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## RATIONALIZING HEARSAY: A PROPOSAL FOR A BEST EVIDENCE HEARSAY RULE

MICHAEL L. SEIGEL\*

### INTRODUCTION

The survival of the republic does not rest on divining the perfect parameters of the rule against hearsay. Nevertheless, dispute over the proper form of this rule, currently epitomized by its federal codification as a blanket prohibition followed by roughly thirty-six exemptions and exceptions,<sup>1</sup> has produced a steady stream of legal scholarship for the better part of the twentieth century.<sup>2</sup> Is this simply a case of compulsive academics being overly concerned with the aesthetics of a body of legal doctrine that, notwithstanding its patchwork nature, serves the ends of justice?<sup>3</sup> The altogether dismal failure of successive generations of hearsay reformers<sup>4</sup> tempts one to answer this

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<sup>1</sup> See FED. R. EVID. 801-804. The exact number depends on issues of interpretation, such as whether some of the broader categories (e.g., admissions of a party opponent) are counted as one exemption or as several (e.g., a party's own statement, the statement of an agent, the statement of a co-conspirator, and so forth).

<sup>2</sup> See *infra* notes 4-5.

<sup>3</sup> At least two respected experts in the field appear to hold this opinion. See RICHARD O. LEMPert & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 523 (2d ed. 1982) (remarking that, "[o]n aesthetic grounds alone, one can appreciate the desire of scholars to rationalize this area of evidence law. But one should be wary of changing a system which apparently delivers justice, however neat and attractive the suggested alternative.").

<sup>4</sup> Early reformers included Professors Wigmore, Morgan, Maguire, and James. See 5 JOHN H. WIGMORE, *EVIDENCE* § 1427 (James H. Chadbourne ed., 1974) [hereinafter WIGMORE, *EVIDENCE*] (proposing a general exception for the out-of-court statements of deceased persons and increased trial court discretion); Edmund M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 922 (1937) (proposing an exception giving broad discretionary power to trial judge to admit hearsay when its probative value is high); George F. James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 ILL. L. REV. 788, 795-97 (1940) (proposing a "best evidence" theory for the exclusion of hearsay). Professor Weinstein led the next generation of reform, see Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331,

question in the affirmative, and to hesitate before entering the protracted and seemingly endless battle for rationalization of the hearsay rule. But the conclusion that much more than aesthetics are at stake is inescapable; the game is worth the candle.

The degree of consensus among twentieth century evidence scholars concerning the intellectual bankruptcy of hearsay doctrine is nothing short of remarkable.<sup>5</sup> Although the resilience of this doctrine in the face of extraordinary criticism has a number of causes,<sup>6</sup> at its root is an essential complacency: many practitioners, judges, and at least some scholars believe

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353-55 (1960) (advocating change from rule of exclusion to one of discretion), which also included Professors Chadbourn and Stewart, see James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 951 (1962) (proposing rule of admission for unavailable declarants); 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, 3 (proposing a “rule of preference” for live testimony “[w]henver hearsay raises substantial questions of the accuracy of perception and memory of the hearsay declarant”). The views of the second-generation reformers were influential in the drafting of the *Model Code of Evidence*, the *Uniform Rules of Evidence*, and early versions of the *Federal Rules of Evidence*. See MODEL CODE OF EVIDENCE Rule 503 (1942); UNIF. R. EVID. 63 (1953); FED. R. EVID. 8-03, 8-04 (Preliminary Draft of Proposed Rules 1969). The failure of hearsay reform is illustrated by the fact that the only codification to gain widespread acceptance and approval has been the final version of the *Federal Rules of Evidence*, which is relatively faithful to the categorical approach of the pre-existing common law. See Roger C. Park, *Evidence Scholarship, Old and New*, 75 MINN. L. REV. 849, 869 (1991) [hereinafter Park, *Scholarship*] (citing the failure of the more radical *Model Code of Evidence* and the general acceptance of the more moderate *Federal Rules of Evidence*).

Convincing evidence indicates that a new generation of reformers has recommenced the struggle. Professors Park, Swift, and Friedman are among the leaders of this more recent effort. See Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51 (1987) [hereinafter Park, *Subject Matter*] (arguing that in civil cases hearsay should be more freely admitted); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1341 (1987) (proposing admission of hearsay upon the production of foundation facts); Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723 (1992) (proposing a hearsay rule dependent upon an analysis of which party should bear the costs of producing the declarant). The success of the latest round of hearsay reform is far from assured.

<sup>5</sup> See Ronald J. Allen, *Commentary: A Response to Professor Friedman: The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 800 (1992) (advocating the abolition of the current hearsay rule); Swift, *supra* note 4, at 1353 (characterizing the current categorical approach as effectively bankrupt); Weinstein, *supra* note 4, at 344-46 (listing Professors Bentham, Appleton, Thayer, Chamberlayne, McCormick, Morgan, Maguire, Davis, Baker, James, Hart, McNaughten, Conrad, Falknor, Ladd, Loevinger, Peck, and Reed as critics of the hearsay rule).

<sup>6</sup> For instance, one particularly cynical view is that members of the practicing bar support contemporary hearsay doctrine because its intricacies “are hard to learn and cherished once learned; abolition of the hearsay rule would make a hard won element of the lawyer’s training obsolete.” Park, *Subject Matter*, *supra* note 4, at 68.

that, despite the irrational nature of hearsay law, most judges use the current rule of exclusion and its myriad exceptions to admit reliable evidence, to exclude unreliable evidence, and to achieve "rough justice" in the majority of cases.<sup>7</sup> Substantial revision, therefore, is unnecessary and might even upset a delicate doctrinal balance. The sense of complacency surrounding hearsay law is unjustified, however, and the paralysis to which it contributes is very costly.

Studies indicate that judges are, in fact, manipulating hearsay doctrine to achieve desired results.<sup>8</sup> For instance, judges frequently stretch hearsay-related definitions, such as the scope of statements made "for the purposes of medical diagnosis or treatment,"<sup>9</sup> well beyond recognition.<sup>10</sup> In addition, courts are resorting to the residual exceptions<sup>11</sup> on an increasingly routine basis in ways clearly not contemplated by Congress.<sup>12</sup>

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<sup>7</sup> See, e.g., LEMPERT & SALTZBURG, *supra* note 3, at 523 (asserting that current hearsay doctrine promotes justice and should not be liberalized); Allen, *supra* note 5, at 801 (noting that "[t]he implausible justification is the rule's standard, although often implicit, rationale that somehow it contributes to justice"); Swift, *supra* note 4, at 1353 (observing that "[t]he legal profession's complacency about the current hearsay rule reflects subjective impressions about what hearsay categories are intrinsically reliable enough to help reliable outcomes. The profession then believes that the categories are valid because the outcomes are accurate.").

The extent of complacency about hearsay doctrine has generally varied among different segments of the legal profession. Academicians and student commentators have tended to advocate radical reform; judges have lobbied for more discretion; prosecutors have desired an expansion of the exceptions; and trial lawyers have had little enthusiasm for any major change. See Park, *Subject Matter*, *supra* note 4, at 67-68.

<sup>8</sup> See, e.g., Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 491-95 (1992) (demonstrating that courts have interpreted the categorical exceptions in response to recurring fact patterns that generate useful hearsay for the prosecution in criminal cases and admit such hearsay if deemed trustworthy); *id.* at 504 (noting that "[t]he rule is not being abolished de facto . . . [Still,] the categorical structure of the admission/exclusion decision may be giving way to a more flexible process that openly acknowledges the trustworthiness factor.").

<sup>9</sup> FED. R. EVID. 803(4).

<sup>10</sup> See Swift, *supra* note 8, at 496-98 (demonstrating that courts have extended this definition to include the identification of child abusers on the theory that identity is necessary to determine appropriate psychiatric treatment).

<sup>11</sup> FED. R. EVID. 803(24), 804(5).

<sup>12</sup> See Myrna S. Raeder, *Commentary: A Response to Professor Swift: The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?*, 76 MINN. L. REV. 507, 514-19 (1992) (arguing that the hearsay rule is being eroded by judicial discretion through use of the catchall exceptions); Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. L. REV. 925 (1992) (noting that the use of the catchall exceptions in criminal litigation has been expanded well beyond congressional intent); see also Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L.

This ad hoc judicial manipulation of hearsay doctrine, however, is not promoting the goal of adjudicatory justice. Achieving justice in the context of the fact-finding portion of a trial means determining the truth—that is, obtaining an accurate, unbiased picture of a historical event.<sup>13</sup> As an initial matter, the assertion that current doctrine is being manipulated to serve justice hides behind the epistemological maxim that truth is not self-evident; we can do no better than approximate it through the very processes we seek to evaluate. Therefore, the defense of any set of evidentiary rules based upon the results yielded by their use is wholly circular.<sup>14</sup>

This does not mean that there is no rational basis upon which to evaluate evidence doctrine. The efficacy of doctrine related to the fact-finding process can sometimes be measured by the theoretical likelihood that it enhances the fact finder's ability to discern truth through logical reasoning.<sup>15</sup> Current hearsay doctrine, even when manipulated in good faith by a judge to obtain desired outcomes, necessarily fails under this method of measurement. In brief, it violates a foundation principle of inductive logic: the validity of an inductive hypothesis is highly dependent upon the decision maker's consideration of all available information.<sup>16</sup> Thus, the claim that current doctrine promotes the just resolution of disputes is simply an insupportable statement of blind faith.

The enterprise of this article is the theoretical construction of an optimal solution to the hearsay conundrum. Its first task is the elucidation of the premises upon which a rational hearsay rule can be built. Thus, the article starts by exploring the relationship between hearsay doctrine and the foundation of all rational truth-seeking enterprises, inductive logic.<sup>17</sup> The article continues with an examination of the relationship between hearsay evidence and trial dynamics, for a workable rule must take into account the actual functioning of our adversary system.<sup>18</sup> This two-pronged analysis leads to the proposal of a "best evidence hearsay rule."

The proposed rule incorporates two basic principles. First, in accordance with the premises of inductive logic, the rule rejects the notion of a hearsay rule as an absolute bar to the admission of evidence, and seeks instead to

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REV. 431, 445-62 (1986) (concluding that the Fourth Circuit has used the residual exceptions to stretch the boundaries of specific exceptions and effectively replace the existing hearsay structure); Faust F. Rossi, *The Silent Revolution*, LITIG., Winter 1983, at 13, 13-17 (arguing that "the ban on hearsay is now almost a fiction" and observing that, through broad interpretation of the exceptions, especially the catchall provisions of the federal rules, courts are routinely admitting probative hearsay).

<sup>13</sup> See *infra* text accompanying notes 23-24.

<sup>14</sup> See Swift, *supra* note 4, at 1350 (arguing that the accuracy of adjudicative fact finding is unknown).

<sup>15</sup> See *infra* text accompanying notes 26-40.

<sup>16</sup> See *infra* text accompanying notes 42-45.

<sup>17</sup> See *infra* part II.

<sup>18</sup> See *infra* part III.

maximize the amount of information received by the fact finder. Second, the rule minimizes what inductive logic and the study of trial dynamics reveal to be the only serious "hearsay danger": the ability of a skillful advocate to make strategic decisions to present inferior hearsay evidence as a means of disguising factual weaknesses in her case. The analysis establishes that this is most likely to happen precisely when the risk of distortion to the fact-finding process is at its greatest.

Although the specific features of the best evidence hearsay rule are set out in the penultimate section of this article, it is worthwhile to sketch its contours at the outset. Some of its characteristics are similar to those found in proposals by other hearsay reformers, particularly reformers who have flirted with the best evidence concept.<sup>19</sup> For instance, the proposed rule operates as a general rule of preference for the in-court testimony of available declarants, and it permits the admission of all hearsay in the event of unavailability.<sup>20</sup> But the proposed rule is also unique in several respects. For example, it authorizes the admission of any hearsay evidence on the condition that its proponent also offers "better evidence," i.e., the testimony of an available declarant.<sup>21</sup> Moreover, the best evidence hearsay rule recognizes that, by its very nature, hearsay is sometimes the best evidence of its assertive content. The proposed rule admits such "inherently best" hearsay in lieu of the testimony of available live witnesses. A routine and detailed business record is one example of inherently best hearsay evidence.<sup>22</sup>

A traditional road-map will assist the reader in following the argument. Part I begins the analysis by examining in some detail the subject of inductive logic. Part II applies the principles of inductive logic to the rule against hearsay. Part III confronts the question whether any hearsay rule is necessary in light of the dynamics of litigation and the supposed self-correcting effects of the adversary system. The question is, of course, answered affirmatively: a hearsay rule of some sort is necessary to correct "market failures" associated with the adversary process. Part IV takes a short but necessary detour. The preceding analysis assumes that the rationale for any hearsay rule is the attainment of truth at trial. The fourth part examines the persuasiveness of several alternative justifications that scholars have proffered for a rule against hearsay. Part V tackles the problem of designing an optimal hearsay rule. Part VI examines the "post-admission controls" that might be instituted to take account of the fact that the proposed rule would result in

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<sup>19</sup> See *infra* note 117 and text accompanying notes 114-17. I should also note that I owe a great deal of my appreciation of the importance of the best evidence principle, as well as my understanding of its contours, to Professor Nance's thorough article on the subject. See Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988) (examining in detail the notion of best evidence and its broad influence on evidence doctrine).

<sup>20</sup> See *infra* text accompanying notes 113-18.

<sup>21</sup> See *infra* text accompanying notes 118-19.

<sup>22</sup> See *infra* text accompanying note 128.

the admission of a substantial quantum of hearsay evidence, more than is admissible under current doctrine. The sixth part also emphasizes that the "best evidence hearsay rule" is only the first step toward comprehensive hearsay reform in the criminal context. The body of the article is followed by a brief postscript positing a heretofore unrecognized factor making hearsay reform especially urgent: the cynicism and contempt for law that is fostered by the firm entrenchment of wholly irrational doctrine at a critical place in legal education and practice.

### I. PRELIMINARY INQUIRY: INDUCTIVE LOGIC

Most scholars agree that the primary purpose of the rule against hearsay, like most other rules of evidence, is to assist the fact finder (in the classic case, the jury) in ascertaining an accurate picture of historical truth.<sup>23</sup> This is a very important purpose, for it is this version of truth to which substantive legal doctrine is applied to resolve disputes among members of society. The utility of current hearsay doctrine (and any proposed alternatives) should thus be measured by its performance of this primary function.<sup>24</sup>

Analysis of this issue begins with a general examination of the fact-finding process.<sup>25</sup> The paradigmatic model of fact finding posits that the jury uses

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<sup>23</sup> Indeed, this has been the foundational principle of the law of evidence for several centuries. See WILLIAM L. TWINING, *RETHINKING EVIDENCE* 33-91 (1990) [hereinafter TWINING, *RETHINKING EVIDENCE*] (tracing the intellectual history of evidence law); see also Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 381-84 (1992) (describing the purpose of hearsay rules as providing assistance to triers of fact); Swift, *supra* note 4, at 1348 (noting that "[r]ules of evidence and procedure are routinely evaluated by their alleged effect on the accuracy of the trier's factfinding"); William Twining, *Evidence and Legal Theory*, 47 MOD. L. REV. 261, 272 (1984) [hereinafter Twining, *Evidence*] (observing that the end of adjudication is "the establishment of truth").

I use the word "truth" recognizing, of course, that in a strict sense truth is impossible to discern. See David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1016 (1989) (reporting that "the 'truth' of a proposition can never be fully demonstrated"); Mary Morton, Note, *The Hearsay Rule and Epistemological Suicide*, 74 GEO. L.J. 1301, 1310 (1986) (postulating that truth is dependent upon social consensus). Moreover, describing the jury's role as finder of objective truth is a positivist oversimplification: the jury is also called upon in many cases to render normative judgments about the parties' conduct. See Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487, 494 (1986) (observing that fact finding and law application are closely bound together, and that "the system is designed to allow legal and moral values to be reflected in the fact-finding process as well as in the application of legal rules").

<sup>24</sup> This does not, of course, preclude an examination of the fit between hearsay doctrine and other values underpinning evidence rules. I will undertake such an examination at a later point in this article. See *infra* part IV.

<sup>25</sup> Most hearsay scholars would begin their analysis with a recitation of the hearsay dangers. But such methodology, by starting at the middle, fails to make an explicit con-

relevant evidence in a rational manner to reach conclusions about the historical events in dispute.<sup>26</sup> Rationality requires that the jury employ logic, rather than emotion, speculation, or random choice, in making decisions during this process. Two types of logic are central to the fact-finding task: deduction and induction. In fact finding, as in any empirical endeavor, inductive logic is dominant.<sup>27</sup>

Very simply stated, inductive logic is the process by which individuals employ past experience and knowledge to draw inferences about the unknown.<sup>28</sup> To give an elementary example: every time I have gone to the grocery store, I have found my favorite brand of cereal. Therefore, I predict that the next time I go to the grocery store, I will find my favorite brand of cereal. The process of drawing a conclusion about the unknown using information gained from relevant known events is inductive reasoning.<sup>29</sup>

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nection between the rule against hearsay and the bedrock policies and values of the law of evidence. Without making this connection, the efficacy of hearsay doctrine cannot be properly evaluated.

<sup>26</sup> See, e.g., John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1070 (1968) (observing that rational considerations may be at least as important as non-rational considerations in juries' decision-making processes); Swift, *supra* note 4, at 1348-49 (noting that "[t]he goal of accuracy posits a rational model of decision-making in which questions of fact, usually about unknown past events, are decided through a process of inferential reasoning").

<sup>27</sup> See EVIDENCE UNDER THE RULES 65 (Christopher B. Mueller & Laird C. Kirkpatrick eds., 1988) [hereinafter Mueller & Kirkpatrick] (observing that "[n]ot only in litigation, but in science and everyday thinking, inductive argument is far more common [than deductive argument]").

<sup>28</sup> Joseph Brennan describes induction as "a mode of inference by which we proceed from observations of particular instances or cases to a generalization about all instances or cases of the same kind." JOSEPH G. BRENNAN, *A HANDBOOK OF LOGIC* 173 (2d ed. 1961).

Inductive logic is problematic for a number of reasons, not the least of which is a complete lack of consensus among logicians on the fundamental question whether induction is in fact logic. See, e.g., G.N. GEORGACARAKOS & ROBIN SMITH, *ELEMENTARY FORMAL LOGIC* xiii (1979) (opining that the subject of inductive arguments "is . . . more appropriate to courses in epistemology or the philosophy of science" than to the study of logic); DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* 34 (Antony Flew ed., Paul Carus student ed. 1988) (arguing that the defense of induction requires dependence on the concept of induction, therefore induction is not logic but habit). There is also no consensus concerning measurement of the validity of inductive arguments. See PETER A. FACIONE & DONALD SCHERER, *LOGIC AND LOGICAL THINKING* 447 (1978) (observing that "[t]he incompleteness of human understanding of all areas of inductive logic has the consequence that no set views or systematic approaches are established beyond controversy").

<sup>29</sup> Some readers might detect a distinction between this example and the jury's fact-finding task: the example involves the prediction of a future event, whereas juries attempt to reconstruct past events. This distinction is inconsequential, however, because in both cases the fact finder must come to a conclusion about the unknown; whether the



One description of logically valid inductive reasoning proceeds as follows. First, the decision maker is presented with an unknown about which she must draw a conclusion. She starts with an initial hypothesis that seems most plausible to her based upon her background knowledge and general experience. She then considers other plausible hypotheses that are also consistent with her knowledge base. Next, she gathers additional information and determines whether it (1) supports the initial hypothesis; (2) supports one of the other plausible hypotheses; or (3) suggests that she consider and test a new initial hypothesis. After taking account of all available information, she is in a position to reach an inductive conclusion.<sup>30</sup>

As this description makes evident,<sup>31</sup> the accuracy of an inductively reasoned conclusion is highly dependent on the amount of information upon

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unknown has already occurred is of no importance. See V.C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 815 (1961) (explaining that "propositions about past facts are [, in effect,] 'predictions,' on existing information, as to what the 'truth' will turn out to be when and if more knowledge is available"); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1345-46 (1971) (citing Ball and noting that "[i]nsofar as the relevance of probability concepts is concerned, then, there is simply no inherent distinction between future and past events").

