Post-Modern Hearsay Reform: The Importance of Complexity

Christopher B. Mueller
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INTRODUCTION

Practicing lawyers never tire of talking about hearsay and commentators in the academy never tire of reforming it.1

Hearsay grips our attention for many reasons: In general outline it presents the very picture of order and rationalism, a little like the view from an airplane of the layout and arterial patterns of a city or the checkerboard fields of a farm. On closer inspection, however, it seems chaotic and irrational, like noisy traffic at a congested intersection, and almost random and accidental, like a farm seen from a country road. Hearsay is practical and theoretical, simple and complex, accepted and criticized. Hearsay is the place where professional cultures conflict: Trial lawyers do not describe themselves as hunters or hired guns,2 but they see lawsuits as fights to be won; commentators do not think trials resemble library research or laboratory experiments, but think they should (among other things) find the truth, and the tension between these perspectives colors the discourse about hearsay.3

Arguments about hearsay bring feelings of unease to academic commentators,4 but the hearsay doctrine, or something which fulfills its objectives, is necessary. Persuasive objections to most reform proposals go beyond saying they stand little chance of being adopted. The nub of it is that they are too sim-

1. That practitioners and commentators differ this way is no more surprising than that different dogs bark differently. People who try cases worry about understanding the system and making it work, and people who teach and do research see problems in conventional wisdom and look for new solutions. Cf. Roger C. Park, Evidence Scholarship, Old and New, 75 MINN. L. REV. 849, 870 (1991) (“[I]f doctrinal scholars became more willing to support as well as attack existing authority, that change might open the way to scholarship elaborating reasons for existing law that judges themselves have not had the leisure or specialized expertise to appreciate.”).

2. But one actually does. See GERRY SPENCE & ANTHONY POLK, GERRY SPENCE: GUNNING FOR JUSTICE 15 (1982). This Wyoming lawyer calls himself a hunter and suggests that fear is his motivating emotion during trial—fear of losing, failing to protect his client, and being misunderstood by the jury. Spence, a veritable Marlon Brando of the courtroom, resembles other lawyers in Wyoming by wearing cowboy boots and a broad western hat, but goes further with the look than most, adding a fringed leather jacket and longcut hair.

3. Trial judges are omitted from this description because they seem to be reasonably at peace with existing doctrine.

4. Could it be that we love complexity because it is our bread and butter? Because we are too distant from the work of courts? Because we understand it and students are desperate to learn it? With each class that goes through the rigors of learning it, are we perpetuating their devotion, increasing an army of resistance against reform? Are the hearsay exceptions only a refuge for judges who want rules they can apply without thinking hard?
ple, too much attuned to the academic vision of rationality, and too little attuned to the complexity of concerns underlying the doctrine.

This Article examines what I call post-modern justifications and criticisms. It focuses on hearsay doctrine as it appears in the Federal Rules of Evidence, and pays more attention to major themes than specific detail or local variation. In an earlier day, modernists saw a few powerful concerns behind the hearsay doctrine. They argued that these could not justify a doctrine as complex or inhospitable to hearsay as the one we have. They proposed simplified rules aimed at admitting more hearsay. But the modernists did not prevail, as can be seen in the adoption and spread of the Federal Rules, which retain the exclusionary principle and detailed categorical exceptions.

It is too early to claim that the term “post-modern” is anything more than a label describing an environment dominated by the Rules and affected by evolving confrontation jurisprudence. There is some reason to suppose post-modernists see, behind the hearsay doctrine, a set of justifications more elaborate and nuanced than those acknowledged and criticized by modernists, and that post-modernists are more pragmatic, less resolutely academic in attitude, and somewhat more hospitable to the need to test and examine hearsay.

Part I of this Article describes the conventional modern account of hearsay and its difficulties, and modern criticisms and reform proposals. Part II offers a post-modern defense of the hearsay doctrine, in part replying to modern criticisms and proposals and drawing much from Professor Roger Park’s careful and informative study and Professor Eleanor Swift’s thoughtful critique. Part III considers the substance of the Swift and

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5. Several post-modernist notions contribute to a discussion of the hearsay doctrine. These include the idea that speaking is doing, and the feeling that the culture of ordinary people is important. Post-modernists urge people to reflect on their cultural circumstance. For further discussion of post-modernist theory, see Dale Jamieson, The Poverty of Postmodernist Theory, 62 U. COLO. L. REV. 577 (1991).

6. Commentators Roger Park and Eleanor Swift fit this description. So do Ronald Carlson, Edward Imwinkelried, and Michael Graham, whose work focuses largely on improving hearsay doctrine in particular areas of recurrent difficulty. Citations to these commentators appear frequently in this Article.

Park post-modern reform proposals in more detail. Finally, Part IV examines statements used indirectly to prove some act, event, or condition apparently on the declarant's mind as he speaks—an area in which there has been almost no evolution between modernists and post-modernists. Here I offer my own post-modern suggestions for an approach that may produce, if not better results, at least a better understanding.

I. THE CONVENTIONAL MODERN ACCOUNT OF HEARSAY

The modern and conventional account, largely accepted as the basis of the doctrine set out in the Federal Rules, holds that hearsay is generally excluded because it is less reliable than live testimony. Live testimony is subject to trial safeguards that expose the risks that come with taking someone's say-so as proof of something. Those safeguards help the trier of fact evaluate live testimony, but not remote statements, which the hearsay doctrine admits through a scheme of categorical exceptions based on considerations of trustworthiness and necessity.

A. PARTICULAR SHORTCOMINGS

This modern conventional account has explanatory force. Its major shortcoming is that it lacks the power to deal with three major challenges to the hearsay doctrine.

The first and most basic challenge is to decide what hearsay to admit and what to exclude. Here modern doctrine al-

8. In its note to Rule 801, the Advisory Committee cites the risks of taking human accounts as proof, naming memory, perception, narrative ability, and candor. Fed. R. Evid. 801 advisory committee's note.

9. In its note to Rule 801, the Advisory Committee cites the safeguards of cross-examination, assessment of witness demeanor, and the administration of an oath. Fed. R. Evid. 801 advisory committee's note. Exceptions to the exclusion of hearsay are allowed because certain testimony is bolstered by “circumstantial guarantees of trustworthiness.” Fed. R. Evid. 803 advisory committee's note. Notions of necessity apparently underlie Rule 804 and the catchall exceptions in Rules 803(24) and 804(b)(5). See Fed. R. Evid. 803(24), 804(b) advisory committee's notes. These are the same ideas Wigmore singled out and developed as major themes. See 5 JOHN H. WIGMORE, EVIDENCE §§ 1362, 1421-1422 (James H. Chadbourn ed., 1974); see also Lawrence H. Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957, 958-69 (1974) (explaining hearsay dangers and foundations of hearsay exceptions).

10. Although critics of the modern hearsay doctrine imply that it is impossible to draft categorical exceptions that work well, they do not advocate opening the door to any and all hearsay. Even Bentham, with his blunt and sarcastic attacks, did not think hearsay should be freely admissible. He proposed a rule of preference similar to the one put forward in the Model Code of
most sets itself up for the criticism that modernists such as Edmund Morgan and John Maguire delivered in scathing terms. Revisions in the categorical exceptions in the Federal Rules disposed of some complaints, but not the basic attack on the adequacy and coherence of the modern account and overall doctrine.

The notion of trustworthiness surely does operate oddly. For example, excited utterances are admitted because we think that people reacting suddenly to an event cannot lie. However, problems of perception and ambiguity crop up. Business records are admitted because it is thought that commercial practice and reliance on records guarantee care in preparation. However, such records are self-serving. Need, it turns out, is a protean concept: Sometimes it means that evidence is scarce and we should take what we can get; sometimes it means that the declarant is unavailable and something is better than nothing; but his death is no guarantee that what he said will come in; sometimes need means that we should admit out-of-court statements, whatever their shortcomings, because live testimony may be no more reliable; sometimes it means that live evidence more than a century later. See infra note 33 and accompanying text; WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 40 (1985).


12. Morgan describes a hypothetical civil case in which many items of hearsay are offered, and argues that standard doctrine would err in selecting which to admit and which to exclude. See Edmund M. Morgan, Foreward to MODEL CODE OF EVIDENCE 38-47 (1942); EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 169-95 (1956). The categorical exceptions in the Federal Rules would change many results in ways Morgan would appreciate, but not all. Morgan thought that an affidavit by an eyewitness to an accident should be admitted. He also believed that a statement by the driver to his wife should be admitted if both declarants were dead at the time of trial. Morgan thought unavailability alone justified admitting these statements, noting that less reliable dying declarations and excited utterances by the same two people would be admitted.

13.Excited utterances admissible under Rule 803(2) illustrate this notion in fact, if not quite in theory, since most exciting events are fleeting and hard to prove.

14. The exceptions requiring unavailability illustrate this notion, since Rule 804 admits some statements made by unavailable declarants.

15. The exception in Rule 803(3) for statements describing present physical or mental condition illustrates this notion, because it is doubtful that later
testimony promises much bother and little benefit while hearsay poses little risk. In short, sometimes even a strong need for evidence does not result in admitting hearsay, while other times a weaker need does. Neither trustworthiness nor need explains the treatment the doctrine accords to admissions by parties and their agents.

The second challenge is to figure out what to do with out-of-court statements made earlier by people now giving live testimony. Although these statements fit the standard hearsay definition if offered to prove what they assert, trial safeguards can be brought to bear. Academicians generally want to admit these statements, lawyers want to exclude them, and the Rules reach an uneasy compromise which produces tension and practical difficulties.

The third challenge, which is to figure out how far to extend the doctrine, really involves two questions. The one urgent question is whether to accord hearsay treatment to statements used indirectly to prove an act, event, or condition apparently on the declarant’s mind, when the statement seems not actually to say or imply (in the strong sense of intentionally expressing) something about such matters. On this point, many modern critics (with the principal exception of McCormick) believed that keeping faith with theory required the broadest possible application of the doctrine. Rule 801 seems to chart a

16. The business records exception in Rule 803(6) illustrates this notion, for many if not most such records prove narrow points easily, and finding and calling a live knowledgeable witness would be difficult.


18. Rule 801(d)(1) allows the court to admit, for all purposes, certain statements of a testifying declarant, who is then subject to cross-examination on those statements. Fed. R. Evid. 801(d)(1). Statements admitted under this rule include inconsistent statements given under oath in a proceeding, consistent statements offered to rebut charges of recent fabrication or improper motive, and statements identifying someone the declarant has seen. All of these exceptions present serious line-drawing problems, and stop far short of covering every prior statement by testifying witnesses.

19. See Ted Finman, Implied Assertions As Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan. L. Rev. 682, 691-93, 708 (1962) (arguing that nonassertive conduct offered for the two-step inference of belief, hence fact believed, should be treated as hearsay, as should statements offered to prove unspoken beliefs, and proposing an exception allowing the judge to admit such evidence upon concluding that cross-examination would not be helpful); Maguire, Through The Thicket, supra note 11, at 768-73 (proposing an
middle ground, but courts seize on broad and narrow readings and seem unable to locate that ground. The other question is whether to extend the doctrine to conduct lacking assertive quality when offered for the familiar two-step inference, as proof of what the actor thinks happened, hence as proof of what actually happened. Here Rule 801 requires nonhearsay treatment, but this issue and the prior one are more closely connected than post-modernists recognize.

B. MODERN CRITICISMS

Modern attacks usually make four powerful points. First, the hearsay doctrine excludes probative evidence. Critics point out that most of us routinely rely on the reported say-so of others in our daily lives, not only in matters of little consequence but in serious personal and business matters. Critics note that hearsay admitted without objection can support a ver-

elaborate definition and arguing that orders or instructions offered as evidence of unspoken "factual determinations" have "hearsay quality"). Morgan was strongly convinced that hearsay treatment is warranted for statements offered to prove unspoken beliefs. See Edmund M. Morgan, Hearsay and Non-hearsay, 48 HARV. L. REV. 1138, 1158-60 (1935) (proposing an exception that would admit some such assertions on proof of elements of reliance by the declarant). Almost alone among modern critics, McCormick thought assertive utterances should be classified as nonhearsay on the basis of performative aspects. See Charles T. McCormick, The Borderland of Hearsay, 39 YALE L.J. 489, 496-503 (1930) (recognizing performative aspects of words, such as an offer of employment as evidence of the offeree's skill, and doubting that the question should be resolved purely on the basis that "the conduct is verbal or non-verbal"). Part IV of this Article offers additional suggestions, as well as descriptions of post-modern views of this topic.

20. It is not necessary to revisit the question whether Baron Parke was correct in taking the opposite position in the classic Wright v. Tatham, 112 Eng. Rep. 488 (1837). I support the position taken by the framers of Rule 801, and think Parke was wrong to call nonassertive conduct hearsay, and wrong to describe it as an "implied assertion." To give him his due, he was astute to notice that "hearsay risks" accompany the use of conduct to prove belief, hence the fact believed. However, the question whether the hearsay doctrine should apply is another matter altogether.

21. See, e.g., Jack B. Weinstein, Probative Force of Hearsay, 46 IOWA L. REV. 331, 344-46 (1961) [hereinafter Weinstein, Probative Force] (listing the critics); Charles T. McCormick, The New Code of Evidence of the American Law Institute, 20 TEX. L. REV. 661, 671 (1942) (explaining that business could come "to a standstill" if the hearsay rule applied out of court); Jack B. Weinstein, Alternatives to the Present Hearsay Rules, Address Before the Annual Advocacy Institute (Nov. 17, 1967), in 44 F.R.D. 375, 377 (1968) (asserting that the hearsay rule was developed by "upper-class English judges" who were "contemptuous of lower class illiterates who sat as jurors," but that modern jurors can assess the probative force of hearsay "under some guidance from the court").
dict, even if a proper objection would require exclusion, and they say courts can profit from the experience of decision-making bodies that admit hearsay freely.

Second, today's jurors are well educated. Critics point out that the hearsay doctrine evolved long before mass communication and universal public schooling, and claim modern jurors are sophisticated enough to evaluate hearsay. In their experiences in life, the argument runs, jurors acquire an understanding far more discerning than the simple tests courts apply in excluding hearsay. Admitting more hearsay, rather than excluding as much as we do, will result in fewer mistakes. After all, juries decide cases of great moment on the merits, choosing between conflicting stories, allowing or denying the recovery of great sums, and putting accused people in prison or back into the community. In trusting juries with such important tasks while keeping hearsay from them, we seem to swallow the camel and strain at the gnat.

Third, critics argue that some categorical exceptions make little sense, and lead to mistakes both in what they admit and in what they exclude. Here the most frequent targets are the exceptions for excited utterances and dying declarations, and, to some extent, the state-of-mind exception. In addition, crit-

22. See United States v. Hall, 845 F.2d 1281, 1283 (5th Cir.), cert. denied, 488 U.S. 860 (1988); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349, 1356 (5th Cir. 1983); Knorr v. Pearson, 571 F.2d 1366, 1373 (C.C.P.A. 1973); United States v. Phillips, 664 F.2d 971, 1026 (Former 5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), and cert. denied, 459 U.S. 906 (1982). Simply because of similar decisions counting excludable hearsay in assessing sufficiency (no objection having been made), Morgan concluded that the main purpose of the doctrine was to protect parties rather than to express distrust of factfinders. See Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177, 183-84 (1948).

