove the Truth of the Matter Asserted

The out-of-court statement must be offered to prove the truth of the matter asserted.[22] Deciding whether an out-of-court statement is offered to prove the truth of the matter asserted involves answering two questions. First, what is the assertion? Second, what is the issue? The two answers are then compared. The trick is to identify the assertion and the issues.

What is the assertion? First, it is what the out-of-court declarant *did* assert, not what the attorney *is now* asserting. Second, it can be easy to

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assaulted Woman; Woman's testimony is unavailable; Nurse will testify, "When Man came to visit Woman, Woman hid in another room." Wellborn *supra* note 17, at 64-65. Is this assertive conduct or not? Perhaps not: Perhaps she is just hiding, without meaning to say anything. Perhaps so: Perhaps she is hiding and meaning to say to the world, "Keep him away from me (He has beaten me up)." Or she may mean, "Keep me away from him." The judge must decide what the woman meant, for it is a question of law: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court." FED. R. EVID. 104(a). Because her testimony is unavailable, the judge cannot ask her. It may or may not be an easy decision to make.

20. The codification that from now on, insofar as conduct is concerned, the hearsay rule will not bother itself with nonassertive conduct, is arbitrarily dismissive ("[D]ubious at best," Wellborn, *supra* note 17, at 64) of one of the ways out-of-court persons communicate. It is, however, "an innocuous concession." *Id.* It is a convenience. It does remove some cases from the hearsay rule (and, in my view, as you will see when I get to the Truth, the less the hearsay rule has to do, the better). And, as I say in the text, "for those who care to find an answer, [this approach] precisely locate[s] where to look."

21. FED. R. EVID. 804(b)(1).

22. FED R. EVID. 801(c). *See also, e.g.*, Anderson v. United States, 417 U.S. 211, 220 n.8 (1974).

This is "an awkward phrase that describes a difficult idea." This is quoted from Professor James McElhaney's Litigation column in the ABA Journal, this one from the November 1, 1988 column titled "The Real Witness." No one writes easier to read, more intelligent, more insightful, more useful articles about in-trial applications of the rules of evidence than Professor McElhaney. He makes the ABA membership worth the cost. He says you can trim this phrase down to "offered to prove its truth," but that even this Slim-Fast version of the traditional definition doesn't work very well "in the middle of a witness's testimony." James McElhaney, *The Real Witness*, 28 A.B.A. J. 82 (1988).

On the subject of useful articles, Norman M. Garland, *An Overview of Relevance and Hearsay: A Nine Step Analytical Guide*, 22 SW. U. L. REV. 1039 (1993) presents a simple way to work through hearsay problems, particularly useful for law students trying to get their hooks into the rule for the first time and for lawyers trying to get their hooks into the rule again.

And, as another insightful author in the field of evidence has noted, no matter how simply you try to state the concept, "Understanding when a statement has evidentiary value for purposes other than its truth content is one of the most . . . confusing issues in evidence." Mangrum, *supra* note 10, at 506.

identify just what the out-of-court declarant did assert. Sometimes it is obvious from the words used. It is what was said. It is the text of the out-of-court statement. But this is not always true. The English language is full of code words, colloquialisms, double entendre, jingoism, sarcasm, euphemisms, idioms, and all kinds of assertions that do not mean what they say.[23] Question: What was asserted when what was said was "I'm sure?" Answer: I'm not always sure. And sometimes nothing was said, the assertion is by conduct, and identifying the assertion in the conduct can be difficult.[24]

What are the issues in the case?[25] Sometimes the answer will be obvious, sometimes it will require some research. The issues, of course, are found in the statutes or the case law that are the basis for the lawsuit, including the defenses, plus the credibility of each witness.[26]

Having identified the assertion and the issue, compare them. Are they the same or are they different? If they are the same, the out-of-court statement is offered to prove the truth of the matter asserted and chances are it is hearsay. If they are different, the out-of-court statement is not being offered to prove the truth of the matter asserted and chances are it is not hearsay.

Some examples of purposes for which a statement might be offered other than to prove the truth of the matter asserted are: (1) to impeach, where it is a prior inconsistent statement;[27] (2) to rehabilitate, where it is a prior consistent statement;[28] (3) as circumstantial evidence of the state of mind of the person who declared it;[29] (4) to show its effect on the mind of the person who heard it;[30] (5) to show that the one who heard the

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23. *See infra* text following note 460.

24. *See supra* text following note 14.

25. As opposed to the precise issue or issues to which the evidence might be offered.

26. If your jurisdiction has a good set of pattern jury instructions, that is one very good place to find the issues. My jurisdiction has such a set: NEBRASKA JURY INSTRUCTIONS (2d ed. 1989).

27. *E.g.*, United States v. Tavares, 512 F.2d 872, 874 (9th Cir. 1975). Under the Federal Rules of Evidence, some prior inconsistent statements are defined as nonhearsay and may be offered as impeachment and substantive evidence. FED. R. EVID. 801(d)(1)(A).

28. *E.g.*, United States v. Brennan, 798 F.2d 581, 587-88 (2d Cir. 1986); United States v. Harris, 761 F.2d 394, 398-400 (7th Cir. 1985) and United States v. Rubin, 609 F.2d 51, 66-70 (2d Cir. 1979) (Friendly, J., concurring) (explaining position contrary to that later taken in *Payne* and *Miller*, following). *But see*, United States v. Payne, 944 F.2d 1458 (9th Cir. 1991) *cert. denied*, 112 S. Ct. 1598 (1992). *Payne* suggests that Federal Rule of Evidence 801(d)(1)(B) changes this common law approach. The definition in this part of the rule—that says a certain kind of rehabilitative prior statement is nonhearsay for all purposes, substantive and impeachment—is exclusive and, apparently, overrides other parts of the hearsay definition, including the part that says a statement is not hearsay if it is not offered to prove the truth of the matter asserted, but only to show that it was said and, thereby, to rehabilitate the witness: *Accord* United States v. Miller, 874 F.2d 1255, 1271-74 (9th Cir. 1989) ("[P]rior consistent statements may [not] be admitted for rehabilitation apart from Rule 801(d)(1)(B) . . . .")

29. The most infamous example in law professing circles is, "On the issue of the sanity of D, a woman, D's public statement, 'I am the Pope.'" Edmund M. Morgan, Evidence Exam, Summer Term, 1946, Harvard Law School, *quoted in* JOHN KAPLAN ET AL., EVIDENCE CASES AND MATERIALS 126 (7th ed. 1992). This example is discussed *infra* text accompanying notes 141-45.

30. *E.g.*, United States v. Malik, 928 F.2d 17, 23 (1st Cir. 1991); United States v. Hyde, 448 F.2d 815, 845 (5th Cir. 1971). And, of course, the case made famous by John Kaplan and Jon Waltz, Subramaniam v. Public Prosecutor, 100 Solicitor's Journal 566 (Jud. Comm. Privy Council 1956), *cited in* JOHN KAPLAN ET AL., EVIDENCE CASES AND MATERIALS 93 (7th ed. 1992).

statement was on notice of the facts contained therein;[31] (6) to show personal knowledge of independently established facts;[32] (7) as a "verbal act" or words of legal significance;[33] and (8) to show "its patent falsity."[34]

More on these examples later, as I discuss the Truth.

5. The Definitional Exclusions

In a federal rules jurisdiction, the definition of hearsay is not complete without the seven definitional exclusions. So here they are. Like Snow White's seven friends, some make sense, some make partial sense, others do not make much sense at all. Regardless, they are in the rule.

a. A Prior Inconsistent Statement Made Under Oath

If the out-of-court declarant is (a) testifying in court and subject to cross-examination regarding the out-of-court statement and (b) this declarant's out-of-court statement is inconsistent with his or her trial testimony and (c) the out-of-court statement was made under oath, then it is not hearsay.[35]

Such a statement is admissible for all purposes including to impeach the witness (one requirement is that the out-of-court statement be inconsistent with an in-court statement, so, by definition, the out-of-court statement must be a prior inconsistent statement) and as substantive evidence of the facts stated in the out-of-court statement.

b. A Prior Consistent Statement Offered to Rebut a Charge of Recent Fabrication

If the out-of-court declarant is (a) testifying in court and subject to cross-examination regarding the out-of-court statement and (b) this declarant's out-of-court statement is offered to rebut a charge that he or she has recently made up a lie or been subject to improper influence, then it is not hearsay.[36] The only difficult part of this rule is that the definitional exclusion is limited to situations where counsel has suggested that the out-of-court declarant recently made up a lie or was subject to improper influence.[37]

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31. *E.g.*, Vinyard v. Vinyard Funeral Home, Inc., 435 S.W.2d 392 (1968). Or to prove that if they had looked, they would have been on notice. *See also* Johnson v. Misericordia Community Hosp., 294 N.W.2d 501 (Wis. 1980).

Maybe this really is not any different than the third and fourth items on this list. *See supra* note 12.

32. *See, e.g.*, Bridges v. State, 19 N.W.2d 529 (Wis. 1945) and United States v. Muscato, 534 F. Supp. 969 (E.D.N.Y. 1982), discussed *infra* in the text accompanying notes 50-62.

33. Under Rule 801(d)(2)(A) & (D) of the Federal Rules of Evidence, many of the statements that used to be argued as nonhearsay "verbal acts" are not nonhearsay admissions by a party or a party's agent. *E.g.*, Ries Biologicals, Inc. v. Bank, 780 F.2d 888 (10th Cir. 1986).

34. United States v. Pedroza, 750 F.2d 187, 203 (2d Cir. 1984).

35. FED. R. EVID. 801(d)(1)(A).

36. FED. R. EVID. 801(d)(1)(B).

37. Note that the prior inconsistent statement described above (at text accompanying note 35) must have been made under oath; the prior consistent statement described here need not have been made under oath. Judge Weinstein and Professor Berger state that the difference may have been inadvertent, in the nature of a typographical error. "This may have been an oversight or may have been due to the limited possibilities of abuse of rehabilitative statements." 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(1)(B)[01] (1988).

c. A Statement Identifying a Person

If the out-of-court declarant is (a) testifying in court and subject to cross-examination regarding the out-of-court statement and (b) the out-of-court statement identifies a person and was made after perceiving that person, then the out-of-court statement is not hearsay.[38]

d. A Party's Own Statement Offered Against Him or Her

If the out-of-court statement is a party's statement, and if it is offered against the party who made it, it is not hearsay.[39]

This is the traditional, common law "admissions" exception to the hearsay rule, but it encompasses much more than just "admissions." In nowise must the statement be against a party's interest (when made, or even when offered into evidence), so long as it is that party's statement and it is offered into evidence by an opponent.

e. A Statement By a Party's Employee

If the out-of-court statement (a) was made by an agent of the party against whom the statement is offered and (b) concerns a matter within the scope of the agency or employment (the focus is on the subject of the statement, not the authority of the declarant to speak for the employer) and (c) was made during the existence of the employment relationship ("hired-to-fired"), then it is not hearsay.[40]

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38. FED. R. EVID. 801(d)(1)(C). This was added to the federal rules sometime after their initial adoption. "Although this provision appeared in the Rule as promulgated by the Supreme Court, it was eliminated by Congress when the Rules of Evidence were originally adopted but reinserted [a few months later]." 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(1)(C)[01] (1988).

Because it was a late addition to the Federal Rules, this particular definitional exclusion did not make, and has not made, its way into the version of the rules adopted in my home jurisdiction. As noted above, initially the United States Congress took the same position as the Nebraska Unicameral and refused to adopt this part of the rule. WEINSTEIN'S EVIDENCE characterized this move as "'the most incomprehensible action of Congress in modifying the Rules of Evidence.'" WEINSTEIN'S EVIDENCE, at ¶ 801(d)(1)(C)[01] (1992) (quoting an earlier version of this same treatise). Presumably, Judge Weinstein and Professor Berger would be similarly short with the Nebraska Unicameral and the legislative bodies of the four other states—Arkansas, Maine, North Carolina, and Oklahoma—they identify as having omitted this from their rules. WEINSTEIN'S EVIDENCE, ¶ 801(d)(1)(C)[02] (1992).

Though this definitional exclusion did not make it into the Nebraska rules, not many people seem to have noticed. Mangrum, *supra* note 10, at 335.

39. FED. R. EVID. 801(d)(2)(A).

40. FED. R. EVID. 801(d)(2)(D). This definitional exclusion as enacted in my home jurisdiction is somewhat different. The out-of-court statement fits this definitional exclusion in Nebraska if it (a) was made by an agent of the party against whom the statement is offered and (b) concerns a matter within the scope of the agency or employment (the focus is on the subject of the statement, not the authority of the declarant to speak for the employer)—so far this is the same as the federal rule, but then Nebraska adds this extra foundational element—and (c) was made while the out-of-court declarant was on the job. Neb. Evid. R. 801(4)(b)(ii), Neb. Rev. Stat. § 27-801(4)(b)(ii) (1989). In other words, the timing of the statement under the federal rule is "hired-to-fired," while the timing under the Nebraska rule is "while punched in."

f. A Statement By an Employee Authorized to Speak

If the out-of-court statement (a) is offered against a party and (b) was made "by a person authorized by the party to make a statement concerning the subject," it is not hearsay.[41]

This definitional exclusion is subsumed by Federal Rule of Evidence 801(d)(2)(D), regarding statements by an agent or employee of a party. Everything that fits here, also fits there.[42] I suspect the reason it was written as a separate definitional exclusion is more historical than anything else.

g. An Adoptive Admission

If the out-of-court statement (a) is offered against a party, (b) was made within the hearing of that party (you aren't held to have adopted it unless there is some indication you could hear it), (c) probable human behavior would have been to deny the statement if it was not true, (d) the party did not deny that statement and (e) there is no other apparent reason for the lack of denial (such as the 5th Amendment) then it is not hearsay.[43]

h. An Admission By a Co-conspirator

If (a) a conspiracy existed, (b) the out-of-court declarant and the party against whom the out-of-court statement is offered were both members of the conspiracy, (c) the out-of-court statement was made during the course of the conspiracy (when did it begin and when did it end) and (d) the out-of-court statement was made in furtherance of the conspiracy, then the out-of-court statement is not hearsay.[44]

C. And Then There Are Some Exceptions

And then, having defined hearsay, the second piece of work is to identify and become comfortable with the exceptions.

There are a lot of them.

Twenty-nine of them are written down in the Federal Rules,[45] and two of those invite the court to create new exceptions for trustworthy out-

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41. FED. R. EVID. 801(d)(2)(C).

42. Under the Federal Rules, the definitional exclusion for statements by employees authorized to speak is subsumed by the definitional exclusion for statements by an agent of a party. In my jurisdiction, the former does include a kind of out-of-court statement that is not covered by the latter: something said by a "speaking agent" after working hours. See *supra* note 40.

43. FED. R. EVID. 801(d)(2)(B). But not all of the foundational elements are stated in the rule. Therefore, *see also, e.g.*, United States v. Diaz, 936 F.2d 786, 788-89 (5th Cir. 1991); United States v. Joshi, 896 F.2d 1303 (11th Cir. 1990) and Mangrum, *supra* note 10, at 525.

44. FED. R. EVID. 801(d)(2)(E). In a criminal or civil case, the offering party must establish foundational elements of 801(d)(2)(E) by a preponderance of the evidence. Bourjaily v. United States, 483 U.S. 171, 175 (1987). When deciding whether foundational elements of 801(d)(2)(E) have been shown, the court may consider the out-of-court statement sought to be admitted. *Id.* at 181.

45. FED. R. EVID. 803(1)-(24) and 804(b)(1)-(5).

of-court statements not covered by the other written exceptions.[46]

The late Irving Younger told us that he did not know anyone who had catalogued the exceptions, but he thought we "might have as many as fifty or so."[47]

Theory: There are two inclusionary rules of evidence—relevance and competence. If it is relevant and competent, it is presumptively admissible. All of the rest of the rules, including the hearsay rule, are exclusionary. The "thou shalt nots." The theory is that hearsay is inadmissible, with some exceptions, of course, but the general rule regarding hearsay is that it is not admissible in evidence. This is theory. This article is not about theory, but truth. This, then, is where the article begins.

II. TRUTH

> The moment one begins to investigate the truth of the simplest facts which one has accepted as true it is as though one had stepped off a firm narrow path into a bog or quicksand—every step one takes one sinks deeper into the bog of uncertainty.[48]

I have identified eight true statements about hearsay.

A. Truth # 1: Everything Is Nonhearsay

> But the sales slips were not admitted to prove that Hutchison bought the vans. They were admitted to prove that someone using Hutchison's name bought the vans, from which the jury could infer that the person using Hutchison's name was Hutchison himself.[49]

Most everything can be made to be nonhearsay.

There is a famous case, *Bridges v. State*,[50] where the court allowed into evidence out-of-court statements a seven-year-old child made to her mother and to a police officer. The young girl had been the victim of a sexual assault. Her out-of-court statements described several exterior and

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46. These two rules, 803(24) and 804(b)(5), of the Federal Rules of Evidence, are identical in all but two ways. Each is an exception for a hearsay "statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . . ." The relation back to the "guarantees of trustworthiness" of "the foregoing exceptions" is a relation back to different foregoing exceptions, which presumably have different guarantees of trustworthiness. Additionally, with Rule 803(24) the availability of the out-of-court declarant is irrelevant, and with Rule 804(b)(5) the unavailability of the testimony of the out-of-court declarant is required. As far as I can tell, these differences are meaningless.

47. IRVING YOUNGER, THE LAW OF EVIDENCE, VIDEO TAPE # 7, EXCEPTIONS—III, (National Practice Institute 1979). Younger also pointed out that it takes but four words to state the rule against hearsay, and 2,500 to state the exceptions. Irving Younger, *Reflections on Rule Against Hearsay*, 32 S.C.L.REV. 281, 281 (1980).

Sixty some years ago, McCormick characterized the hearsay rule as "riddled with thirteen or more exceptions." Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 503-04 (1930). Truly the good ol' days.

48. LEONARD WOOLF, DOWNHILL ALL THE WAY 9-10 (1967) *quoted in* J. Atlas, *Stranger Than Fiction*, N.Y. Times Magazine (June 23, 1991).

49. United States v. Saint Prix, 672 F.2d 1077, 1083 (2d Cir. 1982), *cert. denied*, 456 U.S. 992 (1982). Discussed *infra* text accompanying notes 91-92 and 491-95.

50. 19 N.W.2d 529 (Wis. 1945).

interior details of the house in which she said she was assaulted. It was subsequently discovered that this description closely fit defendant's home (and probably 1,000 others?). The court let the mother and the police officer testify to what the child had told them. It was not hearsay.

I would say this: It was an out-of-court statement, offered to prove the truth of the matter asserted. The evidence would be this: first piece of evidence—"I was assaulted in a house that looks like this." Second piece of evidence—defendant lives in a house that looks like this. Conclusion: Defendant was the assailant. The testimonial infirmities of hearsay are present: the risk of insincerity, poor memory, suggested narration, and faulty perception—no cross examination. My conclusion: It was hearsay.

The court said this, sort of: Hers was a statement used as circumstantial evidence of memory or belief. The court said it was not hearsay. Rather, it was circumstantial evidence indicating knowledge on the part of the declarant at a particular time. It was evidence of her state of mind. It was not offered to prove the truth of the matter asserted, but just to prove what she knew at a time prior to the defendant becoming a suspect. And other mumbo jumbo.[51]

It may be . . . no, it is true that this evidence indicates knowledge on her part of a particular scene, at a particular time. The police officer's testimony as to what she told him does have that feature, and so does her mother's testimony as to what she told her. It is, however, also and unavoidably true that the primary usefulness of this evidence in this case is as a statement, "I was sexually assaulted in a place that has the following description,"[52] not to prove her knowledge or state of mind, but to prove the place in which she was assaulted.

The hearsay dangers were minimized in *Bridges* by the fact that the young girl did testify and was subject to cross-examination.[53] This, however, had nothing to do with the court's analysis as to why her out-of-court declarations to her mother and the police officer were not hearsay.

Someone is going to jail—and is being labeled a child abuser—based in part on this young girl's out-of-court description of a house. Someone has become a suspect, an accused, and finally a convict based in part on the assumption that her out-of-court description of the house of the assault is a true description.

Judge Weinstein has done something similar in the *Muscato* case.[54] He has given us a peek at how far this "circumstantial evidence of state

51. "When, for instance, it was proven that [the victim] stated during the evening after the alleged assault that there was a picture of the lady in the room, her statement did not constitute competent evidence to prove that there was such a picture in the room. But her statement was competent as evidence to prove that she had knowledge of such an object in the room and for this purpose the utterance is not inadmissible hearsay, but is a circumstantial fact indicating knowledge on the part of [the victim] at a particular time." *Bridges*, 19 N.W.2d at 536.

52. Relating to the previous footnote, "I was sexually assaulted in a room that contained a picture of 'the lady.'"

53. This case is, then, unlike State v. Plant, 461 N.W.2d 253 (Neb. 1990), discussed *infra* text accompanying notes 286-91, where the only evidence of the young girl's knowledge of the event was through out-of-court declarations.

54. United States v. Muscato, 534 F. Supp. 969 (E.D.N.Y. 1982).

of mind" can go towards swallowing the whole hearsay rule. Gollender was part of a conspiracy. The question was whether Muscato also was a part. Gollender *testified* that he'd put a label on a gun. There was evidence there had been a label on the gun found on Muscato. This arguably linked Muscato to Gollender, and, through Gollender, to the conspiracy on trial.[55]

Gollender was impeached, or, as Judge Weinstein put it, "[T]he defense attorney had a field day with him on cross-examination."[56] In response, the prosecutor called a special agent of the United States Treasury Department who testified that Gollender had made an out-of-court statement regarding the labeling of the gun, and had made the statement before there was any opportunity for anyone to have placed the suggestion in his mind. Judge Weinstein let this earlier statement in as non-hearsay under the theory that it is circumstantial evidence of Gollender's state of mind; it proves the existence of a memory in Gollender's mind at a relevant time past; and, in terms of whether this was in Gollender's mind on this date past, we can cross-examine a person who has first-hand knowledge—a person who heard him say it on this date past.[57] "Who is the real witness?" as Professor McElhaney would ask.[58] The treasury agent, and he is testifying.[59]

In *Bridges*, the young girl's out-of-court declaration is offered to prove the existence of knowledge (and that it does). From the existence of knowledge, the triers of fact will be asked to draw an inference. But what inference? If they are asked to infer the cause of the state of mind,[60] that is no different than just saying in the first place, "We offer it to prove that this is the room where she was assaulted." Or maybe it is just offered to prove the existence of the knowledge and then there will be other evidence that will establish the truth of the knowledge, but then what good is the existence of the knowledge, or, at least, what good is it that outweighs the danger the jury will look at it and say, "Defendant's room is the room where she was assaulted?"

In truth, the problems presented by the evidence in *Bridges* and *Muscato* seem to be Rule 403 problems more than hearsay problems. It seems that this evidence is predominately hearsay, and the arguments to

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55. This and other "overwhelming" evidence. *Id.* at 971. This opinion was in response to a motion for a new trial. Judge Weinstein could have used the harmless error rule. *See infra* text accompanying note 300.

56. *Id.* at 972.

57. I resisted typing that sentence because it sounds too much like the student response, "It is not hearsay because she heard him say it."

58. James W. McElhaney, *The Real Witness*, 28 A.B.A. J. 82 (1988). Similarly, while recognizing that it ignores the case where a witness's own out-of-court statement is hearsay, Professor Wellborn offers this: "[T]he hearsay problem exists whenever the belief of a human being other than the witness is used as evidence . . . ." Wellborn, *supra* note 17, at 55.

59. Judge Weinstein also let it in as a nonhearsay prior consistent statement, under Federal Rule of Evidence 801(d)(1)(B), and as reliable and relevant under the residual exception in Federal Rule of Evidence 803(24). *Muscato*, 534 F. Supp. 978-79. On the latter point, there had not been pre-trial notice of use of this exception, "but no objection on this ground was made nor could it have been made with any force since the court would have granted a continuance if one had been requested." *Id.* at 979.

60. *Id.* at 976.

the contrary are too cute. Under the operative definition, these statements are hearsay,[61] but they should not be. The problem is one of probative value versus unfair prejudice and we should recognize it as such. Or as Judge Weinstein said as he lead into the meat of *Muscato*, "In this case, the extra-judicial declaration was both reliable and useful."[62]

In *Posner v. Dallas County Welfare*,[63] the county attempted to terminate the Posners' parental rights to their two minor daughters. In evidence was a particularly damning out-of-court statement spoken by one of the daughters: While playing with a friend, the daughter said, "[G]ive me your doll and I'll show you with mine how daddies sex their little girls."[64] This out-of-court statement was held to be admissible to show state of mind.[65]

The argument that these statements are not offered to prove the truth of the matter asserted but only to show that they were part of the state of mind of those who said them is one that can be applied to very nearly all hearsay, and it simply confuses the issue to make this argument.[66] Every piece of hearsay has a nonhearsay state-of-mind use. Of course that use often is irrelevant.[67] Which foreshadows my point that hearsay really is admissible, and we are pretending when we say otherwise, and the real problems are problems of probative value balanced against the danger of unfair prejudice with, in the hearsay situation, an emphasis on the unfair prejudice resulting from the unavailability of cross-examination.

Here is my personal favorite state-of-mind case. In *Armstrong v. State*,[68] the defendant was convicted of homicide. Two men were involved in an argument in a bar. One man, the accused, left the bar to get a gun. The bartender and others in the bar warned the other man, the victim, that the accused may have gone home for a gun and that, for his own safety, the victim should leave. The bartender made similar statements to others in the bar. The victim did not leave and the accused came back and shot him dead.

The accused claimed he killed in self defense. The evidence I am concerned with is the bartender's out-of-court statements to others in the bar, other than the victim.[69] Testimony as to what the bartender said was

61. Weinstein's approach to Gollender's out-of-court statements may be a perfectly fine response to *a* hearsay rule, but it does not really respond to *our* hearsay rule.

62. *Id.* at 974.

63. 784 S.W.2d 585 (Tex. Ct. App. 1990).

64. *Id.* at 587.

65. *Id.* Actually what the court said is this: The testimony was not offered to prove the truth of the matter asserted, but only to show that the statement was made, therefore it falls under the state-of-mind exception. In other words, what the court said is this nonhearsay evidence is relevant to declarant's state of mind and so it fits under that exception. *Id.* Nonhearsay? Or admissible hearsay? The court's answer seems to be, "Both."

66. Not to mention that it confuses law students all across this great country.

67. *See, e.g.*, United States v. Hernandez, 750 F.2d 1256 (5th Cir. 1985) and United States v. Reynolds, 715 F.2d 99, 101 (3d Cir. 1983) (discussed *infra* note 258).

68. 826 P.2d 1106 (Wyo. 1992).

69. The prosecutor also introduced statements the bartender and others made to the victim. This was let in as nonhearsay state of mind evidence: Without regard to its truth, it was relevant to the state of mind of the victim, which, in turn, was relevant to the claim of self defense. This part of the ruling is uneventful. *Armstrong*, 826 P.2d at 1119.

allowed in as state-of-mind evidence. Here is the reasoning: The persons to whom the bartender made these statements were witnesses at the trial; the bartender's statements were relevant to the state of mind of the witnesses; their state of mind is relevant to their credibility as witnesses, in that it reinforces that they were likely paying attention.[70] The evidence was not offered to prove the truth of the matter asserted (that the defendant had gone home to get a gun—and therefore that the shooting might have been premeditated); instead, it was offered to prove the state of mind of some witnesses (having been told there might be gun-play, they were likely to be paying attention). It was not offered, as would be more typical, to prove the state of mind of a party or the victim; it was offered to prove the state of mind of some witnesses.

Since all hearsay has a nonhearsay state-of-mind use and, when viewed that way, the question becomes one of probative value and unfair prejudice, then in a very real sense every hearsay problem can, if all else fails, be recast as a Rule 401/403 problem. Someone heard it, and it affected his or her state of mind. The trick is to make that state of mind relevant.

Perhaps more straightforwardly, though no more correctly, *In re Dependency of Penelope B.*[71] found that much of what was said out-of-court by the six-year-old child sexual-assault victim was not hearsay. When a tulip blooms, said the court, it does not intend to assert, "It is spring," so a witness's testimony that a tulip bloomed is not hearsay to the issue of whether it was spring. When a dog limps, it is not asserting, "My leg is injured," so a witness's testimony that a dog limped is not hearsay to the issue of whether the dog was injured. From there, the court concludes, "[T]he testimony of a witness that he or she observed a person limping may be offered as circumstantial evidence that the person was injured."[72] From there, the court concludes that much of what Penelope B. said about who assaulted her and how was out-of-court nonassertive verbal conduct.

Two problems exist with this: *First*, tulips and most dogs don't lie, but people do; *second*, the rule says that conduct is not a "statement" unless it is intended to be so and the move from the limping dog to the limping person ignores that the person can be intending his or her limping to be an assertion. Take, for example, the pedestrian-plaintiff faking having been run over by a taxi cab. The problem with the court's analysis in *Penelope B.* is that it skips the analysis. Was Penelope B. intending her verbal and nonverbal expressions to make statements or not?[73]

Here is what the court seems to me to be saying. Tulips and, by and large, animals don't lie. Rather, what they do is reflexive and not the

70. Here I have translated a bit, but I cannot see what else the court could have meant. The court said, "The jury was entitled to weigh [a witness'] state of mind into his report of suddenly paying attention . . . ." *Id.* at 1120. "[This] testimony set the stage of the witnesses' observation . . . ." *Id.*

71. 709 P.2d 1185 (Wash. 1985).

72. *Id.* at 1191-92.

73. The court stated the relevant principle—when an out-of-court "utterance" is not an intentional expression of fact or opinion, it is not a "statement," which means it is not hearsay. *Id.* at 1191. But the court did not apply this principle. It simply assumed that much of what the victim said was "nonassertive verbal conduct." *Id.* at 1192.

product of intelligent thought or outside influence. Insofar as intelligent thought or susceptibility to outside influences is concerned, the court seems to be equating very young children with the animal and vegetable parts of the kingdom. The court seems to be concluding that to the extent children are subject to outside influence, it tends not to have much lasting impact. A lot of what Penelope B. said sort of freely flowed from her, on her own, with little or no apparent coaching. A lot of what she said was in response to questions. Though not broken down this way in the opinion, the former was ruled nonhearsay, the latter hearsay.

But if Penelope B. is playing with anatomically correct dolls and holds the penis of the male doll, points it in the direction of the therapist, and says, "Put this in your mouth," why is that nonhearsay? That statement is nonhearsay in the given circumstances, but becomes hearsay if the therapist says, "What did your daddy do?" and the young girl holds the penis of the male doll, points it in the direction of the therapist, and says, "Put this in your mouth." There may be significant differences in the reliability of these two pieces of evidence, and we may want to let one in and keep the other out, but what is the difference in terms of the hearsay rule? In the context of how they are used in this case, aren't they both out-of-court statements that assert what her daddy did to her, and isn't that exactly why the prosecutor is offering each to prove the truth of the assertion?

Some will say I am forgetting the element of *intent* to assert. When the girl responds to the question, we know she is intending an assertion. When she volunteers the information during observed play with anatomically correct dolls, she is not intending an assertion. How do we know this? In cases like Penelope B.'s, it seems intuitive. It tends not to be based on any particular testimony about Penelope B. or children or sex abuse victims in general, or much particular testimony about the special circumstances surrounding the incident on trial. It seems to reflect a belief that children either are not sophisticated enough or motivated enough to lie when they speak spontaneously. But throw in an adult questioner with his or her agenda and you have both the sophistication and the motive.[74]

But these things are not hearsay things. What is really going on here has little to do with whether an out-of-court statement is offered to prove the truth of the matter asserted, or whether an out-of-court verbalization is intended to assert and, therefore, is a "statement." It has to do with creating a new class of nonhearsay statements for certain kinds of things said by children. Or it has to do with creating a new hearsay exception for certain things said by children, and particularly abused children.[75]

In *United States v. Weeks*,[76] one kidnapper called the other "Gato." An assistant warden testified that defendant's prison nickname was "Gato,"

74. Though if the adult questioner is a doctor hired to diagnose or treat the child, most of the child's extra-judicial statements will be *admissible* hearsay. FED. R. EVID. 803(4).

75. Not surprisingly, this is exactly what many courts and many legislatures have done: At least 25 states have created new exceptions for child-victim hearsay in sexual abuse cases. This is discussed later in the article. *See infra* Truth # 6.

76. 919 F.2d 248 (5th Cir. 1990).

which he knew because he had heard a guard and other inmates call defendant "Gato." The warden's testimony, of course, helped establish the identity of defendant as one of the kidnappers. Defendant objected that the warden was testifying to out-of-court statements by inmates and a guard, that the out-of-court statements asserted that defendant's nickname was "Gato," and that the out-of-court statements were offered to prove the truth of the matter asserted. The Fifth Circuit Court of Appeals said, "We conclude that the warden's testimony reported non-assertive oral conduct and was therefore not hearsay."[77]

In *United States v. Snow*,[78] Bill Snow was convicted of possession of an unregistered firearm. A critical piece of evidence was a piece of "name tape" that was affixed to the case in which the gun was found. On the name tape were the words "Bill Snow." The defendant raised a hearsay objection, arguing that under the prosecution's use, this label was an out-of-court statement, by an unknown out-of-court declarant, stating "This briefcase belongs to Bill Snow." The court ruled that it was not hearsay because it was circumstantial evidence.[79] It does seem to be a statement, it was made out-of-court, and it is offered to prove the truth of the matter asserted. The truth of the assertion depends on the traditional testimonial infirmities.[80] Somewhere in this case there was an out-of-court declarant who no doubt intended by this label to assert (truthfully or falsely), "This briefcase belongs to Bill Snow." It does seem to be hearsay, and the court seems to be wrong.[81]

The point, once again, is this: Using this kind of analysis, very little is hearsay.

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77. *Id.* at 251.

78. 517 F.2d 441 (9th Cir. 1975). Regarding *Snow*, *see also infra* text accompanying notes 145-49, 184-86, 266-68, 277 and 477-80.

79. The court said the name tape is not "an assertion 'from which the truth of the matter asserted is desired to be inferred.'" *Snow*, 517 F.2d at 443 (quoting 1 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 25 (3d ed. 1940)). The only reason seems to be that things like this are on Wigmore's list of examples of nonhearsay circumstantial evidence, in a sub-category he labeled "mechanical traces." *Id.* at 443-44, referencing WIGMORE at §§ 148-57. The court seems to say that this name tape with the words "Bill Snow" is offered only to show that someone stuck it on there, and that is circumstantial evidence that the case belonged to Bill Snow; without regard to truth, it shows the out-of-court declarant's belief regarding ownership of the case, and that is relevant in this lawsuit. But didn't the person who stuck it there intend to assert something—why else stick it there, but to say "This case is Bill Snow's," and isn't that what we are trying to prove?

80. *See supra* text following note 50 and *infra* text accompanying note 469.

81. *See also*, United States v. Alvarez, 960 F.2d 830 (9th Cir. 1992); United States v. Hensel, 699 F.2d 18 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983); United States v. Duffy, 454 F.2d 809 (5th Cir. 1972). *But see*, Payne v. Janasz, 711 F.2d 1305 (6th Cir. 1983) (*infra* text accompanying notes 145-49); United States v. Muscato, 534 F. Supp. 969 (E.D.N.Y. 1982) (discussed *supra* text accompanying notes 54-62). For a more extensive discussion of words that do not assert, *see infra* text accompanying notes 445-502.

Weinstein and Berger state that "Snow was correct in result but tortured in reasoning that the tag was not hearsay under Rule 801(a). In view of the availability of the exception in Rule 803(24) for reliable hearsay, there is no longer any reason for denominating as non-hearsay what analysis and the rules suggest should be characterized as hearsay." 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(a)[01] n.2 (1992). This seems to recognize that before the availability of exception 803(24) there was a need for tortured, result-oriented analysis.