<sup>30</sup> See FACIONE & SCHERER, *supra* note 28, at 453-79.

<sup>31</sup> The foregoing description of rational fact finding through inductive reasoning is, of course, a substantial oversimplification of the actual means by which humans make determinations of fact. For one thing, human cognitive resources are severely limited; people are incapable of reasoning through each inductive conclusion in the manner described. See CHRISTOPHER CHERNIAK, MINIMAL RATIONALITY 93-94 (1986) (demonstrating that the extremely high number of individual human beliefs makes it mathematically impossible to evaluate each one inductively, and arguing that, in practice, humans use other methods of reasoning); GILBERT HARMAN, CHANGE IN VIEW: PRINCIPLES OF REASONING 25-27, 104-05 (1986) (arguing that it is impossible to evaluate human beliefs on principles of logic and probability alone); see also Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 379-80 (1991) [hereinafter Allen, *Juridical Proof*] (arguing that evaluating the probability measure for each item of evidence introduced at trial is beyond the "computational capacity" of humans); Ronald J. Allen, *On the Significance of Batting Averages and Strikeout Totals: A Clarification of the "Naked Statistical Evidence" Debate, The Meaning of "Evidence," and the Requirement of Proof Beyond a Reasonable Doubt*, 65 TUL. L. REV. 1093, 1108-09 (1991) (praising Professor Callen's work for bringing "human computational limitations" to the attention of evidence scholars); Craig R. Callen, *Adjudication and the Appearance of Statistical Evidence*, 65 TUL. L. REV. 457, 472 (1991) [hereinafter Callen, *Adjudication*] (explaining that "[p]erforming the computations necessary for systematic statistical inference based on one's experience is beyond the likely limits of the factfinder's, or any human's, mind"). Thus, a person "behaves rationally by allocating cognitive resources according to learned behavioral strategies which are apparently most likely to resolve the problems at hand." Craig R. Callen, *Human Decision-making and Evidence* 1-4 (unpublished manuscript, on file with the *Boston University Law Review*) [hereinafter Callen, *Manuscript*]. Some of the strategies people use to make decisions under conditions of uncertainty have been

which it is based. Building upon the example in the preceding paragraph,

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termed "heuristics." See Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, in JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 213-42 (Hal R. Arkes & Kenneth R. Hammond eds., 1986) (asserting that heuristics can be used in decision making under conditions of uncertainty to reduce the complexity of information); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (describing commonly employed heuristics and arguing that a better understanding of heuristics will improve decision making).

Differing views over human cognition have led to heated debates in contemporary evidence scholarship over appropriate descriptive and normative models of jury decision making, and over the implications of various models for discrete components of evidence doctrine. See TWINING, RETHINKING EVIDENCE, *supra* note 23, at 119-22 (summarizing the debate between proponents of a mathematical approach to probabilistic reasoning and proponents of a non-mathematical approach to such reasoning); Craig R. Callen, *Cognitive Science and the Sufficiency of "Sufficiency of the Evidence" Tests*, 65 TUL. L. REV. 1113, 1113-16 (1991) (recapping the current debate surrounding the adequacy of a purely statistical approach to fact finding); David A. Schum, *Probability and the Process of Discovery, Proof, and Choice*, 66 B.U. L. REV. 825, 826 (1986) (listing five schools of "inferential direction"). The main schools of thought include the subjective Bayesian probabilists, *see, e.g.*, Michael O. Finkelstein & William B. Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489 (1970) (proposing the use of Bayesian probability analysis in certain trial settings); Kaplan, *supra* note 26 (applying Bayes's Theorem to the criminal trial setting); Richard Lempert, *The New Evidence Scholarship: Analyzing the Processes of Proof*, 66 B.U. L. REV. 439, 476 (1986) (arguing that Bayes's Theorem will enhance "justice in the sense of accurate verdicts"); the Baconian probabilists, *see, e.g.*, TWINING, RETHINKING EVIDENCE, *supra* note 23, at 119 (agreeing tentatively with Professor Cohen's position "that there is a valid form of non-mathematical probability and that this mode of reasoning is appropriate to many arguments about evidentiary issues in forensic contexts"); L. Jonathan Cohen, *The Role of Evidential Weight in Criminal Proof*, 66 B.U. L. REV. 635, 639, 648 (1986) (arguing that the Pascalian (mathematical) analysis "does not suffice to assess all that we need to assess in meeting the standard of criminal proof," and that a "Baconian [non-mathematical] interpretation, on the other hand, provides a simple and commonsensical account of the basic nature of forensic proof"); and the story model adherents, *see, e.g.*, Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) (proposing the story model of jury behavior in which juries process information by constructing a narrative that makes sense of the evidence and facilitates decision making). In addition, Professor Callen has proffered a theory of decision making based upon schema theory developed by cognitive scientists and Professor Allen has conjoined schema theory and the story model. See Craig R. Callen, *Second-Order Considerations, Weight, Sufficiency and Schema Theory: A Comment on Professor Brilmayer's Theory*, 66 B.U. L. REV. 715, 718-22 (1986) (setting forth the cognitive steps involved in problem solving under schema theory); Allen, *Juridical Proof*, *supra*, at 393-406.

The essential argument set forth in this article—that current hearsay doctrine is an irrational means of controlling information considered by the jury—does not rely upon any particular jury decision-making model. Under each of the models, the efficacy of the

my conclusion that I will find my favorite cereal at the store is considerably weaker if I have been there only twice before than if I have shopped at the store each week for the past fifteen years. Furthermore, a "well-accepted condition on the validity of inductive inference [is that] the premises of the proposed inference embody all available, logically relevant evidence."<sup>32</sup> A single bit of information, when factored into the inductive equation, can

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fact-finding process depends on the amount and quality of the information received by the jury. See Allen, *Juridical Proof*, *supra*, at 379 (claiming that the truth of a proposition cannot be evaluated under Baconian probability theory unless all possible disconfirming tests have been run, or all that could be run are known); L. Jonathan Cohen, *The Logic of Proof*, 1980 CRIM. L. REV. 91, 92 (pointing out that the Pascalian model of jury decision making rests on the assumption that "[e]very assignment of a Pascalian probability to a particular conclusion . . . contain[s] all the relevant facts"). Even the jury model and schema theory, which account for the fact that humans are incapable of assimilating and processing all the information available about a given unknown, are not in conflict with the conclusion that fact finding is an extremely information-sensitive endeavor. Cf. Allen, *Juridical Proof*, *supra*, at 398-406 (jurors assess evidence by constructing one or more plausible accounts of what happened, using schemata to fill in evidentiary gaps and to work out inconsistencies in the proof). Therefore, though the remark is quickly becoming cliché, I employ the inductive reasoning model as a useful and adequate heuristic device.

<sup>32</sup> Nance, *supra* note 19, at 233; see also BRENNAN, *supra* note 28, at 179 (explaining that "[w]hat justifies inductive generalizations is the evidence we have for them. Hence, in determining the criteria of sound induction, we shall have to examine the ways in which we can assure ourselves that the evidence on which we base a generalization is good evidence."); Jack L. Landau, *Logic for Lawyers*, 13 PAC. L.J. 59, 93-94 (1981).

Great care should surround use of terms such as "validity" and "truth" in connection with inductive arguments. In the case of deduction, the distinction is simple: validity refers to the internal form of the argument; truth refers to the external empirical support for the content of the conclusion. Deductive logic is concerned only with validity, not truth. See BRENNAN, *supra* note 28, at 3-5. The relationship between truth and validity in induction is more complex, however. Evaluating an inductive argument inevitably involves determining the degree to which the conclusion matches external empirical truth. This depends on both the form and the content of the argument. Validity and truth, form and content, are thus all inextricably linked.

Although most logicians would agree that some inductive arguments are more valid than others, they do not agree on a method of measuring inductive validity. A traditional method involves proposing various criteria by which "soundness" or validity can be judged. Suggested criteria include: (1) the degree of resemblance between the known instance and the one under study; (2) the extent of resemblance among known instances; (3) the breadth of variety of known instances; (4) the number of known instances; (5) the lack of contrary instances; (6) the (non)variable nature of the phenomenon under study; (7) the nature of the conclusion—narrow or broad; (8) experience with the hypothesis; (9) independent confirmation of the hypothesis through other means. See BRENNAN, *supra* note 28, at 179-84 (proposing tentative criteria for sound induction); Mueller & Kirkpatrick, *supra* note 27, at 77 (setting forth six factors for measuring inductive validity); see also JOHN M. KEYNES, A TREATISE ON PROBABILITY 240-41 (1921) (observing that inductive analogy depends upon the likeness of instances being compared). Implicit in

render an apparently correct inference completely baseless.<sup>33</sup> Moreover, the kind of information that can influence the validity of inductive reasoning is remarkably expansive. For example, it might be the case that I have always shopped at the grocery store on Tuesdays, shortly after the shipment of cereal arrives and is unpacked. Suppose I were to shop on Monday, when it is common for the store to be in short supply of many items. Predicting whether I will find my favorite cereal in light of this additional information is much more problematic.<sup>34</sup>

Evidence law is extremely sensitive to the basic requirement of valid inductive reasoning: it facilitates the admission of almost all logically relevant evidence. In this manner, the fact finder is afforded the greatest opportunity to reach accurate inferences about historical truth. The law recognizes, however, that there are some justifications for preventing information from reaching the jury that are in accord with a rational fact-finding process.

The classic reasons for excluding evidence are well known. Some evidence impedes the rational fact-finding process by causing the jury to reach a verdict based upon something other than reason, such as sympathy or anger.

these criteria for inductive validity is a link between the validity of an inference and the quantity and quality of information upon which it is based.

Stephen Barker proposes to measure the validity of induction in the following manner: "An inductive argument is a valid argument if the degree of probability claimed for its conclusion is indeed a reasonable degree of probability to attribute to that conclusion, relative to the given premises." STEPHEN F. BARKER, *THE ELEMENTS OF LOGIC* 225 (3d ed. 1980). Barker relates:

[R]ational credibility [the degree to which it is reasonable to believe a conclusion] is a *relative* matter, in this respect: The degree to which it is reasonable to believe something depends upon how much we know. The very same conjecture takes on different degrees of probability relative to different amounts of evidence. . . .

[C]hanges in available evidence . . . change the degree to which it is reasonable to believe a conclusion.

*Id.* at 226-27. Barker's definition makes the connection between the validity of an inductive conclusion and the information supporting it explicit.

<sup>33</sup> Some logicians refer to the first hypothesis based upon available information as one that has "initial plausibility." Additional information may confirm or defeat this hypothesis. In the latter case, a new hypothesis must be formulated. See FACIONE & SCHERER, *supra* note 28, at 467-68.

<sup>34</sup> Compare this example with the one put forward by Barker. Initially we are informed that "Hugo" is twenty years old. We hypothesize that Hugo will live a long life. Based on the information available, this hypothesis is valid. But we then learn that Hugo is an extremely reckless driver. According to Barker, this additional information calls into question the validity of our original inductive hypothesis. See BARKER, *supra* note 32, at 226.

Under the traditional evaluation of inductive arguments, the hypothetical in the text, as well as Barker's example, illustrates that an inductive hypothesis might be unsound because the instance under study does not resemble the known or referenced instances in a critical way.

Such evidence may or may not be logically relevant; its defect is that its ability to prejudice the jury outweighs its probative content.<sup>35</sup> Other logically relevant evidence simply may be counterproductive because it is apt to overwhelm the rational fact-finding process with chaos and confusion, or dull the reflection of rational jurors by causing utter boredom.<sup>36</sup>

One limitation on the maxim that additional information enhances inductive reasoning is the fact that misinformation can be worse than no information at all.<sup>37</sup> Another cereal example is illustrative. On Monday afternoon, uncertain whether to venture to the grocery store for cereal, I might seek more information by calling the store manager to inquire whether my favorite cereal is on the shelf. Assume that the manager tells me that the cereal is there, when in fact the last box has just been sold. Given this additional information, I would probably go to the store on Monday, only to be disappointed.<sup>38</sup> Had I not called the store manager, I probably would have played it safe by waiting until Tuesday morning to shop. Thus, I was worse off with the additional information, because it was wrong.

The law of evidence often accounts for the problem of misinformation. A number of rules are designed to ensure that inaccurate or misleading information does not reach the jury. In most instances, if evidence fails to meet the requisite guarantees of accuracy and its proponent cannot provide a satisfactory explanation for this deficiency, the rules require that the evidence be excluded.<sup>39</sup>

If the law of evidence is to remain faithful to a model of rational decision making, the justification for any rule intended to promote accurate fact find-

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<sup>35</sup> See FED. R. EVID. 403. Professor Lempert, through use of a device called a "regret matrix," has examined quantitatively the ability of evidence to sway a jury from a rational verdict. Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1032-41 (1977).

<sup>36</sup> See FED. R. EVID. 403; see also James, *supra* note 4, at 790-91 (reviewing the traditional arguments for excluding hearsay).

<sup>37</sup> Some logicians explicitly maintain that the validity of an inductive hypothesis cannot be asserted until one has eliminated the plausibility of the alternative hypotheses that the data being relied upon has been inaccurately reported or recorded. See FACIONE & SCHERER, *supra* note 28, at 69-77.

<sup>38</sup> The complexity of inductive reasoning is evident even in this simple example. I will act upon the information provided by the store manager because of my implicit belief in other inductive inferences: e.g., that a person in the store manager's position is likely to be honest and informed.

<sup>39</sup> Rules designed to protect against misinformation include those pertaining to authentication, see FED. R. EVID. 901-902, and best evidence, see *id.* 1001-1004. In stark contrast to hearsay doctrine, exclusion of evidence under these rules is relatively rare, because authentication is an easily met threshold requirement, see *id.* 901(a), and the best evidence rule permits alternative evidence to be offered when the best evidence is unavailable, see *id.* 1003, 1004.

ing must lie in one of the above-stated principles of logical reasoning.<sup>40</sup> With this in mind, let us turn to an examination of the rule against hearsay.

## II. PRINCIPLES OF INDUCTIVE LOGIC APPLIED TO THE RULE AGAINST HEARSAY

### A. *Examining Hearsay Policy Through the Medium of Inductive Logic*

Every evidence professor can recite the standard rationale for the rule against hearsay in his or her sleep. In the paradigmatic case of an available witness who has a present recollection of a relevant past event, the witness should be required to testify in open court. This reduces the risks associated with testimonial evidence—problems with the witness's perception, memory, sincerity, and communication. Reduction of these risks occurs because the in-court witness must take an oath and subject himself to cross-examination. The personal appearance of the witness allows the jury to make intuitive judgments concerning the worth of the witness's testimony and to assess the witness's courtroom demeanor. Minimizing the hearsay risks maximizes the accuracy of the fact-finding process.<sup>41</sup>

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<sup>40</sup> Some rules of evidence, such as those pertaining to privileges, subsequent remedial measures, and settlement negotiations, interfere with rational fact finding, at least in some cases, because they are intended to serve some systemic or external goal that is, arguably, more important. Hearsay does not fall into this category; although some have advanced non-truth-seeking justifications for the hearsay rule, it is fair to say that these justifications are at least implicitly subordinate to the notion that the rule against hearsay helps the trier of fact reach an accurate decision. See *infra* part IV.

<sup>41</sup> See Paul Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About*, 75 KY. L.J. 841, 841-42 (1987) (observing that the hearsay rule protects against the dangers of memory, sincerity, perception, and ambiguity); 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, 217 (1989) (recalling 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"); Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974) (defending the hearsay rule and proposing a schematic method for determining whether testimony is subject to hearsay risks).

Some recent evidence scholarship has pointed out that this traditional defense of the hearsay rule is too reductionist in that it fails to take into account other truth-related purposes served by the rule. See Mueller, *supra* note 23, at 384 (arguing that "emphasizing cross-examination alone as the basis for insisting on live testimony and excluding hearsay is, as Park argues, too reductionist"); Park, *Subject Matter*, *supra* note 4, at 70-88 (illustrating through an examination of some of the categorical exceptions that the traditional justification for the hearsay rule—"the untested declarant rationale"—is too reductionist). These purposes include "concerns about surprise at trial, concocted or exaggerated statements, and the use of trained investigators to exact statements by trickery and offers of immunity or lenience." Mueller, *supra* note 23, at 384. My agreement with this point of view is implicit in my general conclusion that hearsay regulation is necessary to restrain tactical moves by adversaries that are likely to distort the truth-

Whether they realize it or not, those who defend the hearsay rule in this standard manner are employing arguments based on the principles set out in Part I: the validity of an inductive inference depends upon the decision maker's consideration of all logically relevant information and avoidance or rejection of misinformation.<sup>42</sup> Oath, cross-examination, and demeanor are all important sources of information made available to the fact finder at trial; as such, they enhance the fact finder's ability to draw appropriate inferences from the witnesses' testimony.<sup>43</sup> Oath and cross-examination also function

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seeking process. *See infra* part III. My proposed "best evidence hearsay rule" would account for these "non-reductionist" concerns. *See infra* part V.

<sup>42</sup> Although inductive logic and rational fact finding are subjects well known to evidence professors because of the centrality of these concepts to the issue of relevance, their connection to the rule against hearsay has evidently escaped the attention of most professors, at least judging from a review of several widely used evidence casebooks. *See, e.g.,* LEMPERT & SALTZBURG, *supra* note 3, at 157-65, 347-55 (discussing rational decision making in section on relevance, but ignoring same when addressing hearsay rule); Mueller & Kirkpatrick, *supra* note 27, at 62-79, 115-19 (discussing at length theories of inductive logic in section on relevance, but failing to mention the topic when reviewing the rationale for the rule against hearsay).

<sup>43</sup> Two general kinds of information are lost when hearsay is introduced in place of paradigmatic live testimony. One type of missing information relates to the declarant and the statement itself; its admission would have helped the fact finder accord the hearsay statement its proper weight. Professor Swift calls this "foundation fact" information. *See* Swift, *supra* note 4, at 1355-57. The second type is information unrelated to the statement but relevant to some issue in the case—facts revealed on cross-examination, for instance, which might not otherwise be presented at trial.

The extent to which oath, demeanor, and cross-examination provide useful information has been a subject of an ongoing debate among evidence scholars. *See, e.g.,* Mueller, *supra* note 23, at 386 (asserting that "[w]hatever one might say about jury sophistication and universal education, the objection that juries can perform well without the benefit of demeanor evidence and cross-examination is . . . suspect"); Weinstein, *supra* note 4, at 334-36 (noting that "[e]ven if the assumption" that demeanor evidence enhances the fact finder's ability to assess credibility "is not subject to proof by acceptable psychological tests and theory, it is shared by jurors and it seems to accord with our common experience"); Olin G. Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1104 (1991) (arguing that a large number of experiments have established "[w]ith remarkable consistency" that ordinary people do not "in fact possess the capacity to detect falsehood or error on the part of others by observing their nonverbal behavior").

In *Demeanor*, Professor Wellborn reviews available empirical evidence and concludes that demeanor evidence is at best worthless and at worst counter-productive. Wellborn, *supra*, at 1088. He argues that legal doctrine, including the law of hearsay, should be amended to reflect the fact that "transcripts are probably superior to live testimony as a basis for credibility judgments." *Id.* at 1091. I strongly disagree with the conclusions Professor Wellborn draws from the empirical evidence marshalled in his article.

