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Erosion of the Hearsay Rule

NOTE

EROSION OF THE HEARSAY RULE

"... the process [hearsay reform] has been too unconscious to be healthy...." Cross, *The Scope of the Rule against Hearsay,* 72 L. Q. REV. 91, 117 (1956).

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EROSION OF THE HEARSAY RULE

I. INTRODUCTION

Over a quarter of a century ago, the consensus among evidence scholars was that the rules of evidence were in need of thorough reform.[1] Case law had become so confusing and contradictory that the American Law Institute regarded a straightforward restatement of the law of evidence as a practical impossibility.[2] Instead that body decided upon a new proposal which might readily be adopted by the states as a comprehensive set of evidence rules.[3] Its aim was a more sensible and simple guide for trial judge and attorney than the existing rules.[4] Leading scholars and jurists collaborated to produce a Model Code of Evidence, but the proposal failed to win acceptance.[5] Not a single jurisdiction adopted it.

Within a decade, its proponents conceded that the Model Code would not be received by the legal profession; hence, its chance of passage in the legislatures was all but foreclosed.[6] In its place, the Uniform Rules of Evidence were offered by the National Conference of Commissioners on Uniform State Laws.[7] These rules were admittedly a compromise measure

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[1] *See* MORGAN ET. AL., THE LAW OF EVIDENCE SOME PROPOSALS FOR ITS REFORM (Commonwealth Fund 1927). *See also* 4 CHAMBERLAYNE, EVIDENCE vi (1913); 2 THAYER, PRELIMINARY TREATISE ON EVIDENCE 522 (1898) [hereinafter cited as THAYER]; TREGARTHEN, HEARSAY EVIDENCE 183 (1915); 1 WIGMORE, EVIDENCE § 8c (3d ed. 1940) [hereinafter cited as WIGMORE]; Baldwin, *The Artificiality of Our Law of Evidence,* 21 YALE L. J. 105 (1911); Maguire, *Heresy about Hearsay,* 8 U. CHI. L. REV. 621 (1941); McCormick, *Tomorrow's Law of Evidence,* 24 A.B.A.J. 507, 508 (1938); Peck, *The Rigidity of the Rule against Hearsay,* 21 YALE L. J. 257 (1912); Thayer, *Observations on the Law of Evidence,* 13 MICH. L. REV. 355, 361 (1915).

[2] 16 ALI PROCEEDINGS 46 (1939). Director Davis:

> The existing rules of evidence are often in their application uncertain; some prevent rather than promote the correct ascertainment of facts. Their overhauling by a body capable of distinguishing the absurd and obstructive from the useful and necessary is long overdue. When we first started our work on the Restatement of the Law we considered undertaking a Restatement of Evidence. We then came to the conclusion the existing confusion and defects in the present law of evidence can be remedied only by legislative action.

[3] 18 ALI PROCEEDINGS 85 (1941).

[4] *Cf.* Morgan, *Foreword* to MODEL CODE OF EVIDENCE 12-13 (1942).

[5] *But see* Goodrich, ALI ANN. REP. 9-10 (1954):

> [C]ourts have cited it and learned articles have cited it. Students have studied it. It has been a handbook for some administrative bodies. In other words, this Code, even without legislative adoption, has had a very considerable influence upon the law.

[6] *See* Fryer, *Note on Code as a Means of Promoting Nation-Wide Reform,* in SELECTED WRITINGS ON EVIDENCE AND TRIALS 1160, 1161 (1957): "There is no record of approval having been given to the Model Code of Evidence by any bar association."

[7] *See* Gard, *The New Uniform Rules of Evidence,* 2 KAN. L. REV. 333 (1954). The

designed to eliminate the obstacles to passage found in the Model Code.[8] One of the major obstacles had been the Code's radical departure from the traditional treatment of hearsay.[9] But another of the obstacles—broader discretion in the trial judge in receiving evidence—remained.[10] To the chagrin of the drafters, the American Bar Association, and the American Law Institute which endorsed the Uniform Rules, the reception of this proposal by the legal profession has been less than enthusiastic.[11] Only a few states have adopted the Uniform Rules or used them as the basis for legislative reform.[12]

Radical reform, thought to be imperative a quarter of a century ago, seems less likely to succeed today than it did then.[13] In no other area of the law of evidence is the need for thoroughgoing reform more crucial than in the area of hearsay. It is at the bottom of over one-third of all evidence problems.[14] Nowhere else is there such complexity, inconsistency, and confusion.[15] The present treatment of hearsay has also been blamed for contributing to the overcrowding of court dockets.[16] Pressure for reform has come from many directions, and points to the inadequacy of any proposal, such as the Uniform Rules, that leaves the substance of the hearsay rule intact while liberalizing it by the addition of new exceptions and the expansion of old ones.[17] The hearsay rule needs drastic change, not patching up.[18]

drafters of the Uniform Rules used the Model Code of Evidence as the starting point for their own work. *See also* McCormick, *Some Highlights of the Uniform Rules of Evidence,* 33 TEX. L. REV. 559 (1955).

8 *See* UNIFORM RULE OF EVIDENCE 63, comment at 198; McCormick, *supra* note 7, at 561.

9 *See* Fryer, *supra* note 6, at 1165.

10 UNIFORM RULE OF EVIDENCE 45.

11 *See* Stopher, *The Uniform Rules of Evidence: Government by Man Instead of by Law,* 29 INS. COUNSEL J. 405 (1962).

12 The Uniform Rules of Evidence have been adopted with minor changes in three jurisdictions. KAN. STAT. ANN. §§ 60-401-470 (1964); C. Z. CODE tit. 5, §§ 2731-2996 (Panama Canal Zone, 1963); V. I. CODE ANN. tit. 5, §§ 771-956 (Virgin Islands, 1957). Two other jurisdictions used the Uniform Rules as a starting point in devising new, comprehensive evidence codes of their own. CAL. EVID. CODE (1967); N.J. STAT. ANN. 2A:84A-1-32 (Supp. 1965).

13 Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence,* 14 VAND. L. REV. 725, 732 (1961).

14 *See* Noyes, *The English Jury and the Law of Evidence,* 31 TUL. L. REV. 153, 167 (1956).

15 *See* Maguire, *supra* note 1, at 621.

16 *See* Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise,* 54 A.B.A.J. 231 (1968).

17 *See* Loevinger, *Facts, Evidence and Legal Proof,* 9 W. RES. L. REV. 154, 162 (1958):

> What is now needed most in the law of evidence is a new analysis and re-formulation of the basic terms and concepts, particularly of the important "hearsay"

Until such change comes about, the rule will continue to suffer from inherent inconsistencies, arbitrary classifications, and erroneous assumptions.

The growing number of disputes being taken to nonjudicial tribunals where legal rules of evidence do not apply dramatically symbolizes the public's dissatisfaction with judicial fact determination.[19] Businessmen and others who base important decisions on hearsay reports day after day fail to see the value of a rule which excludes such evidence.[20] Too often they find, as judges have,[21] that the rule frustrates or delays the search for the true facts. The judiciary is well aware of the challenge of arbitration boards and administrative tribunals. Judges have suggested again and again that the hearsay rule be reformed so that the courts might protect their role as the principal public forum for the settlement of disputes.[22] Even if the traditional rule is sound, the very individuals that it purports to protect have become so disenchanted with it that they are taking more cases than ever to tribunals which are not bound by the hearsay rule.

But, as psychologists have shown, the hearsay rule is far from being sound.[23] Discoveries in the field of psychology contradict or add little sup-

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concept, rather than a mere liberalizing of the rules based on these illogical and archaic classifications.

See also 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, 950 (1962); Maguire, *The Hearsay System: Around and through the Thicket,* 14 VAND. L. REV. 741, 774 (1961); Note, *Ancient Documents as an Exception to the Hearsay Rule,* 33 YALE L. J. 412, 418 (1924).

[18] *See* Goodhart, *A Changing Approach to the Law of Evidence,* 51 VA. L. REV. 759, 780 (1965):

> The only solution seems to be to sweep the whole mass away and begin again by stating a few basic principles which a judge should follow unless in his discretion an exception ought to be made.

[19] *See* BOTEIN & GORDON, THE TRIAL OF THE FUTURE 78 (1963); MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 161-65 (1947); Davis, *Hearsay in Administrative Hearings,* 32 GEO. WASH. L. REV. 689, 692-93 (1964).

[20] *See* Taeuch, *Extrajudicial Settlement of Controversies—The Business Man's Opinion: Trial at Law v. Nonjudicial Settlement,* 83 U. PA. L. REV. 147, 150-51 (1934); Rosenthal, *A Business Man Looks at Arbitration,* 4 ARB. J. (N.S.) 138, 139 (1947).

[21] *See, e.g.,* FRANK, COURTS ON TRIAL 123 (1949).

[22] *See* Wyzanski, J., in United States v. United Shoe Machinery Corp., 89 F.Supp. 349, 356 (1950); STATE OF NEW YORK, FIFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK 101-02 (1960).

[23] *See* MARSHALL, LAW & PSYCHOLOGY IN CONFLICT 14-15 (1966); MCCARTY, PSYCHOLOGY AND THE LAW 275 (1960); MÜNSTERBERG, ON THE WITNESS STAND: ESSAYS IN PSYCHOLOGY AND CRIME 15-36, 50 (1923); Britt, *The Rules of Evidence—An Empirical Study in Psychology and Law,* 25 CORNELL L. Q. 556, 574 (1940); Hutchins, *The Law and Psychologists,* 16 YALE REV. 678 (1927); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations,* 28 COLUM. L. REV. 432 (1928); *Memory,* 41 HARV. L. REV. 860 (1928); *Competency of Witnesses,* 37 YALE L. J. 1017 (1928); *State of Mind in Issue,* 29 COLUM. L. REV. 147

port to the basic assumptions upon which the rule rests. Psychologists have little faith in the notion that the trier of fact can determine the sincerity, memory, recall, and articulation of a witness by observing his demeanor on the witness stand.[24] They insist not only that the value of cross-examination has been exaggerated,[25] but also that cross-examination can produce great harm.[26] While it can uncover falsehood and half-truth, it can also lead to distortion and inaccuracy in the answers elicited because of the suggestibility of many witnesses.[27] The danger that a witness may acquiesce in a false suggestion is the very reason that leading questions may not be put to one's own witness.[28] Yet during cross-examination, when leading questions may be asked, psychologists have found that the danger of distorted testimony remains.[29] Psychologists also criticize the method of eliciting facts from a witness on the stand.[30] A narrative statement by the witness, without interruptions from counsel in the form of objections, would be much more helpful to a jury than the bits and snatches they now get.[31]

(1929); *Consciousness of Guilt,* 77 U. PA. L. REV. 1 (1929); *Legal Psychology,* 36 PSYCHOL. REV. 13 (1929). *See also* 3 CHAMBERLAYNE, EVIDENCE 1774 (1916):

> To a certain extent, greater than is perhaps generally understood, each examining counsel and every member of the court and jury is, in dealing with evidence, called upon to act as an amateur psychologist. So regarded, the methods employed by them must, in the light of modern knowledge, be regarded as crude, clumsy and ineffectual. Probably the reason for this lies in the conservative persistency with which we are carrying into the present day the methods and machinery of what might be called the stone age of legal evolution.

See generally WIGMORE 990; MCCORMICK, *Law of the Future: Evidence,* 51 NW. U. L. REV. 218, 220 (1956); Touster, *Law and Psychology: How the Twain Might Meet,* 5 AM. BEHAVIORAL SCIENTIST, May 1962, No. 9, at 3; Winick, *A Primer of Psychological Theories Holding Implications for Legal Work,* 7 AM. BEHAVIORAL SCIENTIST, Dec. 1963, No. 4, at 45.

[24] Britt, *supra* note 23, at 574. In a survey of practicing lawyers, law professors and psychologists, the first two groups saw great value in a rule which required the witness to give his testimony in the presence of the trier of fact, while the third group saw little value in it.

[25] *See also* MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 167 (1956).

[26] *See* MARSHALL, *supra* note 23, at 30.

[27] *See* MCCARTY, *supra* note 23, at 205-22. *See generally* Abraham, *The Suggestible Personality: A Psychological Investigation of Susceptibility to Persuasion,* 20 ACTA PSYCHOLOGIA 167 (1962); Asch, *The Effects of Group Pressure Upon the Modification and Distortion of Judgments,* in CARTWRIGHT & ZANDER, GROUP DYNAMICS: RESEARCH AND THEORY 189 (2d ed. 1960); Evans, *Suggestibility in the Normal Waking State,* 67 PSYCHOL. BULL. 114 (1967); Haward, *Some Psychological Aspects of Oral Evidence,* 3 BRIT J. CRIMINOL. 342 (1963); Marston, *Studies in Testimony,* 15 J. CRIM. L.C. & P.S. 32 (1924).

[28] *See* MARSHALL, *supra* note 23, at 30.

[29] *Id.* at 30-37.

[30] *Id.* at 30.

[31] *See* MAGUIRE, *supra* note 19, at 33

Evidence scholars have been vocal, persistent, and unanimous in their attacks upon the hearsay rule.[32] To be sure, not all have advocated reform as radical as that of the Model Code, but all agree that reform is needed. The inherent weaknesses of the rule, which owes more to historical accident than to logical development,[33] is all too obvious to those who study it. Any rule which admits more under its exceptions than it excludes under its general provisions is certain to invite criticism in regard to its utility.[34] And any rule which admits evidence according to such artificial classifications without regard to the relative weakness and probative value of each bit of evidence in its particular factual setting will be called arbitrary.[35] If hearsay is so obnoxious, why does the law admit the dying declaration of a homicide victim while it excludes the more valuable statement of a disinterested eyewitness who also happens to be an ordained minister?[36] And why would the law treat as untrustworthy under one exception, the same declaration it deems trustworthy under another exception?[37]

The mere fact that so much hearsay must be received in order that courts might get on with their business without unreasonable delay and expense is reason enough to search for a more sensible and consistent basis for admitting it than the present exceptions. The alternative should be simple and should allow for a consideration of the peculiar value or weakness of the particular evidence offered.[38] This would go a long way toward eliminating the all too frequent situation under the present rule wherein hearsay evidence is excluded which has a far greater probative value and which involves far less danger than hearsay evidence which would have been received under one of the exceptions.

Faced with such a situation, courts have occasionally refused to follow the traditional rule and instead have applied common sense.[39] Such liberal decisions are relatively uncommon; and, as one judge has said, they are

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[32] *See* Davis, *supra* note 19, at 695.

[33] *Cf.* Note, *Declarations Against Interest: A Critical Review of the Unavailability Requirement,* 52 CORNELL L. Q. 301, 303 (1967).

[34] *See* Maguire, *supra* note 17, at 774; Smith, *supra* note 16, at 235; Strachan, *The Hearsay Rule,* 116 NEW L. J. 869 (1966).

[35] Smith, *supra* note 16, at 235.

[36] Loevinger, *supra* note 17, at 165.

[37] Dying declarations which fail to meet the technical requirements of the dying declarations exception may frequently be admitted under the res gestae exception. State v. McClain, 125 N.W.2d 765, 769, 4 A.L.R. 3d 134, 143 (Iowa, 1964).

[38] *See* Weinstein, *The Probative Force of Hearsay,* 46 IOWA L. REV. 331, 353 (1961). *See also* Goodhart, *supra* note 18 at 780.

[39] *See, e.g.,* Hurwitz v. Shiu Yim Poon, 364 F.2d 878, 887 (C.C.P.A. 1966); American Luggage Works, Inc. v. United States Trunk Co., 158 F.Supp. 50 (D.Mass. 1957); Moore v. Atlanta Transit System, 105 Ga. App. 70, 123 S.E.2d 693 (1961).

ill-advised since the traditional rule is so firmly established that it should only be changed by legislation.[40] At this point in the history of the hearsay rule, any reform by the courts in a case-by-case manner would probably create more confusion and lead to greater harm than the present rule.

Many of those courts which have not frankly denounced the hearsay rule have so distorted the hearsay rule to reach desired results that the resulting uncertainty in the law has caused more confusion than before.[41] The exceptions, particularly res gestae, have been so abused and extended that their outer limits no longer seem finite. There is hardly a hearsay statement that could not be admitted under one of the exceptions if the judge felt it should come in and was willing to force it. At other times, judges either ignore the hearsay nature of the out-of-court statement or admit it for limited purposes when such limitation cannot effectively be imposed. One writer, in fact, claims that no shrewd trial judge is hampered any longer by the restrictions of the hearsay rule.[42] Such duplicity in the law of evidence should not be allowed to continue.

The courts have further limited the effect of the hearsay rule by refusing to apply it at all or with its full force in cases where special factors exist. For example, judges sitting without juries have generally refused to follow the hearsay rule as they would in jury trials.[43] The peculiar demands of cases in family courts, eminent domain cases, and antitrust, trademark and patent cases have produced a hearsay rule far different from that applied in the usual case. Judges have frankly refused to apply the rule by rote to cases in which special treatment of hearsay is so obviously required. Even in the usual case, judges have undermined the effectiveness of the hearsay rule by relying upon judicial notice or pretrial conferences. Hearsay, which in the last century very clearly was not considered good circumstantial evidence, is today admitted as such. Some courts have even developed

[40] Frank, J., in United States v. Costello, 221 F.2d 668, 679 (2d Cir. 1955) (dissent), *aff'd*, 350 U.S. 359 (1956).

[41] *See, e.g.*, Gray v. State Capital Life Ins. Co., 254 N.C. 286, 118 S.E.2d 909 (1961), where the statement of a man insured by the defendant that he had been injured while breaking into a store was admitted as a declaration against pecuniary interest, since North Carolina does not recognize an exception for declarations against penal interest. The court reasoned that the statement was admissible against the plaintiff, the beneficiary under the policy, on the ground that, by making such a statement, the insured risked the chance that his beneficiary would not recover on the policy since a provision therein excluded recovery when death resulted from the insured's own criminal act. It is highly unlikely that such a thought occurred to the insured or, if it did, that it had any effect on his sincerity.

[42] Weinstein, *supra* note 38, at 343 n.70.

[43] For a detailed study of the trends which are eroding the hearsay rule, see the text material that follows at p. 161 *et seq.*

new theories or rejuvenated old ones for admitting hearsay. The combined effect has been a steady erosion of the hearsay rule.

Simultaneously, there has been a renewed interest in the proposals for legislative reform advanced by Jeremy Bentham in the early nineteenth century.[44] The Model Code treatment of hearsay roughly parallels his suggestions.[45] Quite independently, administrative agencies arrived at a similar result;[46] while arbitration boards were doing the same.[47] Courts in non-jury cases are approaching the same treatment of hearsay. Then, too, the experience of foreign courts, who manage tolerably well while receiving hearsay freely,[48] has led many to believe that the abandonment of the traditional Anglo-American hearsay rule would not be visited with the sacrifice of our precious institutions.

II. Defining the Hearsay Problem

A. *Nature of Judicial Proof*

Fact-finding is the process of arriving at a workable certainty in an area of previous uncertainty.[1] Using available data, the fact-finder must mentally reconstruct the unknown or disputed fact, which in most instances involves a past event.[2] This is inductive rather than deductive reasoning since the fact in question goes beyond the assertive content of the available data from which it is inferred.[3] The fact-finder proceeds from what he

[44] *See* Chadbourn, *supra* note 17, at 950.

[45] *Id.* at 943.

[46] *See* Davis, *supra* note 19, at 695.

[47] Am. Arb. Ass'n, Manual for Commercial Arbitrators 14-15 (1964).

[48] *Cf.* Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure,* 71 Harv. L. Rev. 1193, 1237 (1958); Kunert, *Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure,* 16 Buffalo L. Rev. 122 (1966). *See also* Hammelmann, *Hearsay Evidence, A Comparison,* 67 L. Q. Rev. 67 (1951); Ireton, *Hearsay Evidence in Europe,* 66 U.S. L. Rev. 252 (1932).

[1] *See* Stephen, Digest of the Law of Evidence xviii (1876). *See also* Loevinger, *Facts, Evidence and Legal Proof,* 9 W. Res. L. Rev. 154, 160(1958).

[2] *See* Kunert, *Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure,* 16 Buffalo L. Rev. 122, 123 (1966); Patterson, *Hearsay and the Substantial Evidence Rule in the Federal Administrative Process,* 13 Mercer L. Rev. 294, 296 (1962).

[3] *See* Rescher & Joynt, *Evidence in History and in Law,* 56 J. Philosophy 561, 562 (1959). *See also* Mill, Logic 211 (1843); Thilly, The History of Philosophy 531 (Wood rev. ed. 1952):

> Mill's entire logical theory is based on the laws of association. The child infers that the fire will burn because fire and burn came together before; the inference,

can observe to what he was previously unable to assert as true or probable.[4] Often the terms "proof" and "inference" are used interchangably to describe this process, but whether a fact is proved or inferred is essentially the same thing.[5] In arriving at the ultimate fact in question, there may be several steps of proof. For example, the fact which is established inferentially from available data becomes in turn a premise from which another fact is inferred, and so on, until the ultimate fact is inferred. Or several items of proof may be offered to establish a single fact, each item having a tendency to prove that fact but insufficient standing alone to convince the fact-finder of that fact's existence.

In this inductive process, good rather than conclusive reasons are required to support the fact-finder's conclusions.[6] He is, then, necessarily concerned with degrees of proof and probabilities.[7] In order for fact A to provide a strong basis from which fact B may be inferred, two conditions must be met:

(1) Given fact A, the probability of the existence of fact B must be high, and
(2) The probability of fact B's existence must be significantly higher than its probability without the evidence.[8]

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in this case, is from one particular to another, and not from the universal to the particular, nor from the particular to the universal. . . . The conclusion in an induction extends what is observed in certain particulars to one or more similar particulars and thus embraces more than is contained in the premises.

[4] Michael & Adler, *The Trial of an Issue of Fact,* 34 COLUM. L. REV. 1224, 1271 (1934).

[5] *Id.* at 1270 n.69:

> We shall use the words "proof" and "inference" as names for the same process. It is indifferent whether a proposition is said to be proved or to be inferred. . . . The same process which from the point of view of the parties is proof is from the point of view of the tribunal inference; that is, the parties actively undertake to prove propositions, whereas tribunal passively learns by following these demonstrations. . . .

[6] Rescher & Joynt, *supra* note 3, at 562.

[7] *See* Ball, *The Moment of Truth: Probability Theory and Standards of Proof,* 14 VAND. L. REV. 807 (1961):

> Specialists in all the fields involved agree that the process of proof and persuasion in judicial proceedings presents problems in the application of probability theory and communication theory.

See also GOOD, PROBABILITY AND THE WEIGHING OF EVIDENCE § 6.3 (1950); KINGSTON, PROBABILITY AND LEGAL PROCEEDINGS 93 (1966); James, *Relevancy, Probability and the Law,* 29 CALIF. L. REV. 689 (1941); Kingston, *Applications of Probability Theory in Criminalistics,* 60 AM. STAT. ASS'N 70 (1965); Loevinger, *Jurimetrics,* 33 MINN. L. REV. 455 (1949); Michael & Adler, *supra* note 4, at 1284 ("There are no degrees of relevancy, but there are degrees of probative force."); Stoebuck, *Relevancy and the Theory of Probability,* 51 IOWA L. REV. 849 (1966).

[8] *See* Rescher, *A Theory of Evidence,* 25 PHILOSOPHY OF SCIENCE 83 (1958).

What has been said to this point can be applied with equal force to court-room fact determinations, business, scientific research, and daily life.[9] Legal proof, however, has peculiar properties which are generally not to be found in other types of fact-finding.[10] The difference springs from the nature and purpose of judicial proceedings. It is often said that a trial is not a search for the truth in the sense that laboratory experimentation is a search for truth.[11] Instead a trial is "an attempt to settle a controversy between two persons without physical conflict." [12] A lawsuit is an adversary proceeding for the adjustment of a dispute, and necessity demands that the court reach a speedy decision with the evidence at hand.[13] The Anglo-American trial represents a compromise among three competing elements: (1) a search for the truth concerning the event in question; (2) the adversary procedure employed; and (3) manifest fairness to the litigants in the process of settlement.[14] The search for truth, then, has practical limitations imposed upon it for reasons of policy; nevertheless, the dispute must be resolved "on as close an approximation to truth as is possible." [15]

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[9] *See* Loevinger, *supra* note 1, at 161; 1 BENTHAM, THE RATIONALE OF JUDICIAL PROOF 208 (Mill ed. 1827): ". . . questions of evidence are continually presenting themselves to every human being, every day, and almost every waking hour of his life. . . ."

[10] *See generally* 2 BLACKSTONE, COMMENTARIES *367 (1768); GREENLEAF, EVIDENCE 1 (3d ed. 1846); THAYER 263-76; WIGMORE § 1, at 1-9. The unique feature which sets legal evidence apart is the exclusion of some admittedly relevant facts for reasons of policy. *See* Loevinger, *supra* note 1, at 161. Ordinarily, there are four stages in the forensic factfinding process: (1) defining the question for inquiry; (2) gathering pertinent data; (3) screening out unreliable data or evaluating the weight of conflicting data; and (4) applying rules of logic or common sense to reach a final answer. Freese, *The Warren Commission and the Fourth Shot: A Reflection on the Fundamentals of Forensic Fact-Finding,* 40 N.Y.U. L. REV. 424 (1965).

[11] *See* Frankfurther, J., in Johnson v. United States, 366 U.S. 46, 54 (1948): ". . . a court room is not a laboratory for the scientific pursuit of truth. . . ." *See also* Cleary, *Evidence as a Problem in Communicating,* 5 VAND. L. REV. 277 (1952): "The adversary approach to facts usually presents a dog fight between two conflicting versions out of which the trier is expected to emerge triumphantly carrying in his teeth the bone of 'truth.' "; Hart & McNaughton, *Evidence and Inference in the Law,* 87 DAEDALUS 40, 45 (1958):

> [I]t is always necessary to bear in mind that this *is* a last-ditch process in which something more is at stake than the truth only of the specific matter in contest, [since the parties involved have] a view not so much to establishing the whole truth as to winning the case [and] there is at stake also that confidence of the public generally in the impartiality and fairness of public settlement of disputes.

[12] Chafee, Book Review, 37 HARV. L. REV. 513, 519 (1924).

[13] *See* Morgan, *The Relation between Hearsay and Preserved Memory,* 40 HARV. L. REV. 712 (1927).

[14] This notion comes from Schiff, *The Use of Out-of-Court Information in Fact Determination at Trial,* 41 CAN. B. REV. 335 (1963).

[15] MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 128 (1956).

Different considerations are involved in criminal as opposed to civil trials.[16] Expediency cannot play so important a role in criminal cases; moreover, these are not disputes between private litigants, but between the state and the criminal defendant. The determination of facts upon which convictions are based should accord with truth. If there is reasonable doubt, such doubt must be resolved in the defendant's favor.[17] This is not to say that a different kind of proof is required in criminal cases; rather it means that the law requires more of it.[18] Furthermore, rules requiring the exclusion of certain evidence in criminal cases which would be received in civil cases are predicated upon extrinsic policy, such as the interest in protecting the privacy of the individual,[19] and the need for insuring that the state will not force the individual to incriminate himself.[20] These are procedural rather than evidentiary rules and are designed, at least in part, to protect the individual from overreaching by the state.[21] They attempt to create an artificial balance in an inherently imbalanced contest.

It is for the very reason that fact determinations in criminal as well as civil proceedings are made within practical limitations of time and expense, that any evidence which "is capable of a reasonably satisfactory valuation, should be received for what it is worth." [22] But it is inevitable that, in any rational system of proof, restrictions will be imposed on the amount and quality of evidence which is received by the fact-finder.[23] In judicial proceedings, the fact-finder does not ordinarily determine the amount of data to be considered.[24] The parties themselves are initially responsible for the production of evidence. As a general proposition, they are entitled to present any relevant evidence,[25] but the many rules which

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16 Nevertheless, courts often speak of one body of evidence rules applicable alike to civil and criminal cases; *see* p. 149, *infra,* and the material cited in n. 5 on that page.

17 Urquidi v. United States, 371 F.2d 654, 657 (9th Cir. 1967).

18 Judge Weinstein made this same point in an address at the Trial Lawyers Institute on Practical Trial Evidence, Nov. 17, 1967, in Washington, D.C.

19 U.S. CONST. amend. IV; Mapp v. Ohio, 367 U.S. 643 (1961).

20 U.S. CONST. amend. V; Miranda v. Arizona, 384 U.S. 436 (1966).

21 *Cf.* Frankfurter, J., in Culombe v. Connecticut, 367 U.S. 568 (1961).

22 Morgan, *supra* note 13, at 712.

23 *See* Morgan, *The Jury and the Exclusionary Rules of Evidence,* 4 U. CHI. L. REV. 247, 248 (1937).

24 There are instances in which the trial judge assumes an active role in the production of evidence. *See, e.g.,* Johnson v. United States, 366 U.S. 46, 54 (1948); Rex v. Dora Harris [1927] 2 K.B. 587, 96 L.J.K.B. 1069 (C. Crim. App.). *See also* Schiff, *supra* note 14, at 336-37.

25 Morico v. Cox, 134 Conn. 218, 225, 56 A.2d 522, 525 (1947):

> No litigant can be deprived of the right to support his cause by the introduction of evidence tending to prove all facts upon which issue has been joined, provided it is relevant and not excluded by some rule of law.

operate to exclude certain relevant evidence tend to obscure this general rule of admissibility. No one would argue that it is improper to reject relevent evidence which has no appreciable probative value. Such evidence would only tend to confuse and delay the fact-finding process. But it is the exclusionary rules of auxiliary probative value, such as the character, opinion, best evidence and hearsay rules, that have been the cause of most of the criticism of the existing law of evidence.[26] These rules are the product of experience and are designed to strengthen the kind of evidence which will ultimately be considered by the trier of fact or to eliminate evidence which might lead the trier of fact to an improper conclusion.[27] The hearsay rule, it is believed, will improve the quality of evidence by requiring that all testimony be given in open court where the declarant himself may be tested by cross-examination while under oath and subject to observation by the trier of fact.[28]

B. *The Need for a Rule Excluding Hearsay*

Although claims have been made that the hearsay rule is valued beyond its worth,[29] none of its critics will deny the logic of the rule's underlying rationale.[30] Clearly today, the justification for the rule is in the opportunity it affords to cross-examine one who would offer evidence which depends upon his belief, sincerity or memory.[31] Cross-examination is capable of exposing perjury, half truths, inability to articulate, poor memory, inadequate opportunity to have perceived the event, bias, and

[26] *See* FRANK, COURTS ON TRIAL 123 (1949).

[27] *See* MCCORMICK, EVIDENCE §§ 10, 11, 153, 224, 410 (1954).

[28] *See* WIGMORE § 1364, at 9.

[29] WIGMORE § 8c, at 277 (". . . overworshipped and overworked").

[30] MODEL CODE OF EVIDENCE, Introductory Note, ch. VI, at 217; *see* 3 BENTHAM, RATIONALE OF JUDICIAL PROOF 396 (Mill ed. 1827) [hereinafter cited as BENTHAM]; Maguire, *Hearsay System: Around and through the Thicket,* 14 VAND. L. REV. 741, 742 (1961).

[31] *See* MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 15 (1947); MCCORMICK § 224, at 458; MORGAN, BASIC PROBLEMS OF EVIDENCE 216 (1957); WIGMORE §§ 1362,-63,-66,-67. Baker lists ten reasons for the hearsay rule. BAKER, THE HEARSAY RULE 18 (1950):

(1) Hearsay is irrelevant.
(2) There is danger of error in repeating an out-of-court declaration.
(3) Hearsay causes undue protraction of cases.
(4) Possibility for fraud.
(5) Hearsay is inherently weak.
(6) Systematic exclusion tends to provide stronger proof.
(7) The rule prevents surprise and prejudice.
(8) Jury would be confused and misled.
(9) Hearsay is not subject to oath.
(10) Hearsay is not subject to cross-examination.

other dangers that lurk in testimonial proof.[32] The reason for preferring evidence tested by cross-examination to that which is not is obvious: the former will less likely mislead the trier of fact.

All will agree that, as a general principle, the party against whom the testimony is offered should be given the opportunity to cross-examine the declarant *if the declarant is available.*[33] It is at this point that many of the critics depart from the traditional hearsay on the ground that, if the declarant is unavailable, the hearsay evidence should not be categorically rejected.[34] It is the best evidence available in many instances, and should be presented to the trier of fact for what it is worth.[35] The danger involved in excluding it is often greater than the danger involved in receiving it.[36] It is not hard to imagine a situation in which hearsay evidence constitutes

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[32] *See* Morgan, *Hearsay Dangers and an Application of the Hearsay Concept,* 62 HARV. L. REV. 177 (1948).

[33] *See* 3 BENTHAM 406-10; 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, 938-39 (1962).

[34] *See* 3 BENTHAM 413; 1 STEPHEN, ENGLISH UTILITARIANS: JEREMY BENTHAM 277 (1900):

> . . . as Bentham shows with elaborate detail, a reason for suspecting evidence is not a reason for excluding it. . . . He exposes the confusion implied in an exclusion of evidence because it is not fully trustworthy, which is equivalent to working in the dark because a partial light may deceive.

See also the argument of Littleton in Fendwick's Trial, 13 How. St. Tr. 537, 597 (1696), during a debate in Commons over the reception of certain hearsay in proceedings on a bill of attainer. Earlier, an indictment had been procured on the evidence given to a grand jury by two men, Porter and Goodman. Thereafter, Goodman disappeared and the suggestion was made that his unavailability was somehow attributable to Lady Fenwick. Many of the members of Commons had argued that the former testimony of Goodman should not be considered by that body, not because Fenwick might have been responsible for the witness' absence, but simply because it was hearsay. Littleton, on the other hand, argued thus:

> I told you before, I should not reckon myself so tied by the rules of law, but that I would hear all evidence that should be offered: and I do not think it is for our honour to stifle any thing that may bring out the truth. . . . I hope we shall not be debarred from the satisfaction of hearing what they might hear in the courts below. Here are two witnesses that have been examined against him, which the jury did believe that found the bill. If we cannot have these two witnesses, let us have as much as we can.

The former testimony of Goodman at the grand jury hearing was admitted against Fenwick. 13 How. St. Tr. at 607.

[35] *See* Moore v. Atlanta Transit System, 105 Ga. App. 70, 123 S.E. 2d 693 (1961); Recreation & Park Comm'n v. Perkings, 231 La. 869, 93 So. 2d 198 (1957); Langdon v. Manor, 133 N.Y. 628, 31 N.E. 98 (1892). *See also* Morgan, *The Relation between Hearsay and Preserved Memory,* 40 HARV. LAW REV. 712 (1927).

[36] *See* 3 BENTHAM 410. To Bentham, the danger of "misdecision" caused by the exclusion of hearsay evidence that is nonetheless relevant, outweighs the danger of giving such evidence too much weight when it has not been tested by cross-examination.

the only evidence in or the crucial part of a deserving plaintiff's case. Such relevant evidence should not be excluded unless there are policy considerations which clearly override the interest of this individual.[37] Such balancing should not be done lightly.

A hearsay rule which treats as offensive the medium by which the evidence is offered, either deliberately or incidentally, fails to recognize that some hearsay has more probative value than much of the evidence that is tested by cross-examination.[38] Likewise, some hearsay arises in factual settings which make it reasonable to assume that cross-examination would uncover no falsehood. For example, learned treatises are arbitrarily excluded under the traditional rule without regard to the fact they may reflect the product of careful scrutiny by other experts in the field.[39] Such testing may often constitute a better safeguard against inaccuracy than anything a cross-examiner might do. Evidence of this type, however, is treated just as off-hand remarks and neighborhood gossip.

When the general principle of preference is replaced by a rigid rule which excludes all hearsay unless it falls into one of many well-defined and equally rigid exceptions, great hardship is certain to result because the rule and its exceptions cannot anticipate every situation such as the one above.[40] There will be times when the evidence which is excluded is much more trustworthy than the evidence admitted.[41] The need for a rigid rule of exclusion is questionable when the exigencies of the trial have forced the courts and the legislatures to amass such a long list of equally rigid exceptions.[42] Returning to a guiding principle for the admission of hearsay evidence would not necessarily mean that more hearsay would be received.[43] The use of a principle allowing flexibility in the trial judge would, however, have the potential effect of eliminating situations in which the rote application of a rigid rule would exclude obviously trustworthy hearsay.

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37 This is the general thrust of the cardinal principal of evidence which Thayer, Wigmore and Starkie advocated. THAYER 198, 264-65; WIGMORE § 9, at 289; 1 STARKIE, EVIDENCE 17 (1st Amer. ed. 1824).

38 *See* Loevinger, *supra* note 1, at 165.

39 *Cf. ibid.*

40 *See* James, *Relevancy, Probability and the Law,* 29 CALIF. L. REV. 689, 704 (1941):

> The history of evidence has been in the development of sound principles into arbitrary and unworkable rubrics, a development not to be encouraged in case law or by code.

41 *See* MCCORMICK 626.

42 *See* Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise,* 54 A.B.A.J. 231, 235-36 (1968); Strachan, *The Hearsay Rule,* 116 NEW L. J. 869 (1966).

43 *See* Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials,* 66 COLUM. L. REV. 223, 245 (1966).

What Bentham and his followers would advocate is not only a retreat from the rigidity of the present rule, but a more liberal attitude in the reception of hearsay.[44] The criterion for admissibility should not be such unavailability as amounts to death or insanity. Instead the law should receive hearsay whenever the declarant is unavailable for any reason where it is not due to the fault of the proponent of such evidence and where the non-production of the declarant would raise no inference that the proponent is hiding adverse evidence which would be exposed by cross-examining the declarant. Therefore, where the proponent has used all reasonable efforts to produce the declarant when production would appear to the court to be expected under the circumstances, the hearsay should come in. And where men would ordinarily and naturally rely upon hearsay and would not expect the declarant to be produced, the proponent would not be required to show any effort toward producing the declarant.

C. *Scope of the Rule*

So many definitions of hearsay have been advanced that it would be impractical to list them.[45] Because no one definition is commonly accepted, confusion among decisions in the common law world is inevitable.[46] Morgan preferred to couch his definition in terms of the dangers which the rule seeks to counter: consistency dictates that whenever the trier is asked to rely upon the perception, memory, sincerity, or use of language of a declarant who is not available for cross-examination, the hearsay rule comes into play.[47] This functional rule is much more helpful than a definition of hearsay which speaks of extrajudicial statements offered in

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[44] *See* 3 BENTHAM 541.

