Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach

Gordon Van Kessel

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Gordon Van Kessel, Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach, 49 Hastings L.J. 477 (1998). Available at: https://repository.uchastings.edu/hastings_law_journal/vol49/iss3/1
Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach

by
GORDON VAN KESSEL*

Table of Contents

Introduction............................................................................................479
I. Foundations of the Hearsay Rule.....................................................485
   A. The Conventional View of Hearsay and its
      Weaknesses...........................................................................485
   B. Arguments for Admission of Hearsay.................................487
   C. Explanations for Exclusion of Hearsay..............................489
      (1) The Jury or the Adversary System ....................489
      (2) Complexity and Process-Based Considerations.....490
   D. Constitutional Restrictions on Hearsay Evidence........492
   E. Functional and Analytical Arguments..........................494
      (1) Jury Deception as a Rationale for Hearsay
         Exclusion........................................................................494
      (2) Jury Performance of Other Difficult Tasks...........497
         (a) Judging Expert Testimony.................................497
         (b) Evidence Evaluations........................................497
         (c) Evaluation of Weak Hearsay Admitted Under
             Existing Rules......................................................499
      (2) Ability to Evaluate Hearsay in the Formal Trial
         Context..........................................................................500
      (4) Application of the Hearsay Rule to Nonjury Trials..501
      (5) Summary ......................................................................501
   F. The Adversary System and the Importance of Cross-
      examination......................................................................502
      (1) Particular Weaknesses of Hearsay Evidence..........503
         (a) Hearsay as Easily Creatable Evidence.............503
         (b) Witness-Oriented Dangers.........................504
      (2) Partisan Control over Proof-taking.....................505
         (a) Evidence Contamination..................................506
            —Party preparation of testifying witnesses......506
            —Party threats or inducements......................507
         (b) Evidence Selection: The Hearsay Rules as an
            Instrument of Lawyer Control..................512

__________________________
* Professor of Law, University of California, Hastings College of the Law. I wish
to thank my colleague Professor Roger Park, and my former colleague Professor
Johannes Nijboer for their helpful comments and suggestions and to thank Hastings
students Lafadio Darling, Margaret Paige and Mariah Panza for their invaluable
assistance.
(c) Distrust of Defense Hearsay.................................514
(d) Contentiousness of Lawyers ............................515

G. Hearsay Rules as a Check on the Independent
Factfinder.....................................................................516
(1) Three Threats to Verdict Integrity ....................516
(2) Comparative Perspectives.................................522
(3) Summary ..........................................................523

II. Options and Proposals............................................525
A. The Option of Procedural Modifications ..............525
B. The Need for Consistency and Predictability .........526
C. Guidelines: An Adversary-Oriented Danger Spectrum..528
D. Notice Requirements to Guard Against Surprise ..........532
E. Corroboration and Sufficiency Standards.............532
F. Applications of the Adversary-Oriented Standard ....534
   (1) Temporal Distinctions—Looking Forward or
       Backward ..................................................................535
   (2) Purpose Distinctions—Focusing on Declarant or
       Defendant ...................................................................537
   (3) Benefits of Focusing on Adversary Factors Rather
       than on Temporal or Purpose Distinctions ................539
   (4) Defense Hearsay ..................................................541
       (a) Presenting a More Complete Defense ...............541
       (b) Special Problems with Respect to Statements of
           Defendant ................................................................542

Conclusion ....................................................................543
Introduction

Since the early part of this century, American courts and legislatures have taken incremental steps toward liberalizing hearsay rules. The general thrust of the Federal Rules of Evidence favors the admission of evidence, which is reflected in both the definition of hearsay, which departs from the common law and excludes non-assertive conduct, and in the list of twenty seven formal and two residual hearsay exceptions widely used in Federal courts. States also have been eagerly creating new hearsay exceptions, including residuals. Once enacted, new exceptions generally remain and contribute to a continuous process of expanding the use of hearsay evidence.

Yet despite this trend toward more liberal use of hearsay,


3. See FED. R. EVID. 801(c).

4. See Allen, supra note 1, at 799 n.11 (stating that there are probably thousands of cases, many unreported, admitting hearsay under the residual exceptions).

5. See id. For example, in California there are no residual exceptions comparable to those in the Federal Rules, but the legislature recently has adopted exceptions to meet specific situations. See CAL. EVID. CODE §§ 1360, 1370 (West Supp. 1998).

6. See Allen, supra note 1, at 799 (arguing that hearsay exceptions, once formed, remain). "To my knowledge, there are virtually no examples of hearsay exceptions being eliminated . . ." Id.

7. The movement toward relaxing strictures on the use of hearsay is particularly pronounced in civil cases. Hearsay rules in the United States, as exemplified by the Federal Rules of Evidence, are in many instances more permissive in civil than in criminal cases, and in practice have been substantially weakened by modern expanded discovery systems and the relentless growth of hearsay exceptions.
sweeping proposals for elimination of, or radical surgery on, established hearsay doctrines generally have not been successful. The United States Congress and most state legislatures have rejected proposals for radical hearsay reform. The American Law Institute's Model Code of Evidence in 1942 proposed a Benthamite liberalization of the hearsay rule which would freely admit hearsay whenever the declarant testified or was unavailable, but no jurisdiction adopted the Model Code, partly because of this radical proposal. The 1953 Uniform Rules of Evidence proposed less radical hearsay reform, but it too generally was rejected. The version of the Federal Rules of Evidence originally adopted by the Supreme Court also substantially liberalized the hearsay rule, but

8. "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as witness, or (b) is present and subject to cross-examination." MODEL CODE OF EVIDENCE Rule 503 (1942).

If the declarant is available but uncalled, his statement would be excluded unless it was covered by a categorical exception, such as admissions, excited utterances, declarations against interest and business records. See id. Rules 502-529. In essence, the proposal was a rule of preference for live testimony supplemented by a list of categorical exceptions.


10. Uniform Rule 63(1) would admit hearsay statements of testifying witnesses, but if the declarant was unavailable or available but uncalled, the statement would be admissible only if it came within a listed categorical exception, some of which required unavailability. UNIF. R. EVID. 63(1) (1953) (superseded 1974).

Uniform Rule 63(4)(c) provided an exception when the declarant was unavailable as a witness with respect to "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) (superseded 1974).


12. Federal Rule of Evidence 803(b)(2) provided for admission of statements of recent perception of unavailable declarants. Federal Rules of Evidence 803(24) and 804(b)(6) provided for residual exceptions that contained no notice provision or requirement that the evidence be superior to other means of proof, but demanded only that the statement have guarantees of trustworthiness "comparable" to those of established exceptions. See Park, Hearsay Reform, supra note 9, at 53 n.14; Fredrica Hochman, Note, The Residual Exceptions to the Hearsay Rule in the Federal Rules of Evidence: A Critical Examination, 31 RUTGERS L. REV. 687 (1978).
major reforms were re-written and narrowed by Congress.\textsuperscript{13}

It is particularly in criminal cases that liberalizing tendencies have been less radical, more uneven, and most controversial, resulting in higher barriers to hearsay evidence. The hearsay rules themselves generally limit admission more severely in criminal than in civil cases,\textsuperscript{14} and Supreme Court interpretations of the Sixth Amendment Confrontation Clause have supported the continued viability of the hearsay rule in criminal cases.\textsuperscript{15} Also, while the Court has in the past tended to interpret liberally hearsay exceptions of the Federal Rules, recent cases demonstrate a more conservative approach toward some exceptions, particularly with respect to criminal cases.\textsuperscript{16} Finally, neither lawyers nor academics generally

\textsuperscript{13} The Rules which emerged from Congress in 1975 contained, along with traditional exceptions, two residual exceptions with additional limitations, thus giving courts somewhat greater freedom to admit hearsay not falling within traditional exceptions, but not the scope that the Supreme Court had proposed. The House Committee on the Judiciary struck the two residual exceptions on the ground that they would create too much uncertainty in the law, but the Senate Committee on the Judiciary reinstated them with additional criteria. The Conference Committee added a notice requirement, and the two residual exceptions with limitations became part of the final version which emerged from Congress. \textit{S. REP. NO. 93-1277}, at 18-19 (1974), \textit{reprinted in 1974 U.S.C.C.A.N. 7051, 7065-66}. The Senate Committee reported that "[i]t is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances [which] indicate that the statement has a sufficiently high degree of trustworthiness and necessity." \textit{Id.}

\textsuperscript{14} While the common law hearsay rules generally do not distinguish between civil and criminal cases and the Federal Rules of Evidence generally apply to both civil and criminal trials, in a number of specific situations the Federal Rules restrict the admission of hearsay more severely in criminal cases. \textit{See FED. R. EVID. 804(b)(3) (declarations against interest); FED. R. EVID. 803(8) (public records); FED. R. EVID. 804(b)(2) (dying declarations); FED. R. EVID. 804(b)(1) (former testimony); FED. R. EVID. 803(22) (judgments). Also, erroneous admission of hearsay is more often found harmless error in civil cases, thereby curtailing judicial discretion to a greater degree in criminal cases. \textit{See 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 800[03], at 800-18 (1985).}

\textsuperscript{15} The Court has rejected the "radical" proposal to limit the operation of the Clause to its original purpose and largely constitutionalized the hearsay rule with respect to prosecution evidence through presumptions tied to traditional hearsay exceptions. \textit{See infra Part II.D. See also Gordon Van Kessel, Adversary Excesses in the American Trial, 67 NOTRE DAME L. Rev. 403, 495-99 (contending that the Supreme Court has strongly bound the Confrontation Clause to the hearsay rule); Richard D. Friedman, Toward a Partial Economic, Game-Theoretic Analysis of Hearsay, 76 MINN. L. REV. 723, 725 n.9 (1992) [hereinafter Friedman, Game Analysis].

\textsuperscript{16} \textit{See, e.g.,} Williamson v. United States, 512 U.S. 594, 600-01 (1994) (holding that the against penal interest exception of Federal Rule of Evidence 804(b)(3) covers only those declarations or remarks within an accomplice's confession that are "individually self-inculpatory," and does not allow admission of "non-self-inculpatory statements" even if made within a broader self-inculpatory narrative); Tome v. United States, 513 U.S. 150, 156 (1995) (holding that Federal Rule of Evidence 801(d)(1)(B) embodies the common law's temporal limitation such that prior consistent statements of a witness are admissible as non-hearsay only if made before the alleged recent fabrication or improper influence
advocate sweeping liberalization of the hearsay rule in criminal cases. While scholars such as Thayer, Wigmore, Morgan, Maguire, and McCormick supported radical reform simplifying and liberalizing the hearsay rule in general, the practicing bar has tended to defend the rule with its complexities, and a substantial number, if not the majority, of widely respected modern evidence scholars support interpretations of the Confrontation Clause or hearsay rules which would maintain substantial exclusion of hearsay in criminal cases. Even those contemporary American scholars who strongly advocate radical reforms amounting to almost free admissibility of hearsay in civil cases put aside criminal cases in view of the defendant’s confrontation rights and other considerations. For example,

17. 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, 942 (1952) (citing Thayer, LEGAL ESSAYS 303 n.1 (1908), who advocated a less restrictive hearsay rule). In response to a request by a committee of the Boston Bar Association in 1896 for suggestions on needed changes in the law, Thayer proposed the following: “No declaration of a deceased person, made in writing ante litem motam, shall be excluded, as evidence, on the ground of hearsay, if it appear to the satisfaction of the judge to have been made upon the personal knowledge of the declarant.” Id. See also EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 169-95 (1956) (advocating simplification of hearsay rules such that statements of unavailable declarants generally would be admitted as, for example, an affidavit by an eyewitness to an accident); John M. Maguire, The Hearsay System: Around and Through the Thicket, 14 VAND. L. REV. 741 (1961); John M. Maguire & Edmund M. Morgan, Looking Forward and Backward at Evidence, 50 HARV. L. REV. 909, 921 (1937) (characterizing the hearsay rules as “an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists, and surrealists”); Charles T. McCormick, The Borderland of Hearsay, 39 Yale L.J. 489, 504 (1930) (urging that hearsay should be inadmissible except where “the judge in his discretion finds it needed and trustworthy”).

18. See authorities cited in Park, Hearsay Reform, supra note 9, at 52 n.9.

19. See id.

20. Professor Ronald Allen contends that the hearsay rule in civil cases “should be allowed to lie quietly, undisturbed, for eternity,” but believes that “criminal cases are different because of the Confrontation Clause and the crude systems of discovery.” Allen, supra note 1, at 799 n.8, 800. Professor Roger Park would replace the hearsay rule with a notice-based admission principle in civil cases, but would retain, and in some contexts expand, the hearsay rule in criminal cases, where the risks of declarant and witness unreliability, surprise, and unfair use of governmental power are greater. See Park, Hearsay Reform, supra note 9, at 88-108 (suggesting in criminal cases even more stringent unavailability requirements; contending, for example, that when an out-of-court statement is accusatory, it should not be admissible if the witness is available to testify). Professor Richard Friedman would largely replace the hearsay rule with a relevancy principle in civil cases, but would take a more conservative approach with respect to prosecution evidence in criminal cases. See Friedman, Game Analysis, supra note 15, at 726 n.10 (contending that the Confrontation Clause should operate to exclude hearsay “regardless of declarant’s availability, if the declarant made the statement with the anticipation that it might be used in the investigation or prosecution of a crime and the accused has not had an adequate opportunity to examine the declarant.” In other cases
hearsay post-modernists"\textsuperscript{21} such as Roger Park and Christopher Mueller point to process-based concerns and other non-traditional hearsay dangers which they contend continue to justify substantial restrictions on admission of hearsay in criminal cases.\textsuperscript{22}

Since abolition or radical reform of the hearsay rules in criminal cases is not a realistic option in view of current constitutional constraints and the strong resistance of judges and practicing lawyers to the free admissibility of hearsay evidence, the significant questions for American evidence reformers concern the advisability of continuing the movement toward liberalization, staying the present course, or beginning a retreat toward more limited admissibility,\textsuperscript{23} and whichever the direction, identifying the criteria which should guide reform.

Probing the foundations for the rules excluding hearsay in American criminal cases, I grapple with these questions, analyzing and contrasting traditional jury-oriented justifications, which rest on distrust of lay factfinding, with more recent adversary-based rationales of comparativists and process-based concerns of post-modernists, which emphasize complexity and reach beyond the traditional declarant-oriented view of hearsay dangers. Drawing on comparative insights and process-based rationales, I propose that hearsay analysis focus on adversary and verdict integrity concerns, which generally will result in more liberal admissibility rules. However, I conclude that, even if constitutionally and politically possible, it would not be a good idea to largely eliminate restrictions on hearsay evidence in criminal cases.

Clearly, the traditional deficiencies of hearsay evidence which arise from the lack of ability to test by cross-examination the declarant’s perception, memory, sincerity and narration provide the central rationale for general limitations on use of hearsay evidence in place of first-hand information. The natural distrust of hearsay evidence reflects common notions of reliability and fairness and the belief that, if possible, factfinders should hear from observers, and criminal defendants should be able to question accusers, directly. However, this foundation alone cannot support the broad and elaborate Anglo-American scheme excluding hearsay, particularly

the accused would have to rely for exclusion on the “general and flexible standards of due process.”\textsuperscript{21}

\textsuperscript{21} The term “post-modernist” is used to identify those who view the hearsay rule as supported by non-traditional concerns, and not to refer to its current social, philosophical or literary usage. See generally Mueller, supra note 11.

\textsuperscript{22} See Park, Hearsay Reform, supra note 9; Mueller, supra note 11.

\textsuperscript{23} In England the debate concerns “whether the hearsay rule should retreat even further back and not with whether it should penetrate areas from which it is excluded.” A. A. S. Zuckerman, THE PRINCIPLES OF CRIMINAL EVIDENCE 214 (1989).
statements of unavailable declarants.

Two procedural aspects of our criminal justice system render it particularly vulnerable to hearsay evidence and act as twin buttresses providing additional support for the unique and forbidding structure of the Anglo-American hearsay rules. First, our adversary procedure allows lawyers, particularly prosecutors, almost unfettered power to create and shape both out-of-court statements of declarants and trial testimony of witnesses. The main strength of the adversary system—party motivation to investigate and present favorable evidence and attack the opponent's evidence by cross-examination—renders it vulnerable to the creation of tainted evidence. The independent factfinder (usually, but not necessarily, the jury), which operates largely free of procedural checks on verdict integrity, provides the second buttress supporting exclusion of hearsay in criminal cases. Trial and appellate procedures depower judges both as supervisors of juries and reviewers of jury verdicts. Jurors usually are left on their own without either judicial guidance in evaluating hearsay or responsibility to justify their decisions, and our appellate system does not provide for meaningful review of verdicts. The institution of the common law jury provides some support for the hearsay rules, but not because lay factfinders are less capable of dealing with hearsay than professional judges. The lack of legal training or experience of jurors, while grounds for some concern, is not the principal reason for hearsay rules in jury trials. To the extent that the existence of the jury supports the hearsay rule, it does so more by reason of its accompanying procedural characteristics—a single proceeding with limited pretrial discovery in which a largely unreviewable decision is given without a reason—than by the danger that people untrained in the law would tend to overvalue hearsay evidence. Nor are hearsay restrictions justified by the bifurcated nature of our trial court which separates the judge as law-giver from the jury as fact-finder. There is still a powerful argument for the hearsay rule in unitary bench trials.

These twin procedural characteristics—highly adversary procedures and the unchecked factfinder—increase the possibility of convictions or acquittals based on weak and uncorroborated hearsay and should inform and guide efforts to define the nature and parameters of our hearsay rules. Legislatures should look to these

24. To outsiders, common law evidence "appears arcane" and the hearsay rule is regarded as "so bizarre that [it occupies] one of the most forbidding corners of the entire Anglo-American legal structure." MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 1, 88 (1997) [hereinafter DAMASKA, ADRIFT].

25. Modification of these structures rendering our system "less adversary" and providing greater assurance of verdict integrity would weaken rationales for exclusion of hearsay evidence, but at present, significant alteration of these basic structural
factors in deciding whether to adopt new or restrict existing hearsay exceptions, and courts should consider them in interpreting and applying the hearsay rule and exceptions, particularly residual or "catch-all" exceptions.

A close analysis of these rationales suggests the need to adjust our hearsay rules from an adversary-oriented perspective, which in most contexts would lead to more liberal admission of hearsay on behalf of both the prosecution and the defense. While we should continue to exclude hearsay which is particularly susceptible to dangers inherent in our super-adversary system, exclusion usually is not justified merely by distrust of the jury's ability to evaluate hearsay in terms of ordinary declarant-oriented weaknesses, unenhanced by adversary dangers. Hearsay should not be excluded if the primary dangers posed by adversary-oriented concerns are not present or are substantially diminished.

However, corroboration and sufficiency standards should be increased to insure verdict integrity in light of the absence of checks on the independent and unaccountable factfinder. With respect to all hearsay, whether admitted under specific or residual exceptions, the judge should require a showing of reliability by reference to its nature, the circumstances of its creation, or other evidence in the case. Moreover, a sufficiency rule should bar convictions which are based primarily on hearsay statements unless they are clearly corroborated and the judge also is convinced of defendant's guilt. With these protections, nonadversary-created hearsay generally should be admitted on behalf of both the prosecution and the defense despite the presence of traditional declarant-oriented concerns.

I. Foundations of the Hearsay Rule

A. The Conventional View of Hearsay and its Weaknesses

The conventional and most common explanation for the hearsay rule rests on the assumption that hearsay evidence is less reliable than in-court testimony which is subject to trial safeguards, principally cross-examination. Despite the usual "assertion-oriented" definition of hearsay found in statutes and cited by lawyers as an out-of-court statement offered for its truth, the traditional rationale for characterizing a statement as hearsay and for excluding characteristics is unlikely.