First, Professor Wellborn's conclusion is undercut by one of the studies upon which he relies. This study revealed that the accuracy of deception detection, though high for subjects provided with only a transcript, was in fact highest when subjects were provided with total information—including demeanor evidence. *Id.* at 1085. Moreover, most of

prophylactically to raise the odds that information received by the jury is accurate.<sup>44</sup> Hearsay evidence is thus inferior to live testimony because it provides less, and potentially inaccurate, information. Its use thus increases

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the studies cited by Professor Wellborn failed to capture the essence of courtroom confrontation, i.e., they did not recreate the stress experienced by a perjurer aware that, if caught—and the prospect of cross-examination makes this a serious possibility—he will face public humiliation and perhaps even prosecution. *See id.* at 1082-91. Indeed, one study cited by Professor Wellborn indicated that, although observers cannot detect “deception,” they can detect when a witness is under stress. *Id.* at 1085-86.

<sup>44</sup> The prophylactic effect is the result of witnesses’ self-regulation in response to the taking of an oath subject to the penalty of perjury and in anticipation of cross-examination. *See Park, Subject Matter, supra* note 4, at 55 (noting that the courtroom safeguards “encourage witnesses to be accurate”). From time to time, various hearsay scholars have expressed doubt about the degree of prophylactic protection furnished by the courtroom safeguards. They have argued, for example, that the value of the oath requirement has diminished as Americans have become less pious, *see Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 185-86 (1948) (arguing that in present times the taking of an oath is only a slight stimulus to tell the truth); that fear of perjury is close to non-existent because such cases are rarely prosecuted, *see LEMPERT & SALTZBURG, supra* note 3, at 352 n.11 (stating that the fear of perjury is overemphasized in hearsay literature); and that cross-examination deters less mendacity than is often supposed because effective cross-examination is atypical, *see Edmund M. Morgan, Foreword to MODEL CODE OF EVIDENCE 27* (1942) (implying that cross-examination rarely uncovers deliberate falsehood).

Although no system can guarantee accuracy, the courtroom safeguards appear to serve a significant purpose. The courtroom is one of the few places where an oath must be taken before one can speak; this drives home the gravity of the occasion for at least some witnesses. *See LEMPERT & SALTZBURG, supra* note 3, at 352. The fear of prosecution for perjury almost certainly has a prophylactic effect out of proportion to the likelihood of its actual occurrence: few witnesses will know how difficult perjury is to prove and how rarely such cases are prosecuted. Similarly, the trepidation with which many witnesses face cross-examination is almost certainly out of proportion to the skill of the average cross-examiner. This makes sense in a world where most lay persons’ view of the trial process is based upon fictional portrayals in which the cross-examination of a key witness is often climactic and decisive.

Examples from my prosecutorial experience of the prophylactic effect of the testimonial safeguards abound. Many witnesses, in an unfortunate effort to please, exaggerated or stretched the truth during pre-trial preparations but adhered more carefully to the facts on direct examination at trial. For example, in a tax fraud case, one witness told me prior to trial that he had seen one defendant pass money to the other—a critical element of proof—“dozens of times.” At trial, the witness stated on direct examination that he had witnessed this event only “two or three times.” My intuitive judgment was that the trial testimony was truthful. The intimidation of the trial setting caused the witness to fear the consequences of what had previously appeared to be innocent and minor exaggeration.

If the prophylactic effects of the courtroom safeguards are, in fact, illusory, more than just the hearsay rule needs to be scrapped.



the probability that the fact finder will mistakenly determine historical truth.<sup>45</sup>

Recognizing that the traditional courtroom safeguards serve two distinct functions related to logical decision making—the maximization of information and the minimization of misinformation—is critical, because the corresponding deficiencies of hearsay evidence dictate different responses. If the primary fault of hearsay is its paucity of information, then it need not be excluded; rather, a “hearsay rule,” if one is needed at all, should simply enforce a preference for paradigmatic live testimony. On the other hand, if the primary fault of hearsay is its propensity to misinform, then hearsay, at least bad hearsay, should be excluded.<sup>46</sup>

Concern with the two possible defects of hearsay is reflected, in a somewhat distorted manner, in the two traditional underpinnings of current hearsay doctrine: the principle of necessity, which evinces a preference for available live testimony, and the principle of reliability, which seeks to abate hearsay’s potential to misinform. Of the two, reliability is by far the dominant theme of hearsay jurisprudence.<sup>47</sup> All hearsay must be judged “reliable”<sup>48</sup> before it is admitted, and rarely is reliable hearsay excluded because it is not necessary.<sup>49</sup>

<sup>45</sup> See Morgan, *supra* note 44, 185-88 (asserting that live testimony helps control misdirection and deception of juries); Weinstein, *supra* note 4, at 331-32 (observing the general understanding that “the trier can more readily come to a correct conclusion with respect to credibility if he observes the declarant making his statement, or doing the act, under the stress of a judicial hearing when he is under oath, being observed by an adverse party, and subject to almost immediate searching cross-examination to test the various elements of his credibility”).

<sup>46</sup> This insight is far from new. See James, *supra* note 4, at 791-97 (describing the various reasons proffered by scholars for the exclusion of hearsay). Professor Nance calls the misinformation view of hearsay the “taint” theory, and the lack of information view the “inducement” theory, identifying himself as an adherent of the inducement theory. Dale A. Nance, *Commentary: A Response to Professor Damaška: Understanding Responses to Hearsay: An Extension of the Comparative Analysis*, 76 MINN. L. REV. 459, 461-62, 472 (1992).

<sup>47</sup> Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 497 (1987) (stating that “the essential premise of [the hearsay] debate is that reliability is the principal focus of the hearsay rule”); Swift, *supra* note 4, at 1346 & n.18 (observing that “[a]lthough no single theory can account for all of the existing categorical exceptions, commentators agree that a desire to sort the more reliable hearsay from the less reliable has been the predominant justification for the majority”); Irving Younger, *Reflections on the Rule Against Hearsay*, 32 S.C. L. REV. 281, 282, 285 (1980); Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1799 (1980).

<sup>48</sup> I have put the word “reliable” in quotes because, in my view, current doctrine is unsuccessful in discriminating between reliable and unreliable hearsay evidence. See *infra* text accompanying notes 58-64.

<sup>49</sup> The structure of the federal rules makes this fact clear. Of the 36 exemptions and exceptions to the hearsay rule, only five require necessity in the strict sense, that is, unavailability of the declarant. See FED. R. EVID. 804. It must be noted, however, that

The emphasis of current doctrine on reliability—and, by derivation, its obsession with the problem of misinformation—is its undoing. This issue is explored in the next section.

### B. *The Problem of Reliability Screening*

Present hearsay law attempts to divide hearsay evidence into two categories, that which is reliable and that which is not. Unreliable hearsay evidence is excluded on the assumption that it runs too great a risk of constituting misinformation and, therefore, of being detrimental to the fact-finding process. On the other hand, reliable hearsay is treated as helpful information that can contribute positively to the task of fact finding, sometimes in a crucial way. In theory, admission of reliable hearsay and exclusion of unreliable hearsay enhances the overall accuracy of trial verdicts.

This theory would be elegant but for two critical defects: its underlying premise is probably false, and even assuming the validity of its underlying premise, any attempt to effectuate the theory is destined to become entangled in a web of internal contradiction. Let us examine each of these problems in turn.

As noted above, the justification for excluding hearsay evidence is the belief that unreliable hearsay presents an unacceptable risk of being misinformation. Evaluation of this proposition requires a more detailed examination of the concept of misinformation. To upset a rational fact-finding process, a bit of information must be so inaccurate as to lead a logical fact finder toward a wrong conclusion, i.e., one that is opposite from the truth. Anything less, such as generally correct but specifically inexact information, may still assist the fact-finding process. Consider again the last version of the cereal hypothetical. The store manager misled me because his information was precisely opposite from the truth: he said a box of cereal was on the shelf when, in fact, none was there. But the manager's information could have contained an infinite number of lesser inaccuracies while still leading me toward an accurate inductive conclusion. For example, assume that one box of cereal was on the shelf. Had the store manager told me that "plenty" of cereal was available, I would have decided to go to the store to shop, and would have been happy to purchase the last available box of cereal. Even though the manager's information was inaccurate, it was not misinformation: it did not steer me in the direction of an erroneous conclusion.

Furthermore, inaccurate information will only harm a rational fact-finding process—that is, become misinformation—if it goes undetected. If the fact finder is aware of the inaccuracy, she will either ignore the erroneous information or put it to positive use. Another example illustrates this point. Suppose I had a dispute with the store manager and have been told by a

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the requirement of unavailability in connection with the exception for former testimony (including deposition testimony) preserves to at least some degree a general preference for live testimony within the current hearsay regime. See FED. R. EVID. 804(b)(1).

friend that he is "out to get me." In this context, I would either ignore the manager's assurance that plenty of cereal is available or interpret his statement to mean the opposite of its literal assertion. Thus, even deliberately inaccurate information is not necessarily misinformation.

The critical question is this: does hearsay truly pose an unacceptable risk of being misinformation—i.e., fundamentally inaccurate information likely to go undetected and, therefore, to do harm to the fact-finding process?<sup>50</sup> This question is, of course, to some degree unanswerable. Nevertheless, one tentative hypothesis is worth exploring: if the ability of litigants to manipulate hearsay evidence for strategic gain is factored out,<sup>51</sup> hearsay does not pose an unacceptable risk of constituting misinformation.

The argument in support of this hypothesis is admittedly ontological. Upon reflection, most people would agree that, in the absence of any other information, the report of X that Y said Z increases the probability that Z is true—if only infinitesimally. Indeed, individuals act in accordance with this initial inductive hypothesis almost every day of their lives. For example, assume that you hear a rumor, source unknown, that John, one of your co-workers, plans to quit his job.<sup>52</sup> Does this increase the probability of the truth of the proposition that John is leaving? Your first inclination might be to answer this question in the negative, because you certainly would not rely on the rumor to reach any conclusions. But now assume that John is more than your co-worker; he is also a good friend. In this case, would you simply ignore the rumor? Clearly not; instead, you would investigate the matter further. The very fact that you would take some action as a result of hearing the rumor indicates your instinctive acceptance of the hypothesis that the rumor has increased the probability that John is leaving—otherwise, why would you bother to act?

Once you have started to investigate, the information necessary for you to assess the truth of the rumor is fairly obvious. Assuming that John is unavailable (for he is the best source of information), you might attempt to learn the origin of the rumor. Obtaining this additional bit of information may be sufficient for you to decide whether the rumor is worth taking seriously.<sup>53</sup> You might also check the rumor against other circumstantial evidence at your disposal. For instance, if John had been secretive, you would be more inclined to believe the rumor; if he had told you that he was about

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<sup>50</sup> In a similar vein, Professor James asked the question: "Do we believe, with the hasty David, that all men are liars?" James, *supra* note 4, at 792.

<sup>51</sup> Indeed, strategic manipulation changes the calculus completely. See *infra* text accompanying notes 73-80, 89-90.

<sup>52</sup> The rumor is equivalent to a hearsay statement uttered by an unknown declarant.

<sup>53</sup> In the context of a trial, this is analogous to cases in which the jury knows the identity of the declarant and, presumably, some facts regarding the declarant's credibility.

to receive a tremendous raise, you would be more inclined to reject it.<sup>54</sup> It seems unlikely that, if you have been careful, the rumor would lead you to an erroneous conclusion about John's employment status.

There appears to be no inherent reason why a jury faced with hearsay evidence cannot evaluate it in the same fashion each of us employs to make sense of the endless factual issues that we face on a daily basis.<sup>55</sup> If this is the case, the risk that hearsay will be misinformation seems to be minimal.<sup>56</sup>

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<sup>54</sup> This, of course, is analogous to the process by which the jury decides what weight to assign hearsay evidence in light of all the other evidence in the case.

<sup>55</sup> There is, of course, a critical difference between my hypothetical involving the investigation of John's employment status and a jury's method of fact finding: juries lack the power to investigate anything. In carrying out its duty to find the facts, a jury is both passive and captive. It is at the mercy of the parties' desires and abilities to present it with all of the information necessary to render its decisions. In part III, this article examines whether a hearsay rule of some kind is necessary to ensure that the parties will provide the jury with all of the information it needs to make a logically valid decision.

<sup>56</sup> Many hearsay scholars have reached the same conclusion. See Friedman, *supra* note 4, at 739 (asserting that the results of available empirical research demonstrate that juries appropriately devalue hearsay evidence); James, *supra* note 4, at 794-95 (contending that comparison of hearsay to direct evidence in daily life enables jurors to evaluate hearsay in the courtroom properly); Nance, *supra* note 19, at 286 (observing that "there is strong reason to doubt that the risk of misleading the jury provides a satisfactory account of any exclusionary rule under which the presentation of challenged evidence may be excused on some argument of practical necessity"); Paul J. Brysh, Comment, *Abolish the Rule Against Hearsay*, 35 U. PITT. L. REV. 609, 624 (1974) (agreeing with Albert S. Osborne that "'as a matter of fact, in the ordinary affairs of life hearsay is a well recognized source of information, not of course to be implicitly depended upon but often helpful as one of the steps in an investigation'" (quoting ALBERT S. OSBORNE, *THE MIND OF THE JUROR* 52 (1937))). But see Mueller, *supra* note 23, at 382-83 (noting that, when judging hearsay in the courtroom, jurors lack foundation information otherwise available in daily life, play an unfamiliar role in a foreign setting, and render momentous decisions under unusual time constraints).

Recent empirical evidence tentatively supports the conclusion that juries do not erroneously value hearsay evidence. Margaret B. Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703 (1992) (presenting a jury study suggesting that lay persons are attuned to the quality and verity of hearsay testimony and are able to distinguish between good and poor hearsay testimony); Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 692 (1992) (reporting their recent study, which indicated that "mock juror verdicts were not influenced by . . . hearsay testimony"); Richard F. Rakos & Stephen Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655, 664 (1992) (reporting that no research to date "substantiates the hypothesized dangers of hearsay testimony," but rather indicates that "[m]ock jurors do not appear to be unduly swayed by such evidence"). This work is far from conclusive, however, and some of the researchers have cautioned against basing reform upon their studies. E.g., Miene et al., *supra*, at 699 (warning that "[t]he fact that subjects in this study did not give much weight to hearsay evidence does not conclusively make the case for hearsay reform"); Rakos & Landsman, *supra*, at 676 (advising that "[t]here has not

Apparently then, the underlying premise of current hearsay doctrine—that the primary problem with hearsay is its propensity to provide misinformation rather than inexact or incomplete information—is defective. This misconception would not necessarily be fatal, however, if reliability screening worked, for in the end all helpful hearsay evidence would be admitted.<sup>57</sup> Unfortunately, this is not the case.

Any attempt to screen hearsay on the basis of its reliability, i.e., to admit helpful information and exclude misleading misinformation, is doomed to failure. This is because the screening process itself violates one of the fundamental conditions of valid inductive logic: the drawing of inductive inferences requires consideration of all logically relevant information.<sup>58</sup> To evaluate the reliability of hearsay before and during trial, a judge is forced to reach inductive conclusions based upon considerably less than all available information. The reliability of a hearsay statement will depend as much on the full context of the case in which it is offered as it will on any specific factors that might be singled out as determinative in the prescreening context.<sup>59</sup> Consequently, attempts to assess hearsay before all of the evidence has been introduced cannot, by definition, amount to more than logically invalid guesswork.

Sadly, our current system employs the *least rational* means of evaluating the reliability of hearsay evidence: preconceived categories. Each categorical exception is theoretically supported by an initial inductive hypothesis about human behavior that, if true, reduces the probability that an out-of-court statement falling within the category suffers from one of the hearsay dangers.<sup>60</sup> Accordingly, any such statement is deemed reliable and, therefore,

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yet been enough hearsay research to warrant a discussion of reform on empirical grounds”). Professors Rakos and Landsman go so far as to suggest that no reform should be undertaken in the absence of additional empirical data. Rakos & Landsman, *supra*, at 676. This degree of conservatism seems unwarranted in light of two facts: (1) empirical evidence may never approach a convincing level of certainty, and (2) present doctrine cannot be empirically justified.

<sup>57</sup> Even if reliability screening were successful, the system’s failure to recognize that supposedly unreliable hearsay is not harmful to the fact-finding process is not necessarily an inconsequential matter. Litigants, judges, and scholars invest tremendous resources in applying and analyzing the hearsay rule. Elimination of the rule, based on the idea that hearsay rarely constitutes misinformation, would permit these individuals to shift their intellectual energies to more important tasks. In any event, this article concludes that a rule against hearsay is necessary. *See infra* part III.

<sup>58</sup> *See supra* text accompanying note 32.

<sup>59</sup> *See Weinstein, supra* note 4, at 332-33 (observing that the probative value of hearsay will depend, in part, on its fit with other evidence in the case).

<sup>60</sup> For instance, the public records and reports exception is based, in part, upon the assumption that government employees under a duty to report information will do so accurately. *See* FED. R. EVID. 803(8)(b) advisory committee’s note (announcing that the “[j]ustification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the

admissible. However, even assuming the accuracy of the categories' foundation hypotheses,<sup>61</sup> an out-of-court statement's reliability is simply not measurable through what is, in effect, a unidimensional test. A statement may be grossly unreliable despite the fact that it falls within the bounds of a categorical exception, in light of other information in the case. This more specific information may demonstrate that the category's behavioral assumption is inapplicable to the particular statement at issue,<sup>62</sup> or the statement may present a danger not accounted for by the assumption underlying the specific exception,<sup>63</sup> or other more definitive evidence might make the accuracy of the hearsay suspect. At the same time, the categorical exceptions are not comprehensively inclusive; the facts surrounding excluded hearsay may indicate that it is reliable even though it fails to meet the strictures of any given exception.<sup>64</sup>

Given the deviation of the doctrine from the premises of valid inductive reasoning, even modest claims that the current hearsay regime excludes more unreliable hearsay (i.e., misinformation) than it lets in, or that it lets in more reliable hearsay (i.e., beneficial information) than it excludes are untenable.

The difficulties in prescreening hearsay would have been ameliorated only slightly by the proposal that caught the fancy of many in the last generation of hearsay reformers: replacement of the categorical exceptions with judicial

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record" (citing *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952))). This is essentially an inductive inference about human behavior under certain conditions.

<sup>61</sup> Regarding some categories, this is a very generous assumption. See, e.g., Stewart, *supra* note 4, at 19-28 (presenting empirical evidence raising questions about the reliability of hearsay, including excited utterances); Charles W. Quick, *Some Reflections on Dying Declarations*, 6 How. L.J. 109, 110-20 (1960) (reviewing the contours of the exception for dying declarations under the common law of hearsay and concluding that the doctrine is "shot full of inconsistencies and illogicalities").

<sup>62</sup> Using the public record exception once again, additional information might indicate that the government employee in question is lazy or sloppy; such information would undermine the initial hypothesis that government workers, under a duty to report, act responsibly.

<sup>63</sup> The public records exception, for example, apparently operates on the assumption that the government employee is anonymous, or at least unbiased. Thus, it fails to account for the danger of mendacity. In a specific case, of course, the neutrality of the public official might be a subject of dispute.

<sup>64</sup> This is perhaps the greatest fault of reliability-based prescreening, because it rests on the doctrine's faulty initial premise that hearsay is misinformation except when a special reason counsels reliance upon it. Thus, a public record compiled by a government employee not under a duty to report the information is not admissible even though all other available evidence supports the initial inductive hypothesis that it is believable.

This illustration reveals another problem with categorical reliability-based exceptions. Argument over the admissibility of a public report may focus on the definition of "duty," although, in reality, the issue of "duty" may have nothing to do with the reliability of the report.

discretion to admit or exclude hearsay on the basis of its reliability.<sup>65</sup> These reformers maintained that the flexibility associated with a discretionary system would avoid some of the glaring injustices engendered by the rigid application of formal rules. The preceding analysis indicates that, to a limited extent, they were right. In contrast to the drafters of a preconceived set of rules, trial judges would at least be determining the reliability of hearsay in the context of specific cases. Nevertheless, such an approach would not be without significant costs.