And here is another nice piece of nonhearsay. In New Jersey, if the victim of a sexual assault complains of the assault "within a reasonable time" and "to someone who she would normally turn to for sympathy, protection, or advice,"[82] testimony regarding this complaint by the victim is not hearsay.

> [The testimony] is not offered as proof of the truth of the matter contained in the complaint, rather it is used to respond to the fact finder's natural assumption that if the act complained of had occurred, an early complaint would have been made.[83] "The function of such evidence is not corroboration or substantive proof but solely to sustain the credibility of the witness."[84]

Everything is nonhearsay. Sometimes when it is nonhearsay it is not relevant. In *United States v. Leung*,[85] one federal agent testified that another federal agent told him about typical patterns employed by groups like the one whose members they were about to arrest. The leader, he said, would be found somewhere on the periphery, running the show from there. The defendant was found there, apparently doing just that. The objection to the out-of-court "pattern" statement was hearsay.

> On appeal the prosecutor argues that the testimony [was not hearsay because it] was offered not for its truth but to show why agent Meyer conducted the investigation [on the periphery] as he did. That avoids the hearsay problem at the expense of making the testimony irrelevant—at least, irrelevant to guilt, as opposed to a motion to suppress. [Defendant] did not have a motion to suppress outstanding.[86]

Everything is nonhearsay. Sometimes when it is nonhearsay it is relevant, though not very probative, but admissible anyway.[87] In *United States v. Benton*,[88] Campbell, a state police officer, and Benton, a local sheriff, were tried for being part of a drug scheme. Each defended with the claim that he was conducting an investigation and the acts charged were part of the investigation.[89] To the end of supporting this defense, Campbell entered into evidence a "Confidential File." Benton argued that the file contained unsupported allegations tying him to other local crime

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82. State v. Bethune, 557 A.2d 1025, 1027 (N.J. Super. Ct. App. Div. 1989).

83. Perhaps a dubious, surely a sexist, view of women's reactions to crime. *See infra* note 222.

84. 557 A.2d at 1027 (quoting State v. Gambutti, 115 A.2d 136, 141 (N.J. Super. Ct. App. Div. 1955)). Though the court treats this rule, called the "fresh complaint" rule, as an exception to the hearsay rule, it does recognize that "when [it] is strictly limited to the question of whether or not the child complained, it is not hearsay at all, as it is not introduced to prove the truth of the matter stated." *Id.* at 1028-29. This rule is discussed in greater detail *infra* text accompanying notes 219-29.

85. 929 F.2d 1204 (7th Cir. 1991).

86. *Id.* at 1209.

87. Sometimes a court finds it to be too prejudicial as it relates to an inadmissible hearsay use. *E.g.*, Shepard v. United States, 290 U.S. 96, 104 (1933); United States v. Brown, 490 F.2d 758 (D.C. Cir. 1974); State v. Bartolon, 495 P.2d 772 (Or. Ct. App. 1972); People v. Hamilton, 362 P.2d 473 (Cal. 1961) (also cumulative). *See also, e.g.*, State v. DiLosa, 529 So. 2d 14 (La. Ct. App. 1988) and State v. Steffen, 509 N.E.2d 383 (Ohio 1987) (where the evidence was admitted as state-of-mind evidence, the appellate court said that was error by reason of considerations of probative value versus prejudice, but the error was harmless).

88. 852 F.2d 1456 (6th Cir. 1988).

89. *Id.* at 1460.

figures, and objected that it was hearsay. The court first pointed out that, for reasons stated in the opinion, the file was not particularly damaging to Benton. Then the court stated, "In our view . . . this evidence . . . was admitted not for its truth, but rather to illuminate Campbell's contention that he was conducting his own investigation, and that he maintained a file on the investigation."[90]

And here is the case that contains my personal favorite explanation of why a particular out-of-court statement is not hearsay: Glenn H. Hutchison was on trial for importing and conspiring to import narcotics.[91] In an effort to connect Hutchison with vans in which the drugs had been found, the government offered into evidence sales slips from a Ford dealer, for the vans in question, and bearing Hutchison's name. He objected that they were hearsay. The appellate court said, "But the sales slips were not admitted to prove that Hutchison bought the vans. They were admitted to prove that someone using Hutchison's name bought the vans, from which the jury could infer that the person using Hutchison's name was Hutchison himself."[92] Nothing is hearsay, nothing is what it seems, nothing is offered to prove anything, it is all proved some other way. Cue Rod Serling.

And in a similar case, *United States v. Lieberman*,[93] the court said

> The [hotel registration] card was, however, admissible as non-hearsay, simply to show that someone calling himself Robert D'Ambra registered in the hotel, laying a foundation for further evidence that from his room a call was made to Myron Lieberman's unpublished telephone number. To provide evidence that the jury should infer that this D'Ambra was the person arrested on December 2, the government presented the testimony of the arresting DEA agent, Dennis Nargi, who testified to the address he had read on the driver's license carried by D'Ambra; this address was the same as that written on the hotel registration card. Thus it was proper to receive the hotel registration card for the limited non-hearsay purpose, with other evidence admitted from which the jury could infer that the hotel card spoke the truth.[94]

The address on D'Ambra's driver's license was used to prove the truth of the address on the hotel registration card. Unless the address on the

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90. *Id.* at 1468.

91. United States v. Saint Prix, 672 F.2d 1077 (2d Cir. 1982), *cert. denied*, 456 U.S. 992 (1982), also discussed *infra* text accompanying notes 292-94 and 491-95.

92. *Id.* at 1093. The quotation continues, "Admission for this purpose is permissible so long as other evidence connected Hutchison with the person using his name. Such evidence is in the record. Hutchison lived at 302 London Road, the address at which Bennett [a co-defendant] registered [a boat that was also involved] and at which Bennett lived. Bennett provided the cash for the vans bought at Robin Ford." *Id.* at 1093-94. *See also, e.g.*, United States v. Patrick, 959 F.2d 991, 999 (D.C. Cir. 1992).

There is no explanation of why the *Saint Prix* court did not use the business records exception for these sales slips. For my theory on this, *see infra* text accompanying notes 491-95.

93. 637 F.2d 95 (2d Cir. 1980).

94. *Id.* at 101. In this regard, this case tries to be like Bridges v. State, 19 N.W.2d 529 (Wis. 1945), *supra* text accompanying notes 50-62, and United States v. Muscato, 534 F. Supp. 969 (E.D.N.Y. 1982), *supra* text accompanying notes 54-62, but this case is missing the quantity and quality of confirming evidence present in the other two.

driver's license is an admission by a co-conspirator somehow in furtherance of the conspiracy, hearsay is being used to prove the truth of a statement not able to be offered to prove its own truth because it is hearsay.[95]

The court continued:

> To the extent that the hotel registration card was admitted for non-hearsay purposes, Lieberman was entitled, if he requested, to a limiting instruction. While the record is not entirely clear, it appears that Lieberman did not request such an instruction but that one was given nevertheless. After Nargi had testified to the address on D'Ambra's driver's license (the license itself not being offered or received in evidence), the court gave the following limiting instruction:
>
> This involves that registration piece of paper that was marked into evidence. Registration evidence offered to this Court was solely offered to prove that the Robert D'Ambra registered at the Florida Hotel was the same Robert D'Ambra arrested by the Agent Nargi. That's all. No other inference can be drawn from it.[96]

"Th-Th-Th-That's all folks!" might have been a better way to end this instruction.

- First, doesn't this "limiting instruction" run completely contrary to the theory under which the appellate court is allowing the evidence? Doesn't it say the hotel registration card is offered to prove the truth of the matter asserted, just the use for which the appellate court said it cannot be entered?

- Second, how is it that the prosecution can prove the truth of one piece of hearsay with another piece of hearsay? Is it that neither is offered to prove the truth of the matter asserted; the truth of each is proved by the other? Or, if the driver's license is not hearsay, why is the hotel registration card? Isn't each someone's out-of-court statement of D'Ambra's address? Isn't the hearsay value of each equal?

- Third, if this case is correct, what isn't nonhearsay? In any case where there is more than one way to evidence a fact, what cannot be offered only to show it was said, letting the other evidence prove it is true?

My colleague, Collin Mangrum, categorizes these cases as nonhearsay "mechanical traces as circumstantial evidence of ownership."[97] As he points out, a number of cases categorize this kind of evidence as circumstantial or indirect evidence, not offered to prove the truth of the matter asserted, but offered as circumstantial or indirect evidence of something else from which truth can be inferred. Notwithstanding the fact that there are many

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95. It is not a party's own admission. D'Ambra was not a defendant, just Lieberman.

96. *Lieberman*, 637 F.2d at 101.

97. Mangrum, *supra* note 10, at 510. Wigmore also called this "mechanical traces" evidence. *Supra* note 79.

such cases, "under the plain language of Rule 801, [these things are] hearsay."[98]

If these "mechanical traces as circumstantial evidence" cases are based on the fact that the evidence is circumstantial, then they go too far. All hearsay evidence is circumstantial evidence of something, and I'll bet it is all circumstantial evidence of something that is relevant to the case and, in most cases, something for which there is other evidence: So all hearsay evidence can be offered not for its truth but as circumstantial evidence of something else, from which the truth of the fact it asserts can be inferred or, as in the bloodhound cases, not for its truth but only to show it was said, with other evidence proving the truth of the fact it asserts.[99]

If these cases are limited to mechanical traces when used as circumstantial evidence, then these courts are creating an exception to the hearsay rule. They are creating an exception not found in the statute. And they are creating an exception but not calling it an exception. Instead, they are calling it a kind of nonhearsay.

Another somewhat similar kind of nonhearsay, in one court at least, is "background evidence": out-of-court statements offered not for their truth, but as background. Hearsay evidence inadmissible for the truth of the matter asserted may be admissible for the limited purpose of showing the circumstances surrounding an event (ambience evidence).[100] Presumably, the only limit here is Rule 403 unfair prejudice; that is, if the probative value of the evidence as background evidence is substantially outweighed by the danger of unfair prejudice, the evidence is inadmissible even as background evidence.[101] If widely adopted, this category of nonhearsay background evidence will change a significant number of important hearsay questions into relevance (in the expansive, including-Rule-403 sense) questions.

One more kind of nonhearsay needs to be discussed. I will mention it now, and discuss it later. Various courts have held that the following are not and never will be hearsay: questions,[102] orders,[103] and suggestions.[104]

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98. United States v. Jefferson, 925 F.2d 1242, 1252 (10th Cir. 1991). "Whether evidence is offered as circumstantial evidence as opposed to direct evidence has nothing to do with whether it constitutes inadmissible hearsay . . . . [T]he fact that the evidence was introduced to link circumstantially the accused to the crime does not render the hearsay violation any more acceptable . . . . The protection afforded . . . by Rule 801 should not be discarded simply because the evidence is to be used circumstantially." *Id.* at 1252-53.

99. "All hearsay evidence could be viewed as a kind of circumstantial evidence, and all hearsay risks could in that view be transmogrified into mere questions of weight." Wellborn, *supra* note 17, at 62.

100. United States v. Daly, 842 F.2d 1380, 1388 (2d Cir. 1988). "If the evidence admitted as background consists of, or repeats, out-of-court statements that are hearsay and are not admissible by virtue of an exception to the hearsay rule, the background evidence [though admissible as background] generally is not properly admitted for the truth of the matters there asserted." *Id.* Presumably, as with other limited purpose evidence, opposing counsel is entitled to a limiting instruction. This concept of nonhearsay background evidence sounds a lot like the old common law hearsay exception "res gestae," which is discussed *infra* text accompanying notes 230-31 and 534.

101. FED. R. EVID. 403.

102. *See infra* text accompanying notes 447-74.

103. *See infra* text accompanying notes 474-76.

104. *See infra* text accompanying notes 474-76.

Everything can be made nonhearsay. It all impeaches or rehabilitates someone or another. It is all somehow or another relevant to the speaker's or the listener's state of mind, which might in turn be at least loosely relevant to the case at hand. Lots of out-of-court written or spoken words can be argued to be nonassertive: mechanical traces, oral conduct, or evidence offered only to show it was said, with its truth being shown by other evidence. Much of it is circumstantial evidence of who owned the gun or who purchased the vans or whatever is in issue; that is, the argument that the sales slip is not offered to prove that Glenn H. Hutchison bought the vans, but only that someone using the name Glenn H. Hutchison bought the vans, from which circumstantial evidence the jury can infer that Glenn H. Hutchison bought the vans—this is an argument that will come in handy lots of places. Everything is background for something else. It all could be phrased as a question, an order, or a suggestion—with proper training, the out-of-court declarants within the jurisdiction of the courts of the United States could flap their gums all day and not utter one hearsay declaration.[105]

TRUTH # 1: Everything can be argued to be nonhearsay. From there, it depends on the skill of counsel and the quality of the judge.

B. Truth # 2: Everything Is Hearsay

> [T]he human genius is for fabrication, the creation of that which is not. As an Irish poet once said: false representation is the critical difference between man and horse.[106]

The second truth about hearsay is this: Everything can be made to be hearsay.

Imagine this line of questioning:

Q: Will you please tell the members of the jury your name?

OBJ: Objection, your honor. May I voir dire the witness?

Q: Before you give us your name, let me ask you this: How do you know it is your name?

A: [No answer. The witness seems puzzled.]

Q: Isn't it true that your mother told you it was your name?

A: I . . . .

Q: And you saw it written down on a piece of paper—your birth certificate—some doctor wrote it down on a piece of paper, and the doctor was told by your mother?

A: Well . . . .

Q: And all through the lower grades of school, your teachers called it out, they said it was your name?

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105. *See infra* text accompanying note 474.

106. RICHARD RAYNER, THE ELEPHANT 28 (Turtle Bay 1992).

A: [The witness does not answer.]

Q: I thought so! Objection, your honor. Hearsay.[107]

This example is not so farfetched as it may seem.[108] In *United States v. Brown*,[109] tax preparer Amos Brown was convicted of assisting the preparation of fraudulent tax returns.[110] "The testimony most damaging to Brown was given by the IRS agent, Adrienne Peacock."[111] Regarding tax returns prepared by Brown, Agent Peacock testified "that between 90% and 95% of the returns she audited contained substantially overstated itemized deductions."[112]

There was no overt testimony regarding any out-of-court statements. There was no explicit out-of-court statement offered to prove the truth of the matter asserted. Though the trial court had not ruled on the issue because there was no objection, the appellate court went behind Agent Peacock's testimony and concluded "a clearer case of hearsay testimony would be difficult to imagine."[113] "[H]earsay of the rankest kind,"[114] said the court.[115]

Is this so far removed from looking behind the testimony of the witness in the fictional witness voir dire presented above? No, it is not. It is just more important. The real problem here is not that Agent Peacock's testimony was hearsay. It is that the probative value of the testimony, in the view of the majority, is substantially outweighed by the danger it will mislead or confuse the jury as to what the real issue is or as to what the dangers of this second-hand evidence are (with a hint that trial counsel was ineffective).[116] In fact, before the majority opinion got to its hearsay

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107. As with so much of what is done by today's evidence professors, this example is taken from something I saw the late Irving Younger do one time, but I don't remember where or when.

108. Not so farfetched at all. In addition to the cases discussed in the text, immediately below, *see* State v. Hyatt, 519 A.2d 612, 614 (Conn. Ct. App. 1987) ("Strictly speaking, when a person testifies regarding her age, that testimony is hearsay since one cannot exactly know her own age. A person is incapable of noting the fact of [her own] birth.") *See also* United States v. Allen, 950 F.2d 1055 (D.C. Cir. 1992) (discussing just when one's testimony regarding *someone else's* name might be hearsay).

109. 548 F.2d 1194 (5th Cir. 1977). This case is also discussed *infra* text accompanying notes 270-76.

110. *Id.* at 1197.

111. *Id.* at 1198.

112. *Id.* at 1204.

113. *Id.* at 1205. To which Judge Gee, dissenting, responded, "I find little difficulty in doing so." *Id.* at 1212 (Gee, J., dissenting).

114. *Id.* at 1208.

115. The appellate court said this in spite of the fact that the witness was an expert and her testimonial opinion may have been admissible even if the underlying data was not (Federal Rule of Evidence 703) and had there been an objection at trial the prosecutor probably could have established this as so. The appellate court said this in spite of the fact that the witness based her conclusions on what no doubt were taxpayers' statements against their own pecuniary, and perhaps penal, interests, making the underlying data itself admissible under the statement against interest exception (Federal Rule of Evidence 803(b)(3)) and had there been an objection at trial the prosecutor probably could have established this as so. In fact, there was no objection and therefore, no apparent need for the prosecutor to lay any further foundation regarding either of these points, 548 F.2d at 1207.

116. *See Brown*, 548 F.2d at 1210.

analysis, it concluded that Agent Peacock's testimony was inadmissible under Rule 403.[117] In the fictional voir dire, above, the real problem is not hearsay, but a waste of everyone's time.

Or take this case, even closer to the fictional voir dire above: The point to be proven was "the pauper's birth-place."[118] The pauper was in prison, where he was examined by a justice of the peace. His testimony was: "I was born in the parish of Lydeard St. Lawrence, as I have heard and believe."[119] Lord Denman, C.J., considered the objection "that the evidence as to the birth settlement is entirely hearsay," and ruled "[t]hat objection also must prevail." His explanation was short on detail: "Early recollection may be evidence of the place of birth, but early recollection is not the evidence set forth, but merely hearsay and belief."[120] Again, the question here seems to be: How important is it where this bloke was born? If it is really important, and particularly if it is really important and his testimony does not seem reliable,[121] perhaps we need more proof. Perhaps it is a rule requiring the production of the original problem: We want the original or a duplicate or an explanation of why these are not available.[122] Or perhaps it is a Rule 403 problem of balancing probative value and unfair prejudice or jury confusion. In defense of the Queen's Bench, perhaps it is a hearsay problem: If there is a need to prove where someone was born, then the witness's own place-of-birth testimony is offered to prove the truth of the matter asserted, and if the witness has no independent recollection of his or her own birth but only remembers what others said about it, it is hearsay; if there is no need to prove where someone was born, then it is offered as ambience. Even so, is this really something we want to teach and to learn and to apply at a moment's notice in the heat of the trial? What does this say about the hearsay rule? Well, I'll tell you what I think it says, but not just yet.

Another: "The plaintiff testified that when taken to the hospital, after the accident, she was cauterized on the back."[123] A later witness, a doctor testifying as an expert, was reminded of plaintiff's testimony and asked, "For what is that a remedy?"[124] Defense counsel interjected, "I object to it, as incompetent and immaterial."[125] The trial court allowed the question (in fact, the trial judge re-asked the question himself). The appellate court

117. The court found the evidence independently inadmissible under Rule 403 and the hearsay rule. *Id.* at 1204.

118. The Queen v. Inhabitants of Lydeard St. Lawrence, 1 Gale & D. 191 (1841).

119. *Id.*

120. *Id.* "Further illustration of the breadth of the hearsay rule is provided by some old English cases in which it was held that a witness cannot give admissible evidence of the place or date of his own birth. In more modern times, the fact that a witness cannot testify to his age without infringing the rule against hearsay has been stressed by the South African and Australasian courts." SIR RUPPERT CROSS & COLIN TAPPER, CROSS ON EVIDENCE 522 (Butterworths, 7th ed., 1990) (citations omitted).

121. As it may not have when the imprisoned pauper added "as I have heard and believe," though I suspect that is just some nineteenth century English formality.

122. FED. R. EVID. 1001-1008.

123. Thompson v. Manhattan Ry. Co., 42 N.Y. 896 (1896).

124. *Id.*

125. *Id.*

reversed saying, "We think such proof was in the nature of hearsay."[126] Asking a qualified expert whether a particular treatment is uniquely used as a treatment for any particular injury is in no way hearsay, unless one were to argue that the doctor only knows about this treatment because of what the doctor has read or been told—the Agent Peacock problem from the *Brown* case.[127] And if this is it, then everything is hearsay because we really don't know anything. "I think that I shall never see a poem lovely as a tree,"[128] but how do I know it's a tree? Someone told me.[129]

Above, in my discussion of the definition of hearsay, I wrote this: "Hearsay does not apply to a clock telling time, a bloodhound barking up a tree at a suspect, a radar device depicting speed, or a declaration by a stop sign, telling a driver to 'STOP'!"[130] I gave this reason: It cannot be hearsay unless there is a statement by a person. That is not a good enough reason. It is the reason routinely given,[131] but it is not good enough.

Why not? Take the clock, please. Someone—an out-of-court declarant—did set the clock; and in the process of doing so made an assertion regarding the time;[132] and that assertion, affected by the intervening mechanical operation of the clock, may be offered to prove the truth of the assertion. The assertion by the person setting the clock may be: "This is the correct time." Or, the assertion by one about to be late for work and changing his or her watch to show an incorrect time may be this lie to his or her employer: "This is what time I thought it was." But we let it go. Why do we do this?

We accept the clock at face value. We do not require expert testimony on the workings of clocks in general and the workings of this clock in particular—we do not require the kind of expert foundational testimony that we do require in the case of bloodhound or radar-gun evidence. With radar guns, for example, unless there is no objection, we do require testimonial evidence that at the time in question the particular radar device was in good working order and was being operated accurately.

We accept clocks at face value, but not radar. Why? Because we all have a clock, and we don't all have a radar gun.[133] This is the truth. It's not that the working of radar is beyond the understanding of lay persons, so we need an expert, while the workings of clocks are understood by everyone, so we do not need an expert. I, for example, don't understand how clocks work. They could be black magic, they could be a miracle,

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126. *Id.* at 897.

127. *Supra* text accompanying notes 109-117 and *infra* text accompanying notes 270-76.

128. JOYCE KILMER, *Trees*, in POEMS, ESSAYS AND LETTERS, 180 (Robert Corles Holliday ed. 1937).

129. "And if a tree was not a tree, he wondered what it really was." PAUL AUSTER, *City of Glass*, THE NEW YORK TRILOGY, 43 (1985).

130. *Supra* text accompanying notes 6-10.

131. *E.g.*, Mangrum, *supra* note 10, at 505. *See also* DeFilippo v. DiPietro, 163 N.E. 742 (Mass. 1928) (person weighed on scale; card came out with figures indicating weight).

132. An out-of-court declarant "told" the clock the time, just as out-of-court declarants told IRS Agent Peacock about their itemized deductions.

133. Or a bloodhound.

they could be an alien super-race's way of enslaving new worlds.[134]

It is because we all have clocks, and we all rely on clocks most everyday of our lives. It is like taking judicial notice that clocks are most often accurate enough.[135] It is like calling in a presumption, akin to the presumption of due receipt in the mail, that certain things are generally true; therefore, we will not require traditional methods of proving them but will presume them, leaving it to the other side to dispute them. It is like the business records exception to the hearsay rule, which I once heard the late Irving Younger explain as follows, "If the business record is good enough for big business, it should be good enough for the law."[136] It is like all of those things, but it is not any of them, for we simply say that what the clock says is not hearsay, its evidence is admissible, and if you have a problem with that, the problem is yours.

Accepting the clock is an accommodation to the real world, an accommodation that is not put to, and may not withstand, close analysis. It is exemplary of the problem with defining hearsay, of the problem with learning hearsay, of the problem with applying hearsay. It is existential hearsay.

But it sure does seem to be hearsay, even under the federal rules definition. And I can imagine all kinds of cases where I would like to cross-examine the person who told the time to the clock.[137]

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134. I think I better understand the workings of bloodhounds than clocks.

135. Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1145 (1935). "Where a court receives an almanac as evidence of an astronomical fact, it is not taking judicial notice of the fact; it is admitting anonymous hearsay and taking judicial notice of the reliability of the almanac as a source of authentic information."

Regarding what seems to be another use of judicial notice and the hearsay rule, judicial notice used to establish a foundational element of an exception, *see infra* text accompanying note 289.

136. Author's memory.

137. *See, e.g.*, *supra* text following note 132. *See also* Phillips v. Grand Trunk W. R.R. Co., 134 N.W.2d 201, 202 (Mich. 1965), where the issue was when (what time) the defendant railroad first knew of the presence on its property of certain persons injured thereon. Defendant's agent testified he received the information over the phone "at about 7:00 or a little later." *Id.* He knew the time because as he spoke he looked at the clock on the wall. This evidence was countered with testimony that the clock on the wall was inaccurate, including the testimony of a witness that "he knew, from frequent checking with his own watch, that [the wall clock] was inaccurate." *Id.* A wristwatch was used to impeach a railroad clock. The person who told the time to the wristwatch, if in fact it was the person wearing it, was available for cross-examination; the person who told the time to the railroad wall clock was not.

In a related kind of case, United States v. Tranowski, 659 F.2d 750 (7th Cir. 1981), defendant offered a photograph of himself, his mother, and a dog named Jerry. The man who took the photograph testified he took it at a time and place which provided defendant an alibi for the crime charged. *Id.* at 752. The government offered the testimony of an expert astronomer who testified that by measuring on the photograph the height of Jerry the dog, and the length of Jerry's shadow, and applying those measurements to information from a sun chart, he could tell fairly precisely that the photograph was taken on one of two days of the year. In this case, he testified, the only two days of the year on which this photo could have been taken were no where near the day of the crime charged. *Id.* at 752-53. The question had to do with the admissibility of the sun chart. The defendant claimed it is inadmissible hearsay. The trial court admitted it under the residual exception. *Id.* at 755. The court of appeals disagreed, holding that it "lacked any 'circumstantial guarantees of trustworthiness,'" because, while other experts use this chart to measure the height of lunar moons, no other experts use it to date photographs. *Id.* The chart is inadmissible hearsay (even though the out-of-court declarant, the astronomer who made the chart, is in court and testifying).

In fact, the clock is like the grocery store cash register tape "indicating that appellant's daughter had purchased plastic baggies."[138] A court held the cash register tape was hearsay.[139] In each case, the clock and the cash register, someone manipulated buttons that cause a machine to tell us what we want to know, the time or the item purchased. Perhaps the answer is that both are hearsay, and we generally do not recognize the former as such, whether because it so often is not important, or the out-of-court statement does not so obviously involve words, or because we all have clocks and watches and we assume that most of the time setting clocks is routine enough and clocks themselves are accurate enough. Whatever the reason, we generally do not recognize as hearsay what someone "told" the clock and what the clock now tells us it is. Even so, and even in a case when it would be important, I cannot imagine a hearsay objection being sustained when the coroner, testifying to the time of death in a homicide case, testifies that he based his figuring, among other things, on the time he examined the body, and, having forgotten his own watch when called in the middle of the night at home, he took that time from a wall clock at the scene of the crime.

Take this widely recognized category of nonhearsay: an out-of-court statement offered as circumstantial evidence of the declarant's state of mind.[140] One of the oldest and most infamous examples in law professing circles is, "On the issue of the sanity of D, a woman, D's public statement, 'I am the Pope.'"[141]

The previous edition of the Kaplan and Waltz answer book stated, "This would be classed as circumstantial evidence of D's state of mind," and, therefore, it is not hearsay.[142] They admit, however, that for the statement to be probative of the woman's sanity we have to know something about whether she actually believed she was the Pope.[143] The trier of fact is being asked "to find that she was sincere in her declaration."[144] The opponent of this evidence could benefit from cross-examination of this woman to find out if she really meant it. Perhaps she'd say, "Are you crazy?" or she'd say, "I am pope of my domain!" or, "I was the Pope last night, and my husband was Sister Mary," or, "October thirty-first? Yes. In fact I am the Pope each October thirty-first as I walk the neighborhood with my children." To the issue of her sanity, this is an out-of-court declaration offered to prove that the out-of-court declarant

138. Vandegrift v. Maryland, 573 A.2d 56, 65 (Md. Ct. Spec. App. 1990).

139. *Id.*

140. *See supra* text following note 50.

141. Edmund M. Morgan, Evidence Exam, Summer Term, 1946, Harvard Law School, *quoted in* JOHN KAPLAN ET AL., EVIDENCE CASES AND MATERIALS 126 (7th ed. 1992). *See also* Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1143 (1935).

142. JOHN KAPLAN ET AL., TEACHER'S MANUAL, EVIDENCE CASES AND MATERIALS 29 (6th ed. 1982).

143. *Id.* The new edition reads, "Reasonable arguments can be made on both sides," and it does not matter which argument you accept: if it is not hearsay, so be it; if it is hearsay, it is admissible as a statement of then existing state of mind. JOHN KAPLAN ET AL., TEACHER'S MANUAL, EVIDENCE CASES AND MATERIALS 48-49 (7th ed. 1992).

144. Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1143 (1935).

believed it to be true, something we likely cannot really know if we cannot ask her. And, in any event, isn't the statement, "I am the Pope," offered to the issue of her sanity, really offered to mean, "I think I am the Pope" and isn't that what someone is trying to prove? An out-of-court statement offered to prove the truth of the assertion therein.

So, is "I am the Pope" hearsay or not? Let me review my first two truths, in reverse order. Truth # 2: Everything can be made to be hearsay. Truth # 1: Everything can be made to be nonhearsay.

Is it hearsay, or not? Yes!

Take two more cases, creating one more example: First, in the "Bill Snow" case,[145] Bill Snow was convicted of possession of an unregistered firearm found in a case with an attached name tape containing the words "Bill Snow"; the name tape was nonhearsay evidence of who possessed the gun in the case. Second, in the "10001 Cedar Avenue" case,[146] a resident of 10001 Cedar Avenue was convicted of "intimidation," in part on evidence that he had two guns at his residence; a deputy sheriff testified that on the morning after a raid he observed two pistols in an evidence bag marked with an evidence tag bearing the inscription "10001 Cedar Avenue"; neither the guns nor the evidence tag were produced at trial; the deputy's testimony that he saw the evidence tag inscribed with "10001 Cedar Avenue" was inadmissible hearsay.[147] These two cases are discussed in greater detail elsewhere in this article.[148] The point here is that just as the first case is part of the support for the proposition that everything can be nonhearsay, the second case is part of the support for the proposition that everything can be hearsay.[149]

First Truth: Everything is nonhearsay. Second Truth: Everything is hearsay. Let me allow Judge Weinstein to partly illustrate my point:

> Whether or not this extra-judicial declaration is denominated hearsay turns on how one characterizes its function in the development of the government's case. It may be viewed as admissible hearsay, non-hearsay evidence-in-chief, or non-hearsay insofar as it is admissible on the issue of credibility. Admissibility of evidence of this sort does not derive its ultimate justification from any one theory, but from notions of reliability and the ability of the trier to properly evaluate probative force.[150]

C. Truth # 3: Everything Fits Under an Exception

> Founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries, [the law of evidence] has

145. United States v. Snow, 517 F.2d 441 (9th Cir. 1975), discussed *supra* text accompanying notes 78-81 and *infra* text accompanying notes 184-86, 266-68, 277 and 477-80.

146. Payne v. Janasz, 711 F.2d 1305 (6th Cir. 1983), discussed *infra* text accompanying notes 268 and 477-78.

147. *Id.* at 1313.

148. *See supra* text accompanying notes 78-81, and *infra* text accompanying notes 184-86, 266-68, 277 and 477-80.

149. It also supports the proposition that everything fits under an exception to the hearsay rule. *See infra* text accompanying notes 184-86.

150. United States v. Muscato, 534 F. Supp. 969, 980 (E.D.N.Y. 1982), discussed *supra* text accompanying notes 54-62.

> been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builders' debris.[151]

The third true thing about hearsay is this: Everything can be made to fit under an exception to the rule against hearsay.

1. Selected Exceptions in the Evidence Code

a. William D. Cammisano, Jr., Present Sense Impressions and Excited Utterances

This play involves the Kansas City mob.[152] In Act I, the FBI is investigating a company called C & C Associates, an alleged money laundering operation. William D. Cammisano, Jr. is the vice president of C & C Associates. He is in his thirties, married, and has children. And he is dating the 17-year-old daughter of the president of C & C Associates. Her name is Carey.

Cammisano and Carey travel together to Las Vegas. While in Vegas, Cammisano loses $119,000 playing golf. He collects money from various people, including a man named Roger Reid, and pays off part of this gambling debt. A couple of months later, Roger Reid is murdered and the FBI investigation broadens to include the murder. When the FBI interviews Carey, she claims she knows nothing of value. When Carey is called to testify before a grand jury, she testifies that she knows nothing of value.

As Act II opens, Carey, the young girlfriend, has recanted. She has provided the FBI with information incriminating Cammisano; Cammisano is being brought to trial; Carey is a witness for the prosecution. Cammisano is charged with having tried to get Carey to lie on his behalf in the proceedings in Act I. Specifically, he is charged with: two counts of witness tampering, one count of obstruction of justice, and one count of subornation of perjury.

Carey testifies that Cammisano tampered with a witness—herself. She testifies that Cammisano intimidated her because of the tone of his voice. She feared him because he had physically abused her in the past, and she related some incidents of abuse. On cross-examination by defense counsel, she states that Cammisano had a reputation for violence. She says she has heard that he murdered his brother and that his family is in the mafia.

Cammisano testifies. He says he never abused Carey, but was only concerned for her welfare. On cross, the government asks if he has a violent temper when it comes to women. He says he does not think so. The government then asks:

> Q: Isn't it true that on or about October 25th, 1986, you beat your wife, you beat your children, your wife left you and your children

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151. C.P. HARVEY, THE ADVOCATE'S DEVIL 79 (1958), *quoted in* SIR RUPPERT CROSS AND COLIN TAPPER, CROSS ON EVIDENCE 2 (Butterworths, 7th ed., 1990).

152. United States v. Cammisano, 917 F.2d 1057, 1058-59 (8th Cir. 1990).

left you and your father and [your brother] talked about that, isn't that correct, sir?

A: I have no knowledge of that.

Q: You specifically deny under oath that you beat your wife, beat your children, and that your father and [your brother] talked about it? I can refresh your memory should you wish.

A: I do not beat my wife. I have not beat my children any more than anybody else has reprimanded their children.[153]

Then the government, over objection, introduces into evidence a tape recording of a conversation between Cammisano's father and brother, recorded off of a wire tap on the father's phone. On the tape, the brother informs the father that defendant's daughter, Antoinette, has come to live with him, the brother, and his wife, Judy.

B: . . . Well, they all left.

F: They left?

B: Well, he just, they just, uh, he just beat her [his wife] up in front of the kids and gonna do that and beat the kids, gonna beat the kids up too, or whatever and, and, uh, they finally, they all, uh, they took off and, and, uh, left, Antoinette does not want to go back.

F: Did she, did Antoinette tell ya the reason for anything, why or anything like that? She tell you anything at all?

B: She told Judy, I don't know what all the details were of what happened. Exactly.

F: That why he hit his wife on account of Antoinette or somethin'?

B: Uh, well, I'd say, like I say, I don't know the, the, you know, the details about it, because Antoinette usually is, is goin' to work when I'm leavin' you know, and then she gets home and she's asleep when I'm home. So I really haven't sat down and talked to Antoinette at all about it.[154]

He beat his wife and kids is the evidence. Antoinette told Judy, Judy told her husband. Her husband is on tape. At least double hearsay. The federal district court judge allowed the tape into evidence as both a present sense impression and an excited utterance.[155] Under this reasoning, everything should fit under at least one exception.

b. Ancient Documents

As an example of how much fits under exceptions, consider the modern ancient documents exception. "The phenomenon of docket delays

153. *Id.* at 1059.

154. *Id.* at 1059-60.