[45] Maguire in one of his works decided not to attempt a definition of hearsay, but chose to illustrate the concept by examples. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 11 *et. seq.* (1947); *see* Cross, *The Scope of the Rule against Hearsay,* 72 L. Q. REV. 91 (1956); Falknor, The *"Hear-say Rule as a "See-Do" Rule: Evidence of Conduct,* 33 ROCKY MT. L. REV. 133 (1960); Falknor, *Silence as Hearsay,* 89 U. PA. L. REV. 192 (1940); Hardman, *The Twilight Zone of Hearsay,* 57 W. VA. LAW REV. 137 (1955); Maguire, *The Hearsay System: Around and through the Thicket,* 14 VAND. L. REV. 741 (1961); McCormick, *The Borderland of Hearsay,* 39 YALE L. J. 489 (1930); Morgan, *Hearsay and Non-Hearsay,* 48 HARV. LAW REV. 1138 (1935); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177 (1948); Rucker, *The Twilight Zone of Hearsay,* 9 VAND. L. REV. 453 (1956); Wheaton, *What Is Hearsay?,* 46 IOWA L. REV. 210 (1961).

[46] *See* Goodhart, *The Changing Approach to the Law of Evidence,* 51 VA. L. REV. 759, 779 (1965).

[47] MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 17 (1947); Morgan, *Hearsay Dangers and the Application of the Hearsay Rule,* 62 HARV. L. REV. 177, 185-88 (1948).

court to prove that what the statement asserts is true. In the latter, it is necessary to define as well some of the terms contained therein.

But while Morgan's rule is much more helpful and consistent, it also tends to be broader in scope. In addition to oral and written statements and assertive conduct, it would also cover non-assertive conduct, so long as the sincerity, perception, memory or use of language of the out-of-court declarant or actor are involved. Most courts have refused to go so far, or perhaps have not recognized the potential for hearsay dangers in non-assertive conduct.[48] These courts would treat such evidence as circumstantial evidence.[49]

There are many other troublesome problems encountered in any attempt to set out the scope of the hearsay rule. Some argue that the rule does not apply to prior consistent statements of one who is presently in court.[50] Wigmore treated former testimony and admissions as beyond the scope of the hearsay rule.[51] Questions have arisen concerning the application of the hearsay rule to evidence of the out-of-court conduct of animals[52] and to the readings taken on mechanical devices such as radar.[53] For the pur-

[48] *See, e.g.,* Mash v. Missouri Pacific R.R. Co., 341 S.W. 2d 822 (Mo. 1960). Action by R.R. engineer for wrongful dismissal from employment. Statement by conductor (when trainmaster stopped the train to dismiss the engineer for alleged intoxication) that he had been expecting such a thing was held to be admissible as circumstantial evidence.

[49] See the discussion at p. 178, *infra.* The Uniform Rules of Evidence clearly treat non-assertive conduct as non-hearsay. Rule 62(1).

[50] BAKER, THE HEARSAY RULE 1 (1950) (His definition puts such statements beyond the scope of the hearsay rule.); Cross, *What Should Be Done about the Rule against Hearsay?,* 1965 CRIM. L. REV. 68.

[51] WIGMORE §§ 1030, 1032 (former testimony), 816, 1049 (admissions). He also treated many declarations which were a part of the res gestae as akin to verbal acts and, therefore, non-hearsay. *Id.* § 1766. Wigmore considered declarations offered to prove a state of mind to be circumstantial evidence and not hearsay. *Id.* §§ 1788-92.

[52] State v. Storm, 125 Mont. 346, 238 P. 2d 1161 (1951), *noted in* 9 WASH. & LEE L. REV. 248 (1952); *see* McWhorter, *The Bloodhound as a Witness,* 54 AM. L. REV. 109 (1920); Annot., 94 A.L.R. 413 (1935).

[53] People v. Offermann, 204 Misc. 769, 125 N.Y.S. 2d 179 (1953); Crosby v. Commonwealth, 204 Va. 266, 130 S.E. 2d 467 (1963); *see Symposium—Radar Speedometers,* 33 N. C. L. REV. 343 (1955); Campbell, *Evidence of Speed—Highway Radar,* 30 WASH. L. REV. 49 (1955); Loevinger, *Facts, Evidence and Legal Proof,* 9 W. RES. L. REV. 154, 167 (1958) (Loevinger argues that, if there is any basis at all for excluding radar evidence, it is because the radar device is unreliable, not that the readings which are offered in court are hearsay.); Woodbridge, *Radar in the Courts,* 40 VA. L. REV. 809 (1954). Test results from a mechanical device which measured the degree of intoxication have been excluded as hearsay. City of Sioux Falls v. Kohler, 118 N.W. 2d 14 (S.D. 1962). Results of a polygraph have been excluded on the ground that it is "blatant hearsay." United States v. Stromburg, 179 F. Supp. 278 (S.D.N.Y. 1959).

poses of this note, no precise definition of hearsay will be attempted. Instead the word will be given its broadest application unless a particular section herein indicates otherwise.

III. History of the Hearsay Rule

A. *Origin of the Jury and Development of the English Law of Evidence*

Since the Anglo-American hearsay rule has no counterpart outside the common law world,[1] its roots must surely be in the history of the English law of evidence. Actually, the historical factors which gave rise to the rule may even antedate the emergence of a discrete body of evidence rules. Until the English abandoned superstition as the means of arriving at truth in the settlement of disputes, there was no body of evidence law.[2] Before 1066, trials generally were either by ordeal or by compurgation, each grounded in the belief that an appeal to the deity was the ultimate test of truth.[3] William and his Norman invaders did not put an end to reliance upon superstition in England, although they did introduce, in the form of the public inquest, the forerunner of the grand jury proceeding.[4] Under this new system, a group was selected by a public officer to make a rational inquiry into the facts to determine whether a crime had been committed.[5] If they believed a crime to have been committed and suspected a particular individual of committing it, he was allowed to establish his innocence by undergoing one of three trials: ordeal, battle or compurgation.[6] The English soon developed a second body whose duty it was to decide to which of these trials the accused must submit.[7]

By the close of the twelfth century, trial by ordeal was for all practical purposes the only one of these three methods remaining.[8] In 1215, Pope

[1] *See* Davis, *Hearsay in Administrative Hearings,* 32 Geo. Wash. L. Rev. 689, 690 (1964); Hammelmann, *Hearsay Evidence, A Comparison,* 67 L. Q. Rev. 67 (1951); Ireton, *Hearsay Evidence in Europe,* 66 U.S. L. Rev. 252 (1932).

[2] *See* 9 Holdsworth, History of English Law 130 (1926) [hereinafter cited as Holdsworth]; Wigmore § 8.

[3] *See* Goodhart, *A Changing Approach to the Law of Evidence,* 51 Va. L. Rev. 759, 761 (1965). Trial by battle was introduced by William the Conqueror and was not a publicly sanctioned method of settling disputes in England before that time. *Id.* at 762. *See also* Morgan, *The Hearsay Rule,* 12 Wash. L. Rev. 1, 2 (1937).

[4] *See* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv. L. Rev. 177 (1948).

[5] *See* Wells, *The Origin of the Petty Jury,* 27 L. Q. Rev. 347 (1911). *See generally* Thayer 53-65.

[6] Wells, *Early Opposition to the Petty Jury in Criminal Cases,* 30 L. Q. Rev. 97, 98 (1914).

[7] *See* Goodhart, *supra* note 3, at 761.

[8] *See* Wells, *supra* note 5, at 347.

Innocent III banned the clergy from any further participation in such trials.[9] During this century and the latter part of the preceding century, the development of another system of deciding disputes and determining guilt was in progress. Henry II had sent judges throughout the country during his reign from 1154 to 1189.[10] To cope with the sudden disappearance of trial by ordeal and the resulting lack of a satisfactory method of determining guilt,[11] the regents of Henry III in 1219, issued a writ which instructed the judges to find a new means of deciding guilt. The writ concluded:

> We have left to your discretion the observance of this aforesaid order . . . according to your own discretion and conscience.[12]

The second jury, which before had been called upon only to decide what type of trial the accused would be given, was now given the task of investigating the event in question to determine from the facts whether the accused was guilty.[13] Such a jury trial had previously existed in civil cases even before the twelfth century.[14]

From the beginning, the jury was to determine the truth about the disputed facts from information obtained outside of the court.[15] They were obliged to make sufficient inquiries and the event in question after they were summoned, but before they came into court.[16] Unquestionably, jurors often relied upon hearsay in making their investigations.[17] Witnesses, except for preappointed deed or transaction witnesses, were not at first called into court.[18] One of the principal reasons was that witnesses were

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9 4 U. PA. TRANS. & REPRINTS, No. 4, at 16-17; *see* Wells, *supra* note 6, at 98.

10 *See* Wells, *supra* note 6, at 98; Goodhart, *supra* note 3, at 762. *See also* Ladd, *A Modern Code of Evidence,* 27 IOWA L. REV. 213, 215 (1942).

11 *See* Wells, *supra* note 5, at 347; Wells, *supra* note 6, at 98.

12 *Quoted in* Wells, *supra* note 6, at 98-99. *See also* PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 117, 144-45 (5th ed. 1956).

13 *See* Wells, *supra* note 6, at 98-99.

14 *See* THAYER 53-65.

15 Bushel's Trial, 6 How.St.Tr. 999, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670). *See also* Schiff, *The Use of Out-of-Court Information in Fact Determination at Trial,* 41 CAN. B. REV. 335, 343 (1963).

16 *See* BRUNNER, THE ORIGIN OF JURY COURTS 427, 452 (1872); 2 POLLOCK & MAITLAND, HISTORY OF THE ENGLISH LAW 622, 625 (2d ed. 1899).

17 *See* Morgan, *supra* note 4, at 180; Goodhart, *supra* note 3, at 767.

18 *See* MCCORMICK § 223, at 455; 2 POLLOCK & MAITLAND, *supra* note 16, at 601. Sometime before the Magna Carta, there came into existence the practice of calling a certain group of persons, *i.e.,* deed-witnesses and transaction-witnesses, to court as preappointed witnesses. The function of this "secta" was to testify as to the genuineness of the claim rather than to supply evidence as to the facts in issue. Because they were

reluctant to testify in court because of the threat of a charge of maintenance, which roughly meant intermeddling in the dispute of others.[19] Those who had any personal knowledge were called as jurors until the fourteenth century.[20] It may have been as late as the end of the next century before such practice was abandoned altogether.[21]

Additional information through witnesses did not reach jurors in court with any regularity until the close of the fifteenth or the beginning of the sixteenth century.[22] When witnesses were first allowed to testify in court, it was for the purpose of supplementing what the jurors already knew.[23] Witnesses were permitted to given an account of facts which the jurors could not be expected to know. It was at this point that the first sign of anything resembling the hearsay rule came into existence. Since these witnesses were called to relate matters which the jury could not be expected to know, their testimony could not be based on hearsay.[24] The jurors themselves would ordinarily have heard all the hearsay reports out of court; thus, the witness would be offering no additional information. The objection was to the medium by which the information was presented to the jury: additional information, if it were to be received at all, had to come from the lips of an eye-witness, not one who spoke from hearsay.[25]

Since the use of witnesses developed as a privilege, use could not be

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summoned with the jurors, their testimony was not given in open court but rather presented to the jury during deliberation. As a result of the nature of this testimony, no line could be drawn between it and the jury's verdict, and it was thus not unnatural to have a joint verdict from the jury and the "secta." "Toward the end of the 1400's it became uncommon, because of the inconvenience of numbers, to summon them with the jurors, and their function as joint juror-witnesses fell into disuse." 8 WIGMORE § 2190, at 63 (McNaughton rev. ed. 1961). Transaction witness did not answer questions but gave oath. 2 POLLOCK & MAITLAND, *supra* note 16, at 601. *See also* THAYER 101; 9 HOLDSWORTH 179.

[19] *See* WIGMORE § 2190, at 64 (McNaughton rev. ed. 1961).

[20] *See* THAYER 498, citing a case in 1349 (23 Ass. 11), where a transaction witness had been summoned not merely with the jury, but on the jury panel itself.

> He was ousted, and Thorpe, C.J., said there must be a jury wholly separate from witnesses; and witnesses can only be joined to the jury, and testify to them the fact. It is the jury, itself, he went on, who render the verdict, and not the witnesses; the two have different oaths; the witnesses swear to tell the truth, *i.e.*, what they see and hear; and the jury to say the truth according to the best of their knowledge. This remark imports of course that conclusions from the facts in evidence were only for the jury, and we may see here the roots of the rule against opinion evidence as well as hearsay.

THAYER 498-99.

[21] *See* 8 WIGMORE § 2190 (McNaughton rev. ed. 1961).

[22] COKE, THIRD INSTITUTE *163 (1628).

[23] *See* THAYER 500.

[24] *See* Burrows, Book Review, 67 L. Q. REV. 111 (1951).

[25] *See* THAYER 501, 518.

made of them unless they could be of real help.[26] The jurors were expected to know the facts before they came to court. It was presumed that no evidence need be presented in court.[27] The witness was thought to be of no help when he merely related what another had witnessed. "A gossip would merely repeat what the jurors could hear for themselves." [28] The hearsay rule developed, then, as an enabling rule rather than as a rule of exclusion: parties were given the privilege of presenting additional information in court but they could do so only through witnesses who could speak from personal observation.[29]

B. *Treatment of Hearsay Under a Best Evidence Principle*

Although the witness had become a common figure in the trial by the beginning of the sixteenth century,[1] the threat of a charge of maintenance discouraged many from testifying.[2] Since "what a man does by compulsion of law cannot be called maintenance," [3] it was thought that the problem could be corrected by the passage of a law of general compulsion for all persons who could supply information needed by the parties.[4] Thus in 1562-63, the first compulsory process for ordinary witnesses was enacted;[5] it penalized "any person who refused to attend after service of process and tender of expenses." [6] According to Holdsworth,[7] this statute began a new epoch in the law of evidence because of the extensive use of oral testimony brought about by this general rule of compulsion.

By the early 1600's it was becoming increasingly difficult for the jury on its own to obtain a sufficient amount of information on which to base its verdict; corresponding to this was the marked increase in the quantity of information obtained from ordinary witnesses.[8] Coke said that at this

[26] *See* Burrows, *supra* note 24, at 112.

[27] *Ibid.*

[28] *Id.* at 111.

[29] Throughout this period, however, parties were allowed to give their accounts to the jurors. Morgan, *supra* note 4, at 180.

[1] 8 WIGMORE § 2190, at 62 (McNaughton rev. ed. 1961); *see* THAYER 122-34.

[2] "Maintenance" roughly meant meddling in a dispute to which one was not a party. *See* THAYER 126 *et seq.* To escape a charge of maintence, it was necessary for the person to show either that he was an interested party or that he had been officially called by the jury or the judge. *See* 8 WIGMORE § 2190, at 64 (McNaughton rev. ed. 1961).

[3] Littleton arguing in Y.B. 28 Hen. VI, 6, 1, *quoted in* THAYER 128.

[4] 8 WIGMORE § 2190, at 65 (McNaughton rev. ed. 1961).

[5] 5 Eliz. I, ch. 9, § 12.

[6] 8 WIGMORE § 2190, at 65 (McNaughton rev. ed. 1961).

[7] 9 HOLDSWORTH 185.

[8] WIGMORE § 1364, at 12.

time "most commonly juries are led by deposition of witnesses." [9] From its origin as an investigatory proceeding, trial by jury had by this point evolved into an adversary proceeding.[10] History had gone full circle and returned to a method of settling disputes which in part remained under the control of the parties themselves as it had in trial by battle, ordeal, and compurgation.[11]

An outgrowth of the tranformation of the jury trial from an inquisitorial to an adversary proceeding was the realization that "more attention should be paid to the nature of the evidence by which juries were led," [12] as they were no longer basing their verdicts upon their own knowledge but rather upon the testimony of ordinary witnesses.[13] As a result of the increase in oral testimony caused by the Compulsory Process Act of 1562-63,[14] it was inevitable that questions soon arose as to the competency of certain witnesses and as to conditions under which certain testimony should be admitted.

In spite of the fact that witnesses were to testify from personal knowledge, hearsay was often interspersed in their testimony.[15] The notion that a witness would only be allowed to testify when he could offer more than second-hand information did not immediately precipitate a rigid rule of exclusion.[16] It seems to have been recognized from the beginning of the practice of allowing testimony that better evidence lay behind hearsay and that such better evidence was preferable to hearsay and should be offered if it could

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[9] COKE, THIRD INSTITUTE *163 (1628).

[10] *See* Morgan, *The Hearsay Rule,* 12 WASH. L. REV. 1, 2 (1937).

[11] *See* Morgan, *The Jury and the Exclusionary Rules of Evidence,* 4 U. CHI. L. REV. 247, 248 (1937).

[12] 9 HOLDSWORTH 215-16.

[13] COKE, THIRD INSTITUTE *163 (1628); THAYER 102, 121, 122, 126.

[14] 5 Eliz. ch. 9, § 12.

[15] *See, e.g.,* Rolfe v. Hampden, 1 Dyer 53b, 73 Eng. Rep. 117 (K.B. 1543); Duke of Somerset's Trial, 1 How. St. Tr. 516, 520 (1551); Thomas's Case, 1 Dyer 99b, 73 Eng. Rep. 218 (K.B. 1553); Sir Nicholas Throckmorton's Trial, 1 How. St. Tr. 869, 875, 880, 883, 884 (1554); Stranham v. Cullington, Cro. Eliz. 228, 78 Eng. Rep. 484 (K.B. 1590); *cf.* WIGMORE § 1364, at 15.

[16] The explanation may have been supplied by Thayer when he described the transition of the jury from witnesses *and* triers of fact to triers of fact alone. THAYER 524:

> In the loose and easy administration of the law of trials that existed so long as jurors went on their own knowledge, and needed no witnesses of evidence at all, and at a time when, even if they had witnesses, they were at liberty to disregard them and to follow their own personal information, it was possible to get along without nice discriminations; so that the law of evidence had hardly any development at all until within the last two centuries; and it was but slight before the present century.

be conveniently had.[17] But this was not a hard and fast rule of exclusion; rather it was a "shaping principle." [18]

> Upon the whole, then, it may be said that the Best Evidence rule was originally, in days when the law of evidence had not yet taken definite shape, a common and useful phrase in the mouths of judges who were expressing a general maxim of justice, without thinking of formulating an exact rule.[19]

It would appear that hearsay was first excluded in scattered instances on the basis of a best evidence principle.[20] But one writer has argued that these early cases may not have excluded hearsay on the ground at all, but rather that the best evidence principle was an "ex post facto rationalization" by judges of a later period.[21] Regardless, a rule which consistently and systematically excluded hearsay did not come until the last quarter of the seventeenth century. Until that time, the primary question with respect to hearsay was its value or probative weight.[22]

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17 Y.B. 20 H. VI. 20, 16 (c. 1450), *discussed in* THAYER 499.

18 THAYER 488.

19 *Id.* at 506.

20 *See* James, *The Role of Hearsay in a Rational Scheme of Evidence,* 34 ILL. L. REV. 788, 796 (1940) ("This best evidence principle was at the very least one of the basic elements in the early development of the rule of hearsay exclusion."); Weinstein, *The Probative Force of Hearsay,* 46 IOWA L. REV. 331, 344 n. 73 (1961); Comment, *Hearsay and the English Evidence Act, 1938,* 34 ILL. L. REV. 974, 975 n.4 (1940) ("One of the first reasons given for the rule was based on a 'best evidence' principle. . . .").

The notion persisted even after the hearsay rule became a hard and fast rule of exclusion. Pickering v. Barkley, Style 132, 82 Eng. Rep. 587 (K.B. 1673); Ireland's Trial, 7 How. St. Tr. 79, 105 (1678); Busby's Trial, 8 How. St. Tr. 526, 545 (1681); Elizabeth Canning's Trial, 19 How. St. Tr. 283, 406 (1754); Grant v. Gould, 2 Bl. H. 69, 104, 126 Eng. Rep. 434 (C.P. 1792); Mima Queen v. Hepburn, 11 U.S. (7 Cranch.) 290, 295 (1813); Claiborne v. Parrish, 2 Va. (2 Wash.) 188, 190-91 (1795) ("But these cases which form exceptions from the general rule, are regulated by another, and that is, that it should appear that there is no better evidence behind, and in the power of the party to produce. . . ."); Gregory v. Baugh, 25 Va. (4 Rand.) 611 (1827); Langdon v. Manor, 133 N.Y. 628, 637, 31 N.E. 98, 101 (1892); Recreation & Park Comm'n v. Perkins, 231 La. 869, 93 So.2d 198 (1957); Moore v. Atlanta Transit System, 105 Ga. App. 70, 123 S.E.2d 693 (1961); 3 BLACKSTONE, COMMENTARIES *368 (1768); STARKIE, EVIDENCE 390 (1824); GREENLEAF, EVIDENCE § 99 (3d ed. 1846).

An approach based on a best evidence principle has been suggested as an alternative to the present, unsatisfactory hearsay rule. Address of Judge Weinstein at the Trial Lawyers Institute on Practical Trial Evidence, Nov. 17, 1967, in Washington, D.C.; Note, *Confrontation and the Hearsay Rule,* 75 YALE L. J. 1434, 1440-41 (1966).

21 Morgan, Book Review, 5 VAND L. REV. 672, 678 (1952).

22 *See* MCCORMICK § 223, at 456.

C. *Emergence of a Rigid Rule of Exclusion*

From the very beginnings of trial by jury down to the middle of the sixteenth century there was hardly a thought of systematically prohibiting hearsay;[1] it was admitted and relied upon in both civil and criminal cases.[2] Even as late as the middle of the seventeenth century, hearsay statements were constantly received even over objection and opposition; but "in the meantime, the appreciation of the impropriety of using hearsay statements by persons not called is growing steadily." [3] The courts were beginning now to realize that hearsay evidence was inferior to that of personal knowledge.[4]

Thayer claims that the roots of a rule against hearsay can be traced back in history at least as far as 1349, to a case before the English Court of Common Pleas.[5] In this case a deed witness had been summoned on the jury panel itself rather than with the jury as was the practice. Thorpe, C. J., ousted the witness saying that the jury must be separate from the witnesses because of their separate oaths and functions. Thorpe went on to explain how the witness swears to tell the truth as to what he has seen and heard while the jury swears to find the truth according to the best of its knowledge. According to Thayer, the notion that witnesses could testify only as to *facts* and then only those personally perceived, leaving it to the jury to draw conclusions from the facts, led to the development of both the hearsay and the opinion rules.[6]

There was a statutory attempt in 1533 toward the beginning of a hearsay rule in that the statute required the accuser in a treason case to be personally present at the trial rather than being represented by a deposition.[7] This first step toward requiring the personal production of one who had

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[1] *See* WIGMORE § 1364, at 27. There is some disagreement over the role played by the old rule that a witness must testify *de visu et auditu*, that is, from his own personal observation, in the development of the hearsay rule. Wigmore insists it had no influence, applied to a different situation, and had a different rationale. *Ibid.* Holdsworth feels that the old rule probably had some effect on the establishment of the hearsay rule. 9 HOLDSWORTH 211, 214. Thayer also seems to recognize the influence of the old rule on the evolution of the hearsay rule, THAYER 18, 498-99.

[2] *See, e.g.*, Rolfe v. Hampden, 1 Dyer 53b, 73 Eng. Rep. 117 (K.B. 1543); Duke of Somerset's Trial, 1 How. St. Tr. 516, 520 (1551); Thomas's Case, 1 Dyer 99b, 73 Eng. Rep. 218 (K.B. 1553); Sir Nicholas Throckmorton's Trial, 1 How. St. Tr. 869, 875, 880, 883, 884 (1554); Duke of Norfolk's Trial, 1 How. St. Tr. 957, 992 (1571); Stranham v. Cullington, Cro. Eliz. 228, 78 Eng. Rep. 484 (K.B. 1590).

[3] WIGMORE § 1364, at 27.

[4] 9 HOLDSWORTH 216.

[5] THAYER 498.

[6] *Id.* at 498-99, 523-24; *see* p. 172, *infra.*

[7] Edw. VI, ch. 12, 22 (1533).

made a statement under oath was avoided by judicial construction and, according to Wigmore,[8] was destined to be a dead letter because it was an "innovation . . . too much in advance of the times. . . ." [9] But this statutory failure did serve a useful purpose—it furnished "moral support for the opinion which was already working towards a general hearsay rule." [10]

In respect to hearsay statements under oath,[11] it had previously been the custom for the deponent to be present at the trial to confirm his sworn statement upon its being read to the jury.[12] Now, because of the general attitude against hearsay, it became the practice to have the statement openly adopted by the witness in order to show no fear of a recantation. It was thus natural that the emphasis was "transferred from the sworn statement, as the sufficient testimony, to the statement on the trial as the essential thing." [13] By the middle of the seventeenth century, the principle became

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8 WIGMORE § 1364, at 19.

9 *Ibid. See also* Duke of Norfolk's Trial, 1 How. St. Tr. 957, 992 (1571):

> *Norfolk:* . . . I pray you, let them be brought face to face to me: I have often required it, and the law I trust is so.
>
> *Serjeant:* The law was so for a time, in some cases of Treason: but, since, the law hath been found too hard and dangerous for the prince, and it hath been repealed.

Raleigh's Trial, 2 How. St. Tr. 1, 18 (1603):

> *Lord Cecil:* Sir Walter presseth that my lord Cobham should be brought face to face. . . .
>
> *Lord C. J.:* This thing cannot be granted, for then a number of Treasons should flourish: the Accuser may be drawn by practise, whilst he is in person.
>
> *Justice Gwady:* The Statute you speak of concerning two Witnesses in case of Treason, is found to be inconvenient, therefore by another law it was taken away.
>
> * * * * *
>
> *Raleigh:* The wisdom of the Law of God is absolute and perfect. . . . But now by the Wisdom of the State, the Wisdom of the Law is uncertain. Indeed, where the Accuser is not to be had conveniently, I agree with you; but here my Accuser may; he is alive, and in the house. Susanna had been condemned, if Daniel had not cried out, "Will you condemn an innocent Israelite, without examination or knowledge of the truth?" Remember, it is absolutely the Commandment of God: If a false witness rise up, you shall cause him to be brought before the Judges; if he be found false, he shall have the punishment which the accused should have had. . . .
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> * * * * *
>
> . . . let my Accuser come face to face, and be deposed.
>
> *Lord C. J.:* You have no law for it. . . .

10 WIGMORE § 1364, at 20.

11 The courts did not always treat sworn statements as they did unsworn ones; consequently, the development of the hearsay rule as to one was not identical to the development as to the other.

12 *See* Lord Audley's Trial, 3 How. St. Tr. 401, 402 (1631):

> Certain Examinations having been taken by the lords without oath: It was resolved, Those could not be used until they were repeated under oath, unless of the party to be tried; which might be read without an oath.

13 WIGMORE § 1364, at 21.

established that extra-judicial statements under oath should not be used unless the deponent could not be had in court.[14] Although this rule was by now much more prominent than the orthodox one of allowing the use of sworn hearsay, it was nevertheless still thought of as an innovation.[15]

Notwithstanding the widespread distrust and condemnation of hearsay statements because of their alleged weaknesses, such statements were still freely admitted up to the middle of the seventeenth century even though judges were saying that "hearsays must condemn no man" [16] and that such are of no value and insufficient in themselves.[17] As a result of this continued notion of impropriety of hearsay, oral hearsay statements began to be held inadmissible,[18] and within twenty years after the Restoration of 1660, this rule of exclusion had a substantial following throughout the courts of England.[19] No exact date can be fixed for the creation of the doctrine. Wigmore believed that it was established sometime between 1675 and 1690.[20]

This general rule against unsworn hearsay statements "must have helped to emphasize the anomaly of leaving extra-judicial sworn statements unaffected by the same strict rule," [21] since the irregularity no longer existed by 1696, the year in which the trials of Paine[22] and of Fenwick[23] took place.

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[14] *See, e.g.,* Bushnell's Trial, 5 How. St. Tr. 633, 641 (1656); Bushel's Trial, 6 How. St. Tr. 999, 1003, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670); Ireland's Trial 7 How. St. Tr. 79, 105 (1678); Busby's Trial 8 How St. Tr. 526, 545 (1681). In Mordant's Trial, 5 How. St. Tr. 907, 922 (1658), after showing that the deponent had fled and could not be found, his deposition, which included hearsay, was read by the justice. This was hearsay upon hearsay, but it was admitted nevertheless. *See also* Lord Morely's Trial, 6 How. St. Tr. 769, 776 (1666) where it was said that, if the deponent's unavailability was caused by the defendant, the deposition should be admitted. In Massachusetts, in this same period, depositions were allowed to be used by statute except in felony cases. MASS. REV. LAWS, *Witnesses,* § 2 (1660).

[15] *See* WIGMORE § 1364, at 22.

[16] Modger's Trial, 6 How. St. Tr. 273, 276 (1663).

[17] *See* WIGMORE § 1364, at 15.

[18] *See, e.g.,* Bushnell's Trial, 5 How. St. Tr. 633, 641 (1656); Moder's Trial, 6 How. St. Tr. 273, 276 (1663); Samson v. Yardly, 2 Keb. 223, 84 Eng. Rep. 140 (K.B. 1679) (Deposition of deceased was admitted, but what deceased generally out of court was rejected.)

[19] *See* Bushel's Trial, 6 How. St. Tr. 999, 1003, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670); Braddon & Speke's Trial, 9 How. St. Tr. 1127, 1188-89 (1684):

Braddon: What expression did you hear from a gentleman in the coach?

Lord C. J.: We must not suffer such a question to be asked, that is not evidence.

[20] WIGMORE § 1364, at 16.

[21] *Ibid.*

[22] Rex v. Paine, 5 Mod. 163, 164, 87 Eng. Rep. 584, 585 (K.B. 1696): "But depositions of this sort are never allowed to be read as evidence in a civil cause, and much less in a criminal case."

[23] Fenwick's Trial, 13 How. St. Tr. 537 (1696) (proceedings on a bill of attainder).

"From this time on, the applicability of the hearsay rule to sworn statements in general, as well as to unsworn statements, is not questioned." [24]

While the writers of the early eighteenth century did not refer to the hearsay rule as a definitely fixed exclusionary rule,[25] there was, by the middle of the century, no opposition to the rule, and the only question that remained was the extent of specific exceptions to it.[26] Scholars, however, continue to disagree about the true origin of the rule with the majority arguing that it is the product of the jury system,[27] while others argue that the rule has its roots in the adversary system.[28]

IV. Exceptions to the Rule

A. *Inherent Weaknesses and Inconsistencies*

> There was once a time when all hearsay was receivable; there was never a time when all hearsay was rejected. From its inception the anti-hearsay rule has had its exceptions.[1]

If the hearsay rule were applied without qualifications, valuable evi-

[24] Wigmore § 1364, at 24.

[25] The first evidence treatise is said to be that of Baron Gilbert. Gilbert, Evidence (*ante* 1726). It was actually a digest of case law. *See* Montrose, *Basic Concepts of the Law of Evidence,* 70 L. Q. Rev. 527, 529 (1954). But Thayer is critical of Gilbert's practice of reducing to a rigid rule what older judges had suggested as a shaping principle. *See* Thayer 488. Gilbert turned the best evidence principle into a narrow rule rejecting any offer of proof which suggests that there is something better behind it. *See* Thayer 506. Gilbert did not allude to a "hearsay rule" as such. Apparently, the major texts on evidence did not consider the hearsay rule as a rule separate and distinct from the best evidence rule until the end of the last century. *See* Bacon's Abridgement, *Evidence* (K) (1736); Bathurst, Trials (1760) (also published as Buller, Nisi Prius): 3 Blackstone, Commentaries *368 *et seq.* (1768); Peake, Evidence (1801); Phillips, Evidence (1814 ed.); Starkie, Evidence (1824); Greenleaf, Evidence (1st ed. 1842); Taylor, Evidence (1848); Best, Evidence (1st ed. 1849). Stephen recognized an independent rule excluding hearsay, but based exclusion on the ground that the hearsay was irrelevant. Stephen, Evidence ch. 4, art. 14 (1st ed. 1876). Bentham also recognized the hearsay rule as an independent rule of exclusion. 3 Bentham, Rationale of Judicial Proof 558 (Mill ed. 1827). But it was Thayer who put an end to the classification of the hearsay rule as a branch of the best evidence rule. Thayer 505. For a discussion of the etymology of the word "hearsay," see Mellinkoff, The Language of the Law 55, 171 (1963).

[26] *See* Wigmore § 1364, at 24.

[27] *See, e.g.,* Holdsworth 127; Thayer 47; Wigmore § 4b, at 31; Davis, *Hearsay in Administrative Hearings,* 32 Geo. Wash. L. Rev. 689, 693 (1964).

[28] *See* Morgan, *The Jury and the Exclusionary Rules of Evidence,* 4 U. Chi L. Rev. 747 (1937); Ladd, *A Modern Code of Evidence,* 27 Iowa L. Rev. 213, 216 (1942).

[1] Morgan, *The Relation Between Hearsay and Preserved Memory,* 40 Harv. L. Rev. 712, 714 (1927).

dence would be lost and great hardship would result.[2] Practical considerations require courts to admit some hearsay in order that they might get on with the business of deciding the growing number of cases being brought to them.[3] The exceptions supposedly limit the admissible hearsay to that which is most likely to be trustworthy;[4] but the exceptions are not the product of a careful and methodical analysis of the hearsay rule, the need for receiving some hearsay, and the type of hearsay which would ordinarily be trustworthy.[5] There was no rational scheme for the development of exceptions to the rule.[6] For the most part, they existed as independent rules before the hearsay rule came into existence.[7] The hearsay rule never excluded evidence which was covered by one of these rules.[8]

Wigmore claimed that a single rationale supports all of the exceptions: they are predicated upon necessity and some circumstantial guarantee of trustworthiness.[9] Morgan disagreed.[10] He found no single theory that explained all of the exceptions. Even if there is an underlying rationale common to all of them, it would not obscure the fact that "the exceptions to the hearsay rule constitute one of the most unsatisfactory portions of our law."[11] Numbering over forty by some counts,[12] the exceptions are often so confusing and contradictory that they frustrate rather than further the search for truth.[13] Psychologists have observed that most of the assumptions upon which the exceptions are based cannot be supported.[14]

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[2] *See* Hinton, *Changes in the Exceptions to the Hearsay Rule,* 29 ILL. L. REV. 422, 425 (1934); *Strahorn, A Reconsideration of the Hearsay Rule and Admissions,* 85 U. PA. L. REV. 484, 487 (1937) ("The hearsay rule is more famous for what it permits than for what it forbids.").

[3] *See* Loevinger, *Facts, Evidence and Legal Proof,* 9 W. RES. L. REV. 154, 165 (1958).

[4] *See* WIGMORE § 1420, at 203.

[5] *Cf.* THAYER 519-21; Morgan, *The Hearsay Rule,* 12 WASH. L. REV. 1, 12 (1937) (". . . the result of . . . conflicting considerations modified by historical accident.").

[6] Note, *Declarations against Interest: A Critical Review of the Unavailability Requirement,* 52 CORNELL L.Q. 301, 303 (1967).

[7] *See* THAYER 520-21; Hinton, *supra* note 2, at. 424.

[8] *See* THAYER 521.

[9] WIGMORE § 1420, at 202.

[10] MORGAN, BASIC PROBLEMS OF EVIDENCE 221 (1957). *See also* MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 130 (1947).

[11] Green, *Federal Civil Procedure Rule 43(a),* 5 VAND. L. REV. 560, 564 (1952).

[12] *See* Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise,* 54 A.B.A.J. 231, 235 (1968); Strachan, *The Hearsay Rule,* 116 NEW L. J. 869 (1966).

[13] *See* FRANK, COURTS ON TRIAL 123 (1949); MCCORMICK § 300, at 626.

[14] *See* MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 30-31 (1966); MCCARTY, PSYCHOLOGY AND THE LAW 276 (1960); Hutchins, *The Law and the Psychologists,* 16 YALE REV. 678 (1927); Hutchins & Slesinger, *Some Observations on the Law of*

The admission of hearsay under an exception for spontaneous exclamations is predicated upon the assumption that one making a statement shortly after a startling event does not have sufficient time to fabricate; hence, his statement is more likely to be true than if he had not been under emotional shock.[15] Psychology has shown that the time in which one may reflect (and, thus, fabricate his story) is so slight that it cannot be measured by a psychologist even under ideal conditions.[16] Furthermore, the startling event usually causes an emotional reaction which inhibits, rather than fosters accurate perception.[17] Hutchins and Slesinger make the following point:

> One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation.[18]

They would not exclude spontaneous declarations, but would abandon the present distinction which often admits hearsay that is of less value than that which it rejects.[19] For example, the declaration of a disinterested by-stander is apt to be more accurate than that of the person under emotional shock.[20]

The res gestae exception has been severely criticized.[21] It is a convenient

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Evidence: Spontaneous Exclamations, 28 COLUM. L. REV. 432 (1928); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Memory,* 41 HARV. L. REV. 860 (1928); Hutchins & Slesinger, *Some Observations on the Law of Evidence: State of Mind in Issue,* 29 COLUM. L. REV. 147 (1929); Marston, *Studies in Testimony,* 15 J. CRIM. L.C. & P.S. 5 (1924).

15 *See* WIGMORE § 1420, at 203.

16 Hutchins & Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations,* 28 COLUM. L. REV. 432, 440 n. 43 (1928); ". . . speed is of relatively slight importance in the absence of instruments."

17 *See* Marston, *supra* note 14, at 32:

> . . . emotion may virtually hold connected perception in abeyance so that the subject has only isolated sensations to remember instead of a logically connected unit perception.

18 Hutchins & Slesinger, *supra* note 16, at 437.

19 *Id.* at 440.