23. Weinstein, Probative Force, supra note 21, at 347-49 (citing worker's compensation, administrative and grand jury proceedings, court hearings on warrants, and sentencing proceedings as examples of litigation not bound by hearsay rules).

24. Swift, Foundation Fact Approach, supra note 7, at 1363 (arguing that the general knowledge of jurors "is superior to the categorical generalizations drafted by the judges and legislators").

25. See infra note 39 (citing sources presenting criticisms of excited utterances and dying declarations).

26. There are three major criticisms of the state-of-mind exception. One is that it embraces self-serving statements. See United States v. Torres, 901 F.2d 205, 239-40 (2d Cir.) (holding that the court lacks discretion to exclude statement within state-of-mind exception as untrustworthy), cert. denied, 111 S. Ct. 273 (1990); United States v. DiMaria, 727 F.2d 265, 271-72 (2d Cir. 1984) (same). Another criticism is that the exception supposes hearsay is the best evidence of state of mind, but many statements admitted under the exception
ics routinely claim it makes no sense to limit the use of prior statements by testifying witnesses to impeachment or repair.

It is true that anyone who looks at the array of exceptions from outside the profession will think them odd. Try to imagine, for instance, setting out good rules to advise someone we care for who needs instruction—in the manner, for instance, of a father advising his daughter. Who would tell a daughter to sort out second-hand statements by applying the tests embedded in the hearsay exceptions—"trust what you're told an excited man said," for example, because "excited men don't lie"? In ordinary life, after all, we always pay more attention to particulars and draw on a lifetime of experience in assessing the reported say-so of others. We are more likely to advise others to take into account the character, background and track record of the person whose statement is reported, and to think about what she has at stake, how well she understands the world, and what kinds of ideas she usually brings to conversations. In contrast, the hearsay exceptions focus on a few factors that only begin to touch the question of reliability.27

Fourth, the doctrine is complicated and hard to apply. Even when its meaning is clear, other doctrines governing impeachment and expert testimony may require that a statement be admitted for limited nonhearsay purposes, or for nonhearsay uses (like effect on listener), despite the real risk that a factfinder cannot make the required distinction.28 Similarly,

are used to prove later conduct by the declarant, for which better evidence may well be available. A third criticism is that it is hard to prevent the exception from being used to prove facts remembered and the behavior of others. On the latter points, it is worth noting that a statement describing future purpose is likely to be at least as persuasive in proving the fact motivating the declarant as in proving what she then did. See United States v. Annunziato, 293 F.2d 373, 377-78 (2d Cir.), cert. denied, 368 U.S. 919 (1961). It is also worth noting that modern cases often permit use of the exception to prove conduct by another if independent evidence connects declarant to the one whose behavior is in question. See, e.g., United States v. Delvecchio, 816 F.2d 859, 862-63 (2d Cir. 1987), cert. denied, 485 U.S. 1021 (1988). See generally Eustace Seligman, An Exception to the Hearsay Rule, 26 HARV. L. REV. 146, 157 (1912) (asserting that admitting a statement to prove future act leads to admitting it to prove prior event, thus destroying hearsay rule).

27. See Swift, Foundation Fact Approach, supra note 7, at 1363 (stating that "because of their broad and abstract nature," hearsay exceptions "cannot correspond with any more than a low degree of probability to the conclusions they assert about reality, which is concrete and full of detail").

28. See Ronald L. Carlson, Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data, 36 U. FLA. L. REV. 234, 246-47 (1984) (asserting that only cross-examiners should be allowed to introduce hearsay underlying expert testimony); Ronald L. Carlson, Policing the
hearsay exceptions sometimes allow use of a statement for one purpose but not another. The state-of-mind exception presents an example.\textsuperscript{29} Sometimes one part of a statement satisfies an exception while another does not (as happens with outsider statements against penal interest offered against the accused).\textsuperscript{30} Certainly no one who studies or teaches evidence doubts that the hearsay doctrine is hard to apply and administer.

It may be impossible to say whether the doctrine pays for itself, although some empirical work is now under way. One strong critic believes (or once did) that the doctrine effects at least some savings because it is cheaper to test witnesses in court than prepare and offer evidence bearing on the credibility of remote declarants.\textsuperscript{31} Moreover, the doctrine may save trial time when it excludes evidence for which no substitute is offered. But arguably the doctrine is costly to the extent that it forces proponents to call and examine witnesses rather than offer reports of what they say.\textsuperscript{32}

C. MODERN REFORM PROPOSALS

The hearsay doctrine could easily be simplified in either of two ways. It could be cast as a rule of preference for live testimony, supplemented by categorical exceptions. For example, hearsay would be admissible if the declarant testifies or is unavailable; if he is available but uncalled, his statement would be excluded unless it fits a categorical exception.\textsuperscript{33} Arguably

\textit{Bases of Modern Expert Testimony}, 39 VAND. L. REV. 577, 585 (1986) (arguing against the "wholesale" admission of hearsay underlying expert opinion when the hearsay is offered by the party presenting the expert).

\textsuperscript{29} See supra note 26.

\textsuperscript{30} See, e.g., United States v. Lang, 589 F.2d 92, 98 (2d Cir. 1978) (part of statement by alleged co-offender was properly admitted as against his interest, but not the part implicating the defendant directly).

\textsuperscript{31} Weinstein, \textit{Probative Force}, supra note 21, at 336 (discussing cross-examination and stating that a lawyer relies to some extent on "trial observation, hints from his client or expert, and what he believes about the witness's background and the facts of the case," which permits "cheaper preparation and a shorter trial" than open admissibility of hearsay would allow).

\textsuperscript{32} Park, \textit{Subject Matter Approach}, supra note 7, at 65 (stating that trial examination of declarant "may take longer than would introduction of an out-of-court statement").

\textsuperscript{33} The Model Code of Evidence took this approach. Under Rule 503, hearsay would be admitted if the declarant testifies or is unavailable. \textit{MODEL CODE OF EVIDENCE} Rule 503 (1942). Hearsay would be excluded if the declarant can be brought to court but is not, unless the statement fits an exception on a fairly standard list, including admissions, excited utterances, declarations against interest and business records. See \textit{MODEL CODE OF EVIDENCE Rules} 502-29 (1942).
the conventional account more comfortably fits such a doctrine than the one we have. Trial safeguards would operate when a declarant appears, unavailability shows need, and categorical exceptions would admit trustworthy and needed hearsay. Alternatively, the hearsay doctrine could function as a broad exclusionary principle subject to a general exception directing courts to admit trustworthy statements. A notice provision could satisfy the perennial objection that this approach makes it impossible for lawyers to prepare for trial.

In the last fifty years, these approaches have proved politically unsalable. The framers of the Model Code learned as much when their rule of preference got nowhere, and the framers of the original Uniform Rules fared little better with a modified rule of preference. The framers of the Federal Rules first proposed broad-gauged exceptions in language favoring admissibility backed by a list of exceptions cast as examples or illustrations. However, under pressure they retreated to categorical exceptions backed by catchall provisions. Congress would not swallow even this much reform, so the drafters added to the catchall provisions not only a notice requirement, but unintelligible conditions designed to discourage their use.

34. Under Rule 63(1) of the original Uniform Rules of Evidence, hearsay would be admitted if the declarant appeared. UNIF. R. EVID. 63(1) (1953). If the declarant was unavailable or available but uncalled, his statement would be admissible only if it fit a categorical exception on a standard list. Some of the exceptions required unavailability. Id.

35. The Preliminary Draft of March, 1969, would have paved the way to admit hearsay "if its nature and the special circumstances under which it was made offer assurances of accuracy." FED. R. EVID. 8-03(a) (Preliminary Draft 1969), reprinted in 46 F.R.D. 161, 345 (1969). For unavailable declarants, satisfying that criterion was enough under proposed Rule 8-04(a). See FED. R. EVID. 8-04(a) (Preliminary Draft 1969), reprinted in 46 F.R.D. at 377. For an available declarant, that criterion sufficed under proposed Rule 8-03(a) if the court was satisfied that accuracy was "not likely to be enhanced" by calling the declarant. See FED. R. EVID. 8-03(a) (Preliminary Draft 1969), reprinted in 46 F.R.D. at 345, 377.


37. Under Rules 803(24) and 804(b)(5), the proponent must, among other things, show that the hearsay is "more probative on the point for which it is offered than any other evidence" reasonably available. FED. R. EVID. 803(24), 804(b)(5). See generally Randolph A. Jonakait, The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony, 36 CASE W. RES. L. REV. 431 (1985) (analyzing judicial interpretations of the residual exceptions in cases considering the admissibility of grand jury testimony); David A. Sonenshein, The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of
D. Empiricism and Embarrassment

The central premise of the hearsay doctrine is that live testimony is preferable to remote statements. This premise and the corollary that juries cannot properly appraise remote statements are largely unsupported by empirical evidence. In the absence of such evidence, some commentators seek to demonstrate, more or less ontologically, that courts would be wise to admit more hearsay.38 Others combine empirical data with arguments from common experience in attacking the reliability of statements admitted under the exceptions for excited utterances and dying declarations.39 Still, the absence of more extensive empirical evidence has proved to be a great embarrassment, at least to academic commentators. Practitioners seem far less troubled by the situation.

Commentators may soon present more empirical evidence, along with more doctrinal argument borrowing insights of social scientists. It is fair to say that what we have so far is a mixed picture. Some empirical data arguably support the claim that jurors can evaluate hearsay. For example, in videotaped trial reenactments and experiments using a scene from a motion picture, undergraduate students apparently did not highly value hearsay; nor did people drawn from jury arrays who read a fictional trial transcript.40 As the pioneers in this area are the

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38. See Paul J. Brysh, Comment, Abolish the Rule Against Hearsay, 35 U. Pitt. L. Rev. 609, 621-28 (1974) (stating that the expected error from admitting hearsay is minor, so hearsay should be admitted unless the jury is likely to assign it at least twice its true weight, because otherwise the effect of error is larger in excluding than admitting the evidence).
39. See Robert M. Hutchins & Donald Slesinger, Some Observations on the Law of Evidence, 28 COLUM. L. REV. 432, 436-38 (1928) (citing experimental data supporting the proposition that emotion lessens the impulse to lie but impairs perception); Leonard R. Jaffee, The Constitution and Proof by Dead or Unconfrontable Declarants, 33 ARK. L. REV. 227, 308-63 (1979) (concluding that psychiatric, psychological, experimental, statistical, medical and physical evidence “seems negative, unsupportive, ambiguous, or insignificant” when offered in support of the dying declaration exception and recommending its abolition); I. Daniel Stewart, Jr., Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 UTAH L. REV. 1, 28 (stating that excitement is no guarantee of truthfulness and distorts perception and memory, especially when a witness observes “a nonroutine, episodic event” such as a collision or a crime).
first to acknowledge, however, controlling the experiments and using them in the project of hearsay reform present enormous challenges, and much work remains to be done.  

It is important, for instance, that experimental statements describe real events about which “the truth” is independently known, for otherwise it is impossible to say whether jurors properly appraised such statements. Designers of experiments have found it very hard to avoid or factor out other influences on perceptions of mock jurors, such as the credibility or appeal of reporting witnesses, the effect of opening and closing statements, and the relative proportion of hearsay to other proof. Also, it is hard to know whether experimental subjects mirror real jury arrays, to estimate whether observed outcomes in one setting would hold true in another (e.g., alleged murder versus automobile accidents), and to extrapolate from individual reactions to the group dynamics of jury decisionmaking or from one jury to another.

Some empirical data arguably support the hearsay doctrine. Motivation apparently affects the ability to evaluate conflicting evidence and to overcome distractions from affective reactions and the way evidence is packaged. When people are highly motivated and able to process arguments, “strong arguments are more effective than weak ones despite the presence of peripheral cues” such as source credibility or attractiveness. When people are not highly motivated, a peripheral factor such as attractiveness may act as a “simple positive cue.”


42. When people are highly motivated and able to process arguments, “strong arguments are more effective than weak ones despite the presence of peripheral cues” such as source credibility or attractiveness. When people are not highly motivated, a peripheral factor such as attractiveness may act as a “simple positive cue.”

43. See Marcia K. Johnson, Discriminating the Origin of Information, in THOMAS F. OLTMANNS & BRENDAN A. MAHER, DELUSIONAL BELIEFS 34, 40-41 (1988) (stating that people may “confuse the origin of information, misattributing to perception something that was only imagined” or confusing information from one source with information from another; and genuine memories may be recognized by the presence of more knowledge of perceptual detail, such as
ing source information encourages more attention to message content, and that hearsay evidence may discourage attention to important matters of source credibility—in short, that factfinders do not evaluate hearsay as well as live testimony. While there is some indication that demeanor evidence does not help factfinders in assessing honesty (it may actually mislead people), apparently verbal content is very helpful, which suggests that live questioning, which is useful in exposing and exploring problems stemming from narrative ambiguity and memory, is also useful in assessing veracity (though not because demeanor helps).

What is the right response to the scarcity of empirical data? I suggest two points. First, this shortage is not reason enough to abandon or extensively revise hearsay doctrine, even if we emphasize accurate factfinding as the important value. Experimental data may prove valuable, but probably will not produce direct or persuasive proof that factfinders (judge or jury) decide actual cases correctly or appraise actual hearsay accurately. Mock-empirical claims (the doctrine works well because the system does) deserve little weight, but attempts by judges to sift hearsay and by codifiers to embody and sometimes improve the resulting insights are entitled to some weight.

Second, the lack of empirical data does not distinguish hearsay from other important law. The hearsay doctrine draws on at least as much common sense and careful thought as, for color and sound, and more information about time, place, and detail); see also Richard E. Petty & John T. Cacioppo, Involvement and Persuasion: Tradition Versus Integration, 107 PSYCHOL. BULL. 367, 368 (1990) (summarizing studies on the effects of personal involvement on factors that affect persuasion).

44. See Olin Guy Wellborn, III, Demeanor, 76 CORNELL L. REV. 1075, 1087-88, 1100 (1991) (describing experimental data indicating that nonverbal cues such as facial expression and tone of voice do not help observers detect deception, but noting the importance of verbal content in evaluating veracity); see also Michael J. Saks, Enhancing and Restraining Accuracy in Adjudication, LAW & CONTEMP. PROBS., Autumn 1988, at 243, 262-64 (describing the same data).


46. However important may be the appearance of getting facts right, actually getting them right seems still more important. I agree that “a theory of operational accuracy should underlie evidence rules.” See Swift, Foundation Fact Approach, supra note 7, at 1361-62. Of course, judgments and underlying factual findings are sometimes value laden, so accuracy may capture less of what is meant than rightness or correctness.
example, strict liability in tort. Strict liability came from theories about loss spreading and accident avoidance that were untested when the doctrine took hold. These theories produce continuing debate that is as extensive, vigorous, and empirically unverified as the discussion of hearsay. The point is not that we should accept doctrine uncritically, or that we should ignore empirical evidence, but that experience and reason are adequate bases for hearsay doctrine.