155. Epilogue: Cammisano was convicted; his conviction was affirmed on appeal; the appellate court found this ruling was incorrect, but that the error was harmless. *See infra* text accompanying notes 312-13. For an "error" similar to that of the Cammisano trial court, see the discussion of State v. Plant, 461 N.W.2d 253 (Neb. 1990), *infra* text accompanying notes 286-91.

as well as the frequent litigation of liability arising from health [hazards] that may take decades to [become symptomatic], may be giving new life to the neglected 'ancient documents' hearsay exception.''[156] The ancient documents exception developed at a time when the temporal link between infliction of injury and expression of symptoms was shorter. We did not connect the symptoms of today with the exposure from decades ago, and, if we did, we could not prove the link. Science has changed that. With that change, application of the ancient documents exception changes in two ways: It will be applied more frequently and more frequently it will be applied to prove essential elements of the case.

In *Threadgill v. Armstrong World Industries*,[157] Mrs. Threadgill sued a laundry list of asbestos companies for the death of her husband. During the trial, plaintiff's counsel offered into evidence approximately 6,000 documents tending to indicate that the manufacturer of the asbestos knew as early as the 1930s of the health hazards of asbestos and tried to conceal them. The documents were offered under the ancient documents exception. The Third Circuit Court of Appeals held that the documents were admissible under the ancient documents exception. Regarding this exception, the only questions for the trial judge are: (1) Were the documents in question what they purported to be? and (2) Do they purport to have been in existence twenty years or more?[158]

The ancient document need not bear a date. Some courts have said it is enough if the document is found filed with other documents bearing

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156. *Rule 803(16): Ancient Documents*, 15 FEDERAL RULES OF EVIDENCE NEWS 90-189 (John R. Schmertz, Jr., ed., 1990). The ancient documents exception applies to: "Statements in a document in existence twenty years or more the authenticity of which is established." FED. R. EVID. 803(16).

157. 928 F.2d 1366 (3d Cir. 1991).

158. *Id.* The same documents had been offered into evidence in a number of other asbestos cases in district courts in the Third Circuit and, in *Threadgill*, the Third Circuit reviewed some of those cases. These district courts had held that these documents did not fit under the ancient documents exception. The problem, said one court, was that there was a "'high degree of unreliability as to the completeness of the correspondence.'" *Id.* at 1374 (quoting Cheny v. Celotex, C.A. No. 84-941, bench ruling (E.D. Pa. Sept. 24, 1986)). The problem, said another, was that the judge did not consider the documents trustworthy. This judge had problems with the chain of custody, which led to the conclusion that they did not fit under the exception. *Id.* at 1374, (referencing Neal v. Carey Canadian Mines, Ltd., C.A. No. 78-242, bench ruling (E.D. Pa. March 25, 1981)). The court of appeals disagreed, finding that these district courts had misunderstood the requirements of the ancient documents exception and the rules regarding authenticity. The ancient documents exception reads: "Statements in documents in existence twenty years or more the authenticity of which is established." FED. R. EVID. 803(16). The relevant rule regarding authenticity is Federal Rule 901(b)(8). Those courts focused on the completeness of the documents and the trustworthiness of the information found thereon. Questions of completeness and trustworthiness bear on weight, not authenticity. These same documents were held admissible under this same exception in Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985).

Not all courts agree with this interpretation of the ancient documents exception. Morre v. Goode, 375 S.E.2d 549 (W. Va. 1988) holds that the exception "carries the qualification that the document itself or its contents not be suspicious with regard to its genuineness and reliability." *Id.* at 558. The court added onto the statute a trustworthiness requirement similar to the ones written into some of the other exceptions, for example, Rule 803(6), part of Rule 803(8), the residual exceptions, and others.

In George v. Celotex Corp., 914 F.2d 26 (2nd Cir. 1990), decedent died of lung cancer in 1976. For the previous 58 years his job had exposed him to asbestos. His wife sued his former employer. She offered into evidence over-20-year-old documents regarding the then existing industry standards of safe levels of asbestos exposure. The court let such documents in under the ancient documents exception to the hearsay rule. *Id.*

a date over twenty years old.[159] And the ancient document need not be from this country. In *Matuszewski v. Pancoast*,[160] ancient birth, death, and marriage certificates from Czechoslovakia were allowed to prove that twelve persons living in Czechoslovakia were the heirs of the deceased. In *United States v. Koziy*,[161] Ukrainian police employment forms were used to establish that the defendant was hostile to the United States and defendant's citizenship was revoked. The defendant objected that the documents were forgeries, irrelevant, immaterial, and hearsay. The court admitted them under the ancient documents exception.

In toxic torts,[162] in torts regarding child abuse,[163] in cases involving longtime cigarette smokers,[164] in all kinds of torts[165] there could be all kinds of ancient documents.

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159. Kath v. Burlington N.R.R., 441 N.W.2d 569 (Minn. Ct. App. 1989).

160. 526 N.E.2d 80 (Ohio Ct. App. 1987).

161. 728 F.2d 1314 (11th Cir. 1984).

162. For example, in Vermont it is possible for a person who has been injured by a noxious agent to sue up to 20 years after the last occurrence to which the injury is traced. VT. STAT. ANN. tit. 12, § 518 (1973) (within three years after person knew or should have known, but in no case more than 20 years after last occurrence to which injury attributed). In Cavanaugh v. Abbott Laboratories, 496 A.2d 154 (Vt. 1985), plaintiff sued under this statute for damages due to vaginal cancer, which she claimed was caused by her mother's ingestion of the defendant drug-company's DES (diethylstilbestrol) and did not manifest itself until she was 22 years old.

163. For example, California law allows a person to sue up to eight years after reaching the age of majority, for abuse suffered during childhood. CAL. CIV. PROC. CODE § 340.1 (West Supp. 1991). In Evans v. Eckelman, 216 Cal. App. 3d 1609 (1990), foster parents sexually abused children in 1966. The children had no memory of the abuse (and, therefore, of course, could not trace their damage to that abuse) until 1988. A 1988 suit over 1966 sexual abuse was proper. And in Mary D. v. John D., 216 Cal. App. 3d 285 (Cal. Ct. App. 1990), plaintiff alleged she was molested by her father when she was five years old. She sued when she was 24 years old. The court held that the statute of limitations was tolled during the time plaintiff had repressed the sexual abuse. The accrual date for the cause of action was the date she remembered the sexual assault.

> [T]he plaintiff in Johnson v. Johnson, 701 F. Supp. 1363 (N.D.Ill. 1988), brought a diversity action against her parents when she was thirty-two years old, alleging that she was sexually abused by her father from the age of three until the age of twelve or thirteen and that her mother failed to protect her from the abuse. The plaintiff alleged that she had suppressed all memories of the abuse and was blamelessly ignorant of the causal connection between the incest she endured as a child and her injuries. Not until she initiated psychotherapy did she begin to remember and "understand the nature and scope of her injuries and their causal connection" to the years of abuse. 701 F. Supp. at 1364. In denying the parents' motion for summary judgment on the ground of limitations, the federal district court . . . determined that Illinois courts would apply the discovery rule to an action brought by an adult survivor of incest where the complainant had no conscious memory of the abuse until after the statutory minors tolling provision had expired. By applying the rule, the plaintiff's cause of action accrued and the running of the limitations period commenced when the plaintiff knew or reasonably should have known of her injury and that her injury was caused by the wrongful act of another.

Lindabury v. Lindabury, 552 So. 2d 1117, 1119-20 (Fla. Dist. Ct. App. 1989).

Traditional ways around a statute of limitations in a child sex-abuse case include an insanity exception, equitable estoppel and the discovery rule. Carol W. Napier, *Civil Incest Suits: Getting Beyond the Statute of Limitations*, 68 WASH. U. L.Q. 995, 1011 (1990); Alan Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L.J. 206 (1989).

164. *See* Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2619 (1992) (Federal Cigarette Labeling and Advertising Act does not preempt state law damage actions).

165. Maryland's statute of limitations allows some persons to sue for injuries resulting from an improvement to property up to 20 years after the improvement becomes available for its intended use. MD. CODE ANN., CTS. & JUD. PROC. § 5-108 (1989). Many states have statutes of more or less general

Amazing things (amazing to me at least) fit under these exceptions. In *United States v. Regner*,[166] the issue was whether the defendant had ever been in an accident involving Fovarosi Autotaxi Vallalat, Hungary's state-controlled taxicab company. The prosecutor offered and, "over hearsay objections, the court admitted a certified document from the Hungarian People's Republic indicating that a search made of Fovarosi Autotaxi Vallalat disclosed no record of a taxi accident involving [defendant]."[167] The trial court admitted the documents as self-authenticating under Rule 902(3) and as excepted from the hearsay rule under Rule 803(10), the exception for "absence of public record or entry."[168] To make the point clear, it was received without a sponsoring witness, but under seal from the Hungarian People's Republic. The dissent argues that for hearsay purposes these records should be treated as business records, not public records. And the proponent should be required to establish the foundational elements of the business records exception. We know nothing about the accuracy of public record keeping in Hungary. A witness should be required to take the stand and lay the foundation for the business records exception so that at least we would have that exception's reliability, which is found in the regularity of the practice.[169] In any event, it seems to stretch the absence of public record or entry exception pretty far to use it to admit a Hungarian affidavit to show that particular information was not found in the files of the state taxicab company of Hungary and, therefrom, to argue it did not happen.[170]

c. Statements Against Interest

Allow me one more example of the lengths to which a specific exception can be stretched, and then a word about the residual exceptions. In *United States v. Garris*,[171] the defendant made a statement to his sister; it effectively admitted complicity in a bank robbery. The sister told a Federal Bureau of Investigations (FBI) agent. The FBI agent testified, at defendant's trial, as to what the sister had told the agent the defendant had told the sister. The trial court and the court of appeals allowed the

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application that toll the statute of limitations for causes of action that accrue during the minority of the person who has the cause of action. *E.g.*, NEB. REV. STAT. §25-213 (1989).

166. 677 F.2d 754 (9th Cir. 1982).

167. *Id.* at 760 (Ferguson, J., dissenting).

168. *Id.*

169. *Id.* at 763-64 (Ferguson, J., dissenting).

170. Just as the dying declaration exception makes no sense in the Punjab, "'where a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of his receiving his wound, thus using his last opportunity to do them an injury,'" JOHN KAPLAN ET AL., CASES AND MATERIALS ON EVIDENCE 131 (7th ed. 1992) (quoting 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883)), the absence of entries in public records exception may make no sense in Hungary. Without a witness who can tell us, we are not likely to know.

Regarding documents of foreign governments, *see also In re* Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992) (The vast majority of evidence on damages in this case [awarded in the amount of 600 million francs] were documents from French governmental entities).

171. 616 F.2d 626 (2d Cir. 1980).

testimony under the statement against penal interest exception.[172] The theory is this: "A statement will satisfy [this exception]'s requirement that it 'tended' to subject the declarant to criminal liability if it would be probative in a trial against the declarant."[173] Because the sister did not report her brother to the FBI right away, she was subject to prosecution for acting as an accessory after the fact in the bank robbery. The statement in question is evidence both that she knew of her brother's involvement and that, for a while, did not report it.[174]

d. The Residual Exceptions

And if the evidence does not fit under one of the more specific exceptions, but almost does, try the residual exceptions.[175] There is a theory of interpretation of the residual exceptions called the "near miss theory."[176] One view says that hearsay is to be considered under the specific exception it most nearly fits and, if it is a "near miss" under that exception, it may not be admitted under a residual exception.[177] Many (most?) courts reject the near miss theory. In the leading case to do so, the Third Circuit said this about the theory: "Plainly stated, the theory puts the federal evidence rules back into the straightjacket from which the residual exceptions were intended to free them."[178]

An example of the phenomenon of the residual exceptions picking up evidence that just misses the more specific exceptions is *United States v. McPartlin*.[179] The court held that a business executive's desktop calendars were admissible under the business records exception.[180] Defendant had

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172. FED. R. EVID. 804(b)(3).

173. 616 F.2d at 630.

174. The sister made the statement during the course of admitting her complicity in a separate bank robbery. *Id.* at 629. (She was being interrogated regarding this other robbery, and had been advised of her rights.) The court did not argue that the part of her statement eventually used against the defendant was somehow against her penal interest as regards her bank robbery. They used the argument noted in the text: The accessory after the fact argument. And they used a second argument: Her admission of complicity in her own separate crime cast the shadow of adverse penal interest over everything said during the interrogation. *Id.* at 630. They found it against her penal interest both standing alone and in context. The defendant argued that rather than making a statement she knew to be against her interest, she was currying favor with the government, hoping for better treatment as regards her role in the other robbery, by turning over a bigger fish, her brother—that she saw the statement as in her interest. *Id.*

175. FED. R. EVID. 803(24) and 804(b)(5). On this point, see particularly, Myrna S. Raeder, *Commentary: A Response to Professor Swift, The Hearsay Rule at Work. Has it Been Abolished De Facto by Judicial Discretion?*, 76 MINN. L. REV. 507 (1992).

176. *E.g.*, Thomas Black, *Federal Rules of Evidence 803(24) & 804(b)(5)—The Residual Exceptions—An Overview*, 25 HOUS. L. REV. 13 (1989); Gary W. Majors, Comment, *Admitting 'Near Misses' Under the Residual Hearsay Exceptions*, 66 OR. L. REV. 599 (1987).

177. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1262-64 (E.D. Pa. 1980), *rev'd sub nom. In re* Japanese Elecs. Prods. Antitrust Litig., 723 F.2d 238, 301-03 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

178. *In re* Japanese Elecs. Prod. Antitrust Litig., 723 F.2d 238, 302 (3d Cir. 1983) (though this seems to be an awfully expansive reading of the near miss theory) *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

179. 595 F.2d 1321 (7th Cir. 1979).

180. *Id.* at 1347.

argued that the prosecutor had not established a number of the foundational elements for that exception. Had that been true, said the court, it would not have changed the result: The calendars would have been picked up by and admissible under the residual exception.[181] More directly on point, in *Dartez v. Fibreboard Corp.*,[182] the court avoided the "predecessor in interest" requirement of the former testimony exception by admitting the deposition under Rule 804's residual exception.[183]

The residual exceptions can also be brought to bear on the case of "Bill Snow."[184] As discussed elsewhere in this article,[185] in one case a circuit court of appeals found an inscription on a name tag to be admissible nonhearsay and, in another case, another court found a different name tag to be inadmissible hearsay. It would seem that in each case the evidence in question could have been admissible under the residual exceptions.[186]

The residual exceptions can be stretched so they cover quite a lot of out-of-court statements. In the Fourth Circuit, 804(b)(5) seems to cover grand jury testimony. The residual exceptions require that the evidence in question have "circumstantial guarantees of trustworthiness" equivalent to guarantees in the specific exceptions. In *United States v. Thomas*,[187] the grand jury testimony of two witnesses who disappeared before trial was admissible under 804(b)(5). Regarding the guarantees of trustworthiness, the court cited two cases from the circuit and said that it is clear from previous cases "that the grand jury testimony of an unavailable witness may be introduced under certain conditions without violating . . . the Federal Rules of Evidence,"[188] and held that this grand jury testimony was admissible under those two cases.[189] Not much was required in the way of "circumstantial guarantees of trustworthiness," at least not overtly.[190]

All of this in spite of the following legislative history:

> It is intended that the residual exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(b). The residual exceptions are not meant to authorize major revisions of the hearsay rule, including its present exceptions.[191]

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181. *Id.* at 1350 (apparently this opinion was divided into three parts, with one member of the panel writing each part and concurring in the others; this part is by Sprecher, J.).

182. 765 F.2d 456 (5th Cir. 1985).

183. *Id.* at 462. Another case where evidence that narrowly missed the former testimony exception was allowed under a residual exception is *In re* Screws Antitrust Litig., 526 F. Supp. 1316 (D. Mass. 1981).

184. United States v. Snow, 517 F.2d 441 (9th Cir. 1975), discussed *supra* text accompanying notes 78-81, 145-49, and *infra* text accompanying notes 266-68, 277 and 477-80.

185. *See infra* text accompanying notes 277-80.

186. *See supra* note 81 and *infra* note 279.

187. 705 F.2d 709 (4th Cir. 1983).

188. *Id.* at 711-12.

189. *Id.* at 712.

190. And similarly, see what some courts have done with the pre-trial notice requirements of the residual exceptions, *infra* text accompanying notes 237-53.

191. SENATE COMM. ON JUDICIARY, FEDERAL RULES OF EVIDENCE, S. REP. No. 1277, 93d Cong., 2d Sess., 18 (1974); 1974 U.S.C.C.A.N 7051, 7065. I got it from the West Publishing Company softbound FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, the 1990 edition, at 164.

All of this in spite of this legislative history coupled with these facts: There is a specific exception for former testimony of unavailable declarants[192] and another for statements against interest of unavailable declarants;[193] there is a definitional exclusion for admissions (personal and by co-conspirator)[194] and another for prior under-oath statements of available declarants; and none of these includes this grand jury testimony.[195]

e. The Exceptions as a Way Around Rules Other Than the Hearsay Rule

Not only does nearly everything fit under an exception, so that exceptions tend to get us around the hearsay rule altogether, but the exceptions can get us around many of the other exclusionary rules of evidence while they are at it. *Caterpillar Tractor Co. v. Donahue*[196] is a tractor-rollover product liability case. The lawyer for the widow offered into evidence a report entitled "Study and Evaluation of Tractor Canopies in Rollover Accidents." The hearsay objection, said the court, is taken care of by the public records and reports and the ancient documents exceptions of the Wyoming Rules of Evidence. The defendant complained, among other things, that it was unable to cross-examine the author of this document or the manufacturers of the canopies used in this report, and that it was not aware of this exhibit until it was actually offered into evidence. In effect, this document became an expert witness—an expert witness who:

- Is not under oath, getting us around Rule 603;[197]
- Is not required to be listed during discovery, getting us around the relevant rules of civil procedure;[198]
- May or may not be qualified, getting us around Rule 702;[199]
- Expresses an opinion that might not have a valid basis, getting us around Rule 705;[200] and
- Is not subject to impeachment cross-examination, to some extent getting us around Rules 607,[201] 608,[202] 609;[203] and

192. FED. R. EVID. 804(b)(1). *See* Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 441-42 (1986) (hereinafter *Jonakait*). Regarding using the former testimony exception to admit grand jury testimony, see United States v. Salerno, 112 S. Ct. 2503 (1992).

193. FED. R. EVID. 801(d)(2). *See*, Jonakait, *supra* note 192, at 442-43.

194. FED. R. EVID. 801(d)(2). *See*, Jonakait, *supra* note 192, at 443.

195. FED. R. EVID. 801(d)(1). *See*, Jonakait, *supra* note 192, at 444-45.

196. 674 P.2d 1276 (Wyo. 1983).

197. FED. R. EVID. 603; Wyo. R. Evid. 603.

198. FED. R. CIV. P. 26(b)(1) (discovery in general), 26(b)(4) (discovery of facts known and opinions held by experts), and 26(e)(1)(B) (supplementation of responses to discovery requests). Wyoming's rules are the same: Wyo. R. Civ. P. 26(b)(1), 26(b)(4), and 26(e)(1)(B), respectively.

199. FED. R. EVID. 702; Wyo. R. Evid. 702.

200. FED. R. EVID. 705; Wyo. R. Evid. 705.

201. FED. R. EVID. 607; Wyo. R. Evid. 607.

202. FED. R. EVID. 608; Wyo. R. Evid. 608.

203. FED. R. EVID. 609; Wyo. R. Evid. 609.

an expert witness who contributes to a $1,500,000 verdict.[204]

These exceptions get us around the more specific requirements of each of the just mentioned rules and leave us with the much more general requirements of Rule 403. This is not to say that the judge has no control over ancient documents or public records or other out-of-court statements, but just that the control does not come from the hearsay rule but from Rule 403.[205] Not only does the hearsay rule only pretend to exist, but it pulls other rules down with it, and does so in ways that those who created the hearsay rule and all of its exceptions and nuisances likely never contemplated.

2. Common Law Exceptions, Exceptions in Court Rules, and Exceptions in Statutes, but Outside the Evidence Code

The rules of evidence in many jurisdictions are statutory. There is a written hearsay rule (most are similar to Federal Rule 801), the pretense of a presumption of inadmissibility (most are similar to Federal Rule 802), and a number of written exceptions (most similar to Federal Rules 803 and 804). In these jurisdictions, the question of the admissibility of hearsay is further complicated by miscellaneous rules, statutory and otherwise, found far from the evidence code's hearsay rules, but nonetheless operating as exceptions thereto.

a. In the Statutes, But Outside the Evidence Code

In my jurisdiction, the evidence code is Chapter 27 of the Nebraska Revised Statutes.[206] Here is an exception found in Nebraska statutory law but outside of Chapter 27. Though based on the proposed Federal Rules, the Nebraska Evidence Rules did not include the learned treatise exception to the hearsay rule.[207] Yet, there is a statutory section separate from the evidence code that does accomplish some of the same thing: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest."[208]

b. The "100 Miles From the Courthouse" Exception for Deposition Evidence

Much more significant is Rule 32 of the Federal Rules of Civil Procedure. This rule has to do with the use of depositions in court proceedings. It has lots of provisions, the most far reaching of which says:

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204. 674 P.2d at 1279.

205. It is also not to say that the *Caterpillar* case (674 P.2d 1276) that led to this discussion necessarily stands for each of these propositions, just that they seem to be logical extensions from the opinion.

206. Nebraska Evidence Rules, NEB. REV. STAT. §§ 27-101 through 27-1103 (1989).

207. FED. R. EVID. 803(18).

208. NEB. REV. STAT. § 25-1218 (1989).

"The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition . . . ."[209]

c. The Opening Statement Exception

In his opening statement in *State v. Brooks*,[210] the prosecutor referred to an out-of-court statement. Defense counsel objected that this was hearsay. Regarding this opening-statement reference to the evidence, the objection was overruled; when the evidence itself was later offered, the same objection was sustained.

Regarding the ruling during opening statement, the Missouri Supreme Court said that the search for error during opening statement is a different process "from that employed in a search for error stemming from evidentiary rulings during trial."[211] The trial court's exercise of discretion during opening statements is not reversible error if the statement made during opening referenced "arguably admissible evidence and . . . was made in good faith with a reasonable expectation the evidence will be produced."[212]

Though the Missouri Supreme Court ruled that the evidence in question was admissible—that is, that the second of the trial judge's rulings was error, not the first—in the process it as much as said this: If evidence is hearsay, counsel can still get the evidence in front of the jury by mentioning it in his or her opening statement so long as counsel intends to produce the evidence at trial (or has a good faith basis for believing opposing counsel will offer the evidence, though when this would happen is not immediately apparent) and the evidence is arguably admissible.

And in *United States v. Levy*,[213] the court did this: defined hearsay as "*testimony 'offered in evidence* to prove the truth of the matter asserted'";[214] noted that "opening statements are not evidence";[215] and concluded: "Thus, by definition, the prosecutor's remarks were not hearsay."[216] This neat little syllogism goes even further than the Missouri

209. FED. R. CIV. P. 32(a)(3). Such a deposition is admissible to the extent "it satisfies the rules of evidence . . . applied as if the witness were then present and testifying," in other words, as if the witness were an in-court declarant. CHARLES A. WRIGHT & ARTHUR R. MILLER, 8 FEDERAL PRACTICE AND PROCEDURE § 2143 (1970). *See also*, Ronald J. Allen, *Commentary: A Response to Professor Friedman. The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 799 (1992).

210. 618 S.W.2d 22 (Mo. 1981). This case is discussed more fully *infra* text accompanying notes 528-39.

211. *Id.* at 24.

212. *Id.* When the court says, "with a reasonable expectation the evidence will be produced," I assume it means that the prosecutor must have a reasonable expectation that the evidence will be both produced and admissible.

213. 904 F.2d 1026 (6th Cir. 1990), *cert. denied sub nom.* Black v. United States, 111 S. Ct. 974 (1991), also discussed *infra* text accompanying notes 343-45 and 563-64.

214. 904 F.2d at 1030 (emphasis added) (quoting FED. R. EVID. 801(c)).

215. *Id.* at 1030.

216. *Id.*

Supreme Court, and says that the hearsay rule does not apply during opening statements.[217]

d. The Child Victim Exception

According to one count, by 1989 twenty-five states had statutory exceptions for out-of-court statements made by alleged victims of child abuse, and most are located outside the states' evidence codes.[218]

e. The Fresh Complaint "Exception"[219]

This "arbitrary exception to the hearsay rule"[220] covers evidence that "within a reasonable time after the act occurred," the victim of an alleged sexual assault complained of the assault "to someone who she would normally turn to for sympathy, protection, or advice."[221] It is called the "fresh complaint" rule.[222] In New Jersey, "[e]vidence of 'fresh complaint' is not offered as proof of the truth of the matter contained in the complaint, rather it is used to respond to the fact finder's natural assumption that if the act complained of had occurred, an early complaint would have been made. 'The function of such evidence is not corroboration or substantive proof but solely to sustain the credibility of the witness.'"[223]

"The label 'fresh complaint' is not rigidly adhered to, as testimony of this nature is competent even when it is not truly 'fresh.' The length

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217. Presumably, under *Levy*, the only way to keep out opening-statement mention of hearsay is Rule 403's unfair prejudice.

218. Cynthia Hennings, *Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Offense Prosecutions*, 16 OHIO N.U. L. REV. 663, 672-74 (1989). See Ms. Henning's article for a complete list of these statutes and a more complete discussion. This subject is also discussed in greater detail *infra* at Truth # 6.

219. This rule is not always an exception to the hearsay rule: In some of its manifestations, the rule demarks the evidence as nonhearsay credibility evidence. In fact, in New Jersey, as you will see in the text following this note, it seems to be nonhearsay credibility evidence even though the court refers to it as "an arbitrary exception to the hearsay rule." State v. Bethune, 557 A.2d 1025, 1028 (N.J. Super. Ct. App. Div. 1989).

220. *Id.* But aren't all of the exceptions more or less arbitrary in the lines they draw? In fact, isn't this one of the problems with the laundry list of exceptions approach to the problem of hearsay: the more or less arbitrary, categorical selection of what is admissible hearsay and what is not? *See, e.g.*, United States v. George, 960 F.2d 97, 100 (9th Cir. 1992) ("Focusing on the personal characteristics of the [out-of-court declarant] is inconsistent with the categorical approach to 'firmly rooted' hearsay exceptions . . . .")

221. *Bethune*, 557 A.2d at 1027.

222. *Id.* Regarding this rule generally, *see, e.g.*, Commonwealth v. Lavalley, 574 N.E.2d 1000, 1004 n.7 (Mass. 1991); State v. Hill, 578 A.2d 370, 374-81 (1990) and Michael H. Graham, *The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence*, 19 WILLAMETTE L. REV. 489 (1983).

> In summary, the fresh-complaint doctrine is rooted in sexist notions of how the 'normal' woman responds to rape. We acknowledge the doctrine's misguided history and attempt to cure the defects underlying the rule that could infect rape proceedings with anti-female bias. Nonetheless, we conclude that women victims are better served by the continuance of the fresh-complaint doctrine than by its elimination. The present rule as designed neutralizes juror's negative inferences concerning the woman's silence after having been raped.

Hill, 578 A.2d at 380. It responds to jurors "subtle biases [and] illogical views of the world . . . on their own terms." *Id.* at 377. *See also Lavalley*, 574 N.E.2d at 1004 n.7, regarding "the sexist reasoning behind the theoretical underpinning of the fresh complaint rule."

223. *Bethune*, 557 A.2d at 1027 (citations omitted).

of the delay is a factor to be considered as relevant to the weight to be given to the fresh complaint under all of the accompanying circumstances. The timeliness of the complaint and any circumstances explaining the delay are treated as questions for the jury."[224]

As a further exception within the fresh complaint exception, the court noted:

> [A]t least with regard to children of tender years, the fact that the complaint was made in response to questioning need not be fatal to admissibility. It must be considered that there may be a reluctance on the part of an abused, and consequently confused and troubled young child, to discuss a traumatic sexual incident.[225]

Similarly, in Massachusetts, "An out of court statement of a victim of a sex crime is admissible as fresh complaint if made reasonably promptly in light of the circumstances."[226] For adult victims, a complaint made "a month or so after the incident"[227] can be "fresh" enough. For child victims, a complaint made several months after the incident can be "fresh" enough.[228]

f. The First Complaint Exception

The first complaint exception is really just Florida's version of the fresh complaint exception.[229]

g. The Res Gestae Exception

The State of Florida has adopted an evidence code modeled on the federal rules. Like the federal rules, it does not include a res gestae

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224. *Id.* at 1028.

225. *Id.* And while, at least in New Jersey, this exception does not allow a third person to testify to the victim's statements as to the details of the assault, it does allow the third person to testify that the victim (here a young girl) said the man in question had assaulted her "a lot of times." *Id.* at 1029.

226. Commonwealth v. Lagacy, 504 N.E.2d 674, 677 (quoting Commonwealth v. Adams, 503 N.E.2d 1315, 1317 (Mass. Ct. App. 1987)).

227. *Id.* at 677 (quoting Commonwealth v. Gonsalves, 499 N.E.2d 1229, 1230 (Mass. Ct. App. 1986)).

228. *Id.* at 677 n.6. In Massachusetts, the fresh complaint "is admissible only to corroborate the complainant's testimony [and] . . . cannot be used to establish the truth of the complaint itself." Commonwealth v. Licata, 591 N.E.2d 672, 674 (Mass. 1992). Even so, fresh complaint evidence is admissible during the prosecutor's case-in-chief and without regard to whether the complainant has been impeached. Not only is the fact of the complaint admissible, but also the details of the complaint are admissible. *Id.* at 673-74. *Accord* Commonwealth v. Lavalley, 574 N.E.2d 1000, 1002 n.4 (Mass. 1991) ("The rule in the majority of States is that a witness may testify to the fact that the victim made a complaint, but cannot testify regarding the details of the complaint." (citing cases from 29 states and the District of Columbia; and citing cases from two other jurisdictions that allow details of complaint without precondition that complainant have been impeached)).

In Georgia, the fresh complaint exception has been extended beyond sexual assault. An elderly man's fresh complaint to a neighbor about defendant having pushed him into a table and taken his wallet was admissible fresh complaint. Williams v. State, 413 S.E.2d 256, 257 (Ga. App. 1991). This case is discussed *infra* text following note 298.

229. Monarca v. State, 412 So. 2d 443 (Fla. Dist. Ct. App. 1982). This is part of Florida's res gestae exception, in spite of the fact that the Florida Evidence Code does not include a first complaint or a res gestae exception. *Id.* at 445. *See infra* notes 230-31 and accompanying text.

exception. In fact, the Sponsor's Note following the relevant Florida rule of evidence, Florida's version of Rule 803,[230] states that the code replaces the res gestae exception. Undaunted, the Florida Supreme Court has said, "The deceased victim's statement to the police officer did not qualify for admission into evidence under the dying declaration exception to the hearsay rule but it was properly admitted under the res gestae exception to [the] hearsay rule . . . ."[231]

h. The Mechanical Traces Exception

Above,[232] I discuss a body of cases that treat as nonhearsay what my colleague Collin Mangrum has called "mechanical traces as circumstantial evidence of ownership." He lists it as a "Controversial Nonhearsay Categor[y]."[233] As I explain above, if this is anything other than invalid, it must really be a common law exception to hearsay. It is a common law exception that continues to be imposed in spite of the fact that it is not one of the exceptions listed in the rules. It is a common law exception that continues to be imposed as though the statements covered were not hearsay in the first place, rather than admitting they are hearsay, and that this is an exception, perhaps because it is not any one of the exceptions listed in the rules.

i. The Cleveland Exception

And then there is the "Cleveland Exception to the Hearsay Rule." In a criminal trial in Cleveland, according to Professor McElhaney, the hearsay rule does not stand in the way of the admissibility of anything that was said in the presence of the accused.[234]

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230. FLA. EVID. CODE § 90.803 (1979).

231. Hack v. State, 596 So. 2d 521, 521 (Fla. Dist. Ct. App. 1992), *per curiam*. This per curiam opinion is two paragraphs long. Except for a citation, I have quoted the entire second paragraph, which, by the way, is the longer of the two. For a more detailed statement of Florida's res gestae exception, see Monarca v. State, 412 So. 2d 443, 445 (Fla. Dist. Ct. App. 1982). In Miller v. Keating, 754 F.2d 507 (3d Cir. 1985) (discussed *infra* text accompanying notes 533-38), the trial judge had let some hearsay into evidence under the res gestae exception. The court of appeals noted "there is no such exception. . . . The old catchall 'res gestae' is no longer part of the law of evidence." *Id.* at 509. A variation of res gestae, for use in a jurisdiction with a federal-rules-like evidence code and a supreme court that recognizes res gestae no longer exists, is to rule that background evidence may be admissible as nonhearsay, non-truth evidence. See the discussion of this kind of nonhearsay *supra* Truth # 1, *passim*, and particularly text accompanying note 100.

232. *See supra* note 97 and accompanying text.

233. Mangrum, *supra* note 10, at 510.

234. James McElhaney, *The Cleveland Exception to the Hearsay Rule*, in TRIAL NOTEBOOK at 172-74 (2d ed. 1987). As Professor McElhaney reports, this "exception" exists in other parts of the country, where it goes by different names. *Accord* Charles W. Gamble & Russell L. Sandidge, *Around and Through the Thicket of Hearsay: Dispelling Myths, Exposing Impostors and Moving Toward the Federal Rules of Evidence*, 42 ALA. L. REV. 5, 21-28 (1990) (reporting that in Alabama this sort of out-of-court declaration is declared non-hearsay). The rule applies only to out-of-court statements made in the presence of a defendant in a criminal case; it does not extend to civil cases. Both of the cited sources discuss this rule's obvious roots in the treatment of adoptive admissions, though neither the Cleveland exception nor the Alabama definitional exclusion is limited to adoptive admissions. The "Cleveland Exception" is discussed a bit in Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 70 (1987). Professor Park also cites evidence of this same policy in Philadelphia and in English magistrates' court. *Id.* at 82 n.127.

j. The Probable Cause Exception

Another way to deal with hearsay that stands in your way, if you are the government and are in charge of the procedures, is to create a whole new proceeding and make the burden of proof one that hearsay will satisfy. For example, later in this article I talk about the civil forfeiture provisions of the Controlled Substances Act. The government has used its legislative power to change the rules: Government can seize property involved in illegal drug transactions; it can keep the property if it can prove it had probable cause to seize it; probable cause can be based on hearsay. So, not only is hearsay admissible, but the judgment of forfeiture can be based on it and, apparently, it alone.[235]

k. The When-You-Murder-a-Witness-You-Waive-Your-Right-to-Make-a-Hearsay-Objection-to-the-Admissibility-of-the-Witness'-Grand-Jury-Testimony Exception

This one is self-explanatory.[236]

l. The Notice Requirement of the Residual Exception and the Common Law

Let me discuss two exceptions written into the code that have been rewritten in part by many courts, becoming statutory exceptions with common law amendment. I refer to the two residual exceptions and their requirement that opposing counsel be given pretrial notice of intent to use the exception.[237] Following the lead of Judge Weinstein,[238] a number of courts have read the "pretrial" in pre-trial notice to mean something much different than it would had they followed the lead of Daniel Webster.[239]

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235. This is discussed *infra* text accompanying notes 437-39.

This is different from the cases where a police officer testifies to out-of-court statements to establish probable cause in a criminal case when the defendant argues to the jury, for example, that the police were harassing him or her. Here these statements are not offered to prove the truth of the matter asserted, but instead to show that the statements were made and that they gave the police officer a reason to stop the defendant and that this is not a case of police harassment. It is not admitted as substantive evidence of the underlying issue: guilt. In the situation under discussion here, the underlying issue is probable cause; the evidence is admitted as substantive evidence to prove the underlying issue, the one on which the court will decide the merits of who owns the house, the car, the cash: the claimant or the government.