20 *Ibid.*

21 *See* United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) (L. Hand, J.: ". . . and as for 'res gestae' . . . if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."); Estate of Gleason, 164 Cal. 756, 762, 130 Pac. 872, 875 (1913) ("Definitions of res gestae are as numerous as the prescriptions for the cure of rheumatism and generally about as useful."); People v. Poland, 22 Ill. 2d 175, 180, 174 N.E.2d 804, 806 (1961) ("[The term 'res gestae'] not only fails to contribute to an understanding of the problem but may actually inhibit any reasonable analysis."); MCCARTY, PSYCHOLOGY AND THE LAW 276 (1960) ("In many cases admission seems to be based on expediency rather than on any sound psychological basis."); STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 156 n. v (2d ed. 1876) ("[The term 'res gestae'] seems to have come into use on account of its con-

catch-all for much of the hearsay that is inadmissible under the other exceptions.[22] According to some interpretations, it includes spontaneous exclamations, statements of present pain, statements evidencing an existing state of mind, and statements of intent.[23] It would be more helpful if each were treated as a separate exception.

Statements of present pain and suffering are generally admissible, while statements of past pain are not.[24] Some courts, however, refuse to follow the distinction between the two and have admitted statements made to physicians concerning past pain.[25] Likewise, the "mental states" exception has generally been limited to declarations of a present state of mind.[26] Such declarations are admissible since there may be no other way of establishing the declarant's state of mind when it is a fact in issue.[27] Under the rule in *Mutual Life Insurance Co. v. Hillmon*,[28] declarations evidencing a state of mind are also admissible even when state of mind is not a material fact

venient obscurity."); Letter of Sir Frederick Pollock, HOLMES—POLLOCK LETTERS 284-85 (1941) ("I am reporting a case, with some reluctance, on the damnable pretended doctrine of *res gestae*, and wishing some high authority would prick that bubble of verbiage: the unmeaning term fudges the truth."); Thayer, *Bedingfield's Case: Declarations as a Part of the Res Gesta*, 15 AM. L. REV. 1, 9-10 (1881):

> . . . lawyers and judges seem to have caught at the term 'res gesta' . . . as one that gave them relief at a pinch. They could not in the stress of business, stop to analyze minutely; this valuable phrase did for them what the 'limbo' of the theologians did for them, what a 'catch all' does for a busy housekeeper or an untidy one,—some things belonged there, other things might for purposes of present convenience be put there. . . . the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity multiplied its capacity; it was a larger 'catch all.'

[22] *See* Holtzoff, *Institute on Practical Evidence*, 18 F.R.D. 376 (1956); Payne, *The Mysteries of Virginia's Res Gestae Rule*, 18 WASH. & LEE L. REV. 17 (1961); Thayer, *supra* note 21, at 9-10.

[23] *See* MORGAN, BASIC PROBLEMS OF EVIDENCE 284-300 (1957). Morgan argues that the term should be confined to its original meaning, that is, declarations which are a part of the transaction and which are themselves operative facts. *Id.* at 285. *See also* 2 BLACKSTONE, COMMENTARIES *368 n. 25 (1726) ("But the objection does not apply . . . whenever the declaration or entry is in itself a fact, and is part of the *res gestae.*")

[24] *See* Travelers Ins. Co. v. Mosley, 8 Wall (U.S.) 397 (1869); Etzkorn v. Oelwein, 142 Iowa 102, 120 N.W. 636 (1909); La Duke v. Exeter, 97 Mich. 450, 56 N.W. 851 (1893); Annot., 90 A.L.R. 2d 1084 (1963).

[25] *See, e.g.*, Meaney v. United States, 112 F.2d 538 (2d Cir. 1940); Peterson v. Richfield Plaza, Inc., 252 Minn. 215, 89 N.W. 2d 712 (1958), *noted in* 43 MINN. L. REV. 149 (1958). *See also* MORGAN, *supra* note 23, at 287-88; Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224 (1961).

[26] *See* MORGAN, *supra* note 23, at 290-91.

[27] *Cf.* Hutchins & Slesinger, *Observations on the Law of Evidence: State of Mind in Issue*, 29 COLUM. L. REV. 147 (1929), *State of Mind to Prove an Act*, 38 YALE L. J. 283 (1929).

[28] 145 U.S. 285 (1892).

in issue.[29] Where evidence of the declarant's state of mind tends to establish a subsequent act, that is, where the existence of such a state of mind makes it more likely that the declarant performed the act in question than if no such state of mind existed, then it should be admitted.[30] One writer severely criticized the use of this evidence for such a purpose.[31] Once evidence of the declarant's state of mind is admitted to prove a subsequent act, the next step is to admit it to prove a previous event.[32] Just as a statement of intent was admitted as circumstantial proof of the occurrence of the thing intended, a statement of memory would be admitted as circumstantial evidence of the happening of the event remembered.[33]

Whatever the added hearsay dangers involved in the use of statements of memory as opposed to statements of intent, there is little justification in theory for admitting the one and rejecting the other.[34] Most courts have rejected statements of memory, however, for practical reasons.[35] The hearsay rule would be almost completely circumvented if both were admissible. Mr. Justice Cardozo recognized this problem in *Shepard v. United States*:[36]

> Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.[37]

Several cases, nevertheless, have ignored the distinction[38] and writers have urged that it be abandoned.[39]

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[29] Declarations of intent, for example, are often admitted to prove by inference the occurrence of the act intended.

[30] 145 U.S. at 296. *See also* Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394 (1934); Maguire, *The Hillmon Case—Thirty-three Years After*, 38 HARV. L. REV. 709 (1925).

[31] Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146 (1912).

[32] *Id.* at 156-57.

[33] *Cf.* Payne, *The Hillmon Case—An Old Problem Revisited*, 41 VA. L. REV. 1011, 1012, 1057 (1955).

[34] *See* Seligman, *supra* note 31, at 157.

[35] *See* People v. Hamilton, 55 Cal. 2d 881, 13 Cal. Rptr. 649, 362 P.2d 473 (1961).

[36] 290 U.S. 96 (1933).

[37] *Id.* at 105-06.

[38] *See* Garford Trucking Corp. v. Mann, 163 F.2d 71, 73 (1st Cir. 1947); Emden v. Verdi, 124 Cal. App. 2d 555, 269 P.2d 47 (1954); Kelley v. Bank of America Nat'l Trust & Savings Ass'n, 112 Cal. App. 2d 388, 246 P.2d 92, 34 A.L.R. 2d 578 (1952); Thompson v. Steinkamp, 120 Mont. 475, 187 P.2d 1018 (1947); Mower v. Mower, 64 Utah 260, 228 Pac. 911 (1924); United Construction Workers v. Laburnum Construction Corp., 194 Va. 872, 75 S.E. 2d 694 (1953), *aff'd*, 347 U.S. 656 (1954). *See also* MORGAN, *supra* note 23, at 295-96; Annot., 141 A.L.R. 704 (1942).

[39] *See* Payne, *supra* note 33, at 1057.

Dying declarations have traditionally been limited to criminal prosecutions for homicide,[40] but occasionally courts have admitted hearsay declarations of dying persons in civil cases.[41] Criticism has been made of the practice of admitting dying declarations of hysterical victims while often excluding the much more trustworthy hearsay statements of a bystander.[42] As in so many of the exceptions, the rationale of the dying declaration exception is based on an outmoded ethic. "Modern ethics and psychology do not uphold any such fine-haired distinctions or superstitutions. . . ." [43]

Psychologists would also question the assumption upon which the exception for declarations against interest is predicated.[44] They have found the distinction between self-serving declarations, which are excluded, and declarations against interest, which are received, to be without sound psychological justification.[45] All declarations against interest contain a self-serving element.[46] But if there is any justification for an exception such as this, surely it should not arbitrarily be limited to declarations against pecuniary and proprietary interests. It should extend as well to declarations against penal and social interests.[47]

Most of the other exceptions have been criticized from time to time. For example, the rigid restrictions on the admissibility of former testimony seem unnecessary when one considers that nothing resembling a substitute for cross-examination can be found in the other exceptions. The law appears to be content with some circumstantial quarantee of the declarant's sincerity in these other exceptions and not with a satisfactory substitute for cross-examination. When a man speaks under oath before a tribunal with power to punish him for perjury, would there not be a greater likelihood that he

[40] Cummings v. Illinois Central R.R., 364 Mo. 868, 879-82, 269 S.W. 2d 111, 119-21 (1954); Blair v. Rogers, 185 Okla. 63, 89 P.2d 928 (1939).

[41] *See, e.g.,* United Services Automobile Ass'n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965); Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625 (1914).

[42] Loevinger, *Facts, Evidence and Legal Proof,* 9 W. RES. L. REV. 154, 165 (1958).

[43] McCARTY, PSYCHOLOGY AND THE LAW 276 (1960).

[44] *See* MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 30-31 (1966).

[45] *Ibid.*

[46] *Ibid.*

[47] *See* MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 145 (1947); Note, *Statements against Penal Interest as an Exception to the Hearsay Rule,* 26 U. PITT. L. REV. 129 (1964). Only a handful of states recognize an exception for declarations against penal interest. People v. Spriggs, 60 Cal. 2d 868, 36 Cal. Rptr. 841, 380 P.2d 377 (1964); Thomas v. State, 186, Md. 466, 47 A.2d 43, 167 A.L.R. 390 (1964); Sutter v. Easterly, 354 Mo. 282, 189 S.W. 2d 284, 162 A.L.R 437 (1945); Band's Refuse Removal, Inc v. Fair Lawn Borough, 62 N.J. Super. 522, 163 A.2d 465 (1960), *noted in* 15 RUTGERS L. REV. 359 (1961); McClain v. Anderson Free Press, 232 S.C. 448, 102 S.E. 2d 750 (1958); Blocker v. State, 55 Tex. Crim. Rep. 30, 114 S.W. 814 (1908); Newberry v. Commonwealth, 191 Va. 445, 61 S.E. 2d 318 (1950).

is speaking the truth than there is under the dying declarations exception?

Although the business entries exception is subject to less criticism than most of the other exceptions, it can exclude hearsay that is highly probative and substantially trustworthy.[48] Often it fails to accommodate the rapid changes which modern technology has brought to record keeping.[49] Nevertheless, some courts have admitted copies of business records stored on magnetic tape in spite of objections that they did not meet the requirements of the best evidence rule.[50]

The notion that hearsay admissible under the exceptions is trustworthy and that hearsay not covered by the exceptions is inherently untrustworthy is refuted almost daily in the courtroom. If no objection is made to the reception of inadmissible hearsay, it may be considered by a jury and given whatever weight it deserves under the circumstances.[51] Morgan went further: he argued that much untrustworthy hearsay may be admitted if the exceptions are applied uncritically and mechanically.[52] Furthermore, he insists that a great deal of trustworthy hearsay is excluded under the traditional exceptions.[53]

There is a great need for flexibility in regard to exceptions to the hearsay rule, but this has not traditionally been allowed. It was very early established that courts should recognize only those exceptions which were as old as the hearsay rule itself.[54] Writers have decried the fact that presentday judges do not have the same flexibility enjoyed by earlier judges who decided the question of admissibility by applying general principles.[55] Yet new

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[48] *See generally* MAGUIRE, *supra* note 47, at 155-61; Laughlin, *Business Entries and the Like,* 46 IOWA L. REV. 276 (1961).

[49] *Cf.* Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials,* 66 COLUM. L. REV. 223 (1966).

[50] *See, e.g.,* Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W. 2d 871 (1965). Under Uniform Business Records Act, calculations prepared and printed by an electronic computer from information stored on magnetic tape was admitted.

[51] *See* Diaz v. United States, 223 U.S. 442, 450 (1912); Continental Oil Co. v. United States, 184 F.2d 802, 813 (9th Cir. 1950); People v. Grayson, 172 Cal. App. 2d 372, 378, 341 P.2d 820, 824 (1959); Weinstein, *The Probative Force of Hearsay,* 46 IOWA L. REV. 331, 350 (1961); Annot., 104 A.L.R. 1130 (1936).

[52] Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 219 (1948).

[53] *Ibid.*

[54] *See* Rex v. Eriswell, 3 T.R. 707, 100 Eng. Rep. 815 (K.B. 1790). *See also* Myers v. Director of Public Prosecutions, [1964] 3 W.L.R. 145, holding that courts could not create any new exceptions to the hearsay rule.

[55] *See* Peck, *The Rigidity of the Rule against Hearsay,* 21 YALE L.J. 257, 260 (1912): "Why should not the judges of 1911 have as much power to establish exceptions to the hearsay rule as their predecessors of 1811?" *See also* Cross, *Reform in the Law of Evidence,* 24 MOD. L. REV. 32, 52 (1961).

exceptions have developed and old ones have been expanded from time to time.[56]

B. *Judicial Expansion, Distortion, and Misapplication of the Exceptions*

The liberalization of the hearsay rule by the courts has followed two divergent courses: (1) a frank refusal to be bound by the archaic exceptions[1] and (2) a process of forcing obviously trustworthy and reliable hearsay into one of the exceptions.[2] Courts following the latter course appear to be caught between a realization of the well-established nature of the exceptions with the concomitant desire that reform be accomplished by legislation, and a recognition of the hardship which these exceptions often produce by excluding highly probative and trustworthy evidence. The following cases will illustrate the extent of the distortion of the exceptions by the courts.

In *Powell v. State*,[3] the court allowed an otherwise inadmissible prior identification of the prosecutrix to come in by resorting to a "back-door" approach. The court permitted a police officer to answer the following question: "In your conversation with the prosecutrix did you learn the identity

[56] *See, e.g.*, Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892); United Services Automobile As'n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965); Band's Refuse Removal, Inc. v. Fair Lawn Borough, 62 N.J. Super. 522, 163 A.2d 465 (1960).

[1] Hurwitz v. Shiu Yim Poon, 364 F.2d 878 (C.C.P.A. 1966); United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964); Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961); Glowe v. Rulon, 284 F.2d 495 (8th Cir. 1960); Meaney v. United States, 112 F.2d 538 (2d Cir. 1940); United Services Automobile Ass'n v. Wharton, 237 F.Supp. 255 (W.D.N.C. 1965); American Luggage Works, Inc. v. United States Trunk Co., 158 F.Supp. 50 (D. Mass 1957); United States v. United States Mach. Corp., 89 F.Supp. 349 (D. Mass. 1950); People v. Spriggs, 60 Cal.2d 868, 36 Cal. Rptr. 841, 389 P.2d 377 (1964); Moore v. Atlanta Transit System, 105 Ga. App. 70, 123 S.E.2d 693 (1961); People v. Poland, 22 Ill.2d 175, 174 N.E.2d 804 (1961); Goodale v. Murray, 227 Iowa 843, 289 N.W. 450 (1940); Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625 (1914); Lucas v. Morefield, 18 La. App. 497, 137 So. 633 (1931); Peterson v. Richfield Plaza, Inc., 252 Minn. 215, 89 N.W.2d 712 (1958); Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965); O'Haire v. Breton, 102 N.H. 448, 451, 159 A.2d 805, 807 (1960); Perry v. Parker, 101 N.H. 295, 141 A.2d 883 (1958); Gagnon v. Pronovost, 97 N.H. 500, 92 A.2d 904 (1952); Robertson v. Hackensack Trust Co., 1 N.J. 304, 63 A.2d 515 (1949); Fleury v. Edwards, 14 N.Y.2d 647, 200 N.E.2d 550 (1964); Healey v. Rennert 9 N.Y.2d 202, 213 N.Y.S.2d 414, 173 N.E.2d 777 (1961).

[2] *See, e.g.*, Cook v. Latimer, 279 Ala. 294, 184 So.2d 807 (1966); Cook v. Commonwealth, 351 S.W.2d 187 (Ky. 1961); Gifford v. Iowa Mfg. Co., 243 Iowa 145, 172, 51 N.W.2d 119, 133 (1952); Gray v. State Capital Life Ins. Co, 254 N.C. 286, 118 S.E.2d 909 (1961).

[3] 332 S.W.2d 483 (Ark. 1960), *discussed in* Levin, *Evidence*, 1960 ANN. SURVEY AM. L. 554, 558 (1961).

of anybody you later picked up?" The officer's response to the question was admitted on the theory that it served to explain his actions.[4]

There is a line of cases holding hearsay declarations of employees admissible under the res gestae exception when they make such declarations shortly after their conduct has been called into question.[5] In *Lumbermen's Mutual Casualty Co. v. Renuart-Bailey-Cheely Lumber & Supply Co.*,[6] written confessions of employees of insured were obtained immediately after polygraph tests. These confessions were received under the res gestae exception. Several cases have admitted hearsay under the res gestae exception even though the declarations were made over an hour after the events to which they related.[7] The res gestae doctrine has also been relied upon to justify the reception of the accusatory statements of a dying victim which did not qualify as dying declarations.[8] In *Cooke v. Latimer*,[9] the statement of a declarant that he and another individual planned to take a trip by automobile and that he would drive was admitted under the res gestae exception.

In a state in which declarations against penal interest were not admissible, the court admitted the statement of a deceased individual that he had been injured while attempting to break into a store.[10] The case involved an attempt by the beneficiary to recover on the deceased's life insurance policy which excluded recovery where death resulted from the criminal act of the insured. The court reasoned that the statement of the deceased was a declaration against pecuniary interest because it would preclude recovery by the beneficiary on the life policy of the deceased.[11]

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4 332 S.W.2d at 485.

5 Thomas v. Howard Co., 228 F.2d 550 (4th Cir. 1955); Piggly Wiggly Yuma Co. v. New York Indemnity Co., 116 Cal. App. 541, 3 P.2d 15 (1931); Alexander Grant's Sons v. Phoenix Assur. Co., 25 A.D.2d 93, 267 N.Y.S.2d 220 (1966); Nock v. Fidelity & Deposit Co., 175 S.C. 188, 178 S.E. 839, 98 A.L.R. 757 (1935); American Surety Co. v. North Texas Nat'l Bank, 14 S.W.2d 88 (Tex. Civ. App. 1929).

6 387 F.2d 423 (5th Cir. 1968).

7 *See, e.g.*, Bandoni v. United States, 171 A.2d 748 (D.C. Mun. Ct. App. 1961); Gifford v. Iowa Mfg. Co., 243 Iowa 145, 172, 51 N.W.2d 119, 133 (1952); Cook v. Commonwealth, 351 S.W.2d 187 (Ky. 1961), *noted in* 51 Ky. L. J. 176 (1962).

8 See, e.g., Roberts v. United States, 332 F.2d 892 (8th Cir. 1964); Stevens v. State, 138 Ala. 71, 35 So. 122 (1903); People v. Vernon, 35 Cal. 49 (1868); Jones v. Commonwealth, 313 Ky. 827, 233 S.W.2d 1007 (1950); Stevens v. State 232 Md. 33 192 A.2d 73, *cert. denied*, 375 U.S. 886 (1963); Bradford v. State, 372 S.W.2d 336 (Tex. Crim. App. 1963); Kuckenbecker v. Commonwealth, 199 Va. 619, 110 S.E.2d 523 (1958); Bliss v. State 117 Wis. 596, 94 N.W. 325 (1903); Annot., 4 A.L.R.3d 149 (1965).

9 270 Ala. 294, 184 So.2d 807 (1966).

10 Gray v. State Capital Life Ins. Co., 254 N.C. 286, 118 S.E.2d 909 (1961).

11 *Id.* at 911: "We tried to break in and I got shot." The court admitted that the time which had elapsed between the shooting and the questioning by an interrogating police officer who arrived later, precluded admission under the res gestae exception.

V. Legislative Reform

A. *Bentham and Nineteenth Century Reform Attempts*

The very foundations of late eighteenth century English society were shaken by the French Revolution and its impact on the political, social, and intellectual life of Europe.[1] Yet there were forces already loose in England, prior to the French Revolution, which had been undermining English social, political, economic, and legal concepts and traditions.[2] The humanizing effect of all these forces provided the atmosphere for a re-evaluation of fundamental legal principles.[3] The chief architect of the legal reform movement was Jeremy Bentham of the utilitarian school of philosophy. He and his followers, notably James Mill and his son, John Stuart Mill, "advocated wholesale reforms of the legal system by means of the Legislature in order to give effect to the many detailed deductions which Bentham had drawn from his principle of utility." [4] Bentham's ambition was to draft a comprehensive code for England or some other country.[5] Although his ambition was never fulfilled, his writings and advice, which was actively solicited by the leading men of the age in Europe and in America, had a great influence on the progress of nineteenth century law.[6]

Bentham's *Rationale of Judicial Proof,* containing his proposals for reform of the law of evidence, was published first in French[7] and later in English.[8] The editor of the French edition omitted Bentham's criticisms of English law.[9] But John Stuart Mill, the English editor, incorporated Bentham's "stricture on English law" [10] and even "read . . . the most authorita-

[1] 13 Holdsworth 3, *quoting* from a letter to Bentham written in 1794 from Dresden:

> The French Revolution notwithstanding its atrocities, has produced a kind of revolution in the human mind in Europe, and mankind think on many points as they never thought before.

[2] 1 Stephen, The English Utilitarians 121 (1900):

> It has been easy to ascribe to the contagion of French example political movements which were already beginning in England and which were modified rather than materially altered by our share in the great European convulsion.

[3] Dicey, Law and Opinion 398-404 (1905).

[4] 13 Holdsworth 5.

[5] 3 Encyclopedia Britannica, *Jeremy Bentham* 747, 748 (11th ed. 1910).

[6] *Ibid.*

[7] Bentham, Traite des Preuves Judiciaires (Dumont ed. 1823).

[8] Bentham, Rationale of Judicial Proof (Mill ed. 1827); *see* Thayer 263 n.1. Thayer pointed out that Bentham had written ". . . a philosophical discussion and . . . not . . . a law book."

[9] J. S. Mill, *Preface* to Bentham, Rationale of Judicial Proof vi (Mill ed. 1827); *see* 13 Holdsworth 65.

[10] Mill, *supra* note 9, at 65.

tive treatises on the English Law of Evidence, and commented on a few of the objectionable points of the English rules, which had escaped Bentham's notice." [11] In spite of Mill's great labor and the keen Benthamic insight which for the most part remained hidden beneath the "discursiveness" [12] and "barbaric terminology," [13] the criticism of the English hearsay rule had no immediate influence on the law of evidence. For the most part, the nineteenth legal reformers ignored that portion of Bentham's treatise on evidence dealing with hearsay.[14] Even Brougham, in his famous speech in the House of Commons on the need for procedural reforms in England,[15] did not follow Bentham's lead in calling for the abolition of the traditional hearsay rule. And while Bentham's treatise had great influence in New York in other areas of evidence reform, his criticism of the hearsay rule was not even noted.[16]

Whatever influence Bentham was to have on the treatment of hearsay had to wait until the twentieth century. The provisions of the Model Code of Evidence dealing with hearsay bear striking resemblance to the suggestions of Bentham.[17] Both advocate admission of hearsay where the declarant is not readily available.[18]

B. *Model Code of Evidence*

The Model Code of Evidence, as promulgated by the American Law Institute in 1942, represents a radical departure from the common law rules of evidence especially with regard to the admissibility of hearsay evidence.[1] The Code prescribes a workable remedy for eliminating irrational

11 *Ibid.*

12 Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule* 63(4)(c) *of the Uniform Rules of Evidence,* 75 HARV. L. REV. 934 (1962).

13 *Ibid.*

14 *Id.* at 940.

15 8 PARL. DEB. (N.S.) 127-247 (1828).

16 *See* COMMISSIONERS ON PRACTICE AND PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE NEW YORK STATE 694 (1850); Chadbourn, *supra* note 12, at 940-41.

17 MODEL CODE OF EVIDENCE Rule 503; *see* Chadbourn, *supra* note 12, at 945.

18 MODEL CODE OF EVIDENCE Rule 503(a); BENTHAM, RATIONALE OF JUDICIAL PROOF 407-10 (Mill ed. 1827).

1 After giving careful consideration to the possibility of drafting a Restatement of the Law of Evidence, the Council of the Institute unanimously rejected such an undertaking from their "belief that however much the law needs clarification in order to produce reasonable certainty in its application, the Rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it." As a consequence, the Council "felt a Restatement of the Law of Evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law." *See* MODEL CODE OF EVIDENCE Introduction viii

inconsistencies within the hearsay rule by abandoning the arbitrary exclusion of hearsay (subject to well-defined exceptions) and returning to what resembles a best evidence approach.[2]

Under common law principles, hearsay testimony is precluded from reaching the factfinder primarily because it is untempered by cross-examination.[3] The exceptions to the exclusionary general rule are predicated primarily upon necessity and a circumstantial guarantee of trustworthiness, which Wigmore suggests is a substitute for cross-examination.[4] The framers of the Code recognized the need for restricting some hearsay evidence while at the same time admitting other hearsay evidence. They rejected, however, the common law rationale for delineating between the two on the basis of finding a substitute for cross-examination as "imperceptible." [5] Instead, the draftsmen proceeded with two fundamental premises: (1) that relevant hearsay evidence has definite probative value and should be rationally admitted if there is no better evidence available,[6] and (2) that jurors are far more capable of evaluating hearsay evidence than past decisions

(1942). And as to hearsay evidence in particular, "that the common law rules, as evolved and developed in our many jurisdictions, have become so refined and complex as to require a complete and radical re-examination." See MODEL CODE OF EVIDENCE, Introductory Note ch. VI, at 217.

[2] *See* MODEL CODE OF EVIDENCE, Introductory Note ch. VI, at 221; James, *The Role of Hearsay in a Rational Scheme of Evidence,* 34 ILL. L. REV. 788, 795-797 (1940) for discussion of the best evidence rule and its application to hearsay evidence. James argues that

> the proper criterion, the criterion applied in all other applications of the best evidence which, in the nature of the fact to be proved, could ordinarily be offered to prove it. It is the best evidence which, under the circumstances of the case at bar, this particular litigant could be expected to present. If the "best evidence" theory is accepted. . . . some hearsay rule may be justified as one of the essential rules of Evidence. . . .

[3] Wigmore § 1362.

[4] Matthews v. United States, 217 F.2d 409, 417 (5th Cir. 1954). *See also* WIGMORE §§ 1421, 1422.

[5] MODEL CODE OF EVIDENCE, Introductory Note ch. VI, at 222. Professor Morgan more clearly expressed his dissatisfaction with the hearsay rule when he said, "Indeed a proper appreciation of the history of the hearsay rule, a searching analysis of its supposed rationality and an examination of its exceptions might well lead to its practical abolition." Morgan, *The Law of Evidence,* 59 HARV. L. REV. 481, 545 (1959).

[6] MODEL CODE OF EVIDENCE, Introductory Note ch. VI, at 217. 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 (1962), for a discussion of Bentham's theories for reform of the hearsay rule. The author suggests Bentham's reforms have been incorporated into the Code. *See also* Morgan, *supra* note 5, at 541: "The exclusion of hearsay evidence is not grounded upon its lack of probative value, for if inadmissible hearsay is received without objection, it is to be weighed by the trier of fact, and may be sufficient to support a finding or verdict." *See* Annot., 79 A.L.R. 2d 890 (1961)

would have us believe.[7] Upon these considerations the draftsmen formulated the heart of the rule admitting hearsay declarations in rule 503 which provides:

> Evidence of a hearsay declaration is admissible if the judge finds that the declarant
> (a) is unavailable as a witness, or
> (b) is present and subject to cross-examination.

By virtue of this rule, "a statement made by a person which would be received by him if he were now in court and offering it as part of his testimony, is admissible if he is unavailable as a witness." [8] The whole question of admissibility turns upon the availability of the declarant rather than upon the more nebulous theory of a circumstantial guarantee of trustworthiness.[9]

Unavailability of the declarant, as defined by Rule 1 (15), includes any physical, mental or legal obstacle, whether permanent or temporary, which prevents the declarant from testifying at the trial. The rule is qualified to prevent fraud by disallowing hearsay testimony if the obstacle causing unavailability is brought about either directly or indirectly by the proponent of the hearsay evidence through procurement, wrongdoing, or culpable neglect.[10] The exercise of due diligence to find the declarant is enough.[11] "The mere fact that a deposition might be taken does not make the witness available," for he is still "unavailable if he is absent were though you might have taken his deposition." [12] By rejecting the precautionary measures of the traditional hearsay rule and its exceptions, the

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[7] Morgan, *Foreword* to MODEL CODE OF EVIDENCE 48 (1942). The jurors are treated "as normal human beings, capable of evaluating relevant material in a court-room as well as in the ordinary affairs of life." James, *supra* note 2, at 794-95; *see* Chadbourn, *supra* note 6. Morgan rejects Justice Coleridge's statement in *Wright v. Doe d. Tatham:* "The fallacy that whatever is morally convincing and whatever reasonable beings would form their judgments and act upon, may be submitted to a jury." Morgan, *The Jury and the Exclusionary Rules of Evidence,* 4 U. CHI. L. REV. 247 (1936). *See also* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 179-188 (1948); Morgan, *Book Review,* 5 VAND. L. REV. 672, 678 (1952).

[8] 18 ALI PROCEEDINGS 91 (1940-1941).

[9] A determination by the trial judge that the declarant is unavailable does not necessitate acceptance of hearsay testimony. By Rule 303 the trial judge may within his discretion exclude it if he finds its probative value out weighted by undue consumption of time, creation of undue prejudice or unfair surprise. *See also* Swietlick & Henrickson, *A Code of Evidence for Wisconsin?,* 1947 WIS. L. REV. 88.

[10] MODEL CODE OF EVIDENCE Rules 1(15)(a), 503, comment a, at 232 (1942).

[11] 18 ALI PROCEEDINGS 91.

[12] 18 *id.* at 92.

Code adopts a consistent and rational approach for admitting the most cogent evidence available rather than excluding it merely because it is evidence which has not been tested by cross-examination.[13]

This approach proved to be too radical a change.[14] In spite of the distinguished list of professors, jurists, and authorities who either drafted or advocated adoption of the Code, its practical effect was minimal.[15] Very few courts have cited this section of the Code to support a ruling,[16] and no jurisdiction has enacted these provisions.[16] Professor McCormick suggests, however, that "this probably is the position towards which our law is moving." [17]

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[13] Judge Learned Hand suggested such an approach in the 1920's:

> When a witness is not available at all or available only with a disproportionate expense of time, let us hear what he has said on the matter, just as we do in every other concern of life, even in affairs which may involve our lives or the safety of the state. . . . I agree that it involves chances, but in answer I argue that, as the law now stands, the party who has only such proof is deprived of any chances at all. It would of course be undesirable to open the doors to hearsay evidence when better was available, but I ask you whether Baron Gilbert was not right in saying men should use in their disputes the best means they can get to reach the truth?

Hand, *The Deficiencies of Trials to Reach the Heart of the Matter,* in 3 N.Y.C.B. Ass'n Lectures on Legal Topics 99 (1926).

[14] Morgan describes Rule 503 as the most radical departure from the common law. Morgan, *The Code of Evidence Proposed by the American Law Institute,* 27 A.B.A.J. 694, 695 (1941). McCormick concludes that "This system of hearsay rules is the most complex and technical part of the whole subject of evidence, and the code has atttempted a partial, but only a partial, reform." Although McCormick considered rule 503 as *a* primary reason for the Code's rejection, he believed the hearsay provision to be a "partial reform" only because many hearsay exceptions were retained in the Code. McCormick, *The New Code of Evidence of the American Law Institute,* 20 Texas L. Rev. 661 (1942). "It [the Code] was thought to be over-radical in its reforms, especially in opening the door too wide for the admission of hearsay and in conceding too wide a scope for the trial judge's discretion." McCormick, *Some Highlights of the Uniform Evidence Rules,* 33 Texas L. Rev. 559, 559 (1955); *see* Gard, *The Uniform Rules of Evidence,* 31 Tul. L. Rev. 19, 23-24 (1956). For a summary of criticism of the Code, the reactions of various state bar associations, *see* Fryer, *Note on Code as Means of Promoting Nation-Wide Reform,* in Selected Writings on the Law of Evidence and Trial 1160 (1957).

[15] Wigmore, chief consultant for the Model Code, refused to accept the formulation of rules: "Now, my disagreement is not with the policy of many of the Draft Code's Rules as such. . . . But it is the draftmanship that in my opinion is ground for rejecting it." Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent,* 28 A.B.A.J. 23 (1942).

[16] In re Petango, 24 N.J.M. 279, 48 A.2d 909, 913 (1942); *noted in* 32 Iowa L. Rev. 779 (1947); Robertson v. Hackensack Trust Co., 1 N.J. 304, 63 A.2d 515, 522-523 (1949).

[17] McCormick, *supra* note 14, at 561. But according to Morgan, it is moving in that direction with "glacier-like speed." Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence,* 14 Vand. L. Rev. 725 (1961).

C. *Uniform Rules of Evidence*

The underlying principle of this body of rules is that all witnesses are competent to testify and all relevant evidence is admissible except where specific disqualifications or limitations govern.[1] This corresponds to the cardinal rule of evidence which both Thayer[2] and Wigmore[3] advocate. The purpose of the Uniform Rules, as stated by the chairman of the committee which drafted them,[4] closely resembles the stated purpose of the Model Code:[5]

> [W]e have tried to be very sure that every rule which limits or restricts in any way the evidence available to the fact-finder, is justified by some paramount consideration of public policy. If that element of public necessity does not clearly appear, the restriction is omitted, because as all will agree, truth is difficult of ascertainment unless the fact-finder has access to all of the evidence and the opportunity to weigh each part against the other.[6]

Nevertheless, the specific provisions of the Uniform Rules are far more conservative than those of the Model Code, particularly in regard to the hearsay problem.[7] Even though the Uniform Rules would allow some hearsay evidence to be received that is now admitted in many jurisdictions, they do not go far beyond the existing law of evidence in some of the more liberal jurisdictions.[8] In those jurisdictions, adoption of the Uniform Rules would serve only to simplify and clarify the law of evidence. In the other more conservative jurisdictions, adoption of these Rules would undoubtedly have a liberalizing effect; but the root problem would still remain. The Model Code purported to deal with that problem: in effect,

[1] UNIFORM RULE OF EVIDENCE 7; *see* Gard, *Kansas Law and the New Uniform Rules of Evidence,* 2 KAN. L. REV. 333, 336-37 (1954).

[2] THAYER 198, 264-265.

[3] WIGMORE § 9, at 289.

[4] Judge Spencer A. Gard of Kansas headed the committee and was assisted by a distinguished group of judges, practitioners, and scholars. Professor Morgan played an important role as an advisor along with Maguire and Falknor.

[5] *See Morgan,* Forward to MODEL CODE OF EVIDENCE 10-11 (1942).

[6] Gard, *supra* note 1, at 337.

[7] *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, 946-47 (1962); McCormick, *Some High Lights of the Uniform Evidence Rules,* 33 TEXAS L. REV. 559, 561 (1955).

[8] *See* McCormick, *supra* note 7, at 561-62. Weinstein points out that the Uniform Rules may even be more restrictive in certain respects than the rules currently in force in the more liberal jurisdictions. Weinstein, *The Probative Force of Hearsay,* 46 IOWA L. REV. 331, 346 (1961).

it would have inverted the present rule making the admissibility of hearsay the general rule and exclusion of hearsay the exception.[9] The Code, therefore, would have changed the hearsay rule in its very substance rather than adjust the rule's form by expanding the exceptions to allow more hearsay to come in as the Uniform Rules do.

In attempting to overcome the problems encountered with the Model Code, the drafters of the Uniform Rules of Evidence arrived at a proposal which, in effect, merely restated the law of evidence with respect to hearsay that was then current in some of the more liberal jurisdictions.[10] A restatement of current law was precisely what the drafters of the Model Code did not want.[11] This amounted to a radical shift in approach from that of the Model Code. The drafters of the Uniform Rules returned to the traditional tests for admissibility, necessity and trustworthiness, except in two instances.

The first instance amounted to a new exception for declarations made by one who was unavailable.[12] The Uniform Rules sought a compromise with the traditional rationale and rejected unavailability of the declarant as a sole criteria.[13] Hearsay evidence would be admissible under the Uniform Rules if the declarant is unavailable and the judge finds the extra judicial statement was made in good faith while the subject matter was still fresh in the declarant's mind. This approach leaves the question of admissibility with the judge and implements the task by giving him various alternatives for excluding the hearsay.

Among the various reasons for which the judge may exclude hearsay is that he believes the statement being recounted by the witness was never made. Another possibility of exclusion arises if the judge believes the declarant was lying when making the statement. The judge is also given the opportunity to exclude the hearsay evidence if he believes the pro-

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9 MODEL CODE OF EVIDENCE Rule 503.

10 *See* McCormick, *supra* note 7, at 561-62.

11 *See* 16 ALI PROCEEDINGS 46 (1939).

12 UNIFORM RULE OF EVIDENCE 63(4)(c):

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: . . . (4) . . . (c) if the declarant is unavailable as a witness, 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. . . .

13 *See* Chadbourn, *supra* note 7, at 946. Chadbourn criticizes that part of Rule 63(4)(c) which allows the judge to exclude the evidence because he thinks the statement is false. *Id.* at 947-51.

ponent has failed to show affirmatively compliance with the conditions of admissibility set forth in rule 63(4)(c).

The other instance is a provision for admitting extrajudicial declarations of one who is present at trial and available for cross-examination with respect to the statement and its subject matter.[14] The Model Code had a similar provision. This rule allows the proponent to prove his case by the use of prior consistent and prior inconsistent statements of one who is subject to cross-examination at the trial in which they are related by another. Such statements are received as substantive evidence. This is a common sense rule which recognizes what in reality had been the effect of the admission of prior statements to credit or impeach a witness. The jury, no doubt, attached substantive weight to them in spite of the limiting instructions of the court.[15]

The Uniform Rules also liberalize many of the traditional exceptions.[16] Dying declarations are not limited to homicide cases.[17] Learned treatises are admissible as substantive evidence.[18] Depositions and former testimony are admissible without the requirement that the parties be identical.[19] Admissions of an agent are admissible against his principal so long as they relate to the scope of his employment or duty and are made before the agency relationship is terminated.[20] No longer would vicarious admissions be limited to statements made by "speaking agents," i.e., agents with authority to speak for the principal. Declarations against interest were expanded by the Uniform Rules to include declarations against penal or social interest.[21]

Morgan, who had been chiefly responsible for the Model Code, felt that the Uniform Rules should be adopted; but perhaps out of loyalty,

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14 UNIFORM RULE OF EVIDENCE 63(1).

15 *See* Donnelly, *The Hearsay Rule and Its Exceptions,* 40 MINN. L. REV. 455, 461 (1954).

