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SUBSTANTIVE INFLUENCES ON THE USE OF EXCEPTIONS TO THE HEARSAY RULE†

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To the extent that the end sought is the disposition of the particular case according to the applicable rule of substantive law, the correct or better answers to questions of fact *should* be given.¹

While legal scholars may disagree on the primary purpose of the trial,² most probably would agree that whether a tribunal seeks "fairness" or

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¹ Michael and Adler, *The Trial of an Issue of Fact: I*, 34 COLUM. L. REV. 1224, 1231 (1934).

² The primary purpose of the trial is held by some to be an investigation of the truth. Michael and Adler, *supra* note 1, at 1228-31. Others, however, declare that the purpose of the trial is to settle disputes fairly. For example, Professor Kenneth Culp Davis has observed:

Our society, including especially the legal profession, is wedded to trial procedure for finding disputed facts, and the courts have no occasion to reject what seem to be the democratic desires. The objective is accordingly fair hearing, not accuracy. Indeed, the legal system often affirmatively reaches for something other than the truth. A jury is instructed that a defendant it believes guilty should be found not guilty unless it finds guilt beyond a reasonable doubt. The instruction is inconsistent with accuracy, and so is the extra burden of proof in a deportation case under *Woodby v. INS*, 385 U.S. 276 (1966). When conclusive evidence has been illegally obtained, the known truth is rejected. On nonfactual issues, the objective often is not truth; great decisions are often policy-motivated departures from historical intent embodied in a writing a court or agency is interpreting. K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE, § 10.4, at 319 (2d ed. 1979).

It is probably simplistic to assume that an emphasis on either "truth" or "fairness" as the primary goal of the trial system necessarily excludes the recognition or desirability of the other aim. Cf. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948) [hereinafter cited as Morgan, *Hearsay Dangers*] ("Certainly a lawsuit is not, and cannot be made, a scientific investigation for the ascertainment of truth, but rather is, and must continue to be, a proceeding for the orderly settlement of a dispute between litigants. But just as certainly its objective must be to discover a basis for that settlement which is as close an approximation of the truth as is possible in the circumstances in which the court has to function." *Id.* at 184-85).

"truth," its results should, in *most* instances, settle disputes according to the substantive law.³ To realize this goal, the rule governing the admissibility of hearsay, like all rules of evidence and procedure, is designed to assist in the settlement of disputes according to the substantive law.⁴ Thus, the general ban on hearsay operates properly when it keeps the Trier from considering proof that would defeat the aim of dispute settlement in accordance with the substantive law. Exceptions to the hearsay rule also serve the end of proper dispute settlement by allowing the Trier to gain knowledge of hearsay necessary to implement the substantive law.⁵

That both the general rule banning hearsay *and* the exceptions allowing in some hearsay evidence ultimately serve the same end may seem counter-intuitive to the student who narrowly focuses on the usual rationales for the ban

³ While a detailed treatment of jurisprudential thought is beyond the scope of this article, the statement in the text seems axiomatic. Some of those who might argue for "fairness" as the primary aim of dispute settlement would presumably also argue that in those few instances in which the substantive law is itself perceived as "unfair," the result of a given case should not conform to that law. Manipulation of results might presumably be accomplished by manipulating a rule of procedure to accomplish a "fairer" result than that commanded by the substantive law (and the latter manipulation might, of course, undermine the substantive law itself). An interesting discussion of cases which take this approach is found in Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 722-40 (1975).

⁴ This article does not attempt to set forth any new theory about the relationship between laws of procedure, evidence and substance. Rather, old learning and commonly held beliefs form the basis of much of this article. These principles, however, are rearranged and reconsidered for the purpose of stimulating further research, discussion and debate. To the extent that the ideas expressed herein are commonplace, no attempt is made to cite every source in which the same or similar ideas may be found.

This article also does not attempt to define the terms "substance" and "procedure" in any novel way, nor does it purport to choose among the many definitions that have been proposed. An understanding of the discussion herein requires only the usual intuitive meanings of these terms. "[R]ules of substantive law govern the rights and duties of men in their ordinary relations with each other or the body politic, while procedural rules govern the means whereby these rights may be maintained or redressed." F. JAMES, JR., CIVIL PROCEDURE § 1.1, at 2 (1st ed. 1965). See also *Hanna v. Plumer*, 380 U.S. 460, 474-75 (1965) (Harlan, J. concurring) (determining whether a Federal Rule of Civil Procedure or state law should govern the manner of service in a diversity suit). A rule may be properly characterized as substantive where it might "substantially affect . . . primary decisions respecting human conduct," *id.* at 475, and procedural where it has "no effect on primary stages of private activity." *Id.* at 477.

Further refinements, when necessary to an understanding of the text, are made expressly.

⁵ Profs. Michael and Adler argue that all adjective rules should serve this purpose. See Michael and Adler, *supra* note 1.

There is a dilemma here that in a few instances may be resolved when exceptions to the hearsay rule are created. Prof. Robert Cover put the dilemma succinctly in the context of a discussion of *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813). The plaintiffs in *Hepburn* were held in servitude. *Id.* at 294. They claimed descent from a free maternal ancestor and sought to introduce multiple hearsay under the exception for statements of pedigree to prove the fact. *Id.* The Supreme Court upheld a lower court ruling that the statement was inadmissible under the exception. *Id.* at 295. Prof. Cover observes that whether to relieve the plaintiffs of the problem of lack of proof by admitting the evidence involves "trading off the disutility of 'improperly' adjudicating someone a slave because no evidence save hearsay exists as to the freedom of an ancestor against the disutility of possible incorrect adjudications of freedom on the basis of unreliable evidence." Cover, *supra* note 3, at 731 (footnote omitted). Prof. Cover then observes in a footnote, "Insofar as the exceptions to the hearsay rule relate to rational goals, they are

and its exceptions. The usual rationales for exceptions almost always seem to conflict with the justification for the hearsay ban.⁶

Generally, the ban on hearsay is justified by reference to the need for adversarial cross-examination.⁷ While not perfect, cross-examination is the only means available for probing the accuracy of a witness' perception, memory, sincerity and narrational skills.⁸ This probing, in turn, has been justified by the assumption, somewhat verified by social scientists, that each person gathers and communicates impressions of the world around him in a unique fashion.⁹ Cross-examination allows the adversary the opportunity to

largely representative of this trade-off." *Id.* at 731 n.34. See also 5 J. WIGMORE, EVIDENCE § 1420, at 251-52 (Chadbourn rev. 1974) (suggesting that the trade-off is accomplished by reference to the "reliability" of the hearsay.) Examples of exceptions that were originally created with these trade-offs in mind are cited in note 26 *infra*.

In this article it is suggested that even if a rational trade-off was not made at the creation of exceptions (or if no special trade-off was contemplated when the exception was created) that for substantive policy reasons trade-offs must and, in some of the examples given, are being properly made on a case-by-case basis. A reading of the whole of Prof. Cover's article suggests agreement that such an approach by the courts is desirable.

⁶ See Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1794 (1980) [hereinafter cited as Note, *Theoretical Foundation*].

⁷ See, e.g., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 245, at 583 (2d ed. 1972); 5 J. WIGMORE, *supra* note 5, § 1362, at 3, § 1367, at 32-33; Morgan, *Hearsay Dangers*, *supra* note 2 at 183-85. While absence of the oath and demeanor observation are also normally cited as reasons for the general ban on hearsay, the contribution of these testimonial conditions to the accuracy of the fact-finding process may be questioned, MCCORMICK, *supra*, § 245, at 582-83; Morgan, *Hearsay Dangers*, *supra* note 2, at 179-83.

There is more than one way of defining hearsay. See, e.g., R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 340-51 (1977); MCCORMICK, *supra*, §§ 246-251, at 584-604; 6 J. WIGMORE, EVIDENCE § 1766, at 250-53 (Chadbourn rev. 1978); Morgan, *Hearsay Dangers*, *supra* note 2; Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974). A very interesting and instructive discussion of the differences in these commentators' definitions is found in Park, *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers*, 65 MINN. L. REV. 423 (1981).

In this article, the definition of hearsay used — one that emphasizes limits on the opponent's opportunity to cross-examine, is a definition that Prof. Park would undoubtedly characterize as a "declarant-oriented" definition. Park, *supra*, at 424. This definition is used because the author believes that a hearsay definition is most useful to the goals of the trial process when it serves as a mechanism for the express recognition of any limitation on the opportunity to cross-examine. Careful identification of such limitations serves to best insure an intelligent appraisal of the desirability and need for admitting a statement under an exception. A detailed explanation of the author's opinion on the matter is found in Bein, *Prior Inconsistent Statements: The Hearsay Rule*, 801 (d) (1) (A) and 803 (24), 26 U.C.L.A. L. REV. 967, 983-95 (1979).

⁸ For an explanation of these four hearsay dangers, see Morgan, *Hearsay Dangers*, *supra* note 2, at 185-88. See also Tribe, *supra* note 7.

Lie detectors, truth serums, and other similar devices, even if generally accepted as producing accurate results, apparently only probe the sincerity of the declarant. They cannot probe for honest inaccuracies in memory, narration and perception. Hypnosis (again, even if generally accepted as producing accurate results) assumedly only provides a means for reawakening forgotten perceptions. It could not provide any more certain means than cross-examination for probing inaccuracies in perception and narrational skills (and hypnosis might result in less certainty because of the increased risk of suggestion).

⁹ See E. LOFTUS, EYEWITNESS TESTIMONY (1979); Stewart, *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, and sources cited therein.

lay bare all the likely sources of error¹⁰ that originate in, or are affected by, the witness' peculiar mental processes.¹¹ Thus, when a witness' direct testimony is subject to searching cross-examination, the Trier is afforded the best possible opportunity to make a realistic assessment of the extent to which the witness' assertions reflect objective facts.

When the opportunity to cross-examine a testimonial assertion is limited in any way, the opportunity to provide the Trier with information necessary to reach correct results is also limited. By forcing the parties to present proof through live witnesses, subject to cross-examination, the ban on hearsay protects the integrity of the fact finding process.¹² Even the scope of the hearsay definition, which purposely excludes "operative facts," assists in this aim.¹³ To the extent that substantive results are made to turn on correct answers to questions of fact, therefore, the general ban on hearsay helps to assure decisions that dispose of cases in accordance with their substantive mandates.

Contrary to the rationale for the ban, however, exceptions to the hearsay rule allow into evidence a great deal of proof that is not capable of being cross-examined. In place of the opportunity to cross-examine, preliminary facts must

¹⁰ See *supra* note 8.

¹¹ See generally Stewart, *supra* note 9, at 22; Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741.

¹² See generally Bein, *supra* note 7; Tribe, *supra* note 7; Morgan, *Hearsay Dangers*, *supra* note 2.