II. POST-MODERN ACCOUNTS

Post-modernists take pragmatic approaches to hearsay issues, arriving at more moderate positions than earlier reformers and defenders of conventional doctrine. In the process they suggest important arguments and new twists on conventional arguments that merit comment and reflection, and raise important questions.

A. CONVENTIONAL ARGUMENTS REVISITED

The best conventional argument against hearsay is that it is

47. Modern notions that manufacturers should pay for injuries stemming from product use can be traced to Justice Traynor's famous concurring opinion in Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-44 (Cal. 1944). But the soundness of tort doctrine that in effect tells manufacturers to charge an insurance premium in the price of their products is largely untested and open to considerable doubt. Modern commentators disagree on the appropriate substantive standard for such cases. Compare Richard A. Posner, Economic Analysis of Law § 6.5 (3d ed. 1986) (stating that a negligence theory is preferable to a strict liability theory because the system cannot and should not encourage producers to take more precautions than are cost effective) with Howard A. Latin, Problem-Solving Behavior and Theories of Tort Liability, 73 Cal. L. Rev. 677, 713-14 (1985) (arguing that imposing a strict liability standard on auto makers and common carriers "creates the maximum incentive for capable and attentive decisionmakers to select efficient cost-minimizing choices" and "encourages problem-solving injurers to protect victims against losses resulting from their own foreseeable careless behavior").

There are growing doubts as to the capacity of the tort system to achieve its compensatory goal or properly manage social risk. See, e.g., Peter Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Colum. L. Rev. 277, 278 (1985) (arguing that courts cannot engage in the "aggregative calculus of risk created and risk averted that progressive public-risk management requires"); George L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1550-60 (1987) (pointing out the regressive nature of accident insurance sold as part of the price of a product and criticizing the use of this device as a loss spreading technique); Stephen D. Sugarman, Doing Away With Tort Law, 73 Cal. L. Rev. 555, 664 (1985) (asserting that tort law fails to compensate at acceptable costs and fails to do justice to either plaintiffs or defendants).
untested by cross-examination, and the objection of modern reformers is that juries can properly evaluate hearsay.

These competing claims are not as far apart as they seem. After all, conventional doctrine allows vast quantities of hearsay to be admitted, so it certainly does not imply a belief that juries cannot deal with hearsay. Writing tongue-in-cheek but with serious purpose, one reformer argued that a good reason to scrap the doctrine is that most hearsay is eventually admitted. Even an ardent critic of conventional hearsay doctrine agrees that live testimony is preferable to remote statements. Modern reformers should also have recognized that a rule of free admissibility would pave the way for partisan statements proved by proxy witnesses, statements of unknown origin, and statements made under extraordinary pressure or other circumstances almost certain to distort. Broad admissibility of hearsay would have a negative impact on important procedural mechanisms and invite fabrication of statements that would be hard to detect.

The point of the conventional argument is not that statements are unreliable unless cross-examined, which truly would be preposterous, but that factfinders—judges and juries alike, but especially juries—lack what they need to evaluate most untested statements. Those that are admitted under categorical exceptions are thought to be trustworthy even though the factfinder lacks what the testing process provides. Although Americans are used to the idea that only juries need protection from hearsay, a contemporary study reports that early continental legal traditions, in the setting of factfinding by judges,


49. Weinstein, Probative Force, supra note 21, at 334-35 (stating that both lawyers and jurors think that jurors can better assess witness credibility with demeanor evidence and cross-examination, and arguing that if this preference for live testimony gives triers of fact “more assurance” and conveys a “sense of fairness” to litigants and the public, we are justified in acting on this basis, absent proof of error).

50. For post-modern recognition of these points, see Swift, Abolishing Hearsay, supra note 7, at 498-99, 507, 513-14 (discussing “abstract declarants” about whom the factfinder knows little, “risky declarants,” such as claimants who make self-serving statements, and “burden-shifting declarants” whose statements prevent grant of summary judgment); see also Park, Subject Matter Approach, supra note 7, at 63 (arguing that free admissibility of hearsay would impede pretrial dismissal of weak cases and encourage “jury lawlessness”).
developed rules relating to hearsay. Such conventions appear in Roman-canon law as early as the Thirteenth Century.51

Whatever 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 itself suspect, for two reasons. First, common experience suggests that people prefer first-hand information on serious matters. Of course we rely on second-hand statements, but only selectively, and we prefer the say-so of people we know and trust, and people who know something about the matter in question. When we decide whom to believe in everyday life, we do so on the basis of particular information. We assess the motivations and capacities of people in familiar settings on the basis of character, interest, and track record, as well as our estimate of their viewpoints, understanding and judgment. Usually in everyday life we have an option not open to factfinders, which is to do nothing (reserving decision until matters seem more certain) or to change course when further information comes to light.52

Second, few everyday decisions bear any resemblance to the decisions factfinders make in lawsuits. Rarely do ordinary people decide issues as momentous as whether large sums should change hands or someone should go to jail. Rarely do ordinary people choose between sharply disputed versions of facts and responsibility. Most parents or business people know how hard it is to resolve conflicting accounts of events unseen. Rarely are people in ordinary life directed to decide important questions based on facts presented by advocates in a confined time and unfamiliar setting. Ordinary people have little or no exposure to the forces that operate during litigation, and the ways these forces affect statements collected with an eye toward trial, and little or no familiarity with the most common

51. Mirjan Damaka, Of Hearsay and its Analogues, 76 MINN. L. REV. 425, 434 & n.21 (1992) (reporting that Roman-canon law developed rules requiring corroboration of hearsay, essentially treating the problem as a matter relating to the sufficiency of evidence, and occasionally excluding hearsay from consideration).

52. See Damaka, supra note 51, at 444. Damaka contrasts the Anglo-American party-dominated system of gathering and presenting evidence in a compressed “day-in-court” trial with the continental form of methodical, unhurried, piecemeal proceedings in which the court usually has time to seek out the hearsay declarant and examine him. In the former setting, excluding hearsay is a more attractive option than it is in the latter setting. The article also notes that factual findings are more readily attacked on appeal in the continental system, which makes it less attractive to exclude evidence originally.
kinds of litigation-producing events, from crimes to collisions to toxic or defective products.

B. THE IMPORTANCE OF COMPLEXITY

Emphasizing cross-examination alone as the basis for insisting on live testimony and excluding hearsay is, as Park ably argues, too reductionist.53 A single reason or compact argument simply cannot explain a doctrine as vast and complicated as the hearsay doctrine.

Armed with this insight, Park suggests that the reductionist explanation falls short when it comes to the conventional treatment of prior inconsistent statements (admissible to impeach but not as substantive evidence), where the declarant is available for cross-examination and the factfinder can accept or reject the testimony based on what it sees in court. There are other justifications, he says, including 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. A respected federal judge expressed similar concerns when the Rules were before Congress.54

There is also a kind of reductionism in the neat recitation of the four hearsay risks, as though each were separate from the other. Candor, perception, and memory obviously affect narration, and each of the factors tends to overlap with others.55 The terms themselves, although helpful to students

53. Park, Subject Matter Approach, supra note 7, at 77 (attacking “reductionist explanations” such as the “untested declarant” basis for excluding hearsay).


55. See Kenneth W. Graham, Jr., Q: What Happened to the Last Generation of Reformers? (Sept. 6, 1991) (unpublished paper delivered at the Confer-
and analysts, mask almost as much as they reveal. By perception, for instance, we mean far more than the ability to tell green from blue, male from female. We mean discernment or judgment as well—for instance, the ability to distinguish one person from another, to comprehend what is important to a lawsuit in the larger scene that the speaker observed, and to understand complicated physical and human interactions. By candor, we mean not only the risk of out-and-out lying, but the infinite gradations of attitude between purposeful deception and mild sympathy for a party or viewpoint that shades human reactions. Even our talk of narrative ambiguity is multi-dimensional, reaching not only the risk that the speaker may use words in a peculiar way, but the risk that the trier may misunderstand even the best words, and the risk that even the best words may fail to capture some point of importance or may suggest something that is wrong or misleading.

Reductionist explanations also fail to account for the admissions doctrine. For personal admissions, I think the best account stresses the adversary tradition, the fact that the declarant is there to explain himself, and the fact that many admissions are trustworthy because they are against interest (though this element is not required). Organizational admissions and coconspirator statements are admitted for very different reasons. Other commentators stress different points or suggest reform, and some object that invoking the adversary

56. See LOUISELL & MUELLER, supra note 36, § 423.
57. The better explanation for admitting most organizational admissions is that they are as likely to be true as the next best alternative, which is live testimony given after the witness is subjected to the pressures his employer can bring to bear. See id. § 426. The better explanation for admitting coconspirator statements is that most have performative aspects that make them critical. However, in the end the exception is so flawed that some further showing of trustworthiness should be required insofar as they are admitted to prove what they assert. See United States v. Inadi, 475 U.S. 387, 394-96 (1986); Christopher B. Mueller, The Federal Coconspirator Exception: Action, Assertion, and Hearsay, 12 Hofstra L. Rev. 323, 388 (1984).
tradition begs the question.\(^{59}\) Park says admissions do not bring problems of surprise or unfettered discretion and that worries over abuse of government power are met in criminal cases by constitutional doctrines.\(^{60}\) Whatever the explanation, the tradition of admitting statements made by the adversary cannot be explained by reference to trustworthiness or necessity.

Park is right to protest that reductionist explanations fall short in accounting for many aspects of hearsay. Prior inconsistent statements present but a single compelling example of broader concerns, of which three seem most worthy of note.

First, the hearsay doctrine must accommodate both the scholar's view of trials as a search for truth and the practitioner's view of trials as drama and battle. We should look at each argument in its strongest light. Scholars say the party hurt by an inconsistent out-of-court statement can test it and that the truth may be found in what the witness said before, not what he says now. The declarant is in court and friendly, or at worst neutral, and since his position conflicts with or differs from the one he took before, he is willing to explain what has changed. Practitioners say cross-examination can expose falsehood and error in live testimony, but not in prior statements. The witness may be friendly or neutral, and the lawyer cannot come at him full bore as an enemy in an attempt to

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\(^{59}\) See Bein, supra note 58, at 419; Park, Subject Matter Approach, supra note 7, at 81. There is force in the objection, and Morgan's invocation of the adversary tradition (a party "can hardly object" that he was not under oath or cross-examined when he made the statement offered against him) was perhaps connected with his opinion that the purpose of the hearsay doctrine is to protect parties. See 2 EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (Joint Comm. on Continuing Legal Educ. of the Am. Law Inst. and the Am. Bar Ass'n, 2d ed. 1961).

In reply to the objection that invoking the adversary tradition begs the question, I would suggest that the same notion of individual responsibility that holds each party to what he says and does in court in bringing or defending an action also holds each party to what he says and does out of court. This is the case so long as the statements and actions are relevant and not excludable for extrinsic policy reasons. This approach seems commensurate with one purpose of courts in resolving suits, which is to determine personal accountability.

\(^{60}\) See Roger Park, The Rationale of Personal Admissions, 21 IND. L. REV. 509, 517-18 (1988); Park, Subject Matter Approach, supra note 7, at 81. But Park also argues that process-based concerns explain the rejection as hearsay of many other statements. Id. at 55-68. As a result, I am less comfortable about saying that the Constitution is the only place that can give expression to such concerns in the setting of admissions.
burst the balloon of credibility, but must find a way to deflate the prior statement while leaving the live testimony intact, floating above the fray.

The visions of both scholars and practitioners are important and compelling, and together they should shape the hearsay doctrine. The scholar's view has great force despite the objection that truth is often culturally-loaded and contextual, because courts search for it and we put our faith in an adversary system as the best mechanism to find it. The practitioner's view has great force too, even though lawyers are judicial officers who are not supposed to offer false evidence or knowingly mislead, because we depend on lawyers not only to bring out the truth but to convince the trier of fact. The hearsay doctrine must accommodate both visions, and the accommodation cannot be entirely satisfying because the underlying tension cannot be entirely dispelled. Practitioners have largely won the argument over prior inconsistent statements because their view prevailed over the academic view in Congress.61

Second, hearsay issues are often directly connected with broad questions of balance and fairness. The hearsay doctrine makes it hard for prosecutors and defense attorneys to deal with pertinent out-of-court statements by people who will not reiterate them at trial. For prosecutors, the problem is the

61. In reference to the proposal to admit prior inconsistent statements for all purposes, Senator Ervin spoke for the bar when he said he would “throw this thing on the scrap heap of injustice.” His ensuing exchange with Ed Cleary is a classic collision between the bar and the academy. When Cleary, speaking for the academy, argued that the declarant is “in open court” and “under oath” and “subject to cross-examination,” Ervin for the bar retorted that the proposal would let a jury “find beyond a reasonable doubt in a criminal case that this man told the truth when he was not sworn but told a lie when he was under oath.” See 5463 Hearings, supra note 54, reprinted in 4 LEGISLATIVE HISTORIES, supra note 54, at 51.

Federal Rule of Evidence 801(d)(1) classifies only a few types of prior statements as nonhearsay. See Fed. R. Evid. 801(d)(1). However, it remains to be seen whether practitioners can take comfort in the congressional pronouncement that the Rule addresses only the admissibility of those few prior inconsistent statements whose use as substantive evidence is authorized. See Fed. R. Evid. 801(d)(1)(A) advisory committee’s note. Congress concluded that some prior inconsistent statements may be used substantively, but that courts might conclude that standing alone they are insufficient to carry the day. In addressing mainly the problem of using prior statements against the accused, the Senate Judiciary Committee commented that Rule 801(d)(1)(A) addresses only “admissibility” and not “sufficiency,” and that if a prior statement was the only evidence produced to prove a crucial point, “circumstances could well arise” in which a court should dismiss the case. Fed. R. Evid. 801(d)(1)(A) report of senate committee on the judiciary.
turncoat witness who accuses the defendant but later waffles, commonly out of fear or regret. Prosecutors try to protect witnesses from defense threats or pressure by keeping their statements under wraps, but these efforts may be ineffectual (the accused and those behind him may know who the enemies are as the proceedings go forward). Thus, a rule authorizing use of such statements as substantive evidence is valuable. For defendants, a rule authorizing use of informal confessions is likewise valuable because third parties rarely repeat in court the confessions they make informally. Both prosecutors and defendants received some relief from hearsay limitations in the Federal Rules, although prosecutors fared better than defendants.62

Third, hearsay issues connect with process-based concerns, a point that has special application to prior inconsistent statements. The compromise lets federal prosecutors offer prior testimony by turncoat witnesses, but not station house affidavits and statements, reflecting concern over the government’s approach to criminal cases. Although defendants sometimes intimidate witnesses who cooperate with the government, prosecutors and police also put pressure on the same witnesses when they are subject to related charges or parole revocation (as is often true). The defense bar and some theorists complain that the compromise is wrong because the same pressures that affect affidavits also affect sworn testimony by government witnesses, particularly grand jury testimony given without fear of defense cross-examination. The refusal to go the full distance and let in all prior inconsistent statements, as the Court and Committee proposed, reflects process-based concerns.