Other scholars have amply discussed the conspicuous pitfalls of a discretionary hearsay rule.<sup>66</sup> Simply put, the power to exclude evidence is the power to determine the outcome of cases. If truly discretionary—in other words, if not subject to appellate review—this power is too great to vest in individual trial judges.<sup>67</sup> Moreover, absent clear guidelines defining reliable hearsay, the exclusionary process would be akin to a game of roulette. On the other hand, imposing clear guidelines and enforcing them through appellate review would cause the standard of reliability to evolve slowly into a set of rules. The final outcome would be the recreation of what existed prior to codification of the rules of evidence: an ad hoc common law hearsay regime.

Ultimately, however, any endeavor to improve the hearsay rule by increasing judicial discretion is destined to fail. A discretionary hearsay rule would be plagued by the flaw that characterizes all reliability-based systems of prior exclusion: it would require inductive decision making with less than an optimal amount of available information. As set out above,<sup>68</sup> prescreening hearsay requires the judge to evaluate its reliability when all of the facts relevant to making this judgment, including the other evidence in the case, are not yet known. In at least some cases, a seemingly accurate decision,

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<sup>65</sup> See, e.g., Weinstein, *supra* note 4, at 338-39 (arguing for replacement of categorical exceptions with individual treatment); Younger, *supra* note 47, at 293 (proposing the rule that “[hearsay is admissible . . . unless the court decides as a preliminary question that the hearsay could not reasonably be accepted by the finder of fact as trustworthy. The finder of fact remains free to disbelieve admitted hearsay.”); see also Roger Park, *The Rationale of Personal Admissions*, 21 IND. L. REV. 509, 514-15 & n.25 (1988) (noting that proposals for hearsay reform involving increased judicial discretion, which are common among hearsay reformers, have raised the specter of abuse of discretion).

<sup>66</sup> See, e.g., Mueller, *supra* note 23, at 396-97 (reviewing the importance of having hearsay rules); Park, *Subject Matter*, *supra* note 4, at 110-12 (discussing potential dangers inherent in a discretionary reliability standard, such as localized rules, abuse of discretion, and difficulties in case preparation); Kenneth W. Graham, Jr., *What Happened to the Last Generation of Hearsay Reformers?* 8-9 (1991) (unpublished manuscript, on file with the *Boston University Law Review*) (noting that power is a “zero-sum game,” so that an increase in judicial power reduces the power of trial lawyers).

<sup>67</sup> This power is especially great in criminal cases. Because of criminal defendants’ constitutional protection against double jeopardy, U.S. CONST. amend. V, a trial judge’s decision to exclude the government’s evidence, if it results in a defendant’s acquittal, is not subject to appellate review.

<sup>68</sup> See *supra* text accompanying notes 58-59.

based upon the information available to the judge at the time, will turn out to be invalid in the context of the entire case. Therefore, a rational system of evidence cannot involve any attempt to prescreen hearsay for its reliability, whether through a set of rules or through a discretionary standard, without being fundamentally flawed.

Defenders of a reliability-based hearsay rule have but one argument left: the judge, as an expert fact finder, is more capable of evaluating hearsay evidence than is a lay jury.<sup>69</sup> If true, this expertise might countervail the fact that the judge must rule on the admissibility of hearsay with considerably less information than the jury would have if it were assigned the task of weighing hearsay evidence at the close of the case. But most modern evidence scholars reject the view that judges are superior evaluators of hearsay evidence.<sup>70</sup> This sentiment seems correct, for scrutinizing hearsay is a process involving inductive logic drawing upon everyday human experience. No special expertise or specialized knowledge is necessary to the task. Twelve jurors are at least as capable of weighing hearsay as a single judge.<sup>71</sup>

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<sup>69</sup> I should note that Professor Callen has offered at least a partial defense of the current hearsay scheme based upon his interpretation of cognitive theory. He argues that, since human cognitive resources are limited, individuals must adopt strategies for isolating critical data to solve problems. Cognitive science research has shown that "organizing a method of problem solving by establishing a general default rule, subject to exceptions that are governed, in turn, by other rules which may be subject to exceptions, is a very efficient way of systematizing decisionmaking tasks." Callen, *Adjudication*, *supra* note 31, at 480 (footnote omitted); *see also* Callen, Manuscript, *supra* note 31, at 24-27 (applying the same argument to hearsay doctrine). While declining to endorse the categorical exceptions currently in force, Professor Callen argues that some combination of a rule and exceptions may be the best way to ensure that proffered hearsay evidence "warrants the processing effort necessary to understand it." Callen, Manuscript, *supra* note 31, at 25.

Given that the "best evidence hearsay rule" is, in fact, a blanket rule subject to exceptions, Professor Callen's views may be fundamentally compatible with my own. However, he appears to countenance the exclusion of hearsay evidence based upon *predetermined* categorical evaluations of its usefulness. I am skeptical of the law's ability to make such judgments in a rational way. Thus, although I agree that cognitive resources are finite and that strategies must be used to limit the information juries are called upon to process, I do not assign hearsay doctrine a role in accomplishing this task.

<sup>70</sup> As Professor Nance has noted, "[e]ven Wigmore conceded that 'the judge himself is not a specialist in the science of proof.'" Nance, *supra* note 19, at 287 & n.290 (quoting JOHN H. WIGMORE, *A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE* 12 (1935)).

<sup>71</sup> The only expertise distinguishing the judge from the jury comes from her familiarity with the litigation process itself. On occasion, this expertise might be critical to the evaluation of hearsay evidence. It seems possible that in such cases, however, the judge and/or the parties could provide the jury with sufficient insight into the trial process to facilitate rational decisions. *See id.* at 287-89 (arguing that circumstances in which practical knowledge of the conditions of modern litigation could not be conveyed to the jury in a cost-effective manner would be very rare, but might justify the exclusion of hearsay); *see also infra* part VI (discussing post-admission controls).



An exclusionary hearsay rule based upon the notion of reliability is simply indefensible. The question remains whether hearsay is ever properly subject to exclusion. The next section addresses this question.

### III. DO WE NEED A HEARSAY RULE?

Exclusion of hearsay based upon preconceived judgments concerning its reliability is, as we have seen, an inherently flawed process. Nevertheless, a hearsay statement is unquestionably inferior to the testimonial statement of a live witness with an accurate memory. Compared to live testimony, hearsay provides the fact finder with less information upon which to evaluate its assertive content. In addition, hearsay is more likely to amount to misinformation. But the relative inferiority of hearsay evidence does not, standing alone, necessitate construction of a rule against hearsay. As a general matter, the law of evidence does not impose upon parties any obligation to produce the best evidence. The reason for this is simple: rather than attempt to regulate evidence based upon its relative value, the law of evidence reflects our faith in the natural forces of the adversary system. We hypothesize that, because each party is laboring to win the case, each will present the most persuasive—or best—evidence to prove its own case and will make every effort to refute the evidence offered by the opponent. As a result, the parties will present the jury with sufficient evidence from which to reach an accurate verdict. If our faith in the adversary system is warranted, the hearsay rule is superfluous and should be abolished. This issue thus merits careful examination.

The initial inquiry is this: given freedom of choice, would a trial lawyer present to the jury the live testimony of an available witness or would she offer a hearsay substitute? Those who believe that the hearsay rule is superfluous argue that the trial attorney will almost always present the live witness. Their argument is founded upon two main premises: (1) the attorney, acting in the best interests of her case, will choose the live testimony because it is more dramatic and memorable than a stale hearsay substitute; and (2) the attorney will choose the live witness because doing otherwise will open her case up to the charge of spoliation.<sup>72</sup> Unfortunately, these two premises do not withstand close scrutiny.

Putting a witness on the stand in open court, in front of judge, jury, and spectators, is one of the most stressful events in a trial lawyer's professional life.<sup>73</sup> Although the trial lawyer has interviewed and prepared the witness

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<sup>72</sup> See Jack B. Weinstein, *Alternatives to the Present Hearsay Rule*, 44 F.R.D. 375, 378 (1968) (commenting that "[t]here are substantial pressures on an attorney to provide the psychologically most satisfying evidence if he expects to convince a jury or judge").

<sup>73</sup> For this assertion, I rely, in part, on the butterflies that flew in my stomach each time I called a witness to the stand during my five years as a federal prosecutor.

for this moment, she knows that virtually anything can happen.<sup>74</sup> An ordinarily humble person may turn into a conceited monster; someone usually unflappable might self-destruct. Sometimes telltale signs provide a warning that the witness might get into trouble: for instance, his answers to some probing questions during the preparation phase might have been less than convincing. Other times the witness's self-destruction comes as a complete surprise. Sometimes the damage occurs on direct examination, other times during cross. Under the present system, the rule against hearsay means that the lawyer, in the usual course of events, has no choice but to call the witness to the stand with the hope that the witness will perform well.<sup>75</sup>

If another option, such as the use of a hearsay substitute, were available, the incentives to use it would be great. Hearsay evidence, particularly in the form of deposition or affidavit, has the immeasurable advantage of being known and certain. Even if a witness's performance at her deposition was less than stellar, for instance, the lawyer would at least have the benefit of knowing this in advance. Rather than risk a worse performance at trial, the lawyer might rationally choose to offer the deposition testimony and couple it with a carefully devised strategy of damage control. Moreover, in stark contrast to evidence subject to the vagaries of chance, some kinds of pre-packaged hearsay evidence could be carefully crafted to present a party's best case. The elimination of chance and the opportunity to fine-tune evidence would inevitably appeal to at least some proportion of trial lawyers in a variety of specific situations.<sup>76</sup>

This issue deserves more searching scrutiny. A capable trial lawyer would be especially likely to use hearsay evidence in place of live testimony after careful strategic planning. Potential reasons for preferring hearsay evidence are infinite. The lawyer might intuitively sense that the jury would not believe a witness if it viewed him in open court. Or the attorney might fear that the witness knows too much; cross-examination would likely elicit information helpful to the opposing party. Alternatively, the witness might have exhibited hostility to the proponent of her testimony, leading a savvy attorney to believe that the witness would, if given the opportunity, intentionally sabotage the proponent's case.

Indeed, the strategic plan could extend beyond the particular trial at issue. Some attorneys occasionally try a series of related cases involving overlapping evidence. They often plan an overarching litigation strategy. In this

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<sup>74</sup> *But cf.* John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 298-324 (1989) (discussing the various witness-preparation methods attorneys employ to minimize surprises when a witness takes the stand).

<sup>75</sup> No doubt judgments about witnesses' credibility enter into the calculus attorneys employ when determining whether to settle a case. Many cases look good on paper but are settled because an experienced attorney believes that an important witness will not do well in court.

<sup>76</sup> *See Swift, supra* note 47, at 515 (noting that "[p]resentation of hearsay always allows the proponent to reduce the risks inherent in presenting a witness at trial").

situation, the decision-making process concerning the use of hearsay evidence is significantly more complex. A record is made each time a witness testifies, and future opponents inevitably use this record as fodder for cross-examination.<sup>77</sup> Given this reality, a skillful litigator might maximize her overall success rate by presenting a hearsay substitute for a critical witness in earlier, less important trials, thereby reducing the effect of cross-examination when she opts to present the more dramatic live testimony of the witness at later, more important trials.<sup>78</sup>

Responding to these arguments, advocates of the abolition of the hearsay rule assert that allegations of spoliation would militate against the use of hearsay in almost all cases.<sup>79</sup> Without doubt, fear of being accused of hiding something will often prompt an attorney to offer the testimony of an available live witness. Nevertheless, the deterrent effect of a spoliation challenge is easily exaggerated. With just a little imagination and perhaps some advance planning, an attorney could successfully counter the challenge in many situations. For example, she might establish that the declarant is "old and frail," or "in Europe on important business," and these facts may very well defeat suspicions raised by the other side.<sup>80</sup> Indeed, an attorney could

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<sup>77</sup> This is literally a no-win situation for the attorney sponsoring the witness. If the witness's testimony changes—even slightly—over time, a skillful opponent will mount an attack based upon the witness's prior "inconsistent" statements. If the witness's testimony remains the same, the opponent may accuse the witness of reciting a "canned" story that rings hollow because of its very consistency. See Applegate, *supra* note 74, at 310-11 (explaining that "[o]bviously, inconsistency can denote uncertainty or fabrication. Perfect consistency, however, is also a sign of perjury. Consequently, a good cross-examiner can depict a witness's consistency or inconsistency as evidence of unreliability." (footnote omitted)).

<sup>78</sup> Prosecutors undoubtedly face this judgment when they occasionally obtain the cooperation of a career criminal who can offer evidence against a number of unrelated defendants or conspiratorial groups. The prosecutor attempts to formulate a litigation sequence that will maximize the number of defendants tried and the probability that the most culpable will be convicted. Some witnesses are not used in early trials to prevent premature cross-examination. If the rules of evidence permitted the free introduction of witnesses' hearsay declarations, prosecutors would seriously consider this option, seeing it as a way to get this evidence before the jury at a negligible cost.

No doubt many civil litigators face analogous situations, as when numerous plaintiffs sue a corporation on related matters and the testimony of the corporate officers will be required in each case.

<sup>79</sup> See Weinstein, *supra* note 72, at 378 (commenting that "[p]erhaps the most effective check against abuse of a rule of free admissibility is an automatic one—the inference of spoliation").

<sup>80</sup> In providing such an explanation, or even arranging for such an outcome, the hearsay proponent would not be perpetrating a fraud on the court—as long as the explanation was literally true. Cf. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (2d ed. 1992) (prohibiting a lawyer from making "a false statement of material fact or law to a tribunal"). Of course, the lawyer would have to observe her ethical obligation not to "unlawfully obstruct another party's access to evidence." *Id.* Rule

counter some spoliation arguments simply by apprising the jury that the rules of evidence countenance the use of out-of-court statements, suggesting that the rules surely would not permit action that could be used to manipulate the evidence.

Additionally, the "glass house" syndrome would mark a system of free admissibility.<sup>81</sup> An attorney planning to use hearsay instead of one or more live witnesses would likely perceive the disadvantage of causing too much of a fuss if her opponent chose the same course of action. In fact, one would expect that during the preparation of a case opposing counsel would sound each other out concerning the use of hearsay, and, in some cases, would reach an implicit understanding that the spoliation argument is out of bounds at trial, at least with respect to certain witnesses. Consequently, some portion of the trial would enter the realm of deposition, affidavit, and surrogate.<sup>82</sup>

Over time, a new generation of trial lawyers, one whose members had never practiced law under a regime that excluded hearsay evidence, would dominate the profession. This new generation would view the hearsay rule as something akin to the old doctrines of competency—as an antiquated and misplaced attempt to control the proof at trial, finally defeated by progressive modern thought. Unquestionably, hearsay evidence would be used, ever increasingly, in our courts.<sup>83</sup>

This conclusion does not, however, definitively answer the question whether the absence of a hearsay rule would impede the rational fact-finding process. If the fact finder would be presented with all logically relevant information despite parties' initial decisions to use hearsay, then the process

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3.4(a). But, consistent with her ethical duties, she clearly could request a relative, employee, or agent of the client to "refrain from voluntarily giving relevant information to [the other] party." *Id.* Rule 3.4(f). In any event, by explaining the declarant's absence, the hearsay proponent would shift the burden back to the opponent to convince the jury that the explanation is a cover for something more sinister. In the process of accusation, explanation, and counter-accusation, the spoliation argument would undoubtedly lose some, if not most, of its punch.

<sup>81</sup> From the aphorism, "People in glass houses should not throw stones."

<sup>82</sup> This occurs today when attorneys stipulate to certain facts or testimony. But trial attorneys' internalization of the system's general preference for live testimony limits stipulations to the very periphery of a case. Attorneys practicing in a system without a hearsay rule would probably become more and more willing to barter away live testimony. For instance, it is not far-fetched to envision that, in such a world, agreements in criminal cases permitting the prosecutor to use a videotaped deposition of an important witness in exchange for defense counsel's right to present a videotaped statement of the defendant would become common.

<sup>83</sup> The fact that liberalization of the hearsay rule has led to the introduction of more hearsay at trial supports the argument that elimination of the hearsay rule would have the same effect. *See* Rossi, *supra* note 12, at 13-15 (asserting that exclusion of hearsay today is "almost a fiction" and that since the 1970's courts "have created theories and precedents to admit almost all probative hearsay").

would not be compromised. Commentators have advanced two arguments in support of the view that a jury would obtain equivalent information with or without a hearsay rule. The first argument postulates that a hearsay opponent can effectively reveal the inherent weaknesses of hearsay evidence, i.e., the risks of inaccurate perception, distorted memory, ambiguity, and deception, by cross-examining the witness who relates the hearsay declaration in court. The argument assumes that jurors who view such a cross-examination will value the hearsay accordingly.<sup>84</sup>

In reality, though, cross-examination of non-declarant witnesses is of only limited use. There is a profound difference between disclosing to the jury the *potential* dangers associated with hearsay, which is all that is normally possible through cross-examination of a "foundation witness,"<sup>85</sup> and exposing the actual inaccuracy of the hearsay by requiring the declarant to testify as a witness in court. For example, assume that a witness testifies that a declarant stated: "John was sober when he left the bar to drive home." On cross-examination, the witness will likely admit that there is at least the possibility that he heard the declarant incorrectly, and that the declarant might have said, "John wasn't sober when he left the bar to drive home." According to the abolitionists, the opponent of this hearsay statement can easily convince the jury to discount it because of its untested nature, thereby obtaining essentially the same outcome available through cross-examination of the declarant himself.

This, of course, is not so. Assume that the witness did, in fact, misunderstand the declarant.<sup>86</sup> If the declarant were on the stand he would testify that John was not sober when he left the bar to drive home; on cross-examination, he would either deny making an earlier inconsistent statement, or explain the fact that an inconsistent statement has been attributed to him as the result of an apparent miscommunication. Instead of having evidence of John's *sobriety* (subject to some discounting), the jury would have evidence of John's *insobriety* (subject to some discounting arising from the allegation of a prior inconsistent statement). The difference in the outcome, with the hearsay rule and without it, is dramatic.<sup>87</sup>

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<sup>84</sup> See, e.g., Brysh, *supra* note 56, at 625-26 (explaining that cross-examination of a hearsay witness is "perhaps the most valuable aid to the jury in assessing the value of hearsay"); Note, *supra* note 47, at 1788 (observing that "[c]ross-examination and closing argument present opportunities to expose the weaknesses of testimony, improving the accuracy of the jury's assessment" of the credibility of the evidence).

<sup>85</sup> The term was coined by Professor Swift. See Swift, *supra* note 4, at 1355-61.

<sup>86</sup> In hearsay terminology, this is the risk of ambiguity.

<sup>87</sup> This analysis engages in one important simplification to make the point. If the mistake were this stark, the inconsistency would likely surface prior to trial, and the opponent of the hearsay would be the party inclined to call John as a witness. In any event, it seems fair to say that cross-examination of the declarant is far more likely than cross-examination of a surrogate to clear up the classic problems plaguing hearsay evidence—the problems of misperception, faulty memory, ambiguity, and mendacity. See *supra* text accompanying note 41 (discussing the hearsay risks).

The second argument supporting the view that a rule against hearsay is extraneous to rational fact finding stresses the hearsay opponent's ability to call the declarant to the witness stand for cross-examination, thereby revealing to the jury the weaknesses camouflaged by the hearsay evidence. Granted, this might take place in rare instances when the declarant's true statement directly supported the opponent's case. In the majority of cases, however, the essence of the declarant-witness's testimony would remain damaging to the opponent's cause; it would make little sense for the opposing party to suffer through an in-court repetition of this testimony merely for the sake of impeachment.<sup>88</sup>

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<sup>88</sup> Professor Friedman begins his solution to the hearsay conundrum with a proposal that gives the opponent of hearsay evidence the ability to require the proponent to call an available declarant for direct examination and then tender him for cross. Richard D. Friedman, *Improving the Procedures for Resolving Hearsay Issues*, 13 *CARDOZO L. REV.* 883, 891 (1991); Friedman, *supra* note 4, at 729-34. He argues that, with this adjustment, an optimal hearsay rule would simply allocate the monetary and informational costs of producing available witnesses between the parties in a fair and efficient manner. Friedman, *supra* note 4, at 724, 734-50. Professor Friedman bases his proposal on a simple, yet powerful, idea: if the opponent of hearsay truly believes that it is inferior to live testimony, she will be willing to pay for the declarant's production at trial. *Id.* at 724. For several reasons, however, Professor Friedman's proposed rule is not an optimal solution to the hearsay problem.

