

1986

Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson, The

Roger Park

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Park, Roger, "Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson, The" (1986). *Minnesota Law Review*. 2262.
<https://scholarship.law.umn.edu/mlr/2262>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson

Roger Park*

In a recent article,¹ Professor Charles Nesson offered an unorthodox explanation for the existence and structure of the rules excluding hearsay evidence. In his view, the hearsay rules have evolved because they promote the stability of verdicts by ensuring that hearsay declarants will not appear after a trial at which their statements have been admitted and recant their statements. If accepted as valid, Professor Nesson's thesis would radically alter thinking about the hearsay rule. In my view, however, his thesis is fundamentally flawed, and other explanations for the persistence of the hearsay rule are more convincing. This Article will first examine these other explanations for the exclusion of hearsay and then evaluate Nesson's theory.

The conventional explanation for the exclusion of hearsay centers on the danger of admitting evidence that has not been tested for reliability. Unlike courtroom witnesses, hearsay declarants have not testified under oath, in the presence of the trier of fact, and subject to cross-examination. These courtroom safeguards have the dual effect of encouraging witnesses to be accurate and of exposing defects in their credibility. Cross-examination is a particularly valuable safeguard because of the opportunity it provides to test credibility by exploring weaknesses in a declarant's memory, perception, narrative ability, and sincerity. The fundamental flaw of hearsay evidence is that the adversary has not had the opportunity to cross-examine the out-of-court declarant.²

* Professor of Law, University of Minnesota Law School. I wish to thank my colleagues Daniel Farber and Donald Marshall for their helpful comments on earlier drafts of this Article.

1. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

2. See, e.g., G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 159-60 (1978); 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1362, at 7 (J. Chadbourn rev. 1974). The theory that the absence of cross-examination makes hearsay inferior to other evidence explains why courts should not

Wigmore tried to show that the lack of opportunity to test reliability with cross-examination was the *sole* basis for the hearsay ban.³ Nonetheless, judges and lawyers have advanced a variety of other reasons for excluding hearsay.⁴ Some have focused not on the unreliability of the out-of-court declarant but on the unreliability of the witness who reports the hearsay statement in court—a witness who is, of course, subject to cross-examination. An in-court witness who reports a hearsay statement is difficult to discredit;⁵ lawyers and witnesses may therefore be tempted to fabricate hearsay evidence.⁶ Concern

lightly permit the substitution of hearsay declarations for live testimony. It does not explain, however, why they should exclude hearsay even when cross-examination is impossible because the declarant is unavailable. In these circumstances, it would seem wiser to admit hearsay for what it is worth than to discard it because it is weaker than courtroom testimony. At least in jury trials, however, one can argue that hearsay should still be excluded because the absence of cross-examination makes the evidence difficult to evaluate and the jury may therefore give it undue weight. See Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 335 (1961). The persistent failure of lawmakers to create a general exception for hearsay statements by unavailable declarants may, of course, be attributable to concerns other than the absence of cross-examination, for example, concern about fraud by the in-court witness. See *infra* notes 5-6 and accompanying text.

3. See 5 J. WIGMORE, *supra* note 2, § 1362, at 7 ("the essence of the Hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination"). Wigmore disparaged jurists who said that hearsay statements should be excluded because the in-court witness might report them incorrectly or because admission of hearsay might lead to fraud by cataloguing quotes from their opinions under the heading "Spurious Theories of the Hearsay Rule." *Id.* § 1363, at 10.

4. See, e.g., G. LILLY, *supra* note 2, at 159-60; 5 J. WIGMORE, *supra* note 2, § 1362, at 10-12.

5. See, e.g., *Coleman v. Southwick*, 9 Johns 45, 50 (1812) (Kent, C. J.) ("A person who relates a hearsay, is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author."). One might add that were hearsay freely admissible, the witness who wanted to concoct a hearsay statement would be free to choose a time and place at which no one was present but the witness and the supposed declarant.

6. See, e.g., *Ellicot v. Pearl*, 35 U.S. (10 Pet.) 412, 436 (1836) (Story, J.) (besides lacking an oath and cross-examination, the fault of hearsay is "that it is peculiarly liable to be obtained by fraudulent contrivances"); *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 296 (1813) (Marshall, J.) (referring to the "frauds which might be practiced" in the absence of the hearsay rule); *Englebreton v. Industrial Accident Comm'n*, 170 Cal. 793, 798, 151 P. 421, 423 (1915) (indicating concern about possible fraud in the absence of the hearsay rule); *Report of Committee on Administration of Justice on Model Code of Evidence*, 19 CAL. ST. B.J. 262, 274-75 (1944) ("[W]hen the self-interest which actuates parties to litigation and their friends and witnesses is considered, the chance of perpetration of actual fraud by either or both parties equals, if it

about fabrication embraces, but goes beyond, the desire to promote accurate fact-finding, because perjury is a mischief whether it affects fact-finding or not. The in-court witness may also be more vulnerable to innocent mistake when describing statements than when describing other observations and hence may unintentionally present misleading evidence to the trier of fact.⁷