26. See, e.g., Fed. R. Evid. 801(c); 6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW § 1766, at 250 (Chadborne rev. 1974).
it as unreliable is "declarant-oriented" in the sense of focusing on whether the probative value of the statement requires reliance on the credibility of the declarant with attendant dangers of unreliability. The Supreme Court recently explained that this declarant-oriented rationale is based on weaknesses associated with the declarant and the absence of the means to reveal those weaknesses which generally are available with respect to in-court witnesses: "The declarant might be lying; he might have misperceived the events which he relates, he might have faulty memory; his words might be misunderstood or taken out of context by the listener." Hearsay is excluded, the Court noted, because "the ways in which these dangers are minimized for in-court statements—the oath, the witness' awareness of the gravity of the proceedings, the jury’s ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine—are generally absent for things said out-of-court." This conventional Wigmore-Morgan rationale points to diminished trustworthiness, primarily from the lack of opportunity to reveal the declarant's weaknesses through cross-examination. For Wigmore the fundamental reason for exclusion of hearsay is the lack of opportunity to test the reliability of the declarant by cross-examination. Morgan was less enthusiastic but recognized that "there can be no doubt that when properly used, [cross-examination] is a most effective instrument for the discovery of the facts so far as


29. Williamson v. United States, 512 U.S. 594, 598-602 (1994). See also 5 WIGMORE, supra note 26, § 1362, at 7; Park, Hearsay Reform, supra note 9, at 55-56.

30. Williamson, 512 U.S. at 598. Similar considerations are found in the Advisory Committee Note to Federal Rule 801 and in the introductory note to Article VIII.

31. See 5 WIGMORE, supra note 26, § 1362, at 7. Wigmore was convinced that the problem with hearsay stems solely from the lack of opportunity to test reliability by cross-examination of the declarant. See id. See also 28 GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 157-60 (1978); Affirmations of the effectiveness of cross-examination often echo Wigmore's assertion that it is "the greatest legal engine invented for the discovery of truth."
they are within the ability of the witness to disclose." \(^{32}\)

**B. Arguments for Admission of Hearsay**

Despite the general weaknesses of hearsay evidence, it can be convincing, reliable, and powerful evidence which we often use as a basis for important decisions in our personal and professional lives. Indeed, most evidence upon which we rely out-of-court is the equivalent of hearsay, and if we applied the rule outside the courtroom, it would "bring all business to a standstill." \(^{33}\) Certainly, most every-day decisions are not as momentous as those criminal juries are asked to make, and people would prefer first-hand information by credible witnesses when called upon to make decisions of great consequence. \(^{34}\) Yet, we often rely on hearsay in important aspects of our lives when it appears reliable or when first-hand sources are unavailable.

Furthermore, many other forms of evidence routinely submitted to juries also are weak, misleading, or difficult to challenge by cross-examination. Consider the testimony of eye-witnesses that so often has lead to misidentifications and convictions of the innocent \(^{35}\) or the testimony of addicts, paid informants, and others with strong motives to fabricate. \(^{36}\) Weighing and giving proper value to such evidence typically is the function of the factfinder, and we trust the jury to perform this function with regard to numerous forms of potentially

---

32. Edmund Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 254 (1937) [hereinafter Morgan, *Jury and Exclusionary Rules*]. For similar qualified praises of cross-examination, see LEMPERT & SALZBURG, A MODERN APPROACH TO EVIDENCE 352 (1982) (pointing out that while in practice cross-examination rarely destroys a witness, it often leads to qualifications of witness assertions); Mueller, supra note 11, at 391 (stating that while cross-examination cannot make witnesses reliable, it does give the opponent a chance to test and challenge their stories so the jury can evaluate them).


34. See Mueller, supra note 11, at 383.

35. See NAT'L INST. OF JUSTICE, U.S. DEPT. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, ¶ 24 (June 1996) In the majority of the 28 cases studied in which defendants were convicted by juries and incarcerated, but later exonerated by DNA evidence, eye-witness testimony had been the most compelling evidence at trial.

36. See Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1382, 1394 (1996) (observing that criminal informers, particularly jailhouse snitches, are generally manipulative, devious, and would not hesitate to commit perjury or manufacture evidence, such that prosecutors should presume that a jailhouse confession presented by an inmate is false until the contrary is proven beyond a reasonable doubt).
false or misleading evidence. Even when eye-witness identifications are shown to have been produced by unnecessarily suggestive police procedures, the Supreme Court has been "content to rely upon the good sense and judgment of American juries, where evidence with some element of untrustworthiness is customary grist for the jury mill."37

Finally, presence of the declarant at trial is no guarantee that effective cross-examination will be possible with respect to declarant's hearsay statements. In United States v. Owens38 the Supreme Court found no violation of either the Federal Rules of Evidence or the Confrontation Clause by admission of a witness's prior identification statement despite the witness's inability because of memory loss to testify concerning the basis for the identification.39 The Court stated that the requirement of indicia of reliability or "particularized guarantees of trustworthiness" for statements falling outside a traditional hearsay exception does not apply when a declarant is present at trial and subject to unrestricted cross-examination.40 Furthermore, the Court concluded that, despite memory loss, the declarant was "subject to cross-examination" concerning the statement under Rule 801(d)(1)(C), since ordinarily, a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and responds willingly to questions.41 Thus, when a declarant testifies at trial, effectiveness of cross-examination can be severely limited, yet both trial testimony and prior out-of-court statements of the witness often may be admitted.

Why then, should hearsay generally be treated differently from other forms of evidence which are weakened by elements of untrustworthiness? Why not follow the recommendations of those

37. Manson v. Braithwaite, 432 U.S. 98, 116 (1977) (characterizing a pre-trial single photograph identification procedure as both suggestive (only one photo was used) and unnecessary (no emergency or exigent circumstances existed), the Court nonetheless found both the out-of-court and the in-court identifications sufficiently reliable to be considered by the jury on the ground that there was not "a very substantial likelihood of irreparable misidentification").


39. A prison counselor was beaten with metal pipe, suffering skull fracture and severely impaired memory. Id. at 556. During the first few days following the attack the victim was unable to remember the attacker's name, but three weeks later, he named defendant and identified him from a photo display. Id. At the trial, the victim could not recall seeing defendant during the attack, but did remember making the photo identification which was admitted into evidence and led to defendant's conviction. Id.

40. The Court adopted Justice Harlan's position that "a witness's inability to recall either the underlying events that are the subject of the extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence." Id. at 558 (quoting California v. Green, 399 U.S. 149, 188 (1970) (Harlan, J., concurring)).

41. Id. at 561.
who urge courts to admit hearsay and instruct juries to weigh and accord it fair and proper value along with other evidence in the case?"  

C. Explanations for Exclusion of Hearsay

(1) The Jury or the Adversary System?

The conventional and most commonly held explanation for common law rules of evidence, and the rule excluding hearsay in particular, is that they arose from, and now rests upon, the existence of the common law jury. Proponents of this view point to Professor James Thayer's well-known assertion that the English law of evidence is "[t]he child of the jury." This traditional view relies on both historical and functional arguments. Traditionalists contend that, along with other common law exclusionary rules, hearsay restrictions arose with the development of the modern independent jury and that current exclusion of hearsay is justified primarily by the weaknesses of lay, as opposed to professional, factfinding with respect to evaluating second-hand evidence, which suffers from the four declarant-oriented weaknesses.

However, a substantial body of scholarly opinion regards the jury-oriented foundation of evidence law as simplistic and misdirected. Sixty years ago, Professor Edmund Morgan described the "adversary feature" of our system as "quite as distinctive as is its use of a jury" and urged caution in accepting the popular assumption that the jury is the sole or chief cause of our rules of evidence. He contended that "[i]t may be true that non-jury systems have not created a hearsay rule; but that has no compelling significance so long as they have not adopted an adversary theory of litigation." He believed that "[t]he adversary theory of litigation is directly

42. See infra notes 208-209.
43. See H. A. Hammelmann, Hearsay Evidence, A Comparison, 67 LAW. Q. REV. 67, 67 (1951) (The view that the hearsay rule owes its origin and justification to the jury still represents "the dominant opinion of the textbooks."). See also John H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Sources, 96 COLUM. L. REV. 1168, 1172 (1996) [hereinafter Langbein, Ryder Sources] (positing that the essential attribute of the modern law of evidence is the effort to exclude probative but problematic oral testimony, such as hearsay, for fear of the jurors' inability to evaluate the information properly). Damaska points to alleged frailties of amateur fact-finders as "the oldest and most widely accepted justification for distinctive Anglo-American evidence rules." DAMASKA, ADRIFF supra note 24, at 28.
45. Morgan, Jury and Exclusionary Rules, supra note 32, at 248.
46. Id. at 255.
responsible for many [exclusionary rules]; and judicial distrust of the jury for not a few”; however, he characterized Thayer’s dictum that the English law of evidence is “the child of the jury” as “not more than half-truth.”

A number of comparative law scholars also contend that our hearsay rules are not founded exclusively, or even primarily, on the existence of the jury. Rather, they stem from, and now primarily rest upon, procedural and structural aspects of our criminal process, primarily the adversary method and its main characteristic—party control over the pre-trial investigation and presentation of evidence.

(2) Complexity and Process-Based Considerations

Another line of attack on traditional justifications for exclusion of hearsay has been leveled by “hearsay post-modernists” or “new wave” scholars such as Roger Park and Christopher Mueller, who believe that explanations focusing on trustworthiness and cross-examination alone are “too reductionist.” Specifically, they contend that the dangers from admission of hearsay evidence go beyond those that underlie the declarant-oriented rationale and reflect “process-based” concerns and other considerations that are both complex and pragmatic. They brand the untested declarant theory as excessively restrictive for failing to account for other problems posed by hearsay, including the danger of distortion or fabrication by the in-court witness, unfair surprise, making trial preparation more difficult, uncontrolled judicial discretion, and fear of leaving “litigation underdogs” unprotected, particularly criminal defendants facing

47. Id. at 255, 258.
48. Professors Mirjan Damaska and John Langbein argue that the jury and the adversary process are distinct institutions and that the hearsay rule arose with the development of the adversary system, rather than with the independent jury. See infra Part II.F.2.a. Professor Hans Nijboer also believes that exclusionary rules of evidence “cannot be exclusively related to existence of the jury.” J.F Nijboer, Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective, 41 AM. J. COMP. L. 299, 319 (1993).
49. The term “post-modernist” was used by Professor Christopher Mueller. See generally, Mueller, supra note 11.
50. The term was employed by Roger Park. See Park, New Wave Scholarship, supra note 9.
51. Park, Hearsay Reform, supra note 9, at 77; see also Mueller, supra note 11, at 370, 384. But see Glen Weissenberger, Reconstructing the Definition of Hearsay, 57 OHIO ST. L.J. 1525, 1546 (1996) (favoring a declarant-oriented approach to hearsay “because it captures the theory underpinning the system”).
52. Park, Hearsay Reform, supra note 9, at 56 (citing the general opposition to liberalization by practitioners who by definition have first-hand experience with such dangers).
possible abuse of governmental power.\textsuperscript{53} They claim that hearsay rules, especially in criminal cases, are "more than merely misguided efforts to protect jurors from fact-finding failures"\textsuperscript{54} and convey a "deeper message" than mere concern with trustworthiness.\textsuperscript{55} These scholars generally urge moderation in hearsay reform in criminal cases, and in some contexts urge the adoption of more stringent hearsay restrictions.\textsuperscript{56} Similar process-based rationales have been advocated for Constitutional limits on prosecution hearsay based on the Sixth Amendment Confrontation Clause.\textsuperscript{57}

These post-modern, process-based explanations for hearsay and confrontation restrictions point to both jury and to adversary system dangers. Like traditional jury-based justifications, they rely to some extent on the assumption that the lay jury is unable to properly

\textsuperscript{53} See id. at 56-65 (contending that lawmakers were concerned with these problems when drafting the Federal Rules of Evidence); see also Mueller, supra note 11, at 384. See generally Eleanor Swift, \textit{Abolishing the Hearsay Rule}, 75 CAL. L. REV. 495 (1987) (pointing to hearsay justifications in addition to reliability, including the need to prevent parties from swamping their opponents with hearsay, particularly in the form of documentary evidence).

\textsuperscript{54} Park, \textit{New Wave Scholarship}, supra note 9, at 365.

\textsuperscript{55} Mueller, supra note 11, at 391, 394.

\textsuperscript{56} See Park, \textit{Hearsay Reform}, supra note 9, at 108 (arguing that accusatory hearsay should not be admissible if the declarant is available to testify).

\textsuperscript{57} See Margaret A. Berger, \textit{The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecution Restraint Model}, 76 MINN. L. REV. 557, 561 (1992) (advancing a "prosecutorial restraint model," which would restrict government creation of evidence in secret, which "hinders the jury from scrutinizing a process in which jurors should play a role as political participants"); Randolph N. Jonakait, \textit{The Right to Confrontation: Not a Mere Restraint on Government}, 76 MINN. L. REV. 615, 616 (1992) (contending that the Confrontation Clause "operates not as a direct restraint on abusive governmental practices, but as a grant of positive rights to those charged with a crime" and that the Clause was drafted to constitutionalize the adversarial jurisprudence by giving rights to the accused, which acted as a "one check of federal power in a system of checks and balances"); Randolph N. Jonakait, \textit{The Origins of the Confrontation Clause: An Alternative History}, 27 RUTGERS L.J. 77, 81-82, 167 (1995) (contending that the framers of the Constitution were concerned not merely about some specific abuses that happened within a trial, but intended to constitutionalize the basic trial system itself by granting the accused the authority and tools to challenge all the evidence: "The prosecution's case was tested not only when the accused could prevent ex parte affidavits, but when the accused could challenge everything against him."); Roger W. Kirst, \textit{The Procedural Dimension of Confrontation Doctrine}, 66 NEB. L. REV. 485 (1987) (contending that reliability cannot be the sole foundation for hearsay jurisprudence, advocating a "procedural dimension" to confrontation doctrine which takes into account the procedures by which the prosecution gathers evidence, and proposing a confrontation rule that distinguishes between hearsay evidence created in the process of prosecution from other hearsay evidence). See also Eileen A. Scallen, \textit{Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause}, 76 MINN. L. REV. 623 (1992) (pointing to societal dimensions of confrontation, such as influencing witness behavior and venting frustration, which are based on a "physical meeting" between the witness and the accused).
evaluate hearsay evidence. But they also believe that the process by which evidence is gathered and presented diminishes the probative value of hearsay evidence such that on occasion process-based dangers may be so great, and cross-examination so ineffective, that neither judge nor jury can be trusted to properly evaluate hearsay evidence. Thus, it is important to inquire further as to what extent our hearsay rules are justified by the institution of the jury, the operation of our adversary system, or both. But first, a digression to constitutional restrictions on use of hearsay evidence.

D. Constitutional Restrictions on Hearsay Evidence

Although constitutional limits on use of hearsay in criminal cases apply only to the prosecution, they have been closely linked to common law hearsay rules by the Supreme Court and pose significant restraints on hearsay reform. The Court has assumed that the confrontation right and the hearsay rules are “designed to protect similar values,” and although admissibility restrictions of the former generally are less than those of the latter, each stands on similar foundations with respect to the regulation of hearsay in criminal cases; and they, of course, operate together in criminal trials. In light of the close relationship, indeed substantial overlap, between the hearsay rules and confrontation jurisprudence, it is not surprising to find jury, adversary, and process-based concerns the focus of both. Thus, it is best to analyze hearsay and confrontation standards together with such concerns informing both exclusionary foundations.

The Supreme Court has largely constitutionalized the hearsay rule with respect to prosecution evidence through presumptions tied to traditional hearsay exceptions. The Court in Ohio v. Roberts

58. See, e.g., Park, Hearsay Reform, supra note 9, at 60-61 (contending that while jurors may use hearsay intelligently in ordinary life, they are likely to overvalue it and be mislead in a formal criminal trial which is “a formal, ritualized proceeding unlike anything in their ordinary lives”).

59. See Mueller, supra note 11, at 391, 394; Park, Hearsay Reform, supra note 9, at 65, 108.


61. Professor Mueller convincingly argues that reformers should focus on hearsay doctrine with respect to process-based concerns and not leave such concerns to confrontation jurisprudence alone, since it is unlikely that the Supreme Court will provide leadership as it did during the Warren Court era and any new constitutional doctrine likely would offer only limited protections for criminal defendants and would “chill debate . . . at other levels.” Mueller, supra note 11, at 400-02.

62. The Supreme Court has strongly bound the Confrontation Clause to the hearsay rule. See Van Kessel, supra note 15, at 495; see also Friedman, supra note 15, at 725 n.9. Professor Graham Lilly largely supports the Court’s approach, hypothesizing that the
announced a two-pronged standard of necessity and reliability, stating that ordinarily prosecution hearsay is not admissible unless the declarant is unavailable and the hearsay evidence "bears adequate 'indicia of reliability.'"63 Tying the Confrontation Clause to the hearsay rules, the Court found that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."64 In other cases, the statement is inadmissible "absent a showing of particularized guarantees of trustworthiness."65 Later, the Court limited the unavailability requirement to prior testimony66 and explained that where admission of a statement is based on a well-recognized exception to the hearsay rules, no special showing of trustworthiness is required.67 However, statements not falling within a firmly rooted hearsay exception are presumed unreliable and are inadmissible unless marked with such trustworthiness that "there is no material departure from the reason of the general rule."68

Thus, the two-pronged test of Ohio v. Roberts has been reduced in most cases to a single reliability test by the Court's limitation of the unavailability requirement to statements in prior judicial proceedings. Other considerations, such as the interest of the defendant and of society in providing a forum in which the accused personally may face his or her accusers, have been downplayed with respect to the admission of hearsay. The Court has rejected the argument that the face-to-face confrontation right applicable to testifying witnesses also applies in the hearsay context, requiring a showing of a hearsay declarant's unavailability.69 That right, the Court concluded, does not apply to the admission of hearsay, but

Clause may have been meant to incorporate contemporaneous common law doctrine, including the rule barring hearsay statements of available declarants. See Lilly, Notes on the Confrontation Clause and Ohio v. Roberts, 36 U. FLA. L. REV. 207, 210-12 (1984).

63. Roberts, 448 U.S. at 63.
64. Id. at 66.
65. Id. The Court later demanded that such "particularized guarantees of trustworthiness" must be demonstrated only from circumstances surrounding the making of the statement that render the declarant particularly worthy of belief and do not include other evidence which corroborate the trustworthiness of the statement. See Idaho v. Wright, 497 U.S. 805, 819 (1990).
67. See Bourjaily v. United States, 483 U.S. 171 (1987). In White v. Illinois, 502 U.S. at 357, the Court restated the connection of the Confrontation Clause and the hearsay rule, announcing that a statement that qualifies for admission under a "firmly rooted hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability."
68. Roberts, 448 U.S. at 65.
69. See White, 502 U.S. at 357
only to procedures required once a witness is testifying. Since the Court has keyed its single reliability standard to traditional hearsay exceptions, the rationale of the Confrontation Clause now largely depends on the foundations of the hearsay rule. It is to those foundations which I now turn, inquiring whether the hearsay rule rests on the jury, the adversary system, or on other more complex factors, and to what extent such foundations justify the exclusion of hearsay in our criminal trials.

E. Functional and Analytical Arguments

(1) Jury Deception as a Rationale for Hearsay Exclusion

The traditional justification for the hearsay rule rests on distrust of lay factfinders, as opposed to professional judges, and on "the belief that jurors lack the competence to make allowance for the second-hand character of hearsay." This view points to the absence of the jury as the main reason for the lack of exclusionary rules on the Continent. In the famous Berkeley Peerage Case, Lord Mansfield contrasted Continental judge trials with English jury trials:

[Where Continental judges determine the facts as well as the law,] they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds.