The point about reductionism also applies to modern criticisms of the hearsay exceptions. It is not surprising that they provide little insight that a father could use in advising a daughter about separating the wheat from the chaff of remote statements, for the exceptions reflect problems in lawsuits, not

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62. Lobbyists for both the prosecutors and the defense bar participated in the rulemaking and legislative processes that produced the Rules. While there is no reason to believe either side played pressure politics, there is also no reason to suppose arms-length bargaining between equals would produce the results we see. For example, if the defense bar had foreseen that admitting statements against penal interest would prove valuable to prosecutors, it is likely that many more objections would have been raised. See, e.g., United States v. Garris, 616 F.2d 626, 632-33 (2d Cir.) (finding that a statement by the defendant’s sister, implicating the defendant, was properly admitted against him under the against interest exception), cert. denied, 447 U.S. 926 (1980).
human experience generally. Nor is it surprising that an account of the exceptions that stresses only a few factors drifts between description and prescription, or that tradition does not conform to rationalist theory. The knowledge and purpose of a parent and commentator can produce powerful insights that are useful in criticizing, applying, and even reforming doctrine, but lawsuits pose problems peculiar to their setting. If it seems odd to a modernist to admit excited utterances, it seems at least plausible to admit statements closely associated with the events in litigation—what we used to call “res gestae” and Park now calls “transactional” statements—and to let juries in on the reactions of victims in the very accidents and crimes that lead to suit.

C. NEW SUPPORT FOR THE HEARSAY DOCTRINE

Looking at the structure of the federal hearsay provisions, Park suggests two new reasons for current doctrine. The first is a concern over misreporting out-of-court statements, which can be inferred from exceptions that reach mostly or exclusively written statements. Important provisions cover business and public records, past recollection recorded, learned treatises and former testimony, and we could add to the list the exception for prior inconsistent statements, which are almost invariably written or recorded and proved by use of transcripts. In these provisions and numerous minor exceptions, Park suggests, the doctrine prefers written statements, in part because people giving testimonial accounts can too easily fabricate or misreport the substance of oral statements. Even if we lack proof that witnesses are better at describing events than statements, we know at least that there is essentially no choice when it comes to events (we must accept human accounts), but often there is an alternative to remote statements.

63. See Park, Subject Matter Approach, supra note 7, at 74-75.
64. I know the excited utterance exception reaches the statements of bystanders well out of harm’s way, that the exciting event need not have substantive significance in the case, and that the exception reaches statements that merely “relate” to the event without creating a word picture of it. Moreover, problems arise when a statement is offered to prove the very event that justifies admitting it, and when declarants are unknown or respond to questions or speak long after the event. Some of these points raise questions, but the principal utility of the exception is in exposing juries to the parties’ reactions to events leading to suit, and both experience and rationalist analysis can defend the exception against at least some of these objections.
65. Park, Subject Matter Approach, supra note 7, at 71 & n.79, 74-76 (mentioning the host of exceptions that reach only or mostly written statements).
The second reason is a lenience toward "transactional" statements. Park describes these as statements that are "part of the same general transaction or occurrence" which are treated as "independently admissible nonverbal conduct." Examples include verbal acts, present sense impressions, excited utterances, and dying declarations. "Transactional" statements have two distinguishing features. They are not likely to come as any surprise to the litigants, who will discover them in the ordinary course of preparation, and they are less likely to be fabricated, because they are generally uttered before the forces that generate litigation have gained strength and come into conflict.

D. PROCESS-BASED CONCERNS

Modern hearsay doctrine reflects process-based concerns relating to pretrial events, trials, government power, and court judgments.

1. Pretrial Investigation

Particularly in criminal cases, the hearsay doctrine reflects concerns connected with the process of information gathering by police and government investigators. Generally, police reports and investigative findings by public agencies are inadmissible against the accused.66 So are station house affidavits and statements to police, typically given by people who know the defendant and are implicated in the charged offenses. Even though such statements often implicate both the declarant and the defendant, they are usually not admissible as substantive evidence because it is feared that the declarant was currying favor—demonstrating that he can help convict the defendant and offering to do so in exchange for favored treatment.67 If the declarant testifies inconsistently at trial, the prior state-

66. Rule 803(8)(B) excludes reports of "matters observed by police officers and other law enforcement personnel" when offered against the accused. Fed. R. Evid. 803(8)(B). An early decision interprets this language as a bar against resort to all other hearsay exceptions. See United States v. Oates, 560 F.2d 45, 77 (2d Cir. 1977). However, other decisions permit resort to the exceptions for past recollection recorded under certain circumstances. See United States v. Yakobov, 712 F.2d 20, 27 (2d Cir. 1983) (allowing use of the past recollection recorded exception to prove absence of any record); United States v. Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1979) (allowing use of the past recollection recorded exception when the declarant appeared and submitted to questioning), cert. denied, 445 U.S. 943 (1980).

67. See generally Louisell & Mueller, supra note 36, § 489.
ments are admissible only to impeach; if he does not appear, they are usually excluded altogether. Here lack of trustworthiness cannot be the entire explanation because the Rules allow use of police reports in civil cases, substantive use of some inconsistent statements in criminal cases, and substantive use of statements against penal interest.68

Barring substantive use of police reports and station house affidavits against the accused conveys a deeper message. The message is that the risks in this area are so great that nobody can determine trustworthiness from a remote position, and therefore nothing but live testimony suffices. Elsewhere the trial judge is asked to assess trustworthiness with the guidance of the criteria in the categorical exceptions, but not in the setting of information gathering by the police. Instead, the officer and the cooperating government witness must appear in court. Cross-examination cannot make the officer or the witness reliable, but it does give the defendant a chance to test and challenge their stories so the jury can evaluate them.69

Even when the cooperating witness testifies, arguably the court should not admit as substantive evidence his prior accusatory statements made to police or prosecutors. Here, however, the Rules reach a compromise that is deeply ambivalent, even conflicted. On the one hand, they forbid substantive use of streetside or station house accusations, even if recorded or cast as affidavits. On the other hand, they permit substantive use of grand jury and other testimony. From a rationalist perspective, this compromise is hard to explain. If the concern is that the trial safeguards are not enough to help the factfinder choose wisely between live testimony and prior statements, why make an exception for what the accusing witness told a grand jury or said in other proceedings? If the concern is that trial safe-

68. Grand jury testimony may be admitted under Rule 801(d)(1)(A) if the declarant testifies inconsistently at trial and is subject to cross-examination about his earlier testimony. FED. R. EVID. 801(d)(1)(A). This seems to concede the point that deferred cross-examination is capable of helping the jury sort out what is true from what is false in the various utterances of the witness. Still, this provision does not embrace station house affidavits and oral statements to the police. This suggests that at least some tasks are beyond the capabilities of cross-examination. See LOUISELL & MUELLER, supra note 36, § 419.

69. See Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 U.C.L.A. L. REV. 557 (1988) (criticizing modern decisions for allowing evidence law to control confrontation rights, and arguing that the purpose of the Confrontation Clause is not to guarantee the reliability of evidence but to guarantee the defendant's right to cross-examine witnesses).
guards cannot reliably detect concocted or fabricated statements, isn't Professor Michael Graham right in saying that the Rule should also make exception for affidavits and for statements the accusing witness admits making?  

2. Trials

Again especially in criminal cases, the hearsay doctrine reflects concerns over the capacity of courts in an adversary system to appraise remote statements. Because all agree that live testimony is preferable to remote statements, the preference is self-executing to some extent. Freely admitting hearsay, however, would create a perverse incentive for lawyers with strong statements by unattractive declarants to offer them through more appealing proxy witnesses. Of course the conventional account of hearsay stresses trial-focused, process-based concerns, and indeed these concerns run even further than the conventional account suggests.

To begin with, practitioners strongly believe that juries, and to some extent judges, decide cases largely on what they see happening in the courtroom. Practitioners see, in other words, a danger that factfinders may misappraise hearsay because they attribute to remote statements the credibility of the witness who reports them. Perhaps, as some practitioners believe, this response is less a matter of confusion than a realistic reaction to the fact that the most visible evidence of the credi-

70. See Michael H. Graham, Witness Intimidation 257-58 (1985) (proposing amendment to Rule 801(d)(1)(A) to embrace, in addition to testimony, any statement “written or signed” or “accurately recorded” or acknowledged by the witness as his own, providing that he has “personal knowledge” of the events reported in the statement). Some might argue, however, that grand jury testimony is the statement of a witness in a sense that an affidavit is not, because the witness (even if coached) actually says the words in his grand jury testimony, while a station house affidavit may well be the words of a police officer to which the witness simply appends his signature.

71. The declarant is needed in court so his perception, memory, honesty, and use of language can be tested. The trier of fact can learn more about underlying events by hearing a witness who saw them than by hearing a reporting witness tell about what he heard of the events. Even if a reporting witness accurately recalls what he heard and the declarant accurately describes what he saw, much more can be learned by questioning the declarant directly than by questioning another person about what the declarant said. Even absent problems with memory and perception, problems with narration remain.

72. Cf. Edward E. Jones, The Rocky Road from Acts to Dispositions, 34 Am. Psychol. 107, 111 (1979) (describing the tendency of an observer erroneously to attribute to the subject attitudes “in line with the thrust” of whatever the subject reports).
bility of the remote declarant is the reaction of the in-court witness.

In criminal prosecutions, moreover, the problem of appraising remote statements has further dimensions. As Park suggests, jurors may "misvalue" police reports even if they are generally trustworthy because conflicting claims of guilt and innocence force a "naked choice" of accepting or rejecting them. This issue "implicates the jury's entire view of the reliability of law enforcement personnel, and its faith in the criminal justice system." Similarly, admitting third-party station house affidavits and statements to police would pose intolerable risks if an accusing witness does not testify, because "an experienced professional" police officer would become the proxy "for one who might be more vulnerable to impeachment" and introduce risks of "misreport or fabrication," which would put an extraordinary burden on the trier of fact to sort things out. In effect, the Federal Rules convey the message that these burdens are simply too heavy for the cross-examiner to carry.

Finally, as practitioners argue, it is hard to uncover in-court fabrication and misreporting of remote statements. The connection of an eyewitness to the realities of the events in litigation is fuller than the connection of an "earwitness" to statements describing such events, and the testing process provided by trials works better when the person being tested has first-hand knowledge of salient facts.

In short, even if the concerns usually associated with untested hearsay could be overlooked, there would remain considerable skepticism that the safeguards provided by the trial process itself could adequately help factfinders distinguish between the credibility of reporting witnesses and that of remote declarants, or adequately test in-court reporting of out-of-court statements.

73. Park, Subject Matter Approach, supra note 7, at 95-96.
74. Id. at 96.
75. Id.
76. Id. at 57-58, 61. When a statement is offered under an exception to the hearsay doctrine, however, the objection that the testifying witness cannot be trusted is typically rejected. See United States v. Peak, 856 F.2d 825, 832-34 (7th Cir.) (rejecting government claim that testimony by one codefendant describing the out-of-court statement of another, offered under the state-of-mind exception, should have been excluded because the testifying witness was untrustworthy), cert. denied, 488 U.S. 969 (1988).
3. Government Power

In criminal cases, the hearsay doctrine reflects concerns over the exercise of government power. In this setting the court is a government institution and the prosecutor a government agent. The doctrine prevents prosecutions and convictions based on remote statements gathered by police, perhaps in secret, and untested in open court. In requiring live testimony, usually by a witness who submits to cross-examination in public, the doctrine operates as a critical restraint. Even in civil cases the doctrine is a significant and important restraint, limiting the institutional authority of courts and forcing the government to proceed with care in its pursuit of regulatory enforcement, again on the basis of live cross-examinable testimony.

Conventional hearsay doctrine can be understood as an incursion on the independence of factfinders (judges or lay jurors) because it displaces with legal rules the common-sense understanding they would otherwise bring to the assessment of remote statements. The hearsay doctrine does not implement substantive policies like those underlying privileges, presumptions, and burdens of proof, nor does it protect parties against popular passion or prejudice. But the hearsay doctrine does serve legitimate societal interests of the sort described in this Article. It protects parties from the mistaken appraisal of remote statements affected by obvious but essentially unmeasurable risks (process-based concerns) and helps insure that factfinders ordinarily have the benefits provided by live testimony and the safeguards of the trial process.

4. Purpose of Judgments

Finally, the hearsay doctrine reflects process-based concerns over public respect for judgments. As Professor Nesson argues, judgments project values embedded in social norms, demonstrate that transgressing those norms carries consequences and shows that conforming to them is both good and expedient. What we aspire to project by means of court judg-

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77. Swift, *Foundation Fact Approach, supra* note 7, at 1367-69 (arguing that admitting hearsay with the necessary foundation facts “would enlarge the independence” of factfinders, who ought to be “nonaccountable” and freed from “precedential bureaucratic generalizations” that give “undue weight to government or other established interests and policies that go beyond the outcome in a particular case”).

78. Charles Nesson, *The Evidence or the Event? On Judicial Proof and*
ments is not that getting caught is painful, or that winning is profitable and losing costly, but that conforming to social norms is preferable to violating them and that persons injured when such norms are transgressed may have redress—in short, that we believe in the norms enough to give them teeth.

To achieve this larger purpose, rules of procedure and evidence should provide reason for confidence that courts reach correct outcomes by fair means. Probably the hearsay doctrine serves this function. Although lay people do not understand the underlying complexities of even the conventional account, surely the doctrine reflects a common preference to hear from and speak to observers directly, as happens at trial where live witnesses testify under questioning by lawyers. In this respect the doctrine reflects a kind of common sense to which lay people can relate.\textsuperscript{79}

More elaborate arguments on the interplay between the hearsay doctrine and the larger purpose of judgments are less persuasive. It has been suggested that excluding hearsay protects judgments against later attack by remote declarants who recant.\textsuperscript{80} One commentator suggests that the insistence on de-

\textit{the Acceptability of Verdicts}, 98 HARV. L. REV. 1357, 1359-60 (1985); see also Steven D. Smith, \textit{The Critics and the “Crisis”: A Reassessment of Current Conceptions of Tort Law}, 72 CORNELL L. REV. 765, 782 (1987) (stating that dispute resolution through tort law is vital “because it reinforces the normative order upon which society depends”).

\textsuperscript{79} See Coy v. Iowa, 487 U.S. 1012, 1016-18 (1988) (quoting William Shakespeare and Dwight Eisenhower on the value of “face to face” confrontation between accuser and accused); Lee v. Illinois, 476 U.S. 530, 540 (1986) (finding that confrontation and cross-examination contribute to “the perception as well as the reality of fairness”); see also Park, \textit{Subject Matter Approach, supra} note 7, at 102-03 (arguing that in criminal cases the hearsay doctrine contributes to “independence of the decisionmaker” by preventing outside pressure that would result if each party had “the full facts before trial” and by letting the jury determine the credibility of people it sees, not the general credibility of government agents and other absent people).