16 *See generally Symposium,* 40 MINN. L. REV. 297 (1956); *Symposium,* 49 NW. U. L. REV. 481 (1954); *Symposium,* 10 RUTGERS L. REV. 479 (1956); *Symposium,* 2 U. C. L. A. L. REV. 1 (1954); Powers, *The North Carolina Hearsay Rule* and the Uniform Rules of Evidence, 34 N. C. L. REV. 171 (1955); Stopher, *The Uniform Rules of Evidence: Government by Man Instead of by Law,* 29 INS. COUNSEL J. 405 (1962); Comment, *A Comparison of the Uniform Rule of Evidence 63(1) and (4) and Virginia Law,* 18 WASH. & LEE L. REV. 358 (1961). Professor Green lists six significant items in the Uniform Rules. Green, *Drafting Uniform Federal Rules of Evidence,* 52 CORNELL L. Q. 177, 187 (1967).

17 UNIFORM RULE OF EVIDENCE 63(5).

18 UNIFORM RULE OF EVIDENCE 63(31)

19 UNIFORM RULE OF EVIDENCE 63(3)

20 UNIFORM RULE OF EVIDENCE 63(9).

21 UNIFORM RULE OF EVIDENCE 63(10)

he clung to the belief that something closer to the proposal originally adopted by the American Law Institute (the Model Code of Evidence) would have been more acceptable.[22]

D. *Dead Man Statutes*

The typical dead man statute disqualifies the survivor of a transaction as a witness in an action by or against the administrator or executor of the deceased party.[1] This is due primarily to a notion of fair play,[2] as the statements or declarations of the deceased are generally inadmissible unless under some exception to the hearsay rule.[3]

Chadbourn points out that, generally, three alternatives to the usual dead man statute have crystallized.[4] One would allow the survivor to testify in the discretion of the trial judge where the interests of justice would be better served.[5] New Hampshire,[6] Montana,[7] and Arizona[8] are representative jurisdictions following this approach.[9] The second alternative qualifies the survivor, yet no judgment may be rendered in his behalf unless his testimony is corroborated.[10] New Mexico's statute[11] is of this variety.[12]

The third alternative is more pertinent to this discussion as it creates a new exception to the hearsay rule for the declarations of the deceased.[13] Virginia[14] and Oregon[15] admit the hearsay statements of the deceased if

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22 Morgan, *The Uniform Rules and the Model Code,* 31 TUL. L. REV. 145, 151-52, (1956).

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1 WIGMORE § 578.

2 Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence,* 14 VAND. L. REV. 725, 728 (1961):

> [T]he fundamental notion was that since the dead man could not testify in denial or explanation of the offered testimony and had had no opportunity to cross examine the witness, it would expose his estate to all sorts of false claims. The refutation of this argument by many commentators and some judges had had no appreciable effect.

3 Chadbourn, *History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization,* 4 U.C.L.A. L. REV. 175, 214 (1957).

4 *Id.* at 212-17.

5 *Id.* at 212.

6 N. H. REV. LAWS ch. 392, §§ 25-26 (1955).

7 MONT. REV. CODE ANN. tit. 93, ch. 701, § 3 (Repl. vol. 1947).

8 ARIZ. CODE ANN. ch. 23, § 105 (1956).

9 Chadbourn, *supra* note 3, at 212.

10 *Id.* at 213.

11 N.M. STAT. ANN. ch. 20, §§ 2-5 (1953).

12 Chadbourn, *supra* note 3, at 213.

13 *Id.* at 214.

14 VA. CODE ANN. § 8-286 (Repl. vol. 1957).

15 ORE. COMP. LAWS ANN. tit. 4, ch. 41, § 850 (1953).

corroborated in an action by or against the administrator or executor of the deceased if the survivor first testifies.[16] Connecticut[17] and South Dakota[18] admit the declarations of the deceased without limit on an action by or against the decedent's executor or administrator,[19] although South Dakota requires that the declaration be made in good faith, by the declarant and upon his personal knowledge.[20] Massachusetts[21] and Rhode Island,[22] however, go all the way and admit the declarations of any decedent in any action.[23] Even though the element of necessity is the primary requisite,[24] the Massachusetts statute is not without adequate safeguards of reliability and trustworthiness for, as in the South Dakota statute, the declarations must have been made in good faith upon the personal knowledge of the deceased declarant before the commencement of the action,[25] and the statement must be one of fact, not of opinion.[26]

Referring to the admission of all the declarations of the decedent without limit, Wigmore states that such came near to being a settled exception in the early 1800's,[27] and although it was later negatived, it "commends itself as a just addition to the present sharply defined exceptions, and represents undoubtedly the enlightened policy of the future." [28]

Rule 7 of the Uniform Rules would abolish the dead man statutes. The successful experience of those jurisdictions which have long been without such statutes has demonstrated that abuses do not follow in the wake of their abolition.[29] There is strong support for this liberal proposal of which Uniform Rule 7 is only the most recent example.[30]

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16 Chadbourn, *supra* note 3, at 214.

17 CONN. REV. GEN. STAT. § 7895 (1958).

18 S.D. Code § 36.0104 (1962).

19 Chadbourn, *supra* note 3, at 214.

20 S.D. CODE 36.0104.

21 MASS. ANN. LAWS ch. 233, § 65 (1959).

22 R.I. GEN. LAWS ch. 538, § 6 (1956).

23 Chadbourn, *supra* note 3, at 214.

24 JONES, EVIDENCE § 274, at 528 (5th ed. 1958).

25 MASS. ANN. LAWS ch. 233, § 65 (1956).

26 JONES, *supra* note 24.

27 WIGMORE § 1576, at 435.

28 *Ibid.*

29 *See* Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes,* 103 U. PA. L. REV. 1, 9 (1954); McCormick, *Some Highlights of the Uniform Evidence Rules,* 33 TEXAS L. REV. 559, 563 (1955); McCormick, *The New Code of Evidence of the American Law Institute,* 20 TEXAS L. REV. 661, 666 (1942).

30 MODEL CODE OF EVIDENCE Rule 101; MORGAN ET. AL., THE LAW OF EVIDENCE—SOME PROPOSALS FOR ITS REFORM 27-30 (1927); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 334 *et. seq.* (1949); WIGMORE § 8c.

E. *Miscellaneous Statutes*

The legislation dealing with particular problems of hearsay evidence are so numerous and varied that they could not adequately be handled here. In fact, it would be unnecessary even to list all of these statutes. None appear to have any substantial impact on the common law hearsay rule with the exception of the English Evidence Act.[1] This Act creates a broad, new exception for written hearsay offered in civil proceedings under certain circumstances.[2] Statements written after the dispute arises, however, are inadmissible.[3] The Act does not make unavailability a prerequisite to admission, and it even allows the judge to admit the hearsay without calling the declarant to the stand when he is available.[4] The judge is also given the power to exclude the statement if, in the exercise of his discretion, he finds that it is "inexpedient in the interests of justice to admit it." [5]

VI. Hearsay in Non-Judicial Tribunals

A. *Administrative Agencies*

(1.) *Background.*—Administrative bodies are hardly new in Anglo-American history. They flourished and were a potent political force in sixteenth and seventeenth century England.[1] Before the American Revolu-

[1] 1 & 2 Geo. 6, ch. 28 (1938)

[2] *See* Maguire, Weinstein, Chadbourn & Mansfield, Cases and Materials on Evidence 542 (5th ed. 1965). *See generally* Cross, *What Should Be Done About the Rule against Hearsay?*, 1965 Crim. L. Rev. 68; Hellamn, *The Reform of the Law of Hearsay,* 17 Can. B. Rev. 302 (1939); Nokes, *Some Suggestions on Hearsay,* 1965 Crim. L. Rev. 85; Stone, *The Evidence Act, 1938,* 85 L. J. 409, 425, 441 (1938); Comment, *Hearsay and the English Evidence Act, 1938,* 34 Ill. L. Rev. 974 (1940); 52 Harv. L. Rev. 539 (1939).

[3] 1 & 2 Geo. 6, ch. 28, § 1(3) (1938).

[4] 1 & 2 Geo. 6, ch. 28, § 1(2)(a) (1938).

[5] 1 & 2 Geo. 6, ch. 28, § 1(5) (1938).

[1] *See* Pound, Administrative Law: Its Growth, Procedure and Significance 27 (1942). In fact, administrative law may be traced back to ancient Rome. *Id.* at 9. In England, it dates back to the Year Books. *See* Lavery, Federal Administrative Law §§ 3-4, at 5-6 (1952). *But see* Dicey, Lectures Introductory to the Study of the Law of the Constitution 180 (1885):

> In England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles on which it rests are in truth unknown.

Dicey later modified his position. *See* Dicey, *The Development of Administrative Law in England.* 31 L. Q. Rev. 148 (1915). His views are criticized in Carrow, The Background of Administrative Law 14-15 (1948); Freund, The Growth of American Administrative Law 9-16 (1923); Jennings, The Law and the Constitution 293 (3d ed. 1943). *See also* 1 Davis, Administrative Law § 1.04, at 24-25 (1958)

tion, they functioned in the colonies and were a major cause of the ultimate breakaway from England.[2] Due largely to the fact that there was no separation of powers, colonial administrative bodies were characterized by arbitrariness; and the distaste for administrative process survived the founding of the new nation. The excessive reaction to this process led to what, by the end of the next century, Pound has called a "law-ridden" society.[3] The judicial process in the late 1800's had become cumbersome and overly technical.

At the same time, there was a heavier demand on the courts than ever before as a result of the great number of disputes growing out of the rapid development of railroads, industry, and public utilities.[4] The courts failed to accommodate this demand.[5] In the face of the pressing need for a way to handle controversies which the courts could not or would not handle, the public put aside its fear of abuses, which historically had accompanied administrative bodies, and turned to such bodies as a means of alleviating the problem.[6] Administrative bodies had never ceased to exist during the intervening period,[7] but now in the last two decades of the nineteenth century their growth and prominence took a sharp swing upward.[8] The

[hereinafter cited as DAVIS]: "Administrative law existed long before the term 'administrative law' came into existence." Professor Goodlow was said to have 'discovered' the existence of administrative law in the United States. *See ibid.* In GOODLOW, COMPARATIVE ADMINISTRATIVE LAW 6-7 (1893), he wrote that

> the general failure in England and the United States to recognize an administrative law is really due, not to the non-existence in these countries of this branch of the law but rather to the well-known failure of English law writers to classify the law. For . . . there has always existed in England as well as in this country, an administrative law. . . .

But the term "administrative law" had been used before. *See* HOLLAND, ELEMENTS OF JURISPRUDENCE 374 (1880); *Index* to 13 OPINIONS OF THE ATTORNEY GENERAL 599 (U.S. 1869), *cited by* LAVERY, *supra*, at 6 n. 8.

2 *See* POUND, *supra* note 1, at 27.

3 *Ibid. See also* 1 COOPER, STATE ADMINISTRATIVE LAW 15 *et. seq.* (1965).

4 *See* GELLHORN, FEDERAL ADMINISTRATIVE PROCEDURE 8-9 (1941).

5 DAVIS § 1.05, at 34-35.

6 *See* POUND, *supra* note 1, at 28.

7 A Maryland statute in 1781, set up an administrative board to license the operation of ferries. LAWS OF MD., ch. 22 (Nov. Sess. 1781). The first federal statute establishing an administrative agency came eight years later. 1 Stat. 29 (1789). This board was created to provide for the effective enforcement of customs laws. *See* GELLHORN, *supra* note 4, at 3-4. In spite of the steady rise in the number of administrative agencies during the next century, the first important agency was not created until 1887, when Congress saw the need for the Interstate Commerce Commission. 24 Stat. 379. *Cf.* CARROW, *supra* note 1, at 61-64; PRETTYMAN, TRIAL BY AGENCY 44 (1959); 1 VON BAUR, FEDERAL ADMINISTRATIVE LAW § 82, at 93 (1942); Patterson, *Hearsay and the Substantial Evidence Rule in the Federal Administrative Process,* 13 MERCER L. REV. 294, 302 (1962).

8 *See* GELLHORN, *supra* note 4, at 4.

administrative machinery has increased markedly since that time and has attained a position rivaling that of the courts in the amount of disputes handled.[9]

The principal characteristic of administrative hearings is informality.[10] Free from the cumbersome legal rules of evidence and procedure, they have proved to be adaptable and simple. A resort to sources of information ordinarily relied upon by businessmen and others in the conduct of the daily affairs has replaced the confining technicalities of the courtroom.[11] Some writers suggest that the legal rules of evidence should be refashioned after the principle which guides administrative tribunals in deciding fact disputes.[12] On the other hand, there are those who advocate an application of the legal rules of evidence to administrative hearings, at least to the extent that they are applied in non-jury trials.[13] Most of this latter group would concede that administrative hearing officers should be allowed at least as much discretion as judges in equity proceedings.[14] This would not effect a strict application of the hearsay rule, but would make it a guide for the hearing officer to use in his discretion when hearsay evidence becomes too remote.[15] However, the basic principles of relevancy, materiality, and probative force would be applied, as much for reasons of practicality as for fairness.[16]

(2.) *Federal Administrative Hearings.*—As a general principle, the hearsay rule does not apply to federal administrative hearings primarily because the administrative agency has as its first responsibility the protection of the public interest.[17] The interest in deciding the case correctly as

9 BOTEIN & GORDON, THE TRIAL OF THE FUTURE 78 (1963); MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 161 (1947); Davis, *Hearsay in Administrative Hearings,* 32 GEO. WASH. L. REV. 689, 692-93 (1964).

10 *See* POUND, *supra* note 1, at 77-78.

11 *See* Learned Hand, J., in John Bene & Sons v. FTC, 299 Fed. 468 (2d Cir. 1924); Loevinger, *Facts, Evidence and Legal Proof,* 9 W. RES. L. REV. 154, 171 (1958).

12 *See* Loevinger, *supra* note 11, at 171-72.

13 *See* COMM'N ON ORGANIZATION OF EXECUTIVE BRANCH OF GOV'T, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 199 (1955) (Second Hoover Commission); COOPER, *supra* note 3, at 379-84; Stephan, *The Extent to Which Fact-Finding Boards Should Be Bound by Rules of Evidence,* 24 A.B.A.J. 63 (1938).

14 *See* TASK FORCE REPORT, *supra* note 13, at 199; Attorney General's Committee, *Administrative Procedure in Gov't. Agencies,* S. DOC. No. 8, 77th Cong., 1st Sess. 70-71 (1941). *See also* A.B.A., CODE OF ADMINISTRATIVE PROCEDURE § 1006 (4) (Proposed Draft, Apr., 1957).

15 CHAMBERLAIN, DOWLING & HAYS, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES 22 (1942).

16 *See* Statement of McFarland, Stason & Vanderbilt, S. DOC. No. 8, 77th Cong., 1st Sess. 241 (1941).

17 *See* Attorney General's Committee, *Administrative Procedure in Gov't Agencies,*

between the litigants is not the pre-eminent concern in such hearings as it is in the courtroom.[18] It has long been settled that in the absence of statute, the rules of evidence applicable to jury trials do not apply to the federal agencies.[19] In 1946, Congress enacted the Federal Administrative Procedure Act[20] which today governs the reception of evidence in most agency hearings. It provides that ". . . any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. . . ." [21] Congress has enacted statutes expressly superseding the Federal Administrative Procedure Act where certain agencies are involved.

The federal agencies fall into three general categories with respect to their treatment of hearsay evidence offered at administrative hearings: (1) those agencies which provide by regulation that relevant and material evidence should be admitted while irrelevant, immaterial, and unduly repetitious evidence should be excluded;[22] (2) those which apply the rules of evidence found in non-jury civil cases tried in federal courts;[23] and finally (3) those which allow the introduction of any evidence that reasonably prudent men consider probative.[24]

S. Doc. No. 8, 77th Cong., 1st Sess. 70 (1941); STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE, A STUDY IN JURISPRUDENCE AND ADMINISTRATIVE LAW 93 (1935); Patterson, *supra* note 7, at 341.

[18] *See* Patterson, *supra* note 7, at 304.

[19] WIGMORE § 4(c), at 43-44.

[20] 60 Stat. 237, 5 U.S.C. § 1001 (1958).

[21] 60 Stat. 241, 5 U.S.C. § 1006(c)(1958).

[22] Included in this first group are the Federal Trade Commission, the Civil Aeronautics Board, and the Securities and Exchange Commission. 16 C.F.R. § 3.43(b)(1968) (FTC); 14 C.F.R. § 301.32 (1967) (CAB); 17 C.F.R. § 201.14(a) (1968) (SEC); *see* Note, *The Federal Trade Commission and Reform of the Administrative Process,* 62 COLUM. L. REV. 671, 692-94 (1962); 46 MINN. L. REV. 778 (1962).

[23] The Federal Communications Commission and the Interstate Commerce Commission have regulations setting out the rules of evidence applicable to civil non-jury cases as a guideline to be followed by the hearing officer as far as it is practical. 47 C.F.R. § 1.351 (1968) (FCC); 49 C.F.R. § 1.75 (1967) (ICC). Both of these regulations provide that the standards of admissibility may be relaxed in the interest of justice. The National Labor Relations Board requires that the rules of evidence as determined under Rule 43a of the Federal Rules of Civil Procedure must be enforced in its hearings. 29 C.F.R. § 102.39 (1968). This means that the same rules applicable in federal cases are applicable in NLRB hearings, but Rule 43a provides in part that the rules of evidence which formerly governed the admissibility of evidence in equity proceedings may be applied. This provision is hardly more precise than those of the FCC and the ICC.

[24] This third group is composed of the Atomic Energy Commission and the Federal Power Commission. The FPC provision contains language reminiscent of that found in the more liberal federal cases dealing with evidence in administrative hearings. 18 C.F.R. § 1.26(a) (1968); *see* John Bene & Sons v. FTC, 299 Fed. 468, 471 (2d Cir.

In immigration[25] as well as deportation cases,[26] the judicial rules of evidence are not applicable. Hearsay, in particular, is thought to be needed in such cases because of the likelihood that the basic source may be thousands of miles away.[27] In deportation cases, however, there is a growing tendency to require the production of extrajudicial declarants if the respondent wishes to cross-examine them, and if they are available.[28] But one court has held that hearsay evidence was properly admitted at an administrative hearing over respondent's objections where he failed to request that witnesses be produced;[29] and there has not been any indication in these cases that the respondent has an absolute right to be confronted by all witnesses.[30]

1924); NLRB v. Remington Rand, 94 F.2d 862, 873 (2d Cir.), *cert. denied,* 304 U.S. 576 (1938). The AEC provision is the only one specifically dealing with the hearsay question. 10 C.F.R. § 2.743(c) (1968):

> . . . Every reasonable effort will be made to obtain the best evidence reasonably available. Hearsay evidence will be admitted without regard to technical rules of admissibility and accorded such weight as the circumstances warrant.

[25] Loy v. Cahill, 81 F.2d 809 (9th Cir. 1936); Smith v. Curran, 12 F.2d 636 (2d Cir. 1926). *See also* 1 GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 3.20f (1967).

[26] Tisi v. Tod, 264 U.S. 131 (1924); Pang v. INS, 368 F.2d 639 (3d Cir. 1966), *cert. denied,* 386 U.S. 1037 (1967). Greene v. INS, 313 F.2d 148 (9th Cir.), *cert. denied,* 374 U.S. 828 (1963); Schoeler v. INS, 306 F.2d 460 (2d Cir. 1962); Morgans v. Pilliod, 299 F.2d 217 (7th Cir.), *cert. denied,* 370 U.S. 924 (1962); Bufalino v. Holland, 277 F.2d 270 (3d Cir.), *cert. denied,* 364 U.S. 863 (1960); Impasato v. O'Rourke, 211 F.2d 609 (8th Cir.), *cert. denied,* 348 U.S. 827 (1954). *See generally* GORDON & ROSENFIELD, *supra note* 1, § 5.10; Taffet, *Evidence in Deportation Proceedings,* 38 INT. REL. 142 (1961).

[27] GORDON & ROSENFIELD, *supra note* 1, at § 3.20f.

[28] Maltez v. Nagle, 27 F.2d 835 (9th Cir. 1928); Matter of M., 6 I.N. 300 (1954); Matter of M., 5 I.N. 738 (1954). *See* GORDON & ROSENFIELD, *supra note* 1, § 5.9g. This trend is due at least in part to a new reading being given the applicable statute in the light of modern criminal cases, such as Pointer v. Texas, 380 U.S. 400 (1965). The statute, 8 U.S.C. § 1252 (b), reads:

> The alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government.

[29] Wei v. Robinson, 246 F.2d 739, 746 (7th Cir.), *cert. denied,* 355 U.S. 879 (1957). *See also* Maltez v. Nagle, 27 F.2d 835 (9th Cir. 1928); Matter of R., 5 I.N. 612 (1954).

[30] See Moncado v. Ramsey, 167 F.2d 191 (8th Cir. 1948); Singh v. McGrath, 104 F.2d 122 (9th Cir. 1939), *cert. denied,* 308 U.S. 629 (1940). *See also* 8 C.F.R. 242.14 (c); GORDON & ROSENFIELD, *supra note* 1, § 5.9g. *But see* Bridges v. Wixon, 326 U.S. 135, 156 (1945), which suggested that the admission of hearsay in a deportation hearing may deny the defendant a fair hearing. This case seems to have been ignored by the courts. *See* MAGUIRE, WEINSTEIN, CHADBOURN & MANSFIELD, CASES AND MATERIALS ON EVIDENCE 773 (5th ed. 1965); *cf.* Sherman v. INS, 350 F.2d 894 (2d Cir. 1965), *discussed in* Jaffe, *Administrative Law: Burden of Proof and Scope of Review,* 79 HARV. L. REV. 914 (1966). In *Sherman,* the Court held that the federal

(3.) *State Administrative Agencies.*—In 1946, the National Conference of Commissioners on Uniform State Laws[1] and the American Bar Association[2] approved the Model State Administrative Procedure Act.[3] Hawaii, Maryland, Michigan, Missouri, Oregon, Washington, and Wisconsin have adopted acts which are substantially similar.[4] This Act provides that "agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs." [5] It further provides that the agencies "may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence." [6] It would seem, then, that the admission of hearsay evidence would be solely within the discretion of the agency. This provision is subject to the restriction that a reviewing court may reverse if the findings are unsupported by competent, material and substantial evidence in view of the entire record submitted.[7] Taken together these provisions mean that although hearsay evidence could be admitted, a finding cannot rest entirely on hearsay which would be inadmissible in trial courts even if it possesses probative value and would be accepted by reasonable men.[8] This is commonly known as the residuum rule.[9]

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statute which made the finding of the Attorney General on deportability conclusive when supported by reasonable, substantial, and probative evidence did not contemplate burden of proof. Therefore, the reviewing court may decide that a higher degree of proof is required in a given case. Jaffe views this to mean that a case may be remanded "despite the fact that the evidence is substantial." Jaffe, *supra,* at 915. *See also* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 651 (1965): "In deportation the administrative considerations warranting limited review are relatively weak, and the claims for procedural protection relatively high."

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1 9c U.L.A. 174 (1957). *See also Symposium,—Model State Administrative Procedure Act,* 33 IOWA L. REV. 193 (1948).

2 32 A.B.A.J. 407 (1946).

3 MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1946) [hereinafter cited as 1946 MODEL ACT].

4 HAWAII SESS. LAWS 1961, Act 103, § 10; MD. ANN. CODE art. 41, § 252 (Repl. vol. 1965); MICH. STAT. ANN. § 3.560 (21.5) (1) (1961); MO. REV. STAT. § 536.070 (Supp. 1967); ORE. REV. STAT. § 183.450 (Repl. part 1967); WASH. REV. CODE 34.04.100 (1963); WIS. STAT. § 227.10 (1961). *See generally* 1 COOPER, STATE ADMINISTRATIVE LAW 384 *et seq.* (1965).

5 MODEL ACT § 9(1). The phrase is derived from Judge Learned Hand's opinion in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938); *cf.* Sigmon, *Rules of Evidence Before the ICC,* 31 GEO. WASH. L. REV. 258, 268 (1962). This standard is frequently applied in administrative cases, and it has been incorporated in the rules of the FPC. 18 C.F.R. 1.26(a) (1967)

6 1946 MODEL ACT § 9(1).

7 1946 MODEL ACT § 12(7)(c).

8 *See* DAVIS § 14.06, at 277.

9 *Ibid.*

The Model State Administrative Procedure Act was revised in 1961[10] and has since been adopted with variations in Georgia, Oklahoma and Rhode Island.[11] There are two substantial changes in the evidence provisions of the revised act: (1) The agencies must exclude irrelevant, immaterial and unduly repetitious evidence, and (2) The rules of evidence as applied in non-jury civil cases in the state courts shall be followed.[12] The purpose is to provide for uniform treatment of evidence in all types of adjudication within the state.[13] Thus, under the present Model Act, the agency has lost its absolute discretion in the admission of hearsay and must follow the rules of evidence in non-jury trials in the state court. This may be a step backward or it may reflect the relaxation of the hearsay rule in the state courts. The latter seems more probable.[14]

Legislation in the remaining states varies greatly,[15] but in general it bears a closer resemblance to the Federal Administrative Procedure Act than to the Model Act.[16] Massachusetts, for example, has provided by statute that

> Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.[17]

This closely parallels the treatment of hearsay in federal agencies. Hearsay is considered on the basis of its reliability and probative value. It is not categorically excluded. That was in essence the way hearsay was treated in the fifteenth and sixteenth centuries before a rigid rule of exclusion developed.[18]

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10 9c U.L.A. 136 (Supp. 1967) [hereinafter cited as 1961 MODEL ACT].

11 GA. CODE ANN. § 3A-101 (Supp. 1967); OKLA STAT. tit. 75, § 310 (Supp. 1963); R. I. GEN LAWS ANN. § 42-35-10 (Supp. 1967).

12 1961 MODEL ACT § 10(1).

13 9c U.L.A. 153 (Supp. 1967)

14 *Cf.* Davis, *Hearsay in Administrative Hearings,* 32 GEO. WASH. L. REV. 689 (1964).

15 9c U.L.A. 153 (Supp. 1967); *cf.* Comment, *Administrative Procedure Legislation among the States,* 49 CORNELL L.Q. 634 (1964).

16 See DAVIS § 14.06, at 252.

17 MASS. ANN. LAWS, ch. 30A, § 11(2) (1966).

18 See the discussion, *supra,* on the treatment of hearsay under a best evidence principle.

The Virginia statute[19] appears to have arrived at the best result by adopting, in effect, the approach of Bentham and the Model Code.[20] It provides that

> All relevant and material evidence shall be received, except that: . . . (2) hearsay evidence shall be received only if the declarant is not readily available as a witness. . . . In deciding whether a witness or document is readily available the agency shall balance the importance of the evidence against the difficulty of obtaining it, and the more important the evidence is the more effort should be made to produce the eyewitness or the original document.[21]

The decision of the agency must be based solely on the evidence received at the hearing and matters which a court of record could judicially notice.[22] Unfortunately, the Virginia statute fails to provide that findings may be supported by hearsay.[23] The judicial review provision of this statute provides for setting aside a decision if the findings are "unsupported by the evidence on the record considered as a whole." [24] Since hearsay can be received it would seem that the finding could be supported by hearsay alone.[25]

(4.) *Substantial Evidence and Residuum Rules.*—Neither the substantial evidence rule nor the residuum rule is a rule of evidence.[1] They are rules applied by reviewing courts to determine whether the evidence presented at an administrative hearing warrants the finding of the hearing officer.[2] The court will not remand cases simply because it disagrees with the finding; it does so only when there is insufficient evidence to justify the finding.[3] Both are rules of fairness resting on the notion that it is

19 VA. CODE ANN. § 9-6.11 (Repl. vol. 1964).

20 *See* the material, *supra,* on Bentham (p. 102), and on the Model Code (p. 126).

21 VA. CODE ANN. § 9-6.11(a) (Repl. vol. 1964).

22 VA. CODE ANN. § 9-6.11(d) (Repl. vol. 1964).

23 *See* DAVIS § 14.06, at 278.

24 VA. CODE ANN. § 9-6.13(g)(5) (Repl. vol. 1964).

25 *See* DAVIS § 14.06, at 278. *See also* American Furniture Co. v. Graves, 141 Va. 1, 15-16, 126 S.E. 213, 216-17 (1925). In a Workmen's Compensation case, the court held that hearsay could support a finding.

1 Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); NLRB v. Thompson Products, Inc., 97 F.2d 13, 15 (6th Cir. 1938); Appalachian Electric Power Co. v. NLRB, 93 F.2d 985, 989 (4th Cir. 1938); *see* Patterson, *Hearsay and the Substantial Evidence Rule and the Federal Administrative Process,* 13 MERCER L. REV. 294, 306-07 (1962).

2 *See* 1 COOPER, STATE ADMINISTRATIVE LAW 404-05 (1965). *See also* Jaffe, *Judicial Review: Question of Fact,* 69 HARV. L. REV. 1020 (1956).

3 *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Barton Trucking

improper to adjudicate the rights of parties and decide controversies when evidence is lacking in probative value or when the evidence has probative value but there is not enough of it.[4]

The two rules are separate but complementary, at least in theory.[5] The substantial evidence rule requires that the evidence must do more than create suspicion of the existence of the fact to be established.[6] It must be of the sort that a reasonable mind might accept as adequate to support a conclusion.[7] The residuum rule operates to determine what portion of the evidence received at the hearing is entitled to consideration.[8] Strictly

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Corp. v. O'Connell, 7 N.Y.2d 299, 197 N.Y.S.2d 138, 165 N.E.2d 163 (1959). *See also* Jaffe, *supra* note 2, at 1021:

> Judicial review has the function of determining whether the administrative action is consistent with law—that and no more. But it is generally held that the adequacy of the evidence adduced to support a finding of fact is a question of law. . . . Under the accepted test, a court will be required to sustain a finding which it believes to be incorrect and even 'against the weight of evidence' because it is the agency, not the court, which finds the fact.

Professor Brown argued that the adequacy of evidence was not a question of law. Brown, *Fact and Law in Judicial Review,* 56 HARV. L. REV. 899, 903 (1943). *See also* Jaffe, *Administrative Law: Burden of Proof and Scope of Review,* 79 HARV. L. REV. 914, 915 (1966), *discussing* Sherman v. Immigration and Naturalization Service, 350 F.2d 894 (2d Cir. 1965). The *Sherman* case held that a reviewing court could remand a case even when the finding was based upon substantial evidence if the court feels that the factfinder should have required a higher quantum of proof. In the deportation case before them, the *Sherman* court felt that the highest quantum (*i.e.,* the greatest burden) of proof was required. This was equivalent to proof beyond a reasonable doubt.

[4] *See* Nelson v. Blake, 419 P.2d 596, 597 (Wash. 1966). *See generally* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

[5] *Cf.* Note, *The Weight To Be Given Hearsay Evidence by Administrative Agencies: The "Legal Residuum" Rule,* 26 BROOKLYN L. REV. 265, 266 (1960).

[6] Ferrell v. Celebrezze, 232 F.Supp. 281, 282 (1964); Bd. of Education v. Comm'n on Civil Rights, 153 Conn. 652, 661, 220 A.2d 278, 282 (1966); Ruettger v. Pennsylvania Public Utilities Comm'n, 164 Pa. Super. 388, 394, 64 A.2d 675, 679 (1949). The federal substantial evidence rule is codified in 80 Stat. 393, 5 U.S.C. § 706(2)(E) (1966).

[7] Bridges v. Gardner, 368 F.2d 86, 90 (5th Cir. 1966); Camero v. United States, 345 F.2d 798, 800 (Ct. Cl. 1965); Texas Liquor Control Bd. v. Cervantes, 333 S.W.2d 466, 468 (Tex. Civ. App. 1960). But the court must look to the whole record. 60 Stat. 244 (1946), 5 U.S.C. § 706 (1966); MODEL STATE PROCEDURE ACT § 12(7); *see* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); Gooding v. Willard, 209 F.2d 913, 916 (2d Cir. 1954); Stork Restaurant, Inc. v. Boland, 282 N.Y. 256, 275, 26 N.E.2d 247, 256 (1940); DAVIS § 29.03; Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951). *Contra,* NLRB v. Waterman S.S. Corp., 309 U.S. 206 (1940); Stason, *"Substantial Evidence" in Administrative Law,* 89 U. PA. L. REV. 1026, 1049-50 (1941).

The factfinder is not entitled to disregard altogether the evidence offered by one side even though there is strong evidence on the other. *Cf.* NLRB v. A. Sartorius & Co., 140 F.2d 203, 205 (1944).

[8] *See* DAVIS § 14.10, at 291-92. It has been suggested that the residuum rule comes

speaking, it requires that all legally incompetent evidence be ignored by the court in determining whether the finding is reasonably supported.[9] Any hearsay, for example, which is inadmissible in legal proceedings under the technical hearsay rule cannot be considered by the reviewing court.[10] There must be a residuum of legal evidence after the incompetent evidence is removed to support the finding.[11] In practice, this rule simply means that the element of trustworthiness lacking in hearsay evidence must be supplied by the corroboration of legal evidence elsewhere in the record.[12]

These rules do not restrict the administrative tribunal as to the kind of evidence admissible before it.[13] What both rules attempt to do is prevent an arbitrary decision by the hearing officer once the evidence is in.[14] They achieve much the same result from one side as the exclusionary rules achieve from the other. There has been a great deal of criticism of the rule as stated above.[15] Most authorities, while recognizing the need to prevent arbitrariness in the factfinder, argue that a rule which was designed to apply in jury trials for the purpose of determining admissibility is ill-suited for use by a reviewing court.[16] What the rule implies rather clearly is that

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in four varieties: (1) the restrictive residuum rule, which requires that the finding rest solely on legally competent evidence; (2) the pure residuum rule, which requires that a prima facie case be established without legally incompetent evidence, but which allows incompetent evidence to be considered in reaching the ultimate determination; (3) the liberal residuum rule, which allows the use of reliable incompetent evidence together with competent evidence to establish the prima facie case and to support the ultimate determination; and (4) the reliability rule, which allows the use of incompetent evidence, if reliable, as the sole basis of the prima facie case and the ultimate determination. Note, *The Residuum Rule and the Appellate Fact Review: Marriage of Necessity,* 13 RUTGERS L. REV. 254, 255-56 (1958). Cooper treats the residuum rule as part of the substantial evidence test. It is the first step in reviewing the finding of an administrative agency. This first step corresponds to the prima facie test mentioned above. 1 COOPER *supra* note 2, at 405.

9 Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916). This was the first case to announce such a rule explicitly. Even though the statute allowed the agency to receive incompetent evidence, the court felt that the finding must be supported by a residuum of legal evidence. 218 N.Y. at 440, 113 N.E. at 509.

10 At least not under the restrictive residuum rule. *See* Gilligan v. Int'l Paper Co., 24 N.J. 230, 236, 131 A.2d 503, 507 (1957).

11 *See* 1 COOPER *supra* note 2, at 405.

12 *See* Altschuller v. Bressler, 289 N.Y. 463, 469, 46 N.E.2d 886, 889 (1943); Note, 26 BROOKLYN L. REV., *supra* note 5, at 267.

13 The substantial evidence and residuum rules, however, do affect the admissibility of evidence at hearings indirectly.

14 *See* Donnelly Garment Co. v. NLRB, 123 F.2d 215 (8th Cir. 1941); Patterson, *supra* note 1, at 306.

15 *See, e.g.,* DAVIS § 14.10; WIGMORE § 4b; Patterson, *supra* note 1, at 343.

16 *See* Davis, *Hearsay in Administrative Hearings,* 32 GEO. WASH. L. REV. 689, 69 (1964).

evidence inadmissible under the legal rules of evidence is utterly lacking in probative value, that is, incapable of inducing belief in the existence of a fact. Yet reasonable men rely upon hearsay daily in reaching important decisions.[17]

Many courts have recognized the harshness of the rule as it was originally enunciated.[18] Although there is some confusion, the federal courts apparently follow a much more liberal rule than the rigid residuum rule.[19] Only a minority of states have frankly rejected the residuum rule,[20] but it seems fair to say that the full impact of that rule is diminished even in those states which purport to follow it.[21] Courts strain to find corroboration, stretch exceptions so that the hearsay will be considered competent, and offer obscure and confusion reasons for upholding the finding so that it is impossible to tell whether it has followed the residuum rule.[22]

(5.) *Due Process Requirements and the Administrative Hearing.*—When the admission of hearsay at an administrative hearing substantially deprives a party of any effective opportunity to cross-examine the declarants, many courts have held that he has been denied a fair hearing.[1] Certain procedural safeguards are deemed to be so essential that their absence amounts to a violation of due process requirements.[2] Reversible error was found in

17 *See* John Bene & Sons, Inc. v. FTC, 299 Fed. 468, 471 (2d Cir. 1924); *cf.* Loevinger, *Fact, Evidence and Legal Proof,* 9 W. RES. L. REV. 154, 171 (1958).

18 *See, e.g.,* Int'l Ass'n v. NLRB, 110 F.2d 29, 35 (D.C. Cir.), aff'd, 311 U.S. 72 (1939) ("It is only convincing, not lawyers' evidence which is required."); John Bene & Sons, Inc. v. FTC 299 Fed. 468, 471 (2d Cir. 1924); Cabe v. Campbellsville, 385 S.W.2d 51 (Ky. 1964).

19 *Compare* NLRB v. Remington Rand, 94 F.2d 862, 873 (2d Cir.), *cert. denied,* 304 U.S. 576 (1938) (A finding may be supported by "the of evidence on which responsible persons are accustomed to rely in serious affairs: even though it includes hearsay.), *with* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 230 (1938) ("Mere uncorroborated hearsay or rumor does not constitute substantial evidence."); *see* DAVIS § 14.11.

20 Holt v. Peterson Construction Co., 134 Kan. 149, 4 P.2d 428 (1931); Standard Oil Co. v. Mealey, 147 Md. 249, 251, 127 Atl. 850, 851 (1925); Derby v. Swift & Co., 188 Va. 336, 49 S.E.2d 417 (1948); McKinnie v. Dep't of Labor and Industries, 179 Wash. 245, 37 P.2d 218 (1934); *see* 1 COOPER 404-12; DAVIS 14.12.

21 *See* DAVIS § 14.12, at 313.

22 *See* 1 COOPER, *supra* note 2, at 405; Davis, *The Residuum Rule in Administrative Law,* 28 ROCKY MT. L. REV. 1, 30 (1955).