¹³ "Operative facts" or "verbal acts" are those words to which the law assigns some legal significance (for example, words of agreement to form a contract). They are generally explained as not hearsay precisely "because the fact that they were spoken carries legal consequences," R. LEMPERT & S. SALTZBURG, *supra* note 7, at 342, or because use of the statement to prove the fact in issue, will not require any reliance upon the declarant's perception, memory, narrational skills nor sincerity, Morgan, *Hearsay Dangers*, *supra* note 2, at 197. See also MCCORMICK, *supra* note 7, § 249, at 588. Whatever the reason given, it is clear that the hearsay rule could not keep such statements out of the trial because that would defeat substantive laws.

It is interesting to note how the "assertion-oriented" or "declarant-oriented" definitions manage to exclude operative facts from the statements they classify as hearsay. (The quoted phrases are used with the meaning given them by Prof. Park, who presumably coined them. Park, *supra* note 7, at 424. Exclusion of some operative facts from an "assertion-oriented" definition apparently cannot be justified by the definition itself. *Id.* Presumably the real reason for the exclusion, therefore, is the substantive one.

On the other hand, operative facts can be deemed outside the scope of a "declarant-oriented" definition because none of the four hearsay dangers are involved in their use. It may be well to ask, however, why the "declarant-oriented" definition includes only *four* hearsay dangers. Since the definition is designed to protect cross-examination, protection of cross-examination presumably would be most complete if the definition recognized *every* utility of cross-examination. A fifth utility of cross-examination, not included as a hearsay danger, in the definition is the opportunity to elicit facts additional to those elicited by the proponent of the witness. 5 J. WIGMORE, *supra* note 5 at § 1368, at 36-39. While it might be argued that this is solely a discovery use of cross-examination, sometimes additional facts elicited on cross-examination will color or change the meaning of testimony given on direct, (e.g., "Yes, as I said on direct, I clearly saw the knife in the defendant's hand, but his hand was broken in three places so he couldn't clutch it very well."). If this fifth purpose of cross-examination were included, however, then presumably all out-of-court statements by anyone in a position to know anything about the litigation would be classified as hearsay. That would sweep "operative facts," the largest group of facts not otherwise defined as hearsay, into the declarant-oriented definition. The declarant-oriented definition, by not including this fifth purpose of cross-examination as a reason for classi-

be shown that a hearsay declaration comports with certain specified "circumstantial guarantees of reliability" and "necessity."¹⁴ These facts, in turn, usually are shown without examining the declarant. Indeed, the hearsay declarant often is not even available in court. Only a few exceptions require provision of some opportunity to cross-examine.¹⁵ Most afford the opponent of the hearsay no opportunity to present information to the Trier about the peculiar manner in which the declarant of the statement perceived, remembered and narrated the facts recited in the statement.¹⁶ In other words, the precise extent to which the hearsay statement reflects the objective facts (its absolute reliability) cannot be determined with any degree of certainty. The allowance of hearsay under an exception, therefore, seems inconsistent with the aim of the general hearsay ban.

When hearsay is admitted under an exception, it may be argued, the Trier always can be informed by the hearsay opponent or the court that each person perceives, understands and reports the world around him differently. Thus, the Trier can be put on notice that errors are possible and the hearsay offered is suspect. Without cross-examination of the hearsay declarant, however, there is no rational way to tie that general caveat to the particular source of the hearsay involved. Some declarants, it might be supposed, are more accurate than most other declarants on most occasions. Others may be less accurate than most declarants on most occasions. In most situations there is no proof available to assist in the characterization of the particular hearsay declarant as either accurate or inaccurate nor to shed light on his proclivities on the relevant occasion.¹⁷ Moreover, there is no reason to suppose, even in the abstract, that most hearsay declarants fall into one or another category. Transformation of an individual into a hearsay declarant does not make him more nor less accurate than the average of humanity as a whole. Likewise, transformation of one of that declarant's utterances into a hearsay declaration does not make the statement itself any more likely to be accurate or inaccurate than the average of all

fying statements as hearsay thus seems purposely designed to achieve the substantive purpose. (It should be noted, however, that the last observation is somewhat undercut by the existence of other assertions that are not classified as hearsay under the declarant-oriented approach that would be so classified were the fifth purpose of cross-examination added).

¹⁴ 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 800[02], at 800-13 (1981) [hereinafter 4 WEINSTEIN'S EVIDENCE]; 5 J. WIGMORE, *supra* note 5 §§ 1420-1422, at 251-54.

¹⁵ See, e.g., FED. R. EVID. 803(5) (exceptions for past recollection recorded); Fed. R. Evid. 804(b)(1) (prior testimony); and FED. R. EVID. 801(d)(1)(A) (some interpretations of the recent exceptions for witness' prior inconsistent statements). For a more thorough classification of exceptions see Tribe, *supra* note 7. See also 4 WEINSTEIN'S EVIDENCE, *supra* note 14 ¶ 800[03], at 800-16 (Arguing that "since the trial judge must balance the need and the value of the evidence against the dangers it would pose, he may consider factors affecting either side of the equation If the declarant is available, the trial judge in his discretion may condition admissibility upon the declarant's being produced as witness.").

¹⁶ It is unlikely that such information would be available from other sources. Maguire, *supra* note 11 at 747-48; Stewart, *supra* note 9, at 22.

¹⁷ See sources *supra* cited in note 16.

¹⁸ MCCORMICK, *supra* note 7, § 306, at 719-20; 5 J. WIGMORE, *supra* note 5, § 1522, at 442-43.

human utterances. Thus a broad warning against a Trier's reliance on hearsay admitted under an exception neither satisfies the concern of the hearsay ban, nor provides a logical principle for the use of hearsay evidence.

Exceptions to the hearsay rule usually are rationalized as exceptions to the immediately preceding observations. In certain circumstances, it is reasoned that observers tend to be more accurate in accounts of their perceptions and memories of external events than they, or the rest of humanity, would be otherwise. Under this rationale, for example, business records are admissible because persons under an employment duty to observe and report generally will do so accurately.¹⁸ Likewise, declarations against interest are admissible because people usually do not say things against their interests unless they believe the statements to be true.¹⁹ Also, statements of pedigree are admissible because people usually are motivated to accurately discover and report their blood relationships.²⁰ And excited utterances are admissible because excitement usually stills the capacity for misstatement.²¹ In these instances the hearsay will be admitted because of the belief that these special circumstances evoke an acceptable level of accuracy.

This belief, however, is based on a series of assumptions. First, it is assumed that certain external pressures motivate most people to try to correct, or suspend, the internal (personality or physical) traits that ordinarily make their perceptions, memories or narrational skills unique. Second, it is assumed that most people are aware of the internal differences between themselves and others, and the extent to which their own uniqueness may cause errors in their perceptions and memories. Third, it is assumed that most people who try to correct or suspend their capacities for error are successful — that through effort they achieve accuracy. (Excited utterances are rationalized on the different premise — that external pressures will cause automatic suspension of the capacity for misstatement, with no effort on the part of the individual necessary.)

The assumptions upon which the admissibility of this hearsay is founded, however, contain within them the seeds of an irreconcilable inconsistency between the usual rationales for hearsay exceptions and the justification for the hearsay ban. If, given some common stimulus to accuracy, most people can be counted upon to adjust their capacities for error and achieve objective accuracy, then certainly it cannot be said that each person or each person's perception is "unique" — but only that people wilfully err.²² Cross-

¹⁸ MCCORMICK, *supra* note 7, § 276, at 670; 5 J. WIGMORE, *supra* note 5, § 1458, at 329.

²⁰ MCCORMICK, *supra* note 7, § 322, at 745-47; 5 J. WIGMORE, *supra* note 5, § 1482, at 373-74.

²¹ MCCORMICK, *supra* note 7, § 297, at 704-09; 6 J. WIGMORE, *supra* note 5, § 1745, at 91-93.

²² The rationalization for excited utterances is based on the same premise. If excitement is needed to assure "automatic" suspension of the capacity for misstatement, *see* FED. R. EVID. 803(2) advisory committee note, the assumption seems to be that under nonexciting circumstances people deliberately chose to state the truth or a lie.

examination, then, has absolutely no utility that cannot be found as readily in the creation and discovery of sufficient external stimuli to truth-telling. On the other hand, if people are unique, the series of assumptions cannot be right. Even if, given a common stimulus, most people will try to overcome their capacities for error, the very uniqueness with which they perceive and comprehend the stimuli, their own capacities, and the meaning of "accuracy" will cause them to achieve nonidentical results. Exceptions to the opportunity to cross-examine, then, are never justified.

The inconsistency thus displayed between the rationales for the hearsay ban and its exceptions, however, may be more illusory than real. Indeed, the process through which this apparent inconsistency is demonstrated itself requires a certain willingness to pay myopic attention to the meaning of the accepted rationalizations that are in themselves nothing more than shorthand slogans.²³ Somewhere in the process we have lost the starting point: the relationship between the hearsay rule and the purpose of the trial. The general ban on hearsay is said to help assure correct or better answers to questions of fact when the substantive law mandates such a finding. Certainly, exceptions to the rule may serve the aim of dispute settlement according to the substantive law without necessarily being rationalized on a basis wholly inconsistent with the beliefs that give rise to the ban.

For example, if a substantive law is made to turn on facts which, as a class, can *only* or *best* be proved through the use of out-of-court statements then exceptions to the ban must be permitted to assure that the best answers to those questions of fact are given. Indeed, this principle has long been recognized.²⁴ In practice, however, exceptions once so rationalized now are made applicable

²³ A recent student note concentrating solely on individual rationales for each hearsay exception demonstrated by a somewhat different tack the inconsistency of those rationales among themselves and between their aggregate and the hearsay ban. Note, *Theoretical Foundation*, *supra* note 6. A "cost/benefit" analysis of admitting and excluding hearsay found at the beginning of the article, however, seems based on either a misconception about the true utility of the hearsay definition, or simply a distrust of the value of cross-examination and live testimony. The apparent inconsistencies in rationales are used to support the conclusion that the hearsay rule should be abolished. The misconstruction at the beginning of the article is unfortunate because, as demonstrated in the sources cited in note 38 *infra*, it is an unnecessary first step to support the conclusion. The desirability of abolishing the general ban on hearsay depends not upon finding or creating errors in theoretical models but upon a variety of practical concerns, including how much trust we are willing to place in the wisdom of the judiciary to make the sort of distinctions suggested in the sources cited in note 38 *infra* and in this article.