The free admission of hearsay could have other undesirable effects. Unreliable hearsay evidence might furnish a peg on which a lawless jury, though disbelieving the evidence, could hang a verdict based on sentiment or bias.⁸ Abolition of the hearsay rule might hamper the speedy disposition of weak cases, because the effectiveness of the motion for summary judgment would be undermined if affiants could successfully defeat the motion with hearsay evidence. Free admission of hearsay might also waste time and resources by opening the door to evidence that is both low in probative value and costly to rebut.⁹

The desire of lawyers to protect their professional role may also help explain opposition to the free admission of hearsay.

does not exceed, the chance of inaccuracy that would be inherent in hearsay testimony of truthful witnesses.”).

7. See, e.g., *Report of Committee on Administration of Justice on Model Code of Evidence*, *supra* note 6, at 274 (1944). After first noting that the accuracy of hearsay statements cannot be tested by cross-examination, the report continues:

But the real objection goes deeper. If cross-examination were to be done away with entirely and the truth of an issue were to be determined wholly upon the direct examination of witnesses produced by each party, still we would be as strongly opposed to the proposed rule. We believe that experience has shown that, laying aside entirely questions of perjury, corrupt motives or interest in one party or the other, that one of the most common occurrences is for one man to misunderstand the statements or declarations of another.

Id.; see also E. CLEARY, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 245, at 727 (3d ed. 1984) (“It seems probable that the reporting of words spoken is subject to special dangers of inaccuracy beyond the fallibility common to all reproduction from memory of matters of observation, and this seems a substantial danger in the admission of hearsay.”) (footnote omitted) [hereinafter cited as MCCORMICK]; cf. Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 13-14, 19 (noting dangers of mistransmission).

8. Cf. Hart & McNaughton, *Some Aspects of Evidence and Inference in the Law*, in EVIDENCE AND INFERENCE 56 (D. Lerner ed. 1958) (one reason for the hearsay rule is to “prevent errant juries from basing an essential finding upon the slender reed of hearsay evidence”).

9. See Weinstein, *supra* note 2, at 336. Although favoring a radical liberalization of the hearsay rule, Weinstein recognized trial convenience as one argument that could be made in favor of excluding hearsay. *Id.*

Bar groups repeatedly have expressed the fear that the free admission of hearsay would make trial preparation more difficult and would increase the danger of unfair surprise at trial.¹⁰ Relaxing the hearsay rules would alter the lawyer's professional role in other ways: documentary evidence would become more important, sometimes replacing the drama and excitement of live testimony; there would be less opportunity to exercise skills of cross-examination; and judges would have more discretion and stronger control.¹¹ Criminal defense attorneys and other lawyers concerned about the rights of criminal defendants may also fear that abolition would shift the balance of advantage to the prosecution, and that it would encourage unscrupulous tactics by police investigators because witness statements taken by them would have much greater importance.¹² Finally, lawyers who have mastered the hearsay rules have acquired a valuable and exclusive skill at the cost of a large intellectual investment; fear of losing this investment may make them less receptive to change.

10. See authorities cited *infra* note 49.

11. Most advocates of liberalization would not make hearsay admissible without limit, but would give the judge discretion to admit it in appropriate cases even if it did not fit a conventional exception. See, e.g., Weinstein, *supra* note 2, at 338-39; Younger, *Reflections on the Rule Against Hearsay*, 32 S.C.L. REV. 281, 293 (1980); *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, Rule 803(a) (1969), reprinted in 2 J. BAILEY & O. TRELLES, *THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS* 173 (1980). The fear of unbridled discretion has been one of the bar's primary reasons for opposing these proposals for broader admission of hearsay. See, e.g., *Proposed Rules of Evidence: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, Ser. No. 2 (Supp.), 93rd Cong., 1st Sess. 74 (1973) (statement of American College of Trial Lawyers) (opposing broad admissibility of hearsay and condemning increased judicial discretion) [hereinafter cited as *Proposed Rules of Evidence: House Hearings*]; *id.* at 91 (statement of Washington State Bar Association) (opposing proposed residual exceptions on grounds of increased judicial discretion); *id.* at 356 (statement of Colorado Bar Association) (opposing residual exceptions on grounds that they "inject too much uncertainty and discretion into the law of evidence"); C. WRIGHT & K. GRAHAM, 21 *FEDERAL PRACTICE AND PROCEDURE* § 5005, at 88 (1977) ("[I]t is now part of the lore that the [Model] Code failed because lawyers objected to the power left in the trial judge. While scholars and appellate court judges may be comfortable with the idea, most practicing lawyers are not 'Big Pots' who can count on the trial judge to be benign in his exercise of discretion.").