\textsuperscript{80} See Nesson, \textit{supra} note 78, at 1373 (arguing that freely admitting hearsay would be dangerous because declarants might recant, which would undercut the long-term acceptability of verdicts; also that excluding hearsay poses less risk because live witnesses commit themselves to their testimony under oath, subject to penalty of perjury). Park counters that excluding hearsay is riskier from the standpoint of protecting verdicts, because declarants may come forward and reiterate what they said earlier, which undermines a verdict if their statements were not considered. See Roger Park, \textit{The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson}, 70 MINN. L. REV. 1057, 1064 (1986). Both these arguments suggest that we spend too much time in the ivory tower. How likely is it that observers will take the trouble to come forward and attack a verdict, either by recanting remote statements that were admitted or by reiterating statements that were excluded? Do lawyers
meanor evidence (largely a function of the hearsay doctrine) helps assure that going to trial poses a risk of uncertain outcome, which may be beneficial because some cases must be tried in order to insure development of the law. The first of these arguments is speculative at best; the supposed risk of a remote declarant recanting appears minimal. The second suggestion amounts to an attempt to find some benefit, rather than an account of purpose, in current practice. The suggestion is problematic because it seems unlikely that a complete absence of evidence rules or specific revisions to current rules would measurably reduce the uncertainty of trying cases. Both arguments suffer from being almost too clever, too far beyond the apparent meaning and concerns of the hearsay doctrine.

E. THE IMPORTANCE OF HAVING RULES

Among the standard defenses of the hearsay doctrine is the argument that practitioners need rules to try cases. The argument has several dimensions.

First, lawyers have to prepare for trial and know what they are up against. Abolishing the hearsay doctrine would require trial lawyers to confront more uncertainty; it would force or encourage more efforts to investigate cases, thus raising costs; it would skew settlements in ways that seem undesirable insofar as we hope settlements project some approximation of legal norms. This objection loses some of its cogency, however, when we recognize that both the civil and criminal rules permit each side to keep many out-of-court statements under wraps, so neither side is sure to know what hearsay will be offered. As Park and others suggest, if notice is all that blocks hearsay evi-

miss many important witnesses, and therefore fail to call them or offer their statements? Notorious cases generate enormous public interest, but who supposes that many citizens worry about which hearsay was admitted and which excluded, or would pay attention if observers came forward and attacked outcomes? 81. Saks, supra note 44, at 273 (developing the concept of the “optimal gray” cases that must be tried if courts are “to announce, refine, revise, and reverse the law”).

82. In civil cases, lawyers can invoke work product protection for the statements they gather, and the adversary can obtain them only by showing special need. See Fed. R. Civ. P. 26(b)(3). In criminal cases, the so-called Jencks Act blocks defense discovery of statements obtained by the prosecutor that implicate the accused, and a notion of reciprocity (coupled with fears of infringing the privilege against self-incrimination) blocks government discovery of statements obtained by the defense. See Fed. R. Crim. P. 16(a)(2), (b)(2).
dence, we could address the problem with a notice system.83 Second, it is not clear that judges will perform better without rules to apply. Practitioners strongly believe they need protection against broad judicial discretion. They worry that if judges are freed completely from the constraint of rules by the generality of a “standard,” subject only to the immediate pressures of lawyers and trials, the judges are very likely to err by favoring one or another lawyer or cause without principled basis, not so much because they are venal but because they are human. One post-modern critic of hearsay reports, on the basis of admittedly fragmentary and preliminary data, that the pattern of observed rulings does not support the hypothesis that political biases of judges explain hearsay rulings.84 Trial judges may need rules of some sort to deal wisely with hearsay. It is one thing for Judge Weinstein, who is both a scholar and an extraordinary jurist, to claim judges work better without rules,85 and quite another to suppose most judges can do so.86 Rules also invite a second look by appellate courts, which probably contributes to the development of sound doctrine and corrects some mistakes.

Finally, even discretionary rules will produce doctrinal complexity unless they grant judges essentially complete discretion. Writing thirty years ago from his post in the academy, Weinstein coupled his proposal for a broad-gauged hearsay exception with the suggestion that appellate courts exercise more control over verdicts resting on hearsay, and freely weigh hearsay in deciding whether the evidence suffices to sustain a judgment.87 It is almost inconceivable that this practice would fail to generate new doctrines suggesting which hearsay is admissible, and when and under what circumstances.

83. See, e.g., Park, Subject Matter Approach, supra note 7, at 100-01, 112-13, 119.
84. See Swift, supra note 48, at 483-84.
85. See Weinstein, Probative Force, supra note 21, at 353.
86. One commentator discussed Judge Weinstein’s conduct of the Agent Orange litigation: “It is nice to have charismatic judges, but this is hardly a trend to be embraced; as Max Weber observed long ago, in a complex society it is necessary to shift authority from a charismatic to an institutionalized leadership.” Richard L. Marcus, Apocalypse Now?, 85 Mich. L. Rev. 1267, 1293 (1987) (citing Max Weber, The Theory of Social and Economic Organization 329-60 (M. Rheinstein ed., 1954) while reviewing Peter H. Schuck, Agent Orange On Trial: Mass Toxic Disasters in the Courts (1986)).
87. See Weinstein, Probative Force, supra note 21, at 341-42 (stating that the appellate court may be “in as good a position as the trier” to evaluate hearsay).
F. What to Make of the New Account?

An appeal to complexity in understanding modern hearsay raises two questions. In what sense does established doctrine reflect newly-discovered concerns? How should we understand process-based concerns as part of a hearsay doctrine when these arguably belong to constitutional jurisprudence?

The first question is important because the post-modern account suggests not so much basic reform as new understanding of existing doctrine. That suggests, in turn, that this new understanding should affect the application and construction of current doctrine.

The hearsay doctrine comes out of the mists of common law tradition, but the Federal Rules produced a rich legislative history and a new reference point. Arguably the “true” reasons for modern doctrine are set out in the Advisory Committee’s Note, which adopts the conventional modern account. A committed historicist or positivist would find support in the legislative history of the Rules for at least the most important points in the post-modern account. To the extent an objection remains, there are at least two good answers. One is a subtle point Park makes that might satisfy even a historicist, which is that influences shaping the evolution of doctrine are not always “acknowledged” or even “consciously considered,” and judges and lawyers limit or expand hearsay exceptions for reasons

88. Because the conventional modern account sought to rationalize common law rather than describe “original intent,” arguably it is no more secure than post-modern accounts, even if the Federal Rules had never appeared.

89. Published materials include three drafts of the Rules by the Advisory Committee, records of hearings in the House and Senate (consisting of three volumes of testimony and written statements by lawyers, judges, academics, and interest groups), drafts of proposed legislation and revisions, three committee reports, and even amendment and debate on the floor of the House and Senate. There are also studies published and circulated locally, not widely available, and unpublished material, such as letters and internal drafts and reports.

90. See Fed. R. Evid. art. VIII advisory committee’s introductory note (citing the preference for testimony given under oath in the presence of the trier of fact and subject to cross-examination, and listing perception, memory, narration, and sincerity as factors bearing on the evaluation of testimony).

91. The term “historicist” is borrowed from RONALD M. DWORKIN, LAW’S EMPIRE 360 (1986).

92. The much argued debate between “originalists” or “interpretivists” or “historicists” on the one hand, and what my colleague Steven Smith calls “present-oriented interpretivists” on the other hand, fills innumerable articles and books. For a useful, short summary and critique of the debate, see Steven D. Smith, Law Without Mind, 88 MICH. L. REV. 104 (1989).
"not recognized or expressed."93 Another is that the Rules did not displace all prior tradition, and indeed they exhort courts to take into account broader concerns.94

Process-based concerns do belong in hearsay doctrine. They appear in congressional testimony and reports, which should prove the point.95 Ironically, contemporary confrontation decisions emphasize traditional hearsay concerns, especially trustworthiness, and virtually immunize from exclusion statements admitted under firmly rooted exceptions.96 These decisions focus on courtroom process-based concerns97 but ignore pretrial process-based concerns, while critics urge exactly the opposite approach.98

93. Park, Subject Matter Approach, supra note 7, at 70-71 n.78, 81 (judges and lawyers might agree, for instance, to an exception "partly" because it does not pose much risk of "surprise" at trial).

94. Rule 102 exhorts courts to construe the rules fairly in order to find truth, obtain just results, and promote "growth and development" of evidence law. Fed. R. Evid. 102. See Edward W. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908, 915 (1978) (arguing that, although in principle "no common law of evidence" survived enactment of the Rules, in reality "the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers").

95. See supra note 54; see also H.R. Rep. No. 650, 93d Cong., 1st Sess. 13 (1973) (considering but rejecting the concerns over defense intimidation of witnesses as a justification for admitting all prior inconsistent statements).

96. See Idaho v. Wright, 110 S. Ct. 3139, 3147-48, 3150-51 (1990) (catchall exception is not firmly rooted; corroborating evidence does not guarantee trustworthiness for confrontation purposes); United States v. Inadi, 475 U.S. 387, 392-400 (1986) (coconspirator exception does not require declarant unavailability); Ohio v. Roberts, 448 U.S. 56, 62-66 (1980) (availability of the declarant and the trustworthiness of the statement are the concerns of the Confrontation Clause, and a statement falling within a firmly rooted exception is trustworthy). See generally Laird C. Kirkpatrick, Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement, 70 Minn. L. Rev. 665 (1986) (identifying hearsay exceptions that should or should not be subject to a constitutional requirement of unavailability).


98. See Jonakait, supra note 69, at 579-81 (arguing that using confrontation jurisprudence to police reliability of hearsay makes the Confrontation Clause "meaningless as a fundamental right"; its purpose is to protect adversarial testing of evidence by cross-examination); Roger W. Kirst, The Procedural Dimension of Confrontation Doctrine, 66 Neb. L. Rev. 485, 498 (1987) (arguing that restoring the procedural dimension to confrontation jurisprudence will increase clarity of the doctrine and provide a "workable test" for judges, because it should usually be clear whether the hearsay was "created in the process of prosecution"); see also Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Re-
Given the overlap between hearsay and confrontation, pre-trial process-based concerns are properly the focus of both.\textsuperscript{99} Indeed, however strong the arguments for a new direction in confrontation jurisprudence,\textsuperscript{100} hearsay doctrine should reflect such issues as well, for three reasons.

First, the current direction of the Court, both in its confrontation jurisprudence and its obvious interest in aiding law enforcement, suggests that it will not provide leadership on this front, and will not likely undertake a Warren-style project generating broad and detailed doctrines restraining police and prosecutors. The ongoing drug crisis and the legislative unwillingness to tackle the problem through legalization and civil regulation combine to suggest that the Court is unlikely to change direction soon.

Second, a court attracted to developing a confrontation jurisprudence reflecting pretrial process-based concerns might hesitate because it would face difficult and conflicting pressures over breadth. The four major Warren Court doctrines\textsuperscript{101} relat-


\textsuperscript{100}. Embracing pretrial process-based concerns in confrontation jurisprudence enables the Court to carry them to state criminal cases. Commentators disappointed in the Court's treatment of ordinary hearsay issues in confrontation cases reviewing application of the coconspirator exception, \textit{see} Bourjaily v. United States, 483 U.S. 171, 176-81 (1987) (diluting the independent evidence requirement); United States v. Inadi, 475 U.S. 387, 392-400 (1986) (refusing to require unavailability of the declarant), hope for more intervention on behalf of defendants if the Court shifts its focus to pretrial process-based concerns.

\textsuperscript{101}. \textit{See} Mapp v. Ohio, 367 U.S. 643, 655 (1961) (the exclusionary doctrine
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ing to evidence and developed to protect defendants—Mapp, Miranda, Massiah, and Wade-Stovall—are truly prophylactic in the sense that they seek to reform police investigative conduct by reducing incentives for police misbehavior. But misbehavior is not the problem with reports that police prepare or the statements they gather that prosecutors might like to offer in evidence. A court that moved in the recommended direction would offer too little protection to the accused if it focused only on cases where law enforcement officers have clearly overreached. Likewise, the Court could not hope to achieve much in the way of reforming police behavior if it focused on protecting the accused against every statement so affected by the underlying process that determining its reliability is impossible. Wade-Stovall is the Warren-era doctrine that most clearly poses a similar dilemma, because police lineups and other identification procedures do not themselves violate defense rights. Notably the Wade-Stovall doctrine is the one that seems most in eclipse today.  

Finally, aggressively constitutionalizing pretrial process-based concerns as the Court set out to do in Mapp and Miranda would involve some cost. It would likely chill debate and discussion of underlying concerns at other levels, and dissuade local courts and rulemakers from developing separate doctrines or addressing issues arising during periods between Court pronouncements. We should invite attention to these concerns as a covering illegally seized evidence); Miranda v. Arizona, 384 U.S. 436, 467-73 (1966) (warnings after arrest); Massiah v. United States, 377 U.S. 201, 206-07 (1964) (interrogation after the right of counsel attaches); United States v. Wade, 388 U.S. 218, 227-39 (1967) (the right to counsel during post-indictment lineups); Stovall v. Denno, 388 U.S. 293, 298-99, 301-02 (1967) (the due process right to exclude in-court testimony based on suggestive pretrial identification).  

102. Where the Wade-Stovall doctrine applies, it excludes third-party statements or testimony offered against the accused, while the other three doctrines focus on statements or objects taken from him personally. Wade still bars use of a post-indictment out-of-court identification where the defendant's right to counsel was denied, but it does not block in-court testimony by the same identifier if the in-court identification has an independent origin. Wade, 388 U.S. at 242. Wade does not reach pre-indictment lineups, see Kirby v. Illinois, 406 U.S. 682, 687-91 (1972), or identifications based on photographic displays, see United States v. Ash, 413 U.S. 300, 313-21 (1973). Moreover, the due process restriction suggested in Stovall for identifications based on misleading lineups amounts to very little. See Manson v. Brathwaite, 432 U.S. 98, 109-14 (1977) (finding that in-court identification taken from suggestive pre-indictment procedures need not be excluded if, under all the circumstances, it seems reliable); Neil v. Biggers, 409 U.S. 188, 196-201 (1972) (stating that determining whether to exclude pre-indictment identification depends on whether suggestive influence would require exclusion of live courtroom identification).
matter of hearsay doctrine, in the hope that occasional Court forays into the area will not remove it completely from the ambit of evidence law. We should look to the Court for occasional and general guidance, rather than multipart tests pouring new meaning into the Confrontation Clause.103

III. POST-MODERN REFORM PROPOSALS

A. THE FOUNDATION FACT APPROACH

One of the most striking and original proposals on hearsay reform comes from Professor Swift, who suggests that courts should admit hearsay if proponents present “foundation facts” enabling a jury to evaluate it intelligently.104 Her approach is revolutionary because she challenges the process of determining reliability by class exceptions, and thus strikes at the heart of conventional doctrine. In another sense her approach is restrained, because she would generally not admit hearsay without precautions analogous to those that surround the presentation of live courtroom testimony. Thus she agrees that hearsay merits special concern and she acknowledges that her approach might not be adopted, suggesting as a fallback that it could be joined with conventional doctrine to improve its performance.105

Swift accepts “operational accuracy” as a primary value for evidence rules, and recognizes that factfinders (judges and juries) must assess credibility in order to perform well. The crux of her argument is that conventional doctrine does not accurately sift out unreliable evidence and admit reliable evidence, and does not ensure enough information to help the factfinder wisely appraise the evidence it admits. The doctrine errs, she says, both in what it excludes and in what it admits.106 It errs

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103. See generally Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review ch. 6 (1989) (arguing that complex doctrinal development isolates the Court from the public and assaults, more than shapes, culture); Robert F. Nagel, Forgetting the Constitution, 6 CONST. COMMENTARY 289, 298 (1989) (arguing that constitutionalizing a right of privacy impoverishes experience, understanding, and debate of important ideas).