²⁴ See note 5 *supra* and sources cited therein. According to Wigmore, several exceptions were originally rationalized on this basis alone. Examples include the state of mind exception, *see infra* text and notes at notes 74-81 and sources cited therein, statements of pedigree, *see supra* note 20; 5 J. WIGMORE, *supra* note 5, § 1480, at 363-69, reputation concerning land boundaries; 5 J. WIGMORE, *supra* § 1582, at 545-47, and, by inference, declarations against interest. Declarations against interest until recently were confined to declarations against pecuniary and proprietary interests by declarants unavailable because of death. 5 J. WIGMORE, *supra* note 5, §§ 1455-1476, at 323-58. While Wigmore claims that the limitation on subjects was arbitrary, it seems fairly inferable from his history of it that it was probably tied to notions of the importance of survival of debts. *Id.*, § 1476, at 349-58. Exclusion of operative facts from the hearsay definition also is best justified on this basis. *See supra* note 13.

in cases where the original rationale does not apply.²⁵ At the same time, new exceptions have been created which are not expressly tied to any particular substantive concern.²⁶ Instead, these expansions and the creation of new exceptions always seem to be rationalized in the same terms.

Briefly, these now familiar arguments fall within one of two categories. First, if a hearsay utterance is reliable because of the particular circumstances under which it was made, statements made under other circumstances that include an equal stimulus to truth telling are also reliable.²⁷ Second, if a hearsay utterance is reliable enough in one case, to prove one matter, it must be equally reliable in any other case, to prove any other matter.²⁸

The first of these arguments refers to the likely "absolute reliability" of two declarations. It compares the likelihood and severity of hearsay dangers in two assertions and concludes that since the dangers are probably equal the statements are equally reliable or unreliable as proof of the truth of the assertions contained in them. It may be noticed that the first rationale does not necessarily include the second rationale, although it might. Statements may have the same absolute reliability but still have differing degrees of reliability in relation to the issues they are offered to prove.

The second of the rationales is counter-intuitive. There are radical differences between our many substantive laws and the social interests which give rise to them. Given these differences, one would not expect that hearsay reliable enough to prove a particular fact involving one substantive law in one case would necessarily be reliable enough to prove a different fact involving another substantive law in another case. Rather, it might be supposed that there would be differences in the utility of a given item of proof in two cases if different substantive concerns are involved.

Indeed, the supposition that the reliability of a hearsay statement can be measured by a single standard, unaffected by the substantive context in which

²⁵ For example, the state of mind exception has been expanded in the manner set forth *infra* in text and notes at notes 102-22; the pedigree exception once confined to cases involving inheritance is now made applicable in all cases by FED. R. EVID. 804(b)(4); declarations against interest are admissible in cases other than those involving debts, FED. R. EVID. 804(b)(3); and reputation concerning land boundaries is no longer confined to ancient matters, FED. R. EVID. 803(20).

²⁶ Examples are the exceptions for present sense impressions, FED. R. EVID. 803(1); excited utterances, FED. R. EVID. 803(2); statements for purposes of medical diagnosis or treatment, FED. R. EVID. 803(4); business entries and public reports, FED. R. EVID. 803(6)-(10).

²⁷ See, e.g., *Gichner v. Antonio Troiano Tile & Marble Co.*, 410 F.2d 238, 242 (D.C. Cir. 1969) (declarations against interest exception should be expanded to include statements against employment interest), and *Deike v. Great Atl. & Pac. Tea Co.*, 3 Ariz. App. 430, 432, 415 P.2d 145, 147 (1966) (statements against penal interest). See also 5 J. WIGMORE, *supra* note 5, § 1476, at 349-58; MCCORMICK, *supra* note 7, § 287, at 673-75; note 25 *supra*.

²⁸ See, for example, rationalizations for expanding dying declarations exception to cases other than homicide prosecutions. MCCORMICK, *supra* note 7, § 283, at 681-82; 5 J. WIGMORE, *supra* note 5, § 1436, at 285-88. See also rationalizations for expanding statements of pedigree to cases involving issues other than inheritance. 5 J. WIGMORE, *supra* note 5, § 1503, at 400-03. Expansion of exceptions by expanding cognizable circumstances also increases the types of cases in which such declarations will be admissible, see *supra* text and notes at notes 25-27.

it is offered, conflicts with at least one basic premise of evidence law. It is accepted wisdom that correct determinations of the *relevancy* of offered proof depend on the substantive issues in a case. To avoid undermining substantive policies, proof held relevant in one case involving one substantive law or issue may be held irrelevant in another case involving another law or issue.²⁹ The recognition of this principle reflects a common understanding that evidence rules are as capable as are substantive rules of influencing the manner in which people conduct those everyday affairs governed by substantive law. Just as people order their conduct to achieve certain substantive results, they frequently plan their activities in a way that best preserves evidence of the conduct in the event of dispute. If courts allowed conduct prescribed by the substantive law to be proved by evidence of divergent or opposite conduct, people might rationally order their activities in accordance with the evidence rule rather than the substantive law. To avoid this result, rulings on the relevancy of proof are regularly adjusted to substantive concerns.

As will be demonstrated herein, similar concerns should influence the admissibility of hearsay under exceptions to the hearsay rule. First, where appropriate use of an exception ascribes an evidentiary effect to conduct that conflicts with the effect given the same conduct by the governing substantive law, hearsay falling within the exception should be banned from the trial for the same reason that evidence made irrelevant by the substantive law is banned.³⁰

Second, it should be recognized that there is a relationship between the successful operation of some substantive laws and the reliability of evidence used to prove disputed facts in cases that arise under those laws.³¹ Not only do people plan activities with an eye toward preservation of evidence in the event of dispute, they are sometimes influenced in their planning by their perceptions of the reliability of the fact-finding process. At the planning stage, the extent of people's awareness of, and interest in, the reliability of evidence used to prove or disprove disputed facts varies with the nature of the activity (e.g. planned or

²⁹ James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941). Technically, the observations in the text might be better described as involving issues of "materiality." The question whether the proposition sought to be proved by evidence is material to the ultimate propositions in the case. The term "relevancy" is used because it is assumed to be more familiar to most readers. See Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371 (1977). (Wellborn argues that because of Enabling Act and *Erie* problems, in federal court diversity cases, state law should be used to determine relevancy and its countervailing policies. *Id.* at 397-406. The question is beyond the scope of this article but some of the substantive distinctions being made and urged herein, should they occur in diversity cases, might involve similar problems of choice of law). Similar problems with proposed privilege rules for the federal courts produced a spate of comment and led to major changes in the rules before they were adopted. See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 198-266 and bibliography therein (2d ed. 1977) [hereinafter cited as S. SALTZBURG & K. REDDEN.]

³⁰ See *infra* text at I(A) and (B). The sources cited in note 38 *infra* argue that all questions of the admissibility of hearsay can either be analogized to, or are identical to, relevancy questions.

³¹ See text at Parts I(A), (B) and (C).

unplanned; avoidable or unavoidable), the perceived possibility of litigation, the costs of undertaking or avoiding the activity in question, and the costs of an adverse outcome. In some instances perceived unreliability in the fact-finding process might influence people to forego activity condoned or encouraged by substantive law. In others, courts' insistence on a high degree of reliability might influence people to engage in activity condemned by the substantive law. Clearly some higher degree of reliability must be demanded of evidence admissible under hearsay exceptions where demanding less will discourage activity the substantive law intends to encourage. Likewise, some lesser degree of reliability must be countenanced where demanding more will encourage activity contrary to substantive law.

This article explores, by example, the extent to which substantive policies are now influencing the admissibility of hearsay statements under exceptions to the rule. It shows that usual rationales aside, courts sometimes do, and always should, use principles of "relative" reliability when determining whether hearsay should be admitted under exceptions to the rule. For organizational consistency, this article is divided into two parts. First, cases in which the admission of hearsay under an exception may undermine substantive policy are considered. Potential conflicts between the law of contracts and the exception for admissions by silence are demonstrated, as are those between the law of lost wills and the exception for state of mind declarations. Second, the article turns to consideration of the concept of the relative reliability of hearsay arguably admissible under an exception. The courts' divergent treatment of identical hearsay in probate and tort actions involving lost wills is analyzed. Likewise, courts' differing responses to identical hearsay in general criminal and antitrust conspiracy cases is considered. Finally, the divergent treatment of hearsay in cases involving intentional torts and crimes and those involving negligent torts and crimes is addressed.

To avoid misunderstanding, it must be emphasized that this article does not suggest that courts should, or are, improperly applying hearsay exceptions made uniformly applicable in all cases. Rather, the more obvious suggestion is made: that uniformity of application of evidence rules cannot mean identity of application in every case. The true objective of uniformity of adjective rules is to mandate use of the rules to serve uniformly the substantive concerns of each area of substantive law in which the rules apply.³²

³² Cover, *supra* note 3, at 718. As Prof. Saltzburg observed:

Technical rules of competency serve numerous purposes; no one theme runs through all of them, unless it is the notion that relevant evidence may be excluded from consideration at trial if some social policy outweighs the need for evidence. Some rules of competency are designed to enhance the reliability of a jury verdict . . . Still others involve questions of reliability as well as other policy considerations. Since rules of competency have different goals, errors in factfinding related to the rules will have differing impacts on the system of justice.

Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 275 (1975) (footnotes omitted) [hereinafter Saltzburg, *Standards of Proof*]. (This article argues convincingly that differing standards of proof must be used in rulings on preliminary facts).

Whatever may be said of the scope of a trial judge's discretion when ruling on preliminary questions of fact,³³ it cannot be denied that judges must have discretion to assure that admissible items of proof do not undermine our substantive laws and policies.³⁴

There is a special utility in exploring these matters at a time when calls for abolition and redesign of the hearsay rule are gaining currency,³⁵ and at least

³³ The debates on the proposed open-ended hearsay exceptions for federal courts are filled with different views on the proper role of judicial discretion. *Compare Rules of Evidence: Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Fed. Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 202-03 (1973) (testimony of George A. Spiegelberg, American College of Trial Lawyers); *id.* at 216 (statement of a Committee of New York Trial Lawyers); *id.* at 234 (statement by John J. Cleary on behalf of National Legal Aid & Defender Association); *Rules of Evidence: Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 305 (Supp. 1973) (letter to subcommittee by Jack H. Simmons, Esq., in support of deleting 803(24) and 804(b)(5) because if adopted, "the Rules of Evidence would differ from Court to Court and from Judge to Judge."); H.R. REP. NO. 650, 93d Cong., 2d Sess. 5-6 (1973), *reprinted* in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7079 (House Committee recommends deletion of 803(24) and 804(b)(6) "as injecting too much uncertainty into the law of evidence"); 120 CONG. REC. 40,892 (1974) (Rep. Holtzman's objections during House debate to giving judges too much discretion); *with Federal Rules of Evidence: Hearings on H.R. 5463 Before Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 36-37 (1974) (testimony by Judge Charles W. Joiner, member of the Standing Comm. on Rules of Practice & Procedure, Judicial Conf. of the United States); *id.* at 114 (statement of W. Vincent Rakestraw, Assistant Att'y Gen., Office of Legislative Affairs: "it would seem ill-advised to adopt a code covering exceptions to the hearsay rule without allowing for some measure of flexibility"); *id.* at 192-93 (testimony of Richard H. Keatinge, Chairman, Cal. Evid. Law Revision Commission); *id.* at 210-12 (testimony of Albert E. Jenner, Jr., Chairman, Advisory Committee on Rules of Evid., Judicial Conf. of the United States); *Rules of Evidence: Hearings on Proposed Rules of Evid. Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 351 (Supp. 1973) (Department of Justice analysis regarding draft of Proposed Rules of Evid., recommending readoption of 803(24) and 804(b)(6)); S. REP. NO. 1277, 93d Cong., 2d Sess. 18-19 (1974), *reprinted* in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7065-66 (Senate Committee recommends retention of 803(24) and 804(b)(6)).