12. See *Proposed Rules of Evidence: House Hearings*, *supra* note 11, at 92-93 (statement of Frederick D. McDonald) ("the proposed rule will place enormous power in the hands of investigators"); R. LEMPert & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 521, 522 & n.42 (2d ed. 1982) ("the balance of advantage [under proposals to liberalize hearsay] lies with the state in criminal cases").

Although none of these considerations can explain all of the features of the hearsay rule and its exceptions, each has probably had some influence. The conventional focus on the reliability of the out-of-court declarant, for example, explains the absence of any restriction on the admission of statements that are not offered for the truth of the matter asserted.¹³ These statements are just as subject to dangers of fabrication, mistransmission, and surprise as any other; their easy admissibility suggests that once concern about the reliability of the declarant is removed,¹⁴ other concerns are not strong enough to bar admission. The absence of a general distinction between documentary and oral hearsay also suggests that fears of fabrication or mistransmission by the in-court witness are secondary considerations.¹⁵ Nonetheless, concern about the reliability of the in-court witness has had some influence. The limits on the scope of the exception for declarations against interest reflect this concern,¹⁶ and it may have influenced other exceptions, such as those displaying a preference for documentary hearsay over oral hearsay.¹⁷ It may also help explain why

13. Under the conventional definition, a statement is not hearsay if it is not offered to prove the truth of the matter asserted. *See, e.g.,* FED. R. EVID. 801(c).

14. Generally, when statements are not offered for the truth of the matter asserted, they do not depend for value on the credibility of the declarant. Hence there is no reason for concern about the declarant's reliability. Admittedly, in certain special situations, a statement not offered for the truth of the matter asserted will depend for value to some degree upon the declarant's credibility. For examples, see Park, *McCormick on Evidence and the Concept of Hearsay*, 65 MINN. L. REV. 423, 426-37 (1981).

15. *Cf.* 5 J. WIGMORE, *supra* note 2, § 1363, at 10-11 (it is "spurious" to assert that hearsay is excluded because of the danger of mistransmission by the witness reporting it, because the hearsay rule makes no general distinction between oral and written transmissions).

16. The long-term reluctance of courts to recognize an exception for statements against penal interest stems at least in part from "fear of opening a door to a flood of witnesses testifying falsely to confessions that were never made." MCCORMICK, *supra* note 7, § 278, at 823. The federal declarations against interest rule, FED. R. EVID. 804(b)(3), contains a corroboration requirement applicable to statements "tending to expose the declarant to criminal liability and offered to exculpate the accused." *Id.* It seems likely that this requirement was based at least partly on fear that in-court witnesses would manufacture evidence.

17. Most of the hearsay exceptions apply to out-of-court statements that exist in recorded form. *See* FED. R. EVID. 803-804. These exceptions manifest a preference for recorded statements over oral statements of a similar nature. The business records exception, for example, applies to recorded statements but not to oral business-related statements that otherwise meet the requirements of the rule. *See* FED. R. EVID. 803(6); *see also* MCCORMICK, *supra* note 7, at 873-74 ("usual statements of the rule" do not include oral reports). A pref-

lawmakers have not created a general exception for statements of unavailable declarants.¹⁸ A concern frequently voiced by trial lawyers—that free admission of hearsay will lead to surprise at trial—is reflected most vividly in the notice provisions of the residual exceptions to the hearsay rule.¹⁹ This concern also may have helped make certain exceptions that minimize the risk of surprise continuously palatable to lawyers who oppose liberalizing the hearsay rule.²⁰

Professor Nesson takes issue with these traditional rationales. He begins by evaluating one of the traditional justifications for the exclusion of hearsay: the danger that triers of fact, especially juries, will be misled by unreliable evidence. Nesson argues that this justification does not explain the rule. Jurors are capable of assessing the reliability of hearsay evidence, he says, and “they would undoubtedly be given this task if reliability alone were at stake.”²¹ He contends that “there must be another, distinct rationale for the hearsay rules.”²² He finds that rationale in the rules’ enhancement of the social acceptability of verdicts. After considering and discarding the view that exclusion of hearsay enhances the “*immediate*” acceptability of verdicts, he decides that the hearsay rules “may be grounded on the legal system’s concern for *continuing* acceptance of the verdict.”²³ In his view, hearsay and confrontation rules

prevent jurors from basing a verdict on the statement of an out-of-

erence for recorded statements suggests concern about problems of unintentional mistransmission of oral statements, a problem created by the inaccuracy of in-court witnesses, not out-of-court declarants.