First, Professor Friedman fails to take sufficient account of the significant difficulties associated with giving one party the ability to affect the opposing party's order of proof. Under Professor Friedman's hearsay paradigm, the proponent of a hearsay statement, when faced with a hearsay objection, would be forced to present other evidence out of order while the declarant was tracked down and brought into court. Even assuming that the monetary costs associated with the declarant's production were taxed to the opponent, these costs would often pale in comparison to the value of disrupting the proponent's case. The disruption would have a heightened impact, of course, in the case of multiple-declarant hearsay. As a result, a smart advocate, never certain whether her opponent intended to object to hearsay, would eliminate this uncertainty by producing available witnesses in all but the most extreme cases. The rule's goals of allocating responsibility between the parties for the presentation of live testimony and of forcing the use of live testimony only when efficient would thus be substantially subverted.

The problem of disruption could be partially solved by requiring the proponent of hearsay to provide notice of an intent to use the hearsay prior to trial. The hearsay opponent could then be obliged to accept the hearsay or produce the declarant at the appropriate moment in the proponent's case. Indeed, Professor Friedman's basic analysis assumes adequate notice. *See id.* at 751. He subsequently discusses the ramifications of late notice. *See id.* at 783-91. This solution, however, carries costs of its own. For one, courts would inevitably be forced to police the notice regime. In a case in which notice was not given, for example, the court would presumably have to determine if the failure to give notice was justified and, if so, which party should bear the prejudice. Significant court resources would thus be spent on a tangential issue, rather than the direct issue of whether the jury would benefit from hearing the witness's testimony. In contrast, this

All things being equal, then, live testimony appears to have at least a modest chance of being more accurate and truthful than a hearsay substitute.

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direct issue is always the focal point under the best evidence hearsay rule. *See infra* text accompanying notes 134-36.

More importantly, a notice requirement would not fully solve the disruption problem. Assume, for example, that hearsay evidence reflects the collective judgment of 10 or 15 individuals, not an outrageous figure in light of the nature of some business documents. Under Professor Friedman's regime, the opponent could force the proponent to call each of these individuals as witnesses, thereby substantially diluting the impact of the proponent's case-in-chief. Although Federal Rule of Evidence 403 is available to keep out cumulative evidence, the opponent would have a strong argument that testing the perception, memory, communication, and veracity of each declarant is not "cumulative." For a wealthy opponent, this tactic might be well worth the cost.

Second, Professor Friedman's paradigm significantly undervalues the problem of the unequal distribution of information between the parties. A hearsay opponent may know too little about a proposed hearsay declarant to make an intelligent judgment whether payment for the declarant's travel to court would be worthwhile. The cost of obtaining such information pre-trial would in many cases be great; indeed, Professor Friedman's rule would effectively double tax an opponent by forcing her to pay for both pre-trial discovery and production of the witness at trial. (Stated another way, when pre-trial discovery costs are considered, the most efficient form of "discovery" may be the (traditional) hearsay rule itself, which effectively combines "discovery" with production of the witness at trial.) Moreover, perfect equality of pre-trial information is impossible. *See infra* notes 93-94 and accompanying text. Thus, on at least some occasions, uncertainty and financial constraints would cause an opponent to forego an objection to hearsay when live testimony would have been helpful to his case. Recognizing this, and the benefits of disruption noted above, smart attorneys—with wealthy enough clients—would always object to hearsay. The result would be far from optimal.

Finally, Professor Friedman's scheme effectively empowers a party to purchase influence over the presentation of his opponent's case. Any evidentiary rule that depends upon judgments about monetary cost diminishes the fairness of a trial between parties with different economic positions. Whereas the marginal cost of paying for the appearance of one more witness may be negligible to a large organization, to an indigent plaintiff it may be decisive. Thus, the only attorneys who would not object to hearsay would be those representing clients for whom the costs of paying for the production of declarants would be relatively great. Wealthy litigants, on the other hand, could afford the maximum interference with and influence over their opponent's case. The result would be a perception—and indeed a substantial reality—of injustice.

In a short section on "distributive justice," Professor Friedman addresses this last criticism in two ways. First, he argues that "[h]earsay litigation is, at best, a clumsy method for redistribution of wealth." Friedman, *supra* note 4, at 744 n.42. This comment appears to misunderstand the criticism. No one has suggested that hearsay doctrine ought to redistribute wealth; the point is that the combination of pre-existing wealth disparities and a rule based on monetary costs will disadvantage poorer parties. Second, Professor Friedman states tentatively that, to promote efficient outcomes, a court might appropriately take into account the parties' relative ability to pay. *See id.* at 766 n.69. For the sake of efficiency as well as justice, this accommodation is imperative, but it would make Professor Friedman's already intricate scheme hopelessly complex.

But in a world in which attorneys could choose freely between hearsay and live testimony, all things would not be equal. Litigators would engage in an instinctive cost-benefit analysis, offering hearsay only if the potential gain outweighed the weaknesses inherent in derivative information. The benefits of introducing hearsay increase in direct proportion with the probability that an in-court appearance would reveal deficiencies in the witness's testimony or would otherwise damage the proponent's case.<sup>89</sup> In addition, the proponent would be inclined to minimize the costs of offering hearsay by, for example, being prepared to cloud the issue of availability.<sup>90</sup> Simply put, parties would offer hearsay evidence precisely when the risks associated with its use were *maximized* and the ability of the opponent to counter the risks *minimized*. Without doubt, total elimination of the hearsay rule would severely impede the jury's quest for the truth.

The preceding argument might be recast by analogizing the trial process to the free market. Elimination of the rule against hearsay is a form of deregulation that would increase the methods through which attorneys may prove their case. Free-marketeers would argue that this form of deregulation should have no effect on the accuracy of verdicts. Each attorney would still have every incentive to present her best case while working zealously to expose the defects in her opponent's proof. In other words, adversarial self-interest would operate as an "invisible hand" to ensure that the fact finder was presented with sufficient accurate information from which to discern the truth.<sup>91</sup> If an opponent offered unreliable or inaccurate hearsay, counsel would do everything necessary to alert the jury. If, on the other hand, counsel offered accurate and reliable hearsay, its admission would not impair the fact-finding process. Indeed, to the extent that the use of hearsay can save time and money, its unrestricted availability as potential proof would increase the efficiency of the judicial system.

The response to this argument is that the world of litigation does not function this perfectly. Like the free market itself, the "adversary market" is burdened with hidden costs and inequities that thwart its efficient operation. Perhaps the greatest of these costs has already been discussed: the cost of calling a witness merely for impeachment.<sup>92</sup> In addition, information about witnesses—particularly about the potential weaknesses in their testimony—is disproportionately held by the proponent of hearsay evidence. Such information may be impossible or expensive for the other party to obtain.<sup>93</sup>

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<sup>89</sup> See *supra* text accompanying notes 75-78 (discussing the incentives for using hearsay).

<sup>90</sup> See *supra* note 80 and accompanying text.

<sup>91</sup> Cf. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (Edwin Cannan ed., Modern Library ed. 1937) (1776).

<sup>92</sup> See *supra* text accompanying note 88.

<sup>93</sup> An accepted maxim in the world of law and economics posits that to maximize efficiency the law should place burdens on the parties that can meet them at the lowest cost. See, e.g., Robert Cooter & Thomas Ulen, LAW AND ECONOMICS 283 (1988)



Although this is especially true in criminal cases because pre-trial discovery is limited, it is true in civil cases as well.<sup>94</sup> A third problem stems from the realities of law practice: opponents of hearsay will sometimes be too busy, too lazy, or too poor to track down the declarant and obtain the information necessary to illuminate the inaccuracy of his out-of-court statement. From this perspective, a rule against hearsay functions as an indispensable regulation that corrects for distortions in the adversary market; one which, if properly designed, can do so at a lower cost than alternative methods of market correction.<sup>95</sup>

A rule against hearsay is thus necessary for at least one fundamental purpose: to preserve our system's basic preference for the testimony of live witnesses,<sup>96</sup> which in turn maximizes the accuracy of the fact-finding process.

#### IV. OTHER ARGUMENTS FOR A RULE AGAINST HEARSAY

Some scholars have argued that the rule against hearsay serves purposes beyond the search for the truth. In a widely recognized article,<sup>97</sup> Professor Nesson analyzed the rule against hearsay as one of a number of rules primarily intended to protect the stability of adjudicatory verdicts.<sup>98</sup> He contended that the rule prevents declarants from arriving on the scene after trial and repudiating their out-of-court statements, which would throw the system into a tizzy and cast doubt upon the verdict. Professor Nesson noted that at least some of the hearsay exceptions, such as the one created for dying declarations, supports this view; one need not worry that a deceased declarant will appear post-trial to repudiate his statement.<sup>99</sup>

Responding to the Nesson thesis, Professor Park has argued that the hearsay rule is just as easily characterized as contrary to the principle of stability.<sup>100</sup> A declarant whose statement was *excluded* at trial may appear

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(observing that contract law places the burden of loss from unassigned frustrating contingencies on the party that could more cheaply prevent or insure against the risk of loss).

<sup>94</sup> Disparities of information between the parties seem inevitable. For example, even in civil cases it is common for one attorney to be thoroughly acquainted with certain witnesses, while the other attorney's only contact with those witness will be at a deposition. *Cf.* Nance, *supra* note 19, at 265-66. Such an imbalance in knowledge could result in the use of inaccurate hearsay without detection.

<sup>95</sup> *Cf. id.* at 235-36, 265-66 (explaining why these market "failures" create the need for a general best evidence requirement).

<sup>96</sup> *See supra* note 49.

<sup>97</sup> Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985) (arguing that many evidentiary rules can be better explained by the need to promote public acceptance of verdicts than by the desire to further the search for truth).

<sup>98</sup> *Id.* at 1373 & n.49.

<sup>99</sup> *Id.* at 1374.

<sup>100</sup> Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN L. REV. 1057, 1064 (1986) (reasoning that if the developers of the hearsay rule were concerned with the repudiating declarant, "fear of the reappearing

afterward and reaffirm his statement, thereby casting doubt on the accuracy of the verdict. Professor Park also noted that many exceptions to the hearsay rule do not require a declarant to be unavailable, further defeating Professor Nesson's thesis that hearsay doctrine permits use of a declarant's out-of-court statement only when it cannot later be disavowed.

Although Professor Park's refutation of Professor Nesson's specific thesis is convincing, Professor Nesson's general observation that the hearsay rule promotes the stability of verdicts remains persuasive. As discussed above, the hearsay rule may be all that separates us from trials dominated by evidence in the form of deposition, affidavit, and surrogate. By forcing the parties to use live witnesses, the hearsay rule helps preserve the trial as a unique event.<sup>101</sup> With the possible exception of a few devoted spectators, only the fact finder views the evidence and arguments first hand and has the opportunity to evaluate the demeanor of each witness in person.<sup>102</sup>

The unique nature of the trial process insulates it from attack. Non-trial participants are dependent upon derivative sources of information, such as news media accounts, transcripts, and perhaps clips of videotape, to learn about the facts of a case. Those who disagree with the verdict must defend their position against the determination of the original fact finder—who was "there." As a result, the fact finder's judgment is difficult, if not impossible, to assail—especially if the outcome of the case turns on the credibility of the witnesses.<sup>103</sup> The stability of trial verdicts is in this manner enhanced, a positive outcome in a world in which the truth is unknowable, disputes must be resolved, and life goes on.<sup>104</sup>

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declarant should have led to the abolition, not the retention, of the hearsay rule"); Park, *Subject Matter*, *supra* note 4, at 66-67 (objecting that "the stability of verdicts, if affected by the hearsay rule at all, would seem to be threatened as much by the exclusion as by the admission of hearsay").

<sup>101</sup> The hearsay rule's role in preserving the trial as a live, public activity not only promotes the acceptability of verdicts, but also guarantees that the trial remains something like a theatrical event. Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 100-13 (1975) (using theater as a metaphor for trials, and observing that trials encourage participants to be impartial and creative, provide an outlet for public and private aggression, and furnish a place where citizens and their government interact).

<sup>102</sup> Surprisingly, even Professor Park posits this legitimizing function of the hearsay rule as a reason to preserve it in criminal cases. Park, *Subject Matter*, *supra* note 4, at 102 (noting that the hearsay rule contributes to the "individualization of the determination of guilt, and independence of the decisionmaker").

<sup>103</sup> Of course, this reasoning is precisely what is used to justify appellate deference to the fact finding of a trial court or jury. See Wellborn, *supra* note 43, at 1094-95.

<sup>104</sup> One commentator has characterized this justification of hearsay law as "cynical." See Note, *supra* note 47, at 1807. However, the argument that the hearsay rule insulates the trial process from outside attack is cynical only if one believes that the rule serves no legitimate truth-seeking function or that it actually impedes the truth-seeking process. Cf. Daniel Shaviro, *Statistical Probability Evidence and the Appearance of Justice*, 103

Analysis of the purposes served by a hearsay rule would not be complete without addressing two theories advanced by Professors Lempert and Saltzburg that simply do not withstand close scrutiny. First, Professors Lempert and Saltzburg contend that abolition of the hearsay rule would benefit large, wealthy organizations in civil cases, and prosecutors in criminal ones.<sup>105</sup> They reason intuitively that the ability of both wealthy organizations and the state to generate self-serving institutional hearsay would give them an unfair advantage at trial.<sup>106</sup> Second, Professors Lempert and Saltzburg claim that parties with the burden of proof would be unduly favored by the free admission of hearsay because they could use hearsay to establish a prima facie case and survive a motion for a directed verdict—even when their case had little merit.<sup>107</sup> Professor Swift has noted at least partial agreement with this latter point.<sup>108</sup> The two arguments will be examined in turn.

The attempt to assert an institutional role for the hearsay rule—protection of the underdog—seems to be an example of good intentions clouding cogent thought. Although it may be true that institutions, including the state, are sometimes able to generate more hearsay than poorer adversaries, it does not follow that this ability would give them an unfair litigation advantage if hearsay were freely admissible. Abolition of the hearsay rule would also mean that the underdog, who might be unable to afford the time and expense of locating and producing certain witnesses for trial, could offer hearsay substitutes. Indeed, the underdog may benefit by his opponent's ability to generate hearsay, some of which might be discoverable prior to trial and support

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HARV. L. REV. 530, 532-33 (1990) (arguing that promotion of stable verdicts over accurate ones is immoral). Because I have concluded otherwise, I do not think that characterizing the hearsay rule's stability-producing effect as a benefit is cynical.

As the trend toward videotaping entire trials accelerates, the fact finder's view of the evidence will no longer be particularly unique. This could upset the current stability of verdicts based upon deference to the fact finder's ability to judge credibility. The first indications of this might be seen in the jurisprudence of appellate review. Indeed, one can envision a world in the not too distant future in which trials are replayed on television and viewers are invited to call in to vote on the verdict, with results contrary to the actual verdict used to support a motion for a new trial. A normative evaluation of such a development is beyond the scope of this article; it is noted as a means of emphasizing the relative stability presently enjoyed by trial verdicts.

<sup>105</sup> LEMPERT & SALTZBURG, *supra* note 3, at 521.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 522.

<sup>108</sup> See Swift, *supra* note 47, at 517-18 (arguing that abolition of the hearsay rule would change the balance between parties in favor of plaintiffs and prosecutors). Professor Swift further observes that “[i]f simply filing a lawsuit is coercive, the threat of being able to make a legally sufficient case is even more powerfully coercive. To the extent that increased costs and burdens make defense more difficult, more outcomes favorable to plaintiffs will result regardless of the substantive law . . . .” *Id.*

the underdog's case. Who would benefit more from abolition of the hearsay rule, organization or underdog, is impossible to predict.

It is also difficult to fathom how the ability to use hearsay would on average benefit parties with the burden of proof. Plaintiffs and prosecutors might get their cases to the jury slightly more often in the absence of a hearsay rule, but the hearsay evidence in many such cases would not be sufficiently probative to support a favorable verdict. On the other hand, hearsay would seem to be of greater use to the party whose success depends merely upon raising doubts and poking holes in the opponent's case. Attempting to determine who would win more cases following the elimination of the hearsay rule—plaintiffs and prosecutors or civil and criminal defendants—is an exercise in futility.<sup>109</sup>

The potential benefit to the underdog of using hearsay evidence is perhaps most evident in the criminal context. Every criminal defendant must face an extremely difficult decision: whether to testify. To succeed, the defense must raise at least a reasonable doubt; this will often require it to provide the jury with an explanation or some alternative to the prosecution's interpretation of events. In some cases, proffering a defense through third-party witnesses is very difficult because the defendant is the only available individual with personal knowledge of the relevant facts. Still, placing the defendant on the witness stand carries the consequence of cross-examination. Even to a truthful defendant with a valid defense, the prospect of cross-examination by a prosecutor, however skilled, is daunting. A defendant raising a truthful but less-than-persuasive defense has more to fear. Given this state of affairs, many criminal defendants would leap at the opportunity to present their

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<sup>109</sup> No doubt *different* cases would be won and lost under a system that permitted the free introduction of hearsay. Prosecutors and plaintiffs would certainly win at least some of the cases that they now lose by directed verdict. But defendants would also win some cases that they now lose because they presently cannot use hearsay evidence to raise a doubt. The net shift in wins and losses, if any at all, is not subject to prediction.

Professor Swift has suggested to me that elimination of the hearsay rule might favor parties with the burden of proof because they would be advantaged first: they could file a lawsuit in good faith, or survive a directed verdict, based entirely upon hearsay evidence. This ability, she argues, would give them an edge toward settling cases in their favor. This variation of the main argument, however, is characterized by the same flaw as the original. Clearly, by enhancing the ability of plaintiffs and prosecutors to initiate lawsuits and survive directed verdicts, elimination of the hearsay rule would add to the number of defendants coerced to settle or plead guilty. On the other hand, eliminating the rule would also cause some defendants to refuse to settle or plead guilty based upon their view of the strength of their hearsay evidence. The relative size of these groups is unknowable.

Some might suggest that, as a matter of policy, the prosecution should automatically lose any case in which an essential element is supported solely by hearsay evidence. Advocates of this view would have to concede, however, that in at least some of these cases a verdict for the prosecution would have been an accurate and just result. See *infra* text accompanying notes 149-50.

case through hearsay evidence. Such evidence, despite its intrinsic weakness, could in many cases be sufficient to raise a reasonable doubt.<sup>110</sup>

It is therefore impossible to predict winners and losers in a world without a hearsay rule.<sup>111</sup> Nevertheless, the accuracy of fact finding, and perhaps even the stability of verdicts, would be compromised without one. On balance, then, preservation of some rule against hearsay is imperative. The next part examines what an optimal rule would look like.

## V. DESIGNING A HEARSAY RULE

The parameters of workable hearsay doctrine can be derived from the analysis set forth in the preceding sections of this article. The main systemic problem with hearsay is the propensity of parties to substitute it for live testimony to gain a strategic advantage.<sup>112</sup> A rule against hearsay must be carefully tailored to tackle this singular problem. Specifically, the rule must be structured to prevent the admission of hearsay evidence offered for tactical reasons when it will harm the fact-finding process. This will occur only when the objective of the proponent of the hearsay is avoidance of the presentation of epistemically "better" evidence, i.e., a witness or witnesses who can be cross-examined. When better evidence is available, hearsay evidence is not the "best." The rule proposed herein, designed to carry out this task, is accordingly labeled the "best evidence hearsay rule."<sup>113</sup>

A true best evidence hearsay rule is not coterminous with an unavailability requirement. Unfortunately, although numerous scholars have noted best evidence aspects of the hearsay principle, they have often equated the notion with unavailability and dismissed it as unworkable or ill-advised.<sup>114</sup>

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<sup>110</sup> The prosecution's inevitable argument of spoliation could be met in a number of ways. In some cases, a defendant might be able to capitalize on the jury's sympathy with his desire to tell his story without being attacked by the prosecutor (who is, after all, a slick lawyer) on cross-examination. In all cases, the defense could rely heavily on the fact that the defendant's explanation need only be sufficient to raise a reasonable doubt.