The evidence scholar Starkie contended that in view of the absence of the oath and opportunity for cross-examination, juries, unskilled in weighing evidence, would lack the sound judgment necessary to avoid placing undue reliance upon hearsay and its admission would burden the court by opening up collateral issues such as the character and means of knowledge of the declarant.

---

70. See id. at 358.
71. J. FRANK, COURTS ON TRIAL 123 (1949). See also DAMASKA, ADRIFT, supra note 24, at 31 (citing the conventional justification for the hearsay rule as the perceived danger that amateur fact-finders might overvalue second-hand information); Langbein, Ryder Sources, supra note 43, at 1194 (arguing that the driving force and "primary mission of our law of evidence" was and is now "to guard against the inherent weaknesses of the jury trial").
74. See 1 STARKIE, EVIDENCE 33-46 (1st American ed. 1824). See also Jon Waltz, Judicial Discretion in the Admission of Evidence Under the FRE, 79 NW. U. L. REV. 1097.
However, Bentham strongly objected to Mansfield's and Starkie's view that while judges may be trusted to evaluate hearsay, it is unsafe to trust the juries to do so.\textsuperscript{75} He proposed to admit the evidence whenever the declarant is unavailable and then, if in a particular case deception is apparent from the facts and the verdict, apply the remedy of granting a new trial which he described as "safe and gentle as it is infallible."\textsuperscript{76}

A number of contemporary scholars point to the lack of empirical support for the assumption that juries overvalue hearsay.\textsuperscript{77} In fact, studies have found that juries in fact do discount for the weaknesses of hearsay evidence, often excessively so.\textsuperscript{78} Furthermore, even if juries often misevaluate hearsay evidence, how do we know that the likelihood of overvaluation is any greater than the likelihood

\textsuperscript{75} He described the assumption that "if the jury were suffered to hear the evidence, they would be sure to be deceived by it" as "rash suspicion." 3 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 539 (J.S. Mill ed. 1827); see also Chadbourn, supra note 17, at 938.

\textsuperscript{76} 3 BENTHAM, supra note 75, at 539.

\textsuperscript{77} See, e.g., Mueller, supra note 11, at 378 (asserting that the assumption that juries cannot properly appraise remote statements is "largely unsupported by empirical evidence"). Roger Park regards the principle that juries cannot be trusted to properly evaluate hearsay as assumed despite the lack of empirical data: "My own review of the literature has failed to reveal any direct study of jury overvaluation of hearsay." Park, Hearsay Reform, supra note 9, at 59 n.33.

\textsuperscript{78} Empirical evidence suggests that jurors are more skeptical of the value and reliability of hearsay testimony than of eyewitness testimony. See Margaret Bull Kovera et al., Jurors' Perceptions of Eyewitness and Hearsay Evidence, 76 MINN. L. REV. 703, 706, 719 (1992). In this study, jurors were able to differentiate among accurate and inaccurate hearsay witnesses, while jurors in this and other studies failed to make similar distinctions between the testimony of eyewitnesses. See id.

Studies of mock juror decision-making processes suggest that jurors value eyewitness testimony over hearsay testimony. See Peter Miene et al., Juror Decision-Making and the Evaluation of Hearsay Evidence, 76 MINN. L. REV. 683, 693, 698 (1992). The subjects in the study rated eyewitness testimony as significantly more important and more reliable than hearsay testimony. See id. Most jurors believed hearsay evidence was potentially unreliable and difficult to evaluate and did not report using hearsay in their decision making process. See id.

Empirical evidence suggests that jurors are not unduly swayed by hearsay testimony, nor do they perceive that it undermines the integrity of the trial process. See Richard J. Rakos and Stephen Landsman, Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions, 76 MINN. L. REV. 653, 658-64 (1992). Jurors viewed specific hearsay testimony as no more important, and perhaps less important, than most of the other evidence. See id. The study concludes that jurors may be competent to weigh hearsay appropriately and admission of hearsay evidence should not be regarded "as an automatic blot on the fairness of proceedings." Id. See also Swift, supra note 53, at 496 (reporting that Kalven and Zeisel in their study of the jury concluded that most often jurors understand the case and follow the evidence and that mistrust of the jury is largely unjustified).
of undervaluation? Even if it is, how do we know that the amount of overvaluation is so great that it is better to do without the evidence than to hear it? In many cases, any assessment error overvaluing hearsay might well be minor in comparison to its evidentiary value.

Finally, some suggest that contemporary jurors are better educated and more sophisticated, and therefore less likely than earlier juries to be mislead or unduly impressed by hearsay evidence. However, it is difficult to identify distinctions between modern and Eighteenth Century juries, much less to know what to make of them. Certainly, contemporary jurors have more formal education than jurors of Eighteenth Century England, but does this lead to a greater capacity to evaluate hearsay evidence? One could argue that when the hearsay rules were developing in England, jurors had more experience in evaluating evidence since typically the same jurors heard numerous cases over weeks or months, unlike the present situation where usually a juror hears one case and is dismissed. Also, while contemporary Americans are engulfed by the “gross hearsay” of television, the public's general distrust of government and the media suggests that citizens will not leave their skepticism toward public officials at home when called to serve as jurors, particularly with respect to second-hand information from

79. Richard Friedman believes that at times juries may “over-discount” hearsay by, for example, according excessive weight to a party's failure to produce an unavailable declarant. Friedman, supra note 15, at 739-40.

80. The danger of slight overvaluation of hearsay would be most significant in those cases in which the evidence as a whole is so finely balanced that the overvaluation tips the scales toward an erroneous conviction or acquittal. However, this danger can be reduced by devices such as jury admonitions and corroboration requirements discussed infra Part IV.

81. See Hammelmann, supra note 43, at 68 (positing that jurors are no longer what they were and now bring to their task wide business experience and a far higher general standard of education); Waltz, supra note 74, at 1097 (noting that the historical rationale underlying the common law exclusionary rules was the assumption that jurors in a less sophisticated time were ill-equipped accurately to assess the relevance and reliability of some classes of evidentiary material and might assign substantial weight to some forms of evidence without pausing to focus on their questionable trustworthiness and the ready availability of stronger, or at least more thoroughly tested, proofs) (emphasis added); Jack Weinstein, Alternatives to the Present Hearsay Rules, 44 F.R.D. 375. 377 (“The jury system no longer presents an insuperable objection.... Jurors are increasingly well-educated and capable, under some guidance from the court, of assessing probative force.”). See also Franklin Strier, Making Jury Trials More Truthful, 30 U.C. DAVIS L. REV. 95, 110-11, 165 (1996) (Distrust of modern juries is anachronistic since present-day jurors are far more educated and sophisticated than their predecessors. When the evidence rules were solidified in the U.S., the number of students graduating from high school was less than 2%, whereas, a century later, the number had increased 35-fold. Since presumed juror incompetence regarding hearsay defies empirical verification, the hearsay exclusion should be eliminated or modified.).

82. See Langbein, Ryder Sources, supra note 43, at 1189.
government sources.

(2) Jury Performance of Other Difficult Tasks

Other tasks which we allocate to the jury demonstrate confidence in jury performance and suggest that distrust of the jury is not the sole, or even the primary, rationale for exclusion of hearsay evidence.

(a) Judging Expert Testimony

We ask the jury to judge the weight and credibility of expert testimony, yet in this task jurors generally are less competent than when evaluating lay testimony. As Professor Gross has pointed out, in most cases where experts testify, they are challenged by experts for the opposition, and juries are called upon to judge credibility and resolve conflicts. Yet juries tend to use criteria which they apply to lay witnesses and which may be misleading when applied to experts—that the expert who appears confident and testifies with certainty is more worthy of belief than the one who is more cautious and less definitive, though the latter may be more reliable. Their strong suit—ability to evaluate witness bias—is less helpful in the case of experts since bias often is discounted in light of the fact that experts are hired by the parties.

(b) Evidence Evaluations

We currently ask the jury to perform magnificent feats of mental manipulation in the evaluation of evidence. When an item of evidence has a prejudicial effect as to one issue, but a legitimate value as to another, such as the case with prior conviction impeachment and use of character evidence, courts generally assume that the jury "has the ability to perform the psychological feat of disregarding the item entirely upon the first issue and of confining its influence to the second issue." Even in Confrontation Clause

84. See DAMASKA, ADrift, supra note 24, at 146 (contending that since experts are chosen to be convincing, ordinary clues to credibility can be misleading).
85. Morgan, supra note 32, at 257. However, the framers of the Federal Rules of Evidence recognized the inability of jurors to follow limiting instructions in some contexts. The Rules provide that statements made to a physician for the purpose of medical diagnosis are admissible as substantive evidence along with the opinion of the physician. See FED. R. EVID. 803(4). The Advisory Committee rejected limiting their use to evaluation of the expert's opinion on the ground that "the distinction...[is] one most unlikely to be made by juries." FED. R. EVID. 803(4) advisory committee note. The Rules take a similar approach with respect to prior consistent statements. See FED. R. EVID. 801(d)(1)(B) advisory committee note.
jurisprudence, the Supreme Court has relied on “the almost invariable assumption” that jurors will follow limiting instructions.\(^8\) As long as a co-defendant’s confession is not “facially incriminating,” the Court assumes that the jury will be able to follow the limiting instructions and not consider any indirect or inferential references to the accused.\(^7\)

Yet when we expose jurors to inadmissible evidence, or evidence admissible only for a limited purpose, and tell them to disregard the evidence entirely or to disregard it for the most apparent and tempting purpose, we ask them to perform the near-impossible task of erasing a mental imprint of relevant and cogent fact. One study found that 98% of criminal defense lawyers and 43% of trial judges believed that jurors were incapable of distinguishing between use of prior bad act evidence, including criminal convictions, for a limited purpose such as impeachment, and use to prove guilt.\(^8\)

While we generally assume that professionals are better able than lay jurors to perform the mental separation task,\(^8\) there is little empirical support for this theory. Studies indicate that judges are no more able than lay juries to avoid over-evaluation of character evidence.\(^9\) Damaska believes the lay jury protection argument “no longer carries much weight” in light of complex instructions on non-use of hearsay which even professional judges would be hard put to follow\(^9\) and points to “the apparent difficulty for any person—lay or professional—to ‘unbite’ the apple of knowledge.”\(^92\)

---

\(^8\) See Richardson v. Marsh, 481 U.S. 200, 207 (1987). See also id. at 209 (holding that the Clause does not bar admission of a co-defendant’s confession which has been edited to remove references to the non-confessing defendant, though the confession incriminates the defendant inferentially by linkage with other evidence).

\(^7\) The Court’s assumption that limiting instructions would be successful was based on the belief that “inferential incrimination” is not as powerful as direct reference to defendant. Id. at 208. However, in Gray v. Maryland, 117 S. Ct. 2452 (1997), the Court held that editing a non-testifying co-defendant’s confession by replacing inculpatory references to a jointly tried co-defendant with a blank space or “deleted,” as in Richardson, invited the jury to “merely fill in the blanks” and violates the defendant’s Sixth Amendment confrontation right.


\(^9\) We point to this assumption as a basis for relaxing appellate review of evidentiary rulings in bench trials.


\(^91\) Damaska, Of Hearsay, supra note 1, at 457.

(c) Evaluation of Weak Hearsay Admitted Under Existing Rules

Many hearsay statements admitted under current exceptions are no less weakened by traditional hearsay dangers than those which we exclude, and many assumptions used to justify our hearsay exceptions are unsupported by empirical proof. For example, a number of scholars have agreed that the premise underlying the excited utterance exception—that people are more likely to speak accurately when under stress of a startling event—is not supported by empirical experiments or common sense. While excitement might diminish one’s capacity to fabricate, excitement wears off quickly and is accompanied by stress which increases inaccuracies in perception. Likewise, the assumption underlying the declaration against interest exception—that a declarant would not likely make a statement against his own interest unless he believed it to be true—has not been subjected to exacting empirical scrutiny. The dying declaration exception has been described as an example of courts putting aside traditional concerns with hearsay dangers and placing reception “frankly upon the ground that the evidence is needed and hearsay is better than no evidence.”

93. Bentham argued that the multitude of existing exceptions testified to the safety of the broad principle of admissibility which he recommends. He contended that evidence “equally weak” is now admitted under existing exceptions “without objection or complaint, to an extent, the magnitude of which affords a conclusive proof of a safety with which this sort of liberty may be allowed.” 3 BENTHAM, supra note 75, at 541. Morgan contended that “[i]f the courts would recognize that much of the evidence which they now admit as non-hearsay is, analytically, within the hearsay concept, they might be persuaded to admit other evidence which, though customarily denominated hearsay, in fact raises the hearsay dangers to no greater extent than evidence now admitted under the hearsay exceptions.” Morgan, Hearsay Dangers, supra note 28, at 219.

94. See, e.g., Robert M. Hutchins & Donald Slesinger, Some Observations on the Law of Evidence, 28 COLUM. L. REV. 432, 436-39 (1928); Park, Hearsay Reform, supra note 9, at 75 (stating that “the better view seems to be that excited utterances are less reliable than unexcited ones”); Michael L. Seigel, Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule, 72 B.U. L. REV. 893 (1992) (contending that the assumption that excited utterances are more reliable than ordinary hearsay statements is ‘faulty on every score’). I. Daniel Stewart, Jr., Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 UTAH L. REV. 1, 28 (contending that the hypothesis underlying the excited utterance exception is “faulty on every score”).

95. See Hutchins & Slesinger, supra note 94, at 436-37.


97. Morgan, Jury and Exclusionary Rules, supra note 32, at 256. See also Charles W. Quick, Some Reflections on Dying Declarations, 6 HOW. L.J. 109, 110-20 (1960) (finding that the exception for dying declarations is “shot full of inconsistencies and illogicalities”).
Even if professionals generally are no better than lay people in evidence evaluation and factfinding, are they better in the artificial context of the criminal trial where they may be more aware of the dangers of evidence manipulation by lawyers? Does the adversary nature of evidence gathering and presentation undermine lay more than professional ability to properly evaluate hearsay evidence? Roger Park believes that while jurors may use hearsay intelligently in ordinary life, they are likely to overvalue it and be mislead in a formal criminal trial which "is not ordinary life," but "a formal, ritualized proceeding unlike anything in their ordinary affairs."

Certainly, the job of weighing a hearsay statement against testimony that has been subject to courtroom cross-examination "is, obviously, unnecessary in ordinary life." However, in the numerous cases in which hearsay is admitted under an exception, jurors currently have the task of evaluating out-of-court statements that have not been subjected to cross-examination against in-court cross-examined testimony. Also, ordinary life is filled with occasions for evaluating hearsay accounts of non-percipients against statements of those who have personally perceived the events and can be questioned by the evaluator. Park's strongest argument, however, rests on jurors' lack of appreciation of the weaknesses of our adversary system. He contends that non-lawyers lack an understanding of "institutional practices" necessary for the proper evaluation of hearsay, such as "ways in which professional statement-takers, with an eye to litigation, can twist and distort without actually lying" or how attorneys can prepare misleading affidavits and "sandpaper" statements of declarants.

These are serious concerns, but they apply mainly to officially-prepared statements, such as those taken by police officers or investigators, as opposed to diary entries or statements to friends or neighbors. Also, since jurors are highly skeptical of witnesses who are party-paid and produced for litigation such as informers and accomplices, they most likely would be even more suspicious of hearsay statements from such persons. Furthermore, the best response to the problem would be to

---

98. Park, Hearsay Reform, supra note 9, at 60-61.
99. Id. at 61. See also Mueller, supra note 11, at 383 (observing that in ordinary life people rarely are called upon to decide important matters "based on facts presented by advocates in a confined time and unfamiliar setting").
100. Park, Hearsay Reform, supra note 9, at 61.
101. Id. at 61 n.40.
102. See Trott, supra note 36, at 1385 (observing that "[o]rdinary, decent people are predisposed to dislike, distrust, and frequently despise criminals who 'sell out' and become prosecution witnesses," and that jurors "frequently disregard their testimony altogether as highly untrustworthy").
“sandpaper” the excesses of our adversary lawyering or at least to educate jurors with respect to these problems by judicial comment or cautionary instructions such that jurors would be in a better position to evaluate party-prepared evidence.\textsuperscript{103}

\textbf{(4) Application of the Hearsay Rule to Nonjury Trials}

Finally, if jury overvaluation or other misuse of hearsay is the principal justification for its exclusion, one would assume that hearsay generally would be admitted in all nonjury trials. As Professor Morgan argued, “[i]f the hearsay rule were intimately connected with the jury, there would little reason to apply the rule in bench trials.”\textsuperscript{104} However, hearsay routinely is excluded in bench trials in criminal cases,\textsuperscript{105} and as will be seen, adversary and other procedural aspects of our criminal process justify continued application of the hearsay rule in nonjury trials.

\textbf{(5) Summary}

The traditional view that points to the existence of the jury as the primary justification for hearsay rules rests on the unproven and mistaken assumption that people untrained in the law tend to overvalue hearsay evidence more than professional judges. But exclusion of hearsay evidence, particularly when not party-created for litigation purposes, cannot be justified on the ground of distrust of lay, as opposed to professional, factfinding in view of the application of hearsay rules to bench trials and the extensive trust which we place in juries in allowing them to consider numerous forms of hearsay and non-hearsay evidence, the reliability of which often is more questionable than many statements currently excluded as hearsay. Furthermore, the traditional jury-oriented view which assumes greater ability of professional judges to properly evaluate hearsay conflicts with how practicing lawyers view judges and juries. Consider a case in which the prosecution is based primarily on hearsay evidence, such as an excited utterance, a dying declaration, or a statement of an accomplice admitted under a catch-all exception. Would a defense attorney have such confidence in a judge’s ability to

\textsuperscript{103} Dale Nance questions why being exposed to admittedly probative hearsay should lead to greater inaccuracy, “especially when the information carries on its face a consumer warning, as it were, by virtue of its derivative status.” Dale A. Nance, \textit{Commentary: A Response to Professor Damaska; Understanding Responses to Hearsay: An Extension of the Comparative Analysis}, 76 MINN. L. REV. 459, 463 (1992).

\textsuperscript{104} Morgan, \textit{Jury and Exclusionary Rules}, supra note 32, at 254.

\textsuperscript{105} Morgan noted that “denial of the right to cross-examine is equally fatal in a case tried without a jury, whether it be one in which the jury is waived or one in which there is no right to trial by jury.” \textit{Id.}
give appropriate weight to the hearsay evidence, and such fear that jurors might overvalue it, that the attorney would advise waiving the right to jury trial? Admittedly the attorney would consider a number of factors, not the least of which would be the general perception that judges usually are more case-hardened and conviction-prone than juries, but I doubt that a practicing lawyer would give much weight to the view that because the principal prosecution evidence is hearsay, it would be given less value by a judge than by a jury.\textsuperscript{106}

\section*{F. The Adversary System and the Importance of Cross-Examination}

An alternative explanation for the hearsay rule in Anglo-American criminal trials points to our adversary system of justice and to the importance of cross-examination. Morgan's conclusion that the hearsay rule is the product of the adversary system of litigation, rests on the importance he places on cross-examination: Since the right to cross-examine "is an essential element of an adversary system"\textsuperscript{107} and preservation of the right of cross-examination is the main purpose of the hearsay rule, the hearsay rule must be a necessary aspect of the adversary method of adjudication.\textsuperscript{108} But why is cross-examination so crucial in an adversary system? Considerations of fairness and reliability both support the proposition that when the parties dominate proof-taking, there is a greater need for cross-examination.

In a system based on a contest between partisan warriors, fairness demands a certain balance—that each side be able to test the opponent's evidence—which is not possible with respect to statements of declarants shielded from cross-examination. This argument is strongest when parties are able to create hearsay evidence and choose it over more immediate and reliable forms of evidence, as for example, substituting statements of victims or

\textsuperscript{106} Criminal defense attorneys believe that in most cases, a waiver of jury trial amounts to a slow plea of guilty, and often assume that the increased likelihood of juries to acquit stems from their greater tendency to discount prosecution evidence. There is no reason to believe that this discounting would not apply also to prosecution hearsay, particularly when today's jurors are accustomed to expect live witness testimony and defense lawyers would pounce on the opportunity to point out the dangers inherent in untested, out-of-court statements.