³⁴ One commentator has observed that those antagonistic to vesting broad discretion in federal judges, *see* note 33 *supra*, were concerned that judges would somehow use the power to erode substantive law. 1 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 3, at 17 (1977) [hereinafter 1 D. LOUISELL & C. MUELLER]. It would clearly subvert the purpose of the framework ultimately provided if judges did not exercise discretion to assure that such a subversion does not occur within that framework. The same point has been made about application of the Federal Rules of Civil Procedure. Cover, *supra* note 3, at 733-40. Commentators generally agree that judges must exercise broad discretion, when determining the admissibility of evidence, to avoid collisions with other policies and to promote the purposes of the trial, S. SALTZBURG & K. REDDEN, *supra* note 29, at 14-15; 4 WEINSTEIN'S EVIDENCE ¶ 800[03]; 1 D. LOUISELL & C. MUELLER, *supra* § 3, at 5-13.

It is generally agreed that judges do have discretion to require more reliability in some circumstances than in others. For example, the character of a proceeding as criminal and civil may influence the degree of reliability required. *See generally* 1 D. LOUISELL & C. MUELLER, *supra*, § 4, at 18-22; 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 800[03] at 800-16 to -17; and sources cited *infra* at note 298. The stakes involved — whether injunctions or damages — may also influence the admissibility of hearsay. *See* sources cited *infra* at note 245. On the use of hearsay in administrative cases *see* 3 DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 16.1-16.8, at 218-54 (1979) and § 14.07, at 63-67, § 14.11, at 69-72 (1980 Supp.).

³⁵ *See, e.g.,* Ladd, *The Relationship Of The Principles Of Exclusionary Rules Of Evidence To The Problem Of Proof*, 18 MINN. L. REV. 506 (1934) [hereinafter cited as Ladd]; Weinstein, *Pro-*

one able commentator has concluded that the general ban on hearsay no longer exists.³⁶ While it is probably premature to announce the death of the hearsay rule, no doubt the potential for its redesign is found in the scheme of Article VIII of the Federal Rules of Evidence. By exposing the substantive ingredient of decision-making, this article provides an insight necessary for a rational refashioning of the rule. Whatever the future of the present rules, the use of hearsay is steadily increasing and so are the dilemmas and resolutions of them illustrated in this article.³⁷ If more hearsay is to be admissible in the future, the need for careful judicial attention to the impact of the use of hearsay on the relevant policies of the substantive law will become that much more urgent.³⁸

I. CASES IN WHICH USE OF HEARSAY FALLING WITHIN AN EXCEPTION COULD UNDERMINE THE SUBSTANTIVE LAW

A. *Admissions by silence offered to prove the existence of contracts allegedly formed by express agreement*

The intimate, and sometimes subtle relationship between the law of evidence and the various substantive laws requiring formal writings for contracts, wills, deeds and the like is well noted.³⁹ The statutes of wills and frauds, and the parol evidence rule, are examples of substantive rules which are rationalized in part by the need to preserve evidence of conduct on which substantive results depend and by the desire to avoid decisions based on fraudulent or unreliable evidence.⁴⁰ These rules are properly characterized as substantive, however, because they are intended to affect the manner in which

bative Force of Hearsay, 46 IOWA L. REV. 331 (1961) [hereinafter cited as Weinstein, *Probative Force*]; Note, *Theoretical Foundation*, *supra* note 6. As originally proposed the federal rules of evidence consisted of a general rule excluding hearsay, with illustrative examples instead of exceptions to guide the judge's discretion. The Advisory Committee's Introductory Note makes clear that it felt that revamping the usual scheme of the rules (ban and class exceptions) was necessary, Proposed Rules of Evidence, 46 F.R.D. 161, 324-91 (1969).

³⁶ Younger, *Reflections On The Rule Against Hearsay*, 32 S.C.L. REV. 281 (1980) (wherein the author acknowledges that his conclusions are based on incomplete and tentative data, but that the data he has so far found confirms his hypothesis that "There is no rule against hearsay. Hearsay is usually admitted. The basis of receiving it is its reliability. Thus, there is only a rule against unreliable evidence." *Id.* at 293.).

³⁷ The open-ended exceptions to the Federal Rules of Evidence, FED. R. EVID. 803(24) and 804(5) are now the most blatant examples of the redesign. The definition of hearsay in the Federal Rules, FED. R. EVID. 801, however, "bears only the slightest resemblance to the common law definition." S. SALTZBURG & K. REDDEN, *supra* note 29, at 455. See generally, *id.* at 455-509 and sources cited at 510-18. See also 4 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* §§ 411-28 (1980); 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶¶ 800[01] to 801(d)(2)[02].

³⁸ See Ladd, *supra* note 35, at 521 and Weinstein, *supra* note 35, at 338-41. Both commentators suggest that elimination of the ban on hearsay will place emphasis on preliminary determinations about probative force.

³⁹ See 9 J. WIGMORE, EVIDENCE §§ 2400-2478 (Chadbourn rev. 1981).

⁴⁰ See sources cited *infra* note 183; J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 41, at 83; § 282, at 441-42 (1970).

people conduct their ordinary affairs.⁴¹ Where these rules operate, people who want the security of enforceable agreements, transactions, or transfers presumably conform their behavior to the applicable law. To avoid subverting these substantive rules, courts regularly refuse to admit evidence which might tend to prove, and thereby make enforceable, a transaction or transfer that does not conform to the mandates of these statutes. The ground for inadmissibility is usually characterized as irrelevancy.

Many substantive rules of contracts and wills, however, are not packaged with such clear warnings about the instances in which their policies may be subverted by applying normal principles of logical relevance to offered proof. In some cases, the logical assumptions about the meaning of human conduct that underlie hearsay exceptions may conflict with the dictates of one or another of these substantive laws. When the conflicting substantive rule is the governing law in a case, the conflict is readily apparent and easily avoided by holding the hearsay inadmissible on relevancy grounds. When the conflicting substantive rule is not the governing law in a case, however, the possibility of its subversion through use of the hearsay exception may be easily overlooked unless careful attention is paid to the relationship between rulings on the admissibility of the hearsay and the substantive law.

This potential for the subversion of substantive policies is illustrated by considering the interplay between the hearsay exception for parties' admissions by silence⁴² and the rules relating to contract formation. The hearsay exception admits into evidence against any party the statement of another person which may be said to have been "adopted" by the party through his silence. This

⁴¹ See *supra* note 4.

⁴² Under the federal rules of evidence *all* party admissions are defined as outside the scope of the rule prohibiting hearsay, or as "not hearsay." FED. R. EVID. 801(d)(2). There is some scholarly support for this definition. See 4 J. WIGMORE, EVIDENCE, § 1048, at 4 (Chadbourn rev. 1972); Strahorn, *A Reconsideration Of The Hearsay Rule And Admissions*, 85 U. PA. L. REV. 564, 570 (1937). In this article, however, all admissions are defined as hearsay but are considered exceptions to the general ban. The reason for this treatment is that while a party by definition will usually be present in court to explain an alleged admission if he did indeed make it, if he did not make the statement, or if he has forgotten the perceptions contained in it, the party cannot possibly explain any defects underlying the statement. Thus, where the party did not make the alleged admission, he is denied any opportunity to cross-examine the perception or memory underlying it. Nevertheless, such statements are probably exceptionally admitted in civil cases, even where the party does not admit making the statement, because of the importance of guarding against abuse of the system by people who do not believe that they are entitled to recover. Cf. MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (5th ed. 1962). Party admissions therefore will be considered here as hearsay covered by the rule, but falling within an exception to the hearsay prohibition. See also *infra* note 193.

Party admissions alleged to have been made by a silent adoption of the statement of another introduce a problem of the limitation on cross-examination that is equal to, if not greater than, that posed when the party denies making the statement itself. The party can still explain that he did not intend an adoption by his silence or that he had no personal knowledge of the matter. The author of the alleged silently-adopted statement need not be made available for cross-examination, however, because it is not, technically, *his* perception, memory and sincerity on which the credibility of the statement now rests. The opportunity, therefore, for manufacture of self-serving evidence is apparent. See generally sources cited *infra* note 43.

hearsay exception is based on the assumption that in some circumstances the normal human reaction would be to deny another's statement if it were untrue. Thus, a party's failure to respond to such a statement is strong evidence that he assented to its truth.⁴³ Once the judge determines that an inference of assent from the silence is reasonable in the circumstances shown, the statement is admitted.⁴⁴ Like all other party admissions, a silently adopted statement that indicates a belief inconsistent with the party's position at trial is excepted from the hearsay ban either because of the adversarial nature of the trial or because the party is present to explain it away.⁴⁵

The hearsay exception for admissions by silence, of course, does not purport to change the law of contracts. Under contract law, absent "special circumstances," an offeror cannot "cause the silence of an offeree to operate as an acceptance when the offeree does not intend it to do so."⁴⁶ The offeror, simply by stipulating that the offeree's silence will be taken as an acceptance, cannot "force the offeree to take his pen in hand, or to spend a two-cent stamp, or to open his mouth, under penalty of being bound by a contract if he does not."⁴⁷ If A, a stranger to B, sends B an offer to sell a series of books at a certain price, which offer stipulates that B's silence will be deemed an acceptance, B is not obliged to respond in order to avoid contractual liability.⁴⁸ Consistency in the law suggests that if A, without more, followed-up his offer with a letter to B that said, "confirming our prior agreement, you are now bound to pay me \$50.00," B would still not be obliged to respond in order to avoid contractual liability.⁴⁹ If A then sued B alleging breach of an agreement formed by B's silence, there would be no occasion to reach the question of admissibility of B's silence in evidence. A's complaint would be dismissed for failure to state a claim or summary judgment would be granted against him.⁵⁰ B's silence in

⁴³ 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 801(d)(2)(B)[01], at 801-145 to -149. *See generally* 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 424, at 268-74, 284-88; MCCORMICK, *supra* note 7, § 270, at 651-55; 4 J. WIGMORE, *supra* note 42, §§ 1071-1073, at 102-40. For an excellent example of the circumstances under which silence gives rise to a strong inference of acquiescence in its truth, *see* United States v. Alker, 255 F.2d 851, 852 (3d Cir.), *cert. denied*, 358 U.S. 817 (1958), *reh'g. denied*, 359 U.S. 950 (1959).