104. See Swift, Foundation Fact Approach, supra note 7, at 1355-57.

105. Id. at 1390. Swift develops her proposal in detail, and by summarizing it I run the risk of distorting it. The description that follows is an attempt to appraise her proposal, not work it out completely or fault it on small points, and is undertaken despite the risk of distortion and the problem of being incomplete.

106. Id. at 1361-63. Swift makes additional claims that conventional doctrine deprives factfinders of independence and that the necessity concept un-
in its exclusionary effect because the categorical exceptions embody "a far narrower range of knowledge about reliability"\textsuperscript{107} than factfinders could bring to bear, given appropriate information. It errs in what it admits because those exceptions require less foundation—less information on candor, narrative meaning, perception, and memory—than factfinders need to appraise hearsay. \textit{Hillmon}\textsuperscript{108} provides a useful example to illustrate Swift's first point. There, letters from Walters to his fiancée and sister were admitted to show that he intended to go west with Hillmon, and probably did.\textsuperscript{109} Even today we would choke at using the letters to show the two talked it over. Can anyone imagine, in the affairs of life, believing what a man writes his sister and fiancée about his plans for the future, but doubting what he says about meeting and talking to the fellow with whom he made his plans?

Swift suggests an example that makes her second point. Two people wait for a bus, and one tells the other the bus ran a stop sign.\textsuperscript{110} Conventional exceptions would admit the statement if the speaker was excited or spoke as it happened. However, the reason one might credit such a statement has less to do with excitement or contemporaneity than with the fact that the observer was likely watching the bus attentively, her obser-

\textsuperscript{107} Id. at 1367-75.


\textsuperscript{109} Hillmon, 145 U.S. at 299-300.

\textsuperscript{110} Swift, \textit{Foundation Fact Approach}, supra note 7, at 1358-59.
vation is simple and the event familiar, and she has no apparent reason to lie or err.

Here is the essence of Swift's proposal: A party may introduce hearsay through a "process foundation witness" who describes the circumstances in which the declarant perceived, remembered, and spoke, which provides the factfinder with information relating to candor, ambiguity, perception, and memory. A process foundation witness is likely to be someone at the scene who saw whatever the declarant saw, but these elements are not critical. In the example of the bus running a stop sign, Swift says the listener can provide the necessary foundation even if she did not see the event. Similarly, if someone makes a record in the routine of business and a witness knows the routine and describes the circumstances that typically surround gathering and reporting, she too can act as a process foundation witness even though she was not present when the particular record was made.

Where the proponent cannot produce a process foundation witness but the statement indicates that the declarant saw and understood the matters reported, Swift would still allow him to offer the hearsay if he produces an "identification foundation witness" who provides information bearing on the declarant's candor and meaning.111 If the adverse party "had access to the declarant prior to trial," the proponent would not need to call a foundation witness.112 This part of the proposal paves the way for statements usually admitted today under the exceptions for admissions or former testimony.

The Swift proposal would almost certainly lead to some changes in outcome. Most (perhaps all) out-of-court statements by testifying witnesses would be admissible, but fewer public investigative records, coconspirator statements, and declarations against penal interest, where the terms of existing exceptions seem furthest from producing the foundation facts Swift would require. Precisely because the key is the presence of foundation facts, and not categories or reliability, it is hard to say how many results would change. In many cases what would change is the nature of the preliminary showing the proponent would make. Some mechanical details would probably

111. Id. at 1383 (suggesting an "adjusted foundation" rule admitting hearsay if a process foundation witness cannot be had, but the statement sets out "specific circumstances" relating to perception, memory, and speaking, and the proponent "also produces an identification foundation witness").
112. Id.
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raise justifiable concerns among practitioners. Also the imponderable that always haunts talk of liberalizing hearsay haunts the Swift proposal too—the fear that many hitherto-unimagined remote statements of the most casual sort will make their way into evidence as proof of major points.

One strength of the Swift proposal is that it calls for particularized treatment of remote statements. They would not be squeezed into exceptions that artificially restrict their use. If adequate foundation testimony had been presented in the Hillmon case, for example, the letters from Walters could be

113. For example, the remote declarant might testify to the foundation facts, then leave the stand to let others who heard the statement give its substance to the factfinder. This strategy puts the adverse party to an unattractive choice—try to attack the statement by cross-examining people who know nothing about the events or recall the declarant and risk an unsuccessful cross-examination that strengthens the statement. But this objection could be met by requiring the declarant, if he serves as a process foundation witness, to testify to the substance of his own statement before other evidence of it is offered, so the cross-examiner could question the remote declarant without seeming to initiate an attack that may not succeed.

114. Of course, witnesses to events that become central or relevant in litigation might note them in a conversation, phone call, diary, or letter. Remote statements of this sort may be largely invisible to readers of cases because they fall far outside standard exceptions and are seldom offered. Even practitioners may pay them little heed because they are part of an array of background information that shapes an investigation, because they duplicate information provided by the client, and because they are never considered as potential “evidence” for trial. The Swift reform, along with most proposed reforms, might persuade lawyers to seek out more such statements, and use those that are best immunized from counterattack at trial. Does experience applying the catchall exceptions support or refute claims that lawyers are just waiting to offer much unimagined hearsay? I don’t know. For an example of hearsay sure to trouble lawyers, see Clark v. City of L.A., 650 F.2d 1033, 1038 (9th Cir. 1981), cert. denied, 456 U.S. 927 (1982) (finding trial court erred in admitting plaintiff’s diary describing encounters with police in suit by street vendors alleging discriminatory enforcement of permit laws).

115. Mutual Life Ins. Co. v. Hillmon, 143 U.S. 285 (1892). In 1880, Sallie Hillmon sued Mutual Life Insurance Company on a policy insuring the life of her husband, John W. Hillmon. The well-known drama of this case has been chronicled frequently, and it is a standard in evidence courses. See Brooks W. MacCracken, The Case of the Anonymous Corpse, AM. HERITAGE, June 1968, at 51; John MacArthur Maguire, The Hillmon Case—Thirty-Three Years After, 38 HARV. L. REV. 709, 709-10 (1925). The letters crucial to the case were written by Adolph Walters to his sister Elizabeth and his fiancée Alvina Kasten in early March, 1879, about two weeks before Walters died. The letter to Elizabeth had been lost, and she testified to its contents from memory. The letter to Alvina was produced. There, Hillmon said:

I will stay here [in Wichita] until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends to start a sheep ranch, and, as he promised me
admitted to prove not merely what Walters planned to do, and later did, but also that he met with Hillmon and the two made plans together. On the *Hillmon* facts, there was probably no process foundation witness who could give live testimony that Walters saw and heard Hillmon or recalled the meeting when he wrote his letters. Walters himself would qualify, but he was dead; Hillmon was missing (perhaps dead) and probably nobody else could be produced. Perhaps the insurance carrier could offer the letters on the basis of identification testimony by, for instance, the sister and fiance, who could describe Walters, answer questions about his experiences in life, discuss how he talked and whether and how far they trusted his word, thus giving the factfinder information useful in deciding whether to believe the letters.\footnote{\text{\textsuperscript{116}}}  

Another strong quality in the Swift approach is that it would require the proponent to offer more evidence helpful in assessing the declarant's credibility than some standard exceptions now require, usually in the form of testimony by a knowledgeable foundation witness who can be cross-examined.\footnote{\text{\textsuperscript{117}}} Today's lawyer who offers an excited utterance or present sense impression leads the testifying witness through the elements of the exceptions, and then his job is done. Swift's lawyer leads the witness through points that bear more particularly on the persuasive force of the statement, and he submits to cross-examination on these points.

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\textsuperscript{116} Swift's examples of "identification foundation witnesses" are people who observed the declarant as she spoke. See Swift, \textit{Foundation Fact Approach}, \textit{supra} note 7, at 1379-80. Swift would apparently allow resort to such foundation witnesses only if the statement itself describes the manner in which the speaker came to know of what he describes. Neither of these conditions could be satisfied on the facts of *Hillmon*. Presumably nobody watched Walters set his thoughts to paper, and the surviving letter to his fiance Alvina surely implies, in the strong sense of intentionally suggesting, that he met Hillmon personally and talked to him. However, the letter does not actually refer to such a meeting. One might hope that the Swift approach would develop some flexibility in such cases. It is hard to imagine learning more from a witness who watched Walters write than from one who knows him well but didn't see him write. The inference that Walters met Hillmon seems safe, even though the letters do not actually describe the meeting.  
\textsuperscript{117} See \textit{id.} at 1357-58.
A third strong quality in the Swift approach is that it would simplify administration while avoiding standard pitfalls. It would greatly reduce the long list of hearsay provisions, and would allow many statements to be admitted without the limits present doctrine imposes on permissible uses at trial. Moreover, the approach does not entail unreviewable discretion, with resultant problems of reactive, unreasoned, or unwise rulings. Under the Swift proposal, reviewing courts would not decide from afar whether the hearsay was reliable, but whether the factfinder received what it needs to decide the point. Thus, the proposal does not portend a return to a growing body of common law rules on reliability.

The difficulties in this approach seem to be three. First, understanding and appraising a person from what someone says about her is very different from seeing and hearing her. Evidence of credibility is mostly circumstantial, but each piece is not of equal value. The Swift approach almost equates information bearing on credibility with the live performance, but a performance conveys more about important qualities, including whether one is serious or flippant, engaged or unconcerned, focused or scattered, fairminded or partisan, and so forth. Even the best informed “process foundation witness”—one who knows the speaker well and was with her when she saw and spoke—may not know other important facts, such as that she once before saw a bus run a stop sign and kill or hurt someone. A foundation witness might miss important clues in the speaker’s demeanor that could be uncovered in live questioning, and might not even be allowed to convey the one conclusion a live performance asks factfinders to draw: Is the person to be believed or not?

118. The hearsay doctrine is self-executing to the extent that a party has a good witness and prefers to offer her views directly rather than through a proxy testifying to her remote statement. The absence of hearsay doctrine would create a perverse incentive, where a party has a percipient but unappealing witness, to call a more attractive proxy. Of course the adversary could call the percipient witness, but doing so would be risky and taking this course would likely prolong trials.

119. In common experience, comments made off the cuff or in jest are taken seriously, and comments intended seriously are mistaken as facetious. Although factfinders can make similar mistakes, the trial process invites testing and probing that people do not pursue in their daily lives, particularly where the matters under discussion do not directly affect them. Moreover, when juries find the facts, six people (or nine or twelve) evaluate these points.

120. Usually the party who calls a witness may not also offer an opinion by a second witness vouching for the truthfulness of the first, unless the adversary launches an attack on the first witness’s truthfulness. Usually one wit-
A partial response is that the Swift approach would often produce a live performance after all. In the common situation where the proponent cannot find someone who was with the declarant when she saw and when she spoke, only the declarant can give all the foundation facts and the proponent must call her if he can. Thus the worst possibility—a party presenting his case through a proxy witness reporting her own out-of-court utterances—would seldom come to be. In short, the Swift approach would not issue a general invitation to present second-best evidence.

Second, this approach undervalues process-based concerns. As noted above, station house affidavits and police reports are generally inadmissible against the accused, and reliability is not the only reason. But the Swift approach would admit station house affidavits and even police investigative reports under some circumstances. Of course a foundation fact approach could accommodate the process-based objection by incorporating specific rules barring certain kinds of remote statements.

Third, the Swift proposal presents two difficult options. One is to discard complicated theory, learning, and doctrine and replace them with something simpler but very different. Maybe it will happen, but I don't think so. The other option is to incorporate the best of the Swift proposal into current doctrine, which poses some difficulty because the two work at different purposes (one seeks to provide evaluative information, the other to measure trustworthiness) and grafting foundation fact requirements to existing exceptions is a half-a-loaf measure. But this difficulty may not be insuperable. It would

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121. For example, if a cohort in a criminal venture implicates the accused in a station house affidavit that says he saw what the defendant did, and the cohort later refuses to testify at trial, the prosecutor could offer the affidavit through an "identification witness" who knows the declarant. See id. at 1413. On the basis of similar foundation evidence, an investigative report could be admitted if the officer was dead or otherwise unavailable. See id. at 1417.

122. Doing so would probably exclude some hearsay that presently gets in, since it would add requirements not presently found in some exceptions. That
not even be necessary to graft foundation fact requirements to all the existing exceptions, although amendments would be needed for the exceptions covering present sense impressions, excited utterances, medical statements, dying declarations, declarations against interest, and public records, among others.

B. LIBERALIZE HEARSAY DOCTRINE IN CIVIL CASES

Park suggests that the hearsay doctrine should speak separately to the two sides of the docket, recommending “interstitial changes,” not “radical reform,” in criminal cases and “broader reform” in civil cases. Much of his argument for retaining existing doctrine in criminal cases is summarized in the foregoing discussion, and his insights are valuable and often new. His suggestion that hearsay doctrine should work differently in the two areas is not troublesome or startling. Other rules draw this distinction expressly, and the special concern over criminal cases is sometimes visible in the structure of the Rules or behind the substance of hearsay and other provisions.

The proposed reform in civil cases would lead to admitting more hearsay, and Park’s argument mostly emphasizes the special difficulties criminal cases present. It is less a positive claim

is not a bad outcome for anyone convinced that the present categorical exceptions sometimes err in what they admit. But this grafting approach would not, by itself, admit hearsay that is presently excluded. If the present exceptions also err in what they exclude, grafting a foundation fact requirement to the current exceptions will not cure the problem. Most people who criticize the present exceptions as being both overbroad and underbroad hope to admit more hearsay, and the grafting approach seems more likely to admit less.

123. Swift would exempt several categories from the requirement, and some exceptions already embody much of what she seeks. Admissions under Rule 801(d)(2)(A)-(C) would be exempt, as would former testimony under Rule 804(b)(1), and Swift would permit judicial notice of foundation facts underlying five minor public record provisions. See Swift, Foundation Fact Approach, supra note 7, at 1409-13. In addition, the treatment of prior statements by testifying witnesses under Rule 801(d)(1), the exceptions for past recollection recorded in Rule 803(5), and business records in Rule 803(6) could continue unchanged without doing violence to her proposal. See id. at 1395-98.

124. Park, Subject Matter Approach, supra note 7, at 106, 109. Like the description of the Swift proposal, what follows is an attempt to appraise Park’s approach, not examine every aspect or small detail. Inevitably, implications will go unmentioned and there is a risk of distortion and incompleteness.