\textsuperscript{107} Morgan, \textit{Jury and Exclusionary Rules}, supra note 32, at 255 (contending that the right of a party to cross-examine "is an essential element of an adversary system; it is not a necessary concomitant of trial by jury").

\textsuperscript{108} Hammelmann takes a similar view, contending that the aspect of the adversary system most responsible for the hearsay rule and "the key to the different attitude which Continental courts have adopted toward hearsay" is the importance which the adversary system places on party cross-examination of the declarant. Hammelmann, \textit{supra} note 43, at 79-80.
accomplices for their courtroom testimony. However, the fairness argument underlying the cross-examination right is weakest with respect to nonadversary-produced statements of unavailable declarants, for example, a statement to a bystander by a homicide victim. The proponent did not create the evidence, but took it as found. Why does a fair fight demand exclusion for lack of cross-examination when, through no fault of either party, it is not possible to produce better evidence in the form of the declarant and when the opponent may have other means of attacking declarant’s credibility? In such case, fairness considerations must rest primarily on reliability problems associated with evidence produced and presented by party advocates. Reliability concerns also are most serious with respect to adversary-created evidence. Evidence which has been created or manipulated by advocates comes to court tainted with partisan poison which must be purified by the fire of cross-examination. In such case, cross-examination can be seen as “the essential guarantee of reliability.”

(1) Particular Weaknesses of Hearsay Evidence

Hearsay by its nature as second-hand evidence of factual assertions is particularly susceptible to creation and manipulation in the context of party-controlled factfinding. Uncurbed admission of hearsay poses concerns beyond the four weaknesses embraced within the conventional untested declarant theory which become more serious in the context of contentious partisan evidence gathering and presentation.

(a) Hearsay as Easily Creatable Evidence

Hearsay evidence is easy to create, and unless party-power to generate admissible hearsay is controlled, admission of party-produced hearsay easily could shift the focus of the trial to pre-trial statements and lead to paper trials similar to Continental trials during the ancien regime.

With the exception of expert witnesses and demonstrative evidence, most admissible physical and testimonial evidence is “taken as found” rather than created for use at trial. While parties may prepare witnesses and seek to shape their testimony, they must, as prosecutors who present unsavory informants often put it, “take witnesses as we find them.” Hearsay, on the other hand, easily can be created by the parties through unregulated witness interviews. Except in limited contexts such as police-conducted, post-accusation eye-witness identifications and in-custody interrogations of suspects,
the Supreme Court has not imposed even minimal Constitutional protections governing the creation of witness statements, whether by the prosecution or the defense. Consequently, control over party production and presentation of hearsay primarily rests on hearsay and other rules of evidence.

(b) Witness-Oriented Dangers

In addition, hearsay, by its character as verbal rather than visual information, can be more easily fabricated by the in-court witness conveying it and is less vulnerable to attack by cross-examination. Despite the opportunity to cross-examine the witness testifying to out-of-court statements, witness-oriented concerns remain from the fact the testimony relates verbal, rather than visual information. It is an old insight of judges and scholars that an in-court witness more easily may lie about a verbal than a visual event and that cross-examination is less effective in revealing falsehoods when an in-court witness is willing to distort, fabricate, or otherwise inaccurately report an out-of-court statement. One who desires to fabricate a hearsay statement often would be free to choose place and time when no one was present but the witness and supposed declarant, such that it would be difficult to show the statement was never made, especially if the declarant was no longer available. On the other hand, as Damaska notes, fabrication of seeing something “must be woven into the fabric of a coherent story, making the exposure of falsehood somewhat easier.” Furthermore, there is reason to believe that memory of verbal events is not recorded and maintained as accurately as memory of visual experiences. Such witness-oriented

110. This duality of hearsay weaknesses was pointed out by the Federal Rules of Evidence Advisory Committee with respect to statements against penal interest. The Committee noted in the decisions “a distrust of evidence of confessions of 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 . . . .” Fed. R. Evid. 804(b)(3) advisory committee’s note (emphasis added).

111. See DAMASKA, ADrift, supra, note 24, at 80 (citing as an early reference to this point, Jeffrey Gilbert, The Law of Evidence 2: 14, at 890 (Dublin, 1795). In Coleman v. Southwick, 9 Johns. 45, 50 (N.Y. Sup. Ct. 1812), Chief Justice Kent explained, “A person who relates a hearsay statement is not obligated 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 entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.” See also Park, Hearsay Reform, supra note 9, at 56-62 (warning of the danger that the witness might distort or manufacture declarant’s statements and that in many situations cross-examination would be ineffective in uncovering such false testimony).

112. DAMASKA, ADrift, supra note 24, at 80.

113. See Park, Hearsay Reform, supra note 9, at 57, and authorities cited in nn.28 & 29. Park also asserts that “[s]ignificant statements are often directed at just one person.
concerns can be seen in the Federal Rules which more readily admit hearsay which has been recorded or is unlikely to be fabricated by the in-court witness.\textsuperscript{115}

Thus, free admission of hearsay is most dangerous in the context of party-controlled factfinding. Hearsay by its nature is particularly susceptible to being manufactured or tainted by the parties or their attorneys and particularly difficult to attack at trial. Both declarant-oriented and witness-oriented dangers are exacerbated in an adversary system of adjudication. Fairness and reliability concerns therefore closely link hearsay rules to the core of the adversary system of adjudication—party control over production and presentation of evidence.\textsuperscript{116}

(2) Partisan Control over Proof-Taking

Partisan evidence gathering and presentation aggravates both declarant-oriented and witness-oriented hearsay weaknesses, with sincerity problems most susceptible to party manipulation. The extent of such increased hearsay dangers turns on the degree to which significant events are often observed by many." Id. at 57 n.30. But the difference more likely lies in the fact that testimony of non-verbal events is more easily corroborated by physical evidence, and therefore less susceptible to undetected fabrication, than testimony of out-of-court statements. For example, an informant's testimony that he observed drugs or guns in defendant's home is more easily corroborated (as by the later seizure of those items) than the informant's testimony that defendant admitted to dealing drugs.

In addition, Park points to the limited effectiveness of cross-examination in detecting fabrication, citing Morgan and other scholars who contend that cross-examination's principal utility is in exposing faults in memory and perception, and that it is less effective in revealing insincerity or language ambiguities. See Park, Hearsay Reform, supra note 9, at 61 (contending that exposure of willful falsehood by cross-examination is "very rarely demonstrated"); see also Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 STAN. L. REV. 682, 690-91 (1962). However, this argument seems less substantial since testimony of informers, accomplices and other bias-contaminated witnesses routinely is admitted despite serious sincerity problems.

114. See FED. R. EVID. 801(d)(1)(A) and the numerous exceptions listed in Park, Hearsay Reform, supra note 9, at 71 n.79.

115. Recent decisions expanding the exception for statements made for the purpose of medical diagnosis or treatment may rest, in part, on the belief that doctors and other professionals are unlikely to fabricate statements of their patients and likely to make some record of them.

116. Of course, dangers presented by the ease of creation and fabrication do not apply to all hearsay. For example, dangers associated with witness fabrication of out-of-court statements generally are diminished with respect to statements that are written, recorded, or otherwise reliably confirmed as made by declarant, such as statements made in judicial proceedings. See FED. R. EVID. 801(d)(1)(A). Yet firm proof that the statement was made by declarant, while dispelling witness-oriented dangers, should not necessarily lead to its admission if serious adversary dangers remain, as for example in the case of a tape recorded statement of an informant or the grand jury testimony of an accomplice.
which parties are permitted to prepare witnesses or otherwise shape their evidence, the powers at their disposal to do so, and the incentive of parties to select and present hearsay over more reliable first-hand information. Such dangers vary considerably between the different legal systems, but are greatest in America where lawyers are given free rein to shape evidence and manage its presentation and are highly motivated and aggressive in the pursuit of courtroom victory.\textsuperscript{117}

(a) Evidence Contamination

\textit{Party preparation of testifying witnesses}

The danger of party tainting of witness statements and testimony varies among different common law systems according to whether they are permitted to coach or otherwise prepare witnesses. The danger is greatest where the parties and their lawyers and agents are largely unrestricted in procuring and preparing witnesses—as in the United States—and less where they are limited by ethical or legal restrictions—as on the Continent and to a lesser degree in England.\textsuperscript{118}

Continental practices are founded on the notion that evidence should be presented to the court in as near to its original form as possible,\textsuperscript{119} such that witnesses are encouraged to testify initially in narrative, and the "shaping" of their testimony, either in the form of pre-trial preparation or direct examination at trial, is severely restricted.\textsuperscript{120} Also, in Continental systems evidence processing is more neutral than in adversary systems where investigation and evidence presentation is partisan and contentious. In Germany, for

---

\textsuperscript{117} Damaska detects "a few signs" that party mastery over factfinding in criminal cases may be weakening. \textit{See} DAMASKA, ADrift, \textit{supra} note 24, at 138. But to this author, the trend over the last few decades, at least up to the O.J. Simpson trial, has been in the direction of greater party dominance in American criminal trials. \textit{See generally} Van Kessel, \textit{supra} note 15, at 425-65.

\textsuperscript{118} In England, the standard American practice in preparing witnesses is considered unethical. Except for parties or experts, "gingering up the witness" by counsel is looked upon with great disfavor in England. While the solicitor may interview and prepare the witness, a barrister may not. Thus, if the witness is called, "his appearance in the witness box will be essentially unrehearsed." C.P. Harvey, \textit{The Advocate's Devil} 66 (1958). The Code of Conduct for barristers provides: "Generally, a barrister should not discuss a case or the evidence in a case with any potential witness other than the lay client, a character witness or an expert witness... A barrister should not rehearse, practice or coach any witness, in relation either to the evidence itself or to the way in which to give it." \textit{The General Standards, Code of Conduct of the Bar of England and Wales}, ¶ 6.1 (1990).


example, prosecutor and defense attorney contacts with and preparation of witnesses are restricted, and the shaping of a witness' testimony either by the prosecution or the defense is improper.\textsuperscript{121}

In America, on the other hand, both the prosecution and the defense actively engage in shaping witness testimony. As Professor Pizzi has pointed out, in this country, a crime victim's testimony has to be shaped so that it comports with our rules of evidence and the goals of the advocates, such that "the United States lies at one extreme in the way that lawyers are free to manipulate evidence for presentation at trial."\textsuperscript{122} With each side preparing and calling its own witnesses, evidence often seems tainted by the partiality of the attorneys. As Damaska puts it, in this "bipolar procedural environment," the concern that testimony is distorted is greatly exacerbated.\textsuperscript{123}

\textit{Party threats or inducements}

Another important factor is the extent to which parties are able to pressure witnesses to make statements or to testify. In America, government informants and turncoats often are threatened with prosecution and promised relief from substantial prison terms or property forfeitures if they agree to testify against others. While we admit and allow the jury to weigh the testimony of such witnesses, cross-examination is particularly important with respect to witnesses whose credibility is highly suspect.

\textsuperscript{121} See id. at 43. It is not the function of the prosecutor or the lawyers for the defense to seek out and interview witnesses prior to trial. If the defendant or victim know of other relevant witnesses, their attorney will bring the names of such witnesses to the attention of the prosecutor who will then have the witnesses interviewed by the police and the interview will be made part of the case file. See id. at 58-59. See also W. Zeidler, \textit{Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure}, 55 AUSTL. L.J. 390, 396 (1981) (stating that due to the leading role played by the judge in deciding the nature of the evidence presented, "lawyers are generally not allowed to examine the witnesses privately before this is done by the court").

\textsuperscript{122} Pizzi & Perron, \textit{supra} note 120, at 44. See also Michael Higgins, \textit{Fine Line}, A.B.A.J. 51, 53 (May, 1998) (discussing the "uncomfortable truth" about the American legal system: that coaxing or helping a witness to lie is a common, yet rarely revealed or punished, practice of both prosecutors and defense attorneys).

\textsuperscript{123} Damaska, \textit{Of Hearsay, supra} note 1, at 431 (contrasting Continental systems where neutral and official fact-finding activity diminishes the specter of unreliability and the threat of one-sided testimonial distortions). See also Moskovitz, \textit{The O.J. Inquisition: A United States Encounter with Continental Criminal Justice}, 28 VAND. J. TRANSNAT'L L. 1121 (1995) (certain features inherent in the Continental tradition assure that the fact-finder will be presented with reliable, non-partisan evidence and will properly weight the evidence in a way as to lessen the need for cross-examination and other traditional adversary safeguards).
Officially-created hearsay has long been distrusted both in England and on the Continent, and its use is most dangerous when the official is a partisan prosecutor motivated to seek a conviction and empowered to exert tremendous pressures on potential witnesses. Such cases raise both fairness and reliability concerns.

Concerns relating to balance and fairness recently have been voiced by post-modernists who point to possible abuse of governmental power as a justification for excluding hearsay in criminal cases. Free admission of hearsay, they contend, would unfairly benefit the government to the detriment of criminal defendants, who in most cases are the “litigation underdogs.” The prosecution generally calls more witnesses and relies on hearsay more often than criminal defendants, and police and prosecutors ordinarily have greater powers to coerce witnesses and distort statements, as well as greater powers both to obtain the presence of witnesses on their behalf and to dissuade witnesses from appearing on defendant’s behalf. The disparity between government and defense power to obtain and shape witness testimony is common knowledge among criminal law practitioners. Defense attorneys often complain that prosecutors and other law enforcement officials in preparing their witnesses use suggestive techniques to mold or strengthen their testimony. In the Oklahoma City bombing case, Michael Tigar, the lead attorney for defendant Terry Nichols, complained that “the government has a room at the Marriott Hotel in which witnesses are transmogrified. I wish I had a room in where I could do that to people.”

Confrontation and hearsay rules are particularly important in controlling prosecutorial overreaching in the creation and production of testimonial evidence from informers and accomplices. Officially-

124. Even in non-adversary systems one finds a distrust of officially-produced hearsay. The history of Continental limits on hearsay evidence supports the view that the greatest skepticism should be directed toward officially-produced witness statements and their use in criminal cases should be carefully limited. The first Continental restrictions on the most egregious use of hearsay evidence, known as “immediacy in the formal sense,” grew out of resentment over trials based on official dossiers compiled by investigating judges. Damaska, Of Hearsay, supra note 1, at 446-47. Modern Continental restrictions of secondary evidence are directed primarily against the substitution of officially-compiled written hearsay for in-court testimony of available witnesses. For example, the German immediacy principle is limited to official documents and “aimed at preventing ‘official’ mediation between the decisionmaker and informational sources,” although general justification requirements tend to inhibit the use of secondary evidence when original evidence is available. Id. at 449-56.

125. Park, Hearsay Reform, supra note 9, at 65.

126. See LEMPERT & SALTZBURG, A MODERN APPROACH TO EVIDENCE 493-94 (2d ed. 1982); ZUCKERMAN, supra note 23, at 181.

produced statements from such persons usually are accusatory, blame-shifting, and made in anticipation of litigation. Their accusations, even in the form of live witness testimony conveying first hand knowledge, have long been distrusted, and for good reason. Usually, such persons are involved in criminal activities and hope to receive some benefit from incriminating others so are motivated to conform their statements to what they believe the listener, usually a police officer or prosecutor, would like to hear and what would bring them the greatest rewards. As Lord Abinger put it in 1837, "[t]he danger is that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others."\(^{128}\) A federal court of appeals judge and former federal prosecutor recently put it more directly: "Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law."\(^{129}\) They are manipulative and devious and would not hesitate to commit perjury or manufacture evidence. The most dangerous informer is the jailhouse snitch who claims defendant confessed to him. "Sometimes they tell the truth, but more often, they invent testimony and stray details out of the air."\(^{130}\)

Distrust of such evidence is an old story and was an important factor leading to the increased importance of cross-examination and the ascendancy of the adversary system. Ancient English practices such as the law of approvement and the crown witness system, which provided favorable treatment to suspects who agreed to testify against their accomplices, brought about convictions based on dubious evidence.\(^{131}\) By the Eighteenth Century, recognition of these problems gave rise to the corroboration rule with respect to accomplice testimony,\(^{132}\) the confession rule, and other exclusionary

\(^{128}\) 4 WIGMORE, supra note 26, § 2057, at 358, § 2059, at 362 (citing Regina v. Farler, 173 Eng. Rep. 418, 419 (Worcester assizes 1837)).
\(^{129}\) Trott, supra note 36, at 1382.
\(^{130}\) Id. at 1394.
\(^{131}\) See Langbein, Ryder Sources, supra note 43, at 1184-1198.
\(^{132}\) See 4 WIGMORE, supra note 26, § 2056, at 351. Wigmore placed development of the corroboration rule at the end of the eighteenth century, id., but John Langbein’s research led him to believe that the rule was in force by 1751. See Langbein, Ryder Sources, supra note 43, at 98.

The corroboration rule declares that the bare, uncorroborated testimony of an accomplice is not thought of as sufficient credit to put a prisoner upon his defense. See 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 609 (T. Leach ed., 6th ed., London 1787). Henry Fielding believed that the corroboration rule hampered law enforcement and wanted it watered-down such that it would not be enforced by threat of directed verdict and prevent the evidence from putting the accused to his defense, but applied only after all the evidence has been presented. See H. FIELDING, AN ENQUIRY INTO THE CAUSES OF THE LATE INCREASE OF ROBBERS 111-17 (London 1751).
rules of evidence. Langbein concludes that the relatively sudden rise of the law of evidence and of adversary trial procedure was, at least in part, a response to system that "encouraged false witnesses, who found it all too easy to bring about the condemnation of innocent men." 133 Dangers of admitting government-produced accusatory statements made in anticipation of litigation has been recognized by American judges and scholars, 134 and was a factor in the formulation of the Federal Rules of Evidence. 135

Recent changes in the areas of sentencing and plea bargaining in America have greatly enhanced the power of prosecutors to pressure suspects and defendants into giving evidence against their accomplices or others suspected of criminal activity. Our prosecutors traditionally have operated unrestrained in their charging decisions, 136 and although plea bargaining decisions usually are

133. Langbein, Ryder Sources, supra note 43, at 2, 96-98, 129 (explaining that distrust of accomplice evidence produced by expectation of rewards also contributed to the eighteenth-century shift toward the adversary system, the first ingredient of which was the presence of lawyers whose primary responsibility was cross-examination of witnesses). However, Langbein later emphasized the need for jury control resulting from depowerment of judges as a reason for the development of hearsay and other exclusionary rules. See id. at 1196.

134. Justice Harlan was “prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused.” Dutton v. Evans, 400 U.S. 74, 98 (1970) (Harlan, J., concurring). Professor Welsh White would enlarge Harlan’s “bright line rule” to exclude under the Confrontation Clause any statement contained in a “confession of an accomplice resulting from formal police interrogation.” White, supra note 96, at 759, 783-84 (1996). Professor Roger Park advocates a general unavailability requirement in criminal cases “when the prior statement is accusatory or when one might reasonably expect that cross-examination would serve a useful purpose,” and proposes that, regardless of unavailability, there should be a firm rule against prosecution use of accusatory statements of accomplices or informants “made while in custody or under interrogation.” Park, Hearsay Reform, supra note 9, at 108. Professor Richard Friedman contends that the Confrontation Clause should “exclude evidence of an out-of-court statement offered by the prosecution regardless of declarant’s availability, if the declarant made the statement with the anticipation that it might be used in the investigation or prosecution of a crime and the accused has not had an adequate opportunity to examine the declarant.” Friedman, Game Analysis, supra note 15, at 725-26.