⁴⁴ *See* sources cited *supra* note 43. In some cases, the jury is instructed about the inferences it may draw from the party's silence to the truth of the statement. *See, e.g.,* Megarry Bros., Inc. v. United States, 404 F.2d 479, 487 n.2 (8th Cir. 1968).

⁴⁵ *See, however,* analysis in note 42 *supra* and sources cited therein.

⁴⁶ 1 A. CORBIN, CORBIN ON CONTRACTS § 73, at 310 (1963 & Supp. 1980).

⁴⁷ 1 A. CORBIN, *supra* note 46, § 73, at 310. The offeree's silence will also not operate as an acceptance where the offer made no such condition. *Id.* *See also* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 2-21, at 64 (2d ed. 1977).

⁴⁸ J. CALAMARI & J. PERILLO, *supra* note 47, § 2-21, at 64; 1 A. CORBIN, *supra* note 46, § 73, at 310; RESTATEMENT (SECOND) OF CONTRACTS § 72, comments a and c (1981).

⁴⁹ *See infra* note 51. If B intended to accept by his silence, of course, he may still have a good claim against A, if A later denies that a binding contract was formed. J. CALAMARI & J. PERILLO, *supra* note 47, § 2-21, at 64; 1 A. CORBIN, *supra* note 46, § 73, at 310; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 48, § 72(b).

⁵⁰ *See* J. CALAMARI & J. PERILLO, *supra* note 47, § 2-21, at 64 & n.35, and sources cited therein; 1 A. CORBIN, *supra* note 46, § 73, at 310-12; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 48, § 72.

response to the second letter would be of no help to A.⁵¹ In these instances, then, the substantive law of contracts will forestall any question of the use of the adoptive admission to prove a contractual relationship.

"Special circumstances," of course, do exist under which contract law permits silence to operate as an acceptance or estoppel.⁵² Thus, if A's complaint alleged any of these special circumstances, the case would proceed to trial. B's silence in response to A's offer, or in some circumstances the confirmatory letter, would then be admissible in evidence not for its truth, but as an operative fact.⁵³ Since B's silence is not technically hearsay in such a case, use of the exception for a party's admissions by silence would be neither necessary nor appropriate.⁵⁴

In all of the above situations, therefore, the rules of evidence and procedure work perfectly well to facilitate decisions in accordance with the

⁵¹ To be carefully distinguished is the possible use of a confirmatory letter and silence in response to show a *writing* sufficient to satisfy the statute of frauds. Under the UNIFORM COMMERCIAL CODE § 2-201 such proof may be admissible *if* there is other proof that the parties had a contract *required* to be in *writing*. The confirmatory letter cannot itself be the contract. *See, e.g., Karlin v. Avis*, 457 F.2d 57, 61-62 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972). On motion for summary judgment where there was no proof of a written agreement sufficient to satisfy the New York statute of frauds, silence in response to offeror's letter confirming the alleged agreement does not constitute acceptance by the defendant, absent proof of previous oral agreement or special circumstances that make such silence equivalent to acquiescence. *Id.* The hypothetical in the text is designed to avoid the statute of frauds question and the cases examined in the notes in this section do not contain relevant issues involving the statute of frauds.

⁵² "Special circumstances," involving *additional* facts and circumstances in which an offeree's silence reasonably may be interpreted by the offeror as an acceptance, apparently fall into two groups: those where the offeree silently takes offered goods and services, and those where the offeror relies (presumably to his detriment) on the offeree's manifestation of an intention that silence may operate as an acceptance. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 48, § 72 comment a. For example, silence may constitute an acceptance where the parties mutually agreed in advance that it would so operate; where the parties have an established course of dealing in which silence in response to the receipt of offered goods has been treated by them both as acceptance; and where the offeree took offered services or exercised dominion over goods with reasonable opportunity to reject them, knowing that the offeror expected compensation. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 48, § 72(1)(a)(C) & (2); J. CALAMARI & J. PERILLO, *supra* note 47, § 2-21, at 64-68; and 1 A. CORBIN, *supra* note 46, §§ 73-76, at 310-28, and cases cited therein.

⁵³ For an explanation of the operative facts doctrine see note 13 *supra* and sources cited therein.

⁵⁴ The reader should note that the "circumstances" cognizable under the hearsay exception and the "special circumstance" cognizable in contract law are not the same. The hearsay exception is not intended to track *any* body of substantive doctrine. *See* 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 424, at 274-75, making the point that the evidentiary question is related to, but distinguishable from the substantive question whether silence indicates acceptance. The treatise uses an example in which silence would not amount to an acceptance if made before performance by the plaintiff, but might be an estoppel if the silence occurred after performance. The treatise concludes that in the latter situation the silence is admissible; in the former "the evidence would either be excluded as irrelevant on the ground that the law of contracts holds that in such circumstances silence cannot amount to acceptance, or at the very least held insufficient to establish this point." *Id.* at 275. As explained more fully in the text at notes 52-53 *supra*, evidence of an offeree's silence in one of the "special circumstances" under which contract law permits silence to operate as an acceptance or estoppel would be admissible as an operative fact (not hearsay at all). *See, however, cases cited supra* in note 63.

substantive law. Hence, a party's silence is not used to bind him to a contract except in those few instances in which the law of contracts provides for that result.

The potential for conflict between the doctrines of evidence and contracts, however, does not occur when a party's silence is urged to be admissible because it is operative conduct that binds him to a contract, but rather results when it is urged that a party by his silence admitted that he was bound by another, substantively binding act. For example, suppose that instead of relying solely on B's silence in the hypothetical situation set out above, A alleges formation of an express contract, accepted orally by B in a telephone call. B denies that he accepted, alleging either that there was no phone call, that he rejected A's offer, or that he remained silent in response to all offers. At the trial, A offers to prove the existence of the alleged oral agreement by showing his second letter to B "confirming our prior agreement," which letter A now claims to have written and sent soon after the alleged phone call, and to which B failed to respond.⁵⁵ Should the court admit A's letter and B's silence as proof of the alleged agreement? B's silence cannot be considered an operative fact because no circumstances are suggested to make it so. A is a stranger to B, has not alleged any reliance on B's failure to respond, and has conferred no goods, nor any other benefits in the form of services, on B.⁵⁶ B's silence, however, may not be urged to be an operative fact but only *evidence* of his former, binding act. The issue presented, then, is whether the evidence will be admitted as an exception to the hearsay rule, or excluded because contrary to contract law policy.

Not surprisingly, sampled decisions were split on the question of the admissibility of adoptive admissions in contract cases according to which doctrine was focused on by the court. Those courts which seemingly viewed the question as involving solely the proper use of the hearsay exception held the evidence ad-

⁵⁵ Facts almost identical to the hypothetical situation may be found in the following cases: *Fentron Architectural Metals Corp. v. Romagnino*, 69 N.J. Super. 410, 174 A.2d 491 (App. Div. 1961), *cert. denied*, 36 N.J. 297, 177 A.2d 341 (1962). In *Romagnino*, the plaintiff subcontractor alleged oral agreement made on telephone by which defendant contractor guaranteed plaintiff would be given the subcontract if defendant were to win a bid. *Id.* at 413, 174 A.2d at 493. The defendant denied that any agreement was made. *Id.* at 414, 174 A.2d at 493-94. The only evidence of the oral agreement was testimony by plaintiff. The plaintiff offered to prove his letters confirming alleged telephonic agreement and defendant's silence in response to them. *Id.* at 417-18, 174 A.2d at 495-96. In *A.B. Leach & Co. v. Peirson*, 275 U.S. 120 (1927), the plaintiff alleged that defendant's agent agreed to repurchase bonds at the same price that defendant, a bond house, sold them to plaintiff. *Id.* at 127. The defendant denied that his agent made such an agreement and alleged the agent lacked the authority to make it. *Id.* The plaintiff offered to prove his letter confirming alleged agreement and defendant's nonresponse thereto. *Id.* In *Trainer v. Fort*, 310 Pa. 570, 165 A. 232 (1933), the plaintiff-broker and defendant-seller disagreed on terms of an oral brokerage contract made on telephone. *Id.* at 572, 165 A. at 233. No statute of frauds question was raised. Proof on both sides consisted solely of the parties' testimony. The defendant offered to prove his "confirmatory" communication containing terms consistent with defendant's version, and plaintiff's nonresponse, to prove that the agreed terms were as defendant alleged. *Id.* at 574-75, 165 A. at 234.

⁵⁶ See *supra* note 52.

missible.⁵⁷ Those courts which broadened their inquiries to include the rules of contract formation relating to acceptance by silence held the evidence inadmissible.⁵⁸ There was only one exception to this dichotomy among the opinions examined.⁵⁹

A narrow focus on the hearsay exception for admissions by silence and its rationale readily explains the sampled decisions admitting the evidence of silence in response to a confirmatory communication. In each of these cases, there was a sufficient foundation for use of the hearsay exception.⁶⁰ There was evidence, independent of the confirmatory letter, to prove that the parties had some agreement, if only the testimony of A to the offer and acceptance. There was a showing that B received the confirmatory communication, had knowledge of its contents, and an opportunity to respond.⁶¹ As a matter of human experience many people — especially those who do not order their

⁵⁷ *Megarry Bros., Inc. v. United States*, 404 F.2d 479, 485 (8th Cir. 1968); *Hellenic Lines v. Gulf Oil Corp.*, 340 F.2d 398, 401 (2d Cir. 1965), *aff'd*, 359 F.2d 403 (2d Cir. 1966); *Golden West Constr. Co. v. United States*, 304 F.2d 753, 756 (10th Cir. 1962); *Willard Helburn, Inc. v. Spiewack*, 180 F.2d 480, 482 (2d Cir. 1950); *McCoy v. Alsop*, 94 N.M. 255, 260, 609 P.2d 337, 342 (Ct. App. 1980).

⁵⁸ *A.B. Leach & Co. v. Peirson*, 275 U.S. 120, 128 (1927); *Fentron Architectural Metals Corp. v. Romagnino*, 69 N.J. Super. 410, 417-18, 174 A.2d 491, 495-96 (App. Div. 1961); *Anderson v. Cactus Heights Country Club*, 80 S.D. 417, 425, 125 N.W.2d 491, 495-96 (1963).

⁵⁹ *Trainer v. Fort*, 310 Pa. 570, 578, 165 A. 232, 235 (1933), held evidence of plaintiff's silence admissible despite express recognition that the plaintiff had no duty under contract law to respond to the communication. The reasoning is almost diametrically opposed to that presented in this section.

Yet while in law silence often has great evidentiary value, it has little or no contractual value If in the case before us the plaintiff had promptly protested defendant's memorandum of December 22d, it clearly would have been for the jury to decide whether the oral contract . . . was . . . made. The plaintiff's failure to reply to the memorandum does not alter the situation except in this respect: Plaintiff's case is less convincing because there was only silence where naturally . . . we would expect a protest The proposition that plaintiff's [silence amounted to an acceptance] must be rejected. The significance of silence is for the triers of the facts.