125. Park does not argue that the existing doctrine in criminal cases requires no work. He tentatively suggests extending the requirement of unavailability to statements “directly accusing the defendant of a crime,” developing carefully tailored treatment for custodial statements by accomplices, and following Michael Graham’s suggestion to seek remedies for witness intimidation. See GRAHAM, supra note 70, at 263-80; Park, Subject Matter Approach, supra note 7, at 107-08.
that civil litigants would benefit from admission of more hearsay than a negative claim that there is less excuse to keep evidence out in civil cases. The strongest claim emerging from the argument is that civil discovery coupled with a notice scheme for hearsay would remove the element of surprise, and in civil cases jurors can understand and take into account bias, financial interests, and institutional loyalties that color remote statements and in-court testimony. By comparison, discovery in criminal cases is limited and the pressures that bear on people who give remote statements in that setting are less understood and more difficult to unravel.

Park's proposed reform would introduce for civil cases a rule of preference coupled with a notice-and-counternotice procedure. A party could give notice of intent to offer hearsay, and by counternotice the adversary could demand production of the declarant instead. The proponent would then be obliged to produce the declarant or demonstrate that she is unavailable. In either case, her hearsay statement would be admissible, regardless whether it satisfies criteria of reliability. Standard exceptions would remain, however, and either party could invoke them without going through the notice-and-counternotice procedure.

This Park proposal is similar to the system the Model Code of Evidence would have introduced across the board, and is easier to describe than the Swift proposal because it builds on current doctrine.

In civil cases, Park's proposal would clearly pave the way for out-of-court statements by testifying witnesses, which would be admitted under standard exceptions or through the notice procedure if the adversary required production of the declarant. Indeed, the Park proposal would pave the way for all remote statements, subject only to the requirement of producing an available declarant if the adverse party demands it.

126. Park emphasizes that in criminal cases (1) the Confrontation Clause blocks "drastic liberalization," (2) process-based concerns surround statements by accomplices and informers and testimony by police, and would surround remote statements by defendants and victims admitted in an abolitionist regime, (3) the problem of surprise is large because discovery is limited and not easily expanded, and (4) the hearsay rule restrains state power, insuring that each trial reaches a unique determination of guilt (rather than being a "show trial") and preserving the "independence of the decisionmaker." Park, Subject Matter Approach, supra note 7, at 88-104.
127. Id. at 117-18.
128. Id. at 120.
129. Like all liberalizing reforms, the Park proposal raises the question of
There are some obvious strengths in this proposal. First, the notice-and-counternotice provision would replace the catch-all exceptions, but courts would probably find it easier to administer than the existing catchall exceptions. The provision would produce less uneasiness over judicial discretion and less doctrinal complexity. Congress made the existing catchall provisions unintelligible in an effort to curb their use and quell fears over judicial discretion. The provisions have produced at least one recognizable "common law exception" and precedents that courts find hard to apply or understand.

Second, combining the notice-and-counternotice procedure with categorical exceptions should satisfy objections by practitioners that free admissibility makes trial preparation hard, but avoids introducing an untoward burden on proponents to give pretrial notice of every item of hearsay. The proposal is a compromise between overly rigid notice requirements and a free-for-all at trial. It is hard to predict how the notice procedure will work in practice. The assumption is that most of the hearsay any lawyer would want to offer already satisfies a categorical exception, so the notice procedure would be a residual feature, and I think it would probably work that way. While the notice procedure may become the bully on the block, with unforeseen and undesirable consequences, it seems important not to succumb to a Chicken-Little mentality.

130. The exception embraces grand jury testimony by unavailable witnesses, which is often admitted against the accused under Federal Rule of Evidence 804(b)(5), although not always. Cases upholding this use of the catchall provision include United States v. Donlon, 909 F.2d 650, 652-654 (1st Cir. 1990); United States v. Lang, 904 F.2d 618, 622-625 (11th Cir.), cert. denied, 111 S. Ct. 305 (1990); United States v. Zannino, 895 F.2d 1, 7-8 (lst Cir.), cert. denied, 110 S. Ct. 1814 (1990); United States v. Doerr, 886 F.2d 944, 956-957 (7th Cir. 1989). Cases disapproving the same use include United States v. Fernandez, 892 F.2d 976, 980-83 (11th Cir.), cert. dismissed by Recarey v. United States, 110 S. Ct. 2201 (1990); United States v. Snyder, 872 F.2d 1351, 1354-55 (7th Cir. 1989).

131. Lawyers who think categorical rules insure predictability might confess they never know whether remote statements will get in, and might sooner list everything in pretrial notice than take a chance on an unfavorable trial ruling. Faced with long lists of hearsay, the adverse party might sooner demand production of a declarant, either to make things difficult for the proponent or to be sure there is someone to cross-examine, or both. Faced with a demand for a declarant the proponent prefers not to produce, one option is to do nothing and hope a categorical exception applies after all, and the adversary then calls "foul" because he thought his demand would result in exclusion of the statement or production of the declarant. Another option is to seek a pretrial ruling that a noticed statement fits a categorical exception, but trial
The real question raised by the Park proposal is whether all statements by unavailable declarants should be admitted in civil cases, and on this point I remain doubtful. Park is right that unseen forces in the larger setting of criminal cases probably affect motivations and purposes of remote declarants in ways more serious and harder to evaluate than those that affect declarants in the larger setting of civil cases. But other hearsay risks appear in civil cases that are very hard to assess. Evaluative statements are an obvious example. Consider employer-generated accident reports, police investigations of a collision, and a doctor's diagnoses of ailments or injuries, all of which are often admitted under standard exceptions but sometimes excluded as untrustworthy. In these and similar cases, unseen forces pushing the declarant one way or another may be part of the problem, but even more important are questions about sources, adequacy of underlying data, risks of technical mistakes for which lay factfinders may have no "feel," or imponderable questions about declarant's purpose (was it to say what he had been told or to convey his own firm view?).

IV. THE MYSTERY AT THE CENTER: HOW MUCH IS ASSERTED IN WHAT SOMEONE SAYS?

During a drug raid a police officer answers defendant's phone, and the caller asks, "Can I pick up the stuff?" Hearsay when offered to prove the defendant deals drugs? Police arrest one defendant and then his apparent colleague comes along. Courts dislike deciding such things beforehand and usually try to leave them open.

For unavailable declarants, courts might permit resort to the notice procedure at trial, where the dynamic insures unsympathetic treatment of the adversary's claim that he did not expect this hearsay and wants time to prepare. Of course this tension already exists with the catchall exceptions.

To the extent the notice procedure becomes the basis for admitting remote oral statements, disparities between what the notice says and what the evidence shows will generate predictable fights over adequacy of notice. In the end, however, my view is that only Chicken Little would refuse the Park proposal on these grounds, and the arguments are best understood as cautions rather than unanswerable objections.

132. See, e.g., Faries v. Atlas Truck Body Mfg. Co., 797 F.2d 619, 622-23 (8th Cir. 1986) (finding that in hearing a product liability claim against a truck maker, the trial court erred in admitting the police report stating that the plaintiff was speeding); Petrocelli v. Gallison, 679 F.2d 286, 289 (1st Cir. 1982) (finding that in hearing a malpractice suit, the court properly excluded a doctor's record containing a technical diagnosis); Campbell v. Nordco Prods., 629 F.2d 1258, 1264-65 (7th Cir. 1980) (finding that in hearing a wrongful death suit against a lift maker, the court properly excluded the employer's report describing the lift's condition).
and the first assures the second, "I didn’t tell them anything about you." Hearsay when offered to implicate the second in the crime? In an apartment at 600 Wilshire is found an eviction notice addressed to Carlos Almaden. Hearsay when offered to prove he lives there?¹³³

In these and many other cases, the words are assertive by any measure, but do not say directly that the event occurred or the condition exists. Nevertheless they support the familiar two-step inference, indirectly suggesting what is on the speaker’s mind, which in turn suggests indirectly that the event occurred or the condition exists. In these "indirect use" cases, the hearsay doctrine is hard to apply and the performance of courts is mixed.

The difficulty lies close to the center of the doctrine, so it is an embarrassment. One response of academic commentators, who devote lots of energy to the problem, is to say it is not important as a practical matter, which at least tends to minimize the embarrassment. But the problem is not small, and it shows no promise of going away.

Some commentators trace the problem to the way the general principle is framed. They argue that some definitions focus more on the speaker and some focus more on his statement,¹³⁴ and that the former are broader and better serve hearsay concerns than the latter. Professors Michael Graham and Olin Wellborn seem to take this view. They propose revisions broadening Rule 801’s definition of hearsay, attempting to embrace every statement offered in support of the two-step inference."¹³⁵

¹³³. Innumerable cases say the first example (an incoming phone call asking about drugs) is not hearsay. Recent examples include United States v. Oguns, 921 F.2d 442, 448-49 (2d Cir. 1990); United States v. Long, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990); and United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990). The second example tracks United States v. Reynolds, 710 F.2d 99, 104 (3d Cir. 1983) (hearsay). The eviction notice to Carlos Almaden is based on United States v. Singer, 687 F.2d 1135, 1147 (8th Cir. 1982) (not hearsay), rev’d on other grounds, 710 F.2d 431 (8th Cir. 1983), cert. denied, 479 U.S. 883 (1986). Police are frequently lied to about the whereabouts or activities of a cohort or relative, and courts generally treat such evidence as not hearsay, under the guidance of a decision by the Supreme Court concluding that evidence that cohorts gave perjured testimony to disguise a crime was not hearsay. Anderson v. United States, 417 U.S. 211, 219-22 (1974).


¹³⁵. Graham proposes expanding the definition to reach a statement offered to prove "declarant's belief in the truth or falsity of the matter asserted." 1 Michael H. Graham, Modern State and Federal Evidence 117
However, Professor Seidelson rightly points out that the framers of the Federal Rules thought that the declarant's expressive intent was the key to proper application of the hearsay doctrine. Seidelson suggests that the federal definition may be broader than some have supposed, and Roger Park concludes that the provision should not be amended. Professors Martin and Saltzburg suggest a rule of thumb that helps resolve some problems, and Professor Milich proposes more elaborate tests. Professor Bacigal suggests that the key is not in re-

(1989). Wellborn proposes expanding the definition to reach a statement offered "as evidence of declarant's belief in a matter, to prove the matter believed." Olin Guy Wellborn, III, The Definition of Hearsay in the Federal Rules of Evidence, 61 Tex. L. Rev. 49, 92 (1982) (proposing to define statement as "an oral or written verbal expression" or "nonverbal conduct" that the actor intends as "a communication").


137. Id. at 760-63, 775 (expressing doubt that courts applying Rule 801 will interpret declarant's communicative intent with appropriate breadth to characterize such statements as hearsay).


139. 2 Stephen A. Saltzburg & Michael M. Martin, Federal Rules of Evidence Manual 137 (5th ed. 1990) (if one fact "must be being asserted" in order to take as true a statement directly asserting a different fact, the statement is hearsay if offered to prove the former; if the statement may be true when the fact to be proved is not, the statement may still be hearsay if declarant "intended to assert" it, and the situation is more difficult to interpret).

140. See Paul S. Milich, Re-Examining Hearsay Under the Federal Rules: Some Method for the Madness, 39 U. Kan. L. Rev. 893, 910, 920 (1991) (suggesting a two-part test to decide whether declarant intended to communicate a point, turning on (1) what fact the statement is offered to prove and (2) whether declarant would be "necessarily lying or mistaken" if we knew the fact to be false, in which case the statement is hearsay; also suggesting a three-part test for statements offered to prove declarant's state of mind, under which a statement is nonhearsay only if (1) independent evidence supports the truth of all or the relevant part of the statement, (2) the evidence is "incontrovertibly true," and (3) the statement is still relevant and not "merely cumulative").

The first of Milich's tests appears to rest on his view that a person who intends to deceive someone will "make some effort to convey the false information with enough clarity and credibility that it will be understood and ... accepted as true." Id. at 909. But it seems as likely that deceivers convey very little "false information," and the proposed test seems likely to treat as nonhearsay much that should be embraced by the doctrine.

The second of Milich's proposed tests is a reasonable approximation of the wise approach taken in cases like Bridges v. State, 19 N.W.2d 529, 535 (Wis. 1945) (admitting child's description of a room as proof that she had been there), and United States v. Muscato, 534 F. Supp. 969, 974-80 (E.D.N.Y. 1982) (admitting description of gun, as proof that declarant had seen it).
fined tests or rules, but in recognizing the importance of cross-examination.141

The indirect use cases resist tests and definitional revisions for two reasons. First, modern hearsay doctrine requires us to distinguish between saying and doing. It reaches assertions but not nonassertive conduct, even when the latter is offered for the famous two-step inference that brings hearsay risks.142 One consequence is that the underlying rationale extends (at least appears to extend) further than the doctrine’s reach, and evidence that might benefit from applying the trial safeguards (particularly cross-examination) gets through untouched.143 Another consequence is that modern doctrine sometimes seems to invite a line that cannot be drawn.144 Words have both performative and assertive aspects, as all recognize in the example of “I’m alive” offered to prove that the declarant was alive. It follows that sometimes words are both hearsay and nonhearsay when offered for a single purpose. It is futile to think otherwise, and yet the profession seems unable to face this difficulty.145


142. The first step is an inference from conduct to the actor’s belief that some act or event occurred or some condition existed, and the second is an inference from belief to the act, event, or condition itself. It is understood that these inferences introduce risks of misperception, faulty memory, and ambiguity (three of the four hearsay risks). Because any act might be intended to express or communicate some point, there is also a risk, often very small, of lack of candor. At least one commentator believes trial courts cannot intelligently decide whether or not conduct is assertive. See Finman, supra note 19, at 696-97, 707 (concluding that “implied assertions should be classified as hearsay”).

143. I think modern doctrine is sound in reaching only assertions, because words and word substitutes are more vulnerable to hearsay risks than nonassertive conduct, which does not raise the problem of candor. Its ambiguities differ from verbal ambiguities, and they are, I think, less dangerous. They resemble the ambiguities that circumstantial evidence often brings, and appraising them involves the factfinder in a task much like the one that comes with deciding a case on its merits. See Michael H. Graham, “Stickperson Hearsay”: A Simplified Approach to Understanding the Rule Against Hearsay, 1982 U. Ill. L. Rev. 887, 909 (arguing that the framers of Rule 801 were correct in finding that nonverbal, nonassertive conduct presents a low “candor risk”).

144. At other times drawing the required line is easy. Words are always, or almost always, assertive. Wordless conduct usually seems nonassertive and is treated that way, or is obviously assertive (for example, shaking the head “no”) and is treated that way.