1 *See, e.g.,* Gonzales v. United States, 348 U.S. 407 (1955); United States v. Baltimore & Ohio Southwestern R.R. Co., 226 U.S. 14 (1912); Powhatan Mining Co. v. Ickes, 118 F.2d 105 (6th Cir. 1941); Tri-State Broadcasting Co. v. FCC, 96 F.2d 564 (D.C. Cir. 1938); *see* 1 COOPER, STATE ADMINISTRATIVE LAW 184 (1965).

2 Greene v. McElroy, 360 U.S. 474, 493-504 (1959), *noted in* 44 MINN. L. REV. 771 (1960), 29 U. CINC. L. REV. 144 (1960); Anti-Fascist Comm'n v. McGrath, 341

a fraud-order proceeding initiated by the Postmaster General where the defendant was not permitted to cross-examine an expert offered against him about divergent opinions expressed in authoritative looks on the subject.[3] The Court said that "one against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine witnesses on the vital issue of his purpose to deceive." [4]

On review, the question is "not whether hearsay has been properly admitted, but whether the hearsay admitted affected the correctness of the administrative findings or had such a harmful or unfair effect as to vitiate the hearing." [5] The Supreme Court indicated in a 1945 case[6] that the admission of hearsay may be improper. That case seems to stand alone, however, and apparently is of doubtful authority.[7]

B. *Arbitration Boards*

Especially in labor and commercial disputes, arbitration has become a

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U.S. 123, 145 (1951); Erdman v. Ingraham, 28 A.D.2d 5, 280 N.Y.S. 2d 865 (1967) (Materially influential ex parte statements used against physician during an administrative hearing in which physician was fined for violating N.Y. narcotic control laws denied him the right to confront and to cross-examine his accuser; hence, a new hearing was required.)

At least one writer argues that *Greene* applied the constitutional right of confrontation to security hearings in which the Government seeks to deprive the defendant of his job. He would also agree with the dissenting Justice (Clark, J., 338 U.S. at 524) that the day may be approaching when confrontation and cross-examination are the constitutional right of every American before he is denied his job, his livelihood, or his reputation. Rauh, *Nonconfrontation in Security Cases: The Greene Decision,* 45 VA. L. REV. 1175, 1185 (1959). *But cf.* Sussman v. Overlook Hospital Ass'n, 95 N.J. Super. 418, 231 A.2d 389 (1967). A nongovernmental hospital which served the public, which appealed to the public for financial support, and which received public funds from municipalities it served, was public in nature. Although it could not arbitrarily deny staff privileges to a qualified doctor, it was not essential that he be afforded the right to confront and cross-examine witnesses. The hospital need not conduct a trial-type hearing, but it should accord the doctor an opportunity to be heard and to present witnesses and appropriate documents.

[3] Reilly v. Pinkus, 338 U.S. 269, 275 (1949); *see* Fryer, *Note on Application of Reilly v. Pinkus,* in SELECTED WRITINGS ON EVIDENCE AND TRIAL 1109 (1957).

[4] 338 U.S. at 276.

[5] Erdman v. Ingraham, 28 A.D.2d 5, 9, 280 N.Y.S. 2d 865, 870 (1967).

[6] Bridges v. Wixon, 326 U.S. 135, 156 (1945).

[7] *See* Davis, *Evidence Reform: The Administrative Process Leads the Way,* 34 MINN. L. REV. 581, 596-97 (1950):

> The cases are legion in which courts uphold both the exclusion and the deportation of aliens on the basis of hearsay. [Citing cases] The outstanding case rejecting such evidence is Bridges v. Wixon, which, however, may rest on such unique considerations and may involve such flagrantly unsound analysis as to be of little value as authority for future cases.

common substitute for litigation.[1] A growing impatience in the early part of this century with the burdensome cost and delay involved in courtroom trials led businessmen and others to look for a more satisfactory method of deciding disputes.[2] Arbitration filled that need, but it was not until 1920 and later that it became truly effective as a substitute. Legislation was required to make arbitration agreements stronger. At common law, agreements to arbitrate were revocable.[3] But in 1920, New York passed an arbitration statute which in large measure remedied the situation.[4] Congress[5] and many of the states[6] followed New York's lead.

Arbitration proved to be a quicker,[7] cheaper[8] and more agreeable method of settling disputes. Businessmen liked the informality of arbitration and the fact that it provided a friendlier atmosphere which was more apt to insure pleasant future relations between the disputants than would a bitter court fight.[9] Arbitration also offered fact-finders who possessed expertise in the subject matter of the dispute.[10]

It has become so prevalent that the Judicial Conference of New York recommended that the hearsay rule be abandoned "to woo cases back into the courts from arbitrators." [11] The absence of anything like a hearsay

[1] BOTEIN & GORDON, THE TRIAL OF THE FUTURE 78 (1963); Davis, *Hearsay in Administrative Hearings,* 32 GEO. WASH. L. REV. 689, 692-93 (1964); Morgan, *The Law of Evidence,* 1941-1945, 59 HARV. L. REV. 481, 576 (1966). *See generally* DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION (1968); UPDEGRAFF & MCCOY, ARBITRATION OF LABOR DISPUTES (1946).

[2] *See* Jones, *History of Commercial Arbitration in England and the United States: A Summary View,* in INTERNATIONAL TRADE ARBITRATION 127 (Domke ed. 1958); Sayre, *Development of Commercial Arbitration Law,* 37 YALE L. J. 595, 615 (1928); 29 VA. L. REV. 338 (1942). *See also* 4 ARB. J. (N.S.) 259 (1949), quoting an excerpt from an address by Joseph D. Stecher, former President of the Ohio State Bar Association:

> Impatient with the law's delays, aggravated by procedural technicalities and unconoinced that our judiciary possesses superior wisdom, business men are, with recurring frequency, insisting upon the insertion in their important contracts of a clause providing for arbitration of any controversy arising thereunder.

[3] Vynior's Case, 8 Co. 80a, 81b, 77 Eng. Rep. 595, 597 (K.B. 1609).

[4] N.Y. LAWS 1920, ch. 925, § 1410.

[5] 43 Stat. 883 (1925), *as codified,* 61 Stat. 669 (1949), and *as amended,* 68 Stat. 1233 (1954), 9 U.S.C. §§ 1-14 (1954).

[6] *See* DOMKE, *supra* note 1, at 381-84, for a listing of the state statutes.

[7] *See* Braden, *Sound Rules and Administration in Arbitration,* 83 U. PA. L. REV. 189, 190 (1934).

[8] *See* Note, *Predictability of Result in Commercial Arbitration,* 61 HARV. L. REV. 1022 n. 2 (1948).

[9] *See* Taeuch, *Extrajudicial Settlement of Controversies—The Business Man's Opinion: Trial at Law v. Nonjudicial Settlement,* 83 U. PA. L. REV. 147, 150-51 (1934); Rosenthal, *A Business Man Looks at Arbitration,* 4 ARB. J. (N.S.) 138, 139 (1947).

[10] *See* Note, 61 HARV. L. REV., *supra* note 8, at 1023.

[11] Davis, *supra* note 1, at 692-93, *paraphrasing* STATE OF NEW YORK, FIFTH ANNUAL

rule is one of the most significant features of arbitration. In general, the arbitrator is not bound by the legal rules of evidence.[12] It is left to the parties to offer whatever evidence they wish,[13] even though it may be hearsay and incompetent.[14] The Rules of the American Arbitration Association provide that the parties may offer such evidence as they desire,[15] subject only to the exclusion of clearly immaterial evidence by the arbitrator in his sole discretion.[16] In addition, once the evidence is admitted the arbitrator is the sole judge of what weight should be attached thereto, even if the evidence is of doubtful relevance.[17]

Although the arbitrator is not bound by the legal rules of evidence, he may look to the reasons and underlying policies behind the exclusionary rules as guides in determining the relevancy and materiality of evidence or the weight to be given it.[18] But the tenor of arbitration proceedings is a positive one of admission in order to secure all useful and reliable evidence, the admission being preferred to rejection of rational evidence of some probative value unless some overriding reason militates for its exclusion.[19] Caution, however, is suggested in admitting hearsay evidence when a first-hand account is available;[20] moreover, such evidence should be attested to by

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REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK 101-02 (1960). *See also* Weinstein, *The Probative Force of Hearsay,* 46 IOWA L. REV. 331, 347 (1961).

[12] Lauria v. Soriano, 180 Cal. App. 2d 163, 4 Cal. Rptr. 328 (1960); Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal. 2d 228, 241, 174 P. 2d 441, 449 (1946) ("Such a requirement would tend to defeat the object of the arbitration proceeding."); Application of Spectrum Fabrics Corp., 285 App. Div. 710, 139 N.Y.S. 2d 612, aff's, 309 N.Y. 709, 128 N.E. 2d 416 (1955). *See also* DOMKE, *supra* note 1, at 235-39; WIGMORE § 4(e), at 106-07; Jones, *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes,* 13 U.C.L.A. L. REV. 1241, 1278 (1966); Coulson, *Appropriate Procedures for Receiving Proof in Commercial Arbitration,* 71 DICK. L. REV. 63, 67, 73 (1966); Hepburn & Loiseaux, *The Nature of the Arbitration Process,* 10 VAND. L. REV. 657, 670 (1957); Weinstein, *supra* note 11, at 347.

[13] Wehringer, *Arbitration and the General Practitioner,* 13 PRAC. LAW., Apr. 1967, at 12, 22.

[14] Petroleum Separating Co. v. Interamerican Refining Corp., 296 F. 2d 124 (2d Cir. 1962); *See* Weinstein, Probative Force of Hearsay, 46 IOWA L. REV. 331, 347 (1960); Note, *Judicial Supervision of Commercial Arbitration,* 53 GEO. L. J. 1079, 1086 (1965).

[15] AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES § 30; AM. ARB. ASS'N, LABOR ARBITRATION RULES § 28.

[16] AM. ARB. ASS'N, PROCEDURAL STANDARDS FOR LABOR-MANAGEMENT ARBITRATION 4(e).

[17] AM. ARB. ASS'N, MANUAL FOR COMMERCIAL ARBITRATORS 14-15 (1964).

[18] Coulson, *supra* note 12, at 67.

[19] Jones, *supra* note 12, at 1254.

[20] *Op. cit. supra* note 17, at 14-15. Fleming, *Some Problems of Evidence before the Labor Arbitrator,* 60 MICH. L. REV. 133, 144-150 (1961). *See also* Abelow, *Standards of Evidence in Arbitration Proceedings,* 4 ARB. J. (N.S.) 252, 256 (1949):

> I would say that hearsay should be excluded where direct or personal testi-

some circumstantial guarantees of its trustworthiness.[21]

Evidence by means of affidavit may also be admitted by the arbitrator,[22] who gives it such weight as he deems proper.[23] However, the opponent is still accorded an opportunity to cross-examine the affiant.[24]

VII. Hearsay in Criminal Cases

A. *Constitutional Limitations on Criminal Evidence*

(1.) *General.*—The hearsay rule enjoys a "special sacrosanctity" in criminal cases.[1] Certainly, any new proposal for the reform of the hearsay rule must accommodate this fact. Three reasons may be offered for the conservative attitude in criminal evidence as far as hearsay is concerned: (1) the constitutional right of confrontation,[2] (2) the constitutional limitation on the use of extrajudicial confessions and exculpatory statements of the accused,[3] and (3) the requirement that a greater degree of proof be offered to sustain a verdict of guilty.[4] In addition, judges in criminal cases may be more inclined to exclude evidence in the exercise of their discretion on the ground that it lacks sufficient probative value to warrant

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mony is available and can be offered. Where such direct testimony is available, and an arbitrator so decides, I would do away with the idea that hearsay evidence should be accepted for what it is worth. I would reject it entirely and insist that the party asserting the fact be required to prove it directly, and not otherwise. Only where it becomes crystal clear that direct evidence is not readily available would I accept hearsay evidence for what it is worth.

21 Jones, *supra* note 12, at 1278.

22 Am. Arb. Ass'n, Commercial Arbitration Rules 31; Am. Arb. Ass'n, Labor Arbitration Rules 29.

23 *Ibid.*

24 Am. Arb. Ass'n, Standards for Commercial Arbitration 16.

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1 Levin, *Evidence,* 1961 Ann. Survey Am. L. 502, 511 (1962), *quoting* 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, 950 (1962). Levin discusses a California case in which former testimony given at the preliminary hearing by victims who had since left the jurisdiction was excluded because in the meantime another count had been added to the charge and there was a suggestion that the former testimony had been edited. Levin, *supra,* at 511, *noting* People v. Terry, 180 Cal. App. 2d 48, 4 Cal. Rptr. 597 (1960), *cert. denied,* 364 U.S. 941 (1961).

2 U.S. Const. amend. VI. The confrontation clause of this amendment has been applied to the states through the due process clause of the fourteenth amendment. Pointer v. Texas, 380 U.S. 400 (1965).

3 U.S. Const. amend. V. Self-incrimination clause applies to the states. Malloy v. Hogan, 378 U.S. 1 (1964); U.S. Const. amend. VI. The accused has a constitutional right to counsel whenever he is in police custody. Any statements obtained in violation of that right are inadmissible. Miranda v. Arizona, 384 U.S. 436 (1966).

4 *See, e.g.,* Crawford v. State, 112 Ala. 1, 21 So. 214 (1896).

its admission or that it is excessively prejudicial. In both instances, the courts are requiring evidence of a higher quality from the outset, rather than simply looking at all the evidence once it is in to determine whether it supports a finding of guilt. This is so in spite of the repeated judicial protestations that civil and criminal trials are governed by the same rules of evidence.[5]

The constitutional limitations on the use of evidence in criminal cases have a rationale distinct from that of the hearsay rule, although they are often confused. The exclusionary rule which prohibits the use of damaging extrajudicial statements of the accused under certain circumstances[6] was implemented by the courts as a means of safeguarding the privilege against self-incrimination.[7] This, then, has nothing to do with the quality of the evidence, but concerns the protection of the individual.[8] It is in regard to those statements of the acused not barred by constitutional limitations that the more difficult hearsay problems arise. Wigmore assumes that no hearsay is involved because the accused is present in court.[9] Other writers disagree, but allow it in under an exception to the hearsay rule.[10] Exculpatory statements—statements that explain the defendant's actions rather than admit guilt[11]—may be made under circumstances that would not meet the requirements of the admissions exception.[12] But the courts generally admit all

[5] United States v. Gooding, 25 U.S. (12 Wheat.) 460, 469 (1827) (Story, J., in dictum); United States v. Page, 302 F.2d 81, 85 (9th Cir. 1962); Kercheval v. United States, 36 F.2d 766, 767 (5th Cir. 1930); Ex parte Messer, 228 Ala. 16, 152 So. 244 (1933); Glover v. Callahan, 299 Mass. 55, 12 N.E.2d 194 (1937); State v. Cooper, 2 N.J. 540, 67 A.2d 298 (1949); State v. Hays, 23 Mo. 314 (1853); Melville's Trial, 29 How. St. Tr. 549, 764 (1806) (". . . a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence."); Stone's Trial, 25 How. St. Tr. 1155, 1313-14 (1796) ("There is no difference between civil and criminal cases as to evidence; whatever is proper in one case is in the other.") *See also* 1 STEPHEN, HISTORY OF CRIMINAL LAW 437 (1883); WIGMORE 4, at 16-19; Orfield, The Reform of Federal Criminal Evidence, 32 F.R.D. 121, 155-58 (1963).

[6] *E.g.*, when they have been obtained by coercion or after long periods of detention or without affording the accused the right to counsel.

[7] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

[8] Except in the sense that it may exclude confessions which are unreliable and which were given without regard to their truth or falsity by an accused who simply wanted to put an end to physical or psychological pressure; *see* MCCORMICK § 109; WIGMORE §§ 815-67.

[9] WIGMORE § 1048.

[10] MCCORMICK § 113, at 234-36 (admissions); Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L. J. 355 (1921); Note, *Proof of the Corpus Delicti Amiunde the Defendant's Confession*, 103 U. PA. L. REV. 638, 671-72 (1955) (res gestae).

[11] Note, 103 U. PA. L. REV., *supra* note 10, at 670.

[12] Note, *Developments in the Law—Confessions*, 79 HARV. 935, 953 (1966).

relevant extrajudicial declarations of the accused for reasons which are seldom articulated.[13]

Another hearsay problem is encountered when the corpus delicti must be established by other independent evidence when the confession of the accused has been admitted.[14] This requirement, it is felt, minimizes the danger of convicting a man on a coerced confession or a confession resulting from mental or emotional illness.[15] Evidence introduced for this purpose must be competent.[16] It has been argued that to admit incompetent evidence to corroborate the confession would defeat the purpose of the rule requiring other independent proof of the corpus delicti because of the supposed weakness of such evidence.[17] For this reason, hearsay has been held to be insufficient corroboration of a confession.[18]

(2.) *Hearsay Rule and the Right of Confrontation.*—These two doctrines have much in common: both require the production of the declarant in court; both are designed to give the party against whom evidence is offered an opportunity to test it at trial by cross-examination. But one is an evidential rule and the other is a constitutional requirement. One applies to all evidence; the other applies only to evidence offered against a criminal defendant.[19] It has been repeatedly held that the right of confrontation is not violated by the reception of hearsay which falls into one of the well-recognized exceptions.[20]

Pointer v. Texas[21] has had an unsettling effect on many who would

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[13] *See, e.g.,* Jones v. United States, 296 F.2d 398, 403-04 (D.C. Cir. 1961), *cert. denied,* 370 U.S. 913 (1962); State v. Anderson, 10 Ore. 448 (1882); State v. Mowry, 21 R.I. 376, 384, 43 Atl. 871, 874 (1899).

[14] People v. Hennessey, 15 Wend. 148 (N.Y. 1836). Smith v. Commonwealth, 21 Gratt. 809 (Va. 1871); United States v. Markman, 193 F.2d 574 (2d Cir. 1952); Bell v. United States, 185 F.2d 304 (4th Cir. 1950), *cert. denied,* 340 U.S. 930 (1951). *See also* 2 HALE, PLEAS OF THE CROW 290 (1847); 39 MINN. L. REV. 902 (1955).

[15] Note, 103 U. PA. L. REV., *supra note* 190, at 642-49.

[16] *See* Hogan v. State, 275 Ind. 271, 132 N.E.2d 908 (1956).

[17] Note, 79 HARV. L. REV., *supra* note 12, at 1075.

[18] Hogan v. State, 275 Ind. 271, 132 N.E.2d 908 (1956).

[19] *See* Note, *Confrontation and the Hearsay Rule,* 75 YALE L. J. 1434, 1435-36 (1966).

[20] Mattox v. United States, 156 U.S. 237, 244 (1895). This holding has been consistently followed. *See, e.g.,* Dowdell v. United States, 221 U.S. 325, 330 (1911) (former testimony); Kirby v. United States, 174 U.S. 47, 61 (1898) (dying declarations). In Salinger v. United States, 272 U.S. 542, 548 (1926), there is dictum to the effect that the right of confrontation would not be satisfied if hearsay were admitted under a newly-created exception. And it seems clear that the hearsay rule could not be utterly abandoned in criminal cases. Motes v. United States, 178 U.S. 458 (1900).

[21] 380 U.S. 400 (1965). In that case, a Texas prosecutor had used the prior testimony of a man who had since left the state given at a preliminary hearing at which the

reform the hearsay rule. A radical change in the hearsay rule would be unacceptable in criminal cases if it were considered violative of the right of confrontation. Any reform which eliminated the exclusion of hearsay as a general premise and replaced it with a general rule of admissibility would raise serious constitutional questions. The Model Code would have done just that, as would the proposal of Morgan and Maguire.[22] Yet holdings such as *Mattox v. United States*[23] put to rest any notion that the right to confrontation is an absolute privilege. Instead extrajudicial declarations are admissible under certain circumstances, presumably when the declarant is unavailable, the hearsay danger is substantially minimized, and the evidence has much probative value.[24] *Pointer v. Texas* did not overrule those cases which allowed dying declarations and former testimony of since deceased witnesses to be received against the accused.[25]

The treatment of hearsay under the Model Code would not entail as radical a departure as one might first suspect. It would simply be a change in degree. The definition of unavailable would be broadened beyond instances involving deceased declarants. In place of many well-defined exceptions, the hearsay rule might be reformulated to provide for one general rule which embodies the rationale theoretically underlying all of the exceptions. It has been suggested that the right of confrontation requires nothing more than a diligent, good faith effort on the part of the prosecutor to produce the extrajudicial declarant.[26] If this were accepted by the courts, there would be no violation of the right of confrontation in the reception of hearsay under a rule such as that of the Model Code of Evidence, because such a rule is, for practical purposes, identical to the above suggestion.

There is little likelihood, however, that such an interpretation of the right of confrontation would be accepted by the courts.[27] Even Rules 62 and 63 of the Uniform Rules of Evidence, which are more conservative than the corresponding rules in the Model Code, have been considered

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defendant had not been given adequate opportunity to cross-examine. (Defendant was not represented by counsel at the hearing.) In reversing, the Supreme Court applied the confrontation clause to the states through the due process clause of the fourteenth amendment.

22 MODEL CODE OF EVIDENCE Rule 503; Morgan & Maguire, *Looking Backward and Forward at Evidence,* 50 HARV. L. REV. 909, 922 (1937).

23 156 U.S. 237, 244 (1895).

24 *See* MCCORMICK § 300; WIGMORE §§1421-23.

25 380 U.S. at 407.

26 Note, 75 YALE L. J., *supra* note 19, at 1439.

27 *Cf.* Green, *Drafting Uniform Federal Rules of Evidence,* 52 CORNELL L. Q. 147, 191 (1967).

unsatisfactory for application in criminal trials on the ground that they would infringe upon the right of confrontation.[28] The reform of the hearsay rule can and should be accomplished without regard to the confrontation problem. The hearsay rule and the right of confrontation, while not entirely dissimilar, rest on entirely separate and independent bottoms. There is no reason why the hearsay rule cannot be changed while the right of confrontation remains constant. Just as the courts superimpose the limitations of the privilege against unreasonable search and seizure and the privilege against self incrimination on a discrete and separate body of evidential rules, they should superimpose the restrictions of the right of confrontation on a hearsay rule which, in theory at least, applies with equal force in civil and in criminal cases.

B. *Pre-Sentence Reports*

When passing upon the guilt or innocence of an accused, tribunals have long been restrained by strict evidentiary limitations.[1] But historically, in this country and in England, the courts have pursued a policy under which a sentencing judge could exercise great freedom in gathering and appraising evidence to assist him in determining the kind and extent of punishment to be imposed upon the defendant within the limits fixed by law.[2] In addition, as emphasized by Mr. Justice Black in his opinion in *Williams v. New York,* there are sound practical reasons for different evidentiary rules governing trial and sentencing procedures.[3] Modern penological procedural policies have individualized punishment and made this distinction necessary.[4]

[28] *See* MAGUIRE, WEINSTEIN, CHADBOURN & MANSFIELD, CASES AND MATERIALS ON EVIDENCE 411-12 (5th ed. 1965); Levin, *Evidence,* 1961 ANN. SURVEY AM. LAW 502, 511 (1962).

[1] Williams v. New York, 337 U.S. 241, 246 (1949). *See also* Snyder v. Massachusetts, 291 U.S. 97 (1934); Graham v. West Virginia, 224 U.S. 616 (1912). *But see* State v. Stevenson, 64 W.Va. 392, 62 S.E. 688 (1908).

[2] Williams v. New York, 337 U.S. 241 (1949); State v. Pope, 257 N.C. 326, 126 S.E.2d 126 (1962), *noted in* 41 N. C. L. REV. 260 (1963). *See also* Annot., 96 A.L.R.2d 768 (1964); Annot., 134 A.L.R. 1267 (1941); Annot., 14 Ann. Cas. 968 (1909). *See generally* Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes,* 75 HARV. L. REV 904 (1962); Levin, *Toward a More Enlightened Sentencing Procedure,* 45 NEB. L. REV. 499 (1966); Note, *Right of Criminal Offenders To Challenge Reports Used in Determining Sentence,* 49 COLUM. L. REV. 567 (1949); Note, *Due Process and the Legislative Standards in Sentencing,* 101 U. PA. L. REV. 257 (1952).

[3] 337 U.S. 241, 246 (1949).

[4] *Id.* at 247. *See also* Devitt, *How Can We Effectively Minimize Unjustified Disparity in Federal Criminal Sentences?,* 42 F.R.D. 218, 225 (1968), *quoting* Aristotle, "There can be no greater injustice than to treat unequal things equally."

"The aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it. Its synopisis should include the unfavorable, as well as the favorable, data. . . ." [5] As a matter of necessity, much of the information gathered and considered will be hearsay and will be weighed accordingly.[6] The judge has wide discretion and can receive evidence of other crimes,[7] statements of the prosecution without evidence to support them,[8] irrelevant and prejudicial hearsay testimony,[9] and other extrajudicial information which has never been submitted to the defendant.[10] The constitutional guarantee of the right of confrontation and cross-examination is not applicable when sentencing is pursuant to a criminal conviction.[11] However, *Williams v. New York,* the leading case in this

[5] United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), *cert. denied,* 382 U.S. 843 (1965).

[6] *Ibid.*

[7] Williams v. Oklahoma, 358 U.S. 576 (1959); United States v. Dalhover, 96 F.2d 355 (7th Cir.), *cert. denied,* 305 U.S. 632 (1938).

[8] Stobble v. United States, 91 F.2d 69 (7th Cir. 1937).

[9] Taylor v. United States, 179 F.2d 640 (9th Cir. 1950); State v. Alford, 98 Ariz. 124, 402 P.2d 551 (1965); *see* Note, *Procedural Due Process at Judicial Sentencing for Felony,* 81 HARV. L. REV. 821, 836 (1968).

[10] Williams v. New York, 337 U.S. 241 (1949). There is no per se violation of defendant's rights in the use of confidential presentence reports. The *Williams* Court did not rule on whether the defendant *could* see the report if he wanted. That issue was never raised. *See* 41 N.C.L. REV. 260, 264-65 (1963); 23 So. CAL. L. REV. 105, 107 (1949). At least one writer feels that a criminal defendant does have a right of access to such reports if he makes timely challenge. Rubin, *Sentences Must Be Rationally Explained,* 42 F.R.D. 203, 215-16 (1968).

Several states have statutes expressly providing for inspection by the defendant. ALA. CODE ANN. tit. 42, § 23 (1959); CAL. PEN. CODE § 1203 (Supp. 1967); VA. CODE ANN. § 53-278.1 (1958). In Linton v. Commonwealth, 192 Va. 437, 65 S.E.2d 534 (1951), failure to allow defendant to cross-examine the probat on officer was held to be reversible error.

Other states have statutes requiring that information contained in presentence reports be offered in open court. ARIZ. CRIM. RULES § 336 (1955); CAL. PEN. CODE §§ 1203 (Supp. 1967), 1204 (1956); IDAHO CODE § 19-2516 (1948); MINN. STAT. § 631.20 (1947); MONT. REV. STAT. § 95-2202 (Supp. 1967); N.D. CENT. CODE ANN. § 29-26-18 (1960); OKLA. STAT. § 974 (1958); ORE. REV. STAT. §§ 137.080, 137.090 (1959); UTAH CODE ANN. § 77-35-13 (1953). *See generally,* Barnett & Gronewald, *Confidentiality of the Presentence Report,* 26 FED. PROB., Mar. 1962, at 26; Higgins *Confidentiality of Presentence Reports,* 28 ALBANY L. REV. 12 (1964); Higgins, *In Response to Roche,* 29 ALBANY L. REV. 225 (1965); Lorensen, *The Disclosure to Defense of Presentence Reports in West Virginia,* 69 W.Va. L. REV. 159 (1967); Parsons, *The Presentence Investigation Report Must Be Preserved as a Confidential Document,* 28 FED. PROB., Mar. 1964, at 3; Roche, *The Position for Confidentiality of the Presentence Investigation Report,* 29 ALBANY L. REV. 206 (1965); Sharp, *The Confidential Nature of Presentence Reports,* 5 CATH. U. L. REV. 127 (1955); Thomsen, *Confidentiality of the Presentence Report; A Middle Position,* 28 FED. PROB., Mar. 1964, at 8.

[11] United States v. Maroney, 355 F.2d 302, 309 (3d Cir. 1966). *But see* NAT.

area, "did not foreclose a defendant's request for cross-examination if properly raised in a suitable situation." [12]

In *Specht v. Patterson*,[13] the Supreme Court reaffirmed its decision in *Williams*, but distinguished the case before it. The defendant in *Specht* had been convicted of the crime of indecent liberties under a state statute providing for a maximum sentence of ten years. He was not sentenced under this statute, but under the state's Sex Offenders Act for an indeterminate period which could potentially extend for defendant's life. He was not afforded notice or a full hearing. Sentencing occurred after a report of a psychiatric examination was given to the trial judge. The Court said that this amounted to "a new charge leading to criminal punishment." [14] Unless the defendant is given adequate notice, is present with counsel, has an opportunity to be heard, is confronted with witnesses against him, and has the right to cross-examine, he has been denied the rights guaranteed by the due process clause of the fifth or fourteenth amendment.[15]

The need for individualized treatment is vital in adult criminal cases, but it is all the more vital in juvenile delinquency cases.[16] If this need is to be satisfied, the *Williams* distinction which allows the judge wide discretion in receiving evidence during the post-adjudicative stage, takes on added importance in the light of the Court's directive in the *Gault* case that juvenile proceedings be carefully broken down into their functional components and that a clear line distinguish the adjudicative from the dispositional stage.[17] The line between the actual finding of guilt or innocence and the process of determining the nature and extent of punishment, if any, to be meted out had been hazy or non-existent in juvenile

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COMM'N ON CRIME AND DELINQUENCY, ADVISORY COMM. OF JUDGES, MODEL SENTENCING ACT § 4, which would give the defendant an opportunity to cross-examine the probation officer who submits the report. It would not, however, give him the right to confront the out-of-court declarants interviewed by the probation officer. This section is discussed in Rubin, *Constitutional Aspects of the Model Sentencing Act*, 42 F.R.D. 226, 231-32 (1968), and in Rubin, *supra* note 10, at 213-15.

[12] *See* Rubin, *Constitutional Aspects of the Model Sentencing Act*, 42 F.R.D. 226, 232 (1968).

[13] 368 U.S. 605 (1967).

[14] *Id.* at 608.

[15] *Id.* at 610.

[16] *See* Ketcham, *An International Report on Juvenile Court Achievements and Deficiencies—1966*, 6 J. FAMILY L. 191, 213 (1966): "[The juvenile court judge] is responsible for finding the facts in an individual case and making a disposition specifically tailored to the needs of that individual delinquent." *See also* Note, *Juvenile Delinquents: The Police, State Courts and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

[17] In Re Gault, 387 U.S. 1, 13 (1967). For a more detailed discussion of the juvenile courts, *see* p. 169, *infra*.

delinquency cases. The Court in *Gault* expressly extended the right of confrontation and cross-examination to the adjudicatory stage,[18] but the Court did not pass on the application of this right to the "post-adjudicative or dispositional process." [19] Consequently, the sentencing and dispositional stage of juvenile proceedings is governed by the same rules as the sentencing stage of criminal cases involving adults. There is no indication that a higher standard (including an application of the right of confrontation) will be imposed on the dispositional stage of juvenile cases.[20] *Williams* allows juvenile court judges to retain broad discretion in determining the proper treatment for each adjudged delinquent by permitting the use of reports based on hearsay. Without such reports, the background of the defendant could not be gleaned by the judge or could be gleaned only at great expense and with unbearable delay and inconvenience to the out-of-court declarants who would then have to appear in court.

C. *Hearsay in Grand Jury, Habeas Corpus, and Extradition Proceedings*

The hearsay rule is generally relaxed in grand jury proceedings both on the federal[1] and the state[2] level. Courts look to the function of grand juries in determining the propriety of receiving hearsay.[3] Since there is no final adjudication of guilt but only a finding of probable cause, the need

18 387 U.S. at 42, 56.

19 *Id.* at 13.

20 GEORGE, GAULT AND THE JUVENILE COURT REVOLUTION 41 (1968).

1 Costello v. United States, 350 U.S. 359, *reh. denied,* 351 U.S. 904 (1956); Holt v. United States, 218 U.S. 245, 248 (1910); Cain v. United States, 239 F.2d 263, 270 (7th Cir. 1956); Ford v. United States, 233 F.2d 56, 59-60 (5th Cir.), *cert. denied,* 352 U.S. 833 (1956); United States v. Scully, 225 F.2d 113, 116 (2d Cir.), *cert. denied,* 350 U.S. 897 (1955); United States v. Garnes, 156 F.Supp. 467, 470 (S.D.N.Y. 1957); Olmstead v. United States, 19 F.2d 842, 845 (9th Cir. 1927), *aff'd,* 277 U.S. 348 (1928); McGregor v. United States, 134 Fed. 187, 193 (4th Cir. 1904). *See also* Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) (Jencks rule does not apply to grand jury proceedings; thus, the production of the transcript of such proceedings lies in the sound discretion of the trial judge.)

2 State v. Kemp, 126 Conn. 60, 9 A.2d 63 (1939); People v. Lambersky, 410 Ill. 451, 102 N.E.2d 326 (1951); Maddox v. State, 213 Ind. 537, 12 N.E.2d 947 (1938); State v. Martin, 210 Ia. 376, 228 N.W. 1 (1929); McIntyre v. Lands, 128 Kan. 521, 278 Pac. 761 (1929); Pick v. State, 143 Md. 192, 121 Atl. 918 (1923); Commonwealth v. Ventura, 294 Mass. 113, N.E.2d 30 (1936); Price v. State, 152 Miss. 625, 120 So. 751 (1929); State v. Pierson, 337 Mo. 475, 85 S.W.2d 48 (1935); State v. Lambertino, 13 N.J. Misc. 687, 180 Atl. 426 (1935); Hope v. People, 83 N.Y. 418 (1881); State v. Levy, 200 N.C. 586, 158 S.E. 94 (1931). *But see* Royce v. State, 5 Okla. 61, 65 (1897).

3 United States v. Costello, 221 F.2d 668, 679 (2d Cir. 1955), *aff'd,* 350 U.S. 359, *reh. denied,* 351 U.S. 904 (1956). *See also* WIGMORE § 4(5).

for a strict application of the hearsay rule is not present.[4] Many states, however, have enacted statutes which require the prosecution to present "legal evidence." [5] Operating without such statutory restriction, federal courts have taken a markedly liberal position on the reception of hearsay, even to the extent of holding that an indictment may be supported by hearsay alone.[6]

In habeas corpus hearings, on the other hand, the same relaxation of the exclusionary rules does not occur.[7] It should be borne in mind that these are not criminal proceedings even when prisoners are attempting to set aside their criminal convictions by collateral attack. These are civil proceedings and the right of confrontation does not apply.[8] In addition, these hearings are always conducted by a judge sitting without a jury; consequently, the application of the hearsay rule in such instances is generally less stringent than in jury-tried cases.[9] In *Townsend v. Sain,*[10] the Court held that a state court record of the petitioner's trial may be admitted at a habeas corpus hearing. A later federal case expressed the notion that the court should do all things to ascertain the merits of the case.[11] Generally, however, the hearsay rule is applied as in civil non-jury cases with the right of cross-examination being carefully guarded.[12]

Extradition does not involve the merits of the accused's case, and the hearsay rule has not been strictly applied in such hearings.[13] Because the

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[4] *See* Comment, *Evidence—Rules of Evidence in Disbarment, Habeas Corpus, and Grand Jury Proceedings,* 58 MICH. L. REV. 1211, 1218-19 (1960). *See also* Orfield, *Hearsay in Federal Criminal Cases,* 32 FORDHAM L. REV. 499, 769, 802 (1964); Weinstein, *The Probative Force of Hearsay,* 46 IOWA L. REV. 349 (1961); Note, *Hearsay as a Basis for Prosecution, Arrest and Search,* 32 IND. L. J. 332 (1957); Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings,* 72 YALE L. J. 590 (1963).

[5] *See* WIGMORE § 4(5), at 23 n.8.

[6] *See Comment,* 58 MICH. L. REV., *supra* note 4, at 1226.

[7] Palakiko v. Harper, 209 F.2d 75, 103 (9th Cir.), *cert. denied,* 347 U.S. 979 (1954); Green v. United States, 158 F.Supp. 804 (D. Mass.), *aff'd per curiam,* 256 F.2d 483 (1st Cir.), *cert. denied,* 358 U.S. 854 (1958); Walker v. Warden of Maryland House of Correction, 209 Md. 654, 121 A.2d 714 (1956); Ex parte Nicely, 116 Tex. Cr. 143, 28 S.W.2d 147 (1930); *see* Orfield, *supra* note 4, at 802; Comment, 58 MICH. L. REV., *supra* note 4, at 1223-25, 1230; Note, *Processing a Motion Attacking Sentence Under Section 2255 of the Judicial Code,* 111 U. PA. L. REV. 788, 795-97 (1963).

[8] Burgess v. King, 130 F.2d 761 (8th Cir. 1942).

[9] *See* p. 161, *infra.*

[10] 372 U.S. 293 (1963).

[11] Harris v. North Carolina, 240 F.Supp. 985, 989-90 (E.D.N.C. 1965) (dictum).

[12] Cobas v. Clapp, 79 Idaho 419, 319 P.2d 475 (1958).

[13] Collins v. Loisel, 259 U.S. 309, 313 (1922); Collier v. Vaccaro, 51 F.2d 17 (4th Cir. 1931); Desmond v. Eggers, 18 F.2d 503 (9th Cir. 1927); Ex parte Wallace,

information upon which the court must act is sent from out of state and is almost entirely in the form of hearsay, great practical difficulty would result if the rule were enforced.[14] The hearsay nature of this evidence does does affect its weight nonetheless.[15]

VIII. Hearsay in Federal Cases

Rule 43(a) of the Federal Rules of Civil Procedure[1] is a reflection of the modern tendency toward a wide rule of admissibility with discretion in the trial judge to exclude evidence which lacks sufficient probative value to warrant its reception.[2] It was intended to liberalize admissibility of testimony, but it has nothing to do with what should be *excluded*.[3] By couching the rule of admissibility in positive terms, it revolutionized federal evidence.[4] It was accomplished by the following language of Rule 43:

> (a) Form and Admissibility. . . . All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs. . . .