18. If the unreliability of the declarant were the only concern, lawmakers might have been more willing to say that when the declarant is unavailable, hearsay evidence should be admitted for what it is worth because it cannot be replaced by the declarant’s in-court testimony. If perjury by the in-court witness is an independent concern, however, the exclusion of this evidence makes more sense. The danger of perjury is increased by the unavailability of the declarant (especially when the declarant is dead), and perjury is undesirable whether the trier can detect it or not. Thus, the hearsay rule may reflect in part the policies that were served by the Dead Man’s statutes. In a well-known statute creating a broad exception for statements of deceased persons, Massachusetts lawmakers included a requirement that the judge make a preliminary determination that the out-of-court statement was in fact made, a requirement that suggests fear of perjury by the in-court witness. See *infra* note 32.

19. See FED. R. EVID. 803(24), 804(b)(5) (requiring notice before trial of intent to offer a statement under a residual exception).

20. See *infra* notes 48-49 and accompanying text.

21. Nesson, *supra* note 1, at 1372.

22. *Id.*

23. *Id.* at 1373 (emphasis in original).

court declarant who might later recant the statement and discredit the verdict. Cross-examination of a declarant minimizes the risk that a verdict will be undercut by ensuring that the declarant cannot easily recant his statement. During cross-examination, the declarant commits his integrity to the accusation; subsequent recantation of the statement would constitute an admission of perjury.²⁴

Nesson suggests that the hearsay exceptions distinguish between kinds of hearsay according to the degree to which they threaten a verdict's stability. Thus dying declarations, despite their unreliability, are admitted because the declarant is not likely to appear later and recant.²⁵ Statements of party opponents are admissible, even if unreliable, because their admission does not endanger respect for verdicts. The party opponent has the opportunity to speak up at trial,²⁶ and to any argument that party might subsequently make, the answer would be, "Did you say that at trial, and if not, why not?"²⁷ Nesson explains the persistence of the excited utterance exception in a similar fashion. Although excited utterances are unreliable, verdicts based upon them are socially acceptable and stable because a declarant who later recanted an excited utterance would not be believed.²⁸ The recantation would occur after the declarant had learned of the significance of the statement in litigation, and would hence be suspect.²⁹

24. *Id.*

25. *Id.* at 1374.

26. Actually, though this opportunity will no doubt ordinarily be present, the admissions rule does not require that it be. The party admission is admissible even if the party who made it is unavailable for trial. *See* FED. R. EVID. 801(d)(2).

27. Nesson, *supra* note 1, at 1375.

28. *Id.*

29. In 1980, the *Harvard Law Review* published a student note expressing similar views. *See* Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786 (1980). After first attempting to demonstrate that the hearsay rule can not be justified on grounds that it excludes evidence that is unreliable or evidence that the jury might misuse, the note expresses the opinion that the rule against hearsay has endured because it enhances the social acceptability of verdicts. According to the note, it does so in two ways:

First, the hearsay rules shield the system from possible embarrassment. Admitting hearsay generally creates the possibility that the declarant might later come forward to reveal that injustice resulted from the trier of fact's reliance on such evidence. Second, hearsay is distinctive in that its deficiencies can be observed readily by anyone outside the system. With other evidence, the jury functions as a "black box": its ability to observe demeanor, though limited in revealing truth, "justifies" deference to the jury's decision because the jury ostensibly has additional information that those absent could not possibly duplicate and those present could not fully communicate.

Id. at 1808 (footnotes omitted).

The first problem with Nesson's thesis is that fear of subsequent attacks on verdicts would better explain the admission than the exclusion of hearsay evidence. Nesson believes that in the absence of a hearsay rule, declarants whose statements had been put into evidence might appear after the verdict and recant, thus threatening the stability or acceptability of verdicts. Nesson overlooks, however, the danger that declarants whose statements were excluded as hearsay might appear, affirm their statements, and offer to testify at a new trial. Their challenge to the verdict's acceptability would be more serious, because their position about the facts would have been completely consistent.

In the situation postulated by Nesson, the recanting declarant appears after the verdict and says, "My first statement was false, and you used it in evidence; let's have a new trial so that I can tell the truth." In this situation the *admission* of hearsay threatens the acceptability of the verdict. Consider, however, the situation in which hearsay has been *excluded* and the declarant appears to challenge the verdict. In this situation, the declarant would be saying, "My first statement was true, but you would not hear it; now I am here in person and ready to testify to the facts, so let's have a new trial." The second situation seems more of a threat to the acceptability of the verdict than the first. If so, fear of the reappearing declarant should have led to the abolition, not the retention, of the hearsay rule.

Even if one assumes, however, that the declarant whose statement was admitted *does* present a greater threat to verdict stability than the declarant whose statement was excluded, it is highly unlikely that the architects of the rule were influenced to any appreciable degree by fear that declarants would challenge verdicts. If they were, then the rule has been designed even more irrationally than its severest critics have claimed. If the rulemakers actually had designed it to protect against recanting declarants, the hearsay rule would have the following two features.