Professor Park has also recognized that criminal defendants would probably rely heavily on hearsay if it were generally admissible. Park, *Subject Matter*, *supra* note 4, at 97.

<sup>111</sup> Professor Swift has conducted a study of the winners and losers under the current hearsay regime, from which she makes some predictions about winners and losers under certain types of hearsay reform. See Swift, *supra* note 8, at 502-04. Although her work provides an interesting and insightful picture of appellate courts' approach to some hearsay issues, the limitations of her methodology, which she thoroughly describes, lead me to be extremely skeptical of her predictive claims.

<sup>112</sup> See *supra* part III.

<sup>113</sup> Compare Professor Nance's description of "best evidence" as that which is "epistemically best," that is, as "the set of information, reasonably available to the litigant, that a rational trier of fact, expert or non-expert, would find most helpful in the resolution of the factual issue." Nance, *supra* note 19, at 240.

<sup>114</sup> Professor Park, for instance, defines what he calls a "pure rule of preference" as a rule under which "hearsay would be excluded if the declarant were available and admitted if the declarant were not available." Park, *Subject Matter*, *supra* note 4, at 114. He

Equally unfortunate, the best evidence principle still conjures up memories

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criticizes such a rule as being both under-inclusive (excluding too much hearsay) and over-inclusive (admitting too much hearsay). *Id.* He observes that, to correct its under-inclusiveness, such a rule would have to be accompanied by "a reduced list of class exceptions designed to admit hearsay statements of available declarants when the utility of cross-examination is outweighed by the cost of producing live testimony." *Id.* Implicit in this observation is criticism: the ultimate result would be the replacement of one unworkable set of class exceptions (i.e., current doctrine) with another. The best evidence hearsay rule proves Professor Park wrong. Because the parameters of the rule proposed herein have a logical and consistent relationship to the task of identifying and admitting the best evidence, the proposed rule is far more workable than current doctrine.

Addressing the problem of over-inclusiveness, Professor Park argues that a rule of preference would fail to account for the problems of witness fabrication and surprise. Regarding fabrication, he echoes the words of many critics of a "necessity" approach, observing that "[t]he very fact that the declarant is unavailable makes it easier to attribute statements that were never made." *Id.*; see also Swift, *supra* note 8, at 498-502 (discussing the problem of "abstract declarants"). Although this is true, it is also true that this kind of hearsay—a statement of an unavailable or unknown witness—is the least persuasive type of derivative information. Fabricated statements will slip through any hearsay regime. It is a virtue of the best evidence hearsay rule that a party offering a fabricated hearsay statement must specifically attribute it to an unavailable or unknown declarant before the court may rule it admissible; in this way, the fact finder is certain to learn of its questionable status. See *infra* pp. 932-33 (Rules 2 and 3).

Professor Park's analysis is similarly skewed by his overestimation of the problem of surprise. In the normal course, the discovery process provides trial counsel with adequate information from which to identify potential hearsay evidence. The best evidence hearsay doctrine, by consisting of a few straightforward rules, furnishes practitioners with the ability to predict which specific hearsay statements will be admissible at trial and which will not be admissible unless the declarant is called as a witness. In the rare instance in which a true surprise threatened to prejudice a party—when, for example, a previously available witness died immediately prior to trial—the court could grant a continuance. If the "surprise" consisted of a witness's gratuitous reference to an out-of-court statement by an unavailable or unknown declarant, the value of such testimony could no doubt be undermined by cross-examination and argument.

After examining many options, Professor Park's proposed reform, limited to civil cases, is to graft a notice-based residual exception, with no reliability screening, onto current doctrine. Upon notification, the opponent of hearsay could accede to its introduction or demand that the declarant, if available, be produced. In response, the proponent would be forced to prove unavailability, produce the witness, or find a basis for admission under a conventional class exception. See Park, *Subject Matter*, *supra* note 4, at 119.

This reform exhibits many similarities to the best evidence hearsay rule: unavailability would result in the admission of hearsay evidence, and a party would be required to produce an available declarant in many situations in which current doctrine authorizes the admission of hearsay. Professor Park's proposal, however, contains several flaws. First, to the extent that it incorporates the current categorical exceptions, it perpetuates irrationality. Second, the pre-trial notice requirement is sure to break down, and the

of the American Law Institute's *Model Code of Evidence*, which organized the admission of hearsay around the concept of availability but then appended to it a hodgepodge of categorical exceptions,<sup>115</sup> and which was universally shunned by legislators, practitioners, and scholars.<sup>116</sup> In any event, a full exploration of how a hearsay rule based upon the notion of best evidence would actually operate has never been attempted.<sup>117</sup> Careful construction of a best evidence hearsay rule yields an optimal solution to the hearsay conundrum.

#### A. *Statement of the Rule.*

*Hearsay*<sup>118</sup> is admissible if it is the best evidence available to the offering party from a particular declarant source, or if the best evidence has been or will be presented to the trier of fact.

The stated rule provides that hearsay evidence should not be excluded unless it is intended to be offered as a substitute for better evidence. Exclu-

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question of prejudice (resolved by referring back to the "reliability" of the hearsay at issue?) is certain to arise. Third, hearsay opponents may abuse the prerogative to accept or reject proffered hearsay; "inherently-best" hearsay ought to be admitted despite an opponent's objection. Finally, a hearsay opponent may not have sufficient information upon which to base a decision to accept hearsay; this information deficit would result in the admission of hearsay in some situations in which it is not epistemically best.

<sup>115</sup> Park, *Subject Matter*, *supra* note 4, at 117 (observing that "[t]he ill-fated Model Code cast the hearsay rule as a rule of preference supplemented by a reduced list of class exceptions"); see also MODEL CODE OF EVIDENCE Rules 503-530 (1942).

<sup>116</sup> See Chadbourn, *supra* note 4, at 945 (observing that not only was the *Model Code* not adopted anywhere, but its rejection was sometimes accompanied with "vehemence bordering upon anger"); Park, *Subject Matter*, *supra* note 4, at 117-18 (relating that the *Model Code* met with vehement opposition); Park, *Scholarship*, *supra* note 4, at 869 (recounting that the *Model Code* "drowned in a flood of procedural conservatism"); Stewart, *supra* note 4, at 1-2 & nn.3, 5 (noting unanimous rejection of the *Model Code*).

<sup>117</sup> Professor James argued for a pure best evidence hearsay rule but did not spell out the details of his reform. James, *supra* note 4, at 795-98. Professor Chadbourn traced the best evidence concept back to Bentham, but carried his analysis forward only so far as to propose a rule of admission in civil cases in the event of an unavailable declarant. Chadbourn, *supra* note 4, at 936-38, 950-51. Professor Stewart endorsed a rule of preference resembling a best evidence rule, but viewed the idea mainly as a modification to be grafted onto the then proposed *Federal Rules of Evidence*. Stewart, *supra* note 4, at 22-38. Professor Weinstein merely observed that in the context of a discretionary system, "rather forceful application of a best-evidence concept should be encouraged." Weinstein, *supra* note 4, at 353.

<sup>118</sup> I have not attempted to define "hearsay" because my analysis does not depend upon choosing a particular definition. My tentative view, however, is that hearsay should be broadly defined to include most implied assertions and non-assertive as well as assertive conduct. A party may choose to introduce testimony regarding an implied assertion or conduct for the same strategic reasons that it might want to proffer more narrowly defined hearsay evidence, i.e., because the secondary nature of the evidence hides some

sion in all other situations runs counter to the fact finder's search for the truth. Only if one believes that the fact finder cannot use hearsay evidence rationally can one justify excluding hearsay when it is the best available evidence, or when it is offered in addition to better evidence. As demonstrated above, hearsay evidence is highly unlikely to mislead juries; its primary shortcoming is that it provides less information than the alternative of calling the declarant to the witness stand. But if this alternative is not available, or if live testimony has been or will be presented, hearsay evidence is a net addition of information and is, in the vast majority of cases, likely to help the fact finder determine the truth.

On rare occasions, a judge might conclude that specific hearsay evidence will be a source of prejudice or confusion, or that it will simply waste time. In this regard, hearsay is no different from any other evidence, and the court may bar it under a general exclusionary rule, such as Federal Rule of Evidence 403. Furthermore, it would make perfect sense for the judge to consider the hearsay nature of the evidence when balancing its probative value against its alleged prejudicial effect. The mere fact that the evidence is hearsay would not make it prejudicial, however. Rather, the secondary nature of hearsay evidence diminishes its probative value.

The proposed rule is substantially simpler than current doctrine. In ruling upon the admissibility of hearsay, a court is required to make the singular inquiry into the question of best evidence. Once the court makes this determination, and the party introduces or promises to introduce the best evidence,<sup>119</sup> all other hearsay issues pertaining to a declarant source disappear. Current doctrine concerning the use of a witness's prior statements would not be necessary, for example, for the witness's testimony automatically satisfies the best evidence rule.<sup>120</sup> Moreover, the simplification of current doctrine does not come at the expense of the fact-finding process. The primary harm in authorizing the introduction of prior consistent statements is waste of time, which can easily be controlled through Rule 403. The primary harm in permitting the use of prior inconsistent statements as substantive evidence is the possibility that a verdict may rest solely upon an out-of-

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defect not likely to be uncovered by the opposing party. Defining this kind of secondary evidence as non-hearsay reduces the exclusionary effect of the hearsay rule, but it does so in an unprincipled and potentially dangerous way. A broad definition of hearsay, combined with strict adherence to the best evidence rule, best serves the truth-seeking function of the trial process. *But 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, 829-38 (1990) (arguing that, on balance, the current definition of hearsay ought to be preserved).

<sup>119</sup> Of course, the judge retains discretion to control the order of proof and can either admit hearsay subject to better evidence or prevent its admission until the better evidence has been offered. *See* FED. R. EVID. 611 (setting forth the objectives that a judge should seek to attain in controlling the mode and order of the presentation of evidence).

<sup>120</sup> *See infra* p. 932 (defining live testimony as the best evidence).



court declaration that has been disavowed in court by a witness under oath.<sup>121</sup> This problem should not be ignored, but it is better dealt with through post-admission controls than through exclusion—or, worse yet, through an instruction to the jury to use the out-of-court statement for impeachment purposes only. It is unrealistic to expect juries to comprehend, let alone follow, such an instruction.<sup>122</sup>

### B. Defining "Best Evidence."

The parameters of the proposed rule are not self-evident; they depend considerably on definition of the term "best evidence." Content must be given to this term.

(1) *Except as otherwise provided, the live testimony of an in court witness is the best evidence of the assertive content of such testimony.*

This rule states the obvious, expressing the usual presumption that live testimony is better than a hearsay substitute.<sup>123</sup> The rule is necessary, however, to prevent parties from calling on judges, in the normal course, to determine the worth of live testimony relative to hearsay declarations. Even if a witness's memory of the pertinent events has faded, the rule requires that

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<sup>121</sup> I realize that other explanations have been put forward in defense of the rules regarding prior consistent and inconsistent statements. See, e.g., Park, *Subject Matter*, *supra* note 4, at 78-80 (noting that explanations for the rules regarding prior statements include fears of surprise, witness fabrication, and overzealousness by pre-trial investigators). The fears expressed by Professor Park do not justify the current convoluted rules. Since the declarant is also a witness, probing questions by the hearsay opponent will provide the jury with explanations regarding the prior statements (e.g., "I never said that" or "I said that because the FBI agent threatened me") from which the jury can discern the truth.

<sup>122</sup> This assessment is not based upon a mistrust of juries. Jurors are tempted to behave logically by using all available evidence when reaching a decision. Much of the problem with the jury instruction approach is that it attempts to force jurors to act contrary to logic and intuition. Turning our heads to this reality contributes to the cynical view of law discussed in the postscript to this article. See *infra* text accompanying notes 168-69.

Empirical evidence strongly supports the view that juries do not follow limiting instructions. See J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 97-99 (1990) (concluding that "[e]mpirical research clearly demonstrates that [limiting instructions] are not effective in preventing the jury from improperly using information" (footnote omitted)).

<sup>123</sup> Current doctrine, of course, does not consistently recognize this presumption. Rather, in a number of situations it admits hearsay despite the availability of the declarant. See, e.g., FED. R. EVID. 803(1) (present sense impressions); *id.* 803(2) (excited utterances); *id.* 803(3) (statements about one's state of mind); *id.* 803(4) (statements to a physician). Under the best evidence hearsay rule a proponent must produce an available declarant before any hearsay, including hearsay fitting into any of these categories, is admissible.

the witness be called to testify at trial. Once the witness testifies, of course, his hearsay statements are admissible. In this manner, the rule prevents strategic manipulation of the evidence by the parties and provides the jury with the maximum information from which to discern the truth.

(2) *Hearsay is the "best evidence" when the declarant is physically unavailable, as by reason of death, disability, assertion of privilege, or refusal to attend the proceeding from beyond the reach of process.*

Inevitably, the notion of best evidence has a strong relationship to a declarant's unavailability. The most compelling case for the use of hearsay evidence involves a physically unavailable declarant. In such a case, the party offering the hearsay evidence is driven by necessity, not a desire to gain an unfair tactical advantage. Under such circumstances, hearsay is better than nothing at all; it helps the proponent prove her case and improves the fact finder's ability to reach the truth. The opponent of the hearsay is disadvantaged by its admission, of course, compared with the alternative of exclusion. But this disadvantage stems from the vagaries of fate, rather than from something within the control of either the hearsay proponent or the tribunal. A rule of automatic exclusion merely shifts the disadvantage to the proponent, and does so to the detriment of the fact-finding process.

(3) *Hearsay is the best evidence when the identity of the declarant is unknown and cannot be discovered through diligent inquiry.*

Much of the academic debate about the definition of hearsay centers around the admissibility of items such as luggage tags<sup>124</sup> or slips of paper with names or telephone numbers scribbled on them by an unknown declarant.<sup>125</sup> This debate is not worth the time and energy invested in it. Hearsay from unknown sources should be admissible for the same reasons set out regarding unavailable witnesses; an unknown declarant is, by definition, an unavailable one. Some kinds of unattributed hearsay are extremely probative. A familiar example involves unidentified persons calling an alleged gambling house where a police raid is in progress and unsuspectingly placing bets with the police officer answering the phone.<sup>126</sup> Without question, hearsay from an unknown source can also be of extremely low probative value;

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<sup>124</sup> *United States v. Snow*, 517 F.2d 441, 442 (9th Cir. 1975) (holding a luggage tag to be admissible as "circumstantial evidence" that the briefcase to which it was attached belonged to defendant Snow); see also Park, *supra* note 118, at 820-21 (discussing *Snow*).

<sup>125</sup> See Park, *supra* note 118, at 817-20 (examining the issues surrounding the admissibility of slips of paper and other items offered for circumstantial evidence of "linkage or association").

<sup>126</sup> *United States v. Zenni*, 492 F. Supp. 464, 469 (E.D. Ky. 1980) (holding that unknown declarants' statements placing bets over the telephone are not hearsay to prove that the location they called was a gambling house, on the theory that the declarants did not intend to communicate this implied assertion); see also Park, *supra* note 118, at 810-11, 825 (discussing *Zenni*).

but its strengths and weaknesses are best judged by the fact finder in the context of the entire case.

(4) *Hearsay is the best evidence when the court determines that the pertinent assertive material will not be found in the memory of a reasonable number of declarants. If there is doubt on this issue, the court may require the hearsay proponent to present testimony from one or more knowledgeable declarants in addition to the hearsay. The court may also require such hearsay evidence to be introduced through an appropriate foundation witness.*

A true best evidence hearsay rule must confront the fact that hearsay evidence is sometimes, by its very nature, better than the testimony of one or more live declarants. This is the case, for example, when the hearsay statement is a routine and detailed business record. Consider for a moment a typical business record: a ledger showing an enterprise's daily receipts for one fiscal year. The hearsay declarant, i.e., the person who counted the money each day and recorded the amounts, will in most instances have no independent recollection of any specific figure contained in the ledger. Under the Federal Rules, this business record, if it meets the requirements of Federal Rule of Evidence 803(6), is deemed reliable and thus admissible despite its hearsay status.<sup>127</sup> In fact, the ledger is more than merely reliable. Under the circumstances described, the ledger is *better evidence* than the declarant's testimony. Indeed, it is the best evidence of its assertive content. For this reason, it is admissible under the best evidence hearsay rule despite the availability of the declarant. Because hearsay evidence of the kind described is "inherently-best," one need not worry that the party offering it is doing so to gain an unfair strategic advantage.

The proposed rule encompasses much of what courts currently admit under the exceptions for business records,<sup>128</sup> public records and reports,<sup>129</sup> and market reports and commercial publications.<sup>130</sup> It also applies to much of what presently falls into exceptions for documents reflecting an interest in property,<sup>131</sup> or recording vital statistics.<sup>132</sup> But by no means would the best evidence hearsay rule merely mimic the operation of existing hearsay doctrine. Two characteristics severely impair the workability of current doctrine, both of which are avoided by the proposed rule. First, under the

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<sup>127</sup> See, e.g., *Igo v. Coachmen Indus.*, 938 F.2d 650, 658-59 (6th Cir. 1991) (quoting the four requirements for admission of business records noted in *Redken Lab., Inc. v. Levin*, 843 F.2d 226, 229 (6th Cir.), *cert. denied*, 488 U.S. 852 (1988), and finding that "counsel did not present evidence to satisfy" them).

<sup>128</sup> FED. R. EVID. 803(6).

<sup>129</sup> *Id.* 803(8).

<sup>130</sup> *Id.* 803(17).

<sup>131</sup> *Id.* 803(14).

<sup>132</sup> *Id.* 803(9).

Others have recognized the notion that documentary evidence is often superior to live testimony. See, e.g., *Stewart*, *supra* note 4, at 24 (observing that "[t]he 14 documentary

present system, courts are forced to attempt a determination of the reliability of hearsay evidence on an absolute basis—which is an impossible task. Second, courts are restricted to a simplistic binary choice: exclude hearsay evidence if it does not meet the parameters of a categorical exception; admit it if it does. By contrast, the best evidence hearsay rule requires courts to make a singular and simple judgment: are there any available declarants with a meaningful recollection of the pertinent hearsay material?<sup>133</sup> In many cases, the very nature of the hearsay document will provide substantial guidance toward the correct answer to this question. The more a document is characterized by repetition and detail, the lower the probability that witnesses with a significant recollection of the pertinent data exist. If a document addresses a discrete event, however, or contains the conclusions of a small number of investigators, the existence of witnesses with significant memory of its assertive content becomes highly probable.

Indeed, in many cases the answer to the hearsay issue will be obvious. If the hearsay is a report compiled by a named individual or by an unidentified person in a particular position (such as the comptroller of a company, or an FBI agent), the best evidence hearsay rule will require the proponent of the report to produce the declarant as a prerequisite to the admission of the hearsay. On the other hand, obvious collective products, such as commercial phone directories or market reports compiled by dozens of financial analysts, are easily classified as inherently best hearsay, and are thus admissible without regard to the availability of any declarants. In all cases, the court's inquiry under the proposed rule—whether there is an available witness who ought to be heard from—is directly related to the larger goal of maximizing information upon which the fact finder can rationally base its decision.<sup>134</sup>

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exceptions [in Federal Rule of Evidence 803] admit evidence that generally is highly reliable and often superior to what a firsthand witness could provide" (emphasis added)).