The question of admissibility, then, must be resolved by looking to three sources. If any one of the three can be fairly read to admit the evidence in question, such evidence must be admitted.[5] The first source, federal statutes, presents no difficulty because they are few and explicit.[6] The second source,

265 Mass. 101, 163 N.E. 870 (1928); People v. Hanley, 153 Misc. 61, 274 N.Y.S. 813 (1934). Notter v. Beasley, 240 Ind. 631, 166 N.E. 2d 643 (1960). *But see* People *ex. rel.* Stauton v. Meyering, 345 Ill. 592, 178 N.E. 122 (1931).

14 *See* Wigmore 4(6), at 24.

15 United States *ex rel.* Klein v. Milligain, 50 F.2d 687 (2d Cir.), *cert. denied,* 284 U.S. 665 (1931).

1 Promulgated in 1938 under a federal enabling statute. 48 Stat. 1064 (1934), *as amended,* 28 U.S.C. § 2072 (1958).

2 *See* United States v. 25.406 Acres, 172 F.2d 990, 993 (4th Cir. 1949); Greene, *Federal Civil Procedure Rule 43(a),* 5 Vand L. Rev. 560, 563 (1952).

3 *Cf.* United States v. Aluminum Co. of America, 1 F.R.D. 48 (S.D.N.Y. 1938); 5 Moore, Federal Practice ¶ 43.04, at 1319 (2d ed. 1967) [hereinafter cited as Moore].

4 *See* United States v. Vehicular Packing, Inc., 52 F.Supp. 751 (D. Del. 1943).

5 *See* Mossom v. Liberty Fast Freight Co., 124 F.2d 448 (2d Cir. 1942); Moore ¶ 43.04, at 1328.

6 The most important are the business records and official records statutes. 62 Stat.

federal equity practice, provides no definite body of evidence rules.[7] This has led to confusion. The provision was included apparently in recognition of the fact that federal courts, prior to the passage of Rule 43(a), followed state evidence rules in actions at law but not in equity.[8] The courts have given three interpretations to the provision dealing with evidence in federal equity cases: (1) if there are no decisions specifically applying in equity, the evidence is excluded unless authority exists in the state for receiving it;[9] (2) the federal equity court would have applied the federal rule established on the common law side of the court;[10] and (3) the federal court in which the question arises can decide from general authority what rule would have applied in equity.[11] The third source, state rules of evidence, has presented the same problem which *Erie R.R. Co. v. Tompkins*[12] presents generally.[13] When state law is unclear or where the highest court of the state has not decided the point, what rule should the federal court accept as the rule of the state?

The fact that evidence may be excluded in the state court has nothing to do with its admissibility in federal court if there is some other basis on which it can be admitted.[14] This rule permits the "widest admissibility possible under any existing law, state or federal of relevant evidence." [15] If there is

945, *as amended,* 28 U.S.C. § 1732 (Supp. 1961) (business records); 62 Stat. 946, 28 U.S.C. § 1733 (1958) (official records).

[7] *See* MOORE ¶ 43.04, at 1328-29; WIGMORE § 6c, at 201.

[8] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts,* 30 F.R.D. 73, 94 (1962) [hereinafter cited as *Preliminary Report,* 30 F.R.D. 94 (1962)].

[9] Mosson v. Liberty Fast Freight Co., 124 F.2d 448 (2d Cir. 1942); Lake Shore Nat'l Bank v. Bellanca Aircraft Corp., 83 F.Supp. 795 (D.Del. 1949); *see Preliminary Report,* 30 F.R.D. 94, 96 (1962).

[10] Peoples Gas Co. v. Fitzgerald, 188 F.2d 198 (6th Cir. 1951); Peck v. Pacific-Atlantic S.S. Co., 180 F.2d 866, 869 (2d Cir. 1950); Vanadium Corp. of America v. Fidelity & Deposit Co., 159 F.2d 105, 109 (2d Cir. 1947).

[11] Hope v. Hearst Consol. Publications, Inc., 294 F.2d 681 (2d Cir. 1961), *cert. denied,* 368 U.S. 956 (1962); Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).

[12] 304 U.S. 64 (1938).

[13] *See* MOORE ¶ 43.02 [4]; Callahan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure,* 45 YALE L. J. 622 (1936), 47 YALE L. J. 194 (1937); Green, *Drafting Uniform Federal Rules of Evidence,* 52 CORNELL L. Q. 177, 200 (1967); Comment, *Federal Rule 43(a): The Scope of Admissibility of Evidence and the Implications of the Erie Doctrine,* 62 COLUM. L. REV. 1049 (1962); Note, *Rule 43(a) and Erie—The Conflict in the Sixth Circuit,* 34 TENN. L. REV. 671 (1967); Comment, *The Admissibility of Evidence under Federal Rule 43(a),* 48 VA. L. REV. 939 (1962).

[14] Hope v. Hearst Consol. Publications, Inc., 294 F.2d 681 (2d Cir. 1961), *cert. denied,* 368 U.S. 956 (1962).

[15] Commercial Banking Corp. v. Martel, 123 F.2d 846 (2d Cir. 1941).

any doubt as to the admissibility of the evidence it should be admitted.[16] There have been conservative holdings, however, to the effect that evidence specifically excluded by state law cannot be received in federal court unless a specific rule which admits it can be found in federal statutes or equity cases.[17] But Rule 43(a) is not a rule of exclusion; consequently, it would seem that where the question of admissibility is open in either federal equity practice prior to the adoption of Rule 43(a) or under state law, the court could admit the evidence even though the other source clearly excludes it.[18] The federal courts did not immediately respond to the liberal tone of this rule,[19] even though they had generally been more liberal in their reception of evidence than state courts.[20] But since the decision in *Dallas County v. Commercial Union Assurance Co.*,[21] the federal courts have shown a tendency toward freer admissibility of hearsay evidence.[22] Some have refused to exclude highly probative hearsay even though it could not be fitted into one of the traditionally recognized exceptions.[23] Others have refused to treat

[16] *See,* Mourikas v. Vardianos, 169 F.2d 53 (4th Cir. 1948).

[17] *See, e.g.,* Schillie v. Atcheson T.&S.F. Ry., 22 F.2d 810 (8th Cir. 1955); Atlantic Coast Line R.R. v. Dixon, 207 F.2d 899 (5th Cir. 1953); Wright v. Wilson, 154 F.2d 616, 170 A.L.R. 1237 (3d Cir.), *cert. denied,* 329 U.S. 743 (1946); Pen-Ken Gas and Oil Corp. v. Warfield Natural Gas Co., 137 F.2d 871, 887 (6th Cir. 1943), *cert. denied,* 320 U.S. 800 (1944).

[18] Hope v. Hearst Consol. Publications, Inc., 294 F.2d 681 (2d Cir. 1961), *cert. denied,* 368 U.S. 956 (1962); Peoples Gas Co. v. Fitzgerald, 188 F.2d 198 (6th Cir. 1951); Peoples Loan & Inv. Co. v. Travelers Ins. Co., 151 F.2d 437, 440-41 (8th Cir. 1945) (dictum); Een v. Consolidated Freightways, 120 F.Supp. 289 (D.N.D. 1954), *aff'd,* 220 F.2d 82 (8th Cir. 1955). *Contra,* Sleek v. J. C. Penney Co., 324 F.2d 467 (3d Cir. 1963).

[19] *See* Greene, *Federal Civil Procedure Rule 43(a),* 5 VAND. L. REV. 560, 565 (1952). *But see* Commercial Banking Corp. v. Martel, 123 F.2d 846 (2d Cir. 1941).

[20] See Funk v. United States, 290 U.S. 371 (1933). Montana Ry. v. Warren, 137 U.S. 348 (1890); United States v. 5139.5 Acres, 200 F.2d 659 (4th Cir. 1952); United States v. United Shoe Mach. Corp., 89 F.Supp. 349 (D.Mass. 1950).

[21] 286 F.2d 388 (5th Cir. 1961), *noted in* 46 CORNELL L. Q. 645 (1961), 60 MICH. L. REV. 105 (1961), 13 STAN. L. REV. 945 (1961), 35 TUL. L. REV. 639 (1961), 15 VAND. L. REV. 288 (1961).

[22] Sayen v. Rydzewski, 387 F.2d 815 (7th Cir. 1967); Bowman v. Kaufman, 387 F.2d 582 (2d Cir. 1967); Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84 (5th Cir. 1966); Hurwitz v. Shiu Yim Poon, 364 F.2d 878 (C.C.P.A. 1966); Rain v. Pavkov, 357 F.2d 506, 509 (3d Cir. 1966) (despite state statute to contrary, evidence admitted); Hambrice v. F. W. Woolworth, 290 F.2d 557 (5th Cir. 1961); Ostrov v. Metropolitan Life Ins. Co., 250 F. Supp. 152, 167 (E.D. Pa. 1966); United Services Automobile Ass'n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965). See also Glowe v. Rulon, 284 F.2d 495 (8th Cir. 1960); Carlson v. Chisholm-Moore Hoist Corp., 281 F.2d 766 (2d Cir.), *cert. denied,* 364 U.S. 883 (1960); Norwood v. Great American Indemnity Co., 146 F.2d 799 (3d Cir. 1944); United States v. Columbia Pictures Corp., 25 F.R.D. 497 S.D.N.Y. 1960). *See generally* Degnan, *The Law of Federal Evidence Reform,* 76 HARV. L. REV. 275 (1962).

[23] Hurwitz v. Shiu Yim Poon, 364 F.2d 878 (C.C.P.A. 1966).

evidence as hearsay even though hearsay dangers were involved.[24] Still other courts persist in justifying the admission of hearsay by distorting the exceptions.[25]

Federal courts have also shown a liberal attitude in regard to the admission of evidence in criminal cases.[26] But the confrontation clause and the general attitude of most judges that evidence in criminal case should be more carefully scrutinized than in civil cases have operated as a restraint so that rulings in the area of federal criminal evidence have not been as radical as in civil cases.[27] Rule 26 of the Federal Rules of Criminal Procedure provides in part:

> . . . The admissibility of evidence . . . shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

This rule, like its counterpart in the Federal Rules of Civil Procedure, is too vague to be of practical value. It did provide, however, an excellent means by which the courts might have liberalized federal criminal evidence.[28] Yet the courts have not taken advance of the opportunity to the fullest.[29]

Under Rule 56(e), affidavits for summary judgment and opposing affidavits "shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence . . . ."[30] This has been strictly construed.[31] The courts have consistently interpreted the rule to mean that

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[24] Bowman v. Kaufman, 387 F.2d 582 (2d Cir. 1967). Although proof of driver's silence as to brake failure being cause of accident admittedly involved hearsay dangers, the court said that the high probative value justified its admission.

[25] Lumbermen's Mut. Casualty Co. v. Renuart-Bailey-Cheely Lumber & Supply Co., 387 F.2d 423 (5th Cir. 1968). Confessions made by employees immediately after their conduct is called into question will come in under the res gestae exception.

[26] *See* Meredith v. United States, 238 F.2d 535, 543 (4th Cir. 1956). In holding that experts could give their opinions on the ultimate fact in issue, the court said: ". . . the modern tendency in the law of evidence is to give the triers of facts all the light they can have. . . ." *See generally* Orfield, *The Hearsay Rule in Federal Criminal Cases,* 32 FORDHAM L. REV. 499, 799 (1964).

[27] See Michelson v. United States, 335 U.S. 469, 486 (1948); Green, *supra* note 13, at 197. *But see* Kay v. United States, 255 F.2d 476 (4th Cir. 1958).

[28] *Preliminary Report,* 30 F.R.D. 94, 99 (1962).

[29] *Ibid. See also* Orfield, *The Reform of Federal Criminal Evidence,* 32 F.R.D. 121 (1963).

[30] F.R. CIV. P. 56(e).

[31] Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950); Liberty Leasing Co. v. Hillsum Sales Corp., 380 F.2d 1013 (5th Cir. 1967); Bowen Electric Co. v. J. D. Hedin Construction Co., 316 F.2d 362, 364 (D.C. Cir. 1963); Washington v. Maricoper County, 143 F.2d 871 (9th Cir. 1944); New Hampshire Fire

an affidavit may not be based upon hearsay.[32]

In 1965, the Chief Justice of the Supreme Court of the United States appointed a committee to formulate uniform rules of evidence for federal district courts.[33] If adopted, they would provide uniformity not only in all the district courts, but also as between civil and criminal cases.

IX. Hearsay in Non-Jury Cases

Theoretically, jury and non-jury cases are governed by the same rules of evidence,[1] but the application of these rules in non-jury cases often varies from the practice followed in jury cases.[2] This variance is attributable in part to the following rules followed by appellate courts: a finding of fact by the lower court judge will not be reversed where there is sufficient competent evidence to support it, regardless of the fact that incompetent testimony was admitted; failure to admit competent testimony will result in reversal where such failure was prejudicial to the losing party.[3] As a result of the rules, many trial judges in order to avoid reversal make it a practice to admit incompetent evidence when proffered and disregard it later in reaching a decision.[4] The practice is justified as one that expedites the trial of a case by eliminating counsels' arguments over, and appeals over a judge's rulings on, the admissibility of evidence.[5] If the practice does

Ins. Co. v. Perkins, 30 F.R.D. 382 (D. Del. 1962); Mellen v. Hirsch, 8 F.R.D. 248, 249 (D. Md.), *aff'd,* 171 F.2d 127 (4th Cir. 1948). *See* 6 Moore ¶ 56.22(1), at 2806-08.

[32] Jameson v. Jameson, 176 F.2d 58, 60 (D.C. Cir. 1949); Dean Construction Co. v. Simonetta Concrete Construction Corp., 37 F.R.D. 242 (S.D.N.Y. 1965); Dulansky v. Iowa-Illinois Gas & Electric Co., 10 F.R.D. 566 (S.D. Iowa 1950), *rev'd on other grounds,* 191 F.2d 881 (8th Cir. 1951) (Expert opinion of medical witness based on hearsay cannot support an affidavit.)

[33] 36 F.R.D. 128 (1965).

[1] Davis, *Hearsay in Administrative Hearings,* 32 Geo. Wash. L. Rev. 689, 693 (1964). *But see* Fenwick's Trial, 13 How. St. Tr. 537, 585 (1696):

> It is discretionary, whether you will determine that this is evidence now, or after you have heard it. . . . [I]t is one thing when a man is to be tried by a jury, and another when he is to be tried before judges. A jury may be so swayed and possessed by it, that it may not be fit for them to hear it: but look into the court of Chancery; and there depositions, if one side say they are evidence, and the other side say they are not, are every day admitted; and the rule is, that it sooner dispatched by hearing of it, than not. [Argument of the Solicitor General]

[2] McCormick § 60, at 137 (1954); Davis, *supra* note 1, at 693.

[3] Builder's Steel v. Commissioner of Internal Revenue, 179 F. 2d 377, 379 (8th Cir. 1950); McCormick 137.

[4] Donnelly Garment Co. v. National Labor Relations Board, 123 F. 2d 215, 224 (8th Cir. 1941); McCormick 137.

[5] Donnelly Garment v. National Labor Relations Board, 123 F. 2d 215, 224 (8th Cir.

not in fact make it virtually impossible for a judge to commit reversible error in a non-jury case by admitting incompetent evidence,[6] it at least decreases the importance of the rules of evidence in such cases.[7] However, to what extent the practice is utilized, or whether it is utilized at all, lies in the discretion of the trial judge and, thus, predictability is lacking in the preparation of cases for trial.[8] Moreover, reservations have been expressed on the assumed ability of the trial judge to dispel the influence of incompetent testimony that he has received.[9] The limitations of this practice have led to the demand for more positive standards for determining the admissibility of evidence in non-jury cases.[10]

The apparent irony of allowing administrative officers, sometimes lacking a legal background, to hear and decide cases on evidence inadmissible before judges in a non-jury cases[11] has led to the suggestion that the practice of administrative bodies serve as a guide in the development of rules of evidence for the non-jury cases.[12] However, in contrast to most trial judges, administrative officers generally deal with a narrower range of subject matter with which they have either had, or can be expected to develop, a more thoroughgoing acquaintance. The resulting sophistication obtained in a particular area may justify the greater latitude they are given in considering evidence.[13]

1941); McCORMICK 137. *Contra,* Note, *Improper Evidence in Non-jury Trials: Basis for Reversal?,* 79 HARV. L. REV. 406, 409-10 (1965).

[6] Builder's Steel v. Commissioner of Internal Revenue, 179 F. 2d 377, 379 (8th Cir. 1950): "In the trial of a non-jury case it is virtually impossible to commit reversible error by receiving incompetent evidence, whether objected to or not."

[7] McCORMICK 137.

[8] Davis, *An Approach to the Rules of Evidence for Non-jury Cases,* 50 A.B.A.J. 723, 724 (1964); Weinstein, *Some Difficulties in Devising Evidentiary Rules for Determining Truth in Judicial Trials,* 66 COLUM. L. REV. 223, 245 (1966).

[9] State v. Millar, 64 N.J. Super. 263, 165 A. 2d 829, 831 (Super. Ct. 1960); Kovacs v. Szentes, 130 Conn. 229, 33 A. 2d 124, 125 (1943) (dictum); Note, *Incompetent Evidence in Non Jury Trials: Ought We Presume That It Has No Effect?,* 29 IND. L. J. 446, 451 (1954). The argument, however, ignores the fact that even in cases in which a trial judge *does* refuse incompetent evidence when profferred, he must often listen to a substantial portion of it before ruling it inadmissible.

[10] Weinstein, *supra* note 9, at 245-46; Davis, *supra* note 8, at 723; Note, 79 HARV. L. REV., *supra* note 5, at 413.

[11] Note, *Exclusionary Rules of Evidence in Non-jury Proceedings,* 46 ILL. L. REV. 915, 919 (1952), *citing* DAVIS, ADMINISTRATIVE LAW 448 (1951). The irony seems more pronounced when the same case can be heard either before a judge sitting without a jury or before an administrative body as noted in United States v. United Shoe Machinery Corporation, 89 F. Supp. 349, 356 (D. Mass. 1950).

[12] Davis, *Evidence Reform: The Administrative Process Leads the Way,* 34 MINN. L. REV. 581, 607 (1950).

[13] *See* 5 NICHOLS, EMINENT DOMAIN § 18.1 [2] (3d ed. 1962), for a discussion of

The argument is also advanced that, since the rules of evidence came in with the jury system, they are designed to meet dangers not present when a judge sits as trier of fact and are, thus, inappropriate to the latter cases.[14] However, an argument over the disputed historical basis[15] for the application of these rules to non-jury cases (whether they were products of the jury system or adversary system) is beside the point if they have in fact proved valuable in such cases. There is rather a need to articulate in what particular respects a judge is superior to a jury as a trier of fact and how these superiorities lessen or eliminate the specific dangers which each rule of evidence seeks to avoid.[16] In the case of hearsay testimony, it has been suggested that a judge does enjoy a superiority over the jury, since he is trained to recognize it and to evaluate its worth in the light of the absence of an opportunity to cross-examine the declarant.[17] The above situation can be contrasted with one in which a defendant's confession is wrongfully introduced in evidence; in this situation, the judge's superiority in avoiding prejudice is arguable.[18]

X. Judicial Proceedings Requiring Special Treatment of Hearsay

A. *Antitrust, Trademark, and Patent Cases*

Aside from the fact that judges have at times felt compelled to relax the exclusionary rules in some of the "big cases" in this area,[1] the very nature of all of these cases ("big" or not) requires a different treatment of hearsay than does the usual case. The subject matter of this type of litigation requires peculiar proof, particularly in antitrust cases. "Economic proof" has become common, if not essential, in trials involving price-fixing and monopoly issues.[2] It entails survey evidence, testimony of economists

the reasons for the great latitude granted in some jurisdictions to a board of commissioners in a condemnation proceeding.

[14] Davis, *supra* note 8, at 723.

[15] Morgan, *The Jury and the Exclusionary Rules of Evidence,* 4 U. Chi. L. Rev. 247 (1937).

[16] Note, 79 Harv. L. Rev., *supra* note 5, at 413-14.

[17] *Ibid.*

[18] State v. Dietz, 5 N.J. Super. 222, 68 A. 2d 777, 779 (App. Div. 1949).

[1] *See, e.g.,* U.S. v. United Shoe Mach. Corp., 89 F. Supp. 349 (D. Mass. 1950), *noted in* 64 Harv. L. Rev. 340 (1950); 25 So. Calif. L. Rev. 139 (1951); 2 Stan. L. Rev. 776 (1950); 5 Vand. L. Rev. 655 (1952); 60 Yale L. J. 363 (1951); *see* McAllister, *The Big Case: Procedural Problems in Antitrust Litigation,* 64 Harv. L. Rev. 27 (1950).

[2] O'Donnell, *Civil Antitrust Trials,* in Hoffman's Antitrust Law and Techniques

and other experts, statistical and accounting tabulations, and market analyses, much of which is hearsay.[3]

In trademark infringement cases, results of reaction time tests given to consumers to determine whether they would confuse brand names are generally admissible, even though hearsay, under the mental states exception.[4] But when the interviewer seeks facts rather than reactions,[5] the mental states exception may not be relied upon. Yet such surveys have been admitted because of their high probative value.[6] The hearsay nature of survey evidence goes to its weight rather than to its admissibility.[7]

In patent infringement cases, results of tests carried out by a number of persons working together are admissible over objections that parts of the tests were based on hearsay.[8] Each person need not participate in or witness every step of the undertaking, but may rely upon the intermediate tests of others about which he has no personal knowledge.

In this broad area of antitrust, trademark and patent litigation, courts are inclined to treat hearsay evidence, where possible, as either circum-

297, 320-23 (Hoffman & Winard ed. 1963). *See also* Dession, *The Trial of Economic and Technological Issues of Fact,* 58 YALE L. J. 1019, 1242 (1949).

[3] *Id.* at 320. *See generally* CURRENT BUSINESS STUDIES PUBLICATION No. 1, THE ROLE OF SAMPLING DATA AS EVIDENCE IN JUDICIAL AND ADMINISTRATIVE PROCEEDINGS (1954); Caughey, *The Use of Public Polls, Surveys and Sampling as Evidence in Litigation, and Particularly Trademark and Unfair Competition Cases,* 44 CALIF. L. REV. 539 (1956); Christophersen, Light & Sammis, *Public Opinions as Evidence in Unfair Competition Cases,* 2 PRAC. LAW., Oct. 1956, at 15; Early, *The Use of Survey Evidence in Antitrust Proceedings,* 33 WASH. L. REV. 380 (1958); Kennedy, *Law and the Courts,* in THE POLLS AND PUBLIC OPINION (Meir & Saunders ed. 1949); Shryock, *Survey Evidence in Contested Trademark Cases,* 57 TRADE-MARK REP. 377 (1967); Sorensen & Sorensen, *The Admissibility and Use of Opinion Research Evidence,* 28 N.Y.U. L. REV. 1213 (1953); Waterbury, *Opinion Surveys in Civil Litigation,* 44 TRADE-MARK REP. 343 (1954); Note, *Consumer Polls as Evidence in Unfair Trade Cases,* 20 GEO. WASH. L. REV. 211 (1951); Note, *Public Opinion Surveys as Evidence: The Pollsters Go to Court,* 66 HARV. L. REV. 498 (1953); Note, *Admissibility of Public Opinion Polls,* 37 MINN. L. REV. 385 (1953).

[4] United States v. 88 Cases, 187 F. 2d 967, 974 (3d Cir. 195), *cert. denied,* 342 U.S. 86 (1951); Miles Laboratories, Inc. v. Frolich, 195 F. Supp. 256 (D. C. Cal. 1961), *aff'd,* 296 F. 2d 740 (1961), *cert denied,* 369 U.S. 865 (1962); Household Finance Corp. v. Federal Finance Corp., 105 F. Supp. 164 (D. Ariz. 1952); People v. Franklin Nat'l Bank, 200 Misc. 557, 105 N.Y.S. 2d 81 (Sup. Ct. 1951), *rev'd,* 305 N.Y. 453, 113 N.E. 2d 796 (1953), *rev'd,* 347 U.S. 373 (1954).

[5] *See* Zeisel, *The Uniqueness of Survey Evidence,* 45 CORN. L. Q. 322, 334 (1960). The interviewer may ask, for example, whether the consumer owns a car or stove and, if so, what kind. The answer here would clearly be hearsay.

[6] American Luggage Works, Inc. v. United States Trunk Co., 158 F. Supp. 50 (D. Mass. 1957).

[7] General Motors Corp. v. Cadillac Marine & Boat Co., 226 F. Supp. 716 (W.D. Mich. 1964).

[8] Hurwitz v. Shiu Yim Poon, 364 F. 2d 878 (C.C.P.A. 1966).

cumstantial evidence and beyond the hearsay rule[9] or as evidence which credits the in-court testimony of a witness.[10] And where evidence is clearly within the traditional hearsay rule, it is often received without objection in such cases as a matter of practice.[11] This is so for several reasons: there is no jury; the trial will progress faster; and an objection emphasizes a weakness in the objecting party's case.[12] Even if the extrajudicial declarant were subject to cross-examination, it would be less valuable than in the ordinary case because of the general expertise and competence of witnesses in such cases.[13]

In antitrust cases, the courts have developed a rule which admits all declarations made in futherance of a conspiracy.[14] The declarations of one conspirator are admitted against any or all of the rest on the ground that each acts in behalf of all in furtherance of the conspiracy.[15] "Liberality has always been accorded to the admission of evidence in cases where conspiracy issues are present." [16] This rule allows declarations of co-conspirators to come in if there is other independent evidence of a combination between the declarant and the defendant.[17] A mere contract between the two constitutes such independent evidence.[18] Since antitrust suits may arise in either federal district court or the Federal Trade Commission,[19] courts have been encouraged to apply more liberal rules regarding the admissibility of hearsay.[20] There appears to be no strong reason

9 Scholle v. Cuban-Venezuelan Oil Voting Trust, 285 F. 2d 318 (2d Cir. 1960); *see* Bourns, Inc. v. International Resistance Co., 341 F. 2d 146 (C.C.P.A. 1965).

10 Haselstrom v. McKusick, 324 F. 2d 1013 (C.C.P.A. 1963), where a "science" article was admitted to show that the witness had made a statement therein before the dispute arose which was consistent with his testimony.

11 *See* O'Donnell, *supra* note 2, at 312.

12 *Ibid.*

13 *Id.* at 315-16.

14 United States v. General Electric Co., 80 F. Supp. 989 (S.D.N.Y. 1948); *see* O'Donnell, *supra* note 2, at 303-06; Levie, *Hearsay and Conspiracy,* 52 MICH. L. REV. 1159 (1954).

15 Delaney v. United States, 263 U.S. 586, 590 (1924); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917).

16 United States v. Vehicular Parking, 52 F. Supp. 751, 753-54 (D. Del. 1943). *See also* United States v. General Electric Co., 82 F. Supp. 753, 903 (D. N.J. 1949).

17 Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).

18 Galatas v. United States, 80 F. 2d 15, 24 (8th Cir. 1935); *see* O'Donnell, *supra* note 2, at 305-06.

19 FTC v. Cement Institute, 333 U.S. 683 (1948).

20 United States v. United Shoe Machinery Corp., 89 F. Supp. 349 (1950). *See also* United States v. United States Gypsum Co., 333 U.S. 364 (1948) (Written hearsay often is of greater value than the in court testimony of the writer after a long period of time has elapsed.); United States v. Corn Products Refining Co., 234 Fed. 964, 978 (2d Cir. 1916) (Interoffice memoranda constitute perfectly valid evidence where there

for applying different rules of evidence in non-jury antitrust suits in district court than in administrative hearings; furthermore, the more liberal approach of the Federal Trade Commission would continue to attract much of what the courts should handle unless the courts adapted their evidence rules to meet such a threat.[21]

The impact of the hearsay rule is further diminished by a liberal application of the federal business records[22] and official records statutes.[23] The first statute eliminates the requirement of calling to the stand those who made the original entries.[24] Strict proof of authenticity is no longer needed.[25] The second allows for copies of government records, such as patents and census reports, to be admitted without the necessity of producing the originals and the parties who made them.[26] This latter statute makes it possible to prove government transactions without having to call government official from all over the country.[27] In cases involving voluminous documents, experts have been permitted to present summaries of these documents so long as the originals are at the disposal of the court and opposing parties.[28]

B. *Eminent Domain Proceedings*

The very nature of the evidence needed to establish the value of property in eminent domain cases requires a relaxation of the hearsay

is every indication that they were never intended to be seen by outsiders. They are of the "highest value as evidence of intention." Hand, J.)

[21] *Id.* at 356:

> It is difficult to imagine any satisfactory ground for deciding that evidence which is admissible before the Federal Trade Commission is inadmissible before a judge sitting without a jury in a civil anti-trust case brought by the Government. . . .
>
> . . . the admission of hearsay evidence by a Commission undercuts just as effectively as the admission of hearsay evidence by a Court the fundamental objective of the hearsay rule—the opportunity to hear the witness under oath and to subject him to cross-examination.

See also Note, *The Hearsay Rule in Civil Antitrust Suits,* 60 YALE L. J. 363 (1951).

[22] 62 Stat. 945, *as amended,* 28 U.S.C. § 1732 (Supp. 1961).

[23] 62 Stat. 946, 28 U.S.C. § 1733 (1958).

[24] Hoffman v. Palmer, 129 F. 2d 976 (2d Cir. 1942), *aff'd,* 318 U.S. 109 (1943); United States v. General Motors Corp., 121 F. 2d 376, 409 (7th Cir. 1941); Gilbert v. Gulf Oil Corp., 175 F. 2d 705 (4th Cir. 1949); United States v. Aluminum Co. of America, 35 F. Supp. 820 (S.D.N.Y. 1940).

[25] Cornes v. United States, 119 F. 2d 127 (9th Cir. 1941); United States v. Manton, 107 F. 2d 834 (2d Cir. 1939).

[26] *See* O'Donnell, *supra* note 2, at 308.

[27] *Ibid.*

[28] Flame Coal Co. v. United Mine Workers of America, 303 F. 2d 39 (6th Cir. 1962); Greenhill v. United States, 298 F. 2d 405, 412 (5th Cir. 1962); *see* Comment, *Best Evidence Rule—The Use of Summaries of Voluminius Originals,* 37 MICH. L. REV. 449 (1939). *See generally* WIGMORE § 1230, at 434-35.

rule. Courts in such proceedings invariably rely on opinion in determining the amount of compensation to be awarded the condemnee.[1] Strictly speaking, such opinion evidence often violates the hearsay or first hand knowledge rules since the witness, who is ordinarily an expert, may have no information upon which to base his opinion other than hearsay reports of the prices paid in sales of comparable property.[2] Many courts, however, refuse to apply these rules rigidly because in doing so the parties would be deprived of the best and sometimes the only means of establishing the value of the land.[3] The hearsay factor goes to the weight of evidence rather than rendering the witness incompetent.[4]

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[1] *See, e.g.,* Jones v. United States, 258 U.S. 40 (1922). *See generally* Annot., *Competency of Witness to Give Expert or Opinion Testimony as to Value of Real Property,* 159 A.L.R. 7 (1945). Expert testimony is not necessary; a non-expert may offer his opinion as to value. Jones v. Erie & W. Valley R. Co., 151 Pa. 30, 25 Atl. 134, 31 Am. St. Rep. 722 (1892); Lebanon & N. Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W. 2d 22 (1929). *But see* Pennsylvania & P.R. Co. v. Root, 53 N.J.L. 253, 21 Atl. 285 (1891); Buffum v. New York & B. R. Co., 4 R.I. 221 (1856). Experts, however, are given greater latitude in forming their opinions from hearsay reports. Com. v. Citizens Ice & Fuel Co., 365 S.W. 2d 113 (Ky. 1963); State Highway Com. v. Conrad, 263 N.C. 394, 139 S.E. 2d 553 (1965).

[2] United States v. 1846 Acres of Land, 312 F 2d 287 (2d Cir. 1963). *See also* Falknor, *Evidence,* 1963 ANN. SURVEY AM. L. 287, 289-290 (1964); Annot., *Admissibility of Hearsay Evidence as to Comparable Sales of Other Land as Basis for Expert's Opinion as to Value,* 12 A.L.R. 3d 1064, 1066 (1967). Nearly all jurisdictions agree that evidence of price in sales of comparable land is relevant to the issue of value of condemned land. 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 137, at 582 (1953). *But see* Tiffany v. Delaware, L. & W. R. Co., 300 Pa. 45, 150 Atl. 101 (1918) (Private sales as opposed to public sales have no bearing on the issue of value of comparable land.)

[3] Montana Ry. Co. v. Warren, 137 U.S. 348, 354 (1890) ("Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property.") Com. v. Smith, 229 Ky. 345, 347, 17 S.W. 2d 203 (1929). Recreation & Park Com. v. Perkins, 231 La. 869, 93 So. 2d 198 (1957); Johnson v. Lowell, 240 Mass. 546, 550, 134 N. E. 627 (1922); Langdon v. Manor, 133 N.Y. 628, 637, 31 N.E. 98, 101 (1892) ("Under the circumstances it was the best evidence obtainable, which is all that can be reasonably required is any case.") *See generally* 5 NICHOLS, EMINENT DOMAIN § 18. 1 *et. seq.* (3d ed. 1962) [hereinafter cited as NICHOLS]; 1 ORGEL, VALUATION UNDER EMINENT DOMAIN (2d ed. 1953) [hereinafter cited as ORGEL]; Rosenstein, *Hearsay Testimony in Condemnation Cases,* 6 ARIZ. L. REV. 112 (1964); Winner, *The Rules of Evidence in Eminent Domain,* 32 DICTA 243, 259-62 (1955).

[4] United States v. Delano Park, 146 F. 2d 473, 475 (2d Cir. 1944), in which Learned Hand, J., made the following statement:

> . . . it would be absurd to exclude a qualified expert's appraisal because he had considered such [hearsay] evidence; indeed he ought to consider it; it is part of the data on which his opinion should rest.

Saulsbury v. Ky. & W. Va. Power Co., 226 Ky. 75, 81, 10 S.W. 2d 451, 454 (1928). The lack of direct testimony concerning sales is "only a circumstance to be considered by the jury in weighing the evidence"

When opinions based in substantial part on hearsay are received, another more difficult problem arises. To what extent and for what purpose may the hearsay reports be admitted in evidence? The cases have fallen into three general categories: (1) the hearsay information from which the witness forms his opinion is admissible as substantive evidence;[5] (2) the hearsay information is admitted for the limited purpose of showing the basis of the witness' opinion;[6] (3) the hearsay basis of the opinion is inadmissible.[7] Some courts which admit these hearsay reports do so only when there are substantial safeguards against any misuse by the jury.[8] It has been held that admission of such incompetent evidence does not violate due process requirements.[9]

Specially constituted tribunals have been set up in several states to assess compensation in condemnation proceedings.[10] These tribunals typically are

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[5] *See, e.g.,* Southern Elec. Generating Co. v. Leibacher, 269 Ala. 9, 110 So. 2d 308 (1959); Stewart v. Com., 337 S.W. 2d 880, Ky., (1960); Recreation & Park Com. v. Perkins, 231 La. 869, 93 So. 2d 198 (1957); State Highway Com. v. Hayes Estate, 140 N.W. 2d 680, 687 (S.D. 1966):

> Recent and comparable sales of real estate are admissible as evidence in condemnation cases, either as substantive proof of value of the condemned property or as foundation and background for an expert's opinion of value.

See generally NICHOLS § 21.3 [1]; ORGEL § 137.

[6] *See, e.g.,* United States v. 5139.5 Acres, 200 F. 2d 659 (4th Cir. 1952). The majority of cases within this category allow the hearsay to come in during direct examination to support the opinion of the expert witness by showing the facts upon which he based it. United States v. 25.406 Acres, 172 F.2d 990 (4th Cir.), *cert. denied,* 337 U.S. 931 (1949); Urban Renewal Agency of Harrison v. Hefley, 371 S.W. 2d 141 (Ark. 1963); State Highway Comm'n. v. Fisch-Or, Inc., 241 Ore. 412, 406 P. 2d 539 (1965); Natural Gas Pipeline Co. v. Towler, 396 S.W. 2d 917 (Tex. Civ. App. 1965). The minority allows the hearsay evidence to come in only on cross-examination to test the knowledge of the expert. People ex rel Dept. of Public Works v. Alexander, 212 Cal. App. 2d 84, 27 Cal. Rptr. 720 (1963); Warren v. Waterville Urban Renewal Auth., 235 A. 2d 295 (Me. 1967), *petition for cert. filed,* 36 U.S.L.W. 3358 (U.S. Mar. 5, 1968).

The admission of hearsay reports for a limited purpose has been criticized on the basis that jurors cannot distinguish between substantive and limited evidence. State Highway Comm'n. v. Fisch-Or, Inc., 241 Ore. 412, 433, 406 P. 2d 539, 544 (1965) (dissent); *cf.* MCCARTY, PSYCHOLOGY AND THE LAW 251-53 (1960).

[7] *Cf.* United States v. Katz, 213 F. 2d 799 (1st Cir. 1954); Denver v. Quick, 108 Colo. 111, 113 P. 2d 999 (1941); Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Auth., 335 Mass. 189, 138 N.E. 2d 769 (1956).

[8] Baker Bros. Nursery v. State, 357 S.W. 2d 163 (Tex. Civ. App. 1962), *rev'd on other grounds,* 336 S.W. 2d 212 (Tex. Sup. Ct. 1963).

[9] Warren v. Waterville Urban Renewal Auth., 235 A. 2d 295 (Me. 1967), *petition for cert. filed,* 36 U.S.L.W. 3358 (U.S. Mar. 5, 1968); *cf.* State v. Owens, 124 S.C. 220, 117 S.E. 537 (1922); State ex rel Alford v. Thorson, 202 Wis. 31, 231 N.W. 155 (1930).