First, all statements by deceased declarants would be admissible because the dead cannot return and threaten a verdict's stability by recanting a hearsay declaration. The hearsay rule does not, of course, have a general exception for statements of dead declarants. Whether the declarant is dead or alive is not even a factor to be considered under the majority of hearsay exceptions.³⁰ True, the death of the declarant is rele-

30. The 24 exceptions listed in Rule 803, as well as the party admission

vant to admissibility under Rule 804, but only as one of many forms of unavailability which, in conjunction with other requirements, can justify admission.³¹ If verdict stability were the purpose of the hearsay rule, death would be given special status.³² Instead, Rule 804's broader exceptions for unavailable declarants suggest that the drafters were not worried about returning declarants because the evidence was considered reliable.

Second, all statements by available declarants would be excluded. The declarant would be required to testify in court to protect the verdict from subsequent attack. The present hearsay rules are radically different, however. All of the most important exceptions, those described in Rule 803, permit statements to be entered in evidence whether or not the declarant is available. Of course, many out-of-court statements are routinely admitted as not being hearsay at all—whether or not the

and co-conspirator rules in Rule 801, apply whether the declarant is unavailable or not. FED. R. EVID. 801, 803. Cf. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirements*, 70 MINN. L. REV. 665 (1986) (examining when exemptions from the unavailability requirement should be recognized by courts).

31. See FED. R. EVID. Rule 804(b)(1)-(5). Actually, Rule 804(b)(5), the residual exception, does not functionally require unavailability, since its identically worded twin, Rule 803(24), dispenses with that requirement. See FED. R. EVID. 803(24).

32. Massachusetts and Rhode Island are the only states that have generally applicable exceptions for deceased declarants. Since 1898, Massachusetts has had a statute making statements of decedents broadly admissible in civil actions. The current version of the statute reads as follows: "In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay . . . if the court finds that it was made in good faith and upon the personal knowledge of the declarant." MASS. ANN. LAWS ch. 233, § 65 (Law. Co-op. 1974). See also R.I. GEN. LAWS § 9-19-11 (1985) (declarations of a decedent made in good faith are not inadmissible hearsay).

The Massachusetts approach has not spread, although a few states have enacted much more limited statutes for cases involving suits against the estates of decedents. See 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1576 (J. Chadbourn rev. 1974 & Supp. 1985). Subsequent attempts to codify a similar principle have made the statements of *unavailable* declarants broadly admissible, a principle that is not strictly in keeping with the verdict stability thesis because the temporarily unavailable declarant might return and challenge the verdict. See, e.g., MODEL CODE OF EVIDENCE 503(a) (1942); UNIF. R. EVID. 804(b)(5) (1974); FED. R. EVID. 804(b)(2) (Proposed Draft 1975). These proposals have met with either total failure (in the case of the Model Code and the proposed federal rule) or very limited success. See 5 J. WIGMORE, *supra* note 2, § 1577; MCCORMICK, *supra* note 7, § 326. At any rate, neither they nor the Massachusetts statute were justified on grounds that they protected against recanting declarants, but on grounds that hearsay is reliable enough to be admitted when no better evidence is available. See 5 J. WIGMORE, *supra* note 2, §§ 1576-77.

declarant is available and whether or not a danger of subsequent attack exists.

If the developers of the hearsay rule were concerned about the recanting declarant, they also would have been concerned about the repudiating declarant—the declarant who steps forward after trial and denies having made the statement that was admitted into evidence. This declarant would seem to pose as a great a threat to the stability of verdicts. Yet the hearsay rule shows no concern whatsoever about the repudiating declarant. If it did, there would be some limits on the admissibility of out-of-court statements that, under conventional analysis, are not hearsay at all. For example, suppose that in a prosecution for intentional tax evasion, the government offers evidence that the defendant was warned by his tax advisor that his prize income was taxable. The government offers the out-of-court statement by the tax advisor into evidence to show the defendant's guilty knowledge. The witness who testifies about the statement is the defendant's former partner, who is cooperating with the government in return for leniency. The tax advisor is available but is not called by the government. Under current law, the statement would routinely be admitted as nonhearsay.³³ The traditional explanation for admission would be that cross-examination of the advisor is unnecessary because the trier's use of the evidence does not require reliance on the advisor's credibility. Cross-examining the advisor to reveal defects of memory, perception, narration, or sincerity would serve no purpose; the advisor's statement gave the defendant guilty knowledge whether or not there were hidden defects in the advisor's credibility. As to whether the advisor's statement was in fact made, and whether it was made in a serious and outwardly credible fashion, cross-examination of the in-court witness who heard the statement is considered sufficient.