135. The version of the Federal Rules of Evidence transmitted by the Judicial Conference 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 co-defendant or other person implicating both himself and the accused.” The Supreme Court struck this provision from the rules transmitted to Congress. The limitation was reinstated in the House, but deleted in the Senate and was not enacted. See Park. Hearsay Reform, supra note 9, at 108 n.228.

136. See generally Wayte v. United States, 470 U.S. 598 (1985); United States v. Goodwin, 457 U.S. 368 (1982). Prosecutors occasionally indict for the primary purpose of pressuring the accused to testify against another. The Ninth Circuit recently held that the indictment of defendant’s son and his wife for the purpose of pressuring them to testify against defendant did not constitute unconstitutional vindictive prosecution. See United
subject to court approval, courts have allowed prosecutors to apply tremendous pressures against defendants—to the extent of threatening the ultimate penalty—and have relegated judges to a limited role in the area of plea bargaining.  

Also, the movement toward determinate sentencing and increasingly punitive sentences has greatly enhanced prosecutorial powers. Not only has the charging decision become more significant, but the increased importance of criminal histories has allowed prosecutors to exert greater pressures on those with criminal track records—often the least reliable witnesses. For example, in California the existence of a prior serious or violent felony conviction brings an additional and consecutive five year term. If the prior qualifies as a strike, the primary sentence is doubled, and if the defendant has suffered two such strikes, the sentence is twenty five years to life. Under threat of such severe sentences, motivation to falsely incriminate others can be enormous.

Constitutional guarantees governing police interrogation of suspects offer limited protection against use of unreliable statements against other suspects. First, a defendant lacks standing to suppress hearsay statements or in-court testimony of an accomplice on the ground that the accomplice’s constitutional rights were violated in the course of police interrogation which produced the statements or impelled the testimony. Also, the principal constitutional protections applicable to police interrogation practices do not directly serve the function of assuring reliability. The Supreme Court has expressly disavowed reliability as the goal of Due Process and


140. See CAL. PENAL CODE § 1170.12 (West Supp. 1998). Contrast the situation on the Continent where sentences generally are not as severe and plea bargaining in serious cases is generally prohibited. Furthermore, Germany and some other countries operate under the principle of legality which somewhat restricts prosecutorial charging powers by mandating prosecution whenever sufficient evidence is present.

141. Constitutional rights are personal and can be asserted only by the victim of the violation. See United States v. Padilla, 508 U.S. 77, 81 (1993) (a defendant may urge suppression of evidence obtained in violation of the 4th Amendment “only if that defendant demonstrates that his Fourth Amendment rights were violated by the challenged search or seizure”). Furthermore, federal courts are not authorized to use either due process or supervisory powers to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party, even though the government conduct may have been outrageous or offended canons of decency and fairness. See United States v. Payner, 447 U.S. 727, 737 n.9 (1980).
Fifth Amendment protections. The Court has rested the Due Process involuntariness rule on the need to deter undesirable police behavior and to maintain an accusatorial system of justice and has warned against even considering the probable truth or falsity of a contested confession in determining voluntariness. This guarantee is unrelated to the question of guilt or innocence and has "nothing whatever to do with improving reliability of jury verdicts." The Court recently emphasized that the "sole concern" of both Due Process and the Fifth Amendment is to deter government coercion, rather than to assure that statements of suspects are either reliable or the product of the suspect's free will. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." Thus, the government can exert tremendous pressures on suspects and accomplices to incriminate others with little fear that constitutional violations occurring in this pressure-cooker process can be claimed by those incriminated.

(b) Evidence Selection: The Hearsay Rules as an Instrument of Lawyer Control

Although the adversary system usually encourages the parties to produce the most immediate and reliable evidence available, at times partisan self-interest will motivate parties to rely on hearsay or other forms of second-best evidence in preference to in-court testimony. Absence of restrictions on hearsay evidence would

142. See Rogers v. Richmond, 365 U.S. 534, 540-49 (1961). Involuntary confessions are excluded, the Court reasoned, "not because such confessions are unlikely to be true, but because the methods used to extract them offend an underlying principle in the enforcement of criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the state must establish guilt by evidence independently and freely secured and may not, by coercion, prove its charge against an accused out of his own mouth." Id.

143. Lego v. Twomey, 404 U.S. 477, 486 (1972) (rejecting the argument that the reasonable doubt standard is violated if the voluntariness of a confession is proven only by a preponderance, the Court emphasized that the purpose of the voluntariness rule is to prevent an accused from being compelled to incriminate himself by his own statements).


145. Id. at 167 (quoting Lisenba v. California, 394 U.S. 219, 236 (1941)).

146. Jurors bring to the courtroom "expectations about what proper proof should be," and if such expectations are not satisfied, "triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." Old Chief v. United States, 117 S. Ct. 644, 654 (1997) (quoting Saltzburg, A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence, 66 Cal. L. Rev. 1011, 1019 (1978)).

147. See Roger C. Park, Character Evidence Issues in the O.J. Simpson Case - or, Rationales of the Character Evidence Ban, With Illustrations from the Simpson Case, 67 U. Colo. L. Rev. 747, 774 (1996) (observing that "[o]ften the pressures of the adversary
tempt police to produce more written evidence in sanitized form on which prosecutors could place greater reliance, and would tempt defendants to fabricate exculpatory hearsay statements of absent declarants.  

Thus, hearsay rules serve as a check on party incentives to rely on hearsay in preference to first-hand information and as an inducement to produce the most direct evidence available. In this function, the rule serves as a procedural tool which induces the parties to seek and present live witness testimony rather than second-best evidence and deters them from creating misleading or deceptive evidence, such as witness affidavits which in large part are shielded from effective courtroom attack. Like the exclusionary rule in cases of unlawful searches and seizures, the hearsay rule acts as a deterrent, not in punishing a party, but in removing incentives to act improperly. However, the hearsay rule goes beyond simple “production-deterrence” and also serves the function of “creation-deterrence” which, as in the case of eye-witness identification rules, aims at preventing distortion or contamination of evidence. In this way, restrictions on hearsay “deter” the parties from creating tainted and untrustworthy hearsay.

This inducement-deterrent rationale is most weighty with respect to statements of declarants whom the hearsay proponent is able to call as a witness and is weakest as to statements of homicide victims and other unavailable declarants. Some judges and scholars have advocated a rule of preference which would apply only to hearsay which is second-best evidence in light of the availability of the declarant. Certainly, the lawyer-control justification for the system will encourage the parties to seek the best evidence anyway, but this will not always be true”). See also Strier, supra note 81, at 105 (concluding that juries are manipulated by trial lawyers who hide relevant evidence and present only evidence which favors their interests and that “all evidence introduced in a party-controlled adversarial proceeding must, to some extent, be suspect”).


149. “New Wave” theorists view the hearsay exclusion as “a way of... influencing the conduct of police and of prosecutors in the process of preparing and preserving evidence.” Park, New Wave Scholarship, supra note 9, at 365.

150. The inducement-deterrent rationale is most important as a restriction on prosecution production of hearsay, but also applies to creation of defense hearsay, particularly in the context of statements of a defendant who is shielded from testifying by the Fifth Amendment privilege.

151. Dale Nance suggests that we would “move our law in a more respectable direction” if we focused on the inducement rationale and “continued to cleanse the remaining elements of taint theory from our law of hearsay.” Nance, supra note 103, at 472. Peter Westen advocates an approach to the Confrontation Clause as set forth by Justice Harlan in California v. Green, 399 U.S. 149 (1970), where he divided hearsay into statements made by an available declarant and statements made by an unavailable
hearsay rule is strongest when lawyers have the option of producing first-hand witnesses, but admitting all hearsay statements of unavailable declarants would open the door to adversary-created statements of informers who disappear, co-defendants who refuse to testify, and confessions made to defendant's investigator by third parties who cannot be located. At the least, such free admissibility surely would reduce incentives to locate some witnesses. At worst, it would tempt lawyers to conveniently "lose track" of witnesses who may be particularly vulnerable to cross-examination. Also, with respect to witnesses who may become unavailable, such as foreign visitors or those facing impending death or deportation, the hearsay rules provide an incentive to prosecutors to expedite the trial or use evidence-preserving methods such as depositions or preliminary hearings at which the witnesses may be cross-examined. Free admissibility of unavailable declarant statements would reduce or eliminate these incentives.

(c) Distrust of Defense Hearsay

The inducement-deterrent rationale also applies to defendant's use of hearsay evidence. The direct connection doctrine which limits "third party culpability" evidence\(^1\) is based on the suspicion "that criminal defendants may find it all too easy to fabricate [such evidence] which may bamboozle juries into erroneous acquittals."\(^2\) Defendants would find it even easier to substitute out-of-court statements for third party testimony. These concerns support the limitation in the Federal Rules exception for statements against interest which excludes from admission a statement tending to exculpate the declarant. Where the declarant is available, such evidence would be subject to the Confrontation Clause, making the Clause a preferential rule mandating the presentation at trial of the best evidence available. Where the declarant is unavailable, hearsay statements would be subject to the minimal standard of the due process clause that bars evidence only if there is a substantial likelihood that it is false. See Peter Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185 (1979). Michael Seigel sees the main hearsay problem as "the propensity of parties to substitute it for live testimony to gain a strategic advantage," and proposes a "blanket rule subject to exceptions" which would admit hearsay if it is "the best evidence available to the offering party from a particular declarant's source, or if the best evidence has been or will be presented to the trier of fact." Seigel, supra note 94, at 915 n.69, 928-930. However, he would apply further limits in criminal cases. See id. at 944.

\(^1\) Evidence offered by an accused to prove that another person committed the crime charged is admissible only if the evidence directly connects that person to the commission of the crime. See David McCord, "But Perry Mason Make it Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest That Someone Else is Guilty, 63 TENN. L. REV. 917, 919 (1996).

\(^2\) Id. at 980.
accused "unless corroborating circumstances clearly indicate the trustworthiness of the statement." Suspicions of fabrication rest both on concerns over the making of the statement and over the accuracy of its contents.

In terms of producing evidence, the defendant already has the option of not personally giving testimonial evidence by refusing to make pretrial statements during custodial interrogation and of refusing to take the stand at trial. In neither case can the judge or prosecutor ask the jury to consider the defendant's silence. If the defense were given the additional advantage of shielding its witnesses from questioning by introducing their hearsay statements, the defense might more easily present a fabricated defense impervious to attack which would increase the danger of erroneous acquittals.

Even more serious concerns arise with respect to defendant's own exonerating statements. Under present rules, statements of an accused generally are inadmissible when offered by the accused unless offered for a non-hearsay purpose, such as the basis for expert opinion, or shown to fall within an exception. In most cases, defendant must take the stand and submit to cross-examination in order to personally present his or her story to the jury. Yet because of the threat of impeachment by prior convictions, the safe harbor of Griffin's no-comment rules, and other considerations, it appears that defendants are not taking the stand as they once did. Rules barring defense hearsay at least provide some inducement to the accused to take the stand. If the defendant could freely introduce the accused's own prior exonerating statements, particularly ones prepared and packaged by defense counsel, the defense could quite easily introduce the story of the one potential witness who usually knows more about the events than anyone else, but who is far from unbiased and cannot be tested by cross-examination.

(d) Contentiousness of Lawyers

Finally, hearsay dangers from party-controlled factfinding are increased by the partisanship and contentiousness of lawyers, and
American criminal trial lawyers are more aggressive and contentious than either Continental or English advocates. Our courtroom lawyers often regard the trial as ritualized aggression, viewing themselves as prize fighters or semantic warriors in the verbal battle in pursuit of that most important goal—winning the case. Continental and English advocates also like to win, but for a variety of reasons, including less responsibility for evidence presentation, reduced incentives to win, and greater restraints on advocacy, they generally do not place as much importance on victory, and they do not pursue it as aggressively.

In America, controls on creation and presentation of hearsay evidence are particularly important in light of the extreme motivation of lawyers to achieve courtroom victory and their great powers over the investigation and presentation of evidence.

G. Hearsay Rules as a Check on the Independent Factfinder

Although procedural aspects of the adversary system appear more responsible for the hearsay rule than distrust of the jury, Morgan nonetheless recognized that jury distrust was responsible for “not a few” exclusionary rules of evidence, and by characterizing Thayer's dictum that the English law of evidence is “the child of the jury” as “not more than half-truth,” Morgan implied that it might be at least “half-truth.” As discussed earlier, assumptions of judicial supremacy in evaluating hearsay evidence enjoy little support in experience or reason. Nevertheless, justifications for limits on hearsay can be found in procedural characteristics of common law systems associated with the common law jury which threaten the legitimacy and integrity of verdicts. In particular, the lack of checks on factfinding by such procedures as judicial guidance during evidence processing, justification requirements, and meaningful appellate review constitute additional rationales for exclusion of hearsay evidence. Thus, Morgan’s partial-truth connecting the jury trial to the hearsay rules stems from their function as a protector of verdict integrity in light of the largely uncontrolled Anglo-American factfinder.

(1) Three Threats to Verdict Integrity

The independent, unchecked Anglo-American factfinder

159. See Van Kessel, supra note 15, at 435.
160. See id. at 437. The tempered advocacy of Continental lawyers is a natural result of the fact that, in view of the dominance of the Presiding Judge, the cases are not regarded as the lawyer's to win in the first place.
161. Morgan, Jury and Exclusionary Rules, supra note 32, at 258.
threatens the integrity of verdicts in three ways. First, our passive trial judges increase the danger of jury misevaluation of hearsay evidence. American trial judges often have limited knowledge of the facts before trial, and appellate courts discourage trial judges from engaging in significant or extensive questioning of witnesses. Judges who become “overly aggressive in managing or directing important elements of lawsuits” will be reversed on appeal. Furthermore, judicial authority to summarize or comment on the evidence is severely restricted. In most states, judges in criminal trials are prohibited from expressing an opinion on the weight or credibility of the testimony of witnesses or on the merits of the case. Judge Marvin Frankel accurately described the current approach when he noted that “[i]t is not a regular thing for the trial judge... meaningfully to 'comment upon' the evidence.”

This was not always the case in common law trials. Langbein pointed out that prior to the advent of the adversary system in the latter part of the eighteenth century, the active judge could influence

---

162. See generally Van Kessel, supra note 15 at 426-35 (discussing the extreme judicial passivism and lawyer dominance in American criminal trials).

163. While the judge may gain information from pretrial motions, plea bargaining, and other informal discussions, there is no regular procedure, as there is in England, whereby the judge receives prosecution committal papers or other case file materials. See Doran et al., Rethinking Adversariness in Nonjury Criminal Trials, 23 AM. J. CRIM. L. 1, 27 n.117 (contrasting English with Scottish procedure in this regard).

164. See, e.g., United States v. Liddy, 509 F.2d 428, 440 n.31 (D.C. Cir. 1974), cert. denied, 420 U.S. 911 (1974) (warning that in general the trial judge would do better to forego direct questioning, and the possible impact on his objectivity, since he has available the alternative of suggesting to counsel the questions he believes ought to be pursued).


167. See 1 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW § 8 (Tillers rev. 1983); Wolchover, supra note 166, at 784.

168. Frankel, The Search for Truth: An Umpireal View, 123 U. PA. L. REV. 1031, 1042; see also Wyzanski, a Trial Judge's Freedom and Responsibility, 65 HARV. L. REV. 1281, 1283 (1952). As approved by the Supreme Court in 1972, the Federal Rules of Evidence allowed the judge to “fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses,” but Congress struck the rule after the House Committee on the Judiciary recommended its deletion. The Committee noted that the authority of the judge to comment on the weight of evidence and credibility of witnesses was “highly controversial” and was “not granted to judges in most State courts.” H.R. REP. No. 150, 93d Cong., 1st Sess. at 5 (1973) (report of the House Committee on the Judiciary concerning superseded FED. R. EVID. 105).
and correct jury verdicts in advance of accepting them. But as the adversary system developed, the verdict was left to a body of persons untrained in the law and largely unguided by neutral legal professionals, contributing to the need to protect the integrity of verdicts through hearsay and other exclusionary rules of evidence.

Second, in criminal cases the factfinder, whether judge or jury, is not required to justify its verdict. Factfinder unaccountability is a basic tenet of Anglo-American criminal procedure, which demands the return of a general verdict of guilty or not guilty. Courts allow special interrogatories to civil juries, but disfavor them in criminal trials on the ground that their use would undercut defendant’s right to trial by jury. Thus, a criminal jury cannot be required to provide either an account of the evidence or the reasoning supporting the verdict. Even in criminal bench trials judges usually are not required to make explicit findings of fact or to otherwise justify their verdicts, and “reasoned judgments... appear to be the exception

169. See Langbein, Ryder Sources, supra note 43, at 1195. He explains that the judge’s awesome power of comment and instruction resulted in verdicts that were “collaborative products” entailing “deep judicial involvement.” Langbein contended that the rise of adversary procedure broke up the working relationship between judge and jury. As lawyers took on a more active role, judges became more passive. Id. at 1197-98. During the nineteenth century, there was a celebration of cross-examination involving what Langbein characterized as a “naive faith in [its] truth-serving efficiency” together with a growing deference to lawyer domination of trial, resulting in the destruction of the judge’s control over the trial and over jury verdicts. Id. at 1199-1201.

170. In Federal civil trials the court must “find the facts specifically and state separately its conclusions of law thereon.” FED. R. CIV. P. 52(a).

171. The First Circuit declared that “not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent” and condemned the use of special interrogatories upon the ground that they could be used by the judge “to carefully guide the jury to its conclusion.” United States v. Spock, 416 F.2d 165, 180-82 (1st Cir. 1969); cf. United States v. Collamore, 868 F.2d 24 (1st Cir. 1989). The Constitution demands that the defendant be afforded “the full protection of the jury unfettered, directly or indirectly.” Spock, 416 F.2d at 182.

172. See FED. R. EVID. 606(b) (judges and other officials are prohibited from inquiring into reasons underlying jury verdicts). Directing the jury to provide reasons for its decision would violate the principle that criminal juries return general verdicts and may not be required to provide the reasons behind their verdicts. See Gray v. United States, 174 F.2d 919, 923-24 (8th Cir. 1949); See also Spock, 416 F.2d at 181. English rules are even stricter and provide that juries “are neither required nor allowed to give reasons for their verdicts.” ZUCKERMAN, supra note 23, at 33 (emphasis added).

173. Damaska contends that with the decline of the jury and increase in bench trials, the need for exclusionary rules of evidence to compensate for the opacity of jury verdicts is lessening because in bench trials “the basis for the court’s judgment is authoritatively documented in findings of fact and conclusions of law.” DAMASKA, ADrift. supra note 24, at 128. However, in federal non-jury trials, findings of fact are required only on request made before the general finding, FED. R. CRIM. P. 23(c), and many states do not require specific findings in nonjury criminal trials under any circumstances. See Doran, supra note 163, at 46 n.191. Contrast Diplock courts in Northern Ireland where a single
rather than the rule." Since Anglo-American criminal trial verdicts are given without a reason, appellate review is difficult.

Finally, both pre-trial and post-trial opportunities to check the reliability of evidence are limited in common law proceedings. Admission of hearsay is particularly troublesome in those common law jurisdictions that require little pre-trial discovery and depend entirely on the traditional common law clash of opposing forces in a single episode. In such context, there may be little opportunity to obtain the presence or investigate the credibility of a declarant when at trial a hearsay statement springs out of the adversary hat. Damaska contends that the greater dangers of manipulation of evidence and surprise in concentrated proceedings is one explanation for common law hearsay rules. When rules restricting use of secondary evidence were developing, English trials were rapid "one-shot" proceedings in which there was little pre-trial preparation and no appeal, allowing few possibilities for inquiry into the basis for secondary evidence. Continental criminal proceedings, on the other hand, were continuous with trials as merely one stage in an ongoing process which afforded ample opportunity to probe into questionable evidence, such as obtaining the original of a suspicious document or investigating or producing the maker of a hearsay statement. While the extremes of these divergent styles have been abandoned by Anglo-American and continental systems, Damaska believes that they help explain why attitudes toward use of secondary evidence remain more cautious in Anglo-American trials and more lenient in Continental trials.