[10] NICHOLS § 18.1[3]; ORGEL § 128, at 543-44

composed of commissioners who have peculiar knowledge of the subject matter.[11] The hearsay rule has an even lesser impact in these proceedings.[12] Rules of evidence as at common law may not apply to them at all, especially where their determinations of value are preliminary rather than final and the condemnee may require a hearing before a court of law.[13] Even when the determination is final "subject only to the power of the court to confirm the award or remand it for further consideration, there are frequent judicial utterances to the effect that the commissioners are 'untrammeled by technical rules of evidence and unrestricted as to the sources of their information.' " [14]

California[15] and New Jersey[16] have provided by statute that experts may form an opinion as to value on the basis of hearsay reports and may state the matter upon which such opinion is based unless the hearsay is unsupported and unreliable. Whether the admissibility of the underlying hearsay is governed by statute or not, the trial judge is generally given broad discretion in receiving both the hearsay reports and the value opinions based on such reports.[17] This discretion is broader than in the reception of evidence on most other issues,[18] and the judge's decision will not be set aside unless there is manifest error.[19]

C. *Cases in Family Courts*

The term "family court" covers a wide variety of statutory schemes devised by the states to cope with the growing number of domestic disputes.[1] Generally included are child custody, juvenile delinquency, divorce,

11 NICHOLS § 18.1 [3].

12 *Ibid.*

13 ORGEL § 128, at 544.

14 *Ibid. quoting* Matter of Staten Island R.T. Co., 47 Hun. 396, 398 (N.Y. 1888). *See also* United States v. 80.46 Acres, 59 F. Supp. 876 (W.D.N.Y. 1944).

15 CAL. EVID. CODE § 814 (1967); *see* Carlson, *Statutory Rules of Evidence for Eminent Domain Proceedings,* 18 HASTINGS L. J. 143 (1966).

16 N.J. STAT. ANN. 2A:83-1 (Supp. 1965).

17 Southern Elec. Generating Co. v. Leibacher, 269 Ala. 9, 18-19, 110 So. 2d 308, 317 (1959); Honolulu v. Bishop Trust Co., Ltd., 48 Hawaii 444, 404 P. 2d 373 (1965); State v. Oakley, 356 S.W. 2d 909 (Tex. Civ. App. 1962).

18 NICHOLS § 18.1 [3], at 135.

19 Montana Ry. Co. v. Warren, 137 U.S. 348 (1890); United States v. 124.84 Acres, 387 F. 2d 912 (7th Cir. 1968); Southern Elec. Generating Co. v. Leibacher, 269 Ala. 9, 110 So. 2d 308 (1959).

1 *See, e.g.,* CAL. WELFARE & INST'NS CODE § 500 *et seq.* (1962); HAWAII FAMILY COURT ACT, ch. 333 (1965); N.Y. SESS. LAWS 1962, ch. 686; NAT'L PROBATION AND PAROLE ASS'N, STANDARD FAMILY COURT ACT (1959). *See also* YOUNG, SOCIAL TREAT-

annulment, bastardy, adoption, child neglect, and welfare proceedings[2] The scope of the schemes and the procedure involved vary from jurisdiction to jurisdiction, but the usual practice is to receive evidence with a greater degree of liberality than in other cases, and to maintain as informal an approach as possible.[3] Because of the statutory differences, the extent to which the traditional rules of evidence have been relaxed is not constant throughout the country.

The most liberal attitude toward the admission of hearsay evidence is exhibited in child custody and child neglect proceedings where the primary emphasis is upon the welfare of the child, not upon the rights of adverse parties.[4] Here the court is attempting to achieve the best possible result from the point of view of the child's future. Frequently the courts rely upon psychiatric and psychological reports from experts as well as investigation reports from court officers.[5] If the hearsay rule were applied strictly, such information would not be available.

The distinction between adjudicatory and dispositional stages must be clearly drawn in juvenile delinquency proceedings as a result of *In Re*

MENT IN PROBATION AND DELINQUENCY 127 (1952), *quoting* Judge Charles Hoffman:

> The purpose is . . . to establish a court for 'consideration of all matters relating to the family . . . in which it will be possible to consider social as distinguished from legal evidence.'

See generally GOLDSTEIN & KATZ, THE FAMILY AND THE LAW (1965); Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings*, 64 MICH. L. REV. 1 (1965); Foster, *The Family in the Courts*, U. PITT. L. REV. 206 (1956); Foster & Freed, *Family Law*, 1965 ANN. SURVEY AM. L. 387 (1966); ten Broeck, *California's Dual System of Family Law: Its Origin, Development and Present Situation*, 16 STAN. L. REV. 257, 900 (1964), 17 STAN. L. REV. 240 (1965).

[2] Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New York Family Court*, 48 CORN. L. Q. 499 (1963).

[3] *See* Foster, *Family Law*, 1962 ANN. SURVEY AM. L. 603 (1963):

> Although in most states more Family Law cases are heard than any other type of litigation comparatively few are appealed, and it remains characteristic that informal negotiation and settlement are the usual basis for disposition.

[4] Doe v. People, 156 Colo. 311, 398 P. 2d 624 (1965) (hearsay admitted in the post-adjudicative stage); Appeal of Dattilo, 136 Conn. 488, 72 A. 2d 50 (1950) (hearsay admissible under a Connecticut statute allowing courts in such proceedings to formulate whatever rules are necessary and proper); Harter v. State, ... Iowa ..... , 149 N.W. 2d 827 (1967) (hearsay factor goes to the weight of evidence); In Re Yardley, ... Iowa ..... , 149 N.W. 2d 162 (1967); Callen v. Gill, 7 N.J. 312, 81 A. 2d 495 (1951) (rules of evidence ordinarily relaxed in child custody cases); Dumain v. Gwynne, 92 Mass. (10 Allen) 270, 275 (1865) (any reasonable source of evidence proper in habeas corpus proceeding for custody of child). *See also* Note, *The "Adversary" Process in Child Custody Proceedings*, 18 W. RES. L. REV. 1731, 1750 (1967).

[5] *See, e.g.*, Harter v. State, ... Iowa ....., 149 N.W. 2d 827 (1967); In Re Blaine, 54 Misc. 2d 248, 282 N.Y.S. 2d 359 (1967).

Gault.[6] In the New York Family Court Act such a distinction had already been made not only in juvenile delinquency proceedings, but in all others as well.[7] Under this act, only competent evidence is admissible during the adjudicatory stage,[8] but incompetent evidence may be received at the dispositional hearing.[9] The trial judge has broad discretion in receiving evidence during the latter stage.[10] The hearsay nature of the evidence goes not to the basis of admissibility, but to its probative value.[11]

XI. Judicial Devices for Circumventing the Hearsay Rule

A. *Pretrial Conferences and Discovery Rules*

Much of the rigidity of the hearsay rule can often be dispelled before the trial even begins as a result of liberalized pretrial practices.[1] Increasingly, trial attorneys are relying upon pretrial discovery to the extent that much which would have been objected to formerly is received without objection because the element of surprise is eliminated before the case comes to trial.[2] The pretrial conference has proven to be an effective means of eliminating troublesome evidentiary problems.[3] Unlike the trial

6 387 U.S. 1, 13 (1967); *see* p. 154, *supra*. *See also* George, Gault and the Juvenile Court Revolution 41-44 (1968).

7 N.Y. Sess. Laws 1962, ch. 686; *see* Paulsen, *The New York Family Court Act*, 12 Buffalo L. Rev. 420, 432 (1963). The 1961 California Juvenile Court Act makes analagous distinctions. Cal. Welfare & Inst'ns Code §§ 701, 706 (1962) discussed in Note, *1961 California Juvenile Court Law: Effective Uniform Standards for Juvenile Court Procedure?*, 51 Calif. L. Rev. 421; 443 (1963).

8 N.Y. Sess. Laws 1962, ch. 686.

9 N.Y. Sess. Laws 1962, ch. 686, § 346.

10 In Re Blaine, 54 Misc. 2d 248, 282 N.Y.S. 2d 359 (1967).

11 *Id.* at 366.

1 *Cf.* Morgan, *The Future of the Law of Evidence*, 29 Texas L. Rev. 587, 607 (1951): "The first device for eliminating the sporting features of a lawsuit is the pretrial conference."

2 *See* Rosenberg, The Pretrial Conference and Effective Justice 39-40 (1964); *cf.* Degnan, *The Evidence Law of Discovery: Exclusion of Evidence Because of Fear of Perjury*, 43 Texas L. Rev. 435 (1965). Degnan examines the impact of liberalized discovery rules on some exclusionary rules other than the hearsay rule. The use of hearsay, while it does not directly modify these exclusionary rules, is nevertheless undermining their effectiveness. *See also* Chandler, *Discovery and Pre-Trial Procedure in Federal Courts*, 12 Okla. L. Rev. 321 (1959); Pickering, *The Pre-Trial Conference*, 9 Hastings L. J. 117, 125 (1958) (commenting on the interrelationship between the pretrial conference and discovery). *See generally* Holtzoff, *Federal Pretrial Procedure*, 11 Am. U. L. Rev. 21 (1962); McCarthy, *Pre-Trial in Virginia*, 40 Va. L. Rev. 359 (1954).

3 *See* Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 Colum. L. Rev. 223, 224 (1966).

itself, which is characterized by formality and contentiousness, the pretrial conference allows the parties to settle disputed points and often the case itself in the absence of any strict application of the hearsay rule.[4]

More recent pretrial devices, such as notice of intention to use hearsay with opportunity for depositions, have limited further the effect of the hearsay rule.[5] This weakening of the hearsay rule has been accomplished in this context entirely by indirection, that is, by reducing the amount of surprise involved in the use of hearsay, by providing opportunities to settle disputed issues of fact without applying the hearsay rule, by allowing the opponent an opportunity to eliminate the prejudicial effect of the use of hearsay (*e.g.*, giving him a chance to cross-examine the declarant before trial), and by substituting, at least in part, an atmosphere of objectivity for one of contentiousness which is inherent in the adversary system.[6]

B. *Expert Opinion Testimony*

It is not surprising that the same offer of proof may run afoul of both the opinion rule and the hearsay rule since the two rules have a common origin.[1] When jurors ceased to serve the dual function of witnesses and triers of fact and became triers of fact only, the testimony of witnesses began to be scrutinized more closely.[2] Witnesses were restricted to presenting facts and not what they concluded from such facts.[3] Drawing conclusions and inferences became the function of the jury alone.[4] The opinion rule excludes everything but the immediate sense impressions of the witness.[5] He is not to testify as to what he believes after observing such facts.

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[4] *See* Nims, *Some Comments on the Relation of Pre-Trial to the Rules of Evidence*, 5 VAND. L. REV. 581, 583, 588 (1952).

[5] *See* Weinstein, *supra* note 3, at 224-25.

[6] By reducing the contentiousness, the gamesmanship, or even the hostility of the courtroom fight, these devises have undermined the very thing that gave rise to the hearsay rule according to Morgan—the adversary system. *See* Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 254 (1937).

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[1] Adams v. Canon, 1 Dyer 53b, 73 Eng. Rep. 117 n. 15 (K.B. 1622): "It is not satisfactory for a witness to say, that he thinks or persuadeth himself." Thayer felt that the roots of both the hearsay and the opinion rules could be traced back to a case in 1349, where the court said that the witnesses and jurors serve separate functions and witnesses swear only to what they see and hear. THAYER 498-99, 523. *See also* Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 415 (1952). *See generally* WIGMORE § 1917.

[2] *See* WIGMORE § 1364, at 14-15.

[3] *See* THAYER 500.

[4] *See id.* at 524. *See also* Archbishop Laud's Trial, 4 How. St. Tr. 315, 399 (1644).

[5] *See* Pennsylvania R.R. Co. v. Chamberlain, 288 U.S. 333 (1933); Eastern Air Lines v. American Cyanamid Co., 321 F.2d 683 (5th Cir. 1963); Dudek v. Popp, 373 Mich. 300, 129 N.W.2d 393 (1964). *See also* WIGMORE § 1918.

That would be a perfectly sound rule if it were not for the difficulty in, or even the impossibility of distinguishing between immediate sense impressions and inferences drawn from them.[6] In a sense, all testimony is based upon inference.[7] "[I]t is a conclusion formed from phenomena and mental impressions." [8] Opinion is a higher order of abstraction than fact, but it is misleading to treat fact and opinion as mutually exclusive alternatives. The difference between them is not categorical, but one of degree.[9] Similarly, the difference between hearsay and non-hearsay is a matter of "degree of verification in personal experience underlying an assertion." [10] The hearsay rule ignores the fact that the more educated the witness, the higher the degree of hearsay involved in his testimony.[11] Most of one's knowledge in this modern age is derived not from personal experience, but from hearsay sources.[12] This is obvious, for example, where the witness, fresh out of a college course in geography, testifies as to the climate in Burma. But it would not be so obvious where the witness had made a visit to Burma and was unable to distinguish what he personally observed from what he read prior to his visit. Even less obvious is the hearsay element in an answer to the question "How much money do you have in the bank?" or "Who is the president of your company?" or "What is the date?" [13] The courts constantly receive testimony that contains hearsay elements in these less obvious cases.[14] This is certain to continue and perhaps increase as more and more of man's knowledge depends upon the reports and research of others.[15]

The opinion rule has perhaps as many exceptions as the hearsay rule.[16] One of the more important allows an expert to offer his opinion when the inability of the trier to resolve certain issues makes the special skills, experience or knowledge of an experts necessary.[17] In spite of criticism of the practice of using experts because of frequent abuse,[18] the continuation of

[6] *See* THAYER 524; Loevinger, *Facts, Evidence and Legal Proof,* 9 W. RES. L. REV. 154, 166-68 (1958).

[7] *See* THAYER 524.

[8] *Ibid.*

[9] *See* Loevinger, *supra* note 6, at 168.

[10] *Ibid.*

[11] *Cf. id.* at 166.

[12] *See ibid.*: ". . . all . . . 'book learning' is clearly legal 'hearsay.' "

[13] *Id.* at 167.

[14] *See* Falknor, *Indirect Hearsay,* 31 TUL. L. REV. 3 (1956).

[15] *See* Ladd, *supra* note 1, at 417.

[16] *Ibid.*

[17] Louisville & N.R. Co., 179 Ky. 478, 200 S.W. 952 (1918).

[18] *See* Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence,* 10 U. CHI. L. REV. 285, 293 (1943).

the practice in one form or another is almost certain to continue. In fact, reliance upon expert testimony will probably increase as knowledge becomes more specialized.[19]

It is generally recognized that an expert may base his opinion on hearsay.[20] If this were not so, an expert's opinion would be admissible in very few instances. Strictly speaking, an opinion based upon hearsay reports violates the hearsay rule, but the opinion is not necessarily excluded as a result of the hearsay element.[21] The witness, however, must "give the sanction of his general experience" [22] or rely upon his own observations as well as the hearsay reports.[23] The more difficult question, then, is whether the expert may relate the hearsay reports to show the basis for his opinion.[24] The traditional answer was given by Holmes: ". . . the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible." [25] A substantial number of courts have departed from this view, at least to allow the hearsay to come in for the limited purpose of supporting the expert's opinion.[26] Other courts, perhaps recognizing that the jury does not or cannot follow the limiting instructions, have gone so far as to permit the hearsay reports to be used substantively.[27]

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[19] *See* Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials,* 66 COLUM. L. REV. 223, 224 (1966).

[20] Grayson v. Lynch, 163 U.S. 468, 480-81 (1896); United States v. Delano Park Homes, Inc., 146 F.2d 473, 475 (2d Cir. 1944) (L. Hand, J.); Commonwealth v. Smith, 229 Ky. 345, 17 S.W.2d 203 (1929); National Bank v. New Bedford, 175 Mass. 257, 261, 56 N.E. 288, 290 (1900) (Holmes, J.). The fact that the expert relies upon hearsay merely affects the weight of his testimony. American Luggage Works Co. v. United States Trunk Co., 158 F.Supp. 50, 53 (D. Mass. 1957) (Wyzanski, J.). *See generally,* Maguire & Hahesy, *Requisite Proof of Basis for Expert Opinion,* 5 VAND. L. REV. 432 (1952); McCormick, *Some Observations upon the Opinion Rule and Expert Testimony,* 23 TEXAS L. REV. 109 (1945); Rosenthal, *The Development of the Use of Expert Testimony,* 2 LAW & CONTEMP. PROB. 413 (1935). *See also* MODEL CODE OF EVIDENCE Rules 401, 503, 529; UNIFORM RULE OF EVIDENCE 58.

[21] *See* MORGAN, BASIC PROBLEMS OF EVIDENCE 287 (1957).

[22] National Bank v. New Bedford, 175 Mass. 257, 261, 56 N.E. 288, 290 (1900) (dictum).

[23] Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472, 128 A.L.R. 1013 (1940).

[24] *See* Annot., 12 A.L.R.3d 1064, 1066 (1967). *See also* pp. 000-00, *supra.*

[25] National Bank v. New Bedford, 175 Mass. 257, 261, 56 N.E. 288, 290 (1900). *See also* People v. Alexander, 212 Cal. App. 2d 84, 27 Cal. Rptr. 720, 726 (1963).

[26] United States v. 5139.5 Acres, 200 F.2d 659 (4th Cir. 1952); Lowery v. Jones, 219 Ala. 201, 202, 121 So. 704, 706 (1929); State v. Shiren, 9 N.J. 445, 88 A.2d 601 (1952); Village of Lawrence v. Greenwood, 300 N.Y. 231, 90 N.E.2d 53 (1949); State Highway Com. v. Fisch-Or, Inc., 241 Ore. 412, 406 P.2d 539 (1965). *But see* United States v. Katz, 213 F.2d 799 (1st Cir. 1954).

[27] *See, e.g.,* Stewart v. Commonwealth, 337 S.W.2d 880 (Ky. 1960); Recreation & Park Comm'n v. Perkins, 231 La. 869, 93 So.2d 198 (1957); Baltimore v. Hurlock, 113 Md. 674, 78 Atl. 558 (1910); State Highway Comm'n v. Hayes Estate, 140 N.W.2d

C. *Judicial Notice*

In recent years there has been an increasing tendency for courts to broaden the scope of evidence which it will judicially notice. Previously, courts would take judicial notice only of those matters of common knowledge which were accepted as indisputable by persons of average intelligence in the community.[1] Of late there has been an extension of the doctrine of judicial notice beyond the sphere of facts of common knowledge to a broader sphere of the facts capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.[2] Most recently the trend has been to extend the scope of judicial notice beyond the field of common knowledge to facts of "verifiable certainty."[3] In practice, though, much is included that is neither indisputable nor easily verifiable.[4]

One readily apparent result of this trend is the admission of evidence that would otherwise be excluded as hearsay, such evidence now being admitted under the guise of judicial notice. For instance, learned treatises are hearsay and only a few jurisdictions have created an exception to the

680 (S.D. 1966). Some states by statute allow the hearsay to be used substantively. CAL. EVID. CODE § 814 (1967); N.J. STAT. ANN. 2A:83-1 (Supp. 1965). Experts have also been permitted to submit summaries of voluminous documents, especially in anti-trust cases, where the documents themselves are made available to the court and the opponent. Phillips v. Unittd States, 210 Fed. 259, 269 (1912); *see* WIGMORE § 1320, at 434 *et seq.*

Maguire suggests that an expert in mental ailments should be allowed to give his opinion on the credibility of a patient whom the expert has personally examined and should be allowed to testify as to statements made to him by the patient where there is sufficient corroboration of the truth of the statement from the surrounding circumstances. In such a situation, there would be no stronger basis for a hearsay objection than in the case in which evidence of what a thermometer registered outside of court is offered. The truthfulness of the thermometer reading is corroborated by the reliability of such devices, etc. The court may take judicial notice of the dependability of manufacture and adjustment. Maguire, *Heresy about Hearsay,* 8 U. CHI. L. REV. 621, 628-32 (1941).

[1] *See* MCCORMICK, EVIDENCE 688, 712 (1954); THAYER 277-312 (1898); WIGMORE § 2567a, at 535. Davis, *Judicial Notice,* 55 COLUM. L. REV. 945 (1955); Morgan, *Judicial Note,* 57 HARV. L. REV. 269 (1944); Schiff, *The Use of Out-of-Court Information in Fact Determination at Trial,* 41 CAN. B. REV. 335, 338-55 (1963); Strahorn, *The Process of Judicial Notice,* 14 VA. L. REV. 544 (1928). This discussion focuses on judicial notice of adjudicative facts, but much that is said herein applies to legislative facts as well.

[2] *See* Currie, *Appellate Courts Use of Facts outside of the Record by Resort to Judicial Notice and Independent Investigation,* 1960 WIS. L. REV. 39, 40; Korn, *Law, Fact and Science in the Courts,* 66 COLUM. L. REV. 1080 (1966).

[3] Korn, *supra* note 2, at 1089.

[4] *Ibid.*

hearsay rule to allow their admission.[5] Yet, with the difficult problems the courts must encounter in the determination of technical factual data, the likelihood that there will be an increase in admission of such evidence as learned treatises and statistical data, until now excluded as hearsay, under the doctrine of judicial notice is evident.[6]

It has been noted that the potential sweep of the "verifiable certainty" standard in judicial notice "may embrace all scientific knowledge that commands due respect within its own discipline." [7] In the field of social science there is an apparent increase in admitting matters which normally would be excluded as being hearsay but which the courts are willing to notice judicially. A recent New York case is very much in point.[8] In that case the court admitted a psychiatric report even though the psychiatrist was not present at the proceeding so as to be subject to cross-examination. In allowing the introduction of the report of the psychiatrist, the court pointed out its knowledge of the psychiatrist's qualifications and methods of examination.[9]

Judge Talbot Smith of the United States District Court of the Eastern District of Michigan in a recent article criticizing the hearsay rule suggested that in regard to hearsay matter a standard of reasonable reliance should be employed rather than a series of specific rules of admissibility.[10] This is precisely the test the courts are currently using as they admit evidence under the guise of judicial notice. Only the degree of reliability differs.

With the increased use of expert testimony and reliance on learned

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5 There is little case authority to support such an exception, most of it being from Alabama. *See, e.g.,* Mississippi Power & Light Co. v. Whitescarner, 68 F. 2d 928 (5th Cir. 1934); City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939); Lambert v. State, 234 Ala. 155, 174 So. 298 (1937); Russell v. State, 201 Ala. 574, 78 So. 916 (1918); Stoudenmeier v. Williamson, 29 Ala. 558 (1857). A Wisconsin court recently ruled that it would receive medical treatises as substantive evidence in the future. Lewandowski v. Preferred Risk Mutual Ins. Co., 33 Wis. 2d 69, 146 N.W. 2d 505 (1966). Some jurisdictions allow an expert witness to read from a treatise. Eagleston v. Rowley, 172 F. 2d 202, 203 (9th Cir. 1949); State v. Nicolosi, 228 La. 65, 81 So. 2d 771 (1955). In other jurisdictions, counsel may read excerpts in framing questions. *See, e.g.,* Coastal Coaches v. Ball, 234 S.W. 2d 474 (Tex. Civ. App. 1950). *See also* Dana, *Admission of Learned Treatises in Evidence,* 1945 WIS. L. REV. 455; Note. *Medical Treatises as Evidence—Helpful But Too Strictly Limited,* 29 U. CINC. L. REV. 255 (1960).

6 Korn, *supra* note 2, at 1090.

7 *Ibid.*

8 In Re Blaine, 54 Misc. 2d 248, 282 N.Y.S. 2d 359 (1967).

9 In the same proceeding, a letter written by a private psychiatrist was rejected because there was no evidence of the writer's qualifications.

10 *See* Smith, *Hearsay Rule and the Docket Crisis: The Futile Search for Paradise,* 54 A.B.A.J. 231, 236 (1968).

treatises and other scientific data, it is apparent that the courts will make even greater use of the judicial notice doctrine. Especially obvious is the trend of the courts to take judicial notice of the accuracy of scientific instruments and tests such as radar,[11] thermometers,[12] and blood tests.[13] Weinstein claims that few attorneys would be bold enough to object to evidence which assumes that a glass-sealed thermometer was properly calibrated and that, if they were so bold, judicial notice would probably be adapted to confound them.[14] Where the testing device is of a complex nature and requires periodic adjustment to assure its accuracy as in cases involving radar or speedometers, Weinstein suggests that the courts may not judicially notice accuracy quite as rapidly as they would in other cases.[15]

A Florida court took judicial notice of statistics gathered at various sources giving the number of injuries caused by automobiles.[16] Judicial notice has also been taken of statistics with respect to births occurring within a certain period of years in not one of which the mother of a baby was over fifty-five years old.[17] In *Ly Shew* v. *Acheson*,[18] a federal district court in California took judicial notice of statistics in hundreds of cases involving Chinese who claimed to have been sired by American citizens in order to evaluate the credibility of a witness.

Other hearsay evidence which would usually be excluded has gained admittance by judicial notice. Judge Frank in a concurring opinion in *United States* v. *Roth*,[19] took judicial notice of a letter written to him by a sociologist. He also judicially noticed published works of sociologists. In passing upon the constitutionality of statutes, appellate courts have taken judicial notice of social and economic data outside the record.[20] The Supreme Court of the United States has taken judicial notice of such things as a text and encyclopedia articles on vaccination,[21] and reports,

[11] State v. Graham, 322 S.W. 2d 188 (Mo. 1959); State v. Dantonio, 18 N.J. 570, 115 A. 2d 35, 45 A.L.R. 2d 460 (1955). *See generally* Woodbridge, *Radar in the Courts*, 40 VA. L. REV. 809 (1954).

[12] Super-Cold Southwest Co. v. First Baptist Church, 219 S.W. 2d 569 (Tex. Civ. App. 1949).

[13] State *ex rel* Steiger v. Gray, 30 Ohio Ops. 394, 145 N.E. 2d 162, 168 (1957); *see* Britt, *Blood Grouping Tests and More Cultural Lag*, 22 MINN. L. REV. 836 (1938); Annot., 46 A.L.R. 2d 1000 (1956).

[14] Weinstein, *The Probative Force of Hearsay*, 46 IOWA L. REV. 331, 343 (1960).

[15] *Id.* at 343 n. 68.

[16] Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).

[17] City Bank Farmer's Trust Co. v. United States, 74 F 2d 692, 693 (2d Cir. 1935).

[18] 110 F. Supp. 50, 55-56 (N.D. Calif. 1953).

[19] 237 F. 2d 796, 814 (2d Cir. 1956) (concurring opinion).

[20] Brown v. Board of Education, 347 U.S. 483 (1954).

[21] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

books and bulletins on the economics of the grape industry.[22] One Virginia case,[23] citing an Alabama decision,[24] said that the concept of judicial notice extends to information gathered in informal inquiries with experts.

That the trend is toward judicially noticing certain evidence normally not admitted is apparent, particularly in cases involving scientific and technical issues. With the trend to extend the scope of judicial notice to facts of verifiable certainty, the cases show an increasing probability that the courts will judicially notice what has previously been excluded under the hearsay rule.[25] The irony of the situation is that evidence which but for the hearsay rule would be admitted and left to the jury for determination as to its validity and weight will now be admitted freed from those policies of proof which the law otherwise deems paramount to the ascertainment of the truth in adjudication.

D. *Hearsay as Circumstantial Evidence*

Courts often circumvent the hearsay rule by treating the out-of-court statement as circumstantial evidence which differs from direct evidence in that the witnesses do not testify directly as to material facts, that is, they do not assert the occurrence or non-occurrence of material facts of their own knowledge, but rather relate facts from which the trier of fact may infer that the material fact occurred or did not occur.[1] Historically, the hearsay rule excluded extrajudicial declarations used for either purpose.[2] The most noteworthy example of the refusal to accept hearsay as circumstantial evidence is *Wright v. Doe d. Tatham*[3] where, on the issue of testamentary capacity, letters written to the testator which contained no assertions that the testator was sane were excluded. By the end of the

22 Parker v. Brown, 317 U.S. 341 (1943).

23 Richmond & Central Ry. v. Richmond R.R., 96 Va. 670, 674, 32 S.E. 787, 788 (1899).

24 Gordon, Rankin & Co. v. Tweedy, 74 Ala. 232 (1883).

25 Evidence of the extrajudicial conduct of animals has often been excluded as hearsay, but two courts have gotten around the hearsay problem by taking judicial notice of the instincts of the animals. Hodge v. State, 98 Ala. 10, 13 So. 385 (1893) (bloodhounds tracking); State v. Wagner, 207 Ia. 224, 222 N.W. 407 (1928) (chickens coming home to roost).

1 Devine v. Delano, 272 Ill. 166, 179-80, 111 N.E. 742, 748 (1916); *see* Michael & Adler, *The Trial of an Issue of Fact,* 34 COLUMN. L. REV. 1224, 1276-77 (1934); Patterson, *The Types of Evidence: An Analysis,* 19 VAND. L. REV. 1, 4-8, 13-14 (1965). *See generally* WIGMORE § 25.

2 *See* THAYER 501.

3 5 Cl.&F. 670, 7 Eng. Rep. 559 (H.L. 1838).

nineteenth century, however, a trend in the direction of admitting hearsay as circumstantial proof was discernible.[4]

The key is to determine the purpose for which the declaration is offered. Suppose the statement "I am Napoleon" were offered. If the proponent sought to establish the truth of that assertion, it would be treated as hearsay and would be inadmissible unless it fell into one of the exceptions. On the other hand, if it is offered as a circumstance which tends to prove the declarant's insanity, it would not be treated as hearsay or rather it would not be that type of hearsay that offends the hearsay rule. Hinton[5] and Morgan[6] challenge such treatment of the above declaration. Both insist that the evidence would be without probative value unless the trier of fact is asked to believe that the declarant believed it to be true. Under this view, the proponent is offering an assertion by an extrajudicial declarant and the evidence is within the ambit of the hearsay rule. The better view seems to be that hearsay dangers are involved, but the risks are so slight in such instances that the evidence should not be excluded.[7] Ironically, the exceptions are justified by an almost identical rationale.[8] The courts have often confused hearsay used circumstantially with hearsay that is covered by one of the exceptions.[9]

Bridges v. State[10] is one of the most frequently cited cases representing the trend toward using hearsay as circumstantial evidence. There a seven-year-old girl before trial described in detail the room of a man accused of taking indecent liberties with her. Over hearsay objections, the court admitted the evidence saying:

> It is true that testimony as to such statements was hearsay and, as such,

[4] *See* THAYER 522-23. *But see* Thompson v. Manhattan Ry., 11 App. Div. 182, 42 N.Y.S. 896 (1896).

[5] *Hinton, States of Mind and the Hearsay Rule,* 1 U. CHI. L. REV. 394, 397-98 (1934). The facts of at least one case closely resemble those in the example. Sollars v. State, 73 Nev. 248, 316 P.2d 917 (1957). The court treated the declarations as circumstantial evidence.

[6] Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 202-03 (1948). *See also* WIGMORE §§ 218, 1715, 1790; Rucker, *The Twilight Zone of Hearsay,* 9 VAND. L. REV. 453, 475 (1956).

[7] *See* American Luggage Works, Inc. v. United States Trunk Co., 158 F.Supp. 50, 53 (D. Mass. 1957).

[8] *See* WIGMORE § 1420, at 22-23. *See also* Strahorn, *A Reconsideration of the Hearsay Rule and Admissions,* 85 U. PA. L. REV. 485, 487 (1937). *But see* Seligman, *An Exception to the Hearsay Rule,* 26 HARV. L. REV. 146, 156 (1913).

[9] *See, e.g.,* Cook v. Latimer, 184 So.2d 807 (Ala. 1966). The court should have admitted the hearsay as circumstantial evidence or under the mental states exception rather than under the res gestae exception.

[10] 247 Wis. 350, 19 N.W.2d 529 (1945), *noted in* 44 MICH. L. REV. 480 (1946).

> inadmissible if the purpose for which it was received had been to establish thereby that there were in fact the stated articles in the room. . . . That, however, was not in this case the purpose for which the evidence as to those statements was admitted. It was admissible in so far as the fact that she had made the statements can be deemed to tend to show that at the time those statements were made . . . she had knowledge as to articles and descriptive features which, as was proven by other evidence, were in fact in or about that room and house.[11]

These statements were circumstantial proof that she had knowledge of the room which tended to prove that she had been in the room at some time before. Morgan, in commenting on the case, said that the value of the evidence depends on the perception, memory, and veracity of the girl and, because these involve hearsay dangers, the evidence should be classified as hearsay.[12] But McCormick feels that the evidence has value aside from her veracity.[13] He speaks of her statements as a "mental trace" of her visit to the room. The justification for such a position would be that the likelihood of her having been in the room is so great when all of the circumstances including her statements are viewed together that the risks involved in receiving the evidence are substantially reduced. Here the courts are inclined to confuse the rationale of circumstantial evidence with the rationale of the res gestae exception rather than with that of the mental states exception.

Hearsay admissible under the res gestate exception owes its trustworthiness to other circumstances in that mass of circumstantial facts which is labeled the "res gestate." [14] According to Thayer, each fact supports and is supported by the other facts which make up the res gestate "in their tendency to prove some principal fact. . . ." [15] Spontaneous exclamations,

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[11] 247 Wis. at 364, 19 N.W.2d at 535.

[12] Morgan, *The Law of Evidence, 1941-1945,* 59 HARV. L. REV. 481, 544-45 (1946).

[13] MCCORMICK 467.

[14] *See* THAYER 522-23. Thayer did not classify spontaneous exclamations under the res gestae rule. He gave res gestae its original meaning and defined the rule as allowing hearsay to be admitted because of a "special intimacy of connection with the admissible fact." *Ibid.* The term has been abused to such an extent that courts have often admitted facts on the basis that they shed some light on a material fact in evidence. *See, e.g.,* State v. Hill, 241 La. 345, 129 So.2d 12 (1961). *See also* BAKER, THE HEARSAY RULE (1950); Morgan, Book Review, 5 VAND. L. REV. 672, 675 (1952); Thayer, *Bedingfield's Case: Declarations as Part of the Res Gesta,* 14 AM. L. REV. 817 (1880), 15 AM. L. REV. 1, 9-10 (1881). The notion that a declaration made within a reasonable time after a startling event is admissible as part of the res gestae developed in the first part of this century. Actually, it is a misapplication of the res gestae rule and has led to much confusion. *See* Hotzoff, *Institute in Practical Evidence,* 18 F.R.D. 367, 376 (1956).

[15] THAYER 523.

which analytically do not belong in the res gestae category,[16] owe their trustworthiness to the fact that the declarant must have made such statements when he would not have been inclined toward or capable of falsehood.[17] The distinction is obvious: some hearsay owes its trustworthiness to the fact that it is substantially corroborated by other evidence without regard to the declarant's lack of a motive to falsify;[18] other hearsay owes its trustworthiness to the fact that psychological factors operating in the declarant himself make it more likely that he would be sincere and accurate than if such factors were not present.[19] The mere fact that several facts all tending to prove the same proposition occur together enhances the probative value of each. As Weinstein has demonstrated, a single piece of hearsay standing alone may have insufficient probative value to warrant its admission.[20] But if that same hearsay is only one of a number of facts tending to prove a single material fact, the other facts may increase the probability that what the hearsay statement asserts is true. As a result, the mere occurrence of such a declaration has probative force of its own.[21]

Consider, for example, the situation in which results of a survey are offered. As pointed out earlier,[22] such survey evidence may not under certain circumstances come in under the mental states exception. Yet the mere fact that a large number of people were polled enhances the trustworthiness of each response. Resorting to first principles, as Thayer would say,[23] courts have admitted the results because of the great probative value of such evidence while ignoring or flatly refusing to follow established rules of evidence.[24] In such cases the courts have been unable to resort to the concept of circumstantial evidence because the hearsay evidence was obviously offered to prove the truth of the statements or because receipt of the evidence for limited purposes involved too subtle a distinction

16 *See* Holtzoff, *supra* note 14, at 376.

17 Ammundson v. Tinholt, 228 Minn. 115, 36 N.W.2d 521, 7 A.L.R.2d 1318 (1949). Wigmore disagreed with Thayer on the admissibility of declarations which were contemporaneous with the material fact. Wigmore treated these apart from res gestae, but required that the declaration be made while under some emotional shock or pressure so that the statement would be made without a chance to fabricate. WIGMORE § 1750.

18 *See* Houston Oxygen Co. v. Davis, 139 Tex. 1, 6, 161 S.W.2d 474, 476, 140 A.L.R. 868, 872 (1942), *discussed in* MAGUIRE, *supra* note 9, at 147-48; Weinstein, *The Probative Force of Hearsay*, 46 IOWA L. REV. 331, 343 (1961).

19 *See* WIGMORE § 1420, at 223.

20 *See* Weinstein, *supra* note 18, at 333.

21 *See* People v. Barnhart, 66 Cal. App.2d 714, 153 P.2d 214 (1944).

22 *See* p. 164, *supra.*

23 THAYER 523.

24 *See, e.g.,* American Luggage Works Co. v. United States Trunk Co., 158 F. Supp. 50, 53 (D. Mass. 1957)

for the trier to make.[25] It would seem to be the better course to look to the relative probative value of the hearsay rather than to arbitrary concepts which exclude much that is of great value and involves minimal risk.[26]

The discussion of circumstantial use of hearsay necessarily involved cases in which the distinction between circumstantial and direct evidence was blurred or in which the courts found themselves in that marginal area between the two concepts. In the section that follows, situations will be encountered which clearly involved hearsay. Courts were forced to develop new theories or to rejuvenate forgotten ones in order to justify the admission of hearsay evidence that was inadmissible both under the exceptions and as circumstantial evidence.

E. *Hearsay as Corroborative Evidence*

There is a continuous, but almost imperceptible line of authority stretching back to the period before the emergence of the hearsay rule as a rigid rule of exclusion which allows hearsay evidence to be received if it corroborates other evidence.[1] Even after the rule became settled, hearsay clearly was admitted for such a purpose.[2] Both Wigmore and Morgan recognize this exception as a survival of the old notion about sufficiency and quantity of evidence.[3] There is a hint that the court recognized this

[25] *See* United States v Aluminum Co. of America, 35 F.Supp. 82 (S.D.N.Y. 1940); Zeisel, *The Uniqueness of Survey Evidence,* 45 CORNELL L.Q. 322, 334 (1960).

[26] *See* Weinstein, *supra* note 18, at 344.

[1] Rolfe v. Hampden, 1 Dyer 53b, 73 Eng. Rep. 117 (K.B. 1541); Thomas's Case, 1 Dyer 99b, 73 Eng. Rep. 218 (K.B. 1553) (One of two witnesses may testify from hearsay.); Raleigh's Trial, 2 How. St. Tr. 1, 18 (1603); Adams v. Canon, 1 Dyer 53b, 73 Eng. Rep. 117 n.15 (K.B. 1622); Knox's Trial, 7 How. St. Tr. 763, 790 (1679); Lord Russell's Trial, 9 How. St. Tr. 577, 613 (1683); Cole's Trial, 12 How. St. Tr. 875, 883 (1692); Braddon, Observations on the Earl of Essex' Murder, 9 How St. Tr. 1229, 1272 (1725):

> It is true, no man ought to suffer barely upon hearsay evidence; but such testimony hath been used to corroborate what else may be sworn.