That defects in the declarant's credibility pose no danger does not, however, eliminate the danger of subsequent attacks on the verdict. The tax advisor may later say that he never discussed prize money with the defendant, or that he did but gave no warning. His word may be more credible than that of the in-court witness, who testified under the pressure of an offer of leniency. Moreover, the declarant was available and could have

33. See G. LILLY, *supra* note 2, at 165; see also *United States v. Kutas*, 542 F.2d 527, 528 (9th Cir. 1976) (a statement giving the defendant guilty knowledge of an escapee's fugitive status is not hearsay), *cert. denied*, 429 U.S. 1073 (1977).

been called. Calling him to testify under oath would, according to the verdict stability thesis, have protected the system against effective recantation. Yet the specter of the reappearing declarant has not caused lawmakers to place any conditions upon the admissibility of statements that are not offered to prove the truth of the matter asserted.

Perhaps Nesson did not mean to advance the danger of recantation as the sole basis for excluding hearsay. Certainly, however, his article indicates that it is a more important rationale than the traditional one of protecting the jury from unreliable evidence. The structure of the rule and its exceptions, however, suggest that fear of recantation has not been a significant force in shaping the rule at all. If the rulemakers were really concerned about recantation, the hearsay rule would provide that when a declarant is available his testimony must be offered instead of his out-of-court statement, whether the statement falls under an exception or not or, for that matter, whether it would be considered hearsay or not. At the very least, the rules would provide that the declarant must be called when the out-of-court statement is important evidence and when the testimony of the declarant could be obtained without undue burden.³⁴ Yet the hearsay rule contains no "best evidence" requirement. Statements offered for some purpose other than proving the truth of the assertion are admissible no matter how easily the declarant's testimony could be obtained. The same is true for testimony admissible under Rule 801 as a personal admission or the admission of an agent or co-conspirator³⁵ and for testimony admissible under the twenty-four hearsay exceptions set forth in Rule 803.³⁶ Only a few relatively insignificant exceptions to the hearsay rule actually require un-

34. Even if lawmakers were reluctant openly to base changes in the hearsay rules upon fear of recanting declarants, one would expect to have seen more progress toward a rule requiring available declarants to testify if that fear were a substantial unconscious (or conscious but concealed) motive. The rule could be justified on quite different ostensible grounds. See, e.g., Stewart, *supra* note 7, at 24 (supporting a requirement that available declarants be required to testify on the conventional ground that hearsay is unreliable). One would also have expected the Massachusetts statute admitting statements of deceased declarants, see *supra* note 32, to have achieved wider acceptance. It, too, could have been supported on grounds other than the verdict stability thesis if that thesis were too embarrassing for lawmakers to acknowledge or to allow to rise to consciousness. See *id.*

35. See FED. R. EVID. 801(d)(2).

36. See FED. R. EVID. 803.

availability as a condition of admission.³⁷

Finally, Nesson's attempt to support his verdict stability thesis by showing that the exceptions to the hearsay rule were fashioned with the recanting declarant in mind is unconvincing. To be sure, the dying declarations exception lends itself to an argument that the real purpose of the exception is not to let in reliable statements, but to do something else. Nesson argues that "something else" is to let in evidence where there is no chance that the declarant will reappear and recant.

The modern dying declarations exception does not require that the declarant actually die, however, so he or she might conceivably appear and recant. Nesson handles this difficulty by saying that the federal rulemakers took the "articulated logic" of the exception "perhaps too seriously."³⁸ In other words, the rulemakers were not privy to the real reason for the hearsay rule. They thought that the conventional justifications were the real justifications. One wonders whether any of the creators and defenders of the hearsay rule were privy to its real goal—and if they were not, how the rule could have a real goal different from its articulated goal.³⁹

Nesson may have been concerned with this problem himself, because at one point he states that he is "not asserting that judges have designed or applied court rules and procedures with the conscious objective of promoting acceptable verdicts."⁴⁰ He notes that rules that evolved without "conscious design" may now serve important objectives that are not "consciously appreciated."⁴¹ Nonetheless, his hearsay discussion is not intended merely to point out that the hearsay rule has unanticipated effects. His discussion clearly assumes that there is a causal connection between the value he posits—stability of verdicts—and the structure of the hearsay exceptions. Nesson fails, however, to show any mechanism by which this value has shaped the exceptions. The hearsay rule is not an organism that exists and changes without the intervention of human lawmakers pursuing human goals. Conceivably, the creators, revisers, and defenders of the hearsay rule unconsciously wor-

37. See FED. R. EVID. 804(b)(1)-(4). I have excluded 804(b)(5) from my count of exceptions for the reason stated *supra* note 31.

38. Nesson, *supra* note 1, at 1374 n.56.

39. See Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 927 (1986) (something is wrong with an interpretation so clever that it never would occur to the speaker).

40. Nesson, *supra* note 1, at 1369.

41. *Id.*

ried about the problem of the recanting declarant, although they stated different reasons for excluding hearsay. It seems incredible, however, that this specter haunted lawmakers for so long without their recognizing and discussing it. For that matter, it seems odd, if the specter has had so much influence on our law, that it has been so little noticed in any quarter—and that our courts, which permit quite a bit of hearsay to be admitted, have never produced a notable case in which the acceptability of a verdict has been challenged by a recanting declarant.