Of course, a common law jury trial can never be as flexible as Continental trials before professional judges or even mixed courts where cases more easily can be continued or returned to the prosecutor or magistrate for further investigation, but hearsay dangers are particularly acute in jurisdictions that do not provide for effective pre-trial mutual discovery, which allows parties the judge is factfinder and must provide a reasoned judgment in support of a decision to convict. See id. at 11-13.

174. Doran, supra note 163, at 46.
175. See Damaska, Of Hearsay, supra note 1, at 428. Post-modernists also point to the danger of surprise as a justification for exclusion of hearsay evidence. See, e.g., Mueller, supra note 11, at 390; Park, Hearsay Reform, supra note 9, at 62.
176. See Damaska, Of Hearsay, supra note 1, at 428-30.
177. See DAMASKA, ADRIFT, supra note 24, at 60 (explaining that common law countries have gradually dethroned trials by engaging in extensive preparatory activities and lengthy appellate review).
178. See Damaska, Of Hearsay, supra note 1, at 430. However, Damaska believes that "this rapprochement is less than first appears." The common law trial still stands far apart from other stages, whereas continental trials are still "a mere stage in a continuing procedural effort." DAMASKA, ADRIFT, supra note 24, at 60.
opportunity to check out the reliability of hearsay and reduces the dangers of evidence manipulation and surprise. In America, there is considerable diversity in discovery rules among the states and no significant uniform Constitutional standard. Aside from the limited category of exculpatory evidence material to the defense,179 "[t]here is no general constitutional right to discovery in a criminal case . . . "180 The Supreme Court recently pointed out that while an accused has a Due Process right to notice of the charges, an accused has no right to notice of the evidence which the state plans to use to prove the charges.181 Thus, dangers posed by the problem of surprise very much depend on the notice and discovery rules of the particular jurisdiction or trial court. However, such dangers are diminishing with the trend toward greater discovery in criminal cases.182

Post-trial checks on reliability pose more serious problems, since jury misuse of hearsay in Anglo-American trials is extremely difficult to correct in light of low sufficiency standards limiting challenges to convictions and double jeopardy rules barring prosecution appeals from acquittals. The common law's low sufficiency standard has an ancient lineage. Prior to the Enlightenment, England's lack of complex rules of evidence and its low standard of proof contrasted sharply with restrictive Roman-canon standards on the Continent, and has been cited as a reason the English did not resort to judicial torture prevalent in Continental inquisitory systems.183 Over a Century ago, Jeremy Bentham remarked,

There can be few if any cases in which a man can be put to torture under Roman law upon less evidence than would be sufficient to convict him by the English. The direct evidence of one

180. Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Federal courts disagree as to whether the trial court has discretion to order the prosecution and defense to exchange witness lists and summaries of anticipated witness testimony in advance of trial. See United States v. Hicks, 103 F.3d 837 (9th Cir. 1996) (making “explicit” the rule that “a district court that orders the Government and the defendant to exchange witness lists and summaries of anticipated witness testimony in advance of trial has exceeded its authority under Rule 16 of the Federal Rules of Criminal Procedure”). But see United States v. Fletcher, 74 F.3d 49 (4th Cir. 1996).
182. See infra Part III.D..
183. See JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME 80 (1977) [hereinafter Langbein, Torture]. Langbein contends that on the Continent it was the straitjacketing evidence rules, rather than the system of judicial inquiry, that lead to torture, and it was the low jury standard of proof that spared England from it. See id. at 184 n.20. But see S. LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 8, 13-14 (1984) (contending that English reliance on the jury allowed England to avoid use of torture).
HEARSAY HAZARDS

unexceptionable witness, which would be sufficient to warrant the convicting him by the English Law, by the Roman Law would only warrant the putting him to Torture.

Even today English sufficiency standards are no higher. A defendant can be convicted on any single piece of evidence, even a single piece of hearsay, if it is a kind which falls within an exception. Furthermore, when hearsay is admitted, English law treats it as of equal weight with any other type of evidence. A court of appeal has expressly held that a trial judge should not direct the jury to give a statement admitted as documentary hearsay under the Criminal Justice Act of 1988 less weight than the testimony of live witnesses. In fact, the recent Law Commission studying the English hearsay rule voiced concern that a person might be convicted on unreliable hearsay evidence alone. In America also, remedies for convictions or acquittals on the basis of insubstantial or uncorroborated hearsay are extremely limited. Lax sufficiency rules offer slight hope of overturning convictions based on slim evidence,

---

185. Langbein asserts that “[t]o this day an English jury can convict a defendant on less evidence than was required as a mere precondition for interrogation under torture on the Continent.” Langbein, Torture, supra note 183, at 78.
186. In Nembhard v. The Queen, 1 WLR 1515 (1981), the Privy Counsel upheld a murder conviction despite the fact that the only evidence against the defendant was the victim’s dying declaration.
189. Most federal and state courts follow Wigmore’s presumption against rules which require a certain number of witnesses or even corroboration of a single witness. See 7 WIGMORE, EVIDENCE § 2034, at 342 (Chatbourn ed. 1978). For example, in 1960 the California Supreme Court ruled that an extra-judicial identification that cannot be confirmed at trial is insufficient to sustain a criminal conviction in the absence of other evidence tending to connect defendant with the crime. See People v. Gould, 354 P.2d 865, 870 (Cal. 1960). However, the Court in 1995 abandoned this corroboration standard and adopted the general view that an out-of-court identification of a witness can be sufficient by itself to support a conviction even in the absence of other evidence connecting defendant to the crime as long as the identification was “reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” People v. Cuevas, 906 P.2d 1290, 1295 (Cal. 1995).

Avenues of federal collateral review of state criminal convictions are even more limited. A federal district court may grant habeas corpus relief only “if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 324 (1979). The 1996 Anti-Terrorism and Effective Death Penalty Act further prohibits federal courts from granting habeas corpus relief on a claim adjudicated on the merits in state courts unless the adjudication “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). Consequently, federal courts on habeas are
and the prosecution has no remedy if the factfinder chooses to acquit on the basis of insubstantial hearsay. Thus, our constitutional double jeopardy restrictions on prosecution appeals justify our greater reluctance to freely admit defense hearsay than in Continental systems. The danger that unrestricted admission of hearsay evidence would encourage jury lawlessness in using insubstantial hearsay as a peg upon which to hang their bias or emotional hat is a serious concern in American trials.

(2) Comparative Perspectives

Contrast Continental systems where unexplained judgments are anathema and both the prosecution and the defense may appeal. Judges are required to justify their decisions in a written opinion making clear not only what facts the court has found but also what items of evidence support each finding and what chains of inference lead from these items to specific factual determinations. Written judgments are subject to supervision by appellate courts such that Continental rules requiring courts to disclose grounds for decisions both deter reliance on weak evidence and facilitate review. In

required to defer to state court determinations concerning sufficiency of evidence to support a conviction, and a writ of habeas corpus may issue for evidence insufficiency only if state courts have failed to engage in reasoned, good-faith decision making when applying the “no rational trier of fact” test. See Gomez v. Acevedo, 106 F.3d 192,198-99 (7th Cir. 1997).

190. A convicted or acquitted defendant cannot be prosecuted again for the same offense. See Green v. United States, 355 U.S. 184, 187-88 (1957). Compare the current restrictions with the prosecution's ability to challenge erroneous evidentiary rulings which lead to acquittals in state courts prior to incorporation of the Fifth Amendment into the Fourteenth Amendment Due Process Clause. See Benton v. Maryland, 395 U.S. 784 (1969); Palko v. Connecticut, 302 U.S. 319 (1937). However, an acquittal means only that the defendant was not proven guilty beyond a reasonable doubt, and, at sentencing for another crime, the prosecutor may prove facts underlying the acquitted offense by a preponderance of the evidence. See United States v. Watts, 117 S. Ct. 633, 634 (1997).

191. See Park, Hearsay Reform, supra note 9, at 63 (citing such danger as one of the complex process-based concerns).

192. See DAMASKA, ADRIFT, supra note 24, at 45, 128 n.10 (explaining that articulation of reasoned judgments is obligatory and is among the basic postulates of procedural fairness on the Continent).

193. See id. at 45. However, written justification requirements vary among Continental countries and are strongest in Germany and Holland. See J.F. Nijboer, Fact-Finding in Dutch Criminal Procedure, in INT'L. SEMINAR ON EVIDENCE IN LITIGATION, 1,8 (1993).

194. See DAMASKA, ADRIFT, supra note 24, at 45. Damaska observes that articulation of reasons makes exercise of adjudicative power less impenetrable and provides a dissatisfied party with a stationary target, but cautions that the effectiveness of appellate review of such reasons tends to be overestimated as a corrective for trial court errors. See id. at 45-46, 128 n.10.
addition, interpreting the European Convention on Human Rights, the European Court on Human Rights has limited courts of member states from convicting solely on uncorroborated hearsay even when the declarant is unavailable.

(3) Summary

Hearsay rules in America both compensate for "cryptic and enigmatic verdicts" and substitute for meaningful checks on the reliability of verdicts. Since there are few integrity controls at the back-end of common law criminal trials, hearsay and other rules of evidence serve as front-end protections against future error by excluding evidence that might be overvalued or otherwise misused by the factfinder.

It is tempting to point to the common law jury as the source of this difficulty. Damaska contends that the difficulty of requiring amateur factfinders to give reasoned opinions in conjunction with the need to prevent factual error and to shore up verdict legitimacy explains why policing receipt of evidence is more important in common law systems and "may be the single most neglected contribution of the jury to the rational for" Anglo-American

195. The Convention provides that everyone charged with a criminal offense has the right "to examine or have examined witnesses against him and to obtain the assistance and examination of witnesses on his behalf under the same conditions as witnesses against him." Art. 6(3)(d).

196. See Unterpertinger v. Austria, Series A, No. 110 (1987) (finding that Article 6 was violated from use of out-of-court statements as proof of the truth of the accusations and as the main evidence to support the conviction when the defendant at no time had the opportunity to question the witnesses and the judge had refused to allow applicant to adduce evidence to cast doubt on their credibility); Sa'di v. France, September, Series A, No. 261 C (1993) (finding a violation of Article 6 when the conviction was based solely on pre-trial statements of persons whom the accused had no opportunity to confront and there was no additional prosecution evidence to corroborate the statements). Compare Asch v. Austria, April, Series A, No. 203 (1991) (finding no violation of Article 6 when out-of-court statements did not constitute the only item of evidence on which the first-instance court based its decision, although it was not possible to question the declarant).

197. DAMASKA, ADRIFT, supra note 24, at 41 (contending that unexplained jury verdicts suffer from a legitimacy defect and conflict with the assumption that those exercising authority in a democracy are expected to provide reasons for their conduct).

198. See Langbein, Ryder Sources, supra note 43, at 1195 (describing modern hearsay and other exclusionary rules as "essentially prophylactic, in that they seek to prevent error by excluding information that might mislead the jury in view of the fact that in modern practice it is quite difficult for the judge to correct error in a jury verdict once it has occurred). See also Damaska, Of Hearsay, supra note 1, at 429 (noting "the absence of regular mechanisms for reviewing factual findings" in modern Anglo-American trials and concluding that "since the quality of verdicts could not be checked ex-post, the English system was driven to exercise great caution" in admitting questionable evidence).

199. See DAMASKA, ADRIFT, supra note 24, at 44.
Yet the jury is not the sole culprit. With greater judicial influence over jury evaluation of evidence and broader avenues of appeal which provide meaningful checks on verdict integrity, arguments for extensive common law style hearsay would be weakened. Furthermore, input controls on hearsay evidence are needed also in bench trials since a professional judge's overvaluation of hearsay may equally endanger the integrity of a verdict in view of the lack of justification requirements, low sufficiency standards, and unavailability of prosecution appeals. Nor is the divided court alone responsible. Theoretically, in bench trials one judge could decide admissibility questions while another judge, or a panel of professional judges, could decide the issue of guilt. Yet ex post facto checks on reliability of verdicts would remain limited by the absence of a written opinion justifying the decision, the lack of de novo review, low sufficiency standards, and double jeopardy prohibitions on prosecution appeals.

Thus, the theory that the jury is at least one foundation for our hearsay rules does not rest primarily on differences between evaluative abilities of lay and professional factfinders. The very institution of the jury as an unguided body without responsibility to justify its decision which is not subject to appeal by the prosecutor or de novo appeal by the defendant accounts for some of our hesitancy to abandon the hearsay rule in criminal cases. With respect to the use of lay factfinders, the different approaches to hearsay lie, not so much in the different capacities of lay and professional factfinders to accurately evaluate hearsay, as in procedural differences which in Anglo-American adversary systems create a greater need for restrictions on hearsay. The extent that the existence of the jury calls for exclusion of hearsay has more to do with its traditional nature as a

200. Id. at 46.

201. If the principal foundation for exclusion of hearsay rests on procedures associated with the adversary system rather than on distrust of the jury, the relaxed attitude toward hearsay in bench trials may not be appropriate. However, such relaxation may be partially explained by the fact that bench trials may be more easily continued for further investigation and generally are less adversary because of greater judicial control. See Doran, supra note 163, at 28-29, 49-50 (contending that bench trials are less adversarial since the judge takes a more active role). Also, although common in trials of minor crimes, non-jury trials are rare in serious criminal cases. Although some states provide the right to a jury trial in all criminal prosecutions, under the United States Constitution, there is no right to a jury trial where the possible imprisonment is not more than six months. See Blanton v. City of N. Las Vegas, 489 U.S. 538, 543 (1989); Baldwin v. New York, 399 U.S. 66, 68 (1970); Duncan v. Louisiana, 391 U.S. 145, 159 (1968).

202. Damaska points to the lack of justification requirements and other devices aimed at preventing factual error and shoring up legitimacy of inscrutable verdicts as possibly "the single most neglected contribution of the jury to the rationale for" Anglo-American evidence law. DAMASKA, ADRIFT, supra note 24, at 46.
single proceeding with limited pre-trial discovery in which a largely unreviewable decision is given without a reason than with the danger of jury, as opposed to judicial, overvaluation of hearsay evidence.

II. Options and Proposals

A. The Option of Procedural Modifications

Since adversary and other procedural aspects of our system of adjudicating criminal cases provide the main foundation for our hearsay rules, might procedural modifications lead to a reduced need for restrictions on hearsay? Certainly, we might strive toward reducing the degree of party control over the investigation and the presentation of evidence by limiting the power of parties to influence witnesses while increasing pre-trial discovery and creating independent checks on the integrity of verdicts. Admission of hearsay would be less troublesome where rules mandate effective mutual pretrial discovery, the power of lawyers to create and shape evidence is circumscribed, trial judges are more active in controlling the power and contentiousness of lawyers while guiding the jury by admonitory instructions pointing out the weaknesses of hearsay evidence, and both trial and appellate courts check the integrity of jury verdicts by enhanced corroboration and sufficiency rules. However, as I have discussed elsewhere, Constitutional standards, professional inertia, and other factors stand as insurmountable barriers to significant reforms in our adversary or jury trial systems, at least in the near term. With little hope of procedural restructuring, presently we must be content with rules restricting admissibility of hearsay evidence to a greater degree than in England or continental systems.

203. For example, admission of hearsay seems less troublesome in England where lawyers are more constrained and judges more active. Witness interviews by barristers are limited, and shaping witness testimony is prohibited. Barristers generally are less contentious in their zeal to win at all costs, with prosecutors, by reason of restrictions on their plea bargaining powers, enjoying less freedom to influence witness testimony through threats of severe sentences. Finally, the English trial judge is more influential by reason of the judge's authority and duty to summarize and comment on the evidence. See Van Kessel, supra note 15, at 425-448.

204. See Van Kessel, supra note 15, at 487-510. "[I]nstead of speaking of a floor of Constitutional protection, the Court's procedural boundaries in the trial context can be more accurately viewed as walls which prohibit any lateral movement toward procedures foreign to us, but accepted throughout most of the world." Id. at 487-88.
B. The Need for Consistency and Predictability

Should admissibility standards remain categorized or left to judicial discretion with appropriate guidelines? Damaska contends that both the Roman-canon law that tells the judge that “this is reliable evidence and you must attach a certain weight to it” and common law which says “this is bad evidence and you may not consider it,” are based on the same erroneous assumption that it is possible to tell in advance the impact on the factfinder of particular evidence or classes of evidence.205 A number of evidence reformers who advocate loosening the hearsay rule share this view.206

However, courts and legislatures in common law countries have recognized the importance of articulated standards, and we in America have a special need for consistency and predictability in light of the prevalence of plea bargaining which largely stems from efforts to avoid lengthy, burdensome criminal jury trials. American scholars, judges, and practitioners have voiced concerns over the dangers of unbridled judicial discretion,207 and promotion of

205. Damaska, Evidentiary Barriers, supra note 119, at 515 n.10.
206. McCormick proposed that hearsay should be “inadmissible accept where the judge in his discretion finds it needed and trustworthy.” Charles T. McCormick, The Borderland of Hearsay, 39 YALE L.J. 489, 504 (1930). Michael Fenner advocates adoption of “real world” hearsay rules in which hearsay would be inadmissible except when the court, based on both the need for and the reliability of the out-of-court statement, decides otherwise.” G. Michael Fenner, Law Professor Reveals Shocking Truth About Hearsay, 62 U.M.K.C. L. REV. 1 (1993). See also Seigel, supra note 94, at 915 n.69, 916 (contending that the law is incapable of rationally making pre-determined categorical evaluations of the usefulness or reliability of hearsay evidence). However, Seigel goes on to do just that in creating exceptions to his “blanket rule.”

Eleanor Swift criticizes the current categorical approach to hearsay exceptions as based on unsupported and unverifiable generalizations about the reliability of declarants and their statements and proposes a “foundation fact” approach in which the hearsay proponent is “obligated to produce a process foundation witness knowledgeable about the circumstances at the time the declarant perceived, remembered, and made her statement.” Eleanor A. Swift, A Foundation Fact Approach to Hearsay, 75 CAL. L. REV. 1339, 1350-52, 1358 (1987). She would rely primarily on jury, rather than judge, to evaluate the trustworthiness of hearsay and believes that “the trier is able to evaluate weaknesses in declarant’s statements and is the proper institutional actor to do so.” Id. at 1427 n.308. Swift recognizes adversary dangers and the importance of requiring the production of foundation facts with which the jury can fairly evaluate hearsay evidence: “Were hearsay admitted freely, proponents could minimize foundation fact and foundation witnesses production to suit their tactical needs. This would undermine the accuracy of adjudicative fact finding . . . .” Id. at 1427. However, her complete trust in jury evaluation of hearsay without limits or guidelines would raise concerns relating to consistency and predictability and pose dangers relating to adversary-produced hearsay.

207. Wigmore believed that guidance by detailed standards was needed by the bar “in order to prepare competently before trial along normal expected lines” and by both bench and bar “in order that a normal routine may be ordinarily followed, by common understanding, for speedy dispatch at trials, without uncertainty and dispute.” John H.
consistent and predictable evidence rulings was a major objective of
the Federal Rules of Evidence.\textsuperscript{208} The Supreme Court’s Advisory
Committee that drafted the Rules demonstrated considerable
dissatisfaction with an open-ended standard\textsuperscript{209} and eventually
abandoned an illustrative approach\textsuperscript{210} in favor of a list of 29
categorical and two residual exceptions.\textsuperscript{211} In adopting the
categorical approach, Congress narrowed the residual exceptions by
adding a number of limitations to the ability to admit hearsay not
falling within traditional categories.\textsuperscript{212} Furthermore, the Supreme

ALI’s Model Code of Evidence, arguing that it amounted to “a sacrifice to the fetish of
Judicial Discretion.” \textit{Id.} at 27. However, Wigmore advocated guidelines which would be
“directory, not mandatory,” and preferred that the detailed standards should be viewed as
“guides, not chains.” \textit{Id.} Roger Park’s objections to radical hearsay reform in criminal
cases were based in part on fear of uncontrolled judicial discretion and unpredictable
standards that would make trial preparation more difficult and increase the danger of
unfair surprise. \textit{See Park, Hearsay Reform, supra} note 9, at 62-63.