236. United States v. Thevis, 665 F.2d 616, 633 (5th Cir. 1982). Though not truly an exception, this rule seems to fit here in the interest of completeness. *Thevis* announces this waiver rule only after an extensive discussion of why, in spite of contrary rulings from other circuits, this evidence is not admissible under the residual exception in Rule 804(b)(5).

237. FED. R. EVID. 803(24); FED. R. EVID. 804(b)(5).

238. United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y. 1976), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

239. "Pre" is defined as "earlier than : prior to : before." WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1783 (1976). "Pre-trial" is defined as "a conference preliminary to a hearing or trial on the merits where a judge, referee, examiner, arbitrator, or other quasi-judicial officer endeavors to simplify the issues of law or fact in a case by ascertaining what is to be admitted, what is contested, whether certain matters may be stipulated thereby avoiding the expense of proof in order to save time and expense at trial." *Id.* at 1797.

Using what could be labeled the *Iaconetti* approach, after Judge Weinstein's opinion in *United States v. Iaconetti*,[240] courts have been holding that mid-trial notice can satisfy the pre-trial notice requirement. In *Iaconetti*, two of the prosecution's rebuttal witnesses repeated a third person's extrajudicial statements regarding what defendant had said, to prove what defendant had said.[241] Judge Weinstein found it admissible under the residual exception, even though there had not been "pre-trial" notice. Judge Weinstein began his discussion, "The Federal Rules of Evidence codify an open-ended exception for reliable and necessary hearsay. Its use requires careful exercise of judicial discretion and the satisfaction of precise criteria."[242]

Then, he turned to those criteria. First, he found "'circumstantial guarantees of trustworthiness' equivalent to those for the enumerated hearsay exceptions."[243] Second, he found "that the 'statement [was] offered as evidence of a material fact.'"[244] Third, he found the statement "'more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.'"[245] "In addition, 'the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.'"[246] That leaves the requirement that the proponent of the evidence makes his or her intention to use the evidence "known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it."[247] Judge Weinstein's answer to this requirement, in the context of this case, was:

> [T]he government gave the defendant ample notice of the intention to offer the statement. Notice was given midway through the defendant's testimony, five days before the [witness was] called. Defendant did not request a continuance or make any reference to an inability to prepare adequately to meet the testimony of the new witness. Although notice was not given in advance of trial, as required by the language of the Rule, allowance must be made for situations like this in which the need did not become apparent until after the trial had commenced. Since it was not the proponent's fault that notice could only be given after the

240. 406 F. Supp. at 554.

241. *Id.* at 557.

242. *Id.* at 558.

243. *Id.* at 559 (quoting FED. R. EVID. 803(24)).

244. *Id.* at 559. I have always wondered what this requirement is doing in this rule. It is a meaningless addition. All evidence must be relevant to be admissible. FED. R. EVID. 402. Evidence is not relevant unless it is evidence of a material fact. FED R. EVID. 401. Recognizing this same thing—"This requirement seems redundant since, if it did not tend to prove or disprove a material fact, the evidence would not be relevant and would not be admissible,"—Judge Weinstein suspects it probably means "the exception should not be used for trivial or collateral matters." *Iaconetti*, 406 F. Supp. at 559. But why not just say so, and not just regarding the residual exception, but regarding all of them? Why not lump them all together, perhaps as follows: why not define hearsay and state that if the out-of-court statement is important enough and if the trial judge believes it is sufficiently reliable, then it is not excluded by the hearsay rule?

245. *Iaconetti*, 406 F. Supp. at 559 (quoting FED. R. EVID. 803(24)(B)).

246. *Id.* at 559 (quoting FED. R. EVID. 803(24)(C)).

247. FED R. EVID. 803(24).

> trial began, and since the defendant was not prejudiced by the mid-trial notice, the evidence was properly admitted under Rule 803(24).[248]

Judge Weinstein addressed the point and said that while the way the evidence was offered in that case did not comply with the text of the rule, an allowance must be given. On appeal, the Second Circuit agreed, but, in its footnote six, softened the blow to plain meaning: "Our holding should in no way be construed as in general approving the waiver of Rule 803(24)'s notice requirements. Pre-trial notice should clearly be given if at all possible, and only in those situations where requiring pre-trial notice is wholly impracticable, as here, should flexibility be accorded."[249] Either way, what we have, it seems to me, is a common law rewrite of the rule.

The *Iaconetti* approach has been followed by a number of courts, but mostly in apparent ignorance of the Second Circuit's footnote six. This "mid-trial-notice exception" to the pre-trial notice requirement of the residual exception is no different than common law exceptions generally, in this regard: First a narrow exception is announced; later cases expand it, (here, by dropping the restrictions of footnote six)[250] and, apparently, turn this notice requirement into an item for the exercise of the trial court's discretion.[251]

And in *United States v. Williams*[252] the court affirms the admission of an affidavit under the residual exception of Rule 803. Though it is not clear whether pre-trial notice was an issue, the way the court reaches its result is interesting: It quoted the entire residual exception except the part requiring "notice in advance of the trial"; it briefly discussed the parts it quoted; and it found this out-of-court statement fit. It is as though the requirement for pre-trial notice did not exist.

Not all courts have done this, and even in the Second Circuit, home of *Iaconetti*, the course has been wavering.[253] That is not the point. The point simply is that some have.

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248. *Iaconetti*, 406 F. Supp. at 559-60. Recall, the in-court declarants in question were rebuttal witnesses.

249. *Iaconetti*, 540 F.2d at 578 n.6.

250. *Accord, e.g.*, United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976) (Citing and discussing the district court and court of appeals decisions in *Iaconetti*, without mentioning footnote six, and stating: "The record does not indicate whether the government complied with the notice requirement of rule 803(24). Even if it did not comply, appellant was not harmed, since his counsel had a fair opportunity to meet the statements." Perhaps, however, rather than meaning pre-trial notice is not required, all this means is that any error was harmless.); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976) (*Iaconetti* approach adopted; no mention of footnote six); United States v. Brown, 770 F.2d 768, 771 (9th Cir. 1985) (In civil case, failure to give pre-trial notice excused where adverse party had opportunity to attack trustworthiness of statement; here, defendants had ample opportunity, did not move for continuance, and did not claim inability to meet the evidence; no mention of narrowness; rather, question stated as whether district court abused its discretion).

251. The culmination of all of this, in Judge Weinstein's court, at least, is "The offer of a continance [sic] by the trial judge cures this lack of notice." United States v. Obayagbona, 627 F.2d 329, 335-38 (E.D.N.Y. 1985). *See also, e.g.*, United States v. Brown, 770 F.2d 768, 771 (9th Cir. 1985) (failure to give pre-trial notice reviewed under abuse of discretion standard).

252. 573 F.2d 284 (5th Cir. 1978).

253. Second Circuit: *e.g.*, United States v. Oates, 560 F.2d 45, 72 n.30 (2d Cir. 1977) (no notice in advance of trial, through no fault of prosecutor, and no notice during trial until authenticating

m. The Point Is . . .

The point is that these sorts of hidden hearsay exceptions, exceptions found some place other than the state's evidence code, exist in many states and they further complicate efforts to understand and apply the rules regarding hearsay, particularly when operating outside of your home jurisdiction.[254] It is not just that so much hearsay fits under one or more exceptions, it is also that many of the exceptions are so hard to find[255] and so many operate outside of the duly enacted statute, creating a sort of black market of admissible evidence.

It's all nonhearsay. It's all hearsay. It's all exceptional. It's like Lake Wobegon, where "all the children are above average."[256]

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witness called to stand; "the advance notice requirement leaves no doubt that it was the intention of Congress that the requirement be read strictly"; no mention of *Iaconetti*); United States v. Muscato, 534 F. Supp. 969, 980 (E.D.N.Y. 1982) (party cannot complain about lack of pre-trial notice because court would have granted continuance to allow party to prepare to meet evidence in question) (Weinstein, J., author of *Iaconetti*); United States v. Obayagbona, 627 F.2d 329, 340 (E.D.N.Y. 1985) (offer of continuance cures lack of pre-trial notice) (Weinstein, J., author of *Iaconetti*). Fifth Circuit: *e.g.*, United States v. Leslie, 542 F.2d 285 (5th Cir. 1976) *supra* note 250; United States v. Davis, 571 F.2d 1354 (5th Cir. 1978) (only other exception conceivably applicable is 803(24); no record of "attempt to invoke the exception by giving the required advance notice"; no mention of *Leslie*). Sometimes, a court's course wavers within one opinion: United States v. Atkins, 618 F.2d 366, 372 (5th Cir. 1980), says it was not an abuse of discretion to refuse to admit a letter under the residual exception because there had been no notice of an intent to do so in advance of the attempt to do so. The rule says "in advance of trial"; this case says "in advance of [the] attempt to do so." Does this change in wording reflect a change in the rule, or will it be cited as the definitive statement in subsequent cases that change the rule? What is the rule in the Fifth Circuit, the *Leslie* rule, the *Davis* rule, or the *Atkins* rule, whatever it is, or may become?

254. And here is another complicating factor. Even if your evidence seems admissible categorically in that it clearly fits the requirements of one of the exceptions, if it is sufficiently untrustworthy it may be inadmissible ad hoc under Rule 403. The judge's ability to alter the outcome of the admissibility decision under the statute is, thereby, even greater. See Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 272-74 (1984). There are cases and articles that take the opposite approach. For example, "United States v. DiMara, 727 F.2d 265, 270-72 (2d Cir. 1984) (Friendly, J.) . . . holds that statements that fall under the class exceptions to the hearsay rule are admissible even if the trial judge believes them to be untrustworthy." Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 112 n.235 (1987). This view in some ways just complicates it even more. After you get past the hearsay rule, in some jurisdictions you must be concerned with Rule 403, in other jurisdictions you need not be concerned with Rule 403, and in still other jurisdictions you have to be concerned with whether you have to be concerned with Rule 403.

255. Not only can exceptions be hard to find, but in various of their applications they can be remarkably and irrefutably unreliable. Chris Mueller proves this: The excited utterance exception is based on the theory that if an out-of-court statement relates to an exciting event and was made while the out-of-court declarant was under the stress of excitement caused by that event, it is trustworthy. The declarant lacked the time or the mental capacity needed to make up a lie. Imagine, "for instance," says Professor Mueller, "a father advising his daughter. Who would tell a daughter to sort out second-hand statements by applying the tests embedded in the hearsay exceptions—'trust what you're told an excited man said,' for example, because 'excited men don't lie'?" Christopher B. Mueller, *Post Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 375 (1992). Regarding unreliable exceptions, within this article see also United States v. Regner, 677 F.2d 754 (9th Cir. 1982), *supra* text accompanying notes 166-70; United States v. Garris, 616 F.2d 626 (2d Cir. 1980), *supra* text accompanying notes 171-74.

That the exceptions can be unreliable is beside my point. If they really worked, if they really had any meaning, if they really were possible to understand and apply, and the only problem was that they allowed in unreliable evidence, this article would not have been written.

256. Garrison Keillor, *The American Radio Company of the Air* (formerly *A Prairie Home Companion*) broadcast Saturday evenings, 5:00 p.m. CST on National Public Radio.

D. Truth # 4: Great Lawyers Can Convince Average Judges of Almost Anything, and Even Average Judges Can Ignore the Best Arguments of Great Lawyers

> [T]he vagueness of the definition of the [hearsay] rule and of its exceptions, the absence of a clear and consistent rationale for applying it or refusing to do so, the failure to recognize the potential application of the rule in a number of situations, and the blurred distinction between direct and circumstantial use of such evidence, have together created a morass of authority and example, quite devoid of clear and consistent holding. Thoroughfares through this swamp do not occur naturally; they must first be constructed. Nor has the situation been much assisted by voluminous academic survey. A surfeit of markers has been placed, but they point in different directions.[257]

As a corollary to these truths, when the subject is hearsay, skilled counsel can convince the ordinary and reasonable judge of almost anything—and the ordinary and reasonable judge can ignore even the most logical and persuasive argument of even the best lawyers, and rule the other way.[258]

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257. SIR RUPPERT CROSS & COLIN TAPPER, CROSS ON EVIDENCE 515 (Butterworths, 7th ed., 1990).

258. And the extraordinary judge does not need any help. Judge Jack B. Weinstein, for example, is no ordinary judge, and he does not need any help to make these rules do what he wants them to do. He proves this, with Professor Margaret Berger, in their treatise, WEINSTEIN'S EVIDENCE. He proves it in his work on the bench, for example, in *Muscato, supra* text accompanying notes 54-62, *Iaconetti, supra* text accompanying notes 238-51, and *Obayagbona, infra* text accompanying notes 386 and 392.

Neither is Judge Edward R. Becker an ordinary judge who needs the help of mere mortals like ourselves. I refer principally to his opinions, published consecutively in the Federal Supplement in the Japanese Electronics cases. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125 (E.D. Pa. 1980) *rev'd sub nom.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190 (E.D. Pa. 1980) *rev'd sub nom.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313 (E.D. Pa. 1980), *rev'd sub nom.*, *In re* Japanese Elecs. Prods. Antitrust Litig., 723 F.2d 238, 301-03 (3d Cir. 1983), *rev'd on other grounds sub nom.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). (Volume 505 of the Federal Supplement should be dedicated to Judge Becker.) In three masterful opinions at the district court level, Judge Becker tackles almost 250 headnotes worth of evidentiary problems. The first of the three opinions deals with the admissibility of public records and reports; much of the 65 pages of that opinion addresses the hearsay rule. The second deals with the admissibility of various documents from non-governmental sources, including various business documents and documents prepared for and submitted to the Japanese Fair Trade Commission; much of the 255 pages of this opinion addresses the hearsay rule. ("The documents produced in discovery ran into the millions." *Japanese Elect.*, 723 F.2d at 1267 n.97.) The third deals with the expert opinions expressed in some 2700 pages of reports prepared by plaintiffs' experts. *Japanese Elecs.*, 505 F. Supp. at 1319. These three opinions are an advanced course in evidence all by themselves.

The Honorable Leon Higginbotham has taken the particularly difficult problem of "implied assertions" (see *supra* Truth # 1, *passim*, and *infra* text accompanying notes 259-66) and gotten it right. Postal inspectors arrested Reynolds; Parran approached; still in the presence of the inspectors, Reynolds said, "I didn't tell them anything about you." United States v. Reynolds, 715 F.2d 99, 101 (3d Cir. 1983). The trial court let this in as substantive evidence of Parran's guilt. On appeal, the government argued that this out-of-court statement was not offered to prove the truth of the matter asserted. Judge Higginbotham saw this evidence as either irrelevant to the government's case—if Reynolds meant, "I told them nothing because there is nothing to tell"—or as hearsay—if Reynolds meant, "Though you were involved in the crime, I didn't tell *them* about it." *Id.* at 103.

If it is true that most everything is, at the same time, hearsay and nonhearsay, and you can make a pretty good argument that each out-of-court statement fits under at least one exception, then it follows that when the subject is hearsay the ruling can go either way. It can go either way, depending, I think, on the skill and reputation of counsel, the abilities of the judge, and the equities of the particular case.

Take, for example, *Lyle v. Koehler*,[259] and *United States v. Perholtz*.[260] In *Lyle*, a pre-trial detainee wrote letters instructing the addressees to give certain alibi testimony for the writer and his co-defendant; the letters were introduced against the letter writer's co-defendant.[261] In *Perholtz*, one co-conspirator gave another an exculpatory script; the script was introduced against yet a third co-conspirator.[262] In each case there was a hearsay objection. In *Lyle*, the court found that the inference of guilty mind in the attempt to establish a false alibi was "not severable from [the] raw statements."[263] The evidence was offered to prove the truth of the inference asserted and it was inadmissible hearsay. In *Perholtz*, the court found that the script was not offered to prove the truth of the matter asserted and it was admissible nonhearsay.[264]

Which is right, *Lyle* or *Perholtz*? Who knows. Each is right. Both are wrong. The Sixth Circuit Court of Appeals, in *Lyle*, says, in effect, that Morgan would have supported the result in *Lyle*, and Wigmore would have supported the result in *Perholtz*.[265] This is one of the areas of hearsay where the rule means everything, and therefore means nothing.

Granted, this example is in the area of implied assertions, one of the most difficult in all of hearsay.[266] Finding contradictory authority in the area of implied assertions is about as easy as finding reasons to vote against every Member of Congress but my own. What about some examples from other kinds of hearsay problems? Okay, here's one: Contrast the "Bill Snow" case with the "10001 Cedar Avenue" case. First case—the evidence: an attache case with name tape reading "Bill Snow." The issue: Who possessed the gun in the case? Bill Snow? The ruling: nonhearsay.[267] Second case—the evidence: testimony regarding an evidence bag with an evidence tag reading "10001 Cedar Avenue." The issue: Where were the

259. 720 F.2d 426 (6th Cir. 1983).

260. 842 F.2d 343 (D.C. Cir. 1988) (per curiam), *cert. denied*, 488 U.S. 821 (1988).

261. *Lyle*, 720 F.2d at 429-31.

262. *Perholtz*, 842 F.2d at 351, 355.

263. *Lyle*, 720 F.2d at 433.

264. *Perholtz*, 842 F.2d at 357. "[T]he government did not intend to show that any particular item contained in the script was true. To the contrary, the purpose was to show that the information in the document was false." *Id.* (The court also found the script admissible as a co-conspirator's statement. *Id.* at 356-57.)

265. *Lyle*, 720 F.2d at 432-33.

266. Regarding *Lyle* and *Perholtz* and this whole problem of implied assertions as hearsay or not, *see* Roger Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783 (1990).

267. *Supra* text accompanying notes 78-81, 145-49, 184-86, and *infra* text accompanying notes 277, 477-80.

two pistols in the evidence bag found? 10001 Cedar Avenue? The ruling: inadmissible hearsay.[268]

Here's another: Contrast the case of Glenn H. Hutchison with that of Anthony R. Jefferson.[269]

And contrast *United States v. Brown*[270] with *United States v. Bernes*.[271] In each case, the appellant was a tax preparer convicted of preparing fraudulent tax returns. In the former, the evidence most damaging to the accused was the testimony of an IRS agent who testified that she audited 160 of the tax returns prepared by the accused and found between 90% and 95% of them contained substantially inflated itemized deductions. Though there had been no hearsay objection at trial, the appellate court said that the agent's testimony was based on a knowledge of what the honest deductions would have been, and she could only have known that if the taxpayers involved had told her. "[H]earsay of the rankest kind."[272] In the latter, agents "testified as to various aspects of their investigation, and in certain instances stated the names of those individuals interviewed during the course of the audit," but without quoting anything said to them during the investigation.[273] Not surprisingly, in this second case, the United States relied on the first case.

In *Brown*, the Fifth Circuit said the truth of the agent's testimony was necessarily based on the truth of out-of-court statements. In *Bernes*, the Fifth Circuit said, "[T]he implication of any inculpatory statement from those interviewed by the IRS agents is totally conjectural."[274] Why the first case is necessarily based on hearsay and the second case isn't, is beyond anything explained in the second case. They don't explain it, but they do say this, in the second case: "Acceptance of appellant's contention would work a radical and dangerous expansion of the hearsay doctrine."[275] That is a frightening prospect if ever there was one, and I guess it is a good enough reason for me. Which of these cases is right? I don't know . . . and that is the problem with hearsay: Who knows what's the right answer?[276]

And contrast these cases. In *United States v. Snow*,[277] a name tape was not hearsay to the issue of who owned the gun found in the case to which the tape was affixed: nonhearsay circumstantial evidence. In *United*

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268. *Supra* text accompanying notes 145-49, and *infra* text accompanying notes 477-80.

Sure there are differences between these two cases. There is no doubt the out-of-court declarant in the "10001 Cedar Avenue" case meant to declare, "The guns were found at 10001 Cedar Avenue." There could be some doubt, I suppose, as to whether the out-of-court declarant in the Bill Snow case meant to declare anything, though, if he did not, then why write Bill Snow on the name tape.

269. *See infra* text accompanying notes 491-502.

270. 548 F.2d 1194. This case is also discussed *supra* text accompanying notes 109-117.

271. 602 F.2d 716 (5th Cir. 1979).

272. *Brown*, 548 F.2d 1194, 1208.

273. *Bernes*, 602 F.2d 716, 718.

274. *Id.* at 719.

275. *Id.*

276. But I am getting ahead of myself. *See, e.g., infra* text accompanying notes 588 and 608.

277. This case is discussed *supra* text accompanying notes 78-81, 145-49, 184-86, 266-68, and *infra* text accompanying notes 472-75.

States v. Cowley,[278] testimony regarding a postmark was inadmissible hearsay to the issue of whether a letter passed through a specific postal station on a certain date.[279]

One more contrast: *United States v. Oguns*[280] states that inquiries cannot be assertions, questions cannot be used to show the truth of the matter asserted, and, therefore, they cannot be hearsay.[281] *State v. Rawlings*[282] recognizes that questions can assert facts, can be offered to prove the facts asserted, and can be hearsay.[283]

Everything can be made to be hearsay, everything can be made to be non-hearsay, it's all covered by various exceptions, from there it depends on the skill of counsel and the quality of the judge.

E. Truth # 5: These Points Must Be Won at Trial; Appellate Courts Affirm

> Trouble with you is the trouble with me.
> Got two good eyes but we just can't see.[284]

By and large, these points must be won in the trial court, or, said differently, appellate courts tend to affirm.[285]

1. Continuing the Error Through the Appeal

One way appellate courts affirm is by continuing the error.

Thomas Plant was convicted of the second degree murder of his eighteen-month-old stepson, and sentenced to life in prison.[286] He claimed

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278. 720 F.2d 1037 (9th Cir. 1983).

279. The court said the evidence was reliable, making it a great candidate for the residual exception except for the fact that the government had failed to give the defense notice it would be offering the "statement." Its admission was error, but the error was harmless. In *Snow*, the tape itself was in court. In *Cowley*, someone testified he had seen and remembered the postmark. This may make a psychological difference, in that having the tape there is more reliable than one's memory of the postmark. That, however, is irrelevant to whether the tape and the postmark each is hearsay.

280. 921 F.2d 442 (2d Cir. 1990).

281. *Oguns* is discussed *infra* text accompanying notes 460-66. The broader issue is discussed *infra* text accompanying notes 446-77.

282. 402 N.W.2d 406, 408-09 (Iowa 1987).

283. This whole question of questions as hearsay is discussed more fully *infra* text accompanying notes 446-77.

284. JERRY GARCIA & ROBERT HUNTER, THE GRATEFUL DEAD, *Casey Jones* on SKELETONS FROM THE CLOSET, (Warner Brothers Records, Inc. 1974).

285. "Although more than twenty thousand cases a year were tried in the federal courts in the twenty-four month period between July 1, 1988 and June 30, 1990, I could find only thirty cases decided in 1990 in which a court of appeals stated in an officially reported opinion that its reversal was due to an evidentiary error at trial." Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893, 894 (1992). This is all evidentiary error, not just hearsay. Professor Berger goes on to explain that even 30 is somewhat misleadingly high; in many of those 30, the real reason for the reversal seemed to be something other than the evidentiary ruling on which the reversal was hung, something else such as interjection of the judge's opinion, prosecutorial abuse, and so forth. "Even when hearsay is erroneously admitted, or admitted because no objection is made, verdicts based on such evidence are usually sustained and affirmed if the evidence appears sufficiently reliable." 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 800[01] (1992).

286. State v. Plant, 461 N.W.2d 253, 259 (Neb. 1990) (also convicted of first degree assault and child abuse of four-year-old stepson, but it is the other conviction in question here). The facts in the next few paragraphs are taken from *Plant*, at 265-67.

his stepson had fallen off a sofa and struck his head when he fell to the floor. Two days after the stepson was fatally injured, a police officer interviewed the defendant's four-year-old daughter, a stepsister of the deceased. He spoke to the child in a foster home where she had been placed after the incident. Sometime during the interview, he turned on a tape recorder and the tape recording was played into evidence. The four-year-old girl did not testify.

On the tape, the girl stated that she had seen her father throw the deceased eighteen-month-old child at yet a third child. She testified that she had also seen her father throw the deceased child to the floor, head first. These incidents apparently caused the head injuries from which the young boy died.

The state offered these tape recorded out-of-court statements into evidence. The state apparently recognized that they were hearsay and offered them under the excited utterance exception to the hearsay rule and under the two residual or catch-all exceptions.

Plant's lawyer, as could be expected, argued that this statement was not an excited utterance. It was, after all, made under questioning, two days after the event.

The supreme court responded that "two days" is not dispositive.[287] Well, of course it is not, but the point of the argument was that there was no foundation laid for the elements of the excited utterance exception. There was no sufficient evidence that the declarant was still under the stress caused by the event in question, and there was evidence that the event was two days old.

The supreme court also said that the declarant need not be visibly excited for her statement to qualify as an excited utterance.[288] Well, of course not, but the point of the argument was that there was no foundation laid establishing that the girl was still, and had continued to be, under the stress of the excitement caused by the event in question.

The court seems to take judicial notice that the event in question would excite and that the excitement would remain for a considerable period of time—at least two days. "Having observed the brutal nature of the incident, a young child would remain in a stressed condition for some period of time."[289]

According to the court, the only other evidence on this point was the police officer's testimony that the child was extremely shy and was apprehensive. O.K., she's four and he's a cop. She sucked on her finger. O.K., I don't recall my childhood, but I do know someone who sucked his thumb until he was nine or ten—he grew up to be a judge, by the way. She clung to her foster mother.

The court set up straw men and then blew them over—or, as Judge Shanahan said it in his concurring opinion, "[T]his court tilts with temporal windmills en route to the boundary between and 'excited utterance' and

287. *Id.* at 264.

288. *Id.*

289. *Id.* at 264-65. Regarding a different relationship between judicial notice and the hearsay rule, *see supra* note 135.

hearsay."[290] The court set up its straw men, blew them over, and concluded that the trial court's determination that Cindy Plant's taped statement constituted an excited utterance was tenable.[291]

I think the case of Glenn H. Hutchison belongs here also.[292] The prosecutor offered into evidence certain sales slips from a Ford dealer. The sales slips indicated the vehicles had been purchased by Glenn Hutchison. The court of appeals affirmed the admission of this evidence, over a hearsay objection, by saying that the information on the slips was not hearsay: "But the sales slips were not admitted to prove that Hutchison bought the vans. They were admitted to prove that someone using Hutchison's name bought the vans, from which the jury could infer that the person using Hutchison's name was Hutchison himself."[293] Instead of this fatuous line of reasoning, why not use the business records exception, or perhaps the residual exception, if the first wouldn't work? Since the court does not say, we can only guess, and my guess is that there was insufficient foundational evidence at the trial to support any of the exceptions,[294] so the appellate court had to concoct a nonhearsay theory to support the conviction.

The truth about hearsay is that you must win these cases at the trial level because so often it is too late on appeal. So often, whichever decision was made below will be upheld—even when it was wrong.

2. Trial Court Cites Wrong Reason, Appellate Court Finds Right Reason

A second way appellate courts affirm incorrect hearsay decisions is by noting that the trial court cited an incorrect reason for its ruling and then finding a "correct" reason for the same result—acknowledging that the trial court's reasons were wrong, and upholding its ruling for different, "right" reasons.

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290. State v. Plant, 461 N.W.2d 253, 270 (Neb. 1990) (Shanahan, J., concurring in the result). In Judge Shanahan's view, there was not enough foundation laid to establish this as an excited utterance. Nonetheless, there was plenty of evidence of guilt to make the erroneous admission of this statement "harmless beyond a reasonable doubt." *Id.* at 271-72 (Shanahan, J., concurring in the result).

291. What the court actually said was that "it cannot be said that the trial court's determination . . . was clearly untenable." *Plant*, 461 N.W.2d at 265. I've translated a bit.

292. United States v. Saint Prix, 672 F.2d 1077 (2d Cir.), *cert. denied*, 456 U.S. 992 (1982), also discussed *supra* text accompanying notes 91-92, and *infra* text accompanying notes 491-95.

293. 672 F.2d at 1093.

294. In United States v. Patrick, 959 F.2d 991 (D.C. Cir. 1992), the prosecutor offered, and the court received, a sales receipt to link the defendant with the residence in which the drugs were found. Reversible error. Hearsay. Business records exception unavailable on appeal because prosecutor had not laid sufficient foundation at trial. *Id.* at 1000-02. Same with residual exceptions. *Id.* at 1000 n.14.

In United States v. Lieberman, 637 F.2d 95 (2d Cir. 1980) (discussed *supra* text accompanying notes 93-97), the prosecutor offered, and the court received, a hotel guest registration card to prove the person named was a guest in the hotel at the time in question. Offered as nonhearsay and under the business records exception. *Id.* at 99-101. Business records exception unavailable because prosecutor had not laid sufficient foundation at trial. *Id.* at 101. Ruling affirmed, however, "as nonhearsay, simply to show that someone calling himself [by the name in question] registered in the hotel." *Id.* The link between that someone and the person involved in this case could be supplied by other evidence. *Id.*

In *State v. Levin*,[295] defendant was convicted of first-degree murder. In evidence were certain statements by the victim. They were offered and admitted under the residual exception.[296] On appeal, defendant contended the statements failed to meet the stringent requirements of that exception. The North Carolina Supreme Court ruled that it was not necessary to decide whether these statements met the stringent requirements of the residual exception because they were admissible under the statement against interest exception.[297]

Williams v. State[298] presents an interesting little variation of this approach. An elderly man was pushed into a table and his money was taken by a young man. The elderly man made a "fresh complaint"[299] to a neighbor and the young man made inculpatory statements to the police. The elderly man was unable to testify at the young man's trial. The prosecutor offered into evidence the neighbor's testimony about the fresh complaint and the police officer's testimony about the self-inculpatory statement. The former testimony was excluded as inadmissible hearsay; the latter was received and the young man was convicted. On appeal, he argued that his statement alone was insufficient to support a conviction. The appellate court agreed that this evidence was insufficient, but disagreed with the exclusion of the neighbor's testimony and reversed and remanded for a new trial at which the testimony of both the neighbor and the police officer will be admissible. So, while the court didn't affirm, they did reverse in such a way that the defendant can be retried and more evidence can be introduced against him than was at his first trial. Time to plea bargain.

3. Harmless Error

When the trial court is wrong and the appellate court states as much and there is no different "right" reason, the appellate court can turn to a third technique for affirming: uphold the error as harmless error.[300]

There is the *Sullivan*[301] case, handed down the same day as the decision in *Plant*.[302] *Sullivan* follows *Plant* in the Nebraska Reports.

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295. 388 S.E.2d 429 (N.C. 1990).

296. N.C. GEN. STAT. § 8C-1, Rule 804(b)(5) (1988).

297. *Id.* at Rule 804(b)(3). Even the non-incriminating parts of these statements were admissible under the statement against interest exception as "integral to the larger statement more clearly admissible as . . . directly against declarant's penal interest." State v. Levin, 388 S.E.2d 429, 433 (N.C. 1990).

298. 413 S.E.2d 256 (Ga. Ct. App. 1991).

299. *See supra* text accompanying notes 219-28.

300. In terms of the Federal Rules of Evidence, this has to do with Rule 103(a): "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." FED. R. EVID. 103(a).

In terms of the Federal Rules of Criminal Procedure, it has to do with Rule 52(a): "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." FED R. CRIM. P. 52(a). As a sort of a precursor to hearsay and the harmless error rule, Wigmore said this, in 1904: "A hearsay statement, by itself 'can condemn no man,' and so, by itself, it is excluded; but when it merely supplements other good evidence already in, it is receivable." J. WIGMORE, WIGMORE ON EVIDENCE, § 1364, at 1687 (1904).

301. State v. Sullivan, 461 N.W.2d 84 (Neb. 1990).

302. State v. Plant, 461 N.W.2d 253 (Neb. 1990), discussed *supra* text accompanying notes 286-91.

In *Sullivan*, someone robbed Pete's Place, in Fremont, Nebraska.[303] When he left, an employee, who had been pushed around by the robber, phoned police, described what had happened and who had done it, gave what she thought was the license number, and told the police the car was a blue Chrysler, which she later changed to a dirty Ford Fairmont. A police officer heard the radio report and was on the lookout for the car when he was flagged down by another car. The driver of the other car said he had chased the robber out of the parking lot of Pete's Place and had followed his car until he lost him in traffic. He told the officer the car was not a Fairmont, but a Thunderbird. Defendant objected that this out-of-court statement regarding the car being a Thunderbird was hearsay. The trial court overruled and allowed it in as an excited utterance.

The Nebraska Supreme Court said this was error. In spite of these facts: There was a startling event, the robbery; the statement related to the startling event; it was a matter of minutes from the time of the event to the time of the statement and the witness was still under the stress of the exciting event. The supreme court said that the element of spontaneity was questionable. The officer was asking him about the kind of car. This was error, but not to worry, it was harmless error. Conviction affirmed.[304]

When Han Ming Li was arrested, he was sitting in a coffee shop across the street from the motel where the sale of a large quantity of heroin had been scheduled to take place.[305] He had a clear view of much of the motel, which he was watching "intently,"[306] and a walkie-talkie. At his trial, hearsay evidence was introduced that incriminated Han Ming Li as the leader of the indicted group: One drug enforcement agent testified that another drug enforcement agent had told him the leader would be lingering in the background directing operations. Defendant's lawyer objected that this was hearsay. The trial court overruled the objection, saying that a co-defendant's lawyer "had opened the door during cross-examination."[307] The trial court got it wrong: "This ruling was unresponsive to

303. *Sullivan*, 461 N.W.2d at 85.

304. *See also* United States v. Magana-Olvera, 917 F.2d 401 (9th Cir. 1990). It was harmless error, meaning, in a criminal case: "It appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Yates v. Evatt, 111 S. Ct. 1884, 1892 (1991) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). The requirement that the "harmlessness of federal constitutional error be clear beyond reasonable doubt embodies [the] standard requiring reversal if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" 111 S. Ct. at 1892-93 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). Applying harmless error to affirm a conviction in a criminal case when the error is constitutional, is a two-step process. First, the court must review all of the evidence actually considered by the jury on the point in question, pro and con, as determined from analysis of the record (it contains the evidence) and the jury instructions (they tell us which evidence was considered by the jury). Second, the court must consider the probative force on the point of all of that evidence that was non-error-evidence as against the probative force on the point of the error-evidence and ask whether the probative force of the former "is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [error-evidence, which in this case was a] presumption." 111 S. Ct. at 1893-94.

305. United States v. Leung, 929 F.2d 1204 (7th Cir. 1991).

306. *Id.* at 1207.

307. *Id.* at 1209.

the objection. Cross-examination may indeed 'open the door' to a subject on redirect, but it does not authorize the use of evidence violating another rule, such as the complex rules limiting hearsay."[308] The court concludes: "Although the admission of this testimony was error, it was also harmless."[309] The evidence against the defendant "was overwhelming."[310] "[Defendant]'s case has been hopeless since the moment of his arrest."[311]

In the *Cammisano* case,[312] regarding the tape recording of the father and the brother discussing what someone else had told them about the defendant being a spouse and child abuser, the Eighth Circuit Court of Appeals said this was neither a present sense impression nor an excited utterance; the trial judge was wrong. On the other hand, introducing this evidence of spouse and child abuse was harmless error. The only count with a violence element was witness tampering and defendant was acquitted on the two counts of witness tampering.[313]

And, of course, there are others.[314]

Sometimes, as in the cases just discussed, the court discusses the alleged error, concludes that it was error, and then finds the error harmless. Sometimes the court skips the issue of whether there was any error in the first place and simply says that if there was it was harmless. In *United States v. Ellis*,[315] the defendant was convicted of knowingly transporting an individual under the age of eighteen in interstate commerce to engage in illegal sexual activity (which statement sanitizes this man's crimes to an extent he does not deserve). The abuse took place over a long period of time, and involved a number of trips in interstate commerce. There came

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308. *Id.* "On appeal the prosecutor argues that the testimony was offered not for its truth but to show why agent Meyer conducted the investigation as he did. That avoids the hearsay problem at the expense of making the testimony irrelevant—at least, irrelevant to guilt, as opposed to a motion to suppress. [Defendant] did not have a motion to suppress outstanding." *Id.*

309. *Id.* The court continued: "The jury was not being called on to determine whether [defendant] was a 'leader.' . . . The district judge had to determine in sentencing whether [defendant] was a leader, but the hearsay rules do not apply to sentencing." *Id.* This points out another way in which what is done below can be affirmed, though in this case what is done below is not error: by ruling that the rules of evidence do not apply to the proceeding in question. FED. R. EVID. 1101(d).