145. As I develop below, words always have performative aspects, but it does not follow that they are always both hearsay and nonhearsay, which would mean that the doctrine is radically incoherent. It is, I think, relatively seldom that words in their performative aspect tend to prove something important in the case.
Second, the subjective intent of the declarant is both critical and deeply problematic. On the one hand, hearsay's central concern is intentionally expressive or communicative behavior. The preference for live testimony would make no sense if courts decided to admit or exclude out-of-court statements by treating them as things with intrinsic meaning severed from their human sources. There is no escaping that intent is critical in appraising meaning because of the nature of language. On the other hand, the intent standard makes sense only if interpreted in a way that is somewhat broad and artificial. For instance, the statement "he took the car to work" must be understood as intentionally communicating not only who took the car and where it is, but also that there is a car and that he has a job. The speaker might well tell us he meant to say only who took the car and where it is. Nevertheless, the additional points (that there is a car and that the one who took it works), seem so close to this purpose, and so likely to have been on the speaker's conscious mind, that they should be viewed as part of his expressive purpose.

Even with this much guidance, however, it is hard to say how far intent goes as a doctrinal matter or how far it extends in any particular case. It is common in life that speaking suggests things the speaker did not intend (his understanding of the world and experience in it), and nobody can be sure how much of what a listener hears in a statement was included in what the speaker intended to express or communicate, or even how much was in his conscious thoughts. Here at the margins doctrine offers little guidance.

Let me elaborate on these two basic points. Conventional doctrine recognizes that words sometimes have performative aspects that are embraced by a few discreet categories of nonhearsay, such as verbal acts and effect on listener.

146. Only an "assertion" can be hearsay under the Federal Rules. See Fed. R. Evid. 801(a)-(c). Common usage tends to equate assertion with communication. I prefer to speak in terms of expression or communication because the latter conveys the idea of reaching listener or reader (which is unnecessary) and the former focuses appropriately on the heart of hearsay concerns, which is expressing ideas or information in language (words or word substitutes).

147. In one sense it helps to know we mean intentionally expressive or communicative behavior (even though intent seems inherent in these concepts) because that tells us to interpret a statement as saying what declarant meant and not to get stuck on plain or literal meaning. It also helps that the proposed evidential use may require that a statement be understood as intentionally expressing the point to be proved (so it must be hearsay or nothing).

148. See Lilly, supra note 17, § 6.2.
think they always have performative aspects, and in everyday life we understand this point perfectly well as a matter of common experience.\textsuperscript{149} What is this "performative aspect"? Probably it cannot be captured easily in a testing definition because it is many things. At least part of it is that words provide the means by which we shape our relationships, make common arrangements, buy and sell things, set events in motion, protect ourselves, attack or protect others, and focus attention to guide or distract others. Words can be and often are effective in these capacities, whether or not they create "enforceable" rights or obligations.\textsuperscript{150} And these descriptions do not exhaust the performative possibilities of language.

Why, if this claim has any merit, has it gone so long unnoticed as a matter of hearsay law? I offer four suggestions. First, I think our professional culture is so steeped in verbal meaning, in the reading of statutes, contracts and appellate opinions, and in the multi-part tests the Court develops in applying the Constitution, that lawyers (including professors and judges) dissociate common experience from hearsay analysis. Second, I think the doctrine frightens professional people as a thing of complexity, subtlety, and blinding effect. Lawyers and judges focus on the assertive qualities of statements and search for exceptions that might apply, sometimes overlooking the performative aspects and the possibility that statements can be both hearsay and nonhearsay when offered for a single purpose. Third, I do not believe courts and lawyers are completely oblivious to the suggestions advanced here, and in the academy

\textsuperscript{149} Spouses, for instance, know that words of consideration, criticism, frankness, or evasion are important, not only in what they convey in verbal meaning, but in the way they shape and constitute an ongoing relationship, and in what they reflect about the unseen life of the speaker. Parents know that what they tell children is important, not only in conveying information and fostering understanding, but in expressing expectation, approval and pride, which creates an environment in which the developing selfhood of the child takes shape. Outside family settings, working people watchful of careers and concerned over such matters as advancements and deadends, promotions and layoffs, reassignments and shifting responsibilities, salaries and working conditions know that what they say and what they hear affects them in ways having nothing to do with verbal accuracy. And similar insights have long been the stock-in-trade of Madison Avenue and political handlers, and are the basis of arguments by modern feminists who want to censor pornography or change the character of the workplace.

\textsuperscript{150} If friends arrange to meet at the theater, each understands that he has invited the other's reliance, and both are likely to show up simply to "keep their word." Failing to appear would likely cause inconvenience, require explanation, and perhaps sow misunderstanding or mistrust. However, no one would seriously consider "legal remedies" in this setting.
people like Professor James Boyd White have developed the thesis that words have meanings that transcend their assertive aspect.\textsuperscript{151} I think courts and lawyers at least sense the possibility that something more than asserting happens in many cases and they strain for reasons to conclude that statements are not assertions, even when they obviously are, but they lack the professional vocabulary to describe what they sense. Fourth, I think the performative aspect of statements is usually not significant enough to justify nonhearsay treatment, which makes the failure to come to grips with this argument somewhat understandable.

In part because the problem of indirect use of remote statements is truly hard, courts sometimes cut through it by taking extreme positions—adopting the narrow-gauge view that indirect use never involves hearsay, or the overbroad view that it always does. Neither view is right, and each comes from formalisms and sometimes misreading history.

There are at least three ways to reach the narrow-gauge position that indirect use never involves hearsay. One invokes a silly formalism that the term “assertion” does not include questions and, perhaps, imperatives.\textsuperscript{152} This oddity comes from the dictionary and embodies the idea that “assertion” means a strong claim that something is so. Taken where it leads, it makes the last words Shakespeare gave Caesar nonhearsay evidence that Brutus was among his assailants. This approach has nothing to commend it—not common sense, nor history, nor legislative intent nor policy.

The second way to reach the narrow-gauge position involves the ancient formalism “implied assertion,” which once described all human behavior (both assertive and nonassertive) when offered for the two-step inference.\textsuperscript{153} Modern doctrine

\textsuperscript{151} See JAMES BOYD WHITE, JUSTICE AS TRANSLATION at xi-xii (1990) (stating that “little of what happens in any real utterance is reducible to the words uttered, … much lies in the gesture, in the relations between speaker and auditor”; language may be imagined as “a kind of dance, a series of gestures or performances, measured not so much by their truth-value as by their appropriateness to context”).

\textsuperscript{152} See United States v. Oguns, 921 F.2d 442, 448-49 (2d Cir. 1990) (finding that an incoming call asking whether the “apples” had arrived was not hearsay because an inquiry is not an assertion); United States v. Long, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990) (finding that telephoned inquiry asking whether Keith “still had any stuff” that Mike could pick up was not hearsay because any message conveyed by the questions was “merely incidental and not inten-
tional,” and the questions were “nonassertive”).

\textsuperscript{153} Baron Parke coined the term “implied assertion,” and used it to de-
does not treat nonassertive conduct as an “implied assertion” and hearsay, so some courts wrongly conclude that nothing that is an “implied assertion” can be hearsay and allow indirect uses to escape.\footnote{154}

The third route to the narrow-gauge position begins with misreading a comment by the Federal Rules of Evidence Advisory Committee. The Committee said assertive verbal conduct is not hearsay when offered to prove something other than the matter asserted, and some courts therefore conclude that indirect uses escape.\footnote{155} The conclusion, however, is a non sequitur because the Advisory Committee’s comment does not even purport to describe how broadly to construe “matter asserted.” Worse, the suggested reading is forced, assumes the framers only dimly understood the subject, and ignores the larger message that intent is the key.\footnote{156}

Oddly enough, the notion of “implied assertion” has also
been drafted in support of the overbroad view that verbal behavior is *always* hearsay. While the modern doctrine does not embrace an "implied assertion" read into nonassertive conduct, Rule 801 still gives courts enough room to conclude that it embraces every "implied assertion" found in verbal behavior. In a difficult pre-Rules case that could be decided the same way today, one court resorted to this overbroad notion in concluding that the behavior of conspirators in planning a cover-up for murder was hearsay when offered to prove an arrested member of the group did the deed, even though nobody actually said so, directly or indirectly.\(^1\)

As a critic who rejects these extreme positions and doubts the problem can be solved by tests or redefinitions, I owe it to anyone who has read this far to say what I think we should do. First, we need to think about hearsay in a new way, to recognize that it is radically incomplete as a scheme for analyzing what people say because it focuses on statements in their assertive aspect, not on statements in their performative aspect. When performative and assertive aspects both support the point to be proved, conventional understanding of hearsay becomes incoherent, because it asks us to classify a statement as either hearsay or nonhearsay when it is both.

The eviction notice to Carlos Almaden at 600 Wilshire Drive\(^2\) makes the point. The landlord does assert that Almaden lives there, but describing the notice as an assertion captures only a piece of what is going on, as the reviewing court clearly sensed but did not quite know how to say in concluding that it was not hearsay. In its performative aspect, the notice commences eviction (begins to throw the fellow out), so a court that stops at the conclusion that the notice is an assertion is excluding both an assertion and an action reflecting belief, hence the fact believed—claiming for the hearsay doctrine more than its due. The phone calls inquiring after drugs\(^3\) or trying to place bets are similar in nature, since they are not only assertions that the callers want drugs and understand from prior

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157. *See* United States v. Pacelli, 491 F.2d 1108, 1115-18 (2d Cir.) (holding that a planning session, in which conspirators discussed a killing after the arrest of the alleged murderer and planned to dispatch a second member of the group to Florida to hide out, evidenced an "implied assertion" that the arrested person did the deed), *cert. denied*, 419 U.S. 826 (1974).

158. *See supra* note 133 and accompanying text; *see also* United States v. Singer, 687 F.2d 1135, 1147 (8th Cir. 1982), *rev'd on other grounds*, 710 F.2d 431 (8th Cir. 1983), *cert. denied*, 479 U.S. 883 (1986).

159. *See supra* notes 133, 152.
dealings that drugs are to be had, but are attempts to purchase drugs at the number dialed. In each situation, a lawyer would be reasonable to ask for a chance to cross-examine, but we crossed that bridge in excluding nonassertive conduct from the coverage of the hearsay doctrine.

Second, recognizing the performative aspect of a statement does not allow an end-run around the hearsay doctrine. Often this aspect is trivial or does not support the desired conclusion, so it does not count in favor of admitting the evidence. The letters from Walters to his sister and fiance, for example, should be viewed as hearsay when offered to prove any and all of the points important in the Hillmon case—his intent to go west with Hillmon and the fact that he and Hillmon met and discussed the plan and agreed to go together, which in aggregate support the inference that the two did set out together. Those letters, of course, have performative aspects. By writing in an apparently earnest and forthright vein, Walters tried to keep up good relations with his sister and nourish his relationship with his fiance. The letters in their performative aspect support the inference that Walters cared about these women in his life, that he had cordial relations with them as well as prior contacts and understandings. But to draw the inference that Walters met Hillmon and intended to go west we must believe what he said. I have suggested already that there is much reason to do so, and a hearsay doctrine that found room to admit these letters for all purposes would not be a bad thing, but the point here is that the performative aspect would not suffice to admit the letters to prove the points important in the Hillmon case.

To look for a moment at a truly difficult case, consider again the arrested defendant who tells his colleague, "I didn't tell them anything about you." What are the performative aspects of these words? Surely they are a gesture of solidarity in the face of difficulty. Perhaps they are an offer or commitment of mutual cooperation—"I won't tell them what I know about you if you won't tell them what you know about me." Viewed in either light, these are performative statements whose probative value does not depend entirely on the truth of their verbal content. Does such a gesture or offer support the inference that the second fellow is guilty of the crime? I think it does, although not strongly. It is possible that if the second man was innocent, the first would still feel the need to make the gesture

or offer, as arrest spells trouble for innocent people as well as guilty ones. Still, it seems far more likely that the first would behave as he did if he thought the second was guilty of something. But probative worth seems marginal, and a court that recognized these possibilities might exclude the utterance as potentially misleading and confusing under Rule 403.

It would be possible to redefine hearsay to embrace all assertive behavior offered for the two-step inference, or insist that it rise or fall by qualifying or failing to qualify under standard exceptions. But doing so would once again claim more for the doctrine than its due, and amounts to an attempt to shoehorn a three-dimensional reality that includes saying things, doing things, and saying and doing things at once, into a two-dimensional doctrine that contemplates only the saying or the doing but not the two combined. It is wiser to add a dimension to doctrine than to try to subtract one from reality.

Lastly, although this conclusion is only tentative, recognizing the performative aspect of statements may help dispose of cases that can escape the hearsay doctrine only because the point to be proved was apparently on the mind of the declarant but not embraced by his expressive or communicative intent. If the performative aspect of the statement, “I didn’t tell them anything about you,” does not support an inference of guilt, all that remains is the assertive aspect. It is possible to view the statement as an intentional expression or communication of the fact of guilt, and assume that the speaker momentarily forgot the police were listening,\(^{161}\) or as a statement that reveals a thought on his mind that he did not intend to express or communicate.\(^ {162}\) Either way, viewing these assertive aspects of the statement as critical to its evidential use makes it hearsay. In the actual case, the court itself concluded that the statement was hearsay, and this result is clearly defensible.

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161. See Krulewitch v. United States, 336 U.S. 440, 441-42 (1949) (finding statement by one arrested woman to another, that “it would be better for us two girls to take the blame than Kay” because “he couldn’t stand to take it,” was hearsay when offered to prove Kay’s guilt because it “plainly implied” as much).

162. In the case that produced this example, the court took this second approach. It said the statement was hearsay because offered to prove “an assumed fact” (guilt of the colleague) that it “implied,” and apparently the court meant “imply” in the weak sense of suggesting, even though the declarant did not intend to say as much. See United States v. Reynolds, 715 F.2d 99, 103 (3d Cir. 1983).
CONCLUSION

The promulgation of the Federal Rules did not put an end to the talk about reforming hearsay doctrine, nor should it. Modern reform movements attempted to simplify doctrine and admit more hearsay. These movements emphasized the intelligence of lay factfinders and challenged simple accounts that explain the doctrine by reference to the need for cross-examination and explain the exceptions by reference to trustworthiness and necessity.

In the age of the Federal Rules, post-modern accounts recognize that the problem presented by hearsay is more complicated, and the underlying concerns more numerous and nuanced. The common sense of lay factfinders in conducting the affairs of everyday life is not a compelling argument for admitting hearsay freely, and serious process-based concerns are also at work. True accounts of hearsay also recognize the risks of misreporting and fabrication, and the problems of surprise at trial and broad judicial discretion. They also give weight to factors such as the likelihood that remote statements will be discovered and investigated before trial and the reduction in reporting risk that occurs when a statement is written. Post-modern reform proposals should take into account the complexity in underlying concerns. Both Swift's foundation fact approach and Park's notice-based modified rule of preference for civil cases do so. Both proposals merit serious consideration.

The problem of indirect uses of remote statements lies at the heart of hearsay doctrine. The problem is endemic, so long as the hearsay doctrine applies to assertions but not nonassertive conduct. A key to better understanding, and better resolution of the cases, is to recognize that statements often have important assertive and performative aspects, and can be both hearsay and nonhearsay when offered for a single purpose. Treating them as nonhearsay seems reasonable only when the performative aspect is significant.