Even Damaska fears that lifting restrictions on admissibility of hearsay in our system
“could usher in unstructured judicial discretion in the treatment of derivative proof”
which would operate largely unchecked by effective review procedures. Damaska, \textit{Of
Hearsay, supra} note 1, at 457 (contending that general admission of hearsay in Anglo-
American systems would have “a stronger ‘liberating’ effect than in continental
procedure where courts are more restrained by justification and sufficiency rules in the
use of secondary evidence).

\textsuperscript{208} \textit{See} Hochman, \textit{supra} note 12, at 687.

\textsuperscript{209} In its First Draft published in 1969, the Committee rejected Judge Weinstein’s
proposal that all class exceptions be abolished in favor of case-by-case treatment of
hearsay. \textit{See Committee on Rules of Practice & Procedure of the Judicial Conference of
safeguards in the form of notice of intent to use hearsay, free comment by the court on
the weight of the evidence, and more authority on the part of trial and appellate judges to
deal with evidence on the basis of weight. \textit{See Weinstein, supra,} at 338-42. But the
Advisory Committee determined that Weinstein’s approach would vest too much
discretion in the trial judge, minimize predictability, and make trial preparation difficult.
\textit{See Preliminary Draft, supra,} at 327.

\textsuperscript{210} The Advisory Committee initially took an illustrative, rather than categorical,
approach in which both Rules 803 and 804 provided a non-exclusive set of examples of
situations in which hearsay would be admissible. \textit{See Preliminary Draft, supra} note 209, at
324-25.

\textsuperscript{211} \textit{See Committee on Rules of Practice & Procedure of the Judicial Conference of
the United States, Revised Draft of Proposed Rules of Evidence for United States Courts
and Magistrates,} 51 F.R.D. 315 (1971).

\textsuperscript{212} The House Committee on the Judiciary struck these two exceptions on the
ground that they would create too much uncertainty in the law, but the Senate Committee
on the Judiciary reinstated them with additional criteria which became part of the final
version which emerged from Congress. \textit{See S. REP. No. 1277,} at 18-19 (1974), \textit{reprinted in
1974 U.S.C.C.A.N.} 7051, 7065-66. The Senate Committee stated that it “does not intend
to establish a broad license for trial judges to admit hearsay statements that do not fall
Court’s hearsay and confrontation decisions demonstrate a concern for clarity and predictability and a skepticism toward enlarging judicial discretion with respect to admission of hearsay.213

Finally, although the complexity and irrationality of current hearsay rules has been severely criticized,214 a considerable body of opinion regards the rules as working “tolerably well” in practice.215 In view of the recognized need for consistency and predictability and the absence of any perceived crisis in rule application, it would not be fruitful to seek elimination of the categorical approach to hearsay in favor of general standards of reliability and necessity. However, adjusting our rules with a fresh focus on hearsay’s primary foundations would be both possible and productive.

C. Guidelines: An Adversary-Oriented Danger Spectrum

Focusing on the nature of the statement and context in which it was made, it is possible to formulate an adversary-oriented danger spectrum in which the most serious concerns arise from admission of hearsay which was (1) adversary-created, that is, elicited or induced by the party-proponent (such as statements of witnesses to police, prosecutors, or defense investigators) and (2) not recorded or otherwise verified as actually made by the declarant such that the...
factfinder must rely on the credibility of the in-court witness.

The first factor focuses on party activity as the source of declarant's motivation for making the statement, the character of which will vary from case to case. Adversary-created statements (elicited or induced by a party) usually will be adversary-motivated in the broad sense that when making the statement, declarant anticipates future legal proceedings. However, the nature and degree of the motivation will vary from the usual crime victim or impartial witness who makes a statement understanding that legal action may follow, but anticipating no rewards, to accomplices or informers who incriminate the accused hoping for government benefits. The greatest dangers arise from statements which are made both in contemplation of legal proceedings and in fear of punishment or hope for advantage as the result of party threats or inducements, such as accusatory or blame-shifting statements of accomplices or informers. Arguments for exclusion are strongest with respect to unverified, adversary-created statements made in anticipation of litigation and motivated by prosecutorial pressures.

An adversary orientation also may be used in applying the second factor. In the usual adversary-creation context, a party induces a statement from an absent declarant; but a party may induce a witness to testify to nonadversary-created statements of another, in which case verification that such statements actually were made may be problematic. For example, when an informer who hopes for favors from the government testifies to conversations with defendant's accomplice or non-testifying co-defendant, admission of such statements, even if nonadversary-created, may be dangerous if the statements were not recorded or otherwise verified and the factfinder must rely solely on the credibility of the in-court witness.

Of course these factors are not of equal significance, and exclusion of hearsay should not be limited to contexts in which they

216. It may be difficult to determine whether the declarant contemplated legal proceedings when making the statement, particularly when declarant is unavailable. In today's litigious society the remote prospect of litigation frequently is on everyone's mind. However, the primary focus should be on whether the statements were made with hope of obtaining some benefit or with an eye to influencing the course of future legal actions, that is, motivated by adversary considerations.

217. In the Oklahoma City bombing trial against Terry Nichols, the prosecution indicated that it would offer the testimony of Michael and Lori Fortier with respect to conversations they had before the bombing with Nichols' former co-defendant Timothy McVeigh, who later was convicted at a separate trial. See Jo Thomas, Second Bombing Trial Has Same Charges in a New Case, N.Y. TIMES, Aug. 31, 1997, § 1, at 16. Although these statements were not party-created, it is unlikely that they were recorded, and there may be few assurances that they were actually made by McVeigh. In such case, it may make sense to limit admission of nonadversary-created statements to those qualifying for admission under traditional hearsay rules, such as co-conspirator statements.
However, it is in the context of statements induced or elicited by the parties or their agents that the threat of party-manipulation and contamination is greatest and the deterrent rationale strongest, particularly with respect to prosecution-created hearsay. Statements to police may be least reliable, especially when induced by threats or promises. Yet there seems to be a trend toward regarding statements to government officials as more trustworthy. For example, the new “Simpson exception” to the California hearsay rule admits statements that were made in writing, electronically recorded, or “made to a law enforcement official,” thereby placing prosecution-created hearsay on a par with statements verified by recordation. At the other end of the spectrum are nonadversary-created statements which can be reliably produced in court. Arguments for exclusion of hearsay have much less force with respect to statements which were made to persons other than the parties or their agents, made prior to or during the events in controversy and not in contemplation of litigation, and which were recorded or otherwise preserved for reliable in-court presentation.

This adversary-oriented standard generally would admit most statements once introduced under the out-dated label “res gestae” and now viewed as nonhearsay or covered under what Roger Park characterizes as “transactional exceptions” such as present sense impressions or excited utterances. Park describes transactional statements as “part of the same general transaction or occurrence as

---

218. For example, mere verification that statements were actually made, such as with grand jury testimony or police-recorded statements of accomplices, should not guarantee their admission if they were adversary-created.


220. The English documentary hearsay exception for statements of unavailable declarants also treats statements to the police more favorably. The Criminal Justice Act of 1988 provides that a statement to a police officer or similar law enforcement official may be admitted by demonstrating that the declarant “does not give oral evidence through fear or because he is kept out of the way.” § 23(3). Omitted from the new provision is the previous requirement of showing that the declarant was “kept out of the way by means of the procurement of the accused or on his behalf” which required that the act must have been done by the accused or by his agent and with his approval. See Criminal Justice Act of 1925, § 13(3); see also case cited in Di Birch, Documentary Evidence, 15 CRIM. L. REV. 23 (1989). This leaves the prosecution free to claim that the declarant fears to testify and to offer his written statement in place of his oral testimony. The court in exercising its discretion under Section 25 could require a nexus between the accused and declarant’s absence, but the Act does not require the court to do so. See ZUCKERMAN, supra note 23, at 219.

221. Park, Hearsay Reform, supra note 9, at 74.

222. However, admission of excited utterances would rest on the fact that such statements were not adversary-created, rather than on the controversial assumption that statements are more reliable when uttered under stress of excitement.
independently admissible nonverbal conduct,"^{223} and believes that their admission reflects two considerations: that they will not come as a surprise since most likely they will be discovered during ordinary pre-trial preparation and the chance of fabrication by the in-court witness is less since such statements occur at the same time and place as other conduct which forms the basis of the litigation.^{224} In addition, as noted by Professor Mueller, such statements generally are uttered before the forces that generate litigation have strengthened and come into conflict.^{225} Thus, such statements usually suffer less from dangers associated with party-controlled factfinding, as well as escaping weaknesses associated with surprise and credibility of the in-court witness.^{226}

However, an adversary-oriented standard would not be as liberal as the Benthamite-style reform proposed by the American Law Institute's Model Code of Evidence, which would freely admit hearsay whenever the declarant is unavailable,^{227} nor would it go as far as the less radical reform proposed by the Uniform Rules of Evidence a decade later which excepted from the hearsay rule statements of unavailable declarants "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 ...."^{228} While the Uniform Rules required that the statement be "made in good faith prior to the commencement of the action,"^{229} apparently recognizing the dangers of admitting party-created statements which were made in contemplation of litigation, they did not limit admission to nonadversary-created statements.

The second important factor, which might be critical in close cases, focuses on whether the statement was recorded or otherwise verified as actually made by the declarant such that the factfinder need not rely solely on the credibility of the in-court witness. The Federal Rules now recognize the importance of this factor in hearsay

---

223. Park, Hearsay Reform, supra note 9, at 74.
224. See id. at 75-76.
225. See Mueller, supra note 11, at 390.
227. See MODEL CODE OF EVIDENCE Rule 503 (1942) ("Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as witness, or (b) is present and subject to cross-examination."). The radical nature of this proposal, at least in part, was responsible for the fact that no jurisdiction adopted the Model Code. See authorities cited in Park, Hearsay Reform, supra note 9, at 53 n.11.
229. Id.
exceptions manifesting a preference for recorded statements and in the description of prior witness statements admissible as nonhearsay when made under oath at a "trial, hearing, or other proceeding, or in a deposition." Of course, some recordings are better than others, and both the reliability of reproductive method and the general importance of the verification factor will vary from case to case.

D. Notice Requirements to Guard Against Surprise

As discussed previously, serious dangers associated with surprise production of hearsay statements arise in those jurisdictions that lack effective pre-trial mutual discovery rules. However, such dangers are diminishing with the trend toward greater discovery in criminal cases. Where, as in California, mutual discovery rules require both the prosecution and the defense to disclose in advance of trial names and statements of witnesses and other evidence the parties intend to present, dangers from surprise are considerably diminished. Also, the residual exceptions of the Federal Rules of Evidence require notice "of the statement and the particulars of it," including the name and address of the declarant, sufficiently in advance of trial to provide the adverse party "with a fair opportunity to prepare to meet it." These or similar hearsay discovery rules should be sufficient protection against surprise, but should be a condition for admission of all hearsay, particularly statements falling outside categorical exceptions.

E. Corroboration and Sufficiency Standards

Furthermore, corroboration and sufficiency standards should be established to insure verdict integrity in light of the absence of checks on the independent and unaccountable factfinder. With respect to both hearsay admitted under specific exceptions and nonadversary-created hearsay admitted under a residual exception, the judge should, in balancing probative value against the danger of unfair

230. See Park, *Hearsay Reform, supra* note 9, at 71 n.79 (listing a number of exceptions applicable only to recorded statements).

231. FED. R. EVID. 801(d)(1)(a). The new English exception for documentary hearsay also reflects diminished concerns with in-court reproduction with respect to recorded statements.

232. For example, Michael Graham proposes expanding the category of prior statements of witnesses admitted as non-hearsay to any statement written or signed or accurately recorded or acknowledged by the witness as his own. See MICHAEL H. GRAHAM, WITNESS INTIMIDATION 257-58 (1985). Yet a written statement may be more easily distorted or manipulated by statement-takers than testimony of the witness at a judicial proceeding.

233. FED. R. EVID. 803(24), 804(b)(5).
prejudice and other factors, \textsuperscript{234} require that the hearsay be reliable by reference to its nature, the circumstances of its creation, or other evidence in the case. Most statements falling within specific traditional exceptions, as well as most nonadversary, "transaction-based" statements, would be found reliable by reason of their inherent characteristics. However, corroboration should not be limited by the \textit{Idaho v. Wright}\textsuperscript{235} standard of "indicia of reliability by virtue of [the statement's] inherent trustworthiness." \textsuperscript{236} In terms of hearsay reliability, it is not productive to distinguish between intrinsic and extrinsic corroborating factors. In fact, evidence extrinsic to the circumstances surrounding the making of the statement may be stronger proof of statement reliability, and, ultimately, verdict integrity, than the context in which the statement was made. The statement of a kidnap victim describing the interior of defendant's home or of a sexual assault victim describing unique private physical characteristics of the accused would be highly reliable if the statement were proven to conform to the actual facts and the declarant was shown to be incapable of knowing these facts by other means. Such probative hearsay should not be excluded merely because corroboration was not based entirely on the context in which the statement was made.

Finally, although hearsay evidence may be too powerful to exclude, alone it may be too weak a foundation on which to sustain a conviction. \textsuperscript{237} Thus, in those very few cases in which a hearsay statement constitutes the principal evidence against the accused, we should enhance sufficiency rules in order to further guard against unjust convictions. For example, we might require that the statement be clearly corroborated by independent evidence such that the judge also is convinced of defendant's guilt. \textsuperscript{238} Under an elevated sufficiency standard, the degree of corroboration demanded would increase with the importance of the hearsay evidence in the

\textsuperscript{234} See \textit{FED. R. EVID.} 403.

\textsuperscript{235} 497 U.S. 805 (1990).

\textsuperscript{236} \textit{Id.} at 822. The Court interpreted the Confrontation Clause as requiring that a statement not falling under a traditional hearsay exception possess "indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." \textit{Id.}

\textsuperscript{237} See Charles R. Nesson & Yochai Benkler, \textit{Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause}, 81 VA. L. REV. 149, 158, 173 (1995) (seeking to resolve this dilemma by interpreting the Confrontation Clause to require that the judge make an independent foundational finding that all prosecution hearsay is both internally reliable in terms of the \textit{Idaho v. Wright} standard and independently corroborated). \textit{See also} Seigel, \textit{supra} note 94, at 942 (suggesting a corroboration requirement as to prosecution evidence in criminal cases where even best evidence hearsay might be too risky a foundation upon which to rest a conviction).

\textsuperscript{238} The judge could weigh the evidence as a "thirteenth juror" as is currently the practice in some states. \textit{See}, e.g., State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995).
prosecution's case. A hearsay statement, whether or not falling under a traditional hearsay exception, and whether or not adversary-created, simply is too thin a reed on which to sustain a conviction unless clearly and firmly corroborated. 239

F. Applications of the Adversary-Oriented Standard

I have attempted to demonstrate that our hearsay rules are unreasonably restrictive, particularly with respect to nonadversary-created statements of unavailable declarants in criminal cases. Neither the adversary system nor the jury supports exclusion of reliably preserved and corroborated statements of unavailable declarants not elicited or induced by agents of the offering party or otherwise made in contemplation of legal proceedings. 240

Current federal and state rules of evidence could be rewritten to focus primarily on adversary and verdict integrity concerns, but such wholesale revision is highly unlikely. However, a fresh focus on such concerns might guide legislatures in the adoption of new interpretation of existing hearsay exceptions. For example, as noted earlier, the new “Simpson exception” to the California hearsay rule demonstrated appropriate concerns with witness-based dangers in requiring that statements be in writing or electronically recorded, but disregarded adversary-oriented dangers by including statements “made to a law enforcement official.” 241

Furthermore, courts should focus primarily on adversary and verdict integrity concerns when interpreting and applying the present hearsay rule and its exceptions, particularly residual or “catch-all” exceptions. In most contexts, this should lead to greater admission of hearsay on behalf of both the prosecution and the defense. In general, exclusion of probative hearsay is not justified merely by distrust of jury evaluation abilities in terms ordinary declarant-oriented weaknesses, unenhanced by adversary dangers. However, we should continue to exclude hearsay which is particularly susceptible to dangers inherent in our super-adversary system.

The following applications of an adversary-oriented standard suggest admission either under a new exception or a broadened residual category designed for the purpose of “catching all” nonadversary-created statements, particularly those of unavailable declarants, provided the court finds the statements sufficiently

239. In light of double jeopardy guarantees, it is more difficult to guard against unjust acquittals.
240. The proponent, of course, should shoulder the burden of establishing these foundational facts.
corroborated and probative under Rule 403 balancing standards. Applications of the adversary-oriented approach are clearest with respect to "transactional-type" statements of murder victims which are made to persons other than government agents. While some would fall under traditional hearsay exceptions, many would not, yet such statements often are highly probative and often the best evidence available on a material issue. Thus, adversary-oriented perspectives would lead to reassessment of some accepted distinctions.

(1) Temporal Distinctions—Looking Forward or Backward

Standard hearsay doctrine distinguishes between statements of intent looking to the future and statements of fact looking to the past. The statement of a homicide victim that she plans to go out to dinner with the accused on the evening of her demise generally is admissible to show her intent or plan to go out and that she in fact did go out with the accused. But her statement of past events would be inadmissible when offered to prove those events occurred. Thus, Jane's statement to her roommate, "I'm going out to dinner with Frank tonight" would be admissible to prove her intent and to permit the inference that she carried out her plan with Frank. However, couched in terms of past events, admission of her plan would be more questionable—for example, had she said, "Frank and I arranged to have dinner tonight" or "Frank and I met at Bill's Bar and agreed to have dinner together tonight." Assume further

244. This majority view relies on dicta in Hillmon, 145 U.S. at 295-96 (suggesting that statements of intent to engage in future conduct with another can be used to prove the other's conduct as well: "The letters [of Walters] were competent... as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go, and that he went with Hillmon... "). See, e.g., United States v. Annunziato, 293 F.2d 373, 376-77 (2d Cir. 1961); United States v. Pheaster, 544 F.2d 353, 379-80 (9th Cir. 1976); United States v. Houlihan, 871 F. Supp 1495, 1500-01 (D. Mass. 1994); see also Glen Weissenberger, Federal Evidence § 803.15 (2d ed. 1995).
245. See Shepard, 290 U.S. at 105-06.
247. Weissenberger explains the general rule by the implied assertion theory, but admission of an express statement of prior arrangement for future action is difficult to justify under this theory. See Weissenberger, supra note 246.
that Jane was fatally poisoned at dinner, but did not become ill until the following evening. During breakfast the day after dinner, Jane said to her roommate, “I went out to dinner with Frank last night.” Clearly, this statement would not qualify as an expression of state of mind,\textsuperscript{248} and likely would be inadmissible unless brought within a catch-all exception. This is so whether offered by the prosecution in the trial of Frank or by the defense in the trial of Dave to prove that the victim was with Frank when she was poisoned. Yet the result seems reasonable only to those confined to a narrow declarant-oriented hearsay analysis. While the four traditional hearsay dangers are present and cannot be checked by cross-examination, the statement was not adversary-created and, with the declarant clearly unavailable, it may be the best indication of her whereabouts at the critical time. Furthermore, the statement was not accusatory, intended to shift blame, or made in anticipation of litigation. Also important is whether the statement was written, recorded, or otherwise verified as actually made. Arguments for admission of Jane’s statement would be stronger if she had written it in her journal or had spoken before a number of independent witnesses. However, the main focus should not be on whether the statement looks to the past or to the future but on whether the statement was adversary-created and sufficiently corroborated. Despite traditional declarant-based hearsay dangers, the hearsay rule should not normally exclude corroborated, nonadversary-created statements, particularly when written, recorded, or otherwise verified as made.