I think that the explanation for the persistence of the dying declarations and excited utterances exceptions is probably much more simple and pedestrian than Nesson's theory.⁴² Originally the rulemakers probably *did* consider dying declarations and excited utterances reliable—in the case of dying declarations, because no one would want to meet his Maker with a lie upon his lips,⁴³ and in the case of excited utterances, because it was thought that excitement temporarily suspended the capacity for fabrication.⁴⁴ Changing ideas about religion have undermined the rationale of the dying declarations exception. Twentieth-century research about defects of memory and perception has undermined the rationale of both exceptions by raising doubts about the accuracy of statements made near death or in excitement.⁴⁵ Perhaps, also, changing ideas of human nature have shifted concern away from the danger of fabrication to dangers of defective memory and perception.⁴⁶ Therefore, it would seem logical to eliminate these exceptions and to exclude this testimony. Yet the academic lawyers who

42. See Farber, *supra* note 39, at 929 (advocating abandonment of brilliant, "paradigm shifting" work in favor of more pedestrian "normal science").

43. See, e.g., *Rex v. Woodcock*, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789) (for the dying person, "every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth"); J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 804(b)(2)[01] (1985) (the exception for dying declarations originally rested on religious beliefs); Quick, *Some Reflections on Dying Declarations*, 6 HOW. L.J. 109, 111 (1960) ("the dying declarant, knowing he is about to die, would be unwilling to go to his maker with a lie on his lips"). A more secular justification is that a dying person lacks a motive to fabricate. See 5 J. WIGMORE, *supra* note 2, § 1438, at 289.

44. See, e.g., *MCCORMICK*, *supra* note 7, § 297, at 855; 6 J. WIGMORE, *supra* note 2, § 1747.

45. See Hutchins & Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 436 (1928); Stewart, *supra* note 7, at 10; authorities cited in Nesson, *supra* note 1, at 1374 n.55.

46. Cf. Hutchins & Slesinger, *supra* note 45, at 435 (suggesting that emphasis by those who shaped the excited utterance exception on suspension of the capacity for fabrication was based on obsolete theories of mentalist psychology).

have involved themselves in hearsay reform have generally been more concerned with broadening admissibility than with restricting it. They have favored liberalization of the rules in a way that would radically increase the amount of evidence that is admitted.⁴⁷ They have not fully succeeded, but they have been willing to take what they can get, even if it means the perpetuation of exceptions whose rationale has decayed.⁴⁸ The procedural conservatives who have opposed liberalizing the hearsay rule have objected strenuously to the creation of broad new exceptions, but not to the perpetuation of established ones. Perhaps they still accept the original rationale of these exceptions. Perhaps, since those arguing against hearsay liberalization frequently advance the danger of surprise at trial as the reason for their opposition,⁴⁹ they do not find that danger sali-

47. See, e.g., J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 147-65 (1947) (describing remedial proposals and experiments); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 634 (1954) ("the rule excluding hearsay will eventually disappear"); E. MORGAN, MODEL CODE OF EVIDENCE 36-50 (forward), 217-24 (introductory note to hearsay chapter) (1942) (describing Model Code's expansion of the hearsay rules); 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 8(c), at 630-31 (P. Tillers rev. 1983) ("A complete abolition of the [hearsay] rules in the future is at least arguable, not merely in theory but in realizable fact."); 5 J. WIGMORE, *supra* note 2, §§ 1427, 1576 (advocating expanding the hearsay rules exception for dying declarations); Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 918-22 (1937) (increased admission of the hearsay rules would eliminate inconsistencies); Weinstein, *supra* note 2, at 342 ("The current trend is clearly towards a much freer admissibility of hearsay.").

48. This attitude is suggested by the advisory committee's note to Rule 803(2), which acknowledges criticisms of the rationale of the excited utterance rule but justifies perpetuating it simply on grounds that "it finds support in cases without number." FED. R. EVID. 803(2) advisory committee note. The advisory committee felt less precedent-bound when faced with the issue whether to expand the admissibility of hearsay instead of rejecting it. See, e.g., FED. R. EVID. 804(b)(2) (Proposed Draft 1973) (attempting to establish a broad exception for statements of unavailable persons).