Id. at 578-79, 165 A.2d at 235.

⁶⁰ Most thoughtful commentators, discussing use of the exception generally urge that admissibility be conditioned at least on a showing that the statement was made, that the silent party heard the statement, had personal knowledge of the subject, and an opportunity to respond. 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 424, at 291-96; 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 801(d)(2)(B)[01], at 801-145 to 801-151. *But see* 4 J. WIGMORE, *supra* note 42, § 1072, at 116-17 & nn.4-7 (arguing, in context of silence allegedly indicating adoption of oral statements, that some of these requirements may be too strict).

Some of the cases admitting the evidence have been cited approvingly in evidence treatises as examples of the sort of detailed inquiry into the circumstances surrounding the silence that courts should make. 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 801(d)(2)(B)[01], at 801-146 (citing *Megarry Bros., Inc.* and *Hellenic Lines*, *supra* note 57, *infra* note 63; 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 424, at n.26 also citing *Willard Helburn, Inc.*, *supra* note 57, *infra* note 63. The cases so cited might also be construed as reaching the right result under substantive principles as well as evidentiary principles by slightly different reasoning. See the discussion of these cases, *infra* note 63.

⁶¹ See cases cited *supra* note 57.

behavior to the letter of the law — would presumably respond with a denial of a “confirmatory” communication if they did not believe it to be true.⁶² Apparently reasoning solely from such general observations of human behavior, these courts concluded that in such circumstances it would be natural for B to deny the contents of the letter if he disagreed with it.⁶³ Courts accepting this approach, therefore, hold that a party’s silence properly may be considered by the Trier as an indication that the party acquiesced in the truth of the adverse party’s confirmatory communication.⁶⁴

⁶² See *supra* note 57.

⁶³ See cases cited *supra* note 57. In three of the sampled decisions admitting confirmatory communications and silence in response to them, it appears, from the facts articulated in the opinions, that the courts might have found the silence admissible as an “operative fact.” All three courts used solely an evidence rationale, however, although one recognized the operative fact rationale as an alternate ground for admissibility. In *Megarry Bros., Inc. v. United States*, 404 F.2d 479, 481-83 (8th Cir. 1968), *Hellenic Lines v. Gulf Oil Corp.*, 340 F.2d 398, 399-400 (2d Cir. 1965), *aff’d*, 359 F.2d 403 (2d Cir. 1966), and *Willard Helburn, Inc. v. Spiewack*, 180 F.2d 480, 481-82 (2d Cir. 1950), the parties agreed that there was some contract between them. In *Megarry* and *Willard Helburn* the parties disagreed about the terms of the contracts; in *Hellenic Lines*, they disagreed about the existence of an additional contract allegedly covering other related matters. In each case, the party who wrote the confirmatory communication at issue received no reply, and either performed or continued to perform his alleged contractual obligations, thereby arguably conferring benefits on the silent party. While the facts are not clear, it is arguable that the three courts might have reasoned that the Trier reasonably could have found that the silent party, knowing that performance was being rendered under a mistaken impression that the terms in the confirmation were satisfactory to the silent party, had a duty to respond. Failure to object, therefore, might have been held to create an estoppel. It is unclear from the cases whether there was enough in the facts to justify a finding that the party who sent the communication was under such a mistaken impression. In *Willard Helburn, Inc.*, the court recognized this as an alternate ground for admissibility. 180 F.2d 482-83.

While courts are not necessarily to be criticized for reaching the right result (admissibility, if it was justified in these cases) for the wrong reason, the failure to examine more carefully the relationship between the evidence ruling and substantive framework in which the evidence is urged has obscured the analysis enough to lead to apparently wrong results in at least one other case. *E. A. Meyer Constr. Co. v. Drobnick*, 49 Ill. App. 2d 51, 199 N.E.2d 447, 451 (App. Ct. 1964). There the court held that the trial judge properly admitted a confirmatory communication because defendants did not present the “right” objection to the court. The letter was apparently admitted over defendants’ objection that their failure to answer did not indicate agreement. *Id.* On appeal, they argued that the letter was self-serving. *Id.* According to the appeals court, the latter ground was the “right” objection, the former was not. *Id.* By compartmentalizing its ruling on an “evidence” objection separately from its knowledge of contract law, the court failed to realize that these were simply different articulations of the same objection. See quotation from *A.B. Leach & Co.*, *infra* note 70.

⁶⁴ That the preliminary fact necessary to the soundness of the inference (the prior existence of an agreement) is identical to that which the hearsay is offered to prove does not appear any more troublesome for these courts in this context than in the many other contexts in which such a coincidence occurs. That coincidence has, however, given commentators and courts some difficulty in certain areas of the law and has led to special rules relating to, for example, the use of agent’s statements under the admissions exceptions where the “agent’s” agency and/or scope of authority is in issue, and the use of a “coconspirator’s” statements implicating a defendant as a coconspirator where the defendant denies his participation in the conspiracy. See *infra* text and notes at 176-77. There is much thoughtful comment in this area. See 1 D. LOUISELL & C. MUELLER, *supra* note 34, § 33 and sources cited therein; S. SALTZBURG & K. REDDEN, *supra* note 29, at 36-49 and sources cited therein. If there is any problem in the instant cases, it is presumably cured by the testimony of the offering party who lays a sufficient foundation for use of the statement to prove agreement by his own testimony that there was such an agreement.

On the other hand, widening the preliminary inquiry to include the law of contract formation, reveals that such proof probably should be excluded. Contract law imposes no duty on B to respond to the confirmation letter in order to avoid being bound by its terms.⁶⁵ If B is bound to a contract, it must be solely because of his alleged oral acceptance. B's later behavior, unless it constitutes an express acceptance of the terms of the confirmatory communication, has no substantive meaning. Just as a later repudiation by B could not relieve him of the binding effect of an earlier acceptance, B's later silence could not turn an earlier rejection of the offer into a binding acceptance.⁶⁶

In these circumstances, B's silence is at best ambiguous behavior. While B might have felt the need to respond with a denial, he had no substantive *duty* to do so.⁶⁷ Thus his silence can mean that he thereby conformed his behavior to contract law to avoid being bound to a contract, as easily as it can mean that he thereby acknowledged the existence of an earlier oral agreement.

The law of contracts rejects silence as insufficient to constitute an acceptance precisely because it is ambiguous.⁶⁸ Under the hearsay exception, however, ambiguity of inference will not generally render the hearsay inadmissible. Rather, as long as the inference of acquiescence from the party's silence is *reasonable*, the choice between acquiescence and competing inferences is left to the jury.⁶⁹ Clearly, however, an inference of acquiescence from a party's silence cannot be reasonably drawn if to do so would interfere with the operation of the substantive law.

It might be argued that the mere use of a party's silence in response to the adverse party's letter of confirmation as evidence to prove a preexisting contract does not change the letter of contract law rejecting silence as acceptance. There is undoubtedly a conceptual difference between a rule that would admit a party's silence as *evidence* of a previous, substantively binding, acceptance and one that would hold it *sufficient* to constitute an acceptance. In practical effect, however, they are here the same. If in all cases B's non-response were held ad-

⁶⁵ See *supra* text and notes at notes 48-52.

⁶⁶ See *supra* text and notes at notes 48-52, and compare text with reasoning in *Trainer v. Fort*, 310 Pa. 570, 165 A.2d 232 (1933), discussed in notes 51 and 59 *supra*.

⁶⁷ See *supra* text and notes at notes 48-52.

⁶⁸ 1 A. CORBIN, *supra* note 46, § 72, at 306.

⁶⁹ See 4 J. WIGMORE, *supra* note 42, § 1072, at 129 (noting that although in some circumstances the inference of acquiescence is not very strong, it may always be explained away), and compare with sources in note 60 *supra*. Although commentators urge the courts to scrutinize carefully the circumstances to determine whether a "reasonable" person would have denied the statement, (see, e.g., G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 56, at 195-96 (1978); MCCORMICK, *supra* note 7, § 270, at 653), no one has suggested that acquiescence need be the only inference. Applying a very strict standard in a criminal case, the court in *United States v. Moore*, 522 F.2d 1068, 1076 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976), stated that a sufficient foundation was laid when there was sufficient evidence to support a *reasonable* inference that the accused heard, understood and acquiesced in the statement.

See also Saltzburg, *Standards of Proof*, *supra* note 32, at 275 & n.14 (There is no single solution for all preliminary questions of fact "unless it is the notion that relevant evidence may be excluded from consideration at trial if some social policy outweighs the need for evidence." *Id.* at 275 (footnote omitted)).

missible to prove B's earlier acceptance, the everyday behavior of at least those who know and rely on the law would be affected, if not changed. The law of contracts might proclaim that A cannot force B to "take a pen in his hand," but a cunning A would know otherwise. B, of course, would be a fool to count on contract law if his non-response could be used in evidence against him in a suit by A. A mere ruling on the admissibility of evidence could thus substantially interfere with the operation of the substantive law.⁷⁰

It is conceivable that the courts which admit evidence of B's silence are attempting thereby to change the law of contracts, although little hint of such a motive was found in the cases examined. If so, the change seems to have remained a secret. Even the standard literature on the subject reports the contract rule unchanged.⁷¹ Certainly announcements of substantive changes are better made in a substantive, rather than evidentiary, context so that the changes may be noticed and examined by those familiar with the subject, and understood by persons whose conduct may be affected.⁷²

More likely, those courts that admit the evidence simply do not recognize the connection between their evidentiary rulings and the law of contract formation. By failing to recognize the connection, the hearsay exception was applied as it would have been in any other case, with the potentially unhappy and unintended result noted. If the judicial rule of thumb in all cases for applying hearsay exceptions included inquiry into the relationship between use of the hearsay and the substantive law, courts could more readily avoid such unintended consequences.⁷³

B. *Lost and Destroyed Wills*

Just as there is a potential conflict between evidentiary and substantive doctrines in the proof of a contractual agreement by silent adoption of

⁷⁰ Perhaps avoiding this collision between evidence and substance was what Justice Holmes had in mind in *A.B. Leach & Co. v. Peirson*, 275 U.S. 120 (1927), when he held the plaintiff's confirmation letter and the defendant's silent response to it inadmissible to prove that the parties had a contract:

A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. *He no more can impose a duty to answer a charge than he can impose a duty to pay by sending goods.* Therefore, a failure to answer such adverse assertions in the absence of further circumstances making an answer requisite or natural has no effect as an admission. (citations omitted) (emphasis added).

Id. at 128.

⁷¹ See sources cited *supra* notes 48-52.