In most instances, hearsay admitted under Rule 4 will be in a written form, because it is in this situation that hearsay is most likely to be "inherently best." Less frequently, oral hearsay might be admitted under the rule because an available declarant can no longer remember the information. This might happen when the declarant suffers from injury or disease. Except in extreme instances in which there is virtually no question that the declarant will be of no use on the witness stand, the rule—in conjunction with the general presumption in favor of live testimony set forth in Rule 1, *see supra* p. 932—anticipates that the court will require that the declarant be called to testify so that his memory can be probed prior, or perhaps merely in addition, to the admission of the hearsay evidence.

<sup>133</sup> The similarity of this inquiry to that envisioned by Professor Nance's general rule of best evidence should not go unnoticed. Professor Nance suggests that, when faced with an objection on best evidence grounds, a judge would ask herself: "Is it proper under the circumstances to conclude that there exists (or once existed) better evidence to which the litigant has (or once had) reasonable access but which the litigant has not produced for an improper reason?" Nance, *supra* note 19, at 244 (emphasis omitted).

<sup>134</sup> The proposed rule gives the trial judge almost no discretion to deem hearsay to be the best evidence if a reasonable number of available declarants likely to have a sufficient

Of course, the court is not required to rule in a vacuum; it will hear arguments and offers of proof from counsel. To some degree, Rule 4 functions only as a presumption; obviously, if the hearsay opponent can point to a specific and convincing reason to doubt the accuracy of the hearsay, the court could conclude that at least some "pertinent assertive material" will be revealed through the testimony of one or more declarants. In this way, the best evidence hearsay rule treats inherently best hearsay much like the current best evidence rule treats documents: inherently best hearsay is admissible unless a "genuine issue is raised as to" its reliability.<sup>135</sup>

The consequences of a court's decision under the best evidence hearsay rule are very different from those under the current hearsay regime. Under the proposed rule, hearsay is not *excluded*; rather, its admission is conditioned on the production of one or more declarants.<sup>136</sup> In cases of doubt, the court should err on the side of requiring production; if it turns out that the declarant has little present recollection of the information contained in the document, the only costs have been a small amount of the court's time and some minor inconvenience to the declarant and the hearsay proponent.<sup>137</sup> The best evidence, now known to be the hearsay document, is still admissible. The court's erroneous ruling has not impeded the jury's search for historical truth.

The foundation witness requirement set forth in the last sentence of Rule 4 is consistent with the spirit of the best evidence hearsay principle. The only significant prerequisite for admission of documents aside from satisfaction of rules regarding relevancy and hearsay is authentication. Often, a number of witnesses will be available to authenticate a document, some knowing very little about the processes behind the document's development. Conceivably, a party might select an ignorant authenticator because calling a more knowledgeable one to the witness stand would risk revelation of hearsay-related weaknesses in the evidence. To prevent distortions of the fact-finding process that might result if parties were given free reign, Rule 4 authorizes the judge to require introduction of hearsay evidence through a particular foun-

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recollection can be identified. In such cases, the court must sustain the hearsay objection and demand the testimony of these witnesses, unless and until the court is satisfied that additional testimony would be a waste of time.

<sup>135</sup> See FED. R. EVID. 1003 (providing for the admissibility of a duplicate in lieu of an original unless "a genuine question is raised as to the authenticity of the original").

<sup>136</sup> To reiterate: if production of the witness is required, and the witness's testimony is exhaustive, the hearsay evidence could be excluded as cumulative under Federal Rule of Evidence 403.

<sup>137</sup> Inevitably, the court will weigh the costs of witness production—in terms of court time and party expense—against the expected benefits of live testimony. In the normal course, requiring the testimony of one or two declarants (but, perhaps, not five or six) is a small price to pay to ensure that the admission of hearsay is not inimical to the fact-finding process.

dation witness, i.e., a witness with knowledge about the manner in which the hearsay was created.<sup>138</sup>

(5) *Hearsay is the best evidence when it is an aggregate representation of the judgment of a large number of anonymous individuals. The court may require such hearsay to be introduced through an appropriate foundation witness.*

To some degree, this sub-definition is a combination of parts of two previous ones. If hearsay represents a collective judgment, its assertive material cannot be found in the memory of a reasonably small number of declarants,<sup>139</sup> and if the declarants are anonymous, they are effectively unavailable to be called as witnesses.<sup>140</sup> A separate rule is stated to make clear that some hearsay is superior to courtroom testimony specifically because of its collective nature. Examples fitting into this category include public opinion polls and reputation evidence. Additionally, Rule 5 permits introduction of evidence concerning collective non-assertions, such as the testimony in *Cain v. George*<sup>141</sup> that no guest had complained about the lack of heat in a motel room.

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<sup>138</sup> If all knowledgeable foundation witnesses are unavailable, of course, the best evidence notion comes back into play. In such a case, the tribunal is assured that the party's use of an ignorant foundation witness is due to necessity rather than strategy. Thus, the failure to call a better authenticating witness ought not ban the admission of hearsay evidence.

My reliance upon foundation witnesses draws considerably from Professor Swift's important contribution on the subject. See Swift, *supra* note 4, at 1355-61 (discussing the requirement that the proponent produce a knowledgeable foundation witness). I do not agree, however, with Professor Swift's conclusion that an entire hearsay regime can be built on this singular concept. Her approach leaves the parties with the ability to substitute an inferior foundation witness for a declarant for strategic reasons. To illustrate this point, let me use Professor Swift's hypothetical bus accident. See *id.* at 1358-59 (example 2). Assume that the declarant who witnessed the accident suffers from poor eyesight and had consumed some alcohol earlier that day. Further assume that the "foundation witness," the witness who saw the declarant observe the accident, is a school teacher with limited knowledge of the event. She heard "a gentleman" say "I saw that bus driver go through the stop sign." Under Professor Swift's approach, the proponent could offer the testimony of the school teacher in lieu of the declarant's. The proponent will do this when she calculates that there is a good chance that the opponent will fail to bring the declarant into court. See *supra* text accompanying notes 89-90. Thus, in some contexts, the successful substitution of hearsay supported by a foundation witness could undermine the fact-finding process. See *supra* part III; see also Mueller, *supra* note 23, at 407-09 (noting other weaknesses of the Swift approach).

<sup>139</sup> See *supra* p. 934 (Rule 4).

<sup>140</sup> See *supra* p. 933 (Rule 2).

<sup>141</sup> 411 F.2d 572 (5th Cir. 1969) (allowing admission of evidence offered by motel owners regarding collective non-assertion by prior guests).

(6) Hearsay is the best evidence when the court cannot reasonably expect that the declarant will cooperate on the witness stand with the hearsay proponent because the declarant is an opposing party or is strongly identified with an opposing party.

This is a best evidence statement of the exception for party admissions; it is based on the principle that sometimes hearsay is the best evidence available to its proponent because of the declarant's hostility to the proponent's position. In such cases, the hearsay proponent does not use hearsay to cover defects in her case; rather, she uses it because the live witness is likely to be uncooperative on the witness stand and will either disavow the hearsay statement, volunteer an explanation favorable to the opponent, or refuse to testify altogether. The source of the declarant's refusal to cooperate is her identity with the opposing party. Therefore, there is little risk that admission of the hearsay evidence will frustrate the goal of accurate fact finding, for the party opposing the hearsay is in a position to counter it effectively.<sup>142</sup>

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<sup>142</sup> Academicians have long debated the rationale for excepting personal admissions from the rule against hearsay. See Freda F. Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing*, 12 HOFSTRA L. REV. 393, 418-23 (1984); Park, *supra* note 65, at 509-12. Much of this debate has focused on the fact that admissions are routinely received in evidence without regard to their reliability. See Park, *supra* note 65, at 509 (reporting the widely held view that "the admissions rule cannot be supported, in all of its applications, on the theory that a person does not make self-harming statements unless they are true"). The best evidence hearsay rule takes the position that admissions, like all other kinds of hearsay statements, provide the fact finder with additional and potentially useful information, and should be excluded only if the proponent offers the out-of-court declaration in an attempt to distort the fact-finding process. The risk of distortion is negligible if the declarant truly identifies with the opponent of the statement.

The proposed rule differs from current doctrine in two important respects. First, it focuses on the *present* relationship between the declarant and the hearsay opponent, not on their *past* relationship. This is consistent with the best evidence approach. If, for example, a former agent of the opposing party has clearly indicated that her allegiance is no longer with that party, the burden of calling that agent to the witness stand is properly borne by the hearsay proponent. In contrast, the question under current doctrine is whether the declarant was an agent of the hearsay opponent at the time the agent made the statement at issue. FED. R. EVID. 801(d)(2)(D).

Second, consistent with the position that the agency rationale for co-conspirator statements is largely an artificial device, the proposed rule takes no account of statements of co-conspirators, which under the Federal Rules are considered admissions by agents of a party-opponent, *see* FED. R. EVID. 801(d)(2)(E). Co-conspirator statements are admissible under the best evidence hearsay rule to the extent that the declarant is unavailable due to the assertion of privilege. Because the prosecution may overcome a co-conspirator's privilege through a grant of immunity, however, the court might be called upon to ensure that claims of unavailability by the government were made in good faith.

The admissibility of co-conspirator statements are less worrisome under the best evidence hearsay rule than they might otherwise be. First, many co-conspirator statements are admissible as non-hearsay verbal acts. Christopher B. Mueller, *The Federal Cocon-*

## VI. POST-ADMISSION CONTROLS

The proposed best evidence hearsay rule admits almost all hearsay, doing so either because it augments the testimony of the declarant, because the declarant is unavailable, or because calling the declarant would be a waste of time. Logic suggests the appropriateness of admitting hearsay except when a party offers it in lieu of better live testimony. Ultimately, the more information the fact finder receives, the better chance it has to reach an accurate understanding of past events. Nevertheless, some post-admission controls may be necessary to ensure that the fact finder properly evaluates hearsay evidence. Furthermore, in a system in which most hearsay is admissible, the outcome of some cases may rest upon hearsay alone. For policy reasons quite distinct from concerns about the accuracy of verdicts, such outcomes ought to be avoided in some civil cases and in all criminal ones. Additionally, the Confrontation Clause may exclude some hearsay otherwise admissible under the proposed rule. These refinements to the best evidence hearsay rule are addressed below.

*Jury Instructions*

Under the best evidence hearsay rule, significantly more hearsay will enter the trial process, and several measures should therefore be employed to assist the fact finder in properly evaluating it. As a first step, courts should formulate a standard instruction cautioning the jury about the hidden dangers of hearsay and describing these dangers to the jury in everyday terms. Courts might also warn juries that hearsay evidence sometimes appears more credible than witness testimony simply because the witness faced cross-examination, whereas the hearsay declarant did not. In cases in which the declarant has appeared at trial and has testified in a manner inconsistent with his own extra-judicial statement, the court might instruct the jury to recall the declarant's reasons for the conflict in deciding whether to credit the hearsay

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*spirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323, 341-48 (1984). Second, in accordance with the post-admission control discussed below, *see infra* p. 942, a co-conspirator statement—because it is not inherently best hearsay—could not, without corroboration, support an element of the prosecution's case beyond a reasonable doubt. This post-admission control provides significant protection against erroneous outcomes resulting from untrustworthy co-conspirator statements. It performs the same task fulfilled by the current requirement that proof of the existence of a conspiracy and the defendant's participation therein is a prerequisite to the admission of a co-conspirator statement. *Bourjaily v. United States*, 483 U.S. 171 (1978) (holding, *inter alia*, that evidence is admissible under Federal Rule of Evidence 801(d)(2)(E) only after the court is satisfied by a preponderance of the evidence that a conspiracy existed and that the defendant was a member). There is a difference between the status quo and the proposed rule, however. The proposed rule admits all co-conspirator statements and requires a check for sufficient evidence at the end of the government's case, while existing doctrine excludes hearsay statements not meeting the requirement of Federal Rule of Evidence 801(d)(2)(E) at the outset.



statement, the in-court testimony, or neither. Although jury instructions cannot cure defects in hearsay evidence, they can go some distance in decreasing the likelihood that juries will accord it undeserved weight.<sup>143</sup>

A second post-admission control would be explicit recognition of the principle that, when the unavailability of a declarant is in dispute, this issue is itself relevant to the outcome of the case. In other words, an opponent of hearsay evidence should be permitted in appropriate cases to present evidence on, and argue to the jury about, the issue of spoliation. The court might instruct the jurors that, if they credit the spoliation evidence, they are entitled to draw a negative inference about the strength of the proponent's case, at least in regard to the issues on which the proponent offered the hearsay evidence.<sup>144</sup>

### *Outcome-Definitive Hearsay*

A major advantage of the proposed best evidence hearsay rule is that it postpones all inquiry into the weight to be accorded hearsay evidence until the fact finder retires to deliberate. At this juncture, hearsay is not considered in a vacuum; rather, the fact finder has at its disposal all the other evidence in the case. In most instances, the other evidence will either corroborate or contradict the assertive content of the out-of-court statement. Corroboration is an important measure of the value of hearsay; the likelihood of its accuracy increases in direct proportion with the amount of corroborating evidence.<sup>145</sup> Thus, the probability that the fact finder will assign the proper weight to hearsay evidence at this point in the process is very

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<sup>143</sup> Judge Weinstein has suggested that some of the dangers involved in admitting significant amounts of hearsay could be diminished "by permitting courts to comment on the weight to be given evidence." Weinstein, *supra* note 4, at 335-36; *see also id.* at 336 n.27. He also predicts that attorneys could be counted on to highlight the hearsay risks when attacking an opponent's case during closing argument. *See id.* at 336 (observing that "[l]awyers can and do carry the main burden of showing the dangers [inherent in the use of hearsay] by their arguments").

Judge Weinstein's recommendation to vest trial judges with the authority to comment on the evidence is ill-advised in light of the potential for abuse. Indeed, proposed Federal Rule of Evidence 105, which would have codified judges' authority to sum up the evidence, was struck down by Congress. *See* FED. R. EVID. 105 (Proposed Rule 1974).

<sup>144</sup> This suggestion is consistent with current authority for the proposition that spoliation evidence is relevant. *See, e.g.,* McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985) (upholding admission of evidence that plaintiff suborned perjury as relevant because it tended to show that plaintiff believed his own case to be weak); United States v. Bongard, 713 F.2d 419 (8th Cir. 1983) (*per curiam*) (holding that the government may offer evidence of defendant's attempts to influence the witness to show consciousness of guilt).

<sup>145</sup> Courts have routinely made this observation in the context of deciding cases under the Confrontation Clause. Justice Kennedy, dissenting in *Idaho v. Wright*, 110 S. Ct. 3139 (1990) (Kennedy, J., joined by Rehnquist, C.J., & Blackmun, J., dissenting), observed that

high. In rare instances, however, a hearsay statement will be the only evidence supporting an element of the case of the party with the burden of proof. Corroboration will be non-existent. Cases of this kind raise the difficult question: should a verdict be permitted to rest solely on the foundation of hearsay evidence?<sup>146</sup>

The number of cases presenting this problem will be very small. The issue will arise only when a court admits hearsay evidence because of the unavailability of the declarant, not when the court has made the judgment that the hearsay evidence is inherently best. Moreover, a hearsay statement will almost always be supported by some testimonial or circumstantial evidence. In the exceptional case, though, the hearsay will stand alone.

The issue may be distilled into an examination of the relationship between hearsay evidence and burdens of proof. In the typical civil case, it is difficult to fathom why the jury should not be permitted to rely on hearsay evidence to conclude that the plaintiff's version of the facts is "more probable than not." The inferiority of hearsay evidence relative to paradigmatic live testimony does not preclude it from possessing this degree of persuasive force in some situations. Thus, if the jury finds the hearsay convincing, on what principled basis could the court set its judgment aside? Adherence to the best evidence hearsay rule, which maximizes the quantum of information presented to the jury while minimizing the ability of the parties to manipulate hearsay evidence for strategic gain, is the most the tribunal can do to further the search for the truth. If hearsay evidence persuades the fact finder to the degree of fifty-one per cent, so be it.<sup>147</sup>

In a small number of civil cases, perhaps, a public policy concern might override the system's general indifference toward hearsay as outcome-determinative evidence.<sup>148</sup> In such cases, a court could decide to discount or even

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[i]t is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. . . . [M]ost federal courts have looked to the existence of corroborating evidence or the lack thereof to determine the reliability of hearsay statements [for confrontation purposes] . . . .

*Id.* at 3153-54. The majority in *Wright* rejected this test of trustworthiness in the context of confrontation doctrine, preferring instead to rely on the hearsay rule's more narrow view that the evaluation of trustworthiness must be limited to an examination of the circumstances surrounding the making of the statement. *Id.* at 3149-50. Though I venture no opinion on the Confrontation Clause issue, I note that, as a matter of inductive logic, the *Wright* dissent is right.

<sup>146</sup> See James, *supra* note 4, at 798-801 (addressing the issue of the sufficiency of hearsay evidence).

<sup>147</sup> Cf. Swift, *supra* note 47, at 503-05, 509-12 (discussing ramifications of the fact that uncorroborated hearsay statements that are admissible under current hearsay doctrine are generally considered to be sufficient evidence to send a case to the jury).

<sup>148</sup> Cases that function in a quasi-criminal capacity, such as those involving a civil RICO claim, Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1984 & Supp. 1992), might fall into this category. The punitive implications of

disregard uncorroborated hearsay when evaluating the sufficiency of the plaintiff's evidence. This procedure would be much more honest than the current one, however, because the court would be required to articulate why, on the basis of factors extraneous to the accuracy of the fact-finding process, the party with the burden of proof should lose the case even though it has presented evidence (including hearsay) potentially compelling enough to satisfy the jury.

Criminal cases, however, present a very different situation. In the criminal context, the best approximation of the truth is not, in reality, an accurate statement of the system's goal. Rather, criminal procedure strives to reach accurate results on the condition that errors, which are inevitable, fall primarily on the side of exonerating the guilty rather than convicting the innocent. This skewing of the system is reflected in many procedural safeguards, including the burden of proof. Although the "more likely than not" standard of the civil trial evinces the neutrality of the system toward the distribution of error, the "beyond a reasonable doubt" standard in criminal cases is specifically designed to disfavor the prosecution.<sup>149</sup> The same value judgment might appropriately be built into the hearsay rule.

Thus, in criminal cases, non-inherently best hearsay, standing alone, should not be permitted to support an element of a crime beyond a reasonable doubt. This refinement to the best evidence hearsay rule recognizes that it is not enough for hearsay doctrine to force the prosecution to use the best evidence; sometimes, the prosecution should lose because the best evidence—hearsay—is simply too risky a foundation upon which to rest a conviction. Even though the hearsay evidence might appear to satisfy the burden of proof, it is untested; there is an inherent risk that it is misinformation. A requirement that hearsay be corroborated before it can support a criminal conviction thus seems a rational safeguard to protect the innocent from erroneous judgments of guilt.<sup>150</sup>

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such cases might justify added safeguards against erroneous verdicts favoring plaintiffs, even though this would mean a disproportionate increase in erroneous verdicts for defendants. See *infra* p. 942 (discussing criminal cases).

<sup>149</sup> See *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) (stating that "[t]here is always in litigation a margin of error . . . in factfinding . . . . Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact finder . . . of his guilt beyond a reasonable doubt."); see also *In re Winship*, 397 U.S. 358, 361-64 (1970) (describing the rationale for requiring proof beyond a reasonable doubt in criminal cases, and holding "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); LEMPert & SALTzBURg, *supra* note 3, at 794-98 (discussing burdens of proof).

<sup>150</sup> Cf. *Swift*, *supra* note 47, at 503 & n.24 (arguing that uncorroborated hearsay from abstract declarants would probably not survive a motion for a judgment of acquittal in criminal cases).