49. See *Proposed Rules of Evidence: House Hearings*, *supra* note 11, at 74 (statement of American College of Trial Lawyers) (asserting that broad admissibility of hearsay will "make it impossible for a trial counsel adequately to prepare the case for trial since he will not and cannot know what evidence he will have to meet until it faces him in the courtroom"); *id.* at 290 (statement of District of Columbia Bar Association) (unfairness may result from surprise and a "novel offer" of hearsay evidence); H.R. REP. NO. 650, 93d Cong., 1st Sess. 5 (1973), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7079 (explaining Committee's deletion of residual exceptions on grounds that they would have had the effect of "injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial"). The final version of the residual exceptions met the surprise objection by requiring that notice be given before trial of intent to offer evidence under a residual exception. See FED. R. EVID. 803(24), 804(b)(5).

ent in the case of the dying declaration or the excited utterance.⁵⁰ Perhaps the trial lawyers among them, familiar with existing law and skilled in it, simply do not want to see it altered. I cannot prove any of these explanations, but any of them seem more probable to me than the thesis that they were unconsciously worried about recanting declarants.

As for the admissions rule, academic commentators have long recognized that it is not grounded in reliability.⁵¹ Even so, other theories explain the rule better than the verdict stability thesis. Perhaps one reason why opponents of free admissibility have tolerated the rule is that many of them are concerned about the danger of surprise at trial if hearsay is freely admitted,⁵² and that danger may not be as great when the statement of an attorney's own client, or client's agent, is offered as it is when the declarant's connection with the lawsuit is not known until trial. At any rate, the conventional explanations for the rule seem more powerful than the verdict stability thesis. Admissions can be seen as conduct of the party that contradicts the position taken in the pleading and which therefore ought to be brought to the attention of the trier of fact.⁵³ Alternatively, the admissions rule may be grounded in primitive ideas of fairness: the party made the statement and is stuck with it. A person cannot in fairness claim to have suffered from not being able to cross-examine himself, or claim that he is not credible except under oath.⁵⁴

50. In the case of the dying declaration, the party against whom it is offered is on notice, through the circumstances of the case, as to the identity of the possible out-of-court declarant and the likelihood of a statement. In the case of the excited utterance, the declarant must have been a witness to an exciting event that is relevant to the lawsuit and must have made a statement before the excitement subsided; thus the party against whom the statement is offered has a basis for inferring by whom, when, and where excited utterances might have been made.

51. See, e.g., MCCORMICK, *supra* note 7, § 262, at 775 ("no objective guarantee of trustworthiness is furnished by the admissions rule"); 2 E. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 266 (1961) (admissions are admissible upon the adversary theory of litigation and not upon the circumstances in which the statement was made). The advisory committee's note to Rule 801(d)(2) states that "[n]o guarantee of trustworthiness is required in the case of an admission." FED. R. EVID. 801(d)(2) advisory committee note.

52. See *supra* note 49.

53. See 4 J. WIGMORE, *supra* note 2, § 1048, at 4; Strahorn, *A Reconsideration of the Hearsay Rule and Admissions, Part II*, 85 U. PA. L. REV. 564, 573 (1937).

54. 4 J. WIGMORE, *supra* note 2, § 1048, at 4 (a party does not need to cross-examine himself).

One might also justify the admissions rule as a rule that is roughly based on reliability and on guarantees against misuse of evidence by juries. The ad-

Whether one agrees with these views or not, they probably had greater appeal to lawmakers than the complicated and ingenious case that Nesson makes for his explanation of the admissions exception. Unconscious motives need to be direct and primitive, not remote, contingent, and procedurally complex.

CONCLUSION

Despite their vastly different views about the purpose of the hearsay rule, Nesson and Wigmore share two attitudes toward hearsay analysis. Both are reductionists who refuse to recognize multiple bases for the hearsay rule, and both treat theories that fail to explain everything as if they explained nothing. To Wigmore, if a theory about why hearsay is excluded did not account for a feature of the hearsay rule, then it was "spurious."⁵⁵ Rejecting "spurious" explanations, Wigmore decided that lack of opportunity to test reliability with cross-examination was the sole basis for the hearsay rule.⁵⁶ Nesson, in turn, has rejected Wigmore's theory on grounds that it does not explain everything and has sought to find another single basis for the exclusion of hearsay.

No one objective can explain all of the features of the hearsay rule. As suggested earlier, a variety of considerations have shaped the rule and its exceptions. Distrust of statements by declarants who cannot be cross-examined has played an important role in shaping hearsay doctrine, but so have concerns about perjury or mistake by in-court witnesses, about surprise at trial, and about lawless juries, overreaching judges, and unscrupulous investigators. Professional selfishness and simple procedural conservatism probably have also played a part. The design of the hearsay rules and the legislative history of recent attempts at reform indicate that lawmakers have responded to these considerations, and not to Nesson's specter of the recanting declarant.

mission will often be against interest and hence will be more trustworthy than ordinary statements. Moreover, the party against whom it is offered will usually have the opportunity to produce the declarant at trial to rebut or explain the admission. These safeguards are not always present, but the admissions rule could be seen as a flat rule that does justice in most situations and that, for the sake of convenience, certainty, and clarity, has no exceptions for other situations.

55. See 5 J. WIGMORE, *supra* note 2, § 1363, at 10.

56. See *id.* § 1362, at 7.