⁷² It is not suggested here that the law of contracts and the doctrine of estoppel are perfect. Indeed, experts in those fields might wish to change them to conform to the observations of ordinary human nature underlying the hearsay exception for admissions by silence. The wisdom of such a change is beyond the scope of this article and, it is suggested, beyond the scope of evidence law. To effectuate adjective purposes, the rules of evidence must serve, not replace or change, rules of substance.

⁷³ Perhaps the confusion that occurs when a party makes the same objection in the parlance first of one law, and then another, might also be avoided. See discussion of *E.A. Meyer Constr. Co. v. Drobnick*, *supra* note 63.

another's statements, there is also a potential for conflict in the use of hearsay generally admissible under an exception to the ban in cases where the probate of a lost or destroyed will is sought.

Unlike those courts which failed to notice the problem in the contracts cases, in cases involving lost wills most courts seem aware of the potential for subversion of the substantive doctrine. These courts make no apologies for adjusting the use of hearsay otherwise admissible under the state of mind exception to suit the policies of the substantive laws. The hearsay exception is not permitted to threaten the policies of the law, but may be readily used when no threat is posed. The holdings thus reflect a conscious and careful attempt to accommodate the competing rationales for the hearsay exception and the substantive laws involved.

Moreover, these courts demonstrate a willingness to express the influence of substantive policies on their evidentiary rulings. This openness prevents given decisions from being mistaken as broad precedent for use when the same hearsay is offered in a different substantive context. Thus a state of mind hearsay declaration which is inadmissible in a case involving the probate of a lost or destroyed will is fully admissible in a tort suit against the individual charged with the will's destruction! The wisdom of this apparently inconsistent use of the state of mind exception may be seen by a brief examination, first, of the use of such declarations in probate actions, particularly the probate of lost and destroyed wills, and, next, in the comparison between tort and probate actions involving destroyed wills.

1. The State of Mind Exception in Wills Cases

a. *Generally*

The hearsay exception for declarations of a person's own mental condition (state of mind) ostensibly makes admissible in all cases the declarant's statements of his feelings, motive, plan or design.⁷⁴ Statements such as "I love X," "I wish I could have all of X's money" and "I intend to go to the movies tonight" are admissible under this exception when the declarant's state of mind is in issue. The exception is justified on several grounds. First, it is likely that utterances reflecting the declarant's then existing state of mind constitute the most reliable evidence of his inner thoughts obtainable. Thus, such statements are considered better evidence of the declarant's mental state than any circumstantial evidence based on observations of his attitude or behavior.⁷⁵

⁷⁴ See, e.g., FED. R. EVID. 803(3) (making admissible "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will"). The federal rule has been adopted in one form or another in 21 states. For other versions of the state-of-mind exception see CAL. EVID. CODE § 1250 (West 1966); N.J.R. EVID. 63(12). See generally 6 J. WIGMORE, EVIDENCE, *supra* note 7, §§ 1714-1740, at 89-189.

⁷⁵ 6 J. WIGMORE, *supra* note 7, § 1714, at 90-98; Slough, *Spontaneous Statements And State*

Indeed, even the declarant's testimony, subject to memory flaws, may be less reliable than his out-of-court utterances made closer in time to the mental state in issue. For the latter reason, the declarant's unavailability, a prerequisite for the use of some hearsay exceptions, is not required to trigger the use of the state of mind exception.⁷⁶ Second, such statements are not subject to the vagaries of inaccurate perception and memory,⁷⁷ at least not when they are offered to prove the mental state asserted.⁷⁸ Lastly, since these statements are regarded as the most reliable evidence obtainable, they are *needed* to protect the integrity of

Of Mind, 46 IOWA L. REV. 224, 230 (1961) (Other evidence may be either nonexistent or inadequate).

⁷⁶ 6 J. WIGMORE, *supra* note 7, § 1714, at 90.

⁷⁷ For this reason, some commentators have urged that statements *circumstantially* indicating a declarant's state of mind, when that state of mind is in issue, should be treated as not hearsay. See MCCORMICK, *supra* note 7, § 249, at 590-91; 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 803(3)[02], at 803-94 to -96; 6 J. WIGMORE, *supra* note 7, § 1715, at 98-100. One commentator has urged that direct assertions of state of mind should fall outside the hearsay rule as well. R. LEMPert & S. SALTZBURG, *supra* note 7, at 346. The author is of the opinion that the statements are properly classified as hearsay because *all* hearsay dangers should be recognized in the definition. See *supra* note 7. Only then can an intelligent assessment of reliability of the statement in relation to the issues at trial be made. The following commentators (who discuss this particular issue in some depth) seem in accord on the proper classification of these statements as hearsay although they have some disagreements on marginal issues. 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 441, at 532-33, and § 417; Morgan, *Hearsay Dangers*, *supra* note 2, (points of difference between Morgan and Mueller are noted in 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 417, at 122); Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394 (1934). The argument that statements circumstantially indicating state of mind are not hearsay is one sub-part of a larger debate about the appropriate hearsay classification of all conduct not intended as an assertion, offered circumstantially to prove some other fact. In such cases the first step in the inferential process is from the actor's conduct to his belief in some external fact and then to the perceptions and memories on which the belief is based. The Federal Rules of Evidence make all such conduct "not hearsay," FED. R. EVID. 801(c), on the theory that problems with the actor's narrational skills and sincerity are minimized because no assertion is intended. See FED. R. EVID. 801(c) advisory committee note. Statements circumstantially indicating a declarant's state of mind, therefore, technically are not hearsay under the federal rules, although direct statements of his state of mind are hearsay and admissible only under the exception for statements of state of mind, FED. R. EVID. 803(3). See generally 4 WEINSTEIN'S EVIDENCE, *supra* note 14; MCCORMICK, *supra* note 7, §§ 244-253, at 579-613; and R. LEMPert & S. SALTZBURG, *supra* note 7, at 330-508. On the general debate over the proper classification of non-verbal conduct offered as an assertion, compare MCCORMICK, *supra* note 7, § 250 at 596-601; 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 801(c)[01], at 801-70; 6 J. WIGMORE, *supra* note 7, § 1788, at 313-14; with 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 414, at 82-90; Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682 (1962).

⁷⁸ The number of hearsay dangers involved varies with the fact the statement is offered to prove. When a declarant's statement such as "I feel pressured by Joe" is offered to show declarant's feeling of pressure, there is no problem with perception nor memory. When it is offered to show that Joe exerted some pressure on declarant, however, all hearsay dangers are present because the inference is from declarant's feelings to his observation and memories of Joe's conduct. See generally Morgan, *Hearsay Dangers*, *supra* note 2, at 189-90, 201. In cases where a will is contested on the grounds of undue influence, both the testator's state of mind and the actions of another producing that state of mind are in issue. Courts hesitate to allow the use of the statement to prove the alleged conduct of the third person because of the hearsay dangers (although it might come in under FED. R. EVID. 803(3)). See, e.g., *Stephenson v. Stephenson*, 62 Iowa 163, 165, 17 N.W. 456, 457 (1883); *In re Estate of Lehner*, 70 N.J. 434, 436, 360 A.2d 383, 384 (1976);

the fact-finding process in the many cases, including will contests, where resolving declarant's mental state may be crucial in deciding the applicability of the substantive law.⁷⁹

Statements reflecting a declarant's then existing state of mind also generally are admissible to prove the declarant's mental and emotional state both at a time after and, with some hesitation, before the making of the statement.⁸⁰ There is no greater hearsay danger in such use than when the statement is used to show a contemporaneous state of mind. There may, however, be some question of the value of the statements as probative of a continuing mental attitude. Nonetheless, when the circumstances indicate that it is reasonable to expect some continuity in the declarant's mental state over the period in question the statement is usually considered probative and admissible under the exception.⁸¹

These rationales for the reliability of state of mind hearsay declarations notwithstanding, in wills cases courts must apply the exception in a discriminating manner to avoid direct conflicts with the statute of wills. The statute of wills requires that ordinary wills be in writing, attested by a certain number of witnesses, and signed or acknowledged by the testator in the attesting witnesses' presence.⁸² The purpose of these requirements is to assure that the

Buchanan v. Davis, 12 S.W.2d 978, 982-83 (Tex. Civ. App. 1929). See also T. ATKINSON, LAW OF WILLS, § 100, at 539 (2d ed. 1953); A. CLAPP, WILLS AND ADMINISTRATION, § 61, at 144 (5 NEW JERSEY PRACTICE, 3d ed. 1962); 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 443, at 589; 6 J. WIGMORE, *supra* note 7, § 1738, at 178; McCormick, *Evidence Of Declarations of Testators in Texas*, 4 TEX. L. REV. 170-71 (1926); Note, *Admissibility In Indiana of Declarations Made Before or After Execution Of a Will*, 35 IND. L.J. 391, 392 (1960) [hereinafter cited as Note, *Admissibility in Indiana*].

⁷⁹ R. LEMPERT & S. SALTZBURG, *supra* note 7, at 345-46 ("The substantive law takes intent into account for so many different purposes."); MCCORMICK, *supra* note 7, § 249, at 590 ("The substantive rules often make rights and duties depend on the existence of particular states of mind or feeling."); 6 J. WIGMORE, *supra* note 7, § 1714, at 90 (Statements showing state of mind are more reliable than other evidence).

⁸⁰ 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 441, at 529-530; 6 J. WIGMORE, *supra* note 7, § 1714, at 90. There are two reasons for the hesitation about using declarations of state of mind that are urged to be probative of declarant's mental state at a prior time. When the statement expresses a then existing state of mind it is only a single inferential step to its continuation into the future. When the same declaration is offered to show a consistent mental attitude in the past, its probative value is somewhat weakened by the needed extra inference, not proved by the making of the statement, that the declarant's attitude arose prior to the making of the statement, at or before the relevant time. Hinton, *supra* note 77, at 400-07. Moreover, a statement of memory or belief about a past state of mind contains an extra hearsay danger. See *infra* text at notes 90-92 and 115-20.

⁸¹ FED. R. EVID. 803(3); see also 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 441, at 529; 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 803(3)[02], at 803-98.