*Confrontation*

In contrast to the proposals of some hearsay reformers, the application of the best evidence hearsay rule is not limited to civil cases.<sup>151</sup> Faithful to the goal of accurate fact finding, the rule is equally pertinent to the criminal and civil contexts. Indeed, combined with the additional rule that uncorroborated hearsay cannot prove an element of a crime beyond a reasonable doubt, the best evidence hearsay rule goes a long way toward satisfaction of the requirements of the Confrontation Clause.<sup>152</sup> Still, confrontation con-

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<sup>151</sup> See, e.g., Friedman, *supra* note 4, at 725 (offering a "partial theory of hearsay" "not concerned . . . with the context in which a criminal prosecutor offers hearsay evidence against the accused"); Park, *Subject Matter*, *supra* note 4, at 54, 94-109 (outlining numerous reasons why criminal cases require more protection against the admission of hearsay than civil cases and limiting his reform proposal to the latter). Although he declines to take such a step, Professor Park notes that "the language and history of the sixth amendment do not pose an insuperable barrier to radical alteration of the hearsay rule [in criminal cases]." Park, *Subject Matter*, *supra* note 4, at 91. Moreover, Professor Park encourages further inquiry into "whether and when the unavailability of the declarant should be a prerequisite for admission of a hearsay statement" in the criminal context. *Id.* at 107. This article has undertaken such an inquiry, and its result is the proposed best evidence hearsay rule. The rule makes clear that unavailability should *always* be a prerequisite to the admission of hearsay, unless the hearsay is the inherently best evidence of its assertive content.

<sup>152</sup> Some have argued that the Supreme Court has made the goal of accurate fact finding the core purpose of the Confrontation Clause. See, e.g., Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 558-59 (1992) (claiming that the Supreme Court has insisted "that the sole function of the Confrontation Clause is to promote more accurate fact-finding"); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 575-79 (1988) (arguing that the Supreme Court's formulation of the Confrontation Clause makes "the practical concern for accurate truth determination" the core goal of the clause). The Court has done this by subsuming into its analysis of the Confrontation Clause much of the law of hearsay, which purports to further accurate decision making. See Jonakait, *supra*, at 570-74. These conclusions are amply supported by the Court's most recent decisions in *Idaho v. Wright*, 110 S. Ct. 3139, 3148 (1990) (holding a statement inadmissible under the Confrontation Clause because it neither fell within a firmly rooted hearsay exception nor was characterized by particularized guarantees of trustworthiness), and *White v. Illinois*, 112 S. Ct. 736, 743 n.8 (1992) (holding that unavailability of the declarant need not be shown for confrontation purposes when it is not required under the "firmly rooted" hearsay exceptions of excited utterances and statements to a physician). Unfortunately, the Court's current deference to firmly rooted hearsay exceptions has made Confrontation Clause analysis essentially as irrational as hearsay doctrine. Moreover, the Court has specifically recited the worn-out and illogical justifications traditionally put forward for the admission of hearsay under the rules of evidence when justifying the admission of hearsay evidence under the standard of confrontation. See, e.g., *id.* at 742-43.

To the extent that the best evidence hearsay rule achieves the goal of accurate fact finding better than current doctrine, its improvement of Confrontation Clause analysis

cerns ought to put additional limits on the use of hearsay evidence by prosecutors. The most obvious of these involves the use of statements by non-testifying co-defendants. Even if a prosecutor had no recourse but to use such a statement; even if the statement were corroborated by other evidence; and even if the apparently accurate outcome would be conviction, such evidence probably should not be used against a criminal defendant. This (admittedly tentative) conclusion is rooted in the notion that Confrontation Clause protection implies an absolute limit on governmental power that transcends the goal of accuracy. Arguably, the government should lose some criminal cases even when it could prove each element of the crime beyond a reasonable doubt.<sup>153</sup>

As a matter of prudence, hearsay reform might include special rules for criminal cases, rather than rely upon constitutional adjudication to protect the rights of criminal defendants. Although this task is important, an in-depth discussion of particular adjustments to the best evidence hearsay rule necessitated by confrontation principles is a topic to be addressed another day.

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would be almost automatic, assuming that the Court treated it with the same deference that it has shown current hearsay doctrine. Of course, the Court would have to be accepting of a radical alteration of the hearsay rule and willing to formulate a new test for confrontation not dependent on "firmly rooted" hearsay exceptions. Otherwise, the goal of reforming hearsay in the criminal context would be thwarted.

As noted below, I agree with the critics of the Court's confrontation doctrine who argue that the Confrontation Clause ought to do more than guarantee criminal defendants accurate outcomes. To the extent that consideration of the best evidence hearsay rule points toward the realization that maximization of accuracy is not a sufficient goal of confrontation protection, the rule may also indirectly facilitate a more coherent analysis of the constitutional provision.

<sup>153</sup> The appropriate nature of Confrontation Clause protection for criminal defendants, beyond the assurance of accuracy, is a matter of considerable debate. *See, e.g.,* Berger, *supra* note 152, at 607-12 (setting forth a prosecutorial restraint model of confrontation protection); Jonakait, *supra* note 152, at 581-96 (interpreting the Confrontation Clause as an "adversarial right"); Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863 (1988) (supporting a dignity theory of the Confrontation Clause that would account for both the "instrumental and intrinsic values" of a face-to-face encounter); Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992) (arguing that the Confrontation Clause should be concerned not only with the evidentiary and procedural aspects of hearsay statements, but also with a societal dimension that takes account of the ethical value of physical confrontation); Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 617-18 (1978) (suggesting that the Confrontation Clause be interpreted as a pure rule of preference except when "the out-of-court statement is such that the defendant could not reasonably be expected to wish to examine the declarant in person").

## CONCLUSION

Historically, the goal of fundamental hearsay reform has been elusive, which is not surprising in light of the powerful forces weighing against it. These forces include overwhelming complacency, centuries of jurisprudence, the desire of those "in-the-know" to maintain their competitive advantage, basic disagreement among academicians about the proper direction of reform, as well as a ubiquitous fear of the unknown. Yet, hearsay reform is far from impossible. The most telling evidence of this is the fact that other common law jurisdictions have accomplished reform without dire results.<sup>154</sup>

This article has attempted to demonstrate that reform is urgently needed because current doctrine is among the least rational methods of controlling the admission of hearsay evidence. The current method not only results in a serious distortion of the truth-seeking function of our courts, but it also contributes to a sense of cynicism and contempt for the law felt by many in the legal profession.<sup>155</sup> This article has shown that the fact-finding process requires only minimal regulation of hearsay evidence in the form of a "best evidence hearsay rule" that maximizes the amount of information at the disposal of the fact finder while reducing the ability of parties to hinder accurate systemic outcomes through the introduction of misleading hearsay evidence.

The recent spate of hearsay scholarship provides some basis for cautious optimism about the prospects of hearsay reform. Perhaps our generation will be the one that successfully reinvents the rule against hearsay. If so, let us hope that future generations will praise rather than vilify us for it.

*Postscript: An Additional Observation on the Need for Reform*

Although the maintenance of a body of irrational doctrine at the heart of the law of evidence primarily affects the efficacy of the adjudicatory process, it has a secondary effect as well—one receiving scant attention but meriting substantial concern. The utter irrationality of hearsay doctrine has a significant negative impact on lawyers' general perception of the ethical practice of law. This postscript examines this issue.

The problem originates in law school. Law school constitutes, in part, a process of socialization.<sup>156</sup> Lay persons learn "how to think like a law-

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<sup>154</sup> See R.A. Clark, *The Changing Face of the Rule Against Hearsay in English Law*, 21 AKRON L. REV. 67 (1987) (describing recent successful changes in English evidence law that allow for the admissibility of hearsay evidence).

<sup>155</sup> See *supra* postscript.

<sup>156</sup> See Audrey J. Schwartz, *Law, Lawyers, and Law School: Perspectives from the First-Year Class*, 30 J. LEGAL EDUC. 437, 437-39 (1980) (suggesting that some scholars view professional socialization as a "'situational adjustment'" of members of a group undergoing similar experiences, rather than a major change in the value structures of the individual members (quoting Howard S. Becker, *Personal Change in Adult Life*, 27 SOCIOLOGY 40, 44 (1964))). According to Schwartz, social science literature indicates that legal education does not affect fundamental personality traits or values, but does affect

yer",<sup>157</sup> law professors hope to instill in undisciplined minds the ability to use logic and modes of argument to persuade rational triers of fact and interpreters of law to reach appropriate outcomes. At a deeper level, educators expect that law students will learn that the most challenging legal problems are ultimately insoluble; that is, solutions are not value neutral and often require compromise between equally legitimate but wholly contrary concerns.

To the extent that the law and legal education face these incessant dilemmas squarely, new members of the profession receive the message that lawyering is an honest vocation in which individuals attempt to cope with the intractable complexities of social and political life in an intellectually forthright way. To the extent that legal doctrine purports to rest on logical and neutral principles when these principles are in fact demonstrably irrational, however, the emerging professionals receive a rather different message. Thus constituted, law is nothing more than a set of corrupt tools to win cases. Young lawyers learn that legal doctrine is intellectually dishonest; the underlying message is that, to maximize success, attorneys must be dishonest as well.<sup>158</sup>

Hearsay doctrine currently suffers from this phenomenon. One example suffices to prove the point. In the tradition of Wigmore, law students are typically instructed that the principles of necessity and reliability guide the admissibility of hearsay.<sup>159</sup> Soon thereafter, they learn that excited utterances are admissible because they are presumptively reliable; the necessity

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the "synthesis of previously acquired behaviors and affective outlooks appropriate for a specific adult role." *Id.* at 438; see also James P. Rowles, *Toward Balancing the Goals of Legal Education*, 31 J. LEGAL EDUC. 375, 379 (1981) (noting that while the student is in law school the "three separate worlds of family, work, and other social relationships are collapsed into one shrinking sphere monopolized by a single group of anxious peers").

<sup>157</sup> See Rowles, *supra* note 156, at 375 (asserting that "[t]he first year remains . . . the critical time in which the student learns to 'think like a lawyer'"); Schwartz, *supra* note 156, at 440 (explaining that "[w]ith respect to law school, deliberate technical socialization is generally agreed to be the acquisition of information, concepts, and intellectual skills—often summed up as learning 'to think like a lawyer'").

<sup>158</sup> Of course, the problem extends beyond students' recognition of irrational doctrine and may be the result of the entire enterprise of law school. See generally Stephen C. Halpern, *On the Politics and Pathology of Legal Education*, 32 J. LEGAL EDUC. 383 (1982) (arguing that legal education divorces law from politics, thus embodying a preposterous conception of the law which serves only to perpetuate the dominant values of the profession); Karl E. Klare, *The Law-School Curriculum in the 1980s: What's Left?*, 32 J. LEGAL EDUC. 336 (1982) (suggesting that the law school curriculum disenfranchises students intellectually and disables and incapacitates them professionally).

<sup>159</sup> See 5 WIGMORE, EVIDENCE, *supra* note 4, § 1420 (noting that the dual considerations of trustworthiness and necessity underpin hearsay doctrine). However, Wigmore later admits that the two principles "are only imperfectly carried out in the detailed rules under the exceptions." *Id.* § 1423.

principle, it turns out, has only part-time status.<sup>160</sup> Moreover, in applying the exception for excited utterances, reliability is assessed according to the time interval between the exciting event and the declaration. Statements made an hour or more after the event have commonly qualified for admission.<sup>161</sup> This bit of hearsay doctrine, however, is flatly contradicted by empirical evidence developed over the last seventy years. Although a high degree of excitement may diminish one's capacity to lie, studies have demonstrated that this level of excitement wears off quite rapidly, usually in a matter of three or four minutes.<sup>162</sup> In addition, excitement is almost always

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<sup>160</sup> Thus, excited utterances are admissible even when the declarant is available to testify. See FED. R. EVID. 803(2).

In his initial discussion of the necessity principle, Wigmore uses spontaneous exclamations to show that the principle can be satisfied when "we cannot expect, again, or at this time, to get evidence of the same value from the same or other sources." 5 WIGMORE, EVIDENCE, *supra* note 4, § 1421. He does not explain why calling the available declarant to the witness stand would not yield evidence of the same value, or why it would not at least demonstrate the necessity for receiving the hearsay evidence. Indeed, given his oft quoted statement that cross-examination is "the greatest legal engine ever invented for the discovery of truth," *id.* § 1367, his cavalier dismissal of the opportunity to cross-examine in this context is especially difficult to understand. Nevertheless, Wigmore continued: "[t]he necessity [in such a situation] is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. *But the principle is the same.*" *Id.* § 1421 (emphasis added). What principle remains?

In his specific discussion of the excited utterance exception, Wigmore sums up the application of the necessity principle as follows:

This necessity, for the first six exceptions, consists in the impossibility of obtaining from that person testimony on the stand; for the seventh it consists in the general scantiness of other evidence on the same subject; for the eighth, ninth, tenth, and eleventh, in the practical inconvenience of requiring the person's attendance upon the stand; and, for the thirteenth, in the superior trustworthiness of his extrajudicial statements as creating a necessity or at least a desirability of resorting to them for unbiased testimony. It is the last reason that suffices equally for the present exception.

6 WIGMORE, EVIDENCE, *supra* note 4, § 1748. The hollowness of the principle of necessity is thus further revealed. The principle is equated with expedience, or simply collapsed into the reliability requirement, e.g., spontaneous exclamations are necessary because they are ultra-reliable.

<sup>161</sup> See, e.g., *Webb v. Lane*, 922 F.2d 390, 395 (7th Cir. 1991) (admitting statement made hours after declarant was shot six times); *United States v. Scarpa*, 913 F.2d 993, 1017 (2d Cir. 1990) (admitting statement made five or six hours after beating); *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980) (admitting statement of nine-year-old girl made about an hour after assault), *cert. denied*, 450 U.S. 1001 (1981). *But see, e.g.*, *United States v. Sherlock*, 962 F.2d 1349, 1365 (9th Cir. 1992) (denying admission of statement made one hour after assault because declarants "had spoken to several persons before telling" their story), *cert. denied*, No. 92-5433, 1992 WL 202559 (U.S. Nov. 2, 1992).

<sup>162</sup> See, e.g., Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 436-37 (1928) (finding that all observers of an



accompanied by stress, and empirical research has proven that stress causes serious inaccuracies in perception.<sup>163</sup> Given the wide gap between doctrine and reality, obviously unnecessary and potentially unreliable hearsay statements are routinely admitted because they fully satisfy the excited utterance's "tests" for necessity and reliability.

Every law student is astute enough to discern the fictitious nature of so many of the justifications offered to support the various exceptions to the rule against hearsay. Indeed, most evidence teachers probably make the weaknesses in hearsay doctrine explicit, but remind their students that "a good lawyer" will tailor her argument to fit the doctrine in order to persuade a court to admit her evidence.<sup>164</sup>

This lesson is revisited innumerable times throughout law school, for hearsay doctrine is certainly not the only place where the law bears no relation to the principles that supposedly underlie it. Hearsay doctrine is a particularly bad place for it to happen, however. First, almost all law students take a course in evidence.<sup>165</sup> Second, evidence relates to litigation, an area of law in which a majority of those students will practice for some period of time.<sup>166</sup> And hearsay is at the core of any evidence course; at the University of Florida, for example, hearsay occupies six of the fourteen weeks of the

experiment "report[ed] a delay in reaction time to key words where deception [was] attempted, . . . [but] that the difference in time between the ordinary reaction and the deception reaction to significant words [was] so slight, from .83 seconds to 3 1/2 minutes, that it [could not] be measured without the aid of instruments").

<sup>163</sup> See *id.* at 437-39 (arguing that emotion may make clear thinking difficult and render observation and judgment all but impossible); see also Stewart, *supra* note 4, at 28 (citing empirical evidence and arguing that hypothesis underlying excited utterance exception is "faulty on every score").

<sup>164</sup> Attempts to put a positive face on this grim reality by noting that the doctrine is ripe for revision are thoroughly undermined by the uniform failure of several generations of reform efforts. See *supra* note 4.

<sup>165</sup> A 1986 study of law school curricula revealed that evidence is a *required* course in 46% of American law schools, the highest percentage for any course not traditionally offered in the first year. WILLIAM B. POWERS, A STUDY OF CONTEMPORARY LAW SCHOOL CURRICULA 12 (1986). This percentage does not include the undoubtedly large number of schools where evidence is "recommended" rather than required.

<sup>166</sup> Recently, in connection with a review of its curriculum, the University of Florida conducted a survey of its graduates of the last ten years. Of the 678 lawyers who responded, the following numbers reported spending 25% or more of their time practicing in the described litigation-related areas of law:

commercial litigation	214
tort law	174
bankruptcy	89
criminal law	89
domestic relations, family law	82
constitutional, civil rights, civil liberties	33

semester.<sup>167</sup> Furthermore, law students seem to view mastery of the hearsay rule, like the mastery of the rule against perpetuities in the law of property, as a rite of passage into the profession.

The existence of wholly irrational doctrine at a critical point in the process of legal education contributes to law students' sense of cynicism and contempt for the enterprise to which they have chosen to devote their professional lives.<sup>168</sup> This cynicism and contempt is then reflected in the manner in which graduates practice law.<sup>169</sup> If critical legal doctrine lacks a principled foundation, it is not surprising that lawyers feel no need to refrain from making unprincipled arguments or taking unprincipled positions in legal disputes.

Hence, the project of reforming hearsay doctrine may have an element of urgency heretofore unnoticed. The mitigation of cynicism and contempt for

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<sup>167</sup> Cf. Allen, *supra* note 5, at 800 (noting that "[i]n some law schools, students spend over half their time in evidence classes learning the intricacies of the hearsay rule").

<sup>168</sup> Strong anecdotal evidence supports the proposition that law school encourages cynicism, complacency, and even hostility among its students. See James C. Foster, *The "Cooling Out" of Law Students*, 3 L. & POL'Y Q. 243 (1981) (finding that legal education's focus on the purported relativity and neutrality of the law yields frustration and sometimes anger, and can disorient students concerning just where they stand); Ronald M. Pipkin, *Legal Education: The Consumer's Perspective*, 4 AM. B. FOUND. RES. J. 1161, 1163 (1976) (finding that, from their perspective as customers of legal education, law "students see law school as warping student's personalities, causing excessive anxiety, stress, boredom, cynicism and the development of psychological defenses incompatible with later ethical practice"); Schwartz, *supra* note 156, at 437, 440 (stating that anecdotal evidence suggests that the law school experience can lead to "wide-ranging changes . . . in student attitudes, perhaps including a movement toward complacency, cynicism, and hostility"). Furthermore, although Schwartz concludes that her empirical study does not confirm the anecdotal evidence, Schwartz, *supra* note 156, at 467, her interpretation of the empirical data is subject to dispute. She found, for example, that a significant number of students moved toward the following positions after their first year of law school: (1) professors should address issues in moral terms, and (2) law is needlessly complex. *Id.* at 461-62. This evidence could be interpreted as supporting the view that law students become cynical about the enterprise of law: they come to the disillusioning conclusions that it is complex without purpose and that it lacks sufficient moral basis.

In another empirical study, Professors Carrington and Conley found that one in seven law school students are profoundly "alienated" and that a slightly higher proportion are extremely "dissatisfied." Paul D. Carrington & James J. Conley, *The Alienation of Law Students*, 75 MICH. L. REV. 887, 889-96 (1977) (explaining that a large number of students felt angry with the beliefs they suppose their professors and classmates hold, while others also felt disinterest in or disengagement from the law school process).

<sup>169</sup> Once in practice, young lawyers' perceptions about the irrationality of hearsay doctrine is reinforced by the perception that the doctrine is so convoluted that judges routinely apply it incorrectly. See Swift, *supra* note 4, at 501 (explaining that 169 state district prosecutors responding to a survey "reported their perception that state court trial judges significantly misunderstand the hearsay rule and fail to apply it correctly").

the legal system is another compelling reason for reformers to stand firm in the face of an enormously difficult task.

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