310. *Leung*, 929 F.2d at 1209.

311. *Id.*

312. United States v. Cammisano, 917 F.2d 1057 (8th Cir. 1990), discussed more fully *supra* text accompanying notes 152-55.

313. *Id.* at 1058.

314. *See also, e.g.*, United States v. Jefferson, 925 F.2d 1242, 1255 (10th Cir. 1991), discussed *infra* text accompanying notes 499-502 (court found error to be harmless); United States v. Torres, 901 F.2d 205, 240 (2d Cir.), *cert. denied sub nom.* Cruz v. United States, 111 S. Ct. 273 (1990) (Trial court excluded defendant's common law wife's testimony regarding defendant's partly-exculpatory out-of-court statement of future intention; trial court found it unprobative and untrustworthy hearsay; appellate court held relevant declarations covered by the state-of-mind exception "'*categorically* admissible, even if they are self-serving and made under circumstances which undermine their trustworthiness'"; trial court's error was harmless); Payne v. Janasz, 711 F.2d 1305 (6th Cir. 1983) discussed *supra* text accompanying notes 146-49 and *infra* text accompanying notes 477-80 (admission of hearsay in form of verbal re-creation of label on missing evidence bag linking missing evidence to defendant was harmless error); United States v. Gibson, 675 F.2d 825, 833 (6th Cir. 1982); *Brookhover*, as discussed *infra* note 329; *see also* text following note 347. And see Judge Shanahan's concurring opinion in *Plant*, discussed *supra* note 290.

315. United States v. Ellis, 935 F.2d 385 (1st Cir. 1991).

a time when the child-victim, in a flood of tears and words, told her mother what had been going on. At trial, the mother testified to what the child-victim told her about the nature and the perpetrator of the sexual abuse. The prosecution argued two hearsay exceptions: excited utterances[316] and statements for purposes of medical diagnosis and treatment.[317] "We need not enter the dense thicket of whether the evidence was admissible under either of these theories. [Her] testimony was at most cumulative. If its admission constituted error, the error was harmless."[318]

It seems to me that one of the problems with hearsay is that only rabbits voluntarily enter dense thickets. There is quite an incentive for judges to find a way around the dense thicket, to find a way to move cases off their docket without entering the hearsay argument.[319]

Not only can it be harmless error to wrongly admit hearsay, it can also be harmless error to wrongly exclude it.[320] In *United States v. Puzzo*,[321] for example, the trial court incorrectly sustained a number of prosecution objections to defendant's nonhearsay state of mind evidence. On appeal, the Second Circuit found that the trial court erroneously cut short some questioning that would have elicited nonhearsay responses but that the substance of the challenged testimony was subsequently received in evidence and the defendant did have a full opportunity to develop the defense to which it all was relevant.[322]

Rule 806 codifies a right to impeach non-testifying out-of-court declarants as though they had testified. In *United States v. Burton*,[323] the trial court did not allow the defendant to impeach with prior conviction evidence a man whose tape recorded conversation was admitted against defendant. The appellate court held this was a violation of Rule 806. However, because other evidence of the out-of-court declarant's background did come in and because there was other strong evidence of guilt, the violation was harmless error.[324]

For yet one more variation on a theme, evidence can be relevant in both an inadmissible hearsay use and a nonhearsay use, the trial court can admit it for the nonhearsay use, and the appellate court can find that it was error on the part of the trial court because the unfair prejudice to

316. FED. R. EVID. 803(2).

317. FED. R. EVID. 803(4).

318. United States v. Ellis, 935 F.2d 385, 393 (1st Cir. 1991).

319. *But see, e.g.*, United States v. Muscato, 534 F. Supp. 969 (E.D.N.Y. 1982), discussed *supra* text accompanying notes 54-62. Only rabbits and Judge Weinstein voluntarily enter thickets.

320. *See also, e.g.*, United States v. Gibson, 675 F.2d 825, 833-34 (6th Cir. 1982).

321. 928 F.2d 1356 (2nd Cir. 1991).

322. United States v. Puzzo, 928 F.2d 1356, 1366 (2d. Cir. 1991) ("Although the district court erroneously cut short some questioning the responses to which would not have been hearsay, Paci was ultimately able to testify, and his counsel to argue, in support of the theory [to which these responses would have been directed] . . . . [A]ny error [here] . . . was harmless.")

323. 937 F.2d 324 (7th Cir. 1991).

324. *Id.* at 328-30. The tape recording was of a conversation between the out-of-court declarant and the defendant. The government argued that the parts of the tape recording objected to were not hearsay "truth" evidence, but nonhearsay "context" evidence, giving context to defendant's admissions. The appellate court agreed that this would have been a good argument had the use of the evidence been so limited.

the inadmissible hearsay use substantially outweighs the probative value regarding the nonhearsay use, but that error is harmless.[325]

4. No Abuse of Discretion

There is a fourth technique for affirming the trial court's hearsay decision. This applies where, in the appellate court's view, the call below was a close one. In a case where the evidentiary point is close, the trial court may be upheld because the admission of the evidence was not an abuse of discretion.

In *United States v. Joshi*,[326] Joshi was convicted on three narcotics counts relating to a conspiracy to import and to distribute hashish. Among the evidence admitted against him was the testimony of a Drug Enforcement Administration undercover agent. The agent testified that a third party said Joshi was his partner in this and other shipments of hashish and Joshi nodded in the affirmative.[327] This was allowed in as an adoptive admission. Joshi's objection was that the trial court did not make a preliminary finding of sufficient evidence from which a jury could find Joshi had heard and comprehended the statement his nod allegedly confirmed.[328] "Although this case presents a close question, we find sufficient evidence in the record . . . to find that [the] admission [of this evidence] against Joshi was not an abuse of discretion."[329]

Remember the *Brooks* case discussed above?[330] Of course not. It said that inadmissible hearsay can be part of an opening statement so long as the trial court did not abuse its discretion in deciding that the evidence was "arguably admissible" and the attorney mentioning the evidence had a good faith belief it would be produced at trial.

Sometimes an appellate court's finding of no abuse of discretion blends together with the harmless error rule. In *United States v. Miller*,[331] the defendant argued on appeal that certain of his out-of-court statements should have been admitted under the exception for expressions of "then

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325. *E.g.*, State v. DiLosa, 529 So. 2d 14 (La. Ct. App. 1988) (murder case: inadmissible hearsay to guilt of defendant; nonhearsay to state of mind of victim); State v. Steffen, 509 N.E.2d 383 (Ohio 1987) (murder and rape case: inadmissible hearsay to guilt of defendant; nonhearsay to state of mind of victim).

326. United States v. Joshi, 896 F.2d 1303 (11th Cir. 1990).

327. *Id.* at 1311-12 nn. 9-10.

328. Joshi had an uncertain ability to understand English. As a non-English speaking defendant, he was provided an interpreter for this trial. *Id.* at 1309. On the other hand, there was some evidence that he had some understanding of English. *Id.* at 1312.

329. *Id.* at 1312. In addition, said the court of appeals, the evidence could have effectively come in as a co-conspirator statement under Federal Rule of Evidence 801(d)(2)(E). *Joshi*, 896 F.2d at 1312 n.11. *See* Truth # 1, *supra*. In addition, see the *Brookover* case, discussed *infra* text following note 347. In that case, there was also a question raised about the trial judge's use of the residual exception to admit some statement made by the injured man to his mother. The standard for reviewing these rulings on appeal is "the clearly erroneous standard." *Id.* at 419. What this trial judge did was not clearly erroneous. In any event, said the court of appeals, if it was error, it was harmless error. *See* additionally, the *Zannino* case, discussed *infra* text accompanying note 382.

330. *Supra* text accompanying note 211. *See also infra* text accompanying notes 528-39.

331. 874 F.2d 1255 (9th Cir. 1989).

existing state of mind."[332] The court of appeals said that this evidence had relevance to both "then existing" and "backward looking" state of mind. In such a situation, the trial court has discretion and this "trial court did not abuse its discretion in concluding that evidence on this point was cumulative."[333] The additional probative value of the cumulative evidence regarding the issue to which it was admissible—then existing state of mind—was sufficiently outweighed by the danger it presented as regards the issue to which it was inadmissible—past state of mind.

But, query whether "abuse of discretion" is the proper standard against which to measure trial court hearsay rulings. The evidence code is a statute. The ultimate authority is the statute, not the judge's discretion. The judge has discretion only when the statute gives the judge discretion. Therefore, abuse of discretion is the proper standard for review of evidentiary rulings only when the statute makes the ruling discretionary with the trial judge.[334]

Are hearsay rulings discretionary? No and yes. On the one hand, no, they are not discretionary, because the statute lays out what the opponent of the evidence must show to lay the foundation that it is hearsay; and the statute lays out what the proponent must show to lay the foundation that it fits under an exception; and the judge must rule accordingly—either the foundation has been laid or it has not, and the trial judge must rule accordingly, and review consists of looking to see whether there is sufficient evidence of each foundational element. On the other hand, yes they are discretionary. First, there is interpretative discretion. The words of the statute do need some interpretation.[335] Second, there is court-created general judicial discretion. The courts have effectively written a great deal of discretion into the rules by sloppy interpretation, haphazard attention, fuzzy thinking, meandering adherence to legislative directive, and just general mush-headedness. Additionally, regarding a few exceptions, such as the residuals, one of the foundational elements is that the judge must find the evidence sufficiently trustworthy. This is a loose enough word to give the judge considerable discretion. The question here becomes: Did the trial judge abuse discretion when he or she found the evidence was sufficiently trustworthy? But even this is just discretion regarding this one foundational element. The other elements, such as pre-trial notice, are not discretionary, or at least so the rule says.[336]

5. Insufficiently Timely Objection

A fifth way in which "error" below is affirmed on appeal is with a ruling that there was no timely objection.[337] Or no objection at all.[338]

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332. *Id.* at 1264-65.

333. *Id.* at 1265.

334. *E.g.*, State v. Messersmith, 473 N.W.2d 83, 92 (Neb. 1991). For example, discretion is explicit in Federal Rules 103(b), 106, 201(c), 501, 608(b), 611, 612(2), 614, and 706(c) and implicit in Federal Rules 401, 403, 609(a)(1), 614, 701, 702, 703, 706, 803(24) and 804(b)(5), 1003, and 1004.

335. Though not always as much as courts give them.

336. For the truth, *see supra* text accompanying notes 237-53.

337. "Error" is in quotation marks because it may not be the right word. Is it error if there is

In *United States v. Benavente Gomez*,[339] appellant claimed that the prosecutor failed to satisfy the foundational elements of the residual exception. The appellate court agreed, but found two reasons not to reverse. First, there was no timely objection. The appellant had objected earlier in the trial when the same document had been used to refresh recollection and to impeach. Later, however, when the court *sua sponte* admitted the document into evidence, appellant neither objected nor moved to strike. Not immediately, at least: He objected three pages of transcript later. He suggested specific grounds for the objection two pages of transcript after that. The court said the objection was not timely, no explanation was offered for the failure to object timely, and there was no motion to strike.[340] "The objection therefore was waived."[341] Second, even if the evidence had been admitted over timely objection, that error would have been harmless.[342]

In *United States v. Levy*,[343] appellants objected to the part of the prosecutor's opening statement that informed the jury of inadmissible hearsay. The appellate court disagreed, saying that since the opening statement is not testimony, things said during the opening statement cannot be hearsay.[344] In addition, said the court, appellants "did not make a contemporaneous objection, but waited until the conclusion of the prosecutor's remarks."[345]

6. Insufficiently Specific Objection

A sixth way in which "error" below is affirmed on appeal is with a ruling that the objection was not sufficiently specific.[346]

Brookover v. Mary Hitchcock Memorial Hospital,[347] was a medical malpractice action against a hospital, brought by the father of the man

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not a specific objection? If a tree falls in the forest and no one is there to hear it, does it make a sound? In terms of the federal rules, this has to do with Rule 103(a): "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) Objection. — In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . ."

338. Or no motion to strike. An expert testified to his opinion. His testimony then revealed that his opinion was based on a report that was inadmissible hearsay and he began to testify about what the report said. Opposing counsel objected. The trial court sustained the objection. On appeal, counsel claims the trial court should have struck the opinion from the record. But, since counsel never moved to strike the opinion, he cannot complain of the court's failure to do so. "The court gave counsel all the relief he asked for." Nada v. Ford Motor Co., 509 F.2d 213, 222 (7th Cir. 1974) (even if he had moved to strike, this opinion, by this expert, can be based on otherwise inadmissible hearsay). Or no request for a limiting jury instruction. *See infra* text accompanying notes 384-91.

339. 921 F.2d 378 (1st Cir. 1990).

340. *Id.* at 385.

341. *Id.* at 385-86.

342. *Id.* at 386.

343. 904 F.2d 1026 (6th Cir. 1990), *cert. denied sub nom.* Black v. United States, 111 S. Ct. 974 (1991), also discussed *supra* text accompanying notes 213-17, and *infra* text accompanying notes 563-64.

344. This part of the opinion is discussed *supra* text accompanying notes 213-17.

345. *Id.* at 1030.

346. *See supra* note 337.

347. 893 F.2d 411 (1st Cir. 1990).

who had suffered the injuries. The trial judge let plaintiff, the father, testify to some conversations he'd had with nurses at the hospital. The plaintiff argued their admissibility under the admission by an agent of a party opponent definitional exclusion to the hearsay rule.[348] On appeal, defendant assigned error on the grounds that there was no evidence the nurses were employees of the defendant hospital.

The court of appeals agreed, "There was no proof here that the nurses with whom plaintiff spoke were employees of the Hospital,"[349] but, nonetheless, affirmed the admission of the statements as non-hearsay admissions by agents.[350] The court dissected defendant's hearsay objections and found that they related to whether what the nurses said was within the scope of their agency and to whether the nurses had any personal knowledge of what they said (a double hearsay problem), rather than to whether they were in fact agents of the hospital. This is so even though defendant did, at one point, make this general statement: "It's clearly hearsay. It's being offered for the truth of the matter asserted and it does not fall within the ambit of an admission by a party opponent."[351]

The objection on appeal was that there was no proof of agency. The appellate court agreed that there was none, but also found no specific objection to the lack of foundation regarding agency. The objection, "it does not fall within the ambit of an admission by a party opponent" was not specific enough in the context of the details of the discussion among counsel and the trial judge. Therefore, the appellate court concluded, "[T]he defendant waived its objection to the agency-employee requirement of the rule."[352]

7. Error Cured by Jury Instruction

There are a variety of kinds of jury instructions that may cure hearsay error: Instructing the jury to ignore the evidence; instructing the jury to consider the evidence for a limited purpose only; instructing the jury that the evidence may have weaknesses.[353]

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348. FED. R. EVID. 801(d)(2)(D).

349. 893 F.2d 411, 413 (1st Cir. 1990).

350. *Id.* at 415, 418.

351. *Id.* at 414.

352. *Id.* at 415. Regarding defendant's objection that the nurses lacked personal knowledge, the court concluded that there is no personal knowledge requirement attached to admissions, personal or vicarious. *Id.* at 417. And then the court seemed to say that in any event the nurses were experts "by virtue of their training and experience." *Id.* at 417-18. Though the court went no further with this point, using it only to say that the nurses did have some relevant personal knowledge, under Federal Rule of Evidence 703 this could allow the nurses to express opinions based on inadmissible hearsay. *See infra* Truth # 8. The court in *Brookover* used a number of these techniques of affirmance. *See supra* note 316. *See also, e.g.*, United States v. Rubin, 609 F.2d 51, 62-63 (2d Cir. 1979) (objection that exhibit contained characterizations and that different witness was required as sponsoring witness insufficient basis for hearsay claim on appeal).

353. *But see*, Bruton v. United States, 391 U.S. 123, 135 (1968). "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.'" *Id.* at 135 (quoting

In a federal criminal trial, where defendant was charged with receiving proceeds of a bank robbery, one witness was impeached by defense counsel as regards her motive for testifying against defendant and her failure to come forward for one and one half years after the events leading to the crime charged.[354] On redirect, the prosecutor asked her why she was testifying. A hearsay objection was interposed and overruled. The prosecutor asked:

> Q: Could you tell us why?
>
> A: Sgt. Hurd [a police officer] had told me that he believed they had shot a man—[355]

This time the objection was sustained and the trial court instructed the jury "not to base any verdict on that statement made by the witness and you are not to consider it for any purpose at all."[356]

So we have a man charged with receiving proceeds from a bank robbery, and we have a witness's inadmissible hearsay testimony that a police officer told her the defendant "had shot a man," and we have the trial judge instructing the jury to ignore this statement. The Fifth Circuit affirmed:

> As a general rule we have stated that evidence withdrawn from the jury with a direction by the court that it is to be disregarded may not be the basis of reversible error. Only in cases where the remark is so highly prejudicial as to be incurable by the trial court's admonition is the instruction considered insufficient. This is not such a case.[357]

In a receipt of stolen goods case, evidence the defendant and some others shot a man is not incurably prejudicial.

Lutwak v. United States, 344 U.S. 604, 619 (1953)). The court continues:

> It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Bruton, 391 U.S. at 132-33 n.8. The court further notes:

> Judge [Learned] Hand referred to the instruction as a 'placebo,' medically defined as a 'medicinal lie.' Judge Jerome Frank suggested that its legal equivalent 'is a kind of 'judicial lie': It undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice.'

Id. at 134 n.8 (quoting United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956) (Frank, J., dissenting)).

See also Krulewitch v. United States, 336 U.S. 440 (1949) (Jackson, J., concurring). "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Id.* at 453.

Finally, *see also* Nash v. United States, 54 F.2d 1006 (2d Cir. 1932) (Hand, J.). The limiting instruction is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." *Id.* at 1007.

354. United States v. Smith, 517 F.2d 710, 711 (5th Cir. 1975).

355. *Id.*

356. *Id.*

357. *Id.* The court also refers to this as "the unresponsive answer" of the witness. It is not apparent in what sense the answer was unresponsive.

Jury instruction regarding making limited use of evidence[358]—rather than instruction that the item not be considered evidence at all and be completely ignored—can also cure the hearsay error. For example, in *People v. Murphy*,[359] a young man was charged with the brutal stabbing death of a ten-year-old neighbor boy. The day after the homicide, defendant's parents told a child psychiatrist that defendant had come home the previous evening "covered" or "soaked" or "drenched" with blood.[360] Testifying at trial, the parents minimized the amount of blood,[361] which defendant attempted to attribute to a cut on his thumb.[362] Someone who had overheard the conversation with the psychiatrist was allowed to repeat it in court. It was admitted both as part of the prosecution's case-in-chief and as impeachment of the parents testimony. Later, however, when the court charged the jury, it limited this witness' testimony to impeachment purposes.[363]

The appellate court noted that this "testimony was patently hearsay"[364] and inadmissible as substantive evidence. In its charge to the jury, the trial court limited this testimony to the issue of defendant's parents' credibility. "Limited as it was, the testimony was not so prejudicial as to constitute reversible error."[365] The court seems, in this last sentence, to be saying that the hearsay problem was overcome when the court's final charge limited the use of this evidence. Beyond that, it is a question of undue prejudice: Is the prejudice on the inadmissible issue so strong as to constitute reversible error? Tell the jury not to consider the evidence for its inadmissible purpose and consider the hearsay rule satisfied.[366] "We find, in conclusion that although defendant's trial was not free from error, no reversible error occurred and he was not deprived of a fair trial."[367]

And consider the limiting instruction in *United States v. Lieberman*.[368] The evidence in *Lieberman* was nonhearsay for at least one limited purpose, inadmissible hearsay for other purposes. The hotel registration card signed with the name Robert D'Ambra was admissible nonhearsay circumstantial evidence "to show that someone calling himself Robert D'Ambra registered in the hotel,"[369] from which the jury could infer that this was the same guy as was later arrested by the Drug Enforcement Agency, but it was inadmissible as direct evidence that Robert D'Ambra checked into the

358. *See* FED. R. EVID. 105.
359. 515 N.Y.S.2d 895 (N.Y. App. Div. 1987).
360. *Id.* at 898.
361. *Id.*
362. *Id.* at 899.
363. *Id.* at 898.
364. *Id.* at 900.
365. *Id.*
366. There was also testimony from a State Trooper on this subject of blood on defendant. "Properly objected to by defense as hearsay, this testimony should not have been admitted." *Id.* "[This testimony], although hearsay, was likewise limited to the issue of credibility of other witnesses as to when, where and how defendant was cut. Limited as it was, the testimony was not so prejudicial as to constitute reversible error." *Id.*
367. *Id.* at 901.
368. 637 F.2d 95 (2d Cir. 1980), discussed more fully *supra* text accompanying notes 93-97.
369. *Id.* at 101.

hotel.[370] The court of appeals affirmed that for this limited use the evidence is nonhearsay. It noted that the objecting party was entitled to a limiting instruction and that, though he did not request one, a limiting instruction was given. Here is what it said: "Registration evidence offered to this Court was solely offered to prove that the Robert D'Ambra registered at the Florida Hotel was the same Robert D'Ambra arrested by Agent Nagri."[371] This case is saved on appeal by a limiting instruction that, as far as I can tell, imposes no relevant limit.

In *United States v. Grey Bear*,[372] the prosecution called a witness, apparently with foreknowledge that his unimpeached testimony would not please them, just so they could impeach him with a prior inconsistent statement. He testified, they impeached, and the trial court instructed the jury that the prior statements:

> [C]annot be considered as evidence in the case. They are simply offered to impeach the witness . . . and so the net effect of it all is that there has been no evidence at all presented by this witness for the jury to consider in the determination of whether or not the United States has proved the charges it has made against these Defendants.[373]

Hearsay offered to impeach a witness who was called only so that he could be impeached with the hearsay, coupled with a curative jury instruction that the hearsay is only to be used to help the jury decide "that there has been no evidence at all presented by this witness for the jury to consider in the determination of whether or not the United States has proved the charges it has made against these Defendants."[374]

And consider the "fresh complaint" exception to the hearsay rule.[375] In its New Jersey incarnation, it says this: If, "within a reasonable time after the act occurred," the victim of an alleged sexual assault complains of the assault "to someone who she would normally turn to for sympathy, protection, or advice,"[376] this out-of-court declaration is admissible over a hearsay objection. It is, however, admissible only for this limited purpose:

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370. A theory of admissibility is discussed *supra* text following note 96.

371. 637 F.2d at 101.

372. 883 F.2d 1382 (8th Cir. 1989).

373. *Id.* at 1389 n.9.

374. *Id.* I have said it before, and I will say it again:

> Whether such a jury instruction is anything more than "another pious fiction, that we pretend to believe, to get our work done," the fiction is undeniable in the circumstances just outlined. When counsel is reasonably certain that a prior favorable statement will be retracted, the only circumstance under which he is likely to use this technique is when the damage to his opponent by the impeaching statement is greater than the damage to his case by the direct testimony.

G. Michael Fenner, *Handling the Turncoat Witness Under the Federal Rules of Evidence*, 55 NOTRE DAME L. REV. 536, 536-37 (1980) (quoting Irving Younger, THE ART OF CROSS EXAMINATION (ABA Litigation Section Monograph Series 1976)).

On the other hand, similarly to *Grey Bear*, in State v. Marco, 368 N.W.2d 470 (Neb. 1985), a witness testified, the prosecution impeached with prior inconsistent statements, the trial judge gave a limiting instruction during the testimony and again during the final reading of the instructions. *Id.* at 473. The Supreme Court of Nebraska said, "Prejudice, disguised as impeachment, appears to have slipped into this case. The case must be reversed for a new trial." *Id.* at 474.

375. This is discussed *supra* text accompanying notes 219-29.

376. State v. Bethune, 557 A.2d 1025, 1027 (N.J. Super. 1989).

to rebut the trier of fact's natural suspicion of a lack of fresh complaint, which, say the New Jersey courts, makes it evidence of credibility—it bolsters the credibility of the alleged victim's later complaint.[377] It is hearsay; this "arbitrary exception"[378] has been created to allow it in, at least for a limited purpose; and a "limiting instruction *must* be given by the trial judge."[379] So, while the jury instruction does not exactly cure error, an "arbitrary exception" is created and the mandatory limiting jury instruction makes it easier to accept whatever damage is done to the hearsay rule.[380]

Likewise, an instruction warning the jury of weaknesses that the trial judge sees in the evidence (weaknesses the jury should consider when deliberating) can affect the appellate court's receptivity to what was done below.[381] In *United States v. Zannino*,[382] testimony from an earlier trial was admitted under Rule 804(b)(5), the residual exception for witnesses whose current testimony is unavailable. There had been vigorous cross-examination at the first trial, but not by the party against whom the testimony was now being offered. The appellate court stated: "We note with approval that, before Smoot's testimony was read, the district court gave a clear, firm prophylactic instruction highlighting appellant's lack of any opportunity to cross-examine."[383]

8. Waiver of Objection by Failure to Request Limiting Jury Instruction

As a variation on a theme, not only can the error be cured by giving a limiting jury instruction, but it can be "cured" by counsel failing to ask for the curative jury instruction. In *Sherman v. Burke Contracting, Inc.*,[384] for example, the defendant would have been entitled to a limiting instruction that the jury could only consider the evidence in question for a limited purpose (because for other purposes it was inadmissible hearsay), had he requested one. But he had not. This was partial error cured by reason of the fact that counsel did not ask for the limiting instruction that would have cured it.[385] And in *United States v. Obayagbona*,[386] a prosecution witness's prior consistent statement was admitted with a limiting instruction: The judge told the jury they could treat the statement as both credibility and substantive evidence, but warned them to treat it cautiously because "it's hearsay."[387] Then the judge asked defense counsel, "Is there

377. *Id.*
378. *Id.* at 1028.
379. *Id.* at 1029 (emphasis added).
380. Though, in my opinion, the more damage done to the hearsay rule, the better.
381. Is this judicial comment on the evidence?
382. 895 F.2d 1 (1st Cir. 1990).
383. *Id.* at 8 n.6.
384. 891 F.2d 1527 (11th Cir. 1990).
385. *But see* United States v. Myers, 892 F.2d 642 (7th Cir. 1990) (where failure to submit a limiting instruction to the trial court was held, on the facts of the case, to be ineffective assistance of counsel).
386. 627 F.Supp. 329 (E.D.N.Y. 1985) (opinion denying motion for new trial).
387. *Id.* at 334.

any other instruction you wish me to give?"[388] On motion for a new trial, Judge Weinstein said, "Failure to request a more limited instruction after being invited to do so constituted a waiver of any objection to general admissibility."[389]

Finally, on the jury instruction theme, error can be cured by jury instruction even though in some jurisdictions the instructions are only read to the jury—the jurors do not take a written copy with them into the jury room.[390] So, we have the possibility of a jury that has heard particularly damaging, inadmissible, erroneously admitted-over-objection hearsay and the error is cured by the judge saying so in a statement buried somewhere in the middle of tens of instructions; and the party potentially injured by this erroneous ruling must rely on the jury's recollection of that one instruction, for they will not have the instructions with them, to go over again, in the jury room.[391]

9. Objection Waived by Declining to Accept a Continuance

In *United States v. Obayagbona*,[392] the trial judge admitted certain statements under the residual exception. The rule requires pre-trial notice to opposing counsel of the intention to use this exception. The court stated that a continuance cures this lack of notice[393] and concluded: "The defendant declined to accept [the court's offer of] a continuance. Any objection to lack of notice was waived."[394]

Everything is nonhearsay, everything is hearsay, and everything can be made to fit under an exception to the hearsay rule. Naturally, then, when the subject is hearsay, skilled counsel can convince the ordinary and reasonable judge of almost anything—and, the ordinary and reasonable judge can ignore even the most logical and persuasive argument of counsel, and rule the other way. All sorts of results are possible, but only at the trial level: You must win these cases at the trial level because so often it

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388. *Id.*

389. *Id.* at 337.

390. This seems to be the practice in New York. I recently spoke with two friends in New York City who had served on juries in criminal cases. They said that by state law they were not allowed to take the jury instructions with them into the jury room. I asked, "How can you remember them?" They said, "You can't." The Practice Commentary in the 1992 Supplement to McKinney's New York Criminal Procedure Law indicates that New York state's case law in this regard is in a state of flux. Peter Preiser, *Practice Commentary*, N.Y. Crim. Proc. Law, § 310.20, at 453 (Supp. 1992). There are two New York statutes controlling what can be taken into the jury room in criminal cases in that state. N.Y. Crim. Proc. Law, §§ 310.20, 310.30 (McKinney 1982 & Supp. 1992). The law does not authorize sending written instructions to the jury room; violation of this rule requires automatic reversal (that is, there is no harmless error review here). People v. Sotomayer, 569 N.Y.S.2d 973 (N.Y. App. Div. 1991).

391. Well, to be perfectly honest, they will have their memories of the instructions, as impressed during counsel's closing argument, and if this instruction is important to counsel, it can be hammered on in closing argument. Here, however, the attorney is forced to impress upon the jury that they not consider certain evidence by actually reminding them of the evidence. The version of this game we played as children was, "Don't think of a white horse."

392. 627 F. Supp. 329 (E.D.N.Y. 1985).

393. *See also supra* note 251.

394. 627 F. Supp. at 340. *Accord*, United States v. Muscato, 534 F.Supp. 969, 980 (E.D.N.Y. 1982).

It doesn't matter for my purpose here. What matters is that it is so hard to tell. What matters is that judges and other lawyers so often get it wrong. What matters is that the same result as that of the appellate court can be reached under Rule 602 and, perhaps, Rule 403,[555] without a hearsay rule. What matters is do we really want a rule that says, "That bastard tried to cut in," is hearsay and, "I saw that bastard try to cut in" is not hearsay? What matters is that when the subject is the hearsay rule, it is so hard to tell what matters.

And "they" seem to have gotten it wrong in the *Borel* case.[556] Borel filed a product liability action. Defendants took his deposition. He died. His widow was substituted as plaintiff.[557] At trial, plaintiff offered Borel's deposition and several cards Borel had used to refresh his recollection during his deposition testimony. "The card[s] contained the names of various products manufactured by the defendants and the dates and locations when Borel had used each product."[558] The court of appeals said these notes are admissible over a hearsay objection because inspection of the cards "would assist the jury in understanding the evidence and [admitting the cards] would not be prejudicial to the opposing party."[559] If not prejudicial to the other party, one wonders why the first party offered them in the first place, but that is beside the point here. The point here is this: What kind of hearsay exception is it to say that the evidence would assist the jury in understanding the case and it is not prejudicial? It is no kind of hearsay exception: It is relevance and it is probative value weighed against the danger of unfair prejudice.[560] Were this "exception" true, it would chew hearsay to bits and spit it out as relevance.

And then there is the "Cleveland Exception to the Hearsay Rule": in a criminal trial, the hearsay rule does not stand in the way of the admissibility of anything that was said in the presence of the accused.[561]

In fact, many of the cases discussed above, in the section on extra-statutory hearsay exceptions,[562] are really just examples of courts getting it wrong. The Cleveland exception, just discussed, is one example. The opening statement exception is another: In *United States v. Levy*,[563] the court said that because the opening statement is not testimony, things said during the opening statement cannot be hearsay.[564] Well, perhaps so, in

555. *See supra* note 554.

556. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

557. *Id.* at 1086.

558. *Id.* at 1102.

559. *Id.* at 1103.

560. At best, it is a common law precursor of the residual exceptions, but without all of the safeguards; a common law precursor of the residual exception, but one that really is reduced to no more than a rule of relevance, one that has nothing to do with trustworthiness (except heavily disguised as "assist the jury").

561. *Supra* note 234 and accompanying text.

562. *See generally supra* text accompanying notes 206-53.

563. 904 F.2d 1026 (6th Cir. 1990), *cert. denied, sub nom.* Black v. United States, 498 U.S. 1091, (1991). Principally discussed *supra* text accompanying notes 343-45. Also discussed *supra* text accompanying notes 213-17.

564. This part of the opinion is discussed *supra* text accompanying notes 213-17.

who appears to have had opportunity to observe personally the events."[548]

The appellate court did not approach this as a potential problem of hearsay within hearsay.[549] (Which would have put the burden in a different place: The burden of establishing that an out-of-court declaration is hearsay is on the opponent of the evidence, then the burden of establishing an exception is on the proponent.) Though the appellate court did say that this particular foundational element expresses the "familiar principle [of Rule 602] that a witness may not testify about a subject without personal knowledge,"[550] the court did not treat this as a Rule 602 problem. Instead, the court turned to Rule 806, which provides that the credibility of an out-of-court declarant may be attacked and points out the difficulty with attacking the credibility of an unidentified out-of-court declarant.[551] The court links this to personal knowledge as an aspect of credibility and points out the sometimes difficult task of establishing personal knowledge on the part of an unidentified out-of-court declarant.[552]

Did the trial court get it right? Did the appellate court get it right? Maybe so, maybe not. Maybe they are both right, or both wrong.[553] Perhaps there is an implicit personal knowledge requirement in each of the exceptions to the hearsay rule: Maybe it is in Rule 602; maybe it is in the advisory committee note to Rule 806—"[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness"—coupled with Rule 602's requirement that a witness be shown to have personal knowledge, and unless the out-of-court declarant is shown to have had personal knowledge, either that declarant is incompetent or the declaration is hearsay within hearsay.[554] Who is right and who is wrong, if anyone?

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548. *Miller*, 754 F.2d at 510. This case is also discussed *supra* note 231.

549. As the court did, for example, in United States v. Brown, *supra* text accompanying notes 109-17 and 270-76.

550. *Miller*, 754 F.2d at 511.

551. *Id.* at 510. Unidentifiability, as opposed to unavailability.

552. *Id.* at 511.

553. Maybe they are both right if we ignore the first grounds for the trial court's ruling, res gestae, and go with the second, excited utterance.

554. Perhaps the same result could be had under Rule 403. The court says that there is insufficient evidence of personal knowledge: The out-of-court declarant "might have been drawing a conclusion on the basis of what he saw as he approached the scene of the accident. He might have been hypothesizing or repeating what someone else had said. [He might have been] talking about some other driver who had just cut in front of him. [He might have been] a participant in the accident . . . a participant with a natural degree of bias." *Miller*, 745 F.2d at 511-12. The out-of-court declaration is not trustworthy. *Id.* at 512.