⁸² T. ATKINSON, *supra* note 78, §§ 63-73, at 294-348. There is presently a statute of wills in every jurisdiction. They all contain requirements of formality similar to those discussed in the text. The singular is used throughout because it is believed that none of the minor differences between these statutes would have much effect on the reasoning herein. See generally, T. ATKINSON, *supra* note 78. It should be noted however, that at least in New Jersey, the policy of the law is undergoing a change and, contrary to the reasoning in the text *infra*, the courts there are more interested in the subjective intent of the testator. See *infra* note 123.

testator's property is distributed according to his true intentions. The courts, therefore, will treat as a will only those instruments executed with testamentary intent: a settled intention of the testator to transfer his property in accordance with the terms of the instrument. Courts will not probate as a "will" the informal statements of a testator indicating merely a wish to make a will or dispose of property in a particular way, even when such statements are in writing.⁸³

Strict insistence on the statutory formalities is said to have two functions: ritual and evidentiary.⁸⁴ By requiring the would-be testator to satisfy most, if not all, of the statutory rituals,⁸⁵ the statute and the courts impress on him the significance of his act. When the ritual has been observed, the court is justified in treating the document as one deliberately intended as a will.⁸⁶ Additionally, the requirements of a writing and signature insure that evidence of the testator's intent is "cast in reliable and permanent form."⁸⁷ Since the testator himself is dead, and memories of his less formal statements may have faded or been colored by avarice and self-interest, the insistence on a formally executed document safeguards against fraud, perjury and the possibility of a disposition contrary to the testator's final wish.⁸⁸

To appreciate the possible conflict between the policies of the statute of wills and the use of the state of mind exception in lost wills cases, a brief review of some of the settled distinctions the courts have drawn when using the exception in wills cases generally is helpful. For example, under the hearsay exception each of the following statements might be urged admissible in proceedings involving wills: "I am leaving my estate to X because I love her," "I intend to leave my estate to X because I love her," and "I left my estate to X because I loved her." The admissibility of such statements in wills cases will largely depend on underlying substantive policies.

Accordingly, courts will almost always admit such statements when offered to support or rebut a challenge that the testator lacked mental capacity, or was subject to undue influence or fraud at the time he executed the will.⁸⁹ Use of the statements for this purpose causes no conflict with the statute of wills, since there is no danger of distribution according to the informal state-

⁸³ Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3 (1941); T. ATKINSON, *supra* note 78, § 41, at 207-10, and § 75, at 356 & n.7; A. CLAPP, *supra* note 78, § 41, at 105. The balance of the text of this article relating to wills draws heavily on the rationale of the Statute of Wills developed in the Gulliver and Tilson article.

⁸⁴ Gulliver & Tilson, *supra* note 83, at 3-4.

⁸⁵ Apparently some states permit holographic wills, but these must be in writing and signed. T. ATKINSON, *supra* note 78, § 75, at 355-62. Some permit noncupative wills if a variety of formalities are met. *Id.*, § 76, at 363-67. Soldiers' and sailors' wills are exempted from formality requirements altogether. *Id.*, § 77, at 368-74.

⁸⁶ Gulliver & Tilson, *supra* note 83, at 4.

⁸⁷ *Id.* at 6.

⁸⁸ *Id.* at 6-9; 2 PAGE ON WILLS, § 19.4, at 66 (Bowe-Parker rev. 1960); A. CLAPP, *supra* note 78, § 197, at 307-09.

⁸⁹ See generally T. ATKINSON, *supra* note 78, §§ 51-56, at 232-69 and § 100, at 536-39; R. LEMPERT & S. SALTZBURG, *supra* note 7, at 347; 6 J. WIGMORE, *supra* note 7, § 1738, at 178-88. There is, however, some conflict relating to whether or not such statements can be used to show the conduct that caused the feeling of undue influence. See note *supra* 78 and sources cited therein.

ment rather than the formally drawn will. Instead, since the statement is likely to be the best evidence available of the testator's state of mind, its use further assures that only those instruments executed with the appropriate intent are given effect. Thus, hearsay admissible under the state-of-mind exception will be allowed by courts when such use does not conflict with the policies underlying the statute of wills.

Furthermore, even hearsay statements arguably not admissible under the exception generally may be allowed by these courts. For example, the evidentiary value of the third illustrative statement above, "I left my estate to X because I love her," depends on the accuracy of the testator's memory. While that extra hearsay danger probably would make the statement inadmissible under the state of mind exception in most other cases,⁹⁰ there is a special need to use the statement in wills cases due to the unavailability of the testator.⁹¹ In addition, the statement may be the most reliable evidence of the testator's intention available. For these reasons, many courts apparently admit such statements to show the testator's mental condition at the time he wrote the will.⁹²

While each is admissible when no substantive policy is subverted thereby, none of the illustrative statements, however, would be admissible on most issues involving the construction of a will. Such statements would be inadmissible because of the requirements of formal execution contained in the statute of wills. Where, for example, a will admitted to probate contains a blank space instead of the name of a beneficiary beside a particular bequest, the courts will not admit the testator's statements to show that he intended a disposition to X.⁹³ Use of an informal statement to fill in such a blank would be directly contrary to the mandate of the statute of wills.⁹⁴ Similarly, courts refuse to receive direct statements of intention to clarify most ambiguities that appear in otherwise duly executed wills.⁹⁵ Only in a small number of cases, where the testator's true intentions cannot be resolved otherwise, will courts admit such

⁹⁰ FED. R. EVID. 803(3); 4 D. LOISELL & C. MUELLER, *supra* note 37, § 441, at 529. *But see* CAL. EVID. CODE § 1251 (West 1966) (statements of memory of a previous mental state are admissible where the mental state is in issue and declarant is unavailable).

⁹¹ 4 D. LOISELL & C. MUELLER, *supra* note 37, § 443; C. MCCORMICK, EVIDENCE, § 271, at 577-78 (1954); 6 J. WIGMORE, *supra* note 7, § 1738, at 180.

⁹² CAL. EVID. CODE § 1251 (West 1966); T. ATKINSON, *supra* note 78, § 100, at 538; and cases cited in 6 J. WIGMORE, *supra* note 7, §§ 1739-40, at 188-89.

⁹³ There is no remedy in probate or equity for mistakes of omission (absent fraud) because the will must be in writing. T. ATKINSON, *supra* note 78, § 58, at 274-75; A. CLAPP, *supra* note 78, § 197, at 309-10; 9 J. WIGMORE, EVIDENCE § 2473, at 250 (Chadbourn rev. 1981) (it depends on whether the blank space is an equivocation).

⁹⁴ See sources cited in note 93 *supra*.

⁹⁵ T. ATKINSON, *supra* note 78, § 60, at 281-88; 9 J. WIGMORE, *supra* note 92, §§ 2471-72, at 238-50. According to Atkinson and Clapp, the courts, however, do receive evidence of the testator's *indirect* assertions from which his settled intent may be inferred. *See infra* note 96. The reason may be partly that such statements are not considered hearsay since there need be no reliance on the declarant's narrational skills nor, in some cases, the honesty of his assertions. See sources and discussion in note 77 *supra*. Also, there is apparently no danger of a conflict with the formalism required by the statute of wills in the use of *indirect* statements because their use could not logically result in disposition according to the terms of the statements.

statements.⁹⁶ Apparently the courts believe that the formality mandated by the statute proscribes not only the actual probate of informal statements, but also the use of these statements to explain the settled and final intentions incorporated into the formal document.⁹⁷

⁹⁶ Prof. Robert Carter of the Rutgers Law School faculty, has observed that in most of those instances in which the courts hold the declarations of the testator inadmissible, (1-3 below) there are ample means for construing the disposition and disposing of the testator's property under the will, without considering the testator's statements. Private conversation (July, 1981). In cases of patent and latent ambiguities, (4 and 5 below), however, indirect statements and circumstantial evidence may be of little, or no help. The disposition would probably have to fail unless the testator's direct statements of intention are considered and the courts are thus more likely to receive the statements in these cases.

A description of a beneficiary or property in a will may be urged to be mistaken for at least one of several reasons. (1) The description may accurately describe one person or thing, but the opponent wishes to show that the testator customarily described another person or thing by the terms used in the will. Sometimes the courts will not allow such an attack on the grounds that to do so would disturb the "plain meaning" of the will. Where courts do allow such an attack, however, they apparently won't admit evidence of the *direct* statements of the testator, relying instead on circumstantial evidence of usage. T. ATKINSON, *supra* note 78, § 60, at 285-86; A. CLAPP, *supra* note 78, § 198, at 316-17 & n.4. If the circumstantial evidence is not convincing the court can dispose of the property without use of the testator's direct declarations according to the will as written. Since the bequest will not fail, the testator's declarations are not needed. (2) A description may fit an existing person or property in part, but be incorrect in part. The example given by Atkinson is "a testatrix devised her seven houses on a certain street when she really owned eight houses there." T. ATKINSON, *supra* note 78, § 60, at 283. Apparently most courts will not admit proof of the testator's direct statements of intention, preferring instead to put itself in the position of the testator. In such a case the disposition need not fail because it can be construed as giving all eight houses to the named beneficiary. *Id.* Wigmore agrees in principle, 9 J. WIGMORE, *supra* note 93, § 2471, at 238, but uses a similar hypothetical (where the devise is "one of my seven houses") as an example of an incomplete testamentary act which fails for that reason. *Id.*, § 2472, at 251. (3) The description may inaccurately describe a person or thing, but there is only one possible claimant to the will, *e.g.*, where a charitable institution is misnamed in the will. Apparently the courts will correct the error but refuse to admit evidence of the testator's statements. T. ATKINSON, *supra* note 78, § 60, at 285. (4) In cases of "patent" ambiguities, *e.g.*, where the legacy applies on its face to more than one person, many courts do not admit the testator's declarations and so the legacy must fail. T. ATKINSON, *supra* note 78, § 60, at 287-88; 9 J. WIGMORE, *supra* note 93, § 2474, at 253-59. Not surprisingly, the modern view is to the contrary, and the rule is changing. *Wilson v. Flowers*, 58 N.J. 250, 263, 277 A.2d 199, 207 (1971) (abolishing the distinction between latent and patent ambiguities for purposes of admitting direct statements of testator's intent); A. CLAPP, *supra* note 78, § 197, at 136-37 & n.3 (Supp. 1980). (5) Where the legacy applies on its face to only one person but there are two people of the same description (latent ambiguity) most courts apparently admit the declarations of the testator directly stating his intentions. T. ATKINSON, *supra* note 78, § 60, at 287; A. CLAPP, *supra* note 78, § 197, at 311-12 & n.18; 9 J. WIGMORE, *supra* note 93, § 2472, at 243.

⁹⁷ As Wigmore has observed:

The reason is hardly to be found in any prohibitory rule of evidence, for such declarations are admissible under the hearsay exception. . . . Nor is it that these declarations are not useful, for together with others they would certainly help to throw light on the question [what was intended by the testator]. The true reason is found in another rule, already considered — the rule which prohibits setting up *any extrinsic utterance to compete with and overthrow the words of a document* which solely embodies the transaction. . . . The effect of that rule is to deny any jural effect to just such declarations. It is true that where the act is required by statute to be in written form — as, a will — there is the additional reason that the oral utterance would fail to fulfill that formality. But even without such a statutory requirement the other rule would be adequate to prohibit. When a transaction has been even

b. *Lost Wills Cases:*

i) The Policy of Ritual

A claim that a testator's will has been lost through accident or the fraudulent design of another presents some peculiar problems for both the law of wills and the law of evidence. Understandably, courts are reluctant to probate an allegedly lost will;⁹⁸ yet, they also are mindful of the need to prevent frustration of the testator's true intent.⁹⁹ An accommodation has been made between these competing substantive policies in most jurisdictions, either by