Thus, the fact that a statement is accusatory should not alone lead to exclusion of nonadversary-created statements. Assume Jane made the statement after she began to feel ill and added, “I’m feeling sick. I believe that Frank has poisoned me.” The accusatory portion of the statement clearly would not be admissible under the state-of-mind exception.\textsuperscript{249} Yet the statement was not adversary-created and, if corroborated and verified as made, should be considered for admission under a residual hearsay exception. Defendants also might benefit from the more liberal standard. For example, had she stated to her roommate, “My boyfriend and I had a great time yesterday; he is so good to me” or “I just had lunch with my cousin Betty; I think she has poisoned me,” the defendant-boyfriend should be able to use

\textsuperscript{248} Merely a statement of memory or belief.

\textsuperscript{249} The state of mind exception specifically excludes “a statement of memory or belief to prove the fact remembered or believed.” \textit{FED. R. EVID.} 803(3). \textit{See Shepard.} 290 U.S. at 105-06 (holding inadmissible a similar statement by defendant’s wife to her nurse in his prosecution for her murder, and warning that “declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past [and that] there would be an end, or nearly that, to the rule against hearsay if the distinction were ignored”).
it to his advantage.

(2) *Purpose Distinctions—Focusing on Declarant or Defendant*

Standard hearsay doctrine also distinguishes between a crime victim’s fear statement when used to prove the victim’s state of mind or conduct and when used to prove the state of mind or conduct of another. A crime victim’s statements evidencing fear of the defendant or relating threats by the defendant usually are inadmissible to prove defendant’s conduct or state of mind. Such statements are admissible only to rebut defendant’s claim with respect to the victim’s conduct or state of mind. Thus, a murder victim’s statement of fear of her husband is inadmissible to show faulty marriage in order to establish defendant’s motive, but is admissible to prove the victim’s fear of defendant in order to rebut defendant’s claim that the victim provoked defendant’s lethal conduct or that the she consented to sexual acts.

250. This is the majority view. See, e.g., United States v. Brown, 490 F.2d 758, 767-769 (D.C. Cir. 1973) (holding inadmissible a statement of the murder victim that she feared the defendant); People v. Arcega, 651 P.2d 338, 350 (Cal. 1982) (holding inadmissible the victim’s statements relating defendant’s threats when offered to prove that the threats were actually made and that defendant most likely carried them out); People v. Ireland, 450 P.2d 580, 583 (Cal. 1969) (holding that statements of the victim evidencing fear of defendant are inadmissible since ordinarily neither the victim’s conduct nor state of mind is an issue in the action); see also State v. Baca, 902 P.2d 65, 71 (N.M. 1995); State v. Auble, 754 P.2d 935 (Utah 1988); People v. Floyd, 470 N.E.2d 293, 295 (Ill. 1984); Hanson v. Commonwealth of Virginia, 416 S.E.2d 14, 22 (Va. Ct. App. 1992); Commonwealth v. Williams, 571 N.E.2d 29, 32 (Mass. App. Ct. 1991); State v. Singh, 586 S.W.2d 410, 418 (Mo. Ct. App. 1979).

A minority of states allow statements of unavailable declarants to be used to prove defendant’s conduct or state of mind directly, usually fitting the statement within a residual exception. See, e.g., State v. Alston, 461 S.E.2d 687, 704 (N.C. 1995); State v. Davi, 504 N.W.2d 844, 850-51 (S.D. 1993); State v. Fletton, 412 S.E.2d 344, 357 (N.C. 1992); State v. Triplett, 340 S.E.2d 736, 742 (N.C. 1986). Triplett and Alston reasoned that the victim’s fear of defendant evidenced “ill will” between them which was probative of motive and identity, but this approach is merely a circuitous way of using the statement to prove defendant’s conduct.

251. See United States v. Brown, 490 F.2d 758, 767-69 (D.C. Cir. 1973) (noting that the deceased's statements of fear of the accused would be admissible to rebut defendant's claim that (1) the deceased was the aggressor and defendant acted in self-defense, (2) that the deceased committed suicide, or (3) that the death was accidental). See also People v. Green, 609 P.2d 468, 480-81 (Cal. 1980), rev’d on other grounds by People v. Hall, 718 P.2d 99 (Cal. 1986). (holding admissible as non-hearsay the victim’s statements relating defendant’s threats when the victim’s state of mind was made relevant by defendant’s claim that she voluntarily accompanied him on the morning of the murder).

252. See People v. Ruiz, 749 P.2d 854, 863 (Cal. 1988) (holding that such statements were also inadmissible to prove lying-in-wait by showing why defendant needed to catch the victim off-guard).

In the O.J. Simpson criminal trial Judge Ito admitted evidence of specific instances of defendant's past spousal abuse in the form of police photos and witness testimony concerning her injuries and the victim's "911 call" in which defendant uttered threats and kicked down the victim's door. However, the judge excluded on hearsay grounds statements the victim made to friends and statements she wrote in her diary expressing her fear of defendant and recounting acts of abuse and stalking by the defendant, some occurring more recent than the 911 call. In her diary she wrote that defendant beat her and tore off her clothing, and she told friends and relatives that defendant was following her and that she was afraid of him and believed that he was going to kill her.

Judge Ito was correct in holding that these statements were inadmissible hearsay under existing California law, since the defense had not raised any issue with respect to the victim's conduct prior to the homicide. Yet suppression of such important statements was disturbing to Judge Ito, as it must have been to the general public. Judge Ito remarked:

To the man or woman on the street, the relevance and probative value of such evidence is both obvious and compelling, especially those statements made just days before the homicide. It seems only just and right that a crime victim's own words be heard, especially in the court where the facts and circumstances of her demise are to be presented. However, the laws and appellate court decisions that must be applied by the trial court hold otherwise.

In an ad hoc reaction to the Simpson acquittal, the California legislature enacted a new hearsay exception which admits statements of unavailable victims of "physical injury" which narrate, describe, or explain the infliction of such injury, provided the statements were made "at or near" the injury, made under circumstances indicating

254. See People v. Thompson, 753 P.2d 37, 46 (Cal. 1988).
255. See Ruling, People v. Simpson, No. BA 097211, 1995 WL 21768, at 3-4 (Cal. Super. Ct. L.A. County, Jan. 18, 1995). The court also allowed the prosecutor to offer various evidence regarding "stalking incidents," but the prosecution later decided not to offer much of it. Id. at 6.
256. See id. at 7-8.
257. See id. at 4. The defense referred to the diary as a memo to her lawyer. The judge also excluded a telephone call to a shelter for abused women by a woman with characteristics matching those of the victim Ms. Simpson. See infra Part III.F.3.
258. See id.
259. See id.
260. See People v. Ireland, 450 P.2d 580, 583 (Cal 1969) and People v. Arcega, 651 P.2d 338, 350 (Cal. 1982). In California, it is reversible error to admit statements of a homicide victim expressing fear of the accused even when made on the very day of the crime. People v. Ruiz, 749 P.2d 854, 862-63 (Cal. 1988).
truthworthiness, and made in writing, electronically recorded, or to a law enforcement official. Instead of this narrow case-directed approach, the California legislature should have adopted either a residual exception or an adversary-oriented exception which would admit a broader category of nonadversary-created statements than merely those of victims of physical injury, but which would generally exclude statements to police or other law enforcement officials, particularly when not recorded or otherwise verified as actually made.

(3) Benefits of Focusing on Adversary Factors Rather than on Temporal or Purpose Distinctions

In addition to more liberal admission of probative evidence, more lenient admissibility rules with respect to nonadversary-created hearsay will lessen the need for mind-bending instructions which ask the factfinder to consider statements for the purpose of determining the state of mind of the declarant, but not for the truth of the facts in the statement or for the purpose of determining another’s conduct. For example, in admitting the murder victim’s fear statements, the court would not be required to direct the jury to consider the statements only to prove the victim’s state of mind or conduct, but not to prove defendant’s conduct, although evidence of the victim’s conduct contradicts defendant’s story regarding his own conduct.

In the O.J. Simpson civil trial defendant testified, painting a picture of himself as a loving husband and father who could not have fatally slashed his former wife and denying ever hitting or hurting her other than in one “wrestling” incident. He claimed that her death so surprised and shocked him that he was left distraught and suicidal. To counter these images, Judge Fujisaki allowed the plaintiffs to introduce portions of Ms. Simpson’s letters which expressed concern for her safety and her diary which claimed that the defendant had “beat the holy hell” out of her. However, the Judge warned jurors that the letters and diary could not be considered for the truth, but

262. CAL. EVID. CODE § 1370 (West Supp. 1998). This section was enacted in 1996.
263. California has no residual exceptions comparable to those of the Federal Rules of Evidence.
264. For an argument supporting even broader admissibility, see Karleen F. Murphy, Note, A Hearsay Exception for Physical Abuse, 27 GOLDEN GATE U. L. REV. 497, 513-514 (1997) (contending that statements of threatened or inflicted physical abuse are “analogous to . . . declarations against interest” and are particularly trustworthy since “recording, or reporting such incidents to a law enforcement official runs the risk that [declarant’s] abuser, or threatened abuser will discover the report and retaliate.”).
only as an indication of the victim’s state of mind. Judge Fujisaki also permitted a worker at the Sojourn House, a shelter for abused women, to testify that she received a telephone call from one identifying herself as Nicole, a Caucasian woman in her mid-thirties, divorced for eight years, living in West L. A. with two children (a girl and boy), and whose “very high profile” ex-husband had beaten and was now stalking her. The caller said that he had threatened to kill her if he ever caught her with another man and that she was frightened of him. The following day, Judge Fujisaki instructed the jury that they must consider the call only for the limited purpose of proving the caller’s state of mind or conduct, and not for “the substance of her statement ... as evidence of any event or whether such event occurred” or as “evidence of any state of mind, intent, or acts attributable to Mr. Simpson.”

Such limiting instructions are terribly misleading and confusing. The ultimate issue in the case concerned defendant’s conduct—did he kill his former wife? Evidence not helpful on this question in some manner would be irrelevant and inadmissible. This is so despite the fact that limited use of the victim’s statements may require a number of intervening inferences involving the victim’s state of mind and

268. See id. at 11.
269. Transcript, Examination of Randall R. Petee, Dr. Leonore E. A. Walker, Jim Merrell, and Mark Partridge, December 5, 1996, WL 697576, at 3-4 (Cal, Super. Trans.).

The full instruction was as follows:

THE COURT: The testimony [of the Sojourn House Worker with respect to the telephone call from Nicole] was received into evidence for the limited purpose—for a limited purpose, and cannot be considered by the jury for any other purpose. It has been contended previously that Nicole Brown Simpson was trying to get back together with Mr. Simpson; that she was fearful of him, or that she did not want to reconcile with him; or that she had a state of mind that was one way or the other at different times. The testimony ... about the telephone call was offered by the plaintiff to show Nicole's state of mind regarding the relationship at the time the call was made, and to explain her conduct as it may relate to Mr. Simpson at the recital the night of her death. This testimony is received only to show her state of mind, and to explain her conduct. The jury must not consider the substance of her statement ... as evidence of any event or whether such event occurred. The testimony is not evidence of any state of mind, intent, or acts attributable to Mr. Simpson, and cannot be considered by the jury for such purpose .... That the substance of the conversation—you cannot consider whether they were real, truthful, or anything. You may only consider the telephone conversation as it may show what the caller's state of mind was at that time or about that time. Everybody understand that?

JURORS: (Nod affirmatively.)

Id. at 4-5.
Hearsay Hazards

conduct. Provided these statements were not adversary-created, it would have been preferable for the court to admit them with a practical "consumer warning" concerning the weaknesses of second-hand evidence and the inability of the defense to question the declarant, rather than to give confusing, technical instructions which draw distinctions "too fine to be disentangled by a jury" or, for that matter, by professionals.

(4) Defense Hearsay

(a) Presenting a More Complete Defense

Broader admissibility of nonadversary-created statements often will aid the accused in presenting a more complete defense. Common law and statutory hearsay rules generally apply in the same manner to the prosecution and the defense, and can be even more restrictive with respect to exonerating hearsay. It is true that defendant's right to admit hearsay evidence is not constitutionally restricted, as is the prosecution's, and the Sixth Amendment Compulsory Process Clause and other constitutional guarantees may on occasion require admission of defense hearsay otherwise barred by rules of evidence. However, the scope of defendant's constitutional right to introduce exonerating evidence is unclear. In Montana v. Egelhoff, four justices believed that due process demands that a criminal defendant be afforded a fair opportunity for

271. The Federal Rules contain some exceptions to the general rule that foundational requirements are the same whether hearsay is offered by the prosecution or the defense. See, e.g., FED. R. EVID. 803(22) (imposing specific restrictions on prosecution use of judgments of conviction).
272. See FED. R. EVID. 804(b)(3) (imposing specific restrictions on use of statements against penal interest when offered to exonerate the accused).
273. See Washington v. Texas, 388 U.S. 14, 23 (1967) (holding that a statute which renders an accomplice incompetent to testify on behalf of a criminal defendant violates the defendant's right of compulsory process); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that a state rule of evidence violated due process by barring the defendant from introducing a third party's confession to the crime charged and by prohibiting impeachment of the third party by such confession); Davis v. Alaska, 415 U.S. 308, 318 (1974) (holding that defendant's Sixth Amendment right to confront witnesses requires that a statute protecting the confidentiality of juvenile proceedings yield to allow defendant to impeach a prosecution witness for bias by showing he was on juvenile court probation).
274. 116 S. Ct. 2013, 2016-17 (1996) (holding that Montana law that provides that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense" does not violate due process).
"meaningful adversarial testing" of the State's case which includes the right to present "competent, reliable evidence...essential to the accused's defense." However, four other justices rejected the argument that due process guarantees the right to introduce "all relevant evidence" or "critical evidence" favorable to the defendant, asserting that the right to introduce even "critical relevant evidence" on behalf of an accused can be limited by the state for "a valid" reason.

More liberal admission of exonerating, nonadversary-created hearsay may be particularly helpful to the defense in homicide cases where statements of the victim point away from the accused. For example, O.J. Simpson's lawyers suggested that the victim may have been killed by drug dealers. Statements to her friends or in her journal that she had been threatened by drug dealers and was afraid of them would be powerful evidence for the defense, although technically inadmissible hearsay. Some may qualify as statements against interest—"My drug pusher said he would kill me if I did not pay up." But others may not. The statement, "I saw the dealers beat up my neighbor and they threatened to kill me if I go to the police" is not inculpatory and thus not admissible under the exception. Also, diary entries and confidential statements to close relatives may not be viewed as against the interest of the declarant if it were unlikely that she ever would be harmed by them. Yet it would be an injustice to prohibit defendant from introducing non-party created written or recorded statements of a murder victim conveying the victim's fear of being killed by another person.

(b) Special Problems with Respect to Statements of Defendant

In a technical sense, all statements of the defendant are adversary-created in that they are "self-elicited" by a party. Yet defendant's "transactional-type" statements, made in the immediate course of critical events, such as arrest or confrontation with incriminating evidence, usually are significant and are not the product of lawyer advocacy. However, as noted previously, special concerns arise with respect to defendant's own out-of-court statements when offered by the defendant since defendant is an available witness only to the defense. While defendant's story can be presented through other witnesses, and on occasion by defendant's

275. These justices regarded Chambers as "an exercise in highly case-specific error correction" which held only that "under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." Egelhoff, 116 S. Ct. at 2022 (quoting Chambers, 410 U.S. at 302-03). The remaining justice (Ginsburg) believed that the case primarily concerned the issue of defining mens rea rather than defendant's right to introduce relevant evidence. See id. at 2024-25 (Ginsburg, J., concurring).
pre-trial statements offered for a non-hearsay purpose or under an exception, in many if not most cases the accused must take the stand and submit to cross-examination in order to personally present his or her story to the factfinder. Yet because of threats of impeachment when testifying and Fifth Amendment protections when declining to do so, it appears that fewer defendants are taking the stand at criminal trials. Rules barring defense hearsay at least provide some inducement to testify. If the accused could freely introduce prior his or her own exonerating statements, particularly ones prepared and packaged by defense counsel, the defense could quite easily introduce defendant's personal story untested by cross-examination.

Thus, we are faced with conflicting interests—the defendant's interest in presenting his or her own "transactional" statements made during critical events which often have significant probative value and the prosecution's interest in avoiding the presentation of a fabricated defense which cannot be tested by cross-examination. An adversary-oriented accommodation of these interests would lead to admission of such statements provided they are not used as a substitute for defendant's trial testimony. For example, evidence of defendant's denial upon being confronted with contraband in the immediate circumstances of its discovery, which often is excluded as not qualifying as an excited utterance, should be admitted on defendant's behalf, as long as defendant takes the stand and does not use the statement as a substitute for defendant's own in-court testimony. A rule admitting as non-hearsay defendant's prior consistent statements when helpful in evaluating the defendant's credibility as a witness would serve this purpose if interpreted as limited to nonadversary-created, transactional-type statements, as opposed to lawyer-created or packaged denials.

Conclusion

The primary foundations supporting rules limiting the use of hearsay evidence rest on the procedural climate in which they operate. Those who point to the jury as the rationale for common law hearsay rules usually contrast professional with lay factfinding, contending that jurors untrained in the law cannot be trusted and

276. See, e.g., United States v. Sewell, 90 F.3d 326, 327 (8th Cir. 1996) (affirming the trial court's exclusion of defendant's denial of knowledge of presence of gun found in trunk of his car uttered immediately following its discovery on the ground that there was not a sufficient showing of stress which "stills the reflective faculties").

277. In Sewell, the defendant took the stand in his defense, so the purpose of deterring defendant from "testimonial substitution" was not served by excluding the statement. See id.

278. See, e.g., MINN. STAT. ANN. § 50, Rule 801(d)(1)(B).
referring to the absence of the jury as the reason for the lack of hearsay rules in continental countries. However, restrictions on hearsay evidence appear more closely connected to adversary procedures than to the jury. The American hearsay rules are founded on (1) our super-adversary system and the dangers presented by virtually unlimited party control over evidence gathering and presentation and (2) the independent, unchecked factfinder and the lack of means to assure integrity of verdicts which increases the danger that uncorrectable verdicts might be based on unreliable hearsay. To the extent that the jury justifies the hearsay rule, it does so more on account of its character as a source of "decision without a reason" unchecked by meaningful review than by differences between evaluation abilities of lay and professional factfinders. American hearsay rules in large part are aimed at compensating for weaknesses inherent in our highly adversary system which fragments authority, empowers parties and their lawyers, and marginalizes judges. In a system that allocates broad powers to the adversaries and to the factfinder, hearsay rules operate as a check on both and compensate for the lack of significant neutral oversight of the pre-trial, trial, and post-trial processes.

However, in cases where these dangers are significantly diminished, rationales for exclusion of hearsay are weakened. Consequently, we should adjust the hearsay rules to focus on the principles of adversary taint and corroboration, more freely admitting corroborated, nonadversary-created statements and exercising more caution in admitting uncorroborated, adversary-created hearsay. Specifically, our rules are unreasonably lenient in admitting adversary-created statements without requiring clear corroboration as a safeguard against conviction based solely on party-manufactured or contaminated hearsay evidence. On the other hand, our hearsay rules are unreasonably restrictive, with respect to corroborated statements of unavailable declarants which are not party-elicited or induced. Neither the jury trial nor the adversary system supports exclusion of nonadversary-created statements of unavailable declarants in criminal cases when reliably preserved and corroborated.