The statement is sufficiently strong and declarative and definite to be prejudicial: There is part of Rule 403. According to the appellate court, the probative value is low because the evidence is so untrustworthy, so the prejudice may substantially outweigh the probative value: There is another part of Rule 403. But is the prejudice unfair? Unfair prejudice means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. RULE EVID. 403 advisory committee's note. Maybe the improper basis here is "Plaintiff says one thing. Defendant says the opposite. A third party, not known to be associated with either, agrees with defendant. Let's let the third party break the tie." That is a stretch; it would render lots of third party evidence unfairly prejudicial, but it wouldn't render it inadmissible unless the unfair prejudice substantially outweighed the probative value. Therefore, it wouldn't render it inadmissible unless the evidence was also particularly untrustworthy. Perhaps it is a stretch, but no more of a stretch than thousands of applications of the hearsay rule, and, to my way of thinking, it is a more straightforward approach.

relevant nonhearsay purpose. Even further, *McCormick on Evidence* might add, most all of the details were unnecessary to the relevant nonhearsay purpose and it would have been enough for the prosecutor's opening and the arresting officer's testimony to tell the jury that the officer "acted 'upon information received,' or words to that effect."[539]

For yet one more example of how it is gotten wrong anyway, take a case like *Miller v. Keating*.[540] Here the question was whether the plaintiff driver had suddenly and negligently entered defendant's driving lane, or whether she had been there a while, in plain sight, and the defendant just rammed into her. The out-of-court statement, made to a bystander, by an unidentified out-of-court declarant, was "[T]he bastard tried to cut in."[541] The trial judge admitted the statement as res gestae, then, when denying post-trial relief, admitted there no longer is any such exception to the hearsay rule, so ruled the declaration was an excited utterance.[542] The appellate court held this was reversible error—inadmissible hearsay: There was insufficient evidence to satisfy the foundational elements of any of the exceptions. For the declaration to be admissible as an excited utterance, the out-of-court declarant must personally observe the startling event.[543] There was insufficient evidence that the out-of-court declarant had personal knowledge that the bastard tried to cut in.[544] That obstacle might have been overcome if the out-of-court declarant had said, "I saw how that bastard tried to cut in."[545]

Here is a case where the first judge twice got it wrong. First, he continued to use the common law of res gestae in a rules jurisdiction. Second, realizing that error, he misused the excited utterance exception. The appellate court reversed, but in doing so made the same mistakes as the trial court: Read the common law into the rule and misused the excited utterance exception. The excited utterance exception of the federal rules has two foundational elements: The out-of-court declaration must "relat[e] to a startling event or condition" and it must have been "made while the declarant was under the stress of excitement caused by the event or condition."[546] The appellate court cited a common law treatise[547] for the proposition that there is yet another foundational element: "[A] declarant

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539. MCCORMICK ON EVIDENCE § 249 (4th ed. 1992). McCormick continues:

> Nevertheless, cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great.

540. 754 F.2d 507 (3d Cir. 1985).

541. *Id.* at 509.

542. *Id.*

543. *Id.* at 511. And the burden of establishing perception is the proponent's. *Id.*

544. As a second and independent ground, for ruling that the foundation for the excited utterance exception had not been established, the court found insufficient evidence the out-of-court declarant was excited when he spoke. *Id.* at 512.

545. *Id.* at 511.

546. FED. R. EVID. 803(2).

547. Miller v. Keating, 754 F.2d 507, 510 (3d. Cir. 1985) (citing 6 WIGMORE, EVIDENCE §§ 1750-51 (J. Chadborn rev. 1976)).

question asking the officer how he had become aware of the house. The answer to this question was that the officer had been told that Paul Brooks, the very defendant in this case, was selling heroin, the very crime charged in this case, from that address. That answer, said the supreme court, is admissible.[533]

This is admissible under a theory that to the older readers of this work will sound remarkably like the long-ignored res gestae exception.[534] The court said:

> It is well established that such testimony is admissible to explain the officers' conduct, supplying relevant background and continuity to the action. . . . Under this rule the triers of fact can be provided a portrayal of the events in question, more likely to serve the ends of justice in that the jury is not called upon to speculate on the cause or reasons for the officers' subsequent activities.[535]

Even more remarkably, the court concluded, "[I]n the case *sub judice*, the information from the tipster was not relied on to identify defendant nor did it connect defendant with the criminal transaction charged."[536] I guess that is right, it did not directly connect defendant with the particular transaction charged; it was simply circumstantial evidence directly connecting him with crimes identical to the one charged.[537] That is to say, this evidence was in one sense even worse than evidence connecting him with the particular transaction charged: It gives him the look of a professional, a repeat offender, a man too dangerous to be free regardless of what may have happened on the day in question.

This evidence was approved as a nonhearsay out-of-court statement used to show its effect on the mind of the hearer. The officers staking out the place had cause to do so; this was not just some random act that perhaps calls for jury nullification. This must be the theory on which this is relevant nonhearsay. Clearly, however, the evidence has another use: An out-of-court declarant is of the opinion that this defendant sells this drug from this house. To show that the police were doing their job in the way we all want them to, we needn't tell the jury that they had a tip *this defendant* was selling *this very drug* at this very same address. And there were lots of ways the prosecutor could have satisfied his needs without doing so much damage to the hearsay rule. At a minimum, as noted by one of the dissenting judges, "defendant's name was unnecessary"[538] to the relevant nonhearsay purpose. Further, I would add, that the crime suspected was the sale of this very same drug was unnecessary to the

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533. *See Brooks*, 618 S.W.2d at 26 (Seiler, J., dissenting).

534. *E.g.*, *supra* text accompanying notes 230-31; Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 75 (1987). Professor Park gives the subject a new label: "transaction exceptions." *Id.* at 74.

535. *Brooks*, 618 S.W.2d at 25 (citations omitted). If the quotation is longer than you would like, it is because I hesitate to condense things I do not understand.

536. *Id.* at 26.

537. As one of the dissenting judges put it, "[H]ere the court allows the prosecutor to tell the jury that someone told the police the defendant was selling heroin." *Id.* at 28 (Bardgett, C.J., dissenting).

538. *Id.* at 27 (Seiler, J., dissenting).

The court of appeals disagreed, finding that these district courts had misunderstood the requirements of the ancient documents exception and the rules regarding authenticity. Those courts focused on the completeness of the documents and the trustworthiness of the information found thereon. Questions of completeness and trustworthiness bear on weight, not authenticity. This evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of time, and the other Rule 403 considerations. Otherwise, it is admissible and whatever problems it has are for the jury. This evidence, said the court of appeals, was good enough to go to the jury. These trial courts, then, had used the hearsay rule to allow themselves to usurp a jury function.[524]

Sometimes a judge gets it right and then gets it wrong: "Dogs and other dumb animals do not qualify as witnesses in the courts of this state. They know not the nature of an oath. They may not be sworn. They cannot be cross-examined."[525] So far, so good. Why not stop? "They testify only through professed interpreters [or stop here, perhaps?] whose translations and conclusions are always hearsay."[526] The interpreter's translation of the bloodhounds sounds and actions are always hearsay?[527]

Sometimes a number of judges get it wrong in the same case, and sometimes in some very interesting ways. This is what happened in *State v. Brooks*.[528] The defendant, Paul Brooks, was on trial for selling heroin. In the prosecutor's opening statement, he said: "[The police] work through informants. . . . They received information that narcotics were being sold—heroin was being sold at 2918 Sheridan by Paul Brooks."[529] Defendant moved to strike; the motion was denied. During the prosecutor's case-in-chief, he offered evidence to support what he had said in his opening: He asked the arresting officer how he first became aware of the house. Defense counsel registered a hearsay objection; the objection was sustained. At this point, the prosecutor said to the judge, "[T]hat is what I said in opening statement,"[530] and asked the judge if there was a conflict in the rulings. The judge replied, "I didn't know how you were going to tie it up."[531] Defense counsel moved for a mistrial, the trial judge did not rule on the motion, and defendant was convicted.

On appeal, the Missouri Supreme Court affirmed the conviction. First, the court announced what I earlier characterized as the "Opening Statement Exception to the Hearsay Rule."[532] Second, the supreme court said that the trial court had gotten it wrong when it sustained the objection to the

524. *Id.* at 1376.

525. State v. Storm, 238 P.2d 1161, 1176 (Mont. 1952).

526. *Id.*

527. Not according to the bloodhound cases cited *supra* note 8.

528. 618 S.W.2d 22 (Mo. 1981). This case is also discussed *supra* text accompanying notes 210-12.

529. *Id.* at 24.

530. Mary A. Ernst, *A Departure From Accepted Rules of Evidence?* 50 UMKC L. REV. 367, 367 n.6 (1982) (quoting Brief for Appellant at 3-4, State v. Brooks, (Mo. Ct. App. 1979) (No. 41475)).

531. *Id.*

532. *Supra* text following note 210.

confuse the definitional exclusion of the party's own statement offered against him or her with the common law exception of an admission against interest.

Professor Glen Weissenberger describes another area where courts plow ahead with the common law, in ways especially inattentive to the statute, and concludes, "In some courts, judicial liberalization of [the former testimony exception] has effectively replaced Congress' rule with the version originally proposed by the Supreme Court."[514]

In *United States v. Leung*,[515] discussed more fully above,[516] defense counsel made a hearsay objection. The trial court overruled the objection, saying that when a co-defendant's lawyer had asked questions on the subject he "had opened the door."[517] The trial court got it wrong: "This ruling was unresponsive to the objection. Cross-examination may indeed 'open the door' to a subject on redirect, but it does not authorize the use of evidence violating another rule, such as the complex rules limiting hearsay."[518] While the trial court got the ruling wrong, it did not get the result wrong: The error was held harmless.[519]

Often, it seems, a judge has a feeling that the evidence is not admissible, or, at least, is not very good evidence, and incorrectly uses the hearsay rule as a peg on which to hang this feeling.[520] In *Threadgill v. Armstrong World Industries*,[521] the Third Circuit Court of Appeals discussed some district court opinions in which this seems to have happened. In this asbestos case, the plaintiff offered 6000 documents under the ancient documents exception. The same documents had been offered into evidence in a number of other asbestos cases in district courts in the Third Circuit and the *Threadgill* court reviewed some of those cases. These district courts had held that these documents did not qualify as "ancient documents." The problem, said one court, was that there was a "high degree of unreliability as to the completeness of the correspondence."[522] The problem, said another, was that the judge did not consider the documents trustworthy. This judge had problems with the chain of custody, which lead to the conclusion that they did not fit under the exception.[523]

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514. Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C. L. REV. 295, 325 (1989). And the version proposed by Supreme Court was the version of a majority of the common law. *Id.* at 312.

515. 929 F.2d 1204 (7th Cir. 1991).

516. *See supra* text accompanying notes 85-86.

517. *Leung*, 929 F.2d at 1209.

518. *Id.* "On appeal the prosecutor argues that the testimony was offered not for its truth but to show why agent Meyer conducted the investigation as he did. That avoids the hearsay problem at the expense of making the testimony irrelevant—at least, irrelevant to guilt, as opposed to a motion to suppress. [Defendant] did not have a motion to suppress outstanding . . . ." *Id.*

519. *Id. See supra* text accompanying notes 305-11.

520. *See also* Miller v. Keating, 754 F.2d 507 (3d Cir. 1985), *supra* note 231 and *infra* text accompanying notes 540-55.

521. 928 F.2d 1366 (3d. Cir. 1991). This case is also discussed *supra* text accompanying notes 157-58.

522. *Id.* at 1374.

523. *Id.* at 1374 (referencing Neal v. Carey Canadian Mines, Ltd., C.A. No. 78-242, bench ruling (E.D. Pa. March 25, 1981)).

hearsay exception for public records and reports. This exception, as applied to these facts, has a trustworthiness requirement: "unless the sources of information or other circumstances indicate lack of trustworthiness."[505] The magistrate concluded that these reports were inadmissible hearsay because he found a lack of trustworthiness. The court of appeals reversed, holding that what the magistrate had in fact done was to make a decision regarding the credibility of the reports: He decided that he did not believe them, that they were incorrect; he made the jury decision. Trustworthiness does not mean that the reporter got it right, but that the "report was compiled or prepared in a way that indicates that its conclusions can be relied upon."[506] The focus is not on the conclusion, but on the process. The focus is on methodology.[507] Snagged once, the magistrate plunged ahead, only to be snagged again: He considered the admissibility of the reports to be "all or nothing proposition[s]," with no possibility of redaction.[508] And, the third snag is a charm: While he allowed an offer of proof, he required that it be made outside his presence.[509] Three errors on one hearsay decision.

2. Continuing to Apply the Common Law, In Spite of the Statute

Another way in which courts get it wrong is by seeming not to notice that the rules of evidence are different from the common law. Consider *Dugan v. EMS Helicopters, Inc.*[510] On the subject of a party's own statement offered against him, the trial court ruled it inadmissible because it was not inconsistent with any position the party was taking at trial. The appellate court reversed, but by finding that the out-of-court statement was inconsistent with a position the party was taking at trial and, for that reason, "constitutes an admission against interest pursuant to Fed. R. Evid. 801(d)(2)."[511] But, under the federal rules, this is not the test.

Under the federal rules, a party's own statement offered against him or her is defined as nonhearsay.[512] Period! It is that simple. It need not be against the party's interest at the time of trial, it need not have been against the party's interest at the time it was said. It need only be offered against the party (which, presumably, but not necessarily, will mean that an opponent views it as currently against the party's interest). At common law, parties' statements were not excluded from the definition of hearsay, but there was an exception—an exception that required as a foundational element that the party's statement be against the party's interest at the trial or hearing where it was offered in evidence.[513] Courts continue to

505. FED. R. EVID. 803(8).
506. Moss v. Ole South Real Estate, 933 F.2d 1300, 1307 (5th Cir. 1991).
507. *Id.* at 1307-308.
508. *Id.* at 1310.
509. *Id.* at 1310-11 n.10.
510. 915 F.2d 1428 (10th Cir. 1990).
511. *Id.* at 1434.
512. *See supra* note 39 and accompanying text.
513. *E.g.*, John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 564, 569 (1937).

Contrast Glenn H. Hutchison's case with one more, *United States v. Jefferson*.[499] Defendant was a passenger in Tillis's car. In the trunk of the car, the police found a bill for a pager, with defendant's name on the bill, and crack cocaine.[500] The court did not say that this evidence was introduced to show that someone using defendant's name had purchased a pager, from which the jury could infer that the someone was defendant. Instead, the court said:

> Under the plain language of Rule 801, the pager bill was hearsay. The bill was a written statement intended by U.S. West to assert both that Jefferson had purchased pager service from U.S. West and that he owed U.S. West money for this purchase. There is no doubt that the government offered the bill into evidence to prove the truth of the matter asserted—namely that Jefferson had purchased pager service from U.S. West.[501]

One of these courts, I submit, got it wrong, and it was the Glenn H. Hutchison court.[502]

There are so many places to get snagged in the "dense thicket"[503] of hearsay. In *Moss v. Ole South Real Estate*,[504] for example, the question before the magistrate was the admissibility of two evaluative reports, a report by the Department of Housing and Urban Development and a United States Air Force report. The touchstone was Rule 803(8), the

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499. 925 F.2d 1242 (10th Cir. 1991).

500. The government had put on evidence that drug dealers commonly use pagers. *Id.* at 1252.

501. *Id.* at 1252. *See also* United States v. Muhammad, 928 F.2d 1461, 1468-69 (7th Cir. 1991) (Where the beeper company's records regarding who had rented a particular beeper were admissible under the business records exception. The battle was over whether the foundation for the exception was established, not over whether the record was hearsay in the first place: Everyone seemed to assume it was.)

502. CROSS ON EVIDENCE makes a valuable distinction. On the one hand, the inscription "produce of Morocco" was inadmissible to prove the bags in question came from Morocco. Patel v. Comptroller of Customs, *discussed in* SIR RUPPERT CROSS AND COLIN TAPPER, CROSS ON EVIDENCE 519 (Butterworths, 7th ed., 1990). On the other hand, "the words 'Sean rules', found on a piece of paper near a gun discarded after the commission of a robbery," were not hearsay. R. v. Lydon, 85 Cr. App. Rep. 221, 224 (1987) *discussed in* SIR RUPPERT CROSS & COLIN TAPPER, CROSS ON EVIDENCE 520 (Butterworths, 7th ed., 1990). The former was intended to assert the fact of the place of origin of the bags and was offered to prove the truth of the matter asserted. The latter was not intended to assert the identity of the robber and, if it was intended to assert any fact, it was not offered to prove the truth of that fact. Pretty much beyond question, the intention of those who inscribed the bags was to assert they were from Morocco. It is much less likely the intention of the one who wrote the second note was not to assert that Sean was involved in the robbery (though, of course, that too is possible). Experience teaches us that the out-of-court declaration in the first case was much more likely intended to be an assertion of fact, and the out-of-court declaration in the second case was less likely so intended.

> In [cases like the 'Sean rules' case] it seems that the writing, when properly admissible at all, is relevant not as an assertion of a state of facts, but as itself a fact, which affords circumstantial evidence upon the basis of which the jury may draw an inference as it may from any other relevant circumstance of the case.

SIR RUPPERT CROSS AND COLIN TAPPER, CROSS ON EVIDENCE 520 (Butterworths, 7th ed., 1990). On the other hand, when someone signed the name Glenn Hutchison onto the sales receipt, it seems to be way down near the "likely" end of the scale: likely that the out-of-court declarant intended an assertion, and that the assertion intended—Glenn Hutchison is buying these vans—is the issue. The fact that the words "Glenn Hutchison" were found on a piece of paper at a car dealership, purporting to be a sales receipt showing that certain specified vans were purchased by Glen Hutchison, is far removed from the fact that a piece of paper with the word "Sean" was found "at the scene."

503. United States v. Ellis, 935 F.2d 385, 393 (1st Cir. 1991).

504. 933 F.2d 1300 (5th Cir. 1991).

Let's apply this line of reasoning to *Patel v. Comptroller of Customs*.[493] In this case, the inscription "produce of Morocco" was inadmissible hearsay when offered to prove the country of origin of the bags of coriander seeds on which the inscription was found. One authority concluded, by the way, that the inscriptions "had been placed upon the goods to make that assertion, and for no other purpose. They were thus rightly regarded as hearsay."[494] Paraphrasing the case of Glenn H. Hutchison, the inscriptions would not be hearsay, as follows: The inscriptions were not admitted to prove that the bags came from Morocco; they were admitted to prove that the bags came from someplace using the name Morocco, from which the jury could infer that the place using Morocco's name was Morocco itself.

Instead of this fatuous line of reasoning, why not use the business records exception, or perhaps the residual exception, if the first wouldn't work? Since the court does not say, we can only guess, and my guess is that there was insufficient foundational evidence at the trial to support any of the exceptions, so the appellate court had to concoct a nonhearsay theory to support the conviction.[495]

Hutchison's name was on a sales slip for the purchase of vans; drugs were found in the vans; the sales slip, including his name, was not hearsay because it was not offered to prove that Glenn H. Hutchison bought the vans, but only that someone using his name bought the vans. In *United States v. Patrick*,[496] drugs were found in a room. Also in that room was a television sales receipt containing defendant's name and the address at which the sales receipt and the drugs were found. In this case, the court said that the sales receipt was not hearsay insofar as it contained defendant's name; it was hearsay, however, insofar as it contained the address at which the drugs were found. Regarding defendant's name: The receipt was offered to show that an item belonging to defendant was found in the same room as the drugs, said the court. For that use, the receipt is not hearsay, "because it was not offered to prove the truth of any statement."[497] However, said the court, it was reversible error to allow the sales receipt into evidence to prove the address—to link the defendant with the address. The court drew this distinction between the case at hand and cases like that of Glenn H. Hutchison:

> Here, however, at this point in its closing argument, the government did not seek to use the receipt to show that someone claiming to be Patrick and to reside at 818 Chesapeake Street had purchased a television. Rather, the government used the receipt to prove that Patrick resided at that address.[498]

With distinctions like this, it is no wonder we so frequently get it wrong.

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493. *Discussed in* SIR RUPPERT CROSS & COLIN TAPPER, CROSS ON EVIDENCE 519 (Butterworths, 7th ed., 1990), and as discussed more fully in this article *infra* note 502.

494. *Id.*

495. *See supra* notes 292-94 and accompanying text.

496. 959 F.2d 991 (D.C. Cir. 1992).

497. *Id.* at 999.

498. *Id.* at 1000 n.13.

In two cases where income tax preparers were on trial for tax fraud, the same court came to opposite hearsay rulings. In one, the court said the IRS agent's testimony against the income tax preparer was necessarily based on what she had been told by the customers and, for that reason, it was "hearsay of the rankest kind . . . ."[485] In the second, the court said that the argument that the agents' testimony was necessarily based on what they had been told or had read was "totally conjectural" and that acceptance of that argument "would work a radical and dangerous expansion of the hearsay doctrine."[486]

Here is a case where the trial judge commits a most basic hearsay error: the kind of error made by students brand new to the subject.[487] (Which means, of course, that what the trial court did makes sense intuitively, it just isn't the rule, which, of course, is one of the big problems with the rule: Many of its little parts are counter-intuitive.) The case is *United States v. Pedroza*.[488] The government offered into evidence several out-of-court statements on the grounds that they were not inadmissible hearsay because the out-of-court declarants would testify later in the trial and would be available for cross-examination.[489] The district court let the statements in on those grounds. The appellate court noted that there is no such general exception or definitional exclusion and what the trial court did was in error.[490]

And here is another basic error, from the case of Glenn H. Hutchison.[491] The prosecutor offered into evidence certain sales slips from a Ford dealer. The sales slips indicated the vehicles had been purchased by Glenn Hutchison. The court of appeals affirms the admission of this evidence, over a hearsay objection, by saying that the information on the slips is not hearsay: "But the sales slips were not admitted to prove that Hutchison bought the vans. They were admitted to prove that someone using Hutchison's name bought the vans, from which the jury could infer that the person using Hutchison's name was Hutchison himself."[492]

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court statement implies certain specific things, but the out-of-court statement was, we assume, very direct and to the point.

485. United States v. Brown, 548 F.2d 1194, 1208 (5th Cir. 1977), discussed *supra* notes 109-17 and 270-76.

486. United States v. Bernes, 602 F.2d 716, 719 (5th Cir. 1979), discussed *supra* notes 270-76.

487. The most basic mistake ever made by my students is spelling it "heresay." Come to think of it, that might be a better rule. We would establish the foundation for the exceptions by asking questions like, "Just exactly *how close to the accident* was this woman who later described it to you?" Or, "How far from the deceased was the person who shot him, and how far away were you when the deceased said who'd killed him?" Or oppose the foundation, on voir dire of the witness, by asking questions like: "I believe you are about to testify that you heard Kenneth Poos say 'Sophie bit a child.' First, let me ask you this: Where was Mr. Poos when Sophie the wolf allegedly bit young Daniel Mahlandt?" *See* Manlandt v. Wild Canid Survival & Research Ctr., Inc., 588 F.2d 626 (8th Cir. 1978).

488. 750 F.2d 187 (2nd Cir. 1984).

489. *Id.* at 199.

490. *Id.* at 200.

491. United States v. Saint Prix, 672 F.2d 1077 (2d Cir. 1982), *cert. denied*, 456 U.S. 992 (1982). In addition to the above discussion, *see supra* text accompanying notes 91-92 and 292-94.

492. 672 F.2d at 1083.

was convicted of possession of an unregistered firearm found in a case with an attached name tape containing the words "Bill Snow"; the court allowed the name tape into evidence as nonhearsay to the issue of who possessed the gun in the case. A resident of 10001 Cedar Avenue was convicted of "intimidation," in part on evidence that he had two guns at his residence; a deputy sheriff testified that on the morning after the raid he observed two pistols in an evidence bag marked with an evidence tag bearing the inscription "10001 Cedar Avenue"; neither the guns nor the evidence tag were produced at trial; "there is little question that Deputy Campbell's testimony concerning the inscription was hearsay."[479] The difference is not that the name tape was in court and the evidence tag was not. The written out-of-court declaration is either hearsay or it is not; if it is, in-court repetition of it is hearsay; if it is not, in-court repetition of it is not hearsay. One of these courts, I submit, got it wrong, and it was the Ninth Circuit.[480]

Shifting gears, here is an interesting case.[481] File this under, "Nice try that worked at trial and that demonstrates why we have appellate courts." The defendant was on trial for possession of peyote. His defense was that he possessed it as part of his work as an informant for a police officer from another jurisdiction. The prosecutor had a local police officer phone the officer from the other jurisdiction and check on defendant's claim. (The trial judge later instructed the jury that if they believed defendant's informant theory, they must find him not guilty.) The prosecutor called the local officer to the stand, established that he had called the officer on whom defendant's defense rested, and asked this question: "Without telling us what [this other police officer] told you, would you, at this time, ask the State to drop the charges against [the defendant]?" Over a hearsay objection, the witness was allowed to answer, "No, Sir."[482] The local officer could not have testified, "Officer From Other Jurisdiction told me defendant was not carrying peyote as his informant"; it is inadmissible hearsay. The trial court allowed him to testify that, after talking with the officer from the other jurisdiction, he would not recommend dropping the charges against defendant. The Texas Court of Appeals reversed:

> While this form of question and answer does not produce hearsay in the classic or textbook sense, it is nevertheless designed to circumvent the hearsay rule and present the jury with information from unsworn, out-of-court sources. It should be called 'backdoor' hearsay and should be subject to the same rules and limitations as the more common form.[483]

The in-court declaration, in the form of an expression of opinion, is a code: Encoded in the answer "No" is the out-of-court declaration "The defense offered is untrue."[484]

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479. *Id.* at 1313.

480. When I say one court got it wrong, I mean one court wrongly identified the evidence as nonhearsay. I do not mean the result was wrong. The same result—admissibility—could be reached in the "Bill Snow" case by using the residual exception. *See supra* note 184.

481. Schaffer v. State, 721 S.W.2d 594 (Tx. Ct. App. 1986).

482. *Id.* at 597.

483. *Id.* at 597.

484. This is, of course, not a case of an out-of-court declaration as an implied assertion. The in-

to verification at all because such utterances do not assert facts."[475] A suggestion does not assert facts? "Young man, I suggest you take those drugs I found in your room and dump them in the neighbor's trash," offered to prove the drugs found in the neighbor's trash were those of "young man." But perhaps that is not fair. Perhaps it is not a real "suggestion." In any event, the suggestion is dump, and the identification of the owner of the drugs is extraneous to the suggestion. Perhaps I've made this "suggestion" carry too much baggage. "Get out of my house you drunk," to prove the object of this order was a drunk. Still too much baggage? "Out of my house" is the order, and "you drunk" is extra-order. Here's one, then: "Get your gun out of this house this minute!" to prove whose gun it is. Or, even simpler: "Drop the gun!" to prove the person to whom this police officer's order was directed had a gun. Or, "I have a suggestion, let's go get good and drunk," offered to prove that shortly thereafter the person to whom the statement was made was drunk. And here's a suggestion:

Driver: What do *you* suggest?

Gas Station Attendant: I suggest you replace that tire.

Offered to prove some defect or another in the tire. Aren't these suggestions and orders that are "subject to verification" and that "assert facts"? And aren't they hearsay—admissible or not, aren't they at least hearsay?[476]

You say I make too much of a small problem? This is why this article is so long. What killed the hearsay rule is hundreds, thousands of these small problems. Like a colony of ants eating away the insides of a mighty oak, each individual ant is not a problem, no one ant is killing the tree; thousands of them together, however, slowly eat the life right out of it.

Somewhat similarly, to the cases involving questions, etc., contrast the "Bill Snow" case[477] with the "10001 Cedar Avenue" case.[478] Bill Snow

475. *Id.* at 834. And State v. Rawlings, 402 N.W.2d 406, 408-409 (Iowa 1987) said this: Verbal statements "'fall[ing] within such categories as greetings, pleasantries, expressions of gratitude, courtesies, *questions*, offers, instructions, warnings, exclamations, expressions of joy, annoyance, or other emotion, etc. Such utterances are not . . . assertions . . . for purposes of the hearsay rule.'" *Id.* at 409 (quoting DAVID F. BINDER, HEARSAY HANDBOOK 15 (2d ed. 1983)). The court went on, however, to find that the out-of-court question in this case was hearsay. *See infra* note 486.

476. *See also* Reaves v. State, 586 N.E.2d 847, 858 (Ind. 1992). In *Reaves*, an unidentified life-flight attendant asked the trooper "if [he] had been told that Ms. Losekamp had been sexually abused." The trooper was allowed to testify to this out-of-court statement, to the issue of how Ms. Losekamp suffered her injuries. The out-of-court statement "was a question, not an assertion of truth, thus was not hearsay." United States v. Shepherd, 739 F.2d 510, 514 (10th Cir. 1984) (Instructions to co-conspirator to frighten victim are not hearsay; "An order or instruction is, by its nature, neither true nor false and thus cannot be offered for its truth.").

State v. Rawlings, 402 N.W.2d 406, 408-09 (Iowa 1987) recognizes that questions can be hearsay. After first saying that questions are not assertions and, therefore, are not hearsay, *see infra* note 485, the court turned to the facts at hand. The issue was whether "Dennis" was at the scene. A witness testified that at the scene he heard an unidentified declarant ask, "Dennis, what are you doing?" The court said that "the utterance concerning 'Dennis' was couched as a question but it was phrased in such a manner as to make it an implicit assertion of the fact: that a 'Dennis' was present." *Rawlings*, 402 N.W.2d at 409. This question, said the court, was hearsay. *Id.*

477. United States v. Snow, 517 F.2d 441 (9th Cir. 1975), discussed *supra* text accompanying notes 78-81, 145-49, 184-86, 266-68 and 277. *See infra* notes 478-80.

478. Payne v. Janasz, 711 F.2d 1305 (6th Cir. 1983), discussed *supra* text accompanying notes 145-49.

is such a mess anyway, it is easy to dismiss the issue as ultimately ununderstandable). What they miss is that, no matter how you cut it, the question, "Does Keith have any stuff?":

- Asserts that he did have some stuff (and that, whether or not he is guilty of the crime charged, he is in the line of work);
- Is being offered into evidence because it asserts that Keith Long had stuff; and
- Presents each of the four testimonial infirmities.

It strikes me that this is hearsay whichever definition, assertion-centered or declarant-centered, is used.

The opinion in *Long* does recognize that the burden of showing an intent to assert is on "the party claiming the intention existed."[471] First, I would say that this statement of the burden applies to non-verbal conduct. The court of appeals disagrees. Next, I would say there is plenty of evidence of an intention on the part of the caller to note a relationship between herself and Keith Long and stuff. The court of appeals disagrees. Third, I would say that if *Long* is right, (and since its author is now on the United States Supreme Court, he is in a better position than I to make it so), it rather arbitrarily eliminates from the hearsay rule a lot of out-of-court statements that present the problems the rule was designed to deal with.

Maybe it is fair to say: Yes, it is context that does away with the hearsay problem. Context provides circumstantial guarantees of trustworthiness. These questions are not offered to prove the truth of the matter asserted, but only to show that they were asked. Truth will be established by other evidence (as in the bloodhound cases[472]). But that argument does away with the hearsay rule in any case where there is lots of nonhearsay and otherwise admissible evidence. This is like the state-of-mind argument taken to its extreme: It swallows the rule.[473]

I applaud what these courts are trying to do: deal with a rule of evidence that is too difficult and that in many of its applications does not make much sense, but rather is simply arbitrary.

I am all for almost any interpretation that removes things from the operation of the hearsay rule.

In the meantime, crime lords need to train their minions to speak in declarative sentences. "Keith has stuff. I want stuff. I will send Mike to get stuff. Mike will come at 5:00. Tell me *now* if that is not okay."

United States v. Gibson[474] expands the categories of things that are not hearsay: "A suggestion or an order" is not hearsay; neither is "subject

471. *Id.* (quoting FED. R. EVID. 801 advisory committee's note).
472. *Supra* note 8.
473. *Supra* text accompanying notes 66-67.
474. 675 F.2d 825 (6th Cir. 1982).

into a declarant-centered definition. The important thing is not whether the statement is offered to prove the truth of the matter asserted, but whether the value of the statement depends on the credibility of the out-of-court declarant. The statement either asserts that Keith Long had stuff, and is being offered to prove that assertion (absent credibility uses), or it is irrelevant. These courts cannot be using an assertion-centered definition.

Are they even using a declarant-centered definition? Does the value of the statement depend on the credibility of an out-of-court declarant? Yes and no. These cases say that the out-of-court declarant's sincerity is not in question, that is, the fact that the assertion is at best an implied assertion means it is not an intentional untruth. "When a declarant does not intend to communicate anything, however, his sincerity is not in question . . . ."[467] To lie is an intentional act; an assertion not intended cannot be a lie. So, yes, it is a declarant-centered definition in so far as lying is concerned.[468]

But the risk of lies is not the only testimonial infirmity. As then-Judge Thomas admitted, "perception, memory, and narration"[469] can still be an issue, but, quoting the Advisory Committee Note to Federal Rule 801, he said, "[T]hese dangers are minimal in the absence of an intent to assert . . . ."[470] But this unknown caller could have misperceived Keith Long's relationship with "stuff," or she could have dialed a wrong number. Or she could have misremembered who had a relationship with what. Or the police officer answering the phone could have misunderstood the conversation (even though the officer is absolutely and, on cross-examination, unshakably certain that he did not misunderstand). The only thing that removes these other testimonial infirmities is context. Keith Long is guilty. That is to say, we doubt that the caller misperceived Keith Long's relationship with "stuff" because there is so much other evidence that Keith Long was dealing drugs. For that same reason, we doubt the caller punched in the wrong number or remembered the facts incorrectly, or that the police misunderstood just what "stuff" was being discussed, or what "a fifty" is. If it were the only evidence we had against Keith Long, it would be too ambiguous. Out of the context of the other evidence of Keith Long's guilt, it would be too ambiguous.

And, further, if risk of lying were the only testimonial infirmity, or the only one that presented more than a minimal danger, how do we know that this unknown caller was not lying? Context. We believe this was not, for example, a set-up because there is so much other evidence of Keith Long's guilt.

Why isn't this hearsay? Am I missing something? I think not. I think others miss something, or, just under the surface of their consciousness, they ignore it (because it helps us all get our jobs done or because hearsay

467. United States v. Long, 905 F.2d 1572, 1580 (D.C. Cir. 1990).

468. Except, of course, in the odd case where the caller is setting up the person whose phone he or she has called.

469. *Long*, 905 F.2d at 1580 (quoting FED. R. EVID. 801 advisory committee's note).

470. *Id.*

prove anything about apples. Of course, this reasoning would not work because for this inquiry to be relevant it must be translated into, "Has the heroin arrived?" Once it has been translated—or once the prosecutor is allowed to argue that is the correct translation—the court says two things: A question "is not an assertion" and, therefore, "cannot be used to show the truth of the matter asserted" and, therefore, "cannot be hearsay;" and this out-of-court non-assertion is circumstantial evidence of the knowledge and intent of the defendant, who, of course, is not the out-of-court non-asserter.

Why doesn't, "Has the heroin arrived?" coming out of the receiver of the defendant's phone "declare or affirm the existence of"[464] a shipment of heroin directed to the defendant? A question can be a relevant assertion,[465] and, in spite of the court's assertion otherwise, this one was. The court's conclusion otherwise is just wrong.

Or, at least, it certainly may have been: The out-of-court declarant certainly could have intended, "Has the heroin arrived yet?" to assert, "I have done my part at my end. The heroin is on the way [to you]." It may have been intended to assert and, putting it in the best light for this court, we cannot tell without asking the speaker and we do not know who the speaker is. What these courts are really saying is not that this evidence does not fit within the definition of hearsay, but that they trust the evidence.

It is possible, however, that this out-of-court statement was both an assertion that is relevant as proof of the truth of the matter asserted and a non-assertion that is relevant and, as a non-assertion, has no truth or falsity. The probative value of this phone call by an unidentified caller, speaking in code, to the issue of defendant's knowledge and intent would seem to be low and substantially outweighed by the unfair prejudice inherent in the hearsay use. Whether this is so or not, the flaw in deciding that a question can never assert is fatal to this issue: Having concluded a question never can assert, the court does not and needs not weigh the inadmissible use against its view regarding an admissible use.

If *Lewis* is right, and if *Long* is right, and if *Oguns* is right,[466] then the courts have changed the statute's assertion-centered definition of hearsay

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464. The Oxford English Dictionary offers this as one definition of "assert": "To declare or affirm the existence of." 1 OXFORD ENGLISH DICTIONARY 505 (Oxford University Press 1978).

465. Any judge who does not see the possibility of this kind of intended assertion has never been in a long-term relationship with another human being.

466. And here are a few other similar cases. United States v. Singer, 687 F.2d 1135 (8th Cir. 1982), *rev'd* on other grounds, 710 F.2d 431 (8th Cir. 1983), *cert. denied*, 479 U.S. 883 (1986). In *Singer*, an envelope received at defendant's residence through the United States mail was addressed to the defendant and another. The envelope was received in evidence to prove that the other person lived with defendant. The court distinguished between the written content of the words and the implication from the mailer's behavior: "If this letter were submitted to assert the implied truth of its written contents—that [the nonparty lived with defendant]—it would be hearsay and inadmissible. It is, however, admissible nonhearsay because its purpose is to imply from the landlord's behavior—his mailing a letter to [both at the same address]—that [the nonparty] lived there." *Id.* at 1147. *See also* the "Bill Snow" case, discussed *supra* text accompanying notes 78-81, 145-49, 184-86, 266-68 and 277. *See also infra* text accompanying notes 477-80.

The United States Court of Appeals for the District of Columbia, per then-Judge, now-Justice, Thomas held that the police officer's testimony regarding what this unknown caller said was not hearsay because it is not an assertion, because it was not intended to be an assertion.[458]

Doesn't that assert that he once had stuff, and isn't that why it is offered into evidence? Doesn't "Did my dog bite you again?" assert that the dog bit "you" at least once before? Of course. And isn't it really the same as asking whether Keith "still had any stuff"? It seems to me that it is. So then the question is whether the questioner intended to assert that the dog had bitten before or that Keith previously had "stuff." And if these questions are not intended to assert these things, then what does assert anything? Is hearsay reduced to declarative sentences? "The moon is blue." "It is raining in London." "I like green eggs and ham!" There will be disputes as to whether he said "Et tu Brutus?", or was it really "Et tu Brutus!", with perhaps a compromise at a resigned "Et tu Brutus."[459]

One more case: *United States v. Oguns*.[460]

> While the agents were searching the Oguns apartment, Agent Gray answered a phone call. During the course of the ensuing conversation, the unidentified caller asked, "Have the apples arrived there?" The [trial] court properly admitted this evidence . . . as non-hearsay circumstantial evidence of Oguns' knowledge and intent . . . [The trial court] advised the jury that the evidence was submitted" not for the truth of what was said but simply as evidence that such a statement was made to Agent Gray.[461]

What, by the way, does it mean to say, "Have the apples arrived there?" Here is what the court said: "Evidence introduced at trial showed that narcotics traffickers often use code words when discussing drugs on the telephone."[462]

The appellate court, having stated and approved the trial court's reasoning, adds its own:

> We agree with the court that the hearsay rule does not bar admission of this question. "An inquiry is not an 'assertion,' and accordingly is not and *cannot* be a hearsay statement." Because a question *cannot* be used to show the truth of the matter asserted, the dangers necessitating the hearsay rule are not present. . . . The government legitimately used the phone call as circumstantial evidence of Oguns' knowledge and intent regarding the importation and distribution charges.[463]

We have an out-of-court statement by an unidentified caller: "Have the apples arrived there?" The court's reasoning, it seems to me, may as well have been that this is not hearsay because it is not being offered to

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458. *Id.*

459. It is silly. *See* Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 418 (1992).

460. 921 F.2d 442 (2d Cir. 1990).

461. *Id.* at 448-49. Prior to asking about the "apples" the caller had asked for Oguns. There was evidence it was not a wrong number. *Id.* at 445.

462. *Id.*

463. *Id.* at 449 (emphasis added) (quoting Incorporated Publishing Corp. v. Manhattan Magazine, 616 F. Supp. 370, 388 (S.D.N.Y. 1985)), *aff'd*, 788 F.2d 3 (2d Cir. 1986)).

And the court said that "Rule 801, through its definition of statement . . . remov[es] implied assertions from the coverage of the hearsay rule."[449] For this proposition the court cited, among others, Judge Weinstein and Professor Berger, citing to a paragraph of their treatise that discusses assertions implied from conduct and from actions, not from words.[450]

The problem I see in *Lewis* is that the court of appeals took the analysis to be used to decide when conduct is hearsay and applied it to decide when words are hearsay.[451] This is not a case of a reflexive scream of pain or an involuntary groan or even Cassio's dreams,[452] but a voluntary use of deliberately chosen words, chosen and spoken for the message they convey.

Even if we alter the court's proposition to: "Sometimes questions are not meant to assert, sometimes they have the nature of reflexive screams of pain, sometimes they are 'inarticulate utterances,'[453] and have no assertive intent or content," this decision is flawed. First, there is no analysis of whether this particular question was intentionally assertive and second, it does seem that it was intentionally assertive. If the question, "Did you get the stuff?" is relevant, doesn't it assert that the unknown out-of-court declarant expected Lewis to be receiving "stuff," and isn't it likely the out-of-court declarant intended something just like that?[454] Or, at a minimum, isn't it a respectable enough position to deserve some discussion?[455]

Similarly to Mr. Lewis, Keith Long was on trial for various drug offenses.[456] During a search of the relevant premises, the police answered the phone.

> An unidentified female voice asked to speak with "Keith." The officer replied that Keith was busy. The caller then asked if Keith "still had any stuff." The officer asked the caller what she meant, and the caller responded "a fifty." The officer said "yeah." The caller then asked whether "Mike" could come around to pick up the "fifty." Again the officer answered yes.[457]

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449. United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990).

450. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(a)[01] (1988). *See also* Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138 (1935): "An assertion usually consists of . . . utterances or other nonverbal conduct," and in the latter case it must be intended by the asserter to express a proposition before it can be considered an assertion. *Id.* at 1139.

451. *See, e.g.*, Wellborn, *supra* note 17, at 64-65.

452. William Shakespeare, Othello, act 3, sc. 3, *quoted in* JOHN KAPLAN ET AL., EVIDENCE CASES AND MATERIALS 163 (7th ed. 1992).

453. Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1139 (1935).

454. "It therefore seems clear that where evidence of A's conduct [and the Fifth Circuit is equating these questions with conduct] is offered as tending to prove the happening of an event or the existence of a condition by the process of inference from that conduct to A's state of mind and from A's state of mind to the event or condition, the dangers inherent in hearsay manifest themselves in no mean measure." Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1143 (1935).

455. The question did receive some discussion in the next case to be discussed, United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990).

456. *Id.*

457. *Id.* at 1579.

done, the prosecutor got it really wrong. But, ultimately the Ninth Circuit corrected this error. "The government cites no authority for the proposition that hearsay within any authenticated document is automatically admissible. This argument confuses discrete foundational requirements for the admission of a writing; a document may be authentic, but still contain inadmissible hearsay."[444]

This is basic stuff. If the federal trial judge and the government attorney cannot get this right, what hope do we have? In the context of this case, the question answers itself: Our hope is in the appellate process and the fact that some errors are so basic and blatant they won't fool a second judge.[445]

So, here is an error that made it through the appeal. *United States v. Lewis* involved co-defendants Lewis and Wade, convicted on drug trafficking charges.

> At the time of their arrest, each appellant had in his possession an electronic pager or 'beeper.' These pagers were seized by the Ridgeland Police. Later that day, at the police station, the pager associated with Lewis began beeping. Officer Jerry Price called the number displayed on the pager and identified himself as Lewis. The person on the other end asked Price 'Did you get the stuff?' Price answered affirmatively. The unidentified person then asked 'Where is dog?' Price responded that 'Dog' was not available. . . . The evidence at trial revealed that 'Dog' is Wade's nickname.[446]

When Officer Price was asked to testify to the two questions asked by the unknown person on the other end of the phone conversation, there was a hearsay objection. It was overruled. On appeal, the court of appeals agreed with the trial court regarding this particular ruling.

The court of appeals said that "most questions and inquiries are not hearsay because they do not, and were not intended to, assert anything."[447] This seems . . . well, questionable. What if the question asked of Officer Price, pretending to be defendant Lewis, had been, "Are you the scum of the earth from whom my daughter has been buying cocaine?" or, "Lewis, do you got more coke like before?" or "When are you going to pay me for that last batch of cocaine I delivered?" or any other number of questions limited only by your imagination. And how is this different from, "You have been selling cocaine to my daughter. Why?"[448] These are not just relevance problems or probative-value-substantially-outweighed-by-unfair-prejudice problems or personal knowledge problems. They are hearsay problems.

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444. *Id.* at 1000. The conviction was reversed and, in part, remanded. *Id.* at 1005.

445. *See also* United States v. Leung, 929 F.2d 1204 (7th Cir. 1991), discussed *supra* text accompanying notes 305-11, where the trial judge overruled a hearsay objection because the defendant's lawyer had "opened the door" on cross. In fact, see all of the cases discussed in connection with Truth # 5.

446. United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990).

447. *Id.* at 1179.

448. *See* Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783, 796 (1990).

And now, Chapter One in the unfolding story of intrigue among the socially prominent families of Garish Summit. There in stately splendor far removed from the squalid village below they fight their petty battles over power and money.

(Theme up briefly and then fade for)

BOB

As our action begins, Miss Agatha is staring thoughtfully out the music room window. Suddenly she turns and speaks . . .

AGATHA

There's a strange car stopping out front, Rodney.

RODNEY

I wouldn't exactly call it strange, Mother. Of course, I never cared for rally stripes on a Rolls-Royce myself. However . . .

AGATHA

Oh, my word, Rodney! I don't mean strange in that sense. I just never saw it before. And now a strange man is getting out.

RODNEY

I agree, Mother. He is an odd looking duck. Ears set too low . . .

AGATHA

Oh, Rodney—you're such a wimp. You never understand a word I say to you.[440]

Chances are, it will be gotten wrong.

1. Basic Error Under the Statute or the Common Law

Take, for example, *United States v. Chu Kong Yin*.[441] Chu was convicted of making false statements on an immigration application. The government offered into evidence a number of documents from Hong Kong, documents purporting to establish Chu's criminal record in Hong Kong. Regarding the hearsay objections, the trial court ruled that the documents were admissible because they had been properly authenticated. This does not sound possible, so let me confirm what I've just said. Here is how the Ninth Circuit stated it: "It would appear . . . that the district court believed proof of authenticity of document was sufficient, standing alone, to permit the admission of hearsay."[442] The district court got it really wrong.

The government picked up the error of the district court and ran with it. Again, the appellate court: "The government also contends that because its exhibits were authenticated, the information they contain was automatically admissible."[443] Perhaps locked in by what the district court had

440. Bob Elliott and Ray Goulding, FROM APPROXIMATELY COAST TO COAST . . . IT'S THE BOB AND RAY SHOW 9-10 (1983).

441. 935 F.2d 990 (9th Cir. 1991).

442. *Id.* at 997.

443. *Id.* at 1000.

high-powered weapons in this war is civil forfeiture under the Controlled Substances Act.[437] Property used in and proceeds traceable to drug transactions is subject to forfeiture to the United States government. When non-contraband property is seized, here is a rough version of what might happen:

- If someone with an interest in the property challenges the seizure, then the government must bring an *in rem* action against the property.
- The initial burden, the burden of production, is on the government. It must show probable cause for forfeiture.
- If the government shows probable cause, the burden shifts to the claimant, who must show, by a preponderance of the evidence, that the property was not used illegally (or, in some limited circumstances, that he or she did not know of or consent to the illegal use).[438]

Your property can be forfeited even if you did not own it at the time it was involved in the drug transaction. And if you did not own it then (and you are not within the limited circumstances where you may prove you did not know or did not consent), you may have a very hard time proving it was not used as the government claims.

The government can take your boat, your car, your cash, or your home. The government can take any and all of your property if it can show probable cause to believe that the property was used in a drug transaction or was the proceeds of a drug transaction. And probable cause can be based on what a police officer was told by an unnamed, unidentified informant. Probable cause can be based on something your neighbor says about you. It can be based on a statement by one of the people from work, or some guy pulled in off the street, bargaining for his future, or your ex-spouse, who you just left for a new, younger spouse. Probable cause can be and often is based on the worst kinds of hearsay.[439]

Your home is gone, and it was hearsay that took it. So much for rules.

We protect allegedly abused children, we protect society from peddlers of drugs, and when the issue really heats up, if the hearsay rule is in the way, we will move it aside.

G. Truth # 7: None of the Above Matters Much Because Chances Are It Will be Gotten Wrong Anyway

(Drama theme music. Establish and under for)

BOB

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437. PUB. L. No. 91-513, 84 STAT. 1242 (1970) (codified as amended in scattered titles of U.S.C., including primarily 21 U.S.C. §§ 801-971 (1988 & Supp. I 1989)).

438. This information is taken from Lawrence A. Kasten, Note, *Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, particularly at 212 n.141 (1991).

439. *See* WAYNE R. LAFAVE & JEROLD H. ISREAL, CRIMINAL PROCEDURE §3.3(b) at 141 (1992) and CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE §5.03(b) at 148 (1986).

when dealing with child-victims of sexual abuse, than they are when dealing with any of the recognized exceptions under Rules 803 and 804—they are there, but they are different. For that reason, and to avoid tortured readings of the current statutory exceptions, as in some of the cases discussed above, we need a new exception. Our state and federal evidence statutes need a new exception for out-of-court declarations by child victims in sex abuse cases, says Ms. Yun. And a number of jurisdictions have done just that: enacted child-declaration exceptions to the hearsay rule.[435]

Truth # 6, then, is that all bets are off when the case involves the abuse of children.[436]

In fact, all bets are off in cases regarding whatever social issue is presently hot. Take, for example, the war on drugs. One of the government's

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435. By 1989, 25 states had done so. Cynthia Hennings, Comment, *Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Offense Prosecutions*, 16 OHIO N.U. L. REV. 663, 672-74 (1989). These statutes vary considerably from jurisdiction to jurisdiction. Ms. Hennings thoroughly discusses their differences and what they tend to have in common. At least one more has done so since: Michigan, in 1991. Lynne E. Radke, Note, *Michigan's New Hearsay Exception: "The Restatement of the Common Law Tender Years Rule,"* 70 U. DET. MERCY L. REV. 377 (1993).

In his fiction, Andrew Vachss has a different way of responding to the child abuser when the approaches taken by the law are unsatisfactory. *See*, ANDREW VACHSS, SACRIFICE 251-53, 265-70 (1991). Sometimes in his work, as in the legal system, the abused gets hurt in the process. *Id.* at 270.

436. And it is not just the hearsay rule that gets stretched in these kinds of cases.

The first paragraph of Rule 404 forbids most uses of evidence of a person's character to prove "action in conformity therewith on a particular occasion." FED. R. EVID. 404(a); NEB. EVID. R. 404(1). The second paragraph points out that if the evidence is not used as character evidence but is otherwise directly relevant to an issue in the case, then it is not excluded by the first paragraph. It then lists examples of some permissible other uses, such as "proof of motive, opportunity, intent, preparation, plan . . . ." FED. R. EVID. 404(b); NEB. EVID. R. 404(2).

In State v. Stephens, 466 N.W.2d 781 (Neb. 1991), the defendant was convicted of sexually molesting his own not quite one-month-old granddaughter. The trial court allowed in evidence testimony that he had sexually assaulted his own stepdaughter (the present victim's mother) repeatedly, over a substantial period of time, beginning with fondling when she was between the ages of four and five and moving to intercourse at about 14 years of age and continuing thereafter for an unspecified period of time. *Id.* at 784.

The defendant appealed, citing Rule 404. The Supreme Court affirmed, citing the discretion of the trial court and finding the evidence relevant to "identity of the assailant as being [the defendant] and the absence of accident or mistake on his part." *Id.* at 786. The Court concluded that the evidence relating to defendant's intercourse with his stepdaughter after she reached the age of 14 should have been excluded; it does not fit under Rule 404(b); but "the remaining evidence of [defendant's] guilt is so overwhelming that the admission of the intercourse evidence was harmless error beyond a reasonable doubt." *Id.* at 787.

In dissent, Judge Shanahan argued that this other bad acts evidence should not have been admitted. It is insufficiently relevant to any issue other than propensity. "To approve admissibility of [defendant]'s 'other acts,' the majority intones what has become a Rule [404(b)] litany, much akin to that traditional troika or inveterate and terrible trilogy 'irrelevant, immaterial, and incompetent.'" *Id.* at 788-89 (Shanahan, J., dissenting). The litany read aloud as a substitute for analysis. The dissent makes another point:

> [U]ntil today, 20 years was the extreme in the timespan between a defendant's prior act and evidence of that prior act received at trial. Today, however, we have extended temporal acceptability in "other acts" evidence to 28 years and probably have expanded a trial court's "discretion" into absolute latitude. If the trend continues . . . conduct throughout a defendant's lifetime will be admissible and, if reincarnation is a fact, will be admissible from another life.

Id. at 790 (Shanahan, J., dissenting).

My point is that these things happen when the evidence is offered against a person who has abused a child.

the stand, so they will not be subjected to cross-examination, so they will not have to look at the person who committed the abuse we believe to have occurred, because their unusual sensitivity to manipulation may make their earliest statements their most reliable. This tendency is manifest in court, as in the above cases and as in the following. There is a new kind of unavailable witness: the child-victim of abuse who would suffer further psychological harm if required to participate in the trial, harm often inflicted by or on behalf of the very person who is alleged to have inflicted the abuse in the first place.[430] A new kind of unavailable witness is created in part out of the notion that otherwise, the trial becomes yet another incident of abuse.

Not only is there a judicial tendency to want to allow in statements regarding abuse perpetrated on children who we believe have been abused, but also a legislative tendency. In a student note in the Columbia Law Review, Judy Yun stated:

> [T]he various approaches that have been taken by the courts to child hearsay statements in sex abuse cases are unsatisfactory. Given the unusual circumstances attendant to child sex abuse[431] and the special characteristics of its young victims,[432] the rationale of the hearsay rule and its exceptions requires that an alternative approach be employed to assess the admissibility of child hearsay statements.[433]

She argues "the critical need for these [child-victim out-of-court] statements."[434] She argues that the guarantees of reliability are different

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430. Frissell, *supra* note 428, at 616 n.120.

This unavailability is somewhat different from the situations specified in Federal Rule 804(a)(4)—"is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity"—because it refers to injury that is induced by the courtroom and what occurs therein. *Id.* at 616, *citing* State v. Drusch, 407 N.W.2d 328 (Wis. Ct. App. 1987) (child called to testify, began to cry, and became unable to proceed; court interviewed child outside jury's presence and determined her in-court testimony was unavailable).

> Testifying at trial can be a terrifying experience for a child. Psychiatrists have identified the following components of legal proceedings that may place a child victim under prolonged mental stress and endanger the child's emotional equilibrium: repeated interrogations and cross-examination; facing the accused again; the official atmosphere in court; the acquittal of the accused for lack of corroborating evidence to the child's trustworthy testimony; and the conviction of a molester who is the child's parent or relative.

Id. at 616.

431. Including: The crime is committed in secret, so there are not witnesses other than the child and the perpetrator; such offenses are not confined to particular classes of persons, by age, or gender, or otherwise; the perpetrator often has a preexisting special relationship with the victim, such as, close relatives or friends; often there is no corroborative physical evidence. *E.g.*, *In re* Penelope B., 709 P.2d 1185, 1188 (Wash. 1985); Cynthia Hennings, Comment, *Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Offense Prosecutions*, 16 OHIO N.U. L. REV. 663, 664 (1989); Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1745-46, 1749-50 (1983) [hereinafter *Yun*]; Frissell, *supra* note 428, at 616 n.120.

432. Including: They are often either unable to testify or would be so further damaged by testifying that they will not be called as in-court witnesses; they often recant, after pressure is applied by the perpetrator, particularly when the perpetrator is a parent or the lover of a parent; and, because they are children often molested by adults, sometimes trusted adults, they often do not resist the perpetrator. *E.g.*, the cases and authorities cited *supra* note 431.

433. Yun, *supra* note 431, at 1746.

434. Yun, *supra* note 431, at 1763, for the quotation. Yun, *supra* note 431, at 1749-50 for the argument.

mother.[418] The mother had left the victim and her two-year-old sister with the man for forty minutes. When she returned, the victim "was unusually quiet and subdued."[419] Two days later, the victim's great-grandmother saw the victim was bleeding from the genital area and rushed her to the hospital. The doctor determined "the child's vagina had been entered by some object too large for it to accommodate."[420] The great-grandmother questioned the victim, who said things indicating defendant had raped her. The great-grandmother's testimony was admitted at trial under Louisiana's res gestae exception for statements made under the immediate pressure of the occurrence. Generally, said the court, "A statement made fully two days after an event cannot ordinarily be considered to have been made under its immediate pressure."[421] The court then notes, "We have recognized, however, that in prosecutions for sex offenses, the better rule is that the original complaint of a young child is admissible when the particular facts and circumstances of the case indicate that it was a product of the shocking episode and not a fabrication."[422] In other words, the general rule has been changed for cases involving sex offenses victimizing young children. And the new rule seems to be that it is admissible when the trial judge decides it is not a lie.[423] "We are satisfied that the [testimony of the great-] grandmother constituted the original complaint of the victim and that it was made at the first reasonable opportunity under the particular facts and circumstances of this case."[424]

Pushing the envelope of the definition of hearsay.[425] Pushing the envelope of the excited utterance exception.[426] Pushing the envelope of the present sense impression exception.[427] Pushing the envelope of the medical diagnosis or treatment exception.[428] And creating new exceptions.[429]

There is a tendency to want to allow in statements by children we believe to have been abused—so they will not have to relive the abuse on

418. State v. Noble, 342 So. 2d 170 (La. 1977).

419. *Id.* at 171.

420. *Id.*

421. *Id.* at 172.

422. *Id.* at 173.

423. Hearsay is admissible if the trial judge determines it is reliable. Might not that be a far preferable rule to the hearsay rule we are faced with today? Argue reliability to the trial judge and, as a check on trial judges, if the judge lets it in, argue it again to the jury.

424. 342 So. 2d at 173.

425. *Supra* text accompanying notes 50-67 and 71-75.

426. *Supra* text accompanying notes 286-91.

427. *Supra* text accompanying notes 152-55.

428. For a focus on Rule 803(4), statements for purposes of medical diagnosis or treatment, as a vehicle for admitting out-of-court statements by child victims of sexual abuse, see Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257 (1989).

For a round-up of how the courts have interpreted the traditional common law and statutory exceptions to the hearsay rule and made them work to admit out-of-court declarations by non-testifying child-victims, see Anna Frissell & James M. Vukelic, *Application of the Hearsay Exceptions and Constitutional Challenges to the Admission of a Child's Out-of-Court Statements in the Prosecution of Child Sexual Abuse Cases in North Dakota*, 66 N.D. L. REV. 599, 619-26 (1990) [hereinafter *Frissell*].

429. *Supra* text accompanying notes 206-36.

does not seem all that great: There must be other evidence, or the prosecution's case cannot survive a motion at the close of his or her case-in-chief.

At the time of her father's trial, the child in question in *People v. Manuel M.*[411] was fifteen years old. In spite of elaborate steps taken to induce the young girl to testify to the sexual abuse she had suffered from her father, she refused. She had, however, told a number of people that her father had sexually abused her, and had detailed the specific acts of abuse. California's "declaration against interest" exception includes not just the typical declarations against pecuniary, proprietary, and penal interest, but also declarations against social interest.[412] The Court of Appeals of California concluded that this young victim's hearsay statements to several witnesses were "against [her] social interest."[413]

In *United States v. McCaskey*,[414] a Marine was convicted in military court of indecent acts with a thirteen-year-old girl. Defense counsel impeached the victim, implying she had falsified her story from the beginning. Trial counsel then tried to rehabilitate her by offering consistent tellings of the incident.[415] The problem was that the consistent tellings came after the alleged time of fabrication. The military trial judge let the consistent statements in as nonhearsay, substantive evidence. The Court of Military Appeals stated the general rule that the prior statement must have been made before the witness's testimony was improperly influenced or her story was fabricated. Only the prefabrication telling of the story is significant. Once the story has been fabricated, its continued retelling does nothing to rebut opposing counsel's charge that the witness is lying.[416] The trial judge committed error, but the conviction was affirmed: Allowing various people to take the stand and repeatedly retell the alleged victim's telling of her story of the Marine's sexual assault was harmless error.[417]

Another example of hearsay rules rewritten for child sexual abuse cases: A four-year-old girl was raped by the man living with the victim's

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411. 278 Cal. Rptr. 853 (Cal. Ct. App. 1991).

412. CAL. EVID. CODE § 1230 (West 1965).

413. *Manuel M.*, 278 Cal. Rptr. at 860.

> We conclude it was against [the victim]'s social interest to make statements that she had been engaging in a variety of sexual activities with her own father since the age of six and that she believed she was pregnant with her father's child. [Her] disclosures may have received a sympathetic and understanding response, but they were made with the risk that they would just as easily subject her to ridicule, disgrace, and 'odium'.

Id. at 859. The point is not that this interpretation is right or wrong, but that it is indicative of something of a truth regarding the hearsay rule and cases of child abuse. It is its near inevitability.

Because this court had available the declaration against social interest exception, it did not need to rest on, and did reject, several other theories of admissibility. It is not state-of-mind evidence, avoiding the *Bridges* approach. *Id.* at 858. *See supra* text following note 50. The hearsay was not a spontaneous declaration or an excited utterance, rejecting the *Plant* approach. *Manuel M.*, 278 Cal. Rptr. at 858. *See supra* text accompanying note 290.

414. 30 M.J. 188 (C.M.A. 1990).

415. The evidence was offered (and eventually accepted) under Rule 801(d)(1)(B) of the Military Rules of Evidence, which is identical to the federal rule of the same number. *Id.*

416. *Id.* at 192.

417. *Id.* at 193. To be fair, there was a disavowed confession in evidence.

proceeding is *de novo* on the record. Disregarding the testimony of the babysitter and the substantively inadmissible hearsay testimony of a police officer, the court found the case made by the admissible testimony of two psychologists.[402]

The point is not that this case is right or that case is wrong, but that when the subject of the trial is today's major societal concern, courts mostly find a way to enforce that concern, hearsay notwithstanding.[403]

Perhaps this example is better: The "fresh complaint" exception to the hearsay rule.[404] A good general statement of this exception is: "An out of court statement of a victim of a sex crime is admissible as fresh complaint if made reasonably promptly in light of the circumstances."[405] In Massachusetts, when the victim is a child, the "fresh" complaint can have been made several months after the alleged assault and still an in-court declarant can testify to the alleged victim's out-of-court complaint.[406] And, in New Jersey, when the victim is a child, "the fact that the complaint was made in response to questioning need not be fatal to admissibility."[407]

As noted above,[408] one court had discussed this as an "arbitrary exception to the hearsay rule."[409] To some extent, all exceptions are arbitrary. They are based on the in-court need for and the supposed reliability of the particular kind of out-of-court statement, but the determination of when need and reliability are strong enough, and when they are not, is somewhat arbitrary. This "fresh complaint" exception, however, is more arbitrary than usual. It seems to be based more on social policy favoring admissibility of victim evidence in sexual assault cases—particularly child-victim evidence. "Fresh complaints" made months later by an alleged child victim do not seem to possess the guarantees of reliability of the exceptions listed in the Federal Rules and in their progeny. Further, in a jurisdiction like New Jersey, where evidence of the fresh complaint is not admissible as substantive evidence of guilt, but only to "respond to the fact finder's natural assumption that if the act complained of had occurred, an early complaint would have been made,"[410] the need

402. *Id.* at 577.

403. One of the problems with telling the truth about hearsay is that the truth does not come in neat little packages. It overlaps. This truth, Truth # 6, holds that as something of a general rule that eventually courts will get around to doing what it takes to promote today's greatest social agendas. Truth # 7 holds that everyone mostly gets these rules wrong anyway. And Truths # 1 and # 2 hold that everything is nonhearsay and everything is hearsay. With these kinds of truths, there is bound to be a great deal of overlap. Here is one of those places. For the truth that courts do what it takes to protect our young children from the sexual abuse of those on whom they depend, see also the discussion of Bridges v. State, 19 N.W.2d 529 (Wis. 1945) *supra* text following note 50 and *In re* Penelope B., 709 P.2d 1185 (Wash. 1985) *supra* text following note 71.

404. This exception is discussed in more detail *supra* text accompanying notes 219-28.

405. Commonwealth v. Lagacy, 504 N.E.2d 674, 677 (Mass. App. Ct. 1987) (quoting Commonwealth v. Adams, 503 N.E.2d 1315, 1317 (Mass. App. Ct. 1987)).

406. *Id.* at 677 n.6. "[C]ases involving children would appear to constitute a factually distinct branch of the doctrine that gives special consideration to the natural fear, ignorance and susceptibility to intimidation that is often part of a child's make-up." *Id.*

407. State v. Bethune, 557 A.2d 1025, 1028 (N.J. Super. 1989).

408. *Supra* note 220 and accompanying text.

409. *Bethune*, 557 A.2d at 1027.

410. *Id.* at 1028.

is too late on appeal; so often, whichever decision is made below will be upheld.[395]

F. Truth # 6: When the Subject is Child Abuse, None of the Rules (Such as They Are) Apply

seeker of truth
follow no path
all paths lead where
truth is here[396]

Each generation has its own set of cases where the rules do not accomplish what we want to accomplish—they don't favor the government over the Communist; they don't favor the civil rights worker over the red-neck city administration; they don't favor the government and the child over the one charged with beating, sexually abusing, or murdering the child.[397] So we simply do not apply them, at least not in any recognizable fashion. In these cases, the hearsay rules be damned if they stand in the way of convicting Communists and child molesters, and acquitting civil rights workers.

In *Plant*, where the baby was thrown at his brother and onto the floor, the out-of-court statement made two days later was an excited utterance. In *Sullivan*, the robbery of Pete's Place, the out-of-court statement five minutes later was not an excited utterance. And then there is *State v. Gonzales*.[398] In *Gonzales* the Nebraska Supreme Court allowed as excited utterances the statements of a thirteen-year-old boy regarding a sexual assault, despite the fact that he had run one-half mile home after the event and that during that time he had been frightened by the dark, by footsteps, and by a whistle.[399] Perhaps *Gonzales* is not such a stretch. I offer it, along with *Plant*, only as a contrast to *Sullivan*: contemporaneous cases by the same court, where in the child sex-abuse cases, admission of the evidence was affirmed, and in the robbery case, it was not.

Here is one more by that court: *In re Interest of D.P.Y.*[400] In a juvenile court proceeding to terminate the visitation rights of the father, the children's babysitter testified as to what the four-year-old daughter had told her during about a two-hour narrative of the father's extensive physical and sexual abuse of herself and her brother.[401] This was error—inadmissible hearsay—said the Nebraska Supreme Court. Review of this

395. "Even when hearsay is erroneously admitted, or admitted because no objection is made, verdicts based on such evidence are usually sustained and affirmed if the evidence appears sufficiently reliable." 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 800[01] (1988).

396. E.E. CUMMINGS, A SELECTION OF POEMS 162 (1963).

397. An earlier example of this truth than those discussed below may be Bridges v. State, 19 N.W.2d 529 (Wis. 1945), discussed *supra* text following note 50.

398. State v. Gonzales, 366 N.W.2d 775 (Neb. 1985). State v. Plant, 461 N.W.2d 253 (Neb. 1990) is discussed *supra* notes 286-291. State v. Sullivan, 461 N.W.2d 84 (Neb. 1990) is discussed *supra* notes 301-304.

399. 366 N.W.2d at 778.

400. 477 N.W.2d 573 (Neb. 1991).

401. *Id.* at 575.

reverence for these mere procedural rules, will make progress towards such a result slow, but doubtless such a change is on the cards.[623]

And I am patient.[624]

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623. Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 504 (1930).

624. But not as patient, or as long lived, as Ed Zuckerman seems to think will be required. Mr. Zuckerman wrote the teleplay for *Star Trek: The Next Generation: A Matter of Perspective* (Episode Number 162, Star Date 43610.4). Officials of the planet Tanaga Four have charged Commander William Riker, First Officer of the starship Enterprise, with murder, and demanded his extradition from the Enterprise to the planet's surface. The Enterprise is reluctant to grant extradition in part because under Tangen law a defendant is guilty until proven innocent.

Jean-Luc Picard, Captain of the Enterprise, is presiding over the extradition hearing. Chief Inspector Krag, from Tanaga Four is questioning a witness, laying a foundation for a holographic reenactment of her deposition testimony. The witness testified about a fight between Riker and the deceased, a Dr. Apgar. Following up, Krag asked some variation of the old standby, What happened next? and the witness responded:

A: "After the fight, Dr. Apgar came to find me. He was very upset."
Q: (by Chief Inspector Krag) "And he told you what happened?"
OBJ: (by Captain Picard [who is serving as hearing officer and, apparently, as counsel for the guilty]) "Inspector, Inspector, this is hearsay. She wasn't a witness to this incident."
Q: (by Krag) "But Dr. Apgar is dead. Her statement is admissible according to Tanagen law and I insist you consider it."
CT: (by Picard) "Well, we'll watch this evidence and we'll weigh it accordingly."

Apparently, by Star Date 43610.4, neither the rules of evidence nor judges' reaction to counsel will have changed much.

> of the agency or employment, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.[619]

What about my preference, on important matters, for live testimony from witnesses with first-hand knowledge? And the lawyers' general fear of surprise? My suggested rule is perfectly capable of handling the first problem—in fact, more capable of handling it than is the current all-or-nothing style rule. The focus of the evidence code is on foundational elements: If you establish this specific foundation, then live testimony is not needed, the evidence is not excluded by the hearsay rule. My suggestion allows the court to enforce a preference for live testimony on important matters.

As for surprise . . . surprise-wise my rule is somewhere between the code and the common law. I don't see it as much of a problem. I doubt if attorneys will be taken by surprise by new exceptions or unanticipated testimony any more than they already are.

What will we gain? Truth. Flexibility. Room for the law to grow and to meet new problems or new thinking regarding old problems.[620] We will elevate substance over form.

What will we lose? This goes back to surprise. It is said that with a strict and literal foundational elements approach to hearsay, attorneys know just what evidence they need to establish each exception.[621] But I doubt that my suggested rule would create any real problem for an attorney who is preparing his or her argument that a particular piece of evidence fits under an exception. This problem is more imaginary than real. What, then, do we lose? Is it less easy under my rule to rein in maverick judges? There will always be maverick judges; there are under the current rule and there will be under my proposal. This is one reason we have appellate courts. My view is that the problem of maverick judges will not be any greater under my rule. First, appellate courts do not reverse all that often as it is.[622] Second, my rule, while quite flexible, is still specific enough to allow appellate courts to reverse cases too far out of the mainstream.

I am confident. One of the great evidence minds of all times is on my side:

> Would it not have been wiser to set up the hearsay rule [in this form]: 'Hearsay is inadmissible except where the judge in his discretion finds it needed and trustworthy'? The astonishing conservatism of most lawyers and of most judges drawn from their ranks, and their almost religious

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619. I realize it is arbitrary to select out these few kinds of out-of-court statements and keep them as specific exceptions. I picked them for historical reasons, including that they are to various degrees the responsibility of the party against whom offered, and because, overall, they seem to work well. *See, e.g.*, United States v. GAF Corp., 928 F.2d 1253 (2d Cir. 1991) ("derived vestigially from an older, rough and ready view of the adversary process which leaves each party to bear the consequences of its own acts"); John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 564 (1937).

620. As has worked so well with the flexible federal rule on privileges, FED. R. EVID. 501, *interpreted in* Trammel v. United States, 445 U.S. 40 (1980).

621. Except, I would add, in cases where courts add to or subtract from the elements written into the statute. *E.g.*, *supra* text accompanying note 43 and *passim*, Truth # 4.

622. *See supra* Truth # 5.

(3) Factors affecting the out-of-court declarant's memory of the things stated in the hearsay statement, such as:
  (i) the amount of time between the occurrence of an event and the making of a hearsay statement about the event;
  (ii) the focus or the amount of attention the out-of-court declarant was giving to the subject of the hearsay statement; and
  (iii) the likelihood that the event was significant to the out-of-court declarant.

(4) Factors affecting the out-of-court declarant's ability to have seen, heard, felt, smelled, or tasted the things stated in the hearsay statement.

(5) Any special skills or abilities of the out-of-court declarant.

(6) Whether at the time the statement was made the out-of-court declarant was indifferent between or among the parties.

(7) Any other relevant circumstances surrounding the making of the out-of-court statement or pressures on the out-of-court declarant that would likely positively or negatively affect the truthfulness and accuracy of the hearsay statement—pressures such as, but not limited to:
  (i) business pressures;
  (ii) the relationship between the hearsay statement and the diagnosis, treatment, cure, or other resolution of a problem the out-of-court declarant likely considered a serious medical, legal, business, or other such problem;
  (iii) whether, at the time of the making of the statement, the out-of-court declarant believed the statement was, in some significant way, in or against his or her penal, pecuniary, or proprietary interest;[616] and
  (iv) the official or solemn nature of the hearsay statement, including the presence or absence of an oath or affirmation.

(d) The burden of establishing sufficient need and reliability shall be upon the party offering the hearsay into evidence.[617]

(e) This rule recognizes the court's inherent power to grant continuances and points out that in case of an attempt to use a Rule 802 exception, if the court determines that counsel opposing the admission of the hearsay is surprised by the evidence, then the court can grant a continuance to allow that counsel a chance to prepare to resist the call for an exception.

Rule 803. Hearsay Exceptions In Specific.

In addition to admissibility as provided in Rule 802, the following are not excluded by the hearsay rule: statements that are offered against a party and are (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or employee[618] concerning a matter within the scope

616. As I noted *supra*, text accompanying note 412, California adds "social interest" to the list. I have decided not to. It seems too "California."

617. To place the burden elsewhere would require proof of the negative—too often too great a burden.

618. Do we really have to call them "servant," as we do in Federal Rule 801(d)(2)(D)?

- Leave alone Rules 805 and 806, including, for reasons of continuity, leaving their numbers unchanged.

Here is my proposed amendment to the Federal Rules of Evidence, and, likewise, to the various state codes that follow the federal rule:

Rule 802: Hearsay Exceptions—In General

(a) Hearsay is inadmissible except when the court, based on both the need for and the reliability of the out-of-court statement, decides otherwise.[613]

(b) In assessing the need for the out-of-court statement the court shall consider whether the out-of-court declarant is available and is able to give live testimony in the proceeding at hand, and either is willing or can be made to do so.

If the live testimony of the out-of-court declarant is available, the court shall consider whether the cost of the live testimony in some significant way outweighs its benefit.

(1) The cost includes the money, the time, and the other costs that may be associated with the particular live testimony in question. The cost can also take into account what is at stake in the litigation.[614]

(2) The benefit includes whatever is likely to be gained by having live testimony (or, if this is the issue, a more reliable out-of-court statement), which includes considerations of how important the evidence is in the case and how central the issue to which it is relevant is to the case.

If the live testimony of the out-of-court declarant is not available, the court shall consider whether the unavailability is due to the procurement or wrongdoing of one or more parties, and, if so, may[615] rule the evidence inadmissible hearsay for that reason alone.

Additionally, if parts of a hearsay document or statement or some hearsay documents or statements that are part of a single transaction have been admitted at the behest of one counsel, the court may consider whether there is a need grounded in fairness to admit other parts at the behest of an opposing party.

(c) In assessing the reliability of the out-of-court statement the court shall consider:

(1) Whether the out-of-court declarant is testifying and can be cross-examined about his or her out-of-court statement.

(2) The presence or absence of cross-examination at the time of the out-of-court statement and the motivation of that cross-examiner, as it compares with the motivation of the party against whom the hearsay is offered.

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613. The exceptions generally are, after all, based on the two factors of the need for the evidence in the out-of-court statement and its reliability. *E.g.*, SIR RUPPERT CROSS & COLIN TAPPER, CROSS ON EVIDENCE 534 (Butterworths, 7th ed., 1990); Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 69 (1987).

614. In a $2000 property damage case, do we admit the out-of-court declaration or require that the out-of-court declarant be brought in from Tibet?

615. It is intended that this element will strongly influence the court. Its presence, however, does not necessarily decide the issue; it does not remove all discretion from the court.

prepare to meet them,[610] but how can we learn about and prepare to meet statements by out-of-court declarants?

So what to do? Back in the 1800s, Bentham suggested that hearsay be admissible "where the 'original narrator' was shown to be unavailable. He would exclude hearsay where the declarant was 'forthcoming and interrogable.'"[611] This certainly is a bright line rule. It can be understood and applied without much trouble, and solves that part of the problem with modern hearsay. But at what cost? It seems awfully restrictive. It demands live testimony in many cases where live testimony is not really necessary, and is expensive; it increases the cost of litigation: In dollars and time. It is inconvenient. It is, as they say around where I'm from, like burnin' down the barn to get rid of the rats.

Here is my solution: Recognize what we really do seem to be doing already, and substitute it for what we say we are doing. That is, perhaps the solution is not to try to come up with a solution but to identify what is actually being done and to call that the solution. Rather than a bunch of academics, and judges, and lawyers, and members of Congress and senators, and whomever else, sitting down and trying to come up with the best possible way to handle hearsay, let's focus on what is really happening and see if it may not be the way out of the hearsay "bog of uncertainty."[612]

Perhaps the best approach to the problem is the one we have developed. By that, I do not mean the federal rules, but the rules actually applied in that arena our students so often throw up in our faces: The Real World.

One way to approach drafting a new rule is to parallel the following approach to architecture: Build the campus without sidewalks; wait for the paths to appear; build the sidewalks on top of the paths. Let's take what is really being done and build a new rule on top of that.

I contend that in the real world we have developed a hearsay rule that can be expressed as follows:

- Delete part (d) of Rule 801, the definitional exclusions for, among other things, parties' statements offered against them. Classification as a definitional exclusion, rather than an exception, is an awkward, confusing, and often counter-intuitive compromise reached by a committee. Even though it classifies some statements as nonhearsay, even though it is a definitional exclusion from the hearsay rule, textbook authors, scholars, judges, and lawyers still treat 801(d) as though it were an exception to the hearsay rule. So let's have the code treat it that way too, as I will suggest below.
- Delete Rules 802, 803, and 804, and substitute what I propose below.

610. *E.g.*, Bloomquist v. ConAgra, Inc., 481 N.W.2d 156 (Neb. 1992) (failure to list witness was attorney misconduct; failure to object when witness called to stand waived same).

611. Laird C. Kirkpatrick, *Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement*, 25 LOY. L.A. L. REV. 837, 843 (1992) (footnote omitted) (*quoting*, respectively, JEREMY BENTHAM, TREATISE ON JUDICIAL EVIDENCE 203 (M. Dumont ed., 1825) and JEREMY BENTHAM, III RATIONALE OF JUDICIAL EVIDENCE, bk. VI, ch. II, at 408 (J.S. Mill ed., 1827)).

612. *See supra* text accompanying note 583.

it is not the one they need. What to put in its place? I shall come to that after just one more diversion.

"Admissibility of evidence of this sort does not derive its ultimate justification from any one theory, but from notions of reliability and the ability of the trier to properly evaluate probative force,"[607] a.k.a., reliability and the danger of unfair prejudice.

Professor Mueller has said:

> [R]ules of procedure and evidence should provide reason for confidence that courts reach correct outcomes by fair means. Probably the hearsay doctrine serves this function. Although lay people do not understand the underlying complexities of even the conventional account, surely the doctrine reflects a common preference to hear from and speak to observers directly, as happens at trial where live witnesses testify under questioning by lawyers. In this respect the doctrine reflects a kind of common sense to which lay people can relate.[608]

With apologies to Professor Mueller, whom I admire personally and professionally, I would amend that to say:

> Rules of procedure and evidence should provide reason for confidence that courts reach correct outcomes by fair means. Probably the hearsay doctrine does not serve this function, at least very well. Although neither lay people nor most lawyers or judges understand the underlying complexities of even the conventional account, surely the doctrine reflects a common preference to hear from and speak to observers directly, as happens at trial where live witnesses testify under questioning by lawyers. In this respect the doctrine reflects a kind of common sense to which lay people can relate. It is, however, only effective in conveying this message to lay people because they understand only the common preference the rule is said to reflect, and not its actual workings. As a way of achieving this common preference, the hearsay rule is, in fact, overly cumbersome, unnecessarily difficult, roundly misunderstood and misapplied, gingerly avoided as the most feared of all of the rules of evidence, and not worth the trees that die in its defense and its explanation.

I do not contest that it can be difficult (it can be impossible) to dig the truth out of an out-of-court writing offered in court as evidence. I do not contest that it can be difficult for jurors to separate the credibility of the out-of-court declarant from that of the in-court conveyor of the out-of-court message. I only say that there are all around better ways to do it than the way we do it today with the hearsay rule.

I am left with these reservations. First, on important matters, I prefer live testimony from persons with first-hand knowledge over written evidence or oral out-of-court statements relayed to the trier of fact by a third-party witness to the statement. Second, I am concerned about surprise.[609] As a general rule, we can learn who the in-court declarants will be and can

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607. United States v. Muscato, 534 F. Supp. 969, 980 (E.D.N.Y. 1982).

608. Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 395 (1992).

609. *See generally, e.g.*, Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 100-02 (1987).

was going to advise the client they would lose on this key point. I agreed. He had the best arguments, that is he had thought of the best argument available to him and, under the statute, that argument seemed to present the winning side on the point. However, the case involved child abuse, and his client was the alleged abuser. I confirmed his final opinion, which was that the statute and his good arguments aside, interpretive case law says he is going to lose in Nebraska.[600]

Stability. Predictability. In my former student's case, these things came not from the hearsay rule, but from a judicial rewrite of the hearsay rule. The law on this point would be just as predictable—no, I think it would be more predictable—without the statute. It would be more predictable because an attorney not in the know would not be misled by the false security of the statute. You have to look up the cases anyway, and in the end it is the cases on which you have to rely. Your search has to end with the cases: I say it may as well start there too.

How does this square with something I said earlier, "Most of us are not Jack B. Weinstein, Edward R. Becker, or Leon Higginbotham."[601] Are we eager to give more discretion to trial judges? "It is one thing for Judge Weinstein, who is both a scholar and an extraordinary jurist, to claim judges work better without rules, and quite another to suppose most judges can do so."[602] What, then, is to keep our mere mortal judges under control?[603] First let me repeat this: The hearsay rule is not doing a good job of it. Let's not just stick with it because it is familiar. Let's not just stick with it because it is approximately one-half of our evidence courses. Let's not just stick with it because, "We had to go through it and we turned out okay." Let's not just stick with it because we think that, to the exclusion of almost everyone else, we know what it means, and that gives us a tremendous advantage.[604]

But, okay, we are not all Jack Weinstein. Judges need rules.[605] Lawyers need rules. Law students need rules.[606] But the hearsay rule as we know

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600. Again, I know I only get called about the hard cases, the cases on the edge. I'm saying there are way too many of the same and too many of them are resolved dishonestly. *See also supra* note 590 and accompanying text.

601. Quoting *supra* text at note 587.

602. Christopher B. Mueller, *Post-Modern Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 397 (1992) (referring and citing to Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 353 (1961)).

603. "An ancient but powerful objection may be made to this approach. Discretion to exclude or admit vital evidence raises dangers of judicial partisanship, corruption, and plain bad judgment." Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 111 (1987). "[And] the danger that each judge will develop his or her own hearsay 'rules'." *Id.* Within one jurisdiction, appellate courts can handle this, as they do even now with specific statutory rules. From jurisdiction to jurisdiction this would be nothing new: even with the statute, you shouldn't take your case to Cleveland without checking the local rules. *See supra* text accompanying note 234.

604. For if we take that approach, we are as bankrupt as the rule.

605. "[I]t is difficult to keep a straight face when reformers argue that courts would be improved if judges emulated historians and journalists and abandoned efforts to develop rules or principles for dealing with evidence." Kenneth W. Graham, Jr., *What's the Matter with Evidence?*, 25 LOY. L.A. L. REV. 773, 778 (1992). "Trial judges and lawyers need rules of thumb." Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 111 (1987).

606. Apparently everyone in the business needs rules but law professors.

There are those who argue that the more specific hearsay rule is to be preferred to the more general relevancy and competency rules because the more specific is more predictable. Attorneys can plan their litigation because it is easier to predict both what evidence they will be able to get in and what evidence they will have to meet. It leads to more, and more intelligent, settlement.[598] In the long run, this is not so. Part of my point is that it is case law that gives meaning to our evidence statutes. Sometimes the case law follows the literal meaning of the words of the statute, neither adding nor subtracting a thing. There, outcomes are predictable from the statute. Sometimes the case law gives the statute a meaning that seems to have little to do with the words of the statute. This is true in the interpretation of the definition of hearsay. This is true in the interpretation of the exceptions. There, outcomes are not predictable from the statute.

Often it is not the statute, it is not the definition of hearsay or the legislative statement of the exceptions, that gives the law predictability: It is the court. It is judicial interpretation (or judicial creative writing) that gives the law predictability. And judicial interpretation would, over the not-too-long haul give the same predictability to a system where out-of-court statements and out-of-court declarants were handled under other rules.

Professor Roger Park, who writes comprehensive articles on a variety of topics within the law of evidence, and whose articles are unusually useful because you can understand them, seems to me to make my point while trying to argue against it:

> Trial judges and lawyers need rules of thumb. Thus, the application of a general reliability standard, after its case law elaboration, would neither clarify nor necessarily liberalize the hearsay rule; it would simply return it to the process of case law development, with the attendant disadvantages of uncertainty and inconsistency. The appellate cases construing the present reliability-based residual exceptions are certainly as much of a hodgepodge as any list of standard exceptions has ever been.[599]

Statutes in the image of the federal rules are not predictable: no more predictable than was the common law; no more predictable than my suggestion (coming up). And yet they seem predictable. They are false prophets, and they give us false succor.

Two days prior to my first draft of these paragraphs, I received a phone call from a former student with an important hearsay problem. Things did not look good for his side, he said, and he had called for my perspective. He told me the situation, told me what he knew about the law and the arguments he might make, told me why he thought they were good arguments under our evidence code, and told me that nonetheless he

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of evidence are losing their sharpness of definition, their clearness of outline." Charles T. McCormick, *The Borderline of Hearsay*, 39 YALE L.J. 489, 489 (1930).

598. *See, e.g.*, Christopher B. Mueller, *Post-Modern Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 396-97 (1992).

599. Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 111 (1987).

In another context, Herbert Wechsler wrote: "I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[591] There's what's wrong with the hearsay rule: It is not "genuinely principled."

My fourth conclusion is this: As a teacher of the subject, I must teach hearsay not as a truth, but as a tool. My students need to learn to use this tool to advocate, to take a side, to convince a judge. At my worst, I hope not to leave my students "too much puzzled to . . . remark."[592] At my best, I hope to help them prepare themselves to be the skilled lawyers discussed above.[593] I hope I am a good teacher of manipulation.

As a lawyer who works with the subject, I recognize the hearsay rules as tools of my trade. I take sides, I argue the rules, I manipulate them and use them to persuade, just as I hope I am teaching my students to manipulate them and use them to persuade—use them to win.

As a truth teller, I circle back to where this article began, to this bit of theory: "Hearsay is inadmissible, except . . . well, in exceptional cases."[594] I conclude that the truth is just the opposite: Hearsay is admissible, with some, rather fewer than more, exceptions. Hearsay is admissible except when the court considers it particularly unreliable and unnecessary. The hearsay rule as it operates in truth can be reduced to a somewhat more lenient, negative version of the residual exceptions.[595] Unless the evidence lacks guarantees of trustworthiness or is not necessary or some combination of the two, it is admissible, and the trial judge's decision in this regard will be respected unless it is an abuse of discretion or clearly erroneous or substantial error or, however it is phrased, unless the appellate court does not agree with the trial court's judgment that the evidence is sufficiently reliable and does not think it is a close call.

When I say that hearsay is admissible except when the court considers it particularly unreliable and unnecessary, I am really saying that there is no such thing as hearsay: The real problems are problems of probative value balanced against the danger of unfair prejudice with, in the formerly-hearsay situation, an emphasis on the unfair prejudice resulting from the unavailability of cross-examination.[596] I am not advocating abolishing the hearsay rule and substituting relevance rules so much as I am stating that in very large part this has been done already. While we had our backs turned,[597] the hearsay rule became terminally and incurably ill.

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591. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

592. *See supra* note 585.

593. *See supra* text accompanying note 258.

594. *See supra* text accompanying note 4.

595. FED. R. EVID. 803(24) and 804(b)(5).

596. *See supra* text accompanying notes 61, 71, 101, 117, 122, 524, 555 and 564.

See also 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 800[01] (1992). "Even when hearsay is erroneously admitted, or admitted because no objection is made, verdicts based on such evidence are usually sustained and affirmed if the evidence appears sufficiently reliable."

597. Not everyone's back was turned. McCormick, for example: "Like all procedural rules, those

admissions. And once there was a crack in the rule, once the wedge of exceptions pierced the rule, that was the beginning of the end.

And then, as the exceptions grew in number and variety, some uniformity was thought to be needed. So we produced a suggested code—the Uniform Rules of Evidence—and then an enacted code—the Federal Rules of Evidence. Now, however, the code is too rigid. The next logical step is a code, but one that is more flexible. And I'll propose one in just a moment.

My third conclusion is that most of us are not Jack B. Weinstein, Edward R. Becker, or Leon Higginbotham.[587] We are not Edmund M. Morgan, John Henry Wigmore, or Charles T. McCormick. These rules are too difficult, too complicated, too hard for mere mortals such as ourselves to be able to apply them except to the most routine situations—clearly too hard to be applied at the moment during trial. And I am not sure that the judges and scholars mentioned would be able to apply these rules today, on command during trial, without the luxury of leisurely consideration.

Professor Chris Mueller has put modern attacks on the hearsay rule into four categories: The rule excludes probative evidence; modern jurors are better educated and therefore can be more intelligent in their use of hearsay, can be trusted; some categorical exceptions make little sense and lead to mistakes; and the rule is complicated and hard to apply.[588] He is too kind: The rule is not just complicated, but *too* complicated; not just hard to apply, but *too* hard to apply. But even more than that: The rule really has no meaning—because it means everything, it means nothing. It is bankrupt. Oh, sure, the rule is applied day in and day out in any number of cases where its application is routine and uncontroversial. But, the rule is so soft, so pliable, so compliant; the rule is so subject to misuse and abuse; the rule is so riddled that inside the shell, there is no meat.

As the late Irving Younger once wrote, "Every thinker knows that as a proof, a proposition, a theory becomes complicated, the less the chance that it is true; and if 'truth' be too chimerical a measure, then the less its elegance, the more muted the mental pleasure it furnishes."[589]

Before I am accused of ignoring the run-of-the-mill case, the everyday case where the rule is applied without problems,[590] let me say that I know they exist and I count them to this extent: Even though they exist, the rule is too complex, too rigid and too soft, too subject to abuse, misuse, and whim, and too dishonest when much of its actual operation is compared with its text to be left standing in its present form. So, let's not do away with it, but let's change it.

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587. *See supra* note 258.

588. Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 373-76 (1992).

589. Irving Younger, *Reflections on the Rule Against Hearsay*, 32 S.C. L. REV. 281, 281 (1980).

590. Roger Park calls it the "neglect of the core." Roger C. Park, *Foreword: The Hearsay Reform Conference. The New Wave of Hearsay Reform Scholarship*, 76 MINN. L. REV. 363, 363 (1992). The core may be solid, but the rest is rotten. I say let's fix the whole thing before the rot spreads any further.

that is hearsay truth, where has it gotten us? It has been a good workout—for me, at least—but where has it gotten us, for if all we do now is to step back onto this firm narrow path laid over the bog of truth by nearly a century of scholastic, common law, and legislative construction, it has been productive only of the mental exercise.

Where do these Truths get us? What conclusions can we draw, aside from the Truths themselves? First, we can see that Roger Park is a master of understatement. He has said, "A perfect hearsay definition is unattainable."[584]

Second, I conclude that we do not pay "hearsay" enough.[585] We work the word too hard. We ask it to mean too many different things. We devote one-half, sometimes more, of our evidence courses to this one seven-letter word.

It used to be a rather simple little rule. In the beginning, each side was responsible for his[586] own evidence in much different ways than today. For example, you vouched for your witnesses, that is, you could not impeach them; you couldn't take advantage of the other side's evidence. Hearsay was inadmissible. Period. While we did ask the rule to keep out an awfully lot of evidence, we did not ask it to mean very many different things. But then, in the interest of fairness, courts began to allow parties to admit hearsay evidence of opponents' admissions. For reasons of fairness, you were not allowed to object to hearsay evidence of your own

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584. Roger C. Park, *"I Didn't Tell Them Anything About You"; Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783, 794 (1990). He has also written one of the simplest, most complete, and easiest to understand summaries of the arguments for and against hearsay evidence: Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51 (1987).

585. ". . . There's glory for you!" [said Humpty Dumpty.]

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—until I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.

"When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Alice was much too puzzled to say anything; so after a minute Humpty Dumpty began again. "They've a temper, some of them—particularly verbs: they're the proudest—adjectives you can do anything with, but not verbs—however, *I* can manage the whole lot of them! Impenetrability! That's what *I* say."

"Would you tell me please," said Alice, "what that means?"

"Now you talk like a reasonable child," said Humpty Dumpty, looking very much pleased. "I meant by 'impenetrability' that we've had enough of that subject, and it would be just as well if you'd mention what you mean to do next, as I suppose you don't mean to stop here all the rest of your life."

"That's a great deal to make one word mean," Alice said in a thoughtful tone.

"When I make a word do a lot of work like that," said Humpty Dumpty, "I always pay it extra."

"Oh!" said Alice. She was too much puzzled to make any other remark.

LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE 70-71 (Ariel Books/Alfred A. Knopf 1986).

586. Politically correct pronoun? No. Historically correct pronoun? Yes.

inadmissible evidence."[578] This is sound interpretation of the expert witness rules. Nonetheless, this does not limit the burden shifting expert, the one whose opinion by itself, without exposition of the hearsay part of its basis, satisfies the burden of production.

The facts or data relied on—the inadmissible evidence relied on—must be of a type reasonably relied on by experts in the particular field of expertise when they form expert opinions.[579] The opinion to be given by the expert, the opinion formed at least in part on the basis of inadmissible evidence, must itself be based on more than speculation;[580] which is to say that while Rule 703 may be a back door for hearsay and other inadmissible evidence to get into an opinion, the opinion itself still has to comply with the rules, including Rule 403. And, perhaps, an expert allowed to testify to an opinion will, nonetheless, not be allowed to testify to all of its bases, so the opinion based on inadmissible evidence comes in, but the specific inadmissible evidence itself does not come in.[581]

There are limits. My point is not otherwise. My point is that there are lots of ways around the hearsay rule, and this is one more.

III. CONCLUSION

galileo's head was on the block
the crime was looking up the truth[582]

"The moment one begins to investigate the truth of the simplest facts which one has accepted as true it is as though one had stepped off a firm narrow path into a bog or quicksand—every step one takes one sinks deeper into the bog of uncertainty."[583] Having stepped off the firm narrow path of blind adherence to hearsay theory and into the bog of uncertainty

578. Department of Corrections v. Williams, 549 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 1989) (quoting Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859, 859 (1992)). *Accord, e.g.*, Enigh v. Consolidated Rail Corp., "Contrary to the plaintiff's assertions, Rule 703 does not compel the admission of any evidence desired by a litigant simply because that otherwise inadmissible evidence can be fashioned by one expert witness into something he states he relied upon in reaching his opinion." 710 F. Supp. 608, 613 (W.D. Pa. 1989).

Here is a variation of this technique of using an expert to get otherwise inadmissible evidence before the jury. It is the farthest I have seen anyone try to take this particular use of experts. It was a criminal case. Defendant did not take the stand. His lawyer only called one witness, an expert forensic hypnotist. The expert stated an opinion favorable to defendant and based the opinion, in part, on a session wherein he hypnotized the defendant and had him discuss the events of the day of the crime. The session was recorded on videotape. Defense counsel asked to show the jury an edited version of the tape, under the theory that it was relevant nonhearsay to the issue of the credibility of the expert. The trial court said no. The appellate court affirmed: "The attempt to introduce the tape essentially amounted to an effort to put the defendant's testimony directly before the jury without subjecting him to the cross-examination and impeachment that would have followed had he taken the witness stand." United States v. McCollum, 732 F.2d 1419, 1423 (9th Cir. 1984).

579. FED. R. EVID. 703. *See also, e.g.*, Enigh v. Consolidated Rail Corp., 710 F. Supp. 608, 611 (W.D. Pa. 1989).

580. *Enigh*, 710 F. Supp. at 612.

581. *See id.* at 611.

582. EMILY SALIERS, INDIGO GIRLS, *Galileo* on RITES OF PASSAGE (Epic Records 1992).

583. LEONARD WOLF, DOWNHILL ALL THE WAY 9-10 (1967), *quoted in* James Atlas, *Stranger Than Fiction*, N.Y. TIMES MAGAZINE, June 23, 1991.

against Dr. Koven on cross-examination. Under the circumstances of this case, we do not think it was an abuse of discretion for Judge Weinstein to permit Dr. Koven to testify as he did. We observe, however, that while expert witnesses are to be permitted to explain the basis of their opinions, we do not here decide that that leeway extends to the kind of multiple hearsay that would have been present here in the absence of the doctors' reports.

In *Lewis v. Rego Company*: "A lay witness conversation with Dr. McMahon would [have been inadmissible hearsay]. However, since Dr. Leonard's conversation with Dr. McMahon was the kind of material on which experts in the field base their opinions, inquiry concerning the conversation should have been permitted."[574]

On a related matter:

> [I]t appears to be the rule in all jurisdictions in which the matter has been considered that statements made under hypnosis may not be introduced to prove the truth of the matter asserted because the reliability of such statements is questionable. While in California such statements—and those made under the influence of truth serum—may be used to establish a basis for expert opinion . . . they are not admissible to prove the truth of the matter therein contained.[575]

The hypnotic or drug-induced statements are only admissible to the issue of the credibility of the expert and the weight to be given the expert's opinion, but the opinion itself is admissible as substantive evidence, and sometimes that is all that is necessary. And the jury does hear the information on which the opinion was based, even if only for a limited purpose, and sometimes that is all that is necessary.

Couple this with how little may be required to make one an expert. In a case where the question was whether specific marijuana was imported,[576] the Fifth Circuit upheld the expert testimony of a person who "had no special training or education for such identification. Instead, his qualifications came entirely from 'the experience of being around a great deal and smoking it.'"[577]

There are, of course, limits. Regarding the expert stating the opinion and then testifying to its basis, including the part of its basis that is hearsay, some courts make statements like this: "We reject the notion that the expert may be used as a conduit for the introduction of otherwise

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574. Lewis v. Rego Co., 757 F.2d 66, 74 (3d Cir. 1985) (citations omitted).

575. People v. Blair, 602 P.2d 738, 753-54 (Cal. 1979) (citations omitted).

576. It was one of the elements of the crime charged. United States v. Johnson, 575 F.2d 1347, 1361 (5th Cir. 1978).

577. *Id.* at 1360. The witness testified, "He had smoked marijuana over a thousand times and . . . had dealt in marijuana as many as twenty times. He also said that he had been asked to identify marijuana over a hundred times and had done so without making a mistake." *Id.* "He also said that he had compared Colombian marijuana with marijuana from other places as many as twenty times. Moreover, he had seen Colombian marijuana that had been grown in the United States and had found that it was different from marijuana grown in Columbia." *Id.* The expert testified that he had tested samples of the marijuana involved in this case and that it came from Columbia. *Id.*

> all the work on which he based his opinion. You heard him tell you about all the people he interviewed, all the surveys he took, all the articles he read. You remember, for example, what the deceased's best friend told the doctor about how bad the deceased's relationship was with the woman he was living with, and how much stress that was causing him. And how bad it had been with his four previous wives, each of whom was interviewed by Dr. Expert. And how, he had been told that the very night of the accident, deceased had decided to go flying because he wanted to get out of the house . . . .[572]

Here is a case where just this sort of thing worked.[573] In the end, the appellate court criticized what the trial judge (the Honorable Jack B. Weinstein) had done, but ruled it was not an abuse of discretion. Soon after the incident under litigation, the plaintiff consulted a number of treating physicians local to the situs of the trial. She did not call any of these doctors. Instead, she called Dr. Koven, a physician retained for litigation, who first saw her four years after the incident. Dr. Koven presented to the jury the opinions of the treating physicians.

Judge Weinstein permitted the witness to testify not only to what O'Gee had told him about her condition and its genesis, but also to what O'Gee had told him that the other doctors had told her about her injuries. Thus, Dr. Koven's testimony contained both single and multiple hearsay on crucial issues.

Prior to the adoption of the Federal Rules of Evidence, a non-treating doctor such as Dr. Koven would have been permitted to recite his patient's statements to him, not as proof of the facts stated, but only to show the basis of his opinion. The Federal Rules, however, rejected this distinction as being too esoteric for a jury to recognize. Rule 803(4) clearly permits the admission into evidence of what O'Gee told Dr. Koven about her condition, so long as it was relied on by Dr. Koven in formulating his opinion—a foundation that was properly laid.

Nowhere does the commentary on Rule 803(4) indicate, however, whether the Rule was intended to go so far as to permit a doctor to testify to his patient's version of other doctors' opinions, particularly when no showing is made of those other doctors' unavailability. We need not reach the furthest extent of this issue, however, because Dr. Koven clearly stated that he was not relying solely on O'Gee's recollection of the other doctors' opinions, but actually had before him the reports of at least two of those doctors, and of the hospital where O'Gee's laminectomy was performed. Defendant and third-party defendant were aware of what those reports showed, and should have been prepared to counter them as best they could regardless of how testimony concerning them was introduced. In fact, it appears that portions of the hospital record were used quite effectively

572. These facts are from Stevens v. Cessna Aircraft Co., 634 F. Supp. 137 (E.D. Pa. 1986).

573. O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1088-89 (2d Cir. 1978) (citations omitted). On the other hand, see Hutchinson v. Groskin, 927 F.2d 722, 725-27 (2d Cir. 1991). In *Hutchinson*, defense counsel tried essentially the same thing but failed. The difference is that the expert here did not rely on the out-of-court statements in forming his own opinion; rather, he simply said the out-of-court statements were consistent with his own opinion.

plane was not defective and that the real cause of the crash was pilot error.[568] Defendant's proximate cause argument was based on the testimony of an expert, "a physician trained in aeronautical psychology."[569] The expert made a study of the pilot's life; he interviewed many of the pilot's associates and co-workers and others, and concluded the pilot "was under a great deal of stress in his personal life and . . . this stress caused him to lose the concentration necessary for flying."[570] A defense based on what the expert had been told by a number of non-testifying lay persons.

How is this so different from what Agent Peacock did in her investigation of tax fraud on the part of tax-preparer Amos Brown, a case discussed in more detail above?[571] I submit it is not so different. In *Brown*, the expert witness apparently had interviewed clients of the tax-preparer, they had told her their true deductions, she compared those with the deductions Amos Brown claimed, and she concluded fraud. Here the doctor stated he interviewed associates of the deceased, they told him about his personal life and his marriage, he applied his expertise in the area of aeronautical psychology, and he concluded the deceased's own stress caused him to commit error that caused the accident. Perhaps the difference is that Amos Brown's was a criminal case and the widow's was a civil case. Perhaps we apply the hearsay rules more strictly when liberty is at stake; perhaps the difference is that Amos Brown's counsel did seem somewhat inept; perhaps we apply the hearsay rule more strictly when the playing field is not level, and we start off looking for a reason to reverse. Perhaps the reason is what the judge had for breakfast. I don't know the difference, but it does not seem to have much to do with the hearsay rule, which points out once more that the rule means everything and, therefore, means nothing.

The first thing an expert can do for your hearsay problem is consider the inadmissible hearsay, form an admissible opinion, and satisfy your burden of production, and, if the jury is convinced, even satisfy your burden of proof. Additionally, in some cases, the expert will also be able to do this for your hearsay problem: After the expert expresses the opinion, the expert can be asked on what the opinion is based. At this point, the otherwise inadmissible hearsay itself may be allowed into evidence. Granted, it is not admitted as substantive evidence, but just as evidence of the credibility and weight of the expert's opinion, but, nonetheless, it gets before the jury. If so, the hearsay rule has been overcome to an even greater extent.

And on closing argument the hearsay can be emphasized, within the trial judge's tolerance for Rule 403 unfair prejudice:

> Members of the jury, why should you believe the opinions expressed by Dr. Berry? Well, you heard him tell about all the work he had done,

568. *Id.* at 139.
569. *Id.* at 140.
570. *Id.*
571. United States v. Brown, 548 F.2d 1194 (5th Cir. 1977) is discussed *supra* text accompanying notes 109-17 and 270-76.

the most strict constructionist sense. That is to say, perhaps the objection during the opening should be Rule 403 unfair prejudice rather than hearsay, because we are not in the testimonial phase of the trial, but it does seem a trial judge could overrule that for being insufficiently specific. Catch 22. In any event, it seems a trial judge would appreciate a bit more specific direction towards the real problem with what counsel is saying. The *Levy* case, however, seems to be saying even more than that: Not that hearsay was the wrong objection, but that you simply cannot object to hearsay during the opening (except perhaps in the most egregious cases, where there is an independent Rule 403 objection). This has to be incorrect. It is not possible that during the opening statement lawyers are allowed to present all the inadmissible evidence they want, except when unfair prejudice substantially outweighs probative value.

H. Truth # 8: It Is Always Admissible, and, Even When It Is Not, You Can Get Around It By Hiring an Expert Witness to Use It To Form an Opinion That Will Be Admissible

> I found myself fascinated by the alacrity with which these great minds unflinchingly attacked morality, art, ethics, life, and death. I remember my reaction to a typically luminous observation of Kierkegaard's: 'Such a relation which relates itself to its own self (that is to say, a self) must either have constituted itself or have been constituted by another.' The concept brought tears to my eyes. My word, I thought, to be that clever. . . . True, the passage was totally incomprehensible to me, but what of it as long as Kierkegaard was having fun?[565]

It is always admissible and even when it is not, you can get an expert witness to use it to form an opinion that will be admissible.

If the only evidence you have that will satisfy your burden of production is an out-of-court declaration, but it is hearsay and you cannot make it nonhearsay and you cannot make it fit under an exception, then hire an expert who can take the hearsay and use it to form an opinion. Perhaps the opinion will satisfy your burden of production. Perhaps the expert will get your case to the jury, or your affirmative defense. When this is so, the hearsay rule has been partly overcome by expert opinion. This is a burden-shifting expert.[566]

Here is a fascinating case where the defense used an expert to set up its argument, and the expert used hearsay, plenty of it: *Stevens v. Cessna Aircraft Co.*[567] The wife of a pilot who died in the crash of a small plane he was piloting brought suit against the plane's manufacturer, alleging the plane was defective in a number of ways. The defendant argued that the

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565. WOODY ALLEN, GETTING EVEN 27-28 (1972).

566. Professor Swift has identified "burden-shifting *declarants*" as those whose out-of-court statements, when admitted into evidence, prevent the grant of summary judgment. Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 513-14 (1987) (emphasis added). I am addressing "burden-shifting *experts*." If you have a burden-shifting declarant whose out-of-court statement cannot be made admissible, get a burden-shifting expert.

567. 634 F. Supp. 137 (E.D. Pa. 1986), *aff'd*, 806 F.2d 252 (3d. Cir. 1986).