Wright v. Doe d. Tatham, 5 Cl. & F. 670, 7 Eng. Rep. 559 (H.L. 1838) (dictum); Atkins v. Commonwealth, 132 Va. 500, 505-07, 110 S.E. 379, 380-81 (1922); Lucas v. Morefield, 18 La. App. 79, 137 So. 633 (1931); Goldthwaite v. Sheraton Restaurant, 154 Me. 214, 221-24, 145 A.2d 362, 368 (1958) (". . . such evidence may properly be given weight as *corroborative* of other competent legal evidence, but will not *alone* support a verdict or finding."); Robinson v. Commonwealth, 207 Va. 66, 68-69, 147 S.E.2d 730, (1966) (dictum); Fox v. Commonwealth, 207 Va. 701, 705, 152 S.E.2d 60, 64 (1967). *See also* MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 147-48 (1947); Payne, *The Mysteries of Virginia's Res Gestae Rule,* 18 WASH. & LEE L. REV. 17, 36 (1961).

[2] *See* WIGMORE § 1364, at 17; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 181 (1948).

[3] *See* WIGMORE § 1364, at 17; Morgan, *supra* note 2, at 181.

exception in *Wright v. Doe d. Tatham.*[4] Clearly, that court would not allow hearsay to be admitted as circumstantial evidence, but a majority of the court would have admitted letters written to the testator if there had been some independent evidence that he had acted upon them.[5] This would not have altered the hearsay character of the letters, but such independent evidence would have enhanced their probative value. In this case, the hearsay would seem to be rendered admissible by the corroboration of other evidence whereas formerly hearsay was admitted because *it* was the corroborating evidence.

Unlike the exceptions that are predicated upon some psychological factor which supposedly makes it more likely that the declarant is speaking truthfully, hearsay is admitted here because the value of the evidence is enhanced by other evidence. To that extent it closely resembles circumstantial use of hearsay.[6] While the fact that the declarant is facing death or risks losing property when he makes the statement may make it more likely that the statement is trustworthy, a statement is also more likely to be trustworthy where other evidence corroborates it. In this latter instance, the trustworthiness is due to factors entirely apart from the declarant himself. The mere fact that the hearsay blends in with other evidence makes it stronger and more reliable.[7]

A major area of corroborative hearsay in which the hearsay rule has been ignored is prior unsworn identifications of an accused.[8] A number of courts have held that where a witness, who has previously identified an accused, is on the witness stand subject to cross examination, a predominant hearsay danger is not present and therefore the witness' prior identification should be admitted.[9] The courts also contend that, due to the shorter time lapse involved, the testimonial value of the out-of-court identification is stronger than the in-court identification.[10] The argument has con-

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[4] 5 Cl. & F. 670, 7 Eng. Rep. 559 (H.L. 1838).

[5] *See* MAGUIRE, WEINSTEIN, CHADBOURN & MANSFIELD, CASES AND MATERIALS ON EVIDENCE 372 (5th ed. 1965).

[6] *See* THAYER 522-23.

[7] *See* Weinstein, *The Probative Force of Hearsay,* 46 IOWA L. REV. 331, 333 (1961).

[8] *See* WIGMORE § 1130; Annot., 71 A.L.R.2d 451 (1960); 36 MINN. L. REV. 530 (1952). Prior sworn identifications of an accused are not hearsay. United States v. DeSisto, 329 F.2d 929 (2d Cir.), *cert. denied,* 377 U.S. 979 (1964).

[9] Ellicott v. Pearl, 12 U.S. (10 Pet.) 179 (1836); Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925); Arrow v. State, 273 Ala. 337, 139 So.2d 309 (1961); Loser v. E.R. Bacon Co., 201 Cal. App.2d 387, 20 Cal. Rptr. 221 (1962); Fernandez v. Di Salvo Appliance Co., 179 Cal. App.2d 240, 3 Cal. Rptr. 609 (1960); State v. Sinclair, 49 N.J. 525, 231 A.2d 565 (1967); Commonwealth v. Trignani, 185 Pa. Super. 332, 138 A.2d 215 (1958).

[10] United States v. Farzano, 190 F.2d 687 (2d Cir. 1951); People v. Gould, 54 Cal.2d

siderable appeal because it relies on the probative value of the prior identification and the absence of a major hearsay danger.[11] As one of the dangers inherent in hearsay testimony is the inability to cross examine the extra-judicial declarant,[12] this danger is not present where the witness who makes a pre-trial identification is on the witness stand.[13]

A logical extension of the argument, however, would be that in every instance where a witness is subject to cross examination, his prior unsworn statements should be admitted.[14] Yet what this argument ignores is that, although a major hearsay danger has been removed, there are other dangers inherent in freely admitting a witness' prior unsworn statements as substantive evidence. In prior identifications of an accused, for example, there are numerous dangers which should be considered by a court before the prior identification is admitted into evidence.[15]

In the past, courts have not distinguished between the types of identification techniques employed by the police, nor have they determined if the identification was "suggested" by the police.[16] Courts have also admitted the testimony of a police officer present at the line-up to state that the witness positively identified the accused.[17] This testimony has been admitted

621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960); State v. Frost, 105 Conn. 326, 135 A.2d 446 (1926); Judy v. State, 218 Md. 168, 146 A.2d 29 (1958); Bosoff v. State, 208 Md. 643, 119 A.2d 917 (1956); Commonwealth v. Locke, 335 Mass. 106, 138 N.E.2d 359 (1956); State v. Williams, 39 N.J. 471, 189 A.2d 193, *cert. denied,* 374 U.S. 855 (1963); State v. Simmons, 63 Wash.2d 17, 385 P.2d 389 (1963); Annot., 71 A.L.R.2d 449 (1960); 109 U. PA. L. REV. 1182 (1961).

[11] Wigmore § 1130; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 192 (1948); Strahorn, *supra* note 3, at 498; 78 HARV. L. REV. 887, 888-89 (1965).

[12] MCCORMICK § 39; 5 WIGMORE § 1403.

[13] People v. Gould, 54 Cal.2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960); Johnson v. State, 237 Md. 283, 206 A.2d 138, (1965); State v. Pitchford, 324 S.W.2d 684 (Mo. 1959); State v. Matlack, 49 N.J. 491, 231 A.2d 369 (1967); Comment, *Admissibility of Extrajudicial Identification as Substantive Evidence,* 19 MD. L. REV. 201, 215 (1959).

[14] MCCORMICK § 39; Morgan, *supra* note 3, at 192.

[15] *See* Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966), *noted in* Comment, *Due Process in Extrajudicial Identification,* 24 WASH. & LEE L. REV. 107, 109 (1967); 109 U. PA. L. REV. 1182 (1961); 8 U.C.L.A. 467 (1961).

[16] *See, e.g.,* People v. Cook, . . Cal. App.2d ....., 60 Cal. Rptr. 133 (1967) (photograph—picture admissible but writing on mug shot inadmissible); People v. Gould, 54 Cal.2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960) (photographs); Miller v. State, 224 A.2d 542 (Del. 1966) (line up); State v. Childs, 198 Kan. 4, 422 P.2d 898 (1967) (photograph); State v. Owen, 15 Utah 2d 123, 388 P.2d 797 (1964) (Photographs); 8 U.C.L.A. L. REV. 407 (1961). *But see* Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966) (voice identification held violation of due process). Suggestive line-up procedures have been severely criticized by the United States Supreme Court. State v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967). *See also* Edison v. United States, 272 F.2d 684, 686 (10th Cir. 1959); 4 WIGMORE § 1130.

[17] *See, e.g.,* State v. Chaney, 5 Ariz. App. 530, 428 P.2d 1004 (1967); State v.

even when the witness either refuses, or is unable, to identify the accused during the trial.[18] The danger in admitting this type of testimony is obvious. The police officer cannot be the proper subject of cross examination because he has never identified the defendant. Yet the jury will, more than likely, accept the testimony as if it were made by the identifying witness.

What the courts must consider, then, before admitting into evidence a prior unsworn identification of an accused is not the hearsay danger involved, but the probative value of the out-of-court identification. To determine probative value, the courts must consider the type of line-up technique employed by the police, whether the witness will identify the accused during the trial, and if the witness has a motive to falsify on the witness stand.[19]

In criminal cases involving statutory requirements of corroboration, there is a tendency for the courts to relax the rules of admissibility to comply with the corroboration requirement.[20] There is also a practice in some courts to look for corroborating evidence in criminal cases involving sexual offenses, even without the statutory requirement.[21] Due to the need for corroborating evidence, hearsay has been admitted as substantive evidence in cases involving perjury,[22] seduction,[23] sodomy,[24] and criminal confessions.[25]

Taylor, 99 Ariz. 151, 407 P.2d 106 (1965); People v. Slobovian, 31 Cal. 2d 555, 191 P.2d 1, *cert. denied,* 335 U.S. 835 (1948); Gallegos v. People, 157 Colo. 484, 403 P.2d 864 (1965), *cert. denied,* 383 U.S. 971 (1966); Johnson v. State, 237 Md. 283, 206 A.2d 138 (1965); State v. Matlack, 49 N.J. 491, 231 A.2d 369 (1967).

[18] People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960); Bullock v. State, 219 Md. 67, 148 A.2d 133 (1959); State v. Jones, 152 N.W.2d 67 (Minn. 1967); Commonwealth v. Johnson, 201 Pa. Super. 441, 193 A.2d 833 (1963); State v. Simmons, 63 Wash.2d 17, 385 P.2d 389 (1963). *But see* State v. Zaragosa, 6 Ariz. App. 80, 430 P.2d 426 (1967); Commonwealth v. Sanders, 386 Pa. 149, 125 A.2d 442 (1956).

[19] In the past, courts have considered the suggestive nature of the line-up as affecting its weight. Note, *Lawyers and Lineups,* 77 YALE L. J. 390, 391 (1967). The test proposed here is that the probative value of the out of court identification control its admissibility rather than its weight because a jury does not have the intellectual potential to properly weigh evidence. *See* 109 U. PA. L. REV. 1182, 1185 (1961). *But see* 78 HARV. L. REV. 887, 889 (1965).

[20] *See* WIGMORE § 1061; Yahuda, *Unconscious Corroboration,* 116 NEW L. J. 607 (1966). *But see* Note, *Developments in the Law—Confessions,* 79 HARV. L. REV. 935, 1075 (1966).

[21] *E.g.,* Goodsaid v. District of Columbia, 187 A.2d 486 (D.C. App.), *cert. denied,* 375 U.S. 867 (1963). *See also* Yahuda, *supra* note 20, at 607

[22] People v. Laymon, 117 Cal. App. 476, 4 P.2d 244 (1931).

[23] Commonwealth v. Atkins, 132 Va. 500, 110 S.E. 379 (1922).

[24] Konvalinka v. United States, 162 A.2d 778 (D.C. Mun. App. 1960), *aff'd,* 287 F.2d 346 (D.C. Cir. 1961).

[25] Stickney v. State, 169 Tex. Crim. 533, 336 S.W.2d 133 (1960), *cert denied,* 363 U.S. 807 (1961).

In civil cases, corroborative hearsay has been admitted as substantive evidence in cases involving extra-judicial statements made by an agent against his principal. An agent's declarations concerning his status as agent to a third person are inadmissible hearsay, unless admitted as res gestae exceptions to the hearsay rule or as impeaching evidence.[26] A number of courts, however, admit the agent's prior declarations as substantive evidence once the fact of agency has been proved by other evidence.[27] The agent's statements then are admitted to corroborate the evidence already introduced. Other courts have extended this principle to admit an agent's prior unsworn statements when a prima facie case of agency has been established,[28] or when later evidence is introduced to corroborate the hearsay statements.[29]

The courts do not amplify their reasons for admitting the corroborative hearsay into evidence. Generally, the res gestae label is placed on this type of corroborating evidence, but that designation is of little or no value.[30] What the courts should emphasize in admitting corroborative hearsay is that the hearsay dangers are slight in admitting evidence which takes

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[26] *See, e.g.,* Trigollos v. American Oil Co., 231 Md. 95, 188 A.2d 891 (1963) (res gestae); Gorman v. McCleaf, 369 Mich. 237, 119 N.W.2d 636 (1963) (res gestae); Brown Express Co. v. Dieckman, 344 S.W.2d 501 (Tex. 1961) (res gestae); Bankers Ins. Co. v. Henderson, 196 Va. 195, 83 S.E.2d 424 (1954) (impeachment); Sullivan v. Associated Dealers, 4 Wash.2d 352, 103 P.2d 489 (1940) (impeachment); 3 C.J.S., *Agency* § 322, at 280 (1936); Annot., 150 A.L.R. 623 (1944).

[27] *E.g.,* International Bhd. of Teamsters v. United States, 275 F.2d 610 (4th Cir. 1960); Ralston Purina Co. v. Novak, 111 F.2d 631 (8th Cir. 1940); Wilson and Co., Inc. v. Clark, 259 Ala. 619, 67 So.2d 898 (1953); Pullman Co. v. Meyer, 195 Ala. 397, 70 So. 763 (1915); Miller-Brent Lumber Co. v. Stewart, 166 Ala. 657, 51 So. 943 (1909); State v. Creed, 2 Conn. Cir. 435, 200 A.2d 551 (1964); Tregallos v. American Oil Co., 231 Md. 95, 188 A.2d 691 (1963); Boden v. Corbin, 95 Ohio App. 249, 115 N.E.2d 711 (1952); Norton v. Harmon, 102 Okla. 36, 133 P.2d 206 (1943). *But see* Reather v. Ward Furniture Co., 238 Ark. 70, 378 S.W.2d 700 (1964); Shektonian v. Kenny, 156 Cal. App.2d 576, 389 P.2d 699 (1958).

[28] *See* Baptist v. Shanen, 145 Conn. 605, 145 A.2d 592 (1958); Bell v. Washam, 82 Ga. App. 63, 60 S.E.2d 408 (1950); Turner v. Burford Buick Corp., 201 Va. 693, 112 S.E.2d 911 (1960). In *Turner,* the prima facie presumption of agency arose because the agent was driving the principal's car. Since the likelihood of this arising in agency situations is strong, the Virginia courts should be confronted with hearsay declarations in a number of agency cases. Whether a prima facie presumption lends probative value to the agent's declaration has been questioned by Laughlin, *Evidence, 1959 Annual Survey of Virginia Law,* 46 VA. L. REV. 1506, 1516 (1960). *See also* 18 WASH. & LEE L. REV. 151 (1961).

[29] Lallatin v. Terry, 81 Idaho 238, 340 P.2d 112 (1959); Haywood v. Yost, 72 Idaho 415, 242 P.2d 971 (1952); Thomas v. Hearst Consol. Publications, Inc., 169 Wash. 290, 60 P.2d 106 (1936).

[30] Payne, *The Mysteries of Virginia's Res Gestae Rule,* 18 WASH. & LEE L. REV. 17 (1961).

its probative value from other evidence already introduced. Therefore, with the need for a rigid rule minimized, the probative value of the statement should be considered as the criterion for admissibility, rather than whether the statement is, or is not, hearsay.

As has been shown in prior unsworn identifications of an accused, a substantial number of courts have abandoned the hearsay rule; and in certain agency situations, the rule has largely been circumvented. In a third category of cases, involving telephone calls to gambling or betting houses, the courts admit corroborative hearsay by holding the hearsay rule inapplicable.[31] The typical example involves a police raid on a suspected betting establishment. The police answer the phone during the raid and receive calls from would-be betters. The telephone conversations are then offered in court as proof of the use of the premises.[32] Generally, the courts admit the conversations, contending that no hearsay is involved because the prosecution does not intend to prove the truth of the matters asserted in the conversations. On the contrary, the courts argue, the telephone conversations are offered only to prove that the establishment was used for gambling purposes.[33]

Basically, the courts argue that the telephone calls are circumstantial evidence, so there is no hearsay problem involved.[34] Yet this argument is not entirely convincing. The fact that twenty-five persons called a particular room or apartment only tends to show that the phone was in working order, unless the conversations are introduced into evidence.[35] Once the

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[31] *See, e.g.,* United States v. Novick, 124 F.2d 107 (2d Cir. 1941), *cert. denied,* 315 U.S. 813, *reh. denied,* 315 U.S. 830 (1942); People v. Ines, 90 Cal. App.2d 495, 203 P.2d 540 (1949); State v. Tolisano, 136 Conn. 210, 70 A.2d 118 (1949).

[32] *See* People v. Joffee, 45 Cal. App.2d 233, 113 P.2d 901 (1941).

[33] *See* People v. Barnhart, 66 Cal. App.2d 714, 153 P.2d 214 (1944); State v. Roberts, 4 Conn. Cir. 271, 230 A.2d 239 (1967); State v. Tolisano, 136 Conn. 210, 70 A.2d 118 (1949); Chacon v. State, 102 So.2d 578 (Fla. 1959). *Accord,* People v. Carella, 191 Cal. App.2d 115, 12 Cal. Rptr. 446 (1961); Courtney v. State, 18 Md. 1, 48 A.2d 430 (1946); McLaughlin v. State, 123 Neb. 861, 244 N.W. 799 (1932).

[34] The contention is that the telephone call is a fact like other betting paraphenalia from which we can infer use of the premises. Thayer finds a justification for this contention. THAYER 522-23:

> There is, sometimes, a tendency to regard a hearsay statement as admissible if it be one of a set of facts giving and reflecting credit, each to the other, on the principle of what is called circumstantial evidence. . . . No doubt in point of reason, hearsay statements often derive much credit from the circumstances under which they are made . . . and it would in reason have been quite possible to shape our law in the form that hearsay was admissible, as secondary evidence, whenever the circumstances of the case alone were enough to entitle it to credit, irrespective of any credit reposed in the speaker.

[35] *See* People v. Barnhart, 66 Cal. App. 2d 714, 153 P.2d 214 (1944) (concurring opinion).

conversations are introduced, their hearsay nature cannot be ignored because the truth of the matters asserted in the conversations is not self-evident.[36] If the telephone calls were made by pranksters, then any number of calls would fail to show the nature of the premises, and would be of such slight probative value as to be inadmissible.[37] What is obvious, however, is that from the number of calls received taken together with the betting paraphernalia found on the premises, there is a strong presumption that the calls were placed by would-be betters.[38] In other words, the probative value of the calls is strengthened because they corroborate each other and the other independent substantive evidence already introduced. What the courts could also emphasize, to further strengthen the probative value of the telephone conversations, is their non-assertive nature.[39]

The major evidence text writers generally define hearsay as assertive statements or conduct, and they contend that non-assertive statements or conduct are not hearsay.[40] The courts have not recognized this subtle distinction in a number of cases which deal with non-assertive conduct in breach of warranty situations, where evidence of no-complaints is in issue.[41] The most common example of a no-complaint case occurs in an action by Seller against Buyer for the purchase price of allegedly defective goods rejected by Buyer. Seller introduces evidence to prove that the goods were of merchantable quality, and to further prove his point, Seller offers evidence to show that a number of other reputable buyers received the identical goods and did not complain. Buyer objects to the admissibility of the evidence as hearsay, and the courts, refusing to discuss the non-assertive nature of the evidence, either reject the evidence as hearsay or admit the evidence, contending that no hearsay problem is involved.[42] Similar examples may be found in cases involving the sale of foods and cosmetics to consumers.[43]

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36 Despite the numerous definitions of hearsay, broadly it should encompass "any action as declaration involving a hearsay danger." Weinstein, *supra* note 7, at 331.

37 *Id.* at 343.

38 *Ibid.*

39 *Ibid.*

40 *E.g.*, Falknor, *Silence as Hearsay,* 89 U. PA. L. REV. 192, 196 (1940); McCormick, *Borderland of Hearsay,* 39 YALE L. J. 489, 491 (1930); Morgan, *Hearsay and Non-Hearsay,* 48 HARV. L. REV. 1138, 1144 (1935); Seligman, *An Exception to the Hearsay Rule,* 26 HARV. L. REV. 146, 148 (1912); Weinstein, *supra* note 7, at 343; WIGMORE § 459.

41 See cases listed in MCCORMICK § 229 n. 26; 24 N.C.L. Rev. 274, 279 n.24 (1946).

42 *See* Althrug v. William Whitman Co., Inc., 185 App. Div. 744, 173 N.Y.S. 669 (1919) (evidence of no complaint is hearsay); St. Louis Sw. Ry. Co. v. Arkansas & Tex. Grain Co., 42 Tex. Civ. App. 125; 95 S.W. 656 (1906) (evidence of no complaint not hearsay).

43 *See, e.g.*, Admitted: Katz v. Delokey Hat Co., 97 Conn. 665, 118 Atl. 88 (1922);

When the evidence of non-assertive conduct is admitted, common sense rather than a rule of evidence is invoked as a rationale.[44] As the Massachusetts court has pointed out: "There is a reasonable inference that if no one complained no one suffered." [45] Massachusetts is one jurisdiction which has admitted evidence of non-assertive conduct in cases other than those involving a breach of warranty. In *Silver v. New York Central R. Co.*,[46] the plaintiff, who suffered from a circulatory ailment, was a passenger in defendant's pullman car. The plaintiff claimed that the car was too cold and aggravated her condition, so that she suffered undue discomfort. The porter testified that the car was not cold and offered in evidence the fact that none of the eleven other passengers in the car had complained. The lower court excluded the evidence as hearsay, but the appellate court reversed, basing its finding on the probative value of the evidence offered.[47] The court contended that if all the passengers in the car were under the same conditions, then ". . . ordinary prudence might seem to require that one speak out." [48]

Obviously the people in the car had no reason to remain silent if they were cold; therefore, the probative value of the testimony is strong and any hearsay objection weak.[49] Furthermore, the court also hinted that the non-assertive conduct was a type of circumstantial evidence because it "would be offered on the basis of a common condition which all in the car encountered." [50] One could reasonably infer that if no one complained, no one was cold; if no one were cold obviously the car was not unreasonably cold.[51] The court in *Silver* could just as easily have admitted the testimony

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Ogden v. Rosedale Inn, 189 So. 162 (La. App. 1939); Jacquot v. William Fileni & Sons, Co., 337 Mass. 312, 149 N.E.2d 635 (1958); Monahan v. Economy Grocery Stores Corp., 282 Mass. 548, 185 N.E. 34 (1938); Gracey v. Waldorf System, 251 Mass. 76, 146 N.E. 232 (1925). Rejected: United States v. 11¼ Dozen Packages, 40 F. Supp. 208 (W.D.N.Y. 1941); Van Lill Co. v. Federick City Packing Co., 155 Md. 303, 141 Atl. 898 (1928); Osborne & Co. v. Bell, 62 Mich. 214; 28 N.W. 841 (1886); George W. Sanders Line Stk. Comm. Co v. Kincaid, 168 S.W. 977 (Tex. Civ. App. 1914).

[44] Mears v. New York, N.H. & H. R.R., 75 Conn. 171, 52 Atl. 610 (1902) (It would have been reasonable for the carrier to remark about the piano's condition.)

[45] Landfield v. Albiani Lunch Co., 268 Mass. 528, 168 N.E. 160 (1929).

[46] 329 Mass. 14, 105 N.E.2d 923 (1952).

[47] 105 N.E.2d at 926.

[48] 105 N.E.2d at 927.

[49] "It was highly unlikely that all the other passengers were Eskimos or stockholders of the company or masochists." Weinstein, *supra* note 7, at 343.

[50] Silver v. New York Central R.R., 329 Mass. 14, 105 N.E.2d 923, 926 (1952).

[51] This is another example of the evidentiary strength of corroborative hearsay. A hearsay danger is so slight in the *Silver* case that the court treats the non-assertive conduct as a type of circumstantial evidence. The same rationale is used by the

as corroborative evidence to substantiate the porter's testimony because of its high probative value. There are several isolated cases which have followed this argument.

In *Foelkner v. Perkins*,[52] the defendant entered into a written contract with the plaintiff and alleged that by oral agreement, there was a modification of the contract. The defendant worked under the oral agreement, and evidence of his conduct was offered to prove that a modification had been entered into. The court held the evidence of conduct admissible to corroborate the defendant's earlier testimony, adding that there was less danger in admitting the evidence because the defendant was subject to cross examination.[53]

A similar factual situation was present in *Lucas v. Morefield*,[54] but hearsay statements rather than non-assertive conduct were involved here. The plaintiff brought an action against his employer for the unpaid portion of his salary. The defendant claimed that the original employment contract had been modified and the plaintiff's salary had been lowered. A mutual friend of both parties testified that the defendant informed him that he had been forced to cut plaintiff's salary. The mutual friend continued his testimony by saying that the plaintiff had told him that he had "to make some money on the outside because he had had his salary cut." [55] Both statements were admitted as corroborating evidence, not as hearsay, ". . . having been made at a time and under circumstances not suspicious." [56]

The standard established by the court in *Lucas v. Morefield* is one of trustworthiness in determining the admissibility of the evidence. What has become evident from this case and from those dealing with non-assertive conduct and prior consistent statements is that where the trustworthiness of the statement or conduct offered in evidence is not questioned, then the evidence should be admitted despite its hearsay character.[57] The standard to be applied by the courts should be one based on the probative value

courts in cases involving telephone calls to betting establishments and with good reason. The major objection to this rationale is that courts have a tendency to evoke judicial reasoning when in search of a rule of admissibility, but they then reject the reasoning for the rule. If instead of labelling a particular type of evidence as circumstantial or part of the *res gestae*, the courts determined its probative value, they could achieve flexibility without sacrificing the quality of the evidence.

[52] 197 Wash. 462, 85 P.2d 1095 (1938).

[53] *Id.*, 85 P.2d at 1097.

[54] 18 La. App. 79, 137 So. 633 (1931).

[55] *Id.*, 137 So. at 634.

[56] *Ibid.*

[57] *See also* Goodale v. Murray, 227 Iowa 843, 289 N.W. 450, 461 (1940).

of the evidence, not whether it falls within the stringent requirements of a rule more noted for its exceptions than its restrictions.[58]

Generally, in administrative hearings, the probative value of the evidence determines its admissibility.[59] Administrative tribunals, which are not tied to archaic rules of evidence, admit hearsay unless its evidentiary value is too remote. In *Union Drawn Steel Co. v. NLRB*,[60] a discharged employee had participated in picket line activities and was not rehired after the strike settlement. The employee testified that the foreman told him the mistake he made was going on the picket line. The foreman testified that he had said the employee was too old for the picket line, and he could have his job back when there was work available. The court admitted the employee's testimony because it was not remote, and because it was corroborated both by the company's hostility to the union and by the fact that the employee's place had been filled by other men.[61] Administrative tribunals apparently do not hesitate to receive corroborative hearsay, and treat it as any other type of evidence.[62]

Courts could effect the same result by looking to the probative value of the hearsay rather than arbitrarily classifying it as hearsay which must be excluded. To determine probative value, the courts should begin by testing the relevancy of the evidence introduced. If Fact A is introduced to prove material Fact Z, and it has a slight tendency to prove Fact Z, then Fact A has little probative value. Yet if Facts A, B, and C each has a slight tendency to prove Fact Z, then the probative value of each is enhanced by the other, and they should all be admitted in evidence. This is simply an example of one fact corroborating the other to give it strength and cogency, and ultimately to determine its admissibility.[63]

To place this example in the context of a case involving telephone calls to betting establishments, one need only replace the letters A, B, and C by actual telephone conversations. If, during a raid, the police received one phone call from a would-be better, the probative value of the call

58 "The hearsay rule is more famous for what it permits than what it forbids." Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 485, 487 (1937). "In the sea of admitted hearsay, the rule excluding hearsay is a small and lonely island." Weinstein, *supra* note 7, at 346.

59 In most jurisdictions by statute, the legal rules of evidence do not apply in administrative hearings. *See* DAVIS §§ 14.04, 14.05.

60 109 F.2d 587 (3d Cir. 1940).

61 *Id.* at 592.

62 Fox v. Commonwealth, 207 Va. 701, 705, 152 S.E.2d 60, 64 (1967). Reviewing courts, in fact, strain to find some independent evidence elsewhere in the record in order to corroborate the hearsay evidence. *See* DAVIS § 14.12, at 314.

63 *Cf.* THAYER 522-23; Weinstein, *supra* note 7, at 333: "The probative force of hearsay may, therefore, increase as it is fitted into a mosaic of other evidence."

would not be strong enough to render it admissible in evidence. But if the police received ten calls, the probative value of each call would become stronger as more calls were received, and, hence, the conversations could be admitted in evidence.[64] In these cases, each call corroborates the other, and further corroborates the evidence already gathered by the police from the betting paraphernalia found on the premises. How many calls would be sufficient to determine the admissibility of the evidence is a question for the trial court judge, and his determination of this question should be based on common sense and judicial discretion.[65]

The standard of admissibility that must be applied by the courts in the area of corroborative hearsay is that for any testimonial proof. Necessarily, the standard imposes a burden on the trial court judge, but no less of a burden than the heavy anachronistic weight of the hearsay rule. To facilitate the trial court judge's decision-making process, he may consider the evidence from a common sense viewpoint in determining its probative value. The standard proposed here is not new, nor should it be confined to corroborative hearsay.[66] But, at present, it is in this area that the courts have unquestionably drifted away from the stringent requirements of the hearsay rule, and it is here that the need is great for a protective evidentiary standard.

XII. Discretion in the Trial Judge and Certainty in the Law of Evidence

Of necessity, a simpler and more sensible hearsay rule entails greater discretion in the trial judge. Any system which eliminates discretion in favor of a fixed rule governing every situation in which hearsay is offered will be arbitrary and harsh.[1] Only the trial judge can weigh the dangers involved in receiving hearsay in a particular case against its probative value. Psychologists have shown that many of the assumptions upon which the exceptions are based are unrealistic.[2] Other critics question the utility and wisdom of any rule with so many exceptions.[3] Still others believe that

64 *See* Weinstein, *supra* note 7, at 342-43.

65 *Id.* at 338-39.

66 *See* Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise,* 54 A.B.A.J. 231, 236 (1968).

1 *Cf.* Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise,* 54 A.B.A.J. 231, 236 (1968).

2 *See* materials cited, *supra,* in note 23 of the Introduction.

3 *See* Strachan, *The Hearsay Rule,* 116 New L. J. 869 (1966), *quoting* the English Law Reform Committee:

the exceptions exclude hearsay that is often far more trustworthy than much that it admits.[4] The Model Code would not tie the trial judge down to any enumerated set of exceptions, but would allow him broad discretion in applying a general principle rather than specific rules.[5] The Uniform rules retain the enumerated exceptions, but give the judge a freer hand in applying them.[6] The amount of discretion granted by both proposals has been severely criticized.[7] At present, it is the greatest obstacle to reform of the hearsay rule.[8]

While certainty in the law of evidence is desirable, especially from the standpoint of the trial bar, it must not be allowed to supersede more important considerations. Whenever certainty can be achieved only by arbitrary and inconsistent rules of evidence that unduly restrict the amount of relevant evidence which the parties may present, then clearly it must give way. Undoubtedly, there are reasons of policy for excluding relevant evidence.[9] For example, evidence that would involve too many collateral issues, has too little cogency, is unduly repetitious, or is obtained by a violation of some extrinsic policy such as the privilege against unreasonable search and seizure should not be received.[10] But whatever interest there is in providing the trial attorney with a body of fixed rules by which he might safely determine what evidence will be admissible at the trial does not in itself warrant the exclusion of relevant, cogent evidence.

Ironically, the very uncertainty which the bar fears exists in large measure even under the traditional hearsay rule. Many courts have developed effective methods for avoiding the hearsay rule without frankly rejecting it.[11] Other courts have remained steadfast in their adherence to the tradi-

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> [The] rule in its present form with its numerous exceptions in our view lacks rational basis, results sometimes in injustice and often in considerable expense, and introduces much unnecessary complication in the preparation and hearing of civil actions.

[4] *See* McCormick § 300.

[5] Model Code of Evidence Rules 105, 303, 519; see McElroy, *Some Observations Concerning the Discretions Reposed in Trial Judges by the American Law Institute's Code of Evidence,* in Model Code of Evidence 356 (1942).

[6] Uniform Rule 45.

[7] *See* Stupher, *The Uniform Rules of Evidence: Government by Man Instead of by Law,* 29 Ins. Counsel J. 405, 406-07 (1962).

[8] *See* Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence,* 14 Vand. L. Rev. 725, 733 (1961).

[9] *See* Richardson, *Law and Policy: Emphasis on Exclusionary Rules of Evidence,* 53 Ky. L. J. 663 (1965).

[10] *See* Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence,* 10 U. Chi. L. Rev. 285 (1943).

[11] *See, e.g.,* Powell v. State, 332 S.W.2d 483 (Ark. 1960); Gray v. State Capital Life Ins. Co., 254 N.C. 286, 118 S.E.2d 909 (1961).

tional rule honoring its tenets in practice and refusing to pay lip service alone.[12] In the more liberal cases emanating from the former group, no clearly discernible pattern can be established. Reform here has been piecemeal.[13] This situation is perhaps inevitable in any reform accomplished by judicial decisions. The resulting confusion concerning the viability of the old hearsay rule at any given time and in any given common law jurisdiction is understandable. Often it has produced duplicity, which can cause cynicism and work hardship on litigants who must choose between the rule espoused by the court and the practice it actually follows.[14] In eliminating this undesirable condition, a frank renunciation of the traditional rule would, at least in this regard, result in a situation more favorable to the trial attorney than the present one.

The heart of the objection to greater discretion in the trial judge is not that certainty will be sacrificed, but that the trial judge cannot be trusted with such discretion. Critics argue that judges will abuse the power just as judges abused their power and discretion in the last century.[15] That view is not only lacking in substantial support,[16] but is also a dangerous premise to adopt. The trial judge already exercises broad discretion in areas of more importance than the reception of evidence.[17] Weighing the need for a more satisfactory system of determining the admissibility of evidence, the risk involved in granting the trial judge broader discretion seems warranted. It has been suggested that the proposal to give the judge more latitude is analogous to the proposal made in the last century that parties be allowed to testify.[18] No one seriously recommends today that parties should be

[12] *See, e.g.,* People v. Tunnacliff, 375 Mich. 298, 134 N.W.2d 682 (1965); Prince v. Flukinger, 381 S.W.2d 75 (Tex. Civ. App. 1964).

[13] See Cross, *The Scope of the Rule against Hearsay,* 72 L. Q. Rev. 91, 117 (1956).

[14] *Cf.* Keeton, *Creative Continuity in the Law of Torts,* 75 Harv. L. Rev. 463, 472 (1962). Professor Keeton criticizes those who would reform the law of torts by judicial decisions which ostensibly follow traditional tort law, but in actuality reach results that were not intended by traditional law.

[15] *See* Stopher, *supra* note 7, at 406-07. *But see* Swietlick & Henrickson, *Rule 303: The Keystone of the Code,* 1947 Wis. L. Rev. 88, 91 n. 12: "There has never been a hue and cry that trial judges have abused [the discretion of determining what evidence is legally relevant as opposed to logically relevant]."

[16] *See* Goodhart, *A Changing Approach to the Law of Evidence,* 51 Va. L. Rev. 759, 783 (1965); McCormick, *Law and the Future: Evidence,* 51 Nw. U. L. Rev. 218, 219 (1956); Morgan, *supra* note 8, at 733 (1961); Phillips, *Foreword to the Symposium on Evidence,* 5 Vand. L. Rev. 275 (1952); Smith, *supra* note 1, at 236; Weinstein, *The Probative Force of Hearsay,* 46 Iowa L. Rev. 331, 338 (1961).

[17] *See* Payne v. S.S. Nabob, 302 F.2d 803 (3d ed. 1962) (refusal to allow amendment to pretrial order); Hosie v. Chicago & Nw. Ry., 282 F.2d 639 (7th Cir. 1960) (severance of issues of liability and damages in personal injury case); State v. Schneider, 158 Wash. 504, 291 Pac. 1093, 72 A.L.R. 571 (1936) (change of venue).

[18] *See* Goodhart, *supra* note 16, at 783.

disqualified. In addition, the improvement in the manner of selecting, disciplining, and educating judges has changed markedly in the last century thereby minimizing the risk involved in giving them more discretion.[19]

XIII. Conclusion

Superficially, the hearsay rule has remained unchanged since its inception except for occasional additions to or realignment of its many exceptions. It has withstood direct attack by scholars and has survived periods of major legislative reform of procedural law in this century and the last. Yet, unquestionably, the rule has undergone much change beneath the surface. The more liberal courts have chosen not to wait for legislative reform, but have liberalized the rule in its practical application so that it might conform more closely to psychological reality and satisfy the growing demands of a modern society. These courts, then, have not only questioned the utility of the rule, but have attacked its theoretical foundation. Much of this liberalization has come about in response to the increasing attractiveness of non-judicial tribunals to litigants who do not share the attitude of those in the legal profession who consider the rule to be the cornerstone of freedom and the embodiment of fair play. These laymen share with scholars the belief that, simply because certain evidence is suspect, there is no justification for disregarding it altogether.

The product of this liberalization by judicial decision is unsatisfactory. Inconsistent holdings have resulted even within the same jurisdiction. The time for radical reform of the hearsay rule by legislation or by the adoption of court rules is long overdue. But the Uniform Rules of Evidence do not provide the thoroughgoing reform that is needed: it is admittedly a compromise proposal that leaves the root problem of the traditional hearsay rule untouched. The experience of non-judicial tribunals has demonstrated the exaggeration of those claims which picture the drastic restyling of the hearsay rule as an invitation to perjury, injustice, and chaos. These tribunals, with an approach to hearsay closely resembling that of the Model Code of Evidence, have developed an expeditious process for determining fact while preserving the opportunity to cross-examine. The same result could be accomplished in judicial proceedings by allowing the court to receive hearsay of the sort that reasonably prudent men would consider in their daily lives. Where the declarant is available and the circumstances are such that one would expect the proponent of the evidence to come forward with his strongest evidence, the court should exclude hearsay. Even

Judicial Trials, 66 Colum. L. Rev. 223, 224-25 (1966).

[19] *See ibid.;* Weinstein, *Some Difficulties in Devising Rules for Determining Truth in*

if the hearsay were not excluded under these circumstances, the factfinder would naturally infer that the proponent is hiding evidence that is harmful to his case. Such a rule would be a frank recognition of what the more liberal courts have found to be a satisfactory practice and would eliminate the problem of rationalizing results and distorting facts and theory to fit the traditional rule.