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DECONSTRUCTING HEARSAY'S STRUCTURE: TOWARD A WITNESS RECOLLECTION DEFINITION OF HEARSAY

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I. INTRODUCTION

HEARSAY testimony is "nothing more than dual (or multiple) ordinary testimony."¹ The Anglo-American system depends upon witnesses presenting evidence live in open court making the exclusion of hearsay from trials essential.² The rule against hearsay is the primary mechanism for protecting this form of litigation.³ Exclusion of hearsay, therefore, is

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1. JOHN HENRY WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF 377 (2d ed. 1931) [hereinafter PRINCIPLES OF JUDICIAL PROOF].

2. See Edmund M. Morgan, Hearsay—What Is It?, 12 WASH. L. REV. 1, 4 (1937) (recognizing importance of hearsay rule in eliminating court's admission of deliberate falsehoods, as well as "faults in . . . perception, memory, and narration of . . . witnesses," in situations where opposing counsel does not have opportunity to cross examine declarant of statement in live trial); see also 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1362, at 3 (3d ed. 1940) [hereinafter WIGMORE ON EVIDENCE] (tracing history and nature of hearsay while ultimately concluding that "fundamental test, shown by experience to be invaluable, is . . . test of [c]ross examination").

3. See 5 WIGMORE ON EVIDENCE, supra note 2, § 1362, at 7 ("It is thus apparent that the essence of the Hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross examination [coupled with the oath]."). Cross examination and the adversarial trial process are symbiotic. For example, the frequently used justification for confrontation in an adversarial trial is that it provides an opportunity for cross examination. See Carl C. Wheaton, What Is Hearsay?, 46 IOWA L. REV. 210, 221 (1961) ("[T]he only purpose served by confrontation is that it provides an opportunity for cross examination."); see also Frank M. Tuerkheimer, Convictions Through Hearsay in Child Sexual Abuse Cases: A Logical Progression Back to Square One, 72 MARQ. L. REV. 47, 49 (1988) ("There appears little doubt that the principal reason for the exclusion of hearsay is that hearsay evidence deprives the person against whom the evidence is admitted of the right to cross examine the witness that matters.").

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fundamental to preserve the Anglo-American adversarial trial. As currently defined, however, the hearsay rule represents a complex jumble of concepts in which the exceptions virtually swallow the rule. Both the Federal Rules of Evidence and related state codifications present a structure of analysis that has proved unworkable for the trial lawyer hurried by the rapid pace of a modern trial. In a criminal case, Confrontation Clause issues arising from the accused’s Sixth Amendment constitutional rights further complicate the analysis.

Rule 801 of the Federal Rules of Evidence defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Professor McCormick, a renowned evidence law scholar, stated, “A definition cannot, in a sentence or two, furnish ready answers to all the complex problems of an extensive field, such as hearsay.” Perhaps more should be expected than the obviously over-inclusive definition set forth in Rule 801, which requires for its implementation two exemptions, twenty-seven specific exceptions (some with multiple parts) and an invitation to the courts to invent more.

The complex structure of hearsay, riddled as it is with exceptions, has led various legal scholars to suggest that our justice system abolish the

4. See Fed. R. Evid. 801 advisory committee’s note (“The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration.”). The Committee discussed the importance of witness’s testifying accurately and the importance of discovering any inaccuracies in the witness’s testimony. See id. (explaining reasons for excluding hearsay). Therefore, “the Anglo-American tradition has evolved three conditions [as part of the hearsay rule] under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, and (3) subject to cross examination.” Id.


6. See Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 8.75, at 1092 n.1 (1995) (questioning whether hearsay doctrine and its exceptions control or affect meaning of Confrontation Clause and whether, in criminal cases, Confrontation Clause drives hearsay doctrine). The authors note the emerging “procedural rights” theory as one potential method to handle this controversy. See id. § 8.75, at 1096 (“Modern scholars have begun to argue that the clause does not bar hearsay as such, but should be read to prevent the state from building its case against criminal defendants by gathering out-of-court statements and offering them in lieu of live testimony.”)

7. Fed. R. Evid. 801(c).


9. See Fed. R. Evid. 801(d) (listing exemptions of “prior statement by witness” and “admission by party-opponent”); Fed. R. Evid. 803(1)-(23) & 804(b)(1)-(4) (listing 27 exceptions, including “excited utterance” and “public records and reports”); Fed. R. Evid. 807 (offering “invitation” for courts to make further exceptions); see also J.P. McBaime, Admissibility in California of Declarations of Physical or Mental Condition, 19 Cal. L. Rev. 231, 231 n.4 (1931) (“It is thought it is not strictly logical to frame a definition or a rule and at the same time, or later, announce other rules or definitions and call them exceptions to the rule.”).
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Rule.  Perhaps we should change the rule against hearsay for policy reasons related to excessive time and expense or because of the excessively adversarial nature of our justice system.  The problems associated with the unwieldy structure of hearsay analysis, however, are not insufficient alone to justify such revolutionary change, at least until our system attempts more modest approaches. The redefinition of hearsay to include the additional element of recollection results in a simplification of the analytic framework. This Article attempts to incorporate recollection into the revamped definition of hearsay, consistent with the rationalist base of modern hearsay doctrine.

A rule that is more an exception than a rule is a rule that is not properly defined. The presence of a large number of exceptions to a rule suggests, at a minimum, the presence of a missing element that is common to a substantial number of exceptions. The redefinition proposed here attempts to include the missing element of recollection. Our legal system should redefine hearsay to include only those out-of-court statements that rely on both the veracity of the declarant and the accuracy of his or her recollection of past events. This would make the effect of the rule consist-

10. See Michael H. Graham, Handbook of Federal Evidence § 801.0, at 188 (4th ed. 1996) ("Criticisms of this scheme are that it is bulky and complex, fails to screen good from bad hearsay realistically, and inhibits the growth of the law of evidence."). Graham suggests abolishing the rule against hearsay and admitting all hearsay. See id.; see also Paul S. Milich, Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over, 71 Or. L. Rev. 723, 723-24 (1992) (arguing for abolishment of hearsay rule and implementation of "far simpler set of specific rules"); Franklin Strier, Making Jury Trials More Truthful, 90 U.C. Davis L. Rev. 95, 111 (1996) (questioning perpetuation of hearsay rule because presumption of juror incompetence undergirding exclusion of hearsay is anachronistic); Paul J. Brysh, Comment, Abolish the Rule Against Hearsay, 35 U. Prrt. L. Rev. 609, 628 (1974) (arguing that rule against hearsay should be abolished because in most cases trier of fact will not be misled by admission of hearsay). But see Eleanor Swift, Abolishing the Hearsay Rule, 75 Cal. L. Rev. 495, 497-98 (1987) (identifying reasons to reject abolition of rule, including notion that rule "buttresses . . . rationalist assumptions underlying adjudicative factfinding and implements . . . traditional assignment of comparative burdens borne by . . . parties"). Some would not eliminate hearsay entirely, but would permit the rule to be overcome by either: (1) a showing of necessity; (2) the policy embodied in Rule 503(a) from the "hearsay-friendly," but never enacted, Model Code of Evidence of 1942; or (3) some other foundation. See Roger Park, A Subject Matter Approach to Hearsay Reform, 86 Mich. L. Rev. 51, 52-53 (1987) (discussing institutions and how they attempted to simplify or abolish hearsay).

11. See Stephan Landsman, American Enterprise Institute for Public Policy Research, The Adversary System: A Description and Defense 34-35 (1984) (noting that two most frequently voiced criticisms of adversary system are that strict evidence codes, including hearsay rule, make system too slow to serve needs of modern society and place low value on discovery of truth).

12. See Christopher B. Mueller, Post-Modern Hearsay Reform: The Importance of Complexity, 76 Minn. L. Rev. 367, 368-69 (1992) (stating that rationalist viewpoint characterizes current hearsay doctrine as "picture of order and rationalism" when in actuality it seems "chaotic and irrational, like noisy traffic at a congested intersection").

tent with what is normally understood to be the function of witnesses giving testimony. Only those statements based on recollection of a witness are testimony of such a nature as to require in-court recitation, subject to operation of the rule against hearsay.

The redefined rule needs to focus on the goal of excluding out-of-court testimony; that is, our system should define the hearsay rule to forbid only out-of-court declarations where the veracity and accuracy of recollection of past observations is crucial. This redefinition would substantially simplify hearsay analysis, eliminating the need for most hearsay exceptions. Because any changes to the rule would remain subject to countervailing broad and narrow interpretations by the courts, there would be no shift in the overall balance of admissibility for particular evidence.14 The result, however, would be a simpler and more logical structure of analysis. In spite of the additional length of the proposed definition, the resulting elimination of a myriad of hearsay exceptions counteracts the additional burden. Further, the proposed definition comports with the day-to-day thought processes of the experienced trial attorney.15 The redefinition also makes it easier for the courts to reconcile a witness’ recollection, governed by the testimonial hearsay standard, with Confrontation Clause analysis.

Part II of this Article examines why the truth-based definition of hearsay has such resiliency, in spite of its defects.16 Part II suggests three reasons for the sturdiness of the current formulation. First, scholars may be reluctant to meddle with the definition of hearsay because they pay great deference to the legendary legal mind of Dean Wigmore.17 Second, the current structure is a monument to that school of thought that views law as science, a school of thought that remains highly influential.18 Third and


15. See McElhaney, supra note 5, at 82, 84 (offering practical experiences of trial attorney in line with proposed definition). Professor McElhaney’s observations evoke praise from other legal scholars. See, e.g., G. Michael Fenner, Law Professor Reveals Shocking Truth About Hearsay, 62 UMKC L. Rev. 1, 5 n.22 (1993) (“No one writes easier to read, more intelligent, more insightful, more useful articles about in-trial applications of the rules of evidence than Professor McElhaney.”)

16. For a discussion of why the truth-based standard for hearsay remains, see infra notes 28-114 and accompanying text.

17. For a full discussion of Wigmore’s theory and influence, see infra notes 32-61 and accompanying text.

18. For a discussion of the law of science that led to the current definition of hearsay, see infra notes 62-78 and accompanying text.
finally, the truth standard contains an intuitive appeal, for who can argue with truth, especially in the context of a trial of the facts.19

After rationally deconstructing the intuitive and emotional appeal of a truth-based definition, it becomes possible to search for alternative formulations. Part III discusses United States Supreme Court cases decided before the enactment of the Federal Rules of Evidence, with the objective of drawing the line between admissible and inadmissible out-of-court testimony.20 It also reviews analogous Supreme Court cases decided under the Confrontation Clause of the Sixth Amendment.21

Part IV searches for a common thread in the hearsay exceptions found in Rule 803 of the Federal Rules of Evidence.22 These can be roughly categorized as either: (1) res gestae or (2) recorded matter.23 Res gestae is a concept virtually abandoned by scholarly consensus.24 Professor Morgan has thoroughly dissected instances of admissible hearsay, in the past admitted as res gestae and currently codified, in part, in the first three subsections of Rule 803.25 Part IV suggests that, rather than dissect the ambiguous res gestae, efforts at reform should search for the concept’s common

19. For a discussion of the appeal of a truth-based definition, see infra notes 79-114 and accompanying text. Truth seems to be a proper and sufficient test because the word has so many conflated and inconsistent meanings, all of them supremely positive in connotation.

20. For a discussion of the Supreme Court’s approach to hearsay admissibility prior to the enactment of the Federal Rules of Evidence, see infra notes 115-62 and accompanying text.

21. For a review of analogous Supreme Court cases decided under the Sixth Amendment’s Confrontation Clause, see infra notes 163-90 and accompanying text. In both bodies of case law, an important distinction between primary and secondary testimony emerges, with the recollection of past events at the core of this distinction.

22. For a discussion of the similarities among the exceptions to the hearsay rule, see infra notes 191-239 and accompanying text. “Declarant unavailable” exceptions under Rule 804(b) are for the most part secondary forms of evidence and therefore will not be examined for threads of commonality among the primary hearsay “exceptions.” See Fed. R. Evid. 804(b) (providing exceptions to hearsay rule only when declarant is unavailable).

23. See Fed. R. Evid. 803(1)-(18) (containing two conceptually-based exceptions: res gestae and other rules for addressing recollection and recorded matter); see also Fed. R. Evid. 803 (20)-(21) (creating exceptions for reputation evidence necessary because of common law rule against opinion evidence).

24. See 6 Wigmore on Evidence, supra note 2, § 1767, at 182 (“The phrase ‘res gestae’ has long been not only entirely useless, but even positively harmful. . . . It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology.”); see also Graham, supra note 10, § 803.2, at 396-97 (stating that reference to common law phrase is “improper and should be avoided”).

25. See Edmund M. Morgan, A Suggested Classification of Utterances Admissible as Res gestae, 31 Yale L.J. 229, 229-39 (1922) [hereinafter Suggested Classification] (outlining several classes of cases that employ “res gestae” as “convenient obscurity” or to “bewilder and perplex”). Morgan’s stinging criticism of res gestae aside, the Federal Rules, as they currently stand, incorporate several of the phrase’s key concepts. See, e.g., Fed. R. Evid. 803(1)-(2) (retaining ideas inherent to res gestae, such as “present sense impression” and “excited utterance”).
mon element, which is that the statements are not backward-looking and, therefore, not testimonial.

Part V concludes that our system should redefine hearsay to apply only to backward-looking statements. The effect would be to focus hearsay solely on testimonial statements, excluding from the operation of the rule all other out-of-court statements for which cross examination is not an appropriate safeguard. The witness who is needed in court, live and available for cross examination, is the witness who testifies as to remembered past events. The hearsay definition should focus on this necessity of the adversarial trial and not on a “truth of the matter asserted” rule. The Appendix suggests how Rule drafters might reformulate the Federal Rules of Evidence to focus on the distinction between testimonial and nontestimonial statements.

II. DECONSTRUCTING TRUTH

So entrenched is the current definition of hearsay that it is impossible to look beyond it to some other possibility without first examining why the rule, as currently formulated, has become so much a part of the catechism of evidence law. In deconstructing the “truth of the matter” standard, we must examine three elements that have contributed to the rigidity of the rule.

The first of these elements is that our legal system attributes the definition of hearsay to Dean Wigmore, a scholar to whom much is owed in rationalizing and organizing the jumble of hearsay holdings that plagued

26. For a discussion of reform proposals seeking to redefine hearsay to apply only to backward-looking statements, see infra notes 240-43 and accompanying text.

27. See, e.g., PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 215 (3d ed. 1996) (defining hearsay and listing faulty perception, inaccurate memory, insincerity and ambiguity as four testimonial dangers making hearsay inadmissible). For an example of how the Federal Rules of Evidence might be reformulated to focus on the distinction between testimonial and nontestimonial statements, see infra Appendix A.

28. See FED. R. EVID. 801(c) (defining hearsay using “truth of the matter asserted” standard). Rule 801(c) provides: “Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Id. (emphasis added); see 2 WIGMORE ON EVIDENCE, supra note 2, § 1364, at 1680 (stating that hearsay rule prohibits use of person’s assertions “as equivalent to testimony to . . . fact asserted” unless “assertor is brought to testify in court”) (emphasis added); see also FED. R. EVID. 801(a) (exhibiting modern tendency to limit hearsay to statements that are “assertions”). The effect of Rule 801(a), for the most part, is to reduce the operative scope of the hearsay rule to declarative sentences. See Olin Guy Wellborn III, The Definition of Hearsay in the Federal Rules of Evidence, 61 Tex. L. Rev. 49, 52 (1982) (noting that “attempt to delete from the hearsay concept all out-of-court verbal expressions that are not simple, direct assertions of the matter they are offered to prove is a novelty so unsound, both in principle and in practice, that one cannot help but surmise that the Committee did not fully understand the results of its handiwork”).
the trial lawyer and judge in the early part of the twentieth century.29 The second element addresses an additional reason for the continued reliance on the "truth of the matter" definition and resulting elegant organizational structure. This remarkable structure is the product of the science-oriented zeitgeist of legal scholarship, of which Wigmore was a prominent spokesperson.30 The third element of Part II is an attempt to deconflate the meaning of truth as an essentialist concept with profound appeal. If our system had consistently used an unconflated synonym of truth in our definition of hearsay, such as veracity, it might have been easier to see that some other element was at work in the process of determining the scope of admissible out-of-court statements.31

A. The Eminent Wigmore

It would be impossible to overstate how important the scholarly contributions of Dean Wigmore have been to the field of evidence law. Scholars, practitioners and students of the law have praised his treatise as "the most complete and exhaustive treatise on a single branch of our law that has ever been written."32 If a lesser scholar than Wigmore had postulated the current definition, our system might have challenged the definition long ago. By often crediting the definitional "truth of the matter asserted" formulation to Wigmore, we give it a borrowed prestige and status. It is true that Wigmore did use such a formulation.33 In his extensive discussions of the essence of hearsay, however, Wigmore focused primarily on the relation-


30. See WILLIAM R. ROALFE, JOHN HENRY WIGMORE 90 (1977) (indicating that Wigmore made two scientific legal proposals and explaining proposals). Wigmore proposed "to offer tentatively a terminology for legal science" and "to make a plea for the special study of one part of legal science, i.e., nomo-thetics as that branch of legal science which tests a proposed or actual rule of law by asking whether it ought to be the law by some standard of ethics or economics . . . ." Id. (quoting John H. Wigmore, The Terminology of Legal Science (with a Plea for the Science of Nomo-thetics), 28 HARV. L. REV. 1, 2 (1914)).

31. See SURYA PRAKASH SINHA, WHAT IS LAW? 85 (1989) (commenting upon connection between evidence and truth). In a statement that appears especially relevant to the hearsay situation, Sinha noted, "Evidence guarantees the truth of a proposition only when the feeling of evidence is accompanied by a state of affairs that makes the proposition true . . . ." Id.

32. Zechariah Chafee, Jr., Book Review, 37 HARV. L. REV. 513, 513 (1924). Further, Wigmore's scholarly contributions were not limited to the field of evidence. See ROALFE, supra note 30, at 82 (listing Wigmore's scholarly contributions and stating that "Wigmore's commanding role in the field of evidence has tended to eclipse the substantial character of his part in the development of the law of torts").

33. See, e.g., 3 WIGMORE ON EVIDENCE, supra note 2, § 1766, at 770 (stating that hearsay rule applies when statement is offered as "evidence of the truth of the fact asserted in it").
ship between the adversarial cross-examination function and the hearsay rule. Where he did refer to a “truth of the matter asserted” formulation, it was clear that he was using it more as a rule of thumb than as an exhaustive definition. He stated his view of hearsay in a variety of ways, but his essential point was that it consisted of out-of-court assertions.

The solidification of the “truth of the matter asserted” language as the definition and ultimate test of hearsay would more properly be traced not to Wigmore, but to the American Law Institute’s (ALI) Model Code of Evidence. There were, of course, previous instances of the use of this or similar formulations not only by Wigmore, but also by other scholars. Nonetheless, the ALI’s formulation set the modern standard. Perhaps then, we should attribute the credit and blame, if any, for the “truth of the matter asserted” definition more to the ALI and Professor Morgan, the principal reporter for the Model Code of Evidence, than to Dean Wigmore.

34. See id. § 1362, at 3 (noting that fundamental test in hearsay examination is test of cross examination and stating that hearsay rule is “rule rejecting assertions...which have not been in some way subjected to...test of [c]ross-examination”).

35. See id. § 1361, at 3 (stating that hearsay statement is inadmissible because it was made under circumstances that do not subject it to certain “tests or investigations calculated to demonstrate its real value”). When Wigmore identified the type of assertions prohibited by the hearsay rule, he uniformly made this characterization based upon whether the statement was offered to prove the truth of the matter asserted. See id. (“The [h]earsay rule predicates a contrast between assertions untested and assertions tested; it insists upon having the latter.”). Hearsay, to Wigmore, was “an Extra-judicial Testimonial Assertion.” Id. § 1361, at 2 (explaining that hearsay rule prohibits “extra-judicial testimonial assertions” and providing example in which witness attempts to prove that event occurred by stating that third person told him or her of event).

36. See id. § 1364, at 9 (“Under the name of the [h]earsay rule...will here be understood that rule which prohibits the use of a person’s assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross examined...”).

37. See MODEL CODE OF EVIDENCE Rule 501(2) (1942) (defining hearsay statement as “statement of which evidence is offered as tending to prove the truth of the matter intended to be asserted”) (emphasis added).

38. See A.I. McCormick, Hearsay, in 6 THE ENCYCLOPEDIA OF EVIDENCE 442, 443 (Edgar W. Camp & John F. Crowe eds., 1905). McCormick defined hearsay in the following manner:

Hearsay may be defined to be any statement, verbal or written, the persuasiveness or probative value of which depends partly or wholly upon something other than the credit to be given to the witness who utters the statement or the instrument which contains it, and renders necessary a resort to and belief in the veracity and competency of some other person.

Id. Competency includes the perception, recollection and ability to relate. See Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177, 185-88 (1948) [hereinafter Hearsay Dangers] (discussing hearsay dangers of sincerity, misuse of language, vocabulary, memory and perception).

39. See Edmund Morgan, Foreward to MODEL CODE OF EVIDENCE 1, 47 (1942) (stating that Model Code widely departs from common law in hearsay arena and classifying hearsay using “truth of the matter asserted” concept).
Dean Wigmore did not totally approve of the ALI Model Code.\textsuperscript{40} In refusing to endorse it, he primarily cited drafting concerns, but he also opposed its positions, which he thought were exceedingly radical and impractical.\textsuperscript{41} Fundamentally, Wigmore opposed prematurely freezing American hearsay common law into a fixed method or system of analysis.\textsuperscript{42} Unfortunately, Wigmore's syntheses of common law decisions in his multi-volume treatises lacked the ease of use of the apparently simple set of rules proposed by the ALI, the Uniform Code of Evidence and the Federal Rules of Evidence.\textsuperscript{43} In spite of Wigmore's dissent, Morgan's approach has prevailed.

In 1948, Professor Morgan stated that the Model Code is "in no way inconsistent with Wigmore's statement that the hearsay rule 'forbids the use of an assertion, made out of court, as testimony of the truth of the fact asserted.'"\textsuperscript{44} This statement, and the related footnote containing equivocal citation, had both the purpose and effect, copied by others, of invoking the prestigious Wigmorian name.\textsuperscript{45} The suggestion was that Wigmore approved the exclusive use of the "truth of the matter asserted" definition as complete and sufficient.\textsuperscript{46}

To summarize, the attribution of the Federal Rules of Evidence definition of hearsay to Wigmore is not completely accurate. In his treatises, Wigmore focused more on the need to cross examine testimonial assertions as the essential nature of hearsay.\textsuperscript{47} Further, he opposed the codification.


\textsuperscript{41} See id. at 23-28 (examining ALI's Code of Evidence with respect to six "Postulates of method and style" and finding it unacceptable).

\textsuperscript{42} See ROALFE, supra note 30, at 226 (expressing disgust with "untested and premature juristic analysis and method" and, for this reason, calling proposed Corpus Juris "a calamity").

\textsuperscript{43} See, e.g., 5 WIGMORE ON EVIDENCE, supra note 2, §§ 1361-65, at 2-27.

\textsuperscript{44} See Hearsay Dangers, supra note 38, at 216 (quoting 6 WIGMORE ON EVIDENCE, supra note 2, § 1746, at 134). Professor Morgan did not attempt to dissect recollection of past events from other forms of memory. See id. at 218 (pointing to risks of hearsay, such as "insincerity and faulty narration, memory, and perception," rather than formula "assertions offered for the truth of the matter asserted" as basis for hearsay classification).

\textsuperscript{45} See, e.g., Robert A. Leflar, Theory of Evidential Admissibility—Statements Made Out of Court, 2 Ark. L. Rev. 26, 26 n.1 (1947) (citing Wigmore as authority for defining two reasons for hearsay rule).

\textsuperscript{46} See Hearsay Dangers, supra note 38, at 215-16 (providing Model Code definition of hearsay and stating that although Wigmore did not define assertion, word must include nonverbal conduct and speech "offered as evidence of the truth of the matter intended, or assumed by the proponent to have been intended, to be communicated"). Professor Morgan further stated that Wigmore seemed to believe that the hearsay rule was inapplicable when the statement in question was not used to assert the fact provided in the statement. See id. (analyzing Wigmore's view of hearsay in relation to Model Code approach).

\textsuperscript{47} See 5 WIGMORE ON EVIDENCE, supra note 2, § 1362, at 7 (viewing cross examination as "essential and real test required by . . . [hearsay] rule"); see also Hear-
cation of evidence law into simple rules that might obfuscate underlying themes and petrify further analytical development. This is not to say that Wigmore's work did not contribute to the ultimate formulation of the Federal Rules of Evidence, including the definition of hearsay that the Rules contain. The particular definition of hearsay, however, as "out-of-court statements offered for the truth of the matter" to the practical exclusion of a different test, "testimonial assertions that should be subject to cross examination," belongs not to Wigmore, but to Morgan.

Although Professor Morgan was certainly one of the most influential scholars in the field of evidence law, he was not as revered as Wigmore. In invoking the Wigmore name, the definition gained more prestige than Morgan's name could command. The effect was a result that Wigmore had feared; with truth as the standard, hearsay analysis thereafter proceeded only in one path, the path of truth. With "truth" as the standard, lawyers and scholars placed very little focus on the witnessing function and on the need to distinguish between testimonial and nontestimonial statements.

One area of hearsay law on which both Wigmore and Morgan agreed illustrates the difference between Wigmore's approach to hearsay and the

say Dangers, supra note 38, at 188 (concluding that cross examination is most effective in exposing faults in perception and memory); I. Daniel Stewart, Jr., Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 UTAH L. REV. 1, 22 (1970) (stating that right to cross examine is "of the greatest importance to the integrity of the factfinding process and is the keystone of both the hearsay rule and the right of confrontation").

48. See RoALFE, supra note 30, at 227 (stating that tension existed between Wigmore's view in favor of specific attention to current rules of evidence and Morgan's view in favor of more general statements of rules).

49. See Fed. R. Evid. 801(c) advisory committee's note (stating that definition of hearsay "follows along familiar lines in including only statements offered to prove . . . truth of . . . matter asserted" and citing Wigmore as authority).

50. 5 WIGMORE ON EVIDENCE, supra note 2, §§ 1361-62, at 2-7 (stressing importance of cross examination in judicial process). Current scholarship agrees with Wigmore's position that cross examination is the essence of hearsay. See Wheaton, supra note 3, at 221 ("It is only by the use of cross examination that the various defects of testimony can be exposed."); see also Rice, supra note 27, at 233 (noting that courts at common law have wrongly strayed from "straight and narrow path" of classic hearsay definition's logic); Mueller, supra note 12, at 381-82 (identifying conventional argument against hearsay as lack of cross examination).

51. See Michael Ariens, A Short History of Hearsay Reform, With Particular Reference to Hoffman v. Palmer, Eddie Morgan and Jerry Frank, 28 IND. L. REV. 183, 191 (1995) (stating that Morgan's "reputation in the field of evidence was second only to Wigmore's").

52. See Fed. R. Evid. 102 ("These rules shall be construed to secure . . . that the truth may be ascertained and proceedings justly determined.").

53. But see Mason Ladd & Ronald L. Carlson, Cases & Materials on Evidence 803 (1972) (beginning its inquiry as to meaning of hearsay with importance of cross examination and witnessing function, rather than with "truth of the matter" formulation).
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approach of the Federal Rules. Wigmore did not view prior statements of witnesses as hearsay. Under the Federal Rules, prior statements by witnesses are hearsay except for some inconsistent statements that the Rules specifically exempt. This difference illustrates a stark philosophical difference. Under the Federal Rules, truth is the ultimate test of hearsay. Wigmore saw hearsay not as a direct test of truth, but as a means of promoting confrontation through cross examination. Prior statements of a witness do not violate the Confrontation Clause of the Constitution because the Federal Rules preserve the opportunity to cross examine the witness. This is sufficient, under the Wigmore approach, to take such

54. Compare 3 Wigmore on Evidence, supra note 2, § 1018, at 687 (arguing that prior statements should be admissible because they are "not primarily hearsay") (emphasis omitted), with Hearsay Dangers, supra note 38, at 192 (stating that prior statements, while hearsay, should be admissible because they do not involve any hearsay risks). For a brief, useful review of the history of the admissibility of prior statements of witnesses, comparing common law, Wigmore and the Federal Rules approaches, see Frank W. Bullock, Jr. & Steven Gardner, Prior Consistent Statements and the Premotive Rule, 24 Fla. St. U. L. Rev. 509, 511-21 (1997).

55. See 3 Wigmore on Evidence, supra note 2, § 1018, at 687 (finding that prior statement is not "primarily hearsay, because it is not offered assertively, i.e. not testimonially"). According to Wigmore, the hearsay rule excludes only out-of-court statements that a party attempts to use as credible testimony. See id. Prior statements, however, are not to be relied upon. See id. "It follows, therefore, that the use of Prior Self-Contradictions to discredit is not obnoxious to the Hearsay Rule." Id.

56. See Fed. R. Evid. 801(d)(1) (ruling that under certain specified conditions, prior statements are not hearsay). According to Rule 801(d)(1), a prior statement is not hearsay only if:

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and if the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury . . . or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person . . . .

Id.

57. See Fed. R. Evid. 801(c) (defining hearsay as out-of-court statement "offered in evidence to prove the truth of the matter asserted") (emphasis added).

58. See 5 Wigmore on Evidence, supra note 2, § 1362, at 3 (explaining theory and purpose of hearsay rule). Wigmore argued that the hearsay rule involved two elements, cross examination and confrontation, with cross examination as the essential element. See id. (stating that cross examination is "indispensable feature," while confrontation is "subordinate and dispensable"). The underlying theory of the hearsay rule from Wigmore's perspective was that, "as accepted in our law, [the hearsay rule] signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of [cross examination]." Id.

59. See California v. Green, 399 U.S. 149, 164 (1970) (holding that Confrontation Clause does not require exclusion of prior statements by witness). The Supreme Court noted that the Confrontation Clause: 1) forces the witness to testify under oath; 2) allows cross examination of the witness; and 3) permits the jury to judge the demeanor of the witness. See id. at 158. Although the Supreme Court acknowledged that a prior statement may or may not have been subject to the three protections of the Confrontation Clause, the Court ruled that "if the declarant is present and testifying at trial, the out-of-court statement for all practical pur-
statements out of the operation of the hearsay rule. Such statements are hearsay under the Federal Rules because of its rigid adherence to a truth standard rather than a cross-examination standard.

B. Hearsay and Its Exceptions as Legal Science

What we can undoubtedly attribute to Wigmore is the structure of modern evidence law, including the hearsay rule. His great treatise organized and categorized the rule into what has evolved into its modern form. Before Wigmore, courts had focused on admissibility, not on determining a structure for making that determination.

The analytic structure of the modern hearsay rule, its exclusions and its exceptions derive directly from the analytic approach of Wigmore. As far as the first protection is concerned, the witness will be made to affirm or deny the prior statement under oath. See id. at 158-59. At the later proceedings, the witness will also face, albeit belatedly, cross examination, satisfying the second protection of the Confrontation Clause. See id. at 159. Finally, the third protection is satisfied in that the jury will be able to judge the witness's demeanor. See id. at 160.

60. See 3 WIGMORE ON EVIDENCE, supra note 2, § 1018, at 687 (determining that prior statements are not "primarily hearsay").

61. See FED. R. EVID. 801(d)(1) (stating that prior statement that does not fall within narrowly tailored exception was hearsay). The Appendix of suggested revisions to the Federal Rules retains a modified form of Rule 801(d)(1). While this may constitute a philosophical compromise of the basic premise of the proposed revisions, it was thought necessary to retain the Federal Rules formulation regarding prior statements of a witness to avoid a substantive change in the admissibility of evidence. The goal of the proposed revisions contained in the Appendix is not ideological purity, but the creation of a simpler hearsay analysis with minimal impact on evidentiary admissibility. In the author's view, there is no reason not to expand the operation of Rule 801(d)(1) to include all prior inconsistent statements, which is consistent with the Wigmore view.

62. See Thomas J. Reed, Evidentiary Failures: A Structural Theory of Evidence Applied to Hearsay Issues, 18 AM. J. TRIAL ADVOC. 353, 360 (1994) (discussing structure of rules of evidence and concluding, "A brief examination of the Federal Rules of Evidence confirms the impression that Wigmore's structural model provided the basis for the Federal Rules"). Wigmore attempted to give some structure to the study of evidence by using "an elaborate evidentiary taxonomy using very precise definitions." Id. at 357. Professor Morgan, when drafting the 1942 Model Rules of Evidence, followed the general structure of Wigmore's treatise. See id. at 359-60. The Federal Rules of Evidence followed the format of, and are structurally similar to, the original 1942 Model Rules. See id. at 360. "In short, contemporary American evidence law has been shaped by Wigmore's original taxonomy." Id. at 361.

63. See Eleanor Swift, A Foundation Fact Approach to Hearsay, 75 CAL. L. REV. 1341, 1346 n.17 (1987) (noting that Wigmore's use of categorical exceptions to hearsay rule aided rise and acceptance of categorical approach to modern hearsay rule); see also 5 WIGMORE ON EVIDENCE, supra note 2, § 1420, at 202-03 (identifying categories of statements in which there is no need for cross examination).

64. See PRINCIPLES OF JUDICIAL PROOF, supra note 1, at 3 (distinguishing between "Admissibility" and "Proof"). Wigmore believed that the major problem with the law of evidence was that it had focused too intensely on "Admissibility" while virtually ignoring "Proof." See id.

65. Compare 5 WIGMORE ON EVIDENCE, supra note 2, § 1420, at 202-03 (recognizing categories of statements that are exceptions to hearsay rule), with FED. R.
Wigmore attempted to make the law of hearsay into a science in an era when academics venerated science as an absolute, rather than a relative rational enterprise. Borrowing from the precellular science of gross morphology, legal scholars like Wigmore and Morgan dissected, organized and cataloged the law of hearsay into a model of scientific legalism. The under-inclusive hearsay definition was inadvertently advantageous in this endeavor in that it produced a large number of exceptions that, like the myriad of species in the natural world, scholars could further refine in a scientific classification system.

Wigmore saw himself as a legal scientist and the law of evidence as the science of proof. As a man of his time, and a product of the Harvard School of Law during the Langdell period, he saw science as the road of reasoned enlightenment. The science of Wigmore's era was a science of observation and classification in which the whole was the sum of its parts.

Evid. 803 (listing exceptions to hearsay rule when declarant is available as witness), and Fed. R. Evid. 804 (listing categorical exceptions to hearsay rule when declarant is not available as witness).

66. See Joseph Mazzarella, *The Scientific Method of Generalizing from Data of Legal Evolution* (John H. Wigmore trans.), in FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT 77, 79 (Albert Kocourek & John H. Wigmore eds., 1918) (comparing law to science). Wigmore created a science called the Science of Comparative Law and identified the purpose of this science as the “discovery of the general process of development of jural ideas and institutions.” Id.

67. See id. at 80-82 (stating aim of morphology as reconstructing jural system of certain group of people and outlining general concepts of morphology). Morphology is a point of view from which academics study part of Wigmore’s Science of Comparative Law. See id. at 79 (noting that academics study jural system from five points of view: its morphology, stratigraphy, genealogy, psychology and philosophy).

68. See generally Fed. R. Evid. 803-804 (containing total of 29 exceptions to general rule that hearsay statements are inadmissible). For example, the current Federal Rules of Evidence are grouped into sections depending upon whether the declarant is unavailable to be a witness. See Fed. R. Evid. 804 (requiring declarant to be unavailable); see also Fed. R. Evid. 803 (allowing use of certain exceptions regardless of whether declarant is available to be witness).

69. See generally JOHN HENRY WIGMORE, THE SCIENCE OF JUDICIAL PROOF 3-6 (3d ed. 1937) [hereinafter SCIENCE OF JUDICIAL PROOF] (“This book aspires to offer a ‘novum organum’ for the study of Judicial Evidence.”). The science of evidence, according to Wigmore, consisted of two parts, “Proof” and “Admissibility.” Id. “Proof” involved the process of “contentious persuasion” or, in other words, a lawyer’s attempts “to move the mind of the tribunal.” Id. “Admissibility” consisted of procedural rules that attempted to shield the tribunal against “erroneous persuasion.” Id.

70. See Thomas C. Grey, Langdell’s Orthodoxy, 45 U. Pitt. L. Rev. 1, 31 (1983) (explaining reliance that Langell and his followers placed on importance of science). Langdell believed that the best way for the common law to progress was through legal science. See id. at 5 (“The heart of the theory was the view that law is science. Langdell believed that through scientific methods lawyers could derive legal judgments from a few fundamental principles and concepts, which it was the task of the scholar-scientist like himself to discover.”). Once the scholar-scientist discovered the fundamental, previously unrecognized principle, it would lead to judicial decisions that were more enlightened than older decisions because they were based on a scientific model. See id. at 31 (noting that articulating unrecog-
The scientific model of the day was neither the chaos of Quarks nor the relativity of Einstein; rather, it was the classification of nature. The extent of his dedication to the view that law was science can be seen most clearly in a brief article that he wrote just before his death. See John Henry Wigmore, My Philosophy of Law, in My Philosophy of Law: Credos of Sixteen American Scholars 313 (Julius Rosenthal Found. ed., 1941) (discussing Wigmore’s philosophy regarding Science of Law). In this article, Wigmore undertakes to classify the Science of Law, which he terms Nomo-logy. See id. at 315. According to Wigmore’s philosophy, the Science of Law “may be classified according to the different activities of thought which deal with a concept of law.” Id. Wigmore believed that four activities composed the concept of law: (1) Nomo-scopics, “[a] thing to be ascertained as a fact of human conduct”; (2) Nomo-sophics, “[a] thing to be questioned and debated”; (3) Nomo-didactics, “[a] thing to be taught as a subject of education”; and (4) Nomo-practics, “[a] thing to be made and enforced by the State organs.” Id. at 315-16. Wigmore explained that each concept was meant to cover a distinct philosophy about law. See id. at 320.

There were, however, necessary instances in which the concepts overlapped. See id. Wigmore explained this as a necessary result of the nature of law, “because Law deals with conduct, and with our thought about conduct, and our thought of Law is and must be often passing from one aspect to the other, or dealing with several at once.” Id. at 320-21. Nomo-logy and its branches and sub-branches never quite caught on, but the science of law did, enshrined in the structure of modern day hearsay analysis. See Fed. R. Evid. 803 (using categorical approach to establish exceptions to hearsay rule); see also Fed. R. Evid. 804 (same); cf. John Henry Wigmore, Introduction to Albert Kocourek, Jural Relations xxi, xxi-xxii (2d ed. 1928) [hereinafter Introduction Jural Relations]. Wigmore, in his introduction to Jural Relations, noted that his manuscript, which attempted to classify legal ideas, was left “in a discarded bundle” because there was “no professional interest in progress in that field.” Id.

71. See Introduction Jural Relations, supra note 70, at xxi-xxii. Wigmore explained that his philosophy of science consisted of two parts. See id. at xxii. The first part was observation, or as Wigmore described it, “a realistic analysis of all the specific data in a given body of knowledge.” Id. The second part consisted of classification, i.e., “a synthesis of those ideas in a consistent terminology.” Id. Wigmore felt that classification was necessary to handle ideas and further the progress of science. See id. The law, however, had lacked the terminology needed for its progression as a science. See id.

72. See generally Ernst Mayr, The Growth of Biological Thought 188 (1982) (discussing increasing use of biological classification in nineteenth century). Scientists used classification for hundreds of years prior to the nineteenth century, but the use of biological classification did not flourish until technological advances, such as the invention of the microscope, arose. See id. at 185-88. The use of classification exploded with the increased use of microscopical studies after the 1820s. See id. at 189.

This is best illustrated by analogy to the science of biology. At the turn of the twentieth century, biology was a science of classification of species into kingdoms, phyla and groups. See Herbert H. Ross, Biological Systematics 5 (1974) (stating that by end of nineteenth century, systematics had not yet gained widespread support). Classification is one of the major concerns of systematics. See id. at 10 (“Because of its usefulness as a storage-and-retrieval mechanism for biological information, classification is the third chief concern of systematics.”). “Classification is the ordering of organisms into taxa on the basis of their similarity and relationship as determined by or inferred from their taxonomic characters.” Mayr, supra, at 185 (italics omitted). Scientists collected specimens from all over the
This is the model on which hearsay analysis rests today. 73

world to advance the knowledge of the science of “life.” See URL LANHAM, ORIGINS OF MODERN BIOLOGY 126-27 (1968) (discussing rise of scientific exploration). Prior to the nineteenth century, animal and plant specimens had only been collected as a kind of “sideline to . . . commercial activities.” Id. at 127. Systemics, however, created a greater need for specimens. See id. at 126 (noting that geographic exploration was necessary to map organic diversity). During the eighteenth century, scientists began to carry out geographic exploration for specimens in a “well-organized fashion.” Id. What followed was “an era of strictly scientific explorations that were to make known at least the general outlines of the diversity of living things.” Id. at 127. All too often, the cost of scientific “collection” and “preservation” consisted of shooting the last few specimens of a species so that museums could display them as exhibits. Cf. id. at 128 (quoting remarks of one scientific explorer, “[T]he main object of all my journeys was to obtain specimens of natural history, both for my private collection and [to] supply duplicates to museums and amateurs”).

Scientists had not even dreamed of the molecular biology of deoxyribonucleic acid (DNA) and ribonucleic acid (RNA). Similarly, cellular biology was in its infancy. There were no clones, not even in theory. See Cloning: A History, SCIENCE WORLD, May 2, 1997, at 7-10, available in 1997 WL 9586614 (discussing how cloning evolved). A German embryologist first theorized cloning in 1938. See id. The embryologist believed that scientists could clone animals by fusing an embryo and an egg cell. See id. The first attempt at cloning was in 1952, when two scientists attempted to clone frogs. See id. Cloning attempts were largely unsuccessful until 1984, when an embryologist from Denmark cloned sheep from early-stage embryo cells. See id. The first successful cloning of an adult mammal occurred in 1997, when Scottish embryologist Ian Wilmut cloned a baby lamb from an adult sheep’s udder cell. See id. Only the Frankenstein monster demonstrated the dream, or nightmare, of life born in the science laboratory. See MARY W. SHELLEY, FRANKENSTEIN 52 (M. K. Joseph ed., 1969) (“I succeeded in discovering the cause of generation and life; nay, more, I became myself capable of bestowing animation upon lifeless matter.”). Shelley’s original work, which was first published in 1818, was subtitled “The Modern Prometheus.” See M.K. Joseph, Introduction to SHELLEY, supra, vii, vii. One of the main parts of the myth of Prometheus is the story of Prometheus plasticator, who in certain versions of the myth was said to have “created or recreated mankind by animating a figure made of clay.” Id. at viii. This scientifically created life could be built, in theory, like a machine, by grafting together the constituent bodily organs into which scientists could dissect a corpse. See generally SHELLEY, supra, at 53-56 (telling story of creation of human being with materials from “dissecting room and slaughter-house”).

We have organized, classified and cataloged the law of hearsay. We have dissected and described its constituent parts. Like Ptolemy's epicycle theory of the movement of heavenly bodies, the law of hearsay works in that you can get the right answer to any question of admissibility, but you cannot get there directly. This seems to be an obvious failure. Nevertheless, only a few decades ago the "ganglia" structure of hearsay analysis likely seemed scientific and therefore right. That we failed to capture hearsay's life essence and that it lacked the unifying structure of a common DNA did not matter.

C. Conflated Truth

Just as a convoluted structure of rules and "scientifically" classified exceptions seemed intuitively right, so did a definition that focused on

74. See Blair, supra note 73, at 352 ("A]ny analysis of the admissibility of spontaneous statements should proceed under the more precise hearsay exceptions now recognized . . . ."); Moorehead, supra note 73, at 239 n.184 ("The exceptions to the hearsay rule are officially grouped into two classifications: those exceptions where the declarant is unavailable and those where the declarant's unavailability is immaterial."); Rice, supra note 73, at 362 (noting justifications for classifying hearsay exceptions); A.M. Swarthout, Annotation, Admissibility, as Res Gestae, of Statements Relating to Origin or Cause of, or Responsibility for, Fire, 13 A.L.R.3d 1114, 1121-31 (1968) (attempting to classify court decisions holding that exclamations relating to origin of fire are admissible under exceptions to hearsay rule).

75. See Rice, supra note 73, at 369 (proposing amended rule of evidence containing new class of hearsay exceptions); see also Glen Weissenberger, Reconstructing the Definition of Hearsay, 57 OHIO ST. L.J. 1525, 1534-42 (1996) (discussing evolution of hearsay rule and its exceptions).

76. See generally Claudius Ptolemaeus (last modified Nov. 8, 1996) <http://ptol-emy.berkeley.edu/People/ptolemy.html> (providing brief description of Ptolemy and his works). Ptolemy, a Greek astronomer during the Second Century A.D., "codified the geocentric view of the universe, and rationalized the apparent retrograde motion of the planets using epicycles." Id. Until Copernicus proposed the heliocentric theory in 1543, the Ptolemaic system remained "the accepted wisdom." Id.


Truth has many meanings, each of which is positive and relevant to a legal factfinding process. Accuracy, veracity and justice are all possible meanings of truth. The law is all about the search for truth and justice. In one meaning, the word truth encompasses not only factual accuracy and veracity, but all of the aims of justice. One academic suggests that truth is a mystical concept, related to justice. All societies value truth highly and associate it with all things good and right. Therein lies

79. See Fed. R. Evid. 801(c) advisory committee’s note (“The definition [of hearsay] follows along familiar lines in including only statements offered to prove the truth of the matter asserted.”).

80. Compare Black’s Law Dictionary 1515 (6th ed. 1990) (“There are three conceptions as to what constitutes truth: agreement of thought and reality; eventual verification; and consistency of thought with itself.”), with The American Heritage Dictionary 1300 (2d ed. 1982) (defining truth as “1. Conformity to fact or actuality. 2. Fidelity to an original or standard. 3. Reality; actuality. 4. A statement proven to be or accepted as true. 5. Sincerity; integrity”).

81. See Merriam Webster’s Collegiate Dictionary 1269 (10th ed. 1996). Truth may mean “sincerity in action, character, and utterance” or it may mean “a transcendent fundamental or spiritual reality.” Id. Moreover, it may indicate “the property of being in accord with fact or reality” or “fidelity to an original or to a standard.” Id.


83. See Myles Dillon, Celts & Aryans: Survivals of Indo-European Speech and Society 86-90 (1975) [hereinafter Celts & Aryans] (noting that justice is highest virtue to Indo-European societies); see also Celt & Hindu, supra note 82, at 16 (noting importance of truth in Indian religion and literature). During the Ved-ic period in India, “Truth was the highest power, the ultimate cause of all being.” Id. Truth was also viewed as “a power which controls and sustains the created world.” Id. Indian literature contains numerous stories in which a statement of truth allowed one to work a miracle. See id. (describing story in which woman was saved from death by speaking truth). Celtic culture also viewed truth as “the highest principle and the sustaining power of creation . . . .” Id. at 16-17. A Celtic poem instructed a prince to guard the truth, “[f]or it is through the ruler’s truth that great tribes are governed.” Id. at 17. Ancient Greek culture also viewed truth as the “supreme power.” Id. at 18 (expressing notions of truth through writings of Stoics, Stoic Platonists and Platonist Stoics).

Commenting on mythic Celtic Law, for example, Dillon reports a case judged by King Lugaid Mac Con, who was overthrown by Cormac due to Mac Con’s “false” judgement in a matter involving some trespassing sheep. See id. at 17. Dillon recounts the story by writing:

Many of you will know the story of the child Cormac at Tara, who heard the king, Lugaid Mac Con, give a false judgement, when he awarded the sheep who had trespassed on the queen’s garden as forfeit for their trespass. At once the courthouse began to fall and slide down-hill. Cormac said: “No! That is false judgement. The woad will grow again in the garden. Only the sheep’s wool, which will also grow again, is forfeit for the woad!” And all the people cried out: “This is the Truth”. At once the courthouse was stayed in its fall. Lugaid Mac Con had to leave Tara, and Cormac later became king.

Id.

its problem as a standard and test. It is both lacking in precision and evocative of an archetypal mystical belief in the power of the spoken word when used for good.

Trial courts concern themselves daily with three very different meanings of truth that are not necessarily compatible: veracity, accuracy and a just (or true) verdict. Veracity means truth in the sense of sincerity or honesty. Accuracy means factual correctness and is as objective as veracity is subjective. A third meaning of truth is a just outcome, or a true verdict, from a factfinding process in which every person is truthful and all facts are completely disclosed. In an imperfect world, however, these three related ideal concepts may not be congruent. Although triers of fact never have all the facts accurately before them, they may yet reach a just result, with or without reliance on perjured witness statements. The contrary is, unfortunately, also true. Honest testimony, based on sincere belief, can lead to an unjust result because factual accuracy and veracity
are not synonymous. Memory is a complex process that often draws, unconsciously, on imagination. An honest truth may not be true at all.

A witness can be telling the truth, in the sense of being honest and sincere, and yet not be telling the truth, in the sense of accuracy. An error can occur, causing a witness to tell a false truth, either during acquisition of information through perception or during the complex and selective process of remembering and retrieving memory. The reverse is also possible.

A lie can be the truth. That is, a witness can lie, yet accurately portray what actually happened. This is not to suggest that perjury is honorable or tolerable, or that judgments based on such testimony should stand.

Judgments based on perjured testimony, however, have not necessarily failed to find objective truth, just as judgments based on the testimony of totally honest witnesses can convict persons who are in fact innocent of any wrongdoing.

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89. See generally ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, 9-10 (3d ed. 1997) (providing examples that illuminate distinction between factual accuracy and witness veracity).

90. See id. at 10 (describing “complex” processes of memory and perception). The authors explain that people do not simply record important events like a videotape recorder, rather the memory process is divided into three major stages. See id. (explaining three stages as: acquisition, where witness perceives event; retention, where witness stores information about event in memory; and retrieval, where witness tries to recall stored information).

91. See Dillard S. Gardner, The Perception and Memory of Witnesses, 18 CORNELL L.Q. 391, 391 (1933) (“The vast majority of testimonial errors . . . are those of the average, normal honest man, errors unknown to the witness and wholly unintentional, represented in the great body of testimony which is subjectively accurate but objectively false.”).

92. See LOFTUS & DOYLE, supra note 89, at 10 (discussing how eyewitness of aircraft accident honestly believed plane crashed vertically while photographic evidence showed plane crashed horizontally).

93. See Stephan Landsman, Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses, 45 U. PITT. L. REV. 547, 550-56 (1984) (stating that distortion may occur during “initial perception of relevant information (acquisition), storage of that information in memory (retention), and subsequent recitation based on the stored information (retrieval)”; see also Monica L. Hayes, The Necessity of Memory Experts for the Defense in Prosecutions for Child Sexual Abuse Based Upon Repressed Memories, 32 AM. CRIM. L. REV. 69, 75 (1994) (“The retrieval environment and patient expectations during the retrieval process have been shown to play a large role in false memory creation.”); Tillers & Schum, supra note 29, at 817 (“The view that human beings make decisions about what to say and believe and that their expectations and interests influence their beliefs is now supported by a large body of non-legal scholarship.”).

94. See Angel Saad, Perjury, 34 AM. CRIM. L. REV. 857, 879 (1997) (discussing increased penalties under United States Sentencing Guidelines for obstruction of justice that leads to “indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence” (quoting U.S. SENTENCING GUIDELINES MANUAL § 2J1.3 commentary (1995))).

95. See Felice J. Levine & June Louin Tapp, The Psychology of Criminal Identification: The Gap From Wade to Kirby, 121 U. PA. L. REV. 1079, 1081-82 (1973) (stating that inaccurate, but sincere, identification of criminals in lineups is major source
Which truth is it that hearsay seeks to confine to in-court statements—veracity or accuracy? In seeking to exclude out-of-court true statements, is the purpose and effect to exclude lies or errors? Both definitions of truth are essential to the witnessing process, and scholars often conflate the meaning of truth in the hearsay definition, using both accuracy and veracity as an explanation and justification for the rule.  

If the hearsay rule is a rule of accuracy, it does not seem to effectuate its purpose. Hearsay is perhaps better seen as a rule of veracity, its purpose being to prohibit testimony that may consist of lies untested by cross examination. If there is to be a lie, let it be in open court. It is a cynical, yet true, statement. For a judgment to be based on a lie, the hearsay rule requires that the lie take place in court. The ancient “oath helpers,” precursor to the modern jury, consisted of twelve “witnesses” who would swear generally to the defendant’s innocence. The court did not re-

96. See Roger C. Park, “I Didn’t Tell Them Anything About You”: Implied Assertions as Hearsay Under the Federal Rules of Evidence, 74 MINN. L. REV. 783, 783 (1990) (discussing assertion-centered and declarant-centered definitions of hearsay and their effect on implied assertions). Scholars have tended to back into the ambiguity in the word truth. Whether scholars view hearsay primarily as an accuracy or a credibility rule underlies some of the controversy concerning an assertion-centered accuracy model or a declarant-centered credibility model. See id. at 784.

The Federal Rules of Evidence take an assertion-based approach, which results in a narrower definition of the rule’s scope. Although there is some logic to Professor Park’s position, it is not possible to line up the scholarship in any neat fashion. Compare GRAHAM, supra note 10, § 801.0, at 699-702 (discussing veracity of witness), with Suggested Classification, supra note 25, at 230-31 (using truth to mean factual accuracy).


[1]Inaccuracies [in testimony] are usually attributed to the four testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory. In the absence of special reasons, the perceived untrustworthiness of such an out-of-court act or utterance has lead the Anglo-Saxon legal system to exclude it as hearsay despite its potentially probative value. Id. at 958 (footnote omitted).

98. See id. Tribe noted that out-of-court statements have “long been regarded as particularly suspect when the act or utterance is not one made in court, under oath, by a person whose demeanor at the time is witnessed by the trier, and under circumstances permitting immediate cross examination by counsel . . . to probe possible inaccuracies in the inferential chain.” Id. (footnote omitted).

quire that the helpers have personal knowledge to testify because the fact that the "witness" would stake his soul on the innocence of the accused was sufficient indicia of innocence.100

If the sole objective and effect of the hearsay rule were to ensure that only in-court and not out-of-court lies enter the record, our system should probably abolish the hearsay rule.101 Along with abolishing the hearsay rule, we should abolish other rules of incompetence, such as party incapacity, as a relic of a more superstitious time which insisted that a judgment be based on facts that, if not accurate, would at least lead to damnation of the source.102 The modern justification of hearsay is not oaths and threats of damnation, it is cross examination.103 Truth, however defined, seems to be neither the purpose nor the effect of the hearsay rule, because truth is not really what hearsay is all about.104 "Truth of the matter" is a litmus test, but not a very good one for it sweeps too broadly, necessitating an exhaustive list of exceptions to function properly.105

Something different from finding truth is going on when the entire rule, both its definition and its exceptions, is taken as a whole. For example, out-of-court lies respecting present or future events may be admissible, even from the mouths of obvious villains.106 What is not admissible, with few exceptions, are out-of-court recollections that are reports of past

100. See Robert H. White, Origin and Development of Trial by Jury, 29 TENN. L. REV. 11-13 (1961) (noting that one French queen had 300 noblemen and three bishops swear that her four-month-old son was offspring of dead king, fact of which witnesses could have very little personal knowledge).

101. See, e.g., Milich, supra note 10, at 774-76 (discussing this and other reasons for abolishing hearsay rule); see also Christopher Finlayson, Proving Your Case—Evidence and Procedure in Action, 13 CARDOZO L. REV. 257, 299 (discussing abolition of hearsay rule in other countries).


103. See MUELLER & KIRKPATRICK, supra note 6, § 8.3, at 1052-53 (explaining principle that out-of-court statement is not subject to cross examination, and therefore lacks indicia of reliability).

104. See 3A WIGMORE ON EVIDENCE, supra note 2, § 995 (stating that when declarant is present at trial and available for cross examination "the whole purpose of the hearsay rule has been already satisfied"). But cf. MICHAEL H. GRAHAM, CLEARY & GRAHAM’S HANDBOOK OF ILLINOIS EVIDENCE § 801.1, at 504 (4th ed. 1984) (stating that one purpose of hearsay rule is to ascertain truth of statement).

105. See Karla-Dee Clark, Note, Innocent Victims and Blind Justice: Children’s Rights to be Free from Child Sexual Abuse, 7 N.Y.L. SCH. J. HUM. RTS. 214, 257 (1990) (describing hearsay exceptions in certain areas as either too broad or too rigid); see also FED. R. EVID. 803(1)-(24) and 804(a)-(b) (providing exhaustive list of hearsay exceptions).

106. See Myrna S. Raeder, The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond, 69 S. CAL. L. REV. 1463, 1511 (1996) (stating that "opinions of future events have been permitted under existing hearsay exceptions such as present sense impression" which would, of course, also contemplate statements of present events as well); see also FED. R. EVID. 803(1) (defining present sense impression exception to hearsay rule).
events recorded in witness memory, even if the declarant is a person known to be of honest and accurate character.\textsuperscript{107}

**Hypothetical I**

Suppose that Dan, a convicted perjurer and a gangster who hates the police, telephones Will from his cellular phone. These facts can be independently verified. Will wishes to testify that Dan said to him, "Sorry I'm late calling, but I'm hiding in the back of my van. The place is swarming with cops. They grabbed some bozo who looks kind of like me, wait 'til they find they've got the wrong guy. They've got him in 'cuffs on the street. Wait a minute. That cop is pulling his gun. Hey, he just shot the guy. He was helpless on the ground." The issue is whether the shooting was murder or justifiable force. The evidence is hearsay by definition, yet it is admissible as present sense impression.\textsuperscript{108} This unreliable evidence is admissible, even though it may well be inaccurate or false.

**Hypothetical II**

A note found in a saintly nun's prayer book, clearly written by her on or about Christmas past, reads, "Last October I saw a man fall from the top of a train just south of Los Angeles. A woman jumped off after him. She was obviously injured, but struggled until she dropped dead trying to help him. I wish to pattern my own conduct after her." The state asserts that the man pushed her and then jumped. The man, charged with murder, cannot call the nun because she is dead, so defendant wants to use the note in his defense. It is hearsay. There are no exceptions.\textsuperscript{109}

\(\text{\textsuperscript{107}}\text{ See Fed. R. Evid. 802 ("Hearsay is not admissible except as provided by these rules . . . ."); see also Fed. R. Evid. 803(1) (describing limited exception to admission of hearsay recollections where statement is almost concurrent with observation of event); Fed. R. Evid. 803(2) (describing limited exception to admission of hearsay recollections where statement was made in excited state); Fed. R. Evid. 803(3) (describing limited exception to admission of hearsay recollections where statement concerns then existing mental, emotional or physical condition); Fed. R. Evid. 803(4) (describing limited exception to admission of hearsay recollections where statement was made pursuant to medical diagnosis).}

\(\text{\textsuperscript{108}}\text{ See Fed. R. Evid. 803(1). The Rule provides: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition [is admissible as a hearsay exception]." Id.}

\(\text{\textsuperscript{109}}\text{ But see Fed. R. Evid. 807 (providing catchall hearsay exception). The Rule states:}

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing
The difference in admissibility in these hypothetical cases has nothing to do with truth. These examples also explain why scholars have not bothered to refine the meaning of truth as used in the hearsay definition. The test of truth misses the mark. The note in Hypothetical II is a witness statement relating past events; that is, it is out-of-court testimony. Opposing counsel does not have the opportunity to cross examine the witness giving that testimony; therefore, it is not admissible. The phone call in Hypothetical I is of quite a different character. Dan is not witnessing past events. His out-of-court statements are not testimonial because they are not recollection. They are not backward-looking statements of memory recalled and are therefore competent even without cross examination.

The Biblical injunction, “Thou shall not bear false witness against thy neighbor” is often interpreted as, “Thou shall not lie.” The simplified rendition is not an accurate paraphrase; “liar” and “false witness” are not synonymous terms. False witnessing is a much more specific act than lying. If you lie about where you are going tomorrow, you are telling a falsehood, but you are not bearing false witness. On the other hand, it is possible to sincerely attempt to tell the truth, as you know it, yet be wrong. Thus, a truthful person could end up mistakenly bearing false witness. Because one speaking with sincerity and certainty may yet, due to human fallibility, testify falsely, there is a further Biblical injunction, “Thou shall not forswear thyself.” Any witness, even a scrupulously honest one, risks accidentally breaking the false witness commandment.

A witness is a person who gives testimony of his or her recollection concerning past events. If the definition of hearsay focused directly on the witnessing function and less on a conflated truth standard, the rule would be more precise and require fewer exceptions.

to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id. If unsuccessful in invoking the penumbra exception, a defendant may try a due process or Sixth Amendment Confrontation Clause argument.

110. See Fed. R. Evid. 801(c). The statement in Hypothetical II was not subject to cross examination because it did not occur in court or at a hearing, rendering it hearsay. See id.

111. See Exodus 20:16 (King James); see also Hannah Arendt, The Human Condition 278 n.35 (1959) (“Thou shalt not lie (for the commandment: Thou shalt not bear false witness against thy neighbor,) is of course of a different nature.”).

112. See Arendt, supra note 111, at 278 n.35 (examining distinction between bearing false witness and lying); see also Gerrit Hendrik Kersten, The Heidelberg Catechism in Fifty-Two Sermons pt. 17 (2d ed. 1992) (stating that “in matters of judgment we are to embrace the truth and avoid the lie. . . . We may not bear false witness against anyone in such a way that his name, honour, and good character are injured, rather than promoted.”).

113. Matthew 5:33 (King James).

III. WITNESS RECOLLECTION: THE MISSING ELEMENT

A. Federal Common Law of Hearsay

Prior to the enactment of the Federal Rules of Evidence, the United States Supreme Court applied the federal common law of evidence. The Supreme Court decided two important hearsay cases that are highly instructive respecting the hearsay rule. Singly and together, they suggest a memory rather than a truth standard for hearsay.

The first case was Mutual Life Insurance Co. v. Hillmon. In Hillmon, the Supreme Court held competent, as against a hearsay exception, a statement of future intent by an out-of-court declarant. The issue in Hillmon was whether certain letters referring to an anticipated trip by Walters with John Hillmon were admissible as competent evidence. To determine whether Hillmon-type evidence is hearsay, one must undertake a complex analysis under the truth litmus test of the Federal Rules. One must ask questions such as: (1) is the statement potentially


116. See Shepard v. United States, 290 U.S. 96, 105-06 (1933) (declining to extend Hillmon rationale to backward-looking hearsay); Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295 (1892) (holding that admissibility turned on fact that letters were only evidence of decedent's intent, which was material in case).

117. 145 U.S. 285 (1892).

118. See id. at 287, 294 (holding that letters written by Walters on March 1, telling of pending trip with Hillmon to Crooked Creek, were "competent evidence of the intention of Walters at the time of writing them").

119. See id. at 287-88, 295. On March 18, a body was found in the Crooked Creek area. See id. at 287. Later, the beneficiary of John Hillmon's life insurance policy filed a claim. See id. at 285-86. The insurance company argued that the claim was fraudulent and that the body discovered at Crooked Creek was Walter's body, not Hillmon's. See id. at 286-87.

If Walters' intent had been carried out, as identified in the letters, that would have placed both him and Hillmon in the vicinity of Crooked Creek, where the body was found and initially identified as being Hillmon. See id. at 287-88. The insurance company argued that the body was that of Walters, who had been invited to his death by Hillmon as part of an insurance fraud scheme, in which Walter's body was used to prove Hillmon's death. See id. Thus, although the Walters letters were evidence that placed both Walters and Hillmon at Crooked Creek, Hillmon's wife objected that this information was hearsay. See id. at 287.

120. See FED. R. EVID. 801(c) ("'Hearsay' is a statement, other than one being made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). In analyzing the admissibility of the Walters letters under the Federal Rules of Evidence today, one would first ask if the letters were offered for the truth of the matter asserted. In one sense the letters may not have been offered to show the truth; Walters could have been lying about his intent, yet they still show that he had some connection with Hillmon. He also could have been wrong; his plans might have gone the way of other plans of mice and men. Thus, the letters may not be hearsay at all, particularly if used circumstantially to show that Walters had heard of Hillmon. See Hillmon, 145 U.S. at 288. His stated plans to go to Crooked Creek were circumstantial evidence that, at a
a lie?; and (2) how much of the weight of the circumstantial evidence arises from belief in the truth of the asserted statement of intent, as opposed to how much weight arises from circumstantial analysis deduced from the state of mind of Walters?

Of course, even if a statement is hearsay, it may still be admissible under the state of mind exception. The Walter's letters are admissible under Rule 803(3) as an exception to hearsay. What is lost in this definition/exception process of analysis is the rhyme and the reason for admitting testimony such as the letters in Hillmon. The statements are not testimonial; they are primary evidence having an indicia of reliability different than witness statements.

A truth definition of hearsay did not hinder the Supreme Court's analysis of the Hillmon evidence. Its analysis lacked the in-and-out mod-

minimum, Walters had considered a trip with Hillmon, thus increasing the probability that he did go because one is more likely to do something one has considered than something one has not. On the other hand, the facial statement of intent to go with Hillmon to show that he intended to do so is hearsay in its declarative import. If it is true that he intended to go with Hillmon, the probability of his having done so is all the greater. Therefore, the letters may be considered both hearsay or not hearsay under the current definition.

121. See Fed. R. Evid. 803(3) (explaining that certain testimony is excepted from hearsay rule, including "statement[s] of the declarant's then existing state of mind . . . (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will").

122. See Shepard v. United States, 290 U.S. 96, 105-06 (1933) (holding that state of mind, regardless of whether it is directly or circumstantially relevant, is admissible except to show memory of past events). The circumstantial use of "intent" as a kind of "future tense" hearsay exception would not be apparent to the uninformed reader of Rule 803(3). See, e.g., Jack B. Weinstein et al., Evidence: Cases and Materials 492-93 n.1 (1997) (explaining that evidence of future conduct gathered from inference as to declarant's state of mind at time of statement is not hearsay when offered circumstantially).

123. See Park, supra note 10, at 57 (noting that supposed risks in reliability of out-of-court statements make it necessary to determine whether statement is reliable). Park does not believe that these statements should necessarily be considered hearsay:

This justification [the fact that a statement may be unreliable] for excluding hearsay depends upon the belief that a witness describing an out-of-court statement is likely to be less reliable than a witness describing non-verbal events, or at least that cross examination will be less effective on a witness to a statement. . . . [T]wo risks I have mentioned—ineffectiveness of a declarant's out-of-court statement and inaccurate testimony by an out-of-court witness about another's out-of-court statement—create a danger that unreliable evidence will be presented to the trier. Mere unreliability, however, is a weak basis for exclusion; after all, evidence of doubtful reliability is routinely admitted in modern courts, on the assumption that the trier can recognize the infirmities in the testimony and take them into account in evaluating it.

Id. at 57-58.

124. See Hillmon, 145 U.S. at 295-96 (noting that actual letters expressed intent as to what actually happened, not memories that had to be tested by cross
ern approach and was therefore more direct.\textsuperscript{125} The Court simply held that "whenever the intention is of itself a distinct and material fact in the chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party."\textsuperscript{126} Rather than trying to determine whether the evidence was "for the truth of the matter" and, if so, what exception might apply, the Court admitted the evidence as being primary and competent.\textsuperscript{127} The Court stated:

> The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is \textit{as direct evidence of the fact}, as his own testimony that he then had that intention would be. . . . [H]is own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said. . . . "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expression of such feelings are \textit{original} and \textit{competent} evidence."\textsuperscript{128}

The Supreme Court's analogy of the letters written by Walters to a verbal act indicates that it did not view the evidence as hearsay.\textsuperscript{129} Or, more precisely, the Court viewed the issue as being one of drawing the line between admissibility and nonadmissibility, not as one of defining hearsay.\textsuperscript{130} "Such declarations (of bodily or mental feelings) are regarded as verbal acts, and are as competent as any other testimony."\textsuperscript{131}

\textsuperscript{125} See \textit{FED. R. EVID.} 801, 803(3) (referring to way in which statement is considered hearsay under 801, but allowed in under state of mind exception of 803(3)). Because \textit{Hillmon} was decided before the Federal Rules of Evidence were adopted, this "dance" was not necessary. See Rydstrom, supra note 124, at 573 n.2.

\textsuperscript{126} \textit{Hillmon}, 145 U.S. at 295.

\textsuperscript{127} See id. (explaining that letters written at time Walters considered accompanying Hillmon on trip were more probative than would be memory of Walters if he had lived).

\textsuperscript{128} Id. at 295-96 (emphasis added) (quoting \textit{Insurance Co. v. Mosley}, 75 U.S. 397, 404 (1869)).

\textsuperscript{129} See id. at 296 (comparing \textit{Hillmon} facts to that of another case where statements were admissible because they are "expressions [of] natural reflexes of what it might be impossible to show by other testimony" (quoting \textit{Mosley}, 75 U.S. at 404-05)); \textit{Mueller \& Kirkpatrick}, supra note 6, § 8.16, at 1096-97 (defining verbal act as words that "carry legal consequences or logical significance independent of their assertive aspect"); see also \textit{Rice}, supra note 27, § 4.01 (B), at 238 (stating that like statements offered to show effect on listener and statements showing knowledge, verbal acts are extrajudicial statements that do not violate "truth of the matter" formulation).

\textsuperscript{130} \textit{See Hillmon}, 145 U.S. at 296-98 (discussing competency of evidence as main issue in admissibility, without becoming bogged down in theoretical discussion of hearsay).

\textsuperscript{131} Id. at 296 (quoting \textit{Mosley}, 75 U.S. at 404-05).
Verbal acts are not hearsay because they have an operation at law quite apart from any testimonial content. Warnings and notices are typical examples of verbal acts, as are the words that constitute the formation of a contract. They are not tales of tales. They involve no witnessing function.

One major advantage of the “truth of the matter asserted” test is that it effectively distinguishes verbal acts, which are admissible, from some, but not all, inadmissible testimonial statements. A red light, stop sign or verbal police order to halt all have the same legal effect—they can result in a traffic citation. Such verbal acts are not offered for their truth, but merely to show that a legal fact has occurred. Legally, the statement’s truth or falsity is insignificant. Because verbal acts are not offered for the “truth of the matter asserted,” the hearsay rule does not affect their admissibility.

132. See, e.g., Richard C. Mangrum, The Law of Hearsay in Nebraska, 25 Creigh-ton L. Rev. 499, 506 (1982) (noting that “[c]ertain verbal acts, such as the words of a contract, words establishing agency, slanderous words, etc., have legal significance because they have been spoken. If offered to prove that they have been stated they are nonhearsay.”). The author used a case in which one partner told another that “he could have the corn in specific cribs.” Id. The court held that this statement had legal significance referring to the division of their interests and that, therefore, the statement was nonhearsay. See id. (citing Hanson v. Johnson, 201 N.W. 322 (1924)).

133. See 29A AM. JUR. 2D Evidence § 863, at 281-82 (1994) [hereinafter Evidence] (noting that “[f]or utterances to be admissible as verbal acts, (1) the conduct to be characterized by the words must be independently material to the issue; (2) the conduct must be equivocal; (3) the words must aid in giving legal significance to the conduct; and (4) the words must accompany the conduct”). Warnings, notices and contracts fit into these categories. See, e.g., 4 WEINSTEIN’S EVIDENCE § 801(c)(01), at 801-65 (1981) (noting that verbal acts occur “when the utterance is an operative fact which gives rise to legal consequences,” such as notice).

134. See Evidence, supra note 133, § 863, at 281-82 (defining verbal acts); see also FED. R. EVID. 801 (defining hearsay as statements offered for truth of matter asserted).

135. See Evidence, supra note 133, § 863, at 281-82 (noting that words themselves can have independent legal significance, regardless of assertive quality, but stressing that actual words used are important).

136. See Paul I. Birzon, Hearsay There’s More to this Evidence than Meets the Ear, 72 FAM. ADVOC. 4, 6-7 (1985) (noting that admissibility of verbal act depends “only on the utterance of the words and not the truthfulness of the contents. The testimony [is] admissible because it eludes the hearsay rule by definition.”). That being the case, even when verbal acts may be untrue, such as when a sign states, “Caution, men working,” but there are no men present at the time or those present are eating or loafing around, the verbal act is still relevant and therefore admissible. See MUELLER & KIRKPATRICK, supra note 6, § 8.16, at 1097 (stating that assertive aspect, or truthfulness, is unimportant in regard to admissibility of verbal acts).

137. See Jerome A. Hoffman, Res Gestae’s Children, 47 ALA. L. REV. 73, 104-05 (1995) (illustrating that truth or falsity of verbal acts is of no consequence). Hoffman stated:

To inquire into the truth or falsity of such words [verbal acts] makes no sense at all. A proponent does not offer them to prove the truth of the
Nevertheless, the "truth of the matter asserted" test that eliminates verbal acts from hearsay does not similarly eliminate Hillmon-type evidence. Yet the Supreme Court in Hillmon was correct in noting a similarity between verbal acts and statements of intent, a similarity that the truth test does not address. Warnings, notices or the words of a contract are similar to the Walters letters in that they are not testimonial. Writestoes verbal acts and to statements of intent are giving testimony, not testifying as to a "tale of a tale" by an out-of-court declarant.

In Shepard v. United States, the Court identified memory as an essential element of inadmissible hearsay, distinguishing recollection from other states of mind, such as intent. Shepard was a murder case in which police charged a husband with the poisoning death of his wife. At issue was whether the dead wife’s statements, made after the poisoning, but prior to her death some days later, were admissible.

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138. See Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295 (1892) (describing declarations made in Walters’ letters as intentions). Because the letters that Walters wrote were statements of future intent, the words did not accompany the conduct and the letters would not be considered verbal acts today.

139. See id. These letters were direct evidence of Walters’ intention, just as the words of a contract are direct evidence having independent legal significance. See Mueller & Kirkpatrick, supra note 6, § 8.16, at 1097 (noting that words of contract constitute verbal act).

140. See, e.g., McCormick on Evidence, supra note 8, § 249, at 733-34 (illustrating that witnesses to verbal acts are not testifying to evidence of assertions, but to utterances that have legal significance).

141. 290 U.S. 96 (1933).

142. See id. at 104-06 (noting that while state of mind may be proved and admitted as evidence in some cases, in this case testimony was backward-looking and, therefore, inadmissible).

143. See id. at 97-98.

144. See id. at 102-06. Her statements were, in effect, that she feared Dr. Shepard, her husband, had poisoned her by contaminating a whiskey bottle that he had given to her. See id. at 97-98 (noting that if inadmissible, these statements would constitute more than unsubstantial error and verdict could not stand). The government first urged the Court to view Mrs. Shepard’s statement as a dying declaration, and therefore find it admissible under that exception. See id. at 99 (holding that statement was not dying declaration because Mrs. Shepard was not “in the shadow of impending death”). The government then argued that the statement should be admitted to rebut the defendant’s assertions that Mrs. Shepard was suicidal and may have poisoned herself. See id. at 102-03 (rejecting this argument because statement was not offered as rebuttal evidence, but to prove Dr. Shepard killed his wife). Finally, the government tried to convince the Court that this statement fell within the Hillmon rule and could be admitted as evidence of state of
The Supreme Court has identified memory of past events as an important means of separating admissible from inadmissible out-of-court statements. In *Shepard*, Justice Cardozo, writing for the Court, distinguished *Hillmon* and concluded, "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."

This conclusion, that our system cannot extend *Hillmon* to statements of memory or belief without destroying the hearsay rule totally, is sound. The Federal Rules of Evidence codify *Shepard* and *Hillmon* in the Rule 803(3) exception to hearsay. Under the Rules, *Hillmon* is a gloss on the state of mind exception, while *Shepard* is a limitation on that gloss. *Shepard*, however, is much more than this. It defines hearsay because it more precisely draws the line between admissible and inadmissible statements than the "truth of the matter asserted" rule.

*Shepard* never attained a central distinguishing role in common law analysis because the Federal Rules of Evidence intervened. The Rules relegated the *Shepard* holding to a minor position in the analytical structure. In part, this is because the distinction the Court drew never convinced Professor Morgan. Morgan recognized the important relationship between preserved memory and hearsay. He was reluctant, however, to abandon the other dangers of hearsay—perception, narration, mind. See id. at 103-06 (holding that *Hillmon* rule only applied to statements of intention that look to future, not to past).

145. See id. at 105-06 (holding that statements of future intent must be distinguished from "declarations of memory"). The Court noted that *Hillmon*, while still good law, is a "high-water line beyond which courts have been unwilling to go." Id. at 105. If declarations of memory pointing to past events were allowed in as evidence, the hearsay rule would be swallowed. See id. at 106.

146. Id.

147. See Fed. R. Evid. 803(3). The Rule states:
   THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION. A statement
   of the declarant’s then existing state of mind, emotion, sensation, or
   physical condition (such as intent, plan, motive, design, mental feeling,
   pain, and bodily health), but not including a statement of memory or
   belief to prove the fact remembered or believed unless it relates to the
   execution, revocation, identification, or terms of declarant’s will.

148. See Thomas A. Wiseman, III, Note, Federal Rule of Evidence 803(3) and the Criminal Defendant: *The Limits of the Hillmon Doctrine*, 35 Vand. L. Rev. 659, 681 (1982) (stating that “*Shepard* defined the scope of the *Hillmon* doctrine that subsequent courts have followed and that Congress eventually codified in rule 803(3)").

149. See Mueller & Kirkpatrick, supra note 6, § 8.39, at 1252 (referring to *Shepard* decision as “[t]he-line-in-the sand approach”).

150. See Fed. R. Evid 803(3) advisory committee’s note (citing *Shepard* to justify excluding statements of memory or belief as circumstantial evidence that prior event caused declarant’s mental state).


and sincerity. Although the "truth of the matter" definition of hearsay tacitly incorporated Morgan's sincerity test, he was reluctant similarly to promote memory above the other competency dangers.

Professor Morgan's criticism of Shepard rests, at least in part, on concerns over inferential uses of state of mind evidence. He could have taken the matter further, for all communication rests on memory. Everything we do is based, in part, on past experience. In this sense, all statements are backward-looking statements of memory. Additionally, all statements concerning state of mind inevitably cast a backward shadow at some level.

The Federal Rules limit the inquiry, for the most part, to explicit assertions and do not attempt to delve beyond the surface in search of subterranean hearsay levels. Thus, Professor Morgan's concern over

153. See id. at 719 (noting that when witness is present in court, "His capacities of perception, memory, and narration, and his disposition to make an honest use of them can be satisfactorily examined").

154. See id. at 719-20 (Declining to elevate memory above other dangers of hearsay). The title of Professor Morgan’s article, The Relation Between Hearsay and Preserved Memory, 40 HARV. L. REV. 712 (1927), also suggests the existence of a special relationship between hearsay and preserved memory.

155. See Hearsay Dangers, supra note 38, at 212-13 (criticizing Shepard Court’s condemnation of “declarations of memory” because if such declarations were to reach declarations of intent offered as basis for inferring objective facts that created intent, “Such declarations, if used as evidence of what caused the state of mind, call for just as much reliance on memory and observation as do ‘declarations of memory’ and likewise cast their light on the past, not on the future” (quoting Shepard v. United States, 290 U.S. 96, 105-06 (1933))).

156. See McCORMICK ON EVIDENCE, supra note 8, § 11, at 27 (“There is no conceivable statement however specific, detailed and ‘factual,’ that is not in some measure the product of inference and reflection as well as observation and memory.”); MUELLER & KIRKPATRICK, supra note 6, § 8.39, at 1250 (“Virtually all statements that carry information about acts, events, or conditions can be characterized as statements of memory because they openly disclose the speaker’s thoughts . . . .


158. See Baker, supra note 157, at 313 (arguing that individual’s present actions are guided either consciously or subconsciously by that individual’s past experiences).

159. See GILLESPIE, supra note 157, at 142 (stating that memory “suffuses, interpenetrates, colors what is now and here uppermost” (quoting JOHN DEWEY, ART AS EXPERIENCE 306 (1934))).

160. See FED. R. EVID. 801(a) (“A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”). This is an explicit disavowal of the English common law view that implicit hearsay is forbidden. See Regina v. Kearley, 2 App. Cas. 228, 266 (H.L. 1952) (contending that Wright court’s decision is fundamentally sound); Wright v. Doe d. Tatham, 112 Eng. Rep. 488, 516 (Ch. 1837) (holding that proof of particular fact “which is not of itself a matter in issue, but which is relevant only as implying a
memory at the inferential level is itself backward-looking. A recollection test can differentiate recollected events recorded in memory from all other statements that have some memory component. What’s more, the distinction is essential to proper hearsay analysis at some point. The problem cannot be avoided by transferring it to an exception rather than incorporating it as part of the definition.

Rule 803(3)’s “state of mind” exception and the nonhearsay state of mind evidence rule muddles the minds of most trial lawyers and judges because the distinction is both analytically difficult and totally academic. Ultimately, it makes no difference to admissibility; therefore, state of mind is a favorite hearsay “exception” with the bar. The ticklish distinction between hearsay and nonhearsay state of mind statements is only made necessary because the authors of the Rules codified Shepard as part of an exception, rather than as part of the rule. While this added considerable analytic complexity, the codification did not achieve greater precision within the rule.

The distinction between Shepard backward-looking memory and Hillmon-type evidence may lack the precision of scientific, objective measurement. It is, however, a distinction that more accurately than truth identifies the interface between admissible and inadmissible extrajudicial statements. A recollection test would focus on as important a factor as credibility in distinguishing between admissible and inadmissible extrajudicial statements.

B. Confrontation Clause Analogy

The hearsay rule is the traditional means for assuring a live, adversarial trial and for preserving the right of cross examination, but it is not the only rule designed for this purpose. In criminal cases, the Confrontation Clause of the Constitution also safeguards the adversarial trial.

statement or opinion of a third person on the matter in issue, is impermissible in all cases where such a statement or opinion not on oath would be of itself inadmissible”).

161. See David E. Seidelson, The State of Mind Exception to the Hearsay Rule, 13.2 DuQ. L. Rev. 251, 251 (1974) (“The state of mind exception to the hearsay rule may be, simultaneously, the most elusive and the most pernicious of the many hearsay exceptions.”); see also Faust F. Rossi, The Silent Revolution, A.B.A. Litig., Winter, 1983, at 13, 14 (stating that state of mind exception is one of attorneys’ favorite methods to admit hearsay evidence).

162. See Fed. R. Evid. 803(3) (excluding from admission into evidence “a statement of memory or belief to prove the fact remembered or believed”).

The Supreme Court’s statement that “hearsay rules and the Confrontation Clause are generally designed to protect similar values” reflects the close relationship between hearsay and the Confrontation Clause. At the heart of both the hearsay rules and the Confrontation Clause is the right to cross examine witnesses and to have them appear live in front of the finder of fact.

The Supreme Court has carefully avoided, in its Confrontation Clause cases, the constitutionalization of hearsay. It has also eschewed the structure of hearsay in constitutional cases. Rejecting an approach that would forbid all hearsay, the Court determined that the Confrontation Clause would not bar out-of-court statements if they bore an “indicia of reliability” and if the witness was unavailable.

164. California v. Green, 399 U.S. 149, 155 (1970) (finding that there is congruence between hearsay rules and Confrontation Clause, but there is not complete overlap).

165. See Ohio v. Roberts, 448 U.S. 56, 78 (1980) (finding that heart of this constitutional guarantee is accused’s right to compel witness “to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief” (quoting Mattox v. United States, 156 U.S. 237, 242 (1895))). One should note that the Court in Mattox found both credibility and cross examination of recollection as the rationale underlying the right to confront. See Mattox, 156 U.S. at 243; see also Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (“The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross examination.”); Kentucky v. Stincer 482 U.S. 730, 749 (1986) (Marshall, J., dissenting) (asserting that Confrontation Clause provides right for defendant to cross examine adverse witnesses).

166. See Dutton v. Evans, 400 U.S. 74, 86 (1970) (plurality opinion) (“It seems apparent that the Sixth Amendment’s Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now.”) (footnotes omitted); Green, 399 U.S. at 155 (“While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete... Our decisions have never established such a congruence.”); see also Stanley A. Goldman, Not So “Firmly Rooted” Exceptions to the Confrontation Clause, 66 N.C. L. Rev. 1, 4-5 (1987) (“The hearsay rule and the confrontation clause are similar in that both exclude from evidence certain out-of-court assertions. However, the two are not coextensive and do not always exclude the same assertions.”) (footnotes omitted); Barbara Rook Snyder, Defining the Contours of Unavailability and Reliability for the Confrontation Clause, 22 Cap. U. L. Rev. 189, 195 (1993) (noting that hearsay rules of evidence and Confrontation Clause do not serve exactly same functions).


168. See Roberts, 448 U.S. at 63-66 (noting that where witness is unavailable, for statement to be placed before jury, statement must bear “an indicia of reliability”); see also Idaho v. Wright, 497 U.S. 805, 814 (1990) (“[O]nce a witness is shown to be
The first criterion is reliability. Reliability may be met by citing a "firmly rooted" hearsay exception or by a demonstration that the circumstances surrounding the statement suggest, internally, that the statement is not a falsification. 169 There must be something about the time, place and nature of the extrajudicial statement that makes it admissible without cross examination. 170

Similarly, internal indicia of reliability are found in most enumerated exceptions to hearsay. The Rules codify recurring examples of instances where the Court found something in the nature and quality of the statement, combined with the circumstances of its making, to justify admission. 171 Both traditional hearsay analysis and Confrontation Clause analysis agree that the right to cross examine witnesses depends on factors inherent in the out-of-court statement. 172

unavailable, 'his statement is admissible only if it bears adequate "indicia of reliability."'" (quoting Roberts, 448 U.S. at 66).

169. See Wright, 497 U.S. at 805 ("The reliability requirement can be met where the statement either falls within a firmly rooted hearsay exception or is supported by a showing of 'particularized guarantees of trustworthiness.'" (quoting Roberts, 448 U.S. at 66)); Bourjaily v. United States, 483 U.S. 171, 200 (1987) (Blackmun, J., dissenting) (stating that indicia of reliability is required to promote accuracy and trustworthiness and can be found in either "firmly rooted hearsay exceptions" or particularized indicia of reliability); Michael H. Graham, Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions, 40 U. MIAMI L. REV. 19, 54 (1985) ("This ad hoc assessment is to be based upon the totality of the surrounding circumstances, including corroborating facts such as physical evidence, inconsistent facts, and the assessed credibility of the declarant, all considered in the light of the traditional 'firmly rooted' exceptions to the hearsay rule."); Deborah M. Kupa, Note and Comment, Erosion of the Confrontation Clause in the Ocean State: Admitting Declarations of a Decedent Made in Good Faith, 1 ROGER WILJAMS U. L. REV. 137, 145 (1996) (stating that reliability can be met where evidence falls within "firmly rooted" hearsay exception or where totality of circumstances surrounding statement guarantees trustworthiness).


171. See Dutton, 400 U.S. at 87-88 (finding that indicia of reliability, provided by nature and timing of statement, justified admission of hearsay statement without offing Confrontation Clause).

172. See Phillip Halpern, The Confrontation Clause and the Search for Truth in Criminal Trials, 37 BUFF. L. REV. 165, 166-68 (1989) (noting that if witness is unavailable, then statement may be admissible without cross examination if hearsay statement bears adequate indicia of reliability); Elanor L. Owen, The Confrontation Clause Applied to Minor Victims of Sexual Abuse, 42 VAND. L. REV. 1511, 1529-31 (1989) (stating that surrounding circumstances can provide adequate indicia of reliability to justify admission of hearsay statements without providing right to cross examine witnesses).
The second criterion requires that the declarant be unavailable or that the statement is "not replicable" by testimony.\textsuperscript{173} Thus, the lack of testimonial quality is important in two respects. First, it bears on indicia of reliability.\textsuperscript{174} Second, it overrides the need to show that the witness is available.\textsuperscript{175}

Justice Thomas, concurring in \textit{White v. Illinois},\textsuperscript{176} attempts to outline an approach to Confrontation Clause cases.\textsuperscript{177} In addition to the right to cross examine witnesses who actually testify, Justice Thomas would also forbid extrajudicial testimony.\textsuperscript{178} He opines that the Confrontation Clause prohibits testimonial materials when the witness is not present.\textsuperscript{179} Although one might disagree with the narrow range of materials that Justice Thomas would construe as testimonial, the distinction is otherwise sound and can be used to explain why some extrajudicial statements, including some "firmly rooted hearsay exceptions," need no showing of unavailability while others do.\textsuperscript{180} Justice Thomas asks the Court, in some future case, to consider the meaning of "witness against," as used in the

\textsuperscript{173.} \textit{See United States v. Inadi}, 475 U.S. 387, 395 (1986) (noting that sometimes statements derive much of their value from fact that statements are made in context very different from trial and therefore are usually irreplaceable as substantive evidence).

\textsuperscript{174.} \textit{See White v. Illinois}, 502 U.S. 346, 355-56 (1992) (concluding that statements that are incapable of replication can not recapture reliability even in later in-court testimony); \textit{Bourjaily}, 483 U.S. at 182 (finding that where statements are not capable of replication, no additional test for indicia of reliability is necessary).


\textsuperscript{177.} \textit{See id.} at 365 (Thomas, J., concurring). Justice Thomas suggests: One possible formulation is as follows: The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. It was this discrete category of testimonial materials that was historically abused . . . .\textsuperscript{181}

\textit{Id.}

\textsuperscript{178.} \textit{See id.} (Thomas, J., concurring) (opining that allowing extension of Confrontation Clause to extrajudicial testimony contained in formalized documents would result in depriving criminal defendants of benefits of adversarial process and failure of preventing evils at which Confrontation Clause was directed).

\textsuperscript{179.} \textit{See id.} at 364 (Thomas, J., concurring) ("The United States . . . has suggested that the Confrontation Clause should apply only to those persons who provide in-court testimony or the functional equivalent. . . . This interpretation is in some ways more consistent with the text and history of the Clause than our current jurisprudence.").

\textsuperscript{180.} \textit{See United States v. Inadi}, 475 U.S. 387, 394 (1986) (holding that unavailability must be shown when evidence is "weaker substitute" for in-court witness).
Confrontation Clause. The inquiry would be instructive not only for interpreting the Constitution, but also for hearsay, because not everyone who speaks is "witnessing." While the jurisprudence of Confrontation Clause analysis remains in many respects uncertain, the need to grapple with the problems of extra-judicial statements outside the confined structure of the codified hearsay rules has led to insight that we can transfer to the analysis of hearsay. While cross examination is an important procedural safeguard for some kinds of statements, it is ineffective and inappropriate for others. This latter class consists of primary evidence that would, if replicated from the witness stand, lose its character and probative force. This was true in the case of the letters in Hillmon—if Walters (or the ghost of Walters) was called to the stand to testify that he went to Crooked Creek with Hillmon, it would not have the same quality of persuasiveness as letters written before the event, when there was no inkling of possible homicide.

The same nontestimonial quality can be found in the statements of the four-year-old girl in White who awoke her sitter with a scream, complained to her mother as soon as feasible that a man had attacked her and promptly repeated details to a police officer and examining doctor. The probative value of statements of a frightened child seeking comfort from her mother and other care-providing adults has a different probative value than would subsequent testimony by that child. Distinguishing

181. See White, 502 U.S. at 366 (Thomas, J., concurring) ("I respectfully suggest that, in an appropriate case, we reconsider how the phrase 'witness against' in the Confrontation Clause pertains to the admission of hearsay.").

182. See id. at 359 (Thomas, J., concurring) (stating that unfortunately, in recent cases in this area, Supreme Court has assumed that all hearsay declarants are "witnesses against" defendants within meaning of Confrontation Clause, even those in which declarant is not "witnessing").

183. See Garland, supra note 175, at 1071 (recognizing that cross examination of witness does not provide additional safeguard or produce statements with more probative value when statement is made in context that cannot be replicated by live, in-court testimony).

184. See Inadi, 475 U.S. at 395 (noting that certain statements are incapable of being replicated due to circumstances under which statement was made, and even if party is required to take stand, party's in-court testimony seldom will reproduce significant portion of evidentiary value of out-of-court statement).

185. See Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295 (1892) (noting that even if Walters had still been alive, that information would be "no more likely to be clear and true than a bystander's recollection of what he then said, and [would be] less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation"). The fact that Walters intended to go with Hillmon to the place where the body was found made it more probable that he did go with Hillmon and that it might have been his dead body found in Hillmon's camp. See id. at 295-96.

186. See White, 502 U.S. at 349-50.

187. See id. at 356 (finding victim's out-of-court statements had "substantial probative value"). The immediate complaint of a victim of crime is often called a "hue and cry." The inference drawn from the immediate behavior, verbal or non-verbal, of a participant in an event is not the same as inferences drawn from subse-
testimonial extrajudicial statements from the child's statements at bar, the Court admitted the statements not only due to their highly probative value but also because that value was not testimonial in quality or nature. 188

Where an inference drawn from an out-of-court statement is not the same as an inference that could be drawn from in-court testimony to the same effect, cross examination is not a legitimate issue and the hearsay exclusionary rule should not apply. 189 Not surprisingly, many of the "firmly rooted" hearsay exceptions have just the quality identified in White. 190 Most exceptions to the hearsay rule are neither testimonial, witnessing, recollection of past events nor a tale of a tale.

IV. ELIMINATING EXCEPTIONS

The Federal Rules of Evidence permit an attorney to introduce some out-of-court statements, even for the truth of the matter asserted. These permissible extrajudicial statements are classified as: excluded from hearsay; excepted from hearsay, regardless of witness unavailability; or excepted from hearsay, only if the declarant is unavailable at trial. 191 The

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188. See White, 502 U.S. at 356. The Court concluded: They are thus materially different from the statements at issue in Roberts, where the out-of-court statements sought to be introduced were themselves made in the course of a judicial proceeding, and where there was consequently no threat of lost evidentiary value if the out-of-court statements were replaced with live testimony. . . . We therefore think it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the declarant later testifying in court. Id. This analysis mirrors the traditional justification for many of the exceptions that do not require unavailability.

189. See, e.g., Id. (noting that value of victim's out-of-court statements could not be duplicated by declarant's later testifying in court).

190. See, e.g., Idaho v. Wright, 497 U.S. 805, 820-21 (1990) (stating "if the declarant's truthfulness is so clear from surrounding circumstances that the test of cross examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial"); Bourjaily v. United States, 483 U.S. 171, 182 (1987) (finding co-conspirator exception to be "firmly rooted" and noting that inquiry into reliability of co-conspirator's statement is not required by Constitution); Ohio v. Roberts, 448 U.S. 56, 64 (1980) (noting that "competing interests" may outweigh necessity of confrontation at trial).

191. See Fed. R. Evid. 801(d) (delineating statements that are not hearsay). Rule 801(d)(1) permits the introduction of prior statements of a witness who testified at a trial or hearing and was subject to cross examination regarding those statements, as long as the statements are:

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person.
first two categories consist of primary evidence. Only a few exceptions, codified under Rule 804, require a showing of necessity due to the unavailability of the witness.192

The Appendix to this Article suggests, at least in outline form, how the current hearsay exceptions would fare under a witness recollection testimonial hearsay definition.193 It would be unnecessarily tedious to do so in the text. It will be useful, however, to focus briefly on two broad categories of Rule 803 exceptions: *res gestae* and recorded matter.194

A. *Res gestae*

Few areas of the common law of hearsay are in greater disrepute than the doctrine of *res gestae*.195 Dean Wigmore comments, "The phrase *res gestae* is, in the present state of the law, not only entirely useless, but even positively harmful. . . . It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology. It should never be mentioned."196

Professor Morgan agrees that the term is worthless.197 He thoroughly dissected the categories of statements to which courts apply the term *res gestae* and concluded that many were not hearsay because they were verbal acts or their equivalent.198 He identified three categories of extrajudicial *res gestae* statements that the authors of the Rules subsequently codified as exceptions to hearsay in Rule 803(1)-(3) of the Federal Rules of Evi-

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192. See Mueller & Kirkpatrick, supra note 6, § 8.77 (suggesting that unavailability may not be constitutional requirement for all 804(b) exceptions, noting, in particular, statements against interest). Some statements against interest may be primary and others testimonial. See id. The issue has not had to be determined under modern hearsay structure, but may someday have to be reached under Confrontation Clause analysis.

193. For the proposed redefinition of hearsay, see infra Appendix A.

194. See Fed. R. Evid. 803 (containing *res gestae* and recorded matter exceptions).

195. See 6 Wigmore on Evidence, supra note 2, § 1745, at 132 (describing phrase *res gestae* as "inexact and indefinite in its scope").

196. Id.

197. See Morgan, Suggested Classification, supra note 25, at 234-35 (calling *res gestae* "uncertain" and "vague").

198. See id. (stating that "verbal act" often admitted as part of *res gestae* would not be classified as hearsay today because it constitutes part of operative facts of case). Morgan also characterizes other categories that are not hearsay. See id. at 232.
In effect, Professor Morgan broke up *res gestae* into its component parts, some of which were statements not offered for their truth and others of which have since become the modern exceptions for present sense impression, excited utterance and then-existing mental, emotional or physical condition.

Neither Wigmore nor Morgan searched the foreign and unscientific category of *res gestae* evidence for a commonality rather than for distinctions. Yet a commonality does exist. Courts used the term *res gestae* to admit evidence that was not testimonial; that is, evidence that did not constitute witness recollection. The probative worth of *res gestae* utterances lies in their nontestimonial quality and in the irrelevance of cross examination for testing their worth, as the three modern exceptions demonstrate. If one substituted the term nontestimonial statement for the Latin term *res gestae*, the utility of the concept might not have met such scholarly resistance.

A startled utterance made contemporaneously with a startling event is not a statement recalled from memory. It is an exclamation respecting the present. Likewise, a present sense impression must be in the present tense, conceptually if not grammatically. Once again, there is no ele-

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199. See id. at 233-39 (outlining present sense impression, excited utterance and then-existing mental, emotional or physical condition exceptions); see also Fed. R. Evid. 801.


201. See generally 6 WIGMORE ON EVIDENCE, supra note 2, § 1745, at 131-33 (failing to note commonalities); Suggested Classification, supra note 25, at 233-39 (distinguishing cases without noting commonalities).

202. See 6 WIGMORE ON EVIDENCE, supra note 2, § 1745, at 132-33 (defining *res gestae*).

203. See Fed. R. Evid. 803 advisory committee's note (discussing first three hearsay exceptions).

204. See MCCORMICK ON EVIDENCE, supra note 8, § 272 ("The rationale for the (startled utterance) exception lies in the special reliability that is furnished when excitement suspends the declarant's powers of reflection and fabrication."); Aviva Orenstein, *My God! A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 Cal. L. Rev. 159, 159 (1997) (suggesting that absence of opportunity to fabricate justification is suspect).

205. See Suggested Classification, supra note 25, at 238 (stating guaranty of trustworthiness "lies in its spontaneity").
ment of recollection present. 206 Finally, a then-existing mental, emotional or physical condition requires that the focus be on the present or the future, not on past recollection. 207 The authors of the Rules explicitly incorporated the backward-looking element of memory, identified as a key hearsay distinction in Shepard, into Rule 803(3). 208 The Rule, however, also implicitly identifies the res gestae common law root from which it sprang.

Of the four hearsay dangers identified by Professor Morgan—narration, perception, memory and sincerity—res gestae evidence may suffer from the first two dangers, but never from the last two. That is, whether for the truth of the matter or not, the only evidence that the hearsay rule actually excludes is evidence with the danger of faulty memory (in the sense of recollection) or sincerity (in the sense of credibility). 209 Possible defects in narration and perception alone do not render extrajudicial statements inadmissible. 210

Professor Tribe came to a similar, though not identical, conclusion respecting the relative importance of the declarant's belief system as an alternative to the "truth of the matter" formulation. 211 Recognizing that "another elaborate argument for the reform of hearsay law might be in order," Professor Tribe undertook a more modest task of suggesting the relationship between the four dangers of hearsay. He suggested the need to focus on two chains of inference. The first chain contains dangers of ambiguity and insincerity; the second chain leads from belief of the declarant through possible erroneous memory and faulty perception. 212 Tribe thus coupled the four dangers into two pairs, each containing one of the two key elements of hearsay—credibility and recollection. 213

206. See id. (differentiating between declarations of past intent and intent contemporaneous with transaction).
207. See id. at 236 (discussing requirements for then-existing mental, emotional or physical condition exception).
208. See Fed. R. Evid. 803 advisory committee's note (discussing statements of memory). The advisory committee stated that statements of memory must be excluded "to avoid the virtual destruction of the hearsay rule . . . ." Id.
209. See Suggested Classification, supra note 25, at 239 (noting likelihood of truthfulness in author's classifications of res gestae).
210. See id. (stating that "the opportunity to cross examine the witness in court concerning the event" greatly diminishes danger of statement "being given greater weight than it deserves").
211. See Tribe, supra note 97, at 958-59 (introducing theory of Testimonial Triangle, defined as path of inferences grouped by problems with testimony, designed to make identification of hearsay problems and structuring of exceptions easier).
212. See id. at 959 (diagramming Testimonial Triangle).
213. See id. at 958-59 (noting that "[hearsay testimony] inaccuracies are usually attributed to the four testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory" (citing Wright v. Tatham, 5 C & F. 670, 7 Eng. Rep. 559 (H.L. 1838); 5 Wigmore on Evidence, supra note 2, § 1362, at 3-7)). Tribe coupled ambiguity and insincerity into one pair, and combined memory and faulty perception into the other pair. See id. at 958.
The coupling of ambiguity and insincerity is interesting in that it roughly parallels a veracity definition of "truth."²¹⁴ The second chain suggested by Professor Tribe, coupling memory and perception, is particularly insightful in that it identifies the missing recollection element of hearsay.²¹⁵ It is this second element that forms no part of the current hearsay definition.²¹⁶ The memory of past perceptions, recalled to consciousness, is the definition of recollection that this Article suggests is the missing element of hearsay.

Modern psychological theory sees memory as a dynamic process in which the mind constantly restructures recollections.²¹⁷ A simple memory is broken up into categories where each part is subject to confabulation by the overlay of subsequent memories.²¹⁸ Recollection consists of an active reconstruction from among these disparate memory patterns.²¹⁹

²¹⁴. See id. at 959 (noting that to successfully move along chain of inference from action or utterance to declarant’s belief, these two obstacles must be overcome). Both ambiguity and insincerity are related to veracity, as is equivocation in narration.

²¹⁵. See id. (noting that to successfully move along chain of inference from action or utterance or declarant’s belief to external fact asserted, these second two obstacles must be removed).

²¹⁶. See Fed. R. Evid. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and containing no discussion of recollection as element of hearsay).

²¹⁷. See Lawrence S. Kubie, Comment, Implications for Legal Procedure of the Fallibility of Human Memory, 108 U. Pa. L. Rev. 59, 61-66 (1959) (discussing various components of "memory" and various ways these components are distorted, and noting that "[w]hat we call 'memory' actually consists of several components" and that there are five "major components of memory: the perceptual components, the recording components, the processing components, the reliving components and finally the components of representation by means of verbal symbols" each of which "is vulnerable to distortions of several kinds"); see also Landsman, supra note 93, at 551-52 (noting that "[t]he only possible means of dealing with these problems is to fashion procedures that encourage the earliest possible articulation and recording of recollections"); R.T.C., Note, The Admissibility of Testimony Influenced by Hypnosis, 67 Va. L. Rev. 1203, 1213 (1981) (discussing "reconstructive theory of memory, in which the process of remembering is thought to involve reconstructing events based on fragments of experience," which "recognizes that even in ordinary situations memories can be reconstructed in ways that do not correspond to actual events"); Thomas M. Tomlinson, Note, Pattern-Based Memory and the Writing Used to Refresh, 73 Tex. L. Rev. 1461, 1468-70 (1995) (discussing pattern-based memory model theory, which stands for proposition that "memories of similar events and ideas are stored together and overlaid on top of each other, forming a single basic pattern for any type of memory").

²¹⁸. See Tomlinson, supra note 217, at 1470-74 (observing that "[i]f a witness has enough time for the memory to blend with a pattern and that scope of the memory being retrieved is not artificially small, the retrieval cue will result in presentation of an image of the blended pattern rather than the original memory as it was perceived" and thus, in regard to eyewitness testimony, "there is the danger of an error in the witness’s encoding, retention, or retrieval of memories").

²¹⁹. See R.T.C., supra note 217, at 1215 (discussing reconstructive theory of memory that "points out the importance of obtaining recollections under circumstances that minimize the danger of distortion of the original memory").
mony is thus an active mental process, far more complex than simple retrieval. 220 A cross examiner participates in this process, plumbing for missing details not only to find intentionally withheld information, but also as a means of restructuring the whole of the testimony. 221

Professor Imwinkelried, an evidence scholar, effectively argued that the law of evidence had focused on the risk of insincere testimony to the virtual exclusion of another, perhaps greater risk, faulty memory. 222 He viewed the memory factor at work in Rule 803(1) and Rule 803(3), and he identified memory, distinct from veracity, as an important aspect of hearsay analysis. 223 Perhaps more so than veracity, recollection is the element that cross examination can effectively test. 224 He stated that "the common law long assumed that the primary hearsay danger was the declarant's insincerity, and that the other hearsay risks such as imperfect memory were of only secondary importance. That assumption had a decisive impact on the nature of the recognized exceptions to the hearsay rule." 225 The singular focus on veracity also had a decisive impact on the definition of hearsay. 226

220. See, e.g., Landsman, supra note 93, at 549 (noting that "wide range of distorting influences" on testimony can be "a major cause of adjudicatory error").

221. See id. at 554-55 (stating that "advocates generally seek to reshape testimony to fit the needs of their cases" and that "[t]his reshaping usually takes place during sessions in which the witness is asked to present his testimony, and questions are then carefully structured to elicit desired responses"). Landsman further stated that "[r]ehearsal increases the likelihood that the witness's story will become frozen in a fixed pattern" and that "[i]t also provides the witness with innumerable suggestions about what the attorney thinks are the right answers [and] the availability of such suggestions will lead a significant number of witnesses to conform their stories to the interviewing attorney's expectations." Id. at 555. Landsman also noted that "[r]ehearsal is designed to and succeeds in affecting witness's narratives [and] [i]n many cases it substitutes the attorney's words for those of the witness." Id. Landsman further noted that in this scenario, "The lawyer's influence will frequently be amplified because [he or] she is perceived by the witness as a person of high status and because [his or] her influence is exerted immediately before testimony is to be given in court." Id. The effect of all of this is that "[o]nce a substitution has taken place there is virtually no hope of retrieving the original perceptions." Id. at 555-56.

222. See Edward J. Imwinkelried, The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt—and Quickly Forgotten, 41 FLA. L. REV. 215, 218 (1989) (noting that both Thucydides and modern researchers "have found that deficiencies in the memory factor are a far more important cause of testimonial error than subjective insincerity").

223. See id. at 231 (noting that these rules "indicate that the presence of facts ensuring the quality of the declarant's memory weighs strongly in favor of admitting the declarant's hearsay statement" (citing Fed. R. Evid. 803(1) ("Present Sense Impression"); Fed. R. Evid. 803(3) ("Then Existing Mental, Emotional, or Physical Condition")).

224. See Gardner, supra note 91, at 402-06 (explaining that cross examination may provide opportunity to expose elements of suggestion, coaching, leading questions and bias or prejudice or sympathy in testimony of witness).

225. Imwinkelried, supra note 222, at 217.

226. See BURR W. JONES, THE LAW OF EVIDENCE IN CIVIL CASES § 297, at 451 (3d ed. 1924) ("One of the most important of the rules excluding certain classes of
If our legal system defined hearsay so that it only applied to testimonial-type statements, that is, statements that have both credibility and recollection components, the first three Rule 803 hearsay exceptions would not be necessary. The same is true of many other "primary" exceptions found in Rule 803, in which past events are recorded, not in memory, but in written records, such as shop books.227

B. Shop Books

Records of regularly conducted business activities are admissible under an exception to the hearsay rule, provided they are "made at or near the time" of the transaction and meet other requirements of regularity.228 Rule 803 has numerous other exceptions for memoranda made "when the matter was fresh in the witness' memory."229 Some admit extra-judicial memoranda even if not contemporaneous.230 Yet, for the most part, the hearsay exceptions contained in Rule 803 admit evidence that is not testimonial and for which cross examination would be fruitless.231

A marriage certificate meeting the requirements of Rule 803(12) becomes a hearsay exception because a properly authenticated marriage certificate proves a marriage in a way that is quite different from the testimony of a witness who was present at the wedding ceremony.232 The certificate does not consist of past events recorded in memory and then

testimony is that which rejects hearsay evidence. By this is meant . . . evidence which . . . rests also in part on the veracity and competency of some other person from whom the witness may have received his information.” (emphasis added).


229. See, e.g., Fed. R. Evid. 803(5) (“Recorded Recollection”).


231. See Palmer v. Hoffman, 318 U.S. 109, 111 (1943) (distinguishing between testimonial and nontestimonial records and holding that written “statement at a freight office of petitioners where he was interviewed by an assistant superintendent of the road and by a representative of the Massachusetts Public Utilities Commission . . . offered in evidence by petitioners . . . was properly excluded”).

232. See Fed. R. Evid. 803(12) (allowing hearsay exception for “[s]tatement of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergymen, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified,” if certificate is purported to have been issued at time of act or within reasonable time thereafter).
later recalled, as would be the case of a witness testifying at some later time.\textsuperscript{233}

Although it has been traditional to view memory as a kind of tape recording in which the quality may fade or a memory may even be erased, long-term memory does not operate in such a precise and unambiguous manner.\textsuperscript{234} Rather, it changes during retention, as "every time we recall an event, we must reconstruct the memory, and with each recollection the memory may be changed."\textsuperscript{235} This is why the ability to cross examine recollections is important—to attempt to untangle the intricate web of recollected matter that constitutes testimony. Long-term memory is subjective and variable, not objective and concrete.\textsuperscript{236} According to recent commentators:

Truth and reality, when seen through the filter of our memories, are not objective facts but subjective, interpretative realities. We interpret the past, correcting ourselves, adding bits and pieces, deleting uncomplimentary or disturbing recollections, sweeping, dusting, tidying things up. Thus our representation of the past takes on a living, shifting reality.\textsuperscript{237}

This pattern of recall, reconstruction, deconstruction, editing and organizing is absent, or nearly absent, from shop books and official records. In this literate era, we often substitute a written notation for long-term memory.\textsuperscript{238} The memorandum may be in error, but not because some

\begin{itemize}
\item \textsuperscript{233} See Homer H. Clark, Jr., \textit{1 The Law of Domestic Relations in the United States} § 2.3, at 92 (2d ed. 1987) (noting that "[a] common procedure is for the person solemnizing the marriage to fill in the blanks on the marriage license and then send it to the place of recording"). This is a customary practice, which, while not mandated in every state, is required to be completed within a set time period by some state statutes. \textit{See, e.g.}, 25 Pa. Cons. Stat. Ann. § 1504 (West 1991) ("The duplicate certificate shall be signed by the person or by a member of the religious society, institution or organization solemnizing the marriage and returned for recording within ten days to the court which issued the license.").
\item \textsuperscript{234} See Orenstein, \textsuperscript{supra} note 204, at 225.
\item \textsuperscript{236} See Kraus, \textsuperscript{supra} note 14, at 1533-34 (stating that evolution in understanding of mental process of memory, as it related to testimony, has resulted in occasional lobbying for general acceptance of recent perception hearsay exception).
\item \textsuperscript{237} Loftus & Ketcham, \textsuperscript{supra} note 255, at 20.
\item \textsuperscript{238} See Mark J. Osiel, \textit{Ever Again: Legal Remembrance of Administrative Massacre}, 144 U. Pa. L. Rev. 463, 477 n.52 (1995) (rejecting assumption "that people in preliterate societies have better developed memories and more detailed recall—presumably because they cannot turn to documents as a mnemonic crutch—than those in modern, literate societies"). Nonetheless, memory retention depends heavily on careful, original observation. For example, the store clerk who enters a sale at the time of the sale makes an attempt to remember and thus typically promptly forgets the event. Some years later, the memorandum may remain. In an unusual case, a vestigial memory may exist in the mind of the clerk. In any event, the memorandum is a different form of evidence than the clerk's subsequent testimonial recollection. The passage of time and a myriad of intervening
\end{itemize}
intervening mood or event has morphed it. Memoranda of the type typically excepted from hearsay under Rule 803 are based on perceptions that initially may have been faulty. Nevertheless, that error is objectively frozen at the time the exceptions are recorded.239 The mental process of recollection, with its attendant uncertainties, plays no part in written memorandum made contemporaneously with a perception. Thus, when a written memorandum, especially if made for some routine purpose, falls within a hearsay exception, it is admitted, not because it contains the element of truth, but because it lacks the dangers of recollection.

V. Conclusion

The current hearsay formula, which states that evidence is not hearsay unless it includes "out-of-court statements offered to prove the truth of matter asserted," is not a scientific certainty. Nor should it be treated as an article of faith. Rather, it is an effective device for identifying some out-of-court statements that the court should admit because the statement is primary, as opposed to testimonial, evidence. The formula is effective in admitting out-of-court statements representing verbal acts or proving the operative facts of a case. For example, the words of a contract are relevant without regard to their testimonial quality or truth. Similarly, statements used to create a circumstantial inference rather than a direct inference are, by operation of the traditional formula, not excludable as hearsay. For example, statements testing the memory of the declarant concerning incriminating information provide an entirely different inference of guilt than that of a confession resting on belief in the veracity and accuracy of the declarant. The accepted definition of hearsay, set forth in Rule 801(c), would not have stood the test of time had it no utility. Nonetheless, the definition is defective in that it fails to identify many other primary, nontestimonial extrajudicial statements.

The Federal Rules approach is to create exceptions that permit admission, notwithstanding the over-generalization of the Rule. These primary exceptions, mostly codified in Rule 803, are not tales of tales. They are not second best forms of evidence. What is suggested here is a redefining of hearsay to eliminate the need for most of these exceptions without changing the admissibility requirements.

When a definition is over-inclusive, one possible source of error may lie in the failure to identify one or more of the operative elements. The common element found in a large number of hearsay exceptions is recollection. The shop record will not be subject to this dynamic process.

239. See, e.g., Fed. R. Evid. 803(6) (requiring memorandum or report to be "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity"). Accuracy and error are objectively frozen. If the dynamic memory reconstruction process plays an important role, the requirements of these exceptions will not have been satisfied.
lection of past events. Recollection of matters stored in memory differs, as a mental process, from short-term memory. When an event is fresh in the mind, the belief system of the observer has had less opportunity to infect the data. The process of retrieval of recollected testimonial material is highly subjective and suspect. It is also this kind of testimonial evidence for which cross examination is most useful.

If we combined the recollection element with a credibility element in the definition of hearsay, we could simplify the process of applying the hearsay rule and eliminate the complex structure of hearsay. By forcing hearsay analysis into a "truth of the matter" structure, the Federal Rules of Evidence hinder an appropriate synthesis of hearsay law. It may on occasion prove difficult to distinguish testimonial tales of tales recollected from memory from other out-of-court statements, but that is the kind of analysis lawyers and judges are trained to do.

In no other area of law has the science of the early nineteenth century so firmly affixed its mark. Recently, the absolute control of hearsay doctrine by rationalists has begun to face criticism from the perspectives of legal pragmatism, feminist jurisprudence, post-modernism and political-choice. If legal realism is to influence the future direction of hearsay, it must embrace modern scientific insights regarding the functioning of memory, and place those insights at the center of the analytic structure of hearsay. Until then, trial lawyers and judges must continue to grapple with the Frankenstein-like monster that hearsay has become.

An Appendix reconstructing the hearsay sections of the Federal Rules of Evidence is provided with the understanding that it is set forth as a tentative draft, in hopes that it will serve not as a final version, but as a catalyst for a serious attempt to re-examine the structure of hearsay.


241. See generally Orenstein, supra note 204 (attacking hearsay doctrine from feminist jurisprudence perspective).


ARTICLE VIII

HEARSAY

RULE 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by the person as an assertion.

Testimonial Assertion. A "testimonial assertion" is a fact sought to be proven by crediting the purported recollection of that fact by the person making the statement.

(b) Declarant. A "declarant" is a person who makes a statement.

Recollection. A "recollection" is mental process of re-accessing a memory of past events.

(c) Hearsay. "Hearsay" is a statement—testimonial assertion, other than one made by the declarant while testifying at the trial or hearing.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement testimonial assertion by witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement testimonial assertion, and the statement testimonial assertion is (A) inconsistent with the declarant's witness's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's witness's testimony and is offered to rebut an express or implied charge against the declarant witness of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. Neither the hearsay rule, nor any other rule of competency shall prevent admission of any statement that is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.
RULE 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority, common law practice, or by Act of Congress.

RULE 803. Hearsay Exceptions; Availability of Declarant Witness

Immaterial

The following are not excluded by the hearsay rule, even though the declarant witness is available as a witness:

1. Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

2. Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

3. Then-existing mental, emotional, or physical condition. A statement of the declarant’s then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

4. (1) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

5. Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the maker was fresh in the witness’s memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

6. Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, opinions, or diagnoses made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) to prove nonoccurrence or nonexistence of the maker, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) (2) Public records and reports. In civil cases, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) (B) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) (3) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) (4) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution
and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) (5) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) (6) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market quotations, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) (7) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) (8) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) (9) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) (10) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) (11) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family, or general history, or
boundaries, essential to the judgment, if the same would be provable by
evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of
the foregoing exceptions but having equivalent circumstantial guarantees
of trustworthiness if the court determines that (A) the statement is offered
as evidence of a material fact; (B) the statement is more probative on
the point for which it is offered than any other evidence which the proponent
can procure through reasonable efforts; and (C) the general purposes of
these rules and the interests of justice will best be served by admission of
the evidence. However, a statement may not be admitted under this ex-
ception unless the proponent of it makes known to the adverse party suf-
fi ciently in advance of the trial or hearing to provide the adverse party with
a fair opportunity to prepare to meet it, the proponent's intention to offer
the statement and the particulars of it, including the name and address of
the declarant.

RULE 804. Hearsay Exceptions: Declarant Witness Unavailable

(a) Definition of unavailability. “Unavailability as a witness" includes
situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege
from testifying concerning the subject matter of the declarant's statement;
or

(2) persists in refusing to testify concerning the subject matter of the
declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declar-
ant's statement; or

(4) is unable to be present or to testify at the hearing because of
death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has
been unable to procure the declarant's witness's attendance (or in the
case of a hearsay exception under subdivision (b)(2), (3), or (4), the declar-
ant's witness's attendance or testimony) by process or other reasonable
means.

A declarant witness is not unavailable as a witness if exemption, ref-
sal, claim of lack of memory, inability, or absence is due to the procure-
ment or wrongdoing of the proponent of a statement for the purpose of
preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hear-
say rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing
of the same or a different proceeding, or in a deposition taken in compliance
with law in the course of the same or another proceeding, if the party
against whom the testimony is now offered, or, in a civil action or proceed-
ing, a predecessor in interest, had an opportunity and similar motive to
develop the testimony by direct, cross, or redirect examination.
(2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant testimonial assertion made while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) **Statement of personal or family history.** (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated, or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Amended, eff 12-12-75; 10-1-87; 11-18-88)

**RULE 805. Hearsay Within Hearsay**

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.
RULE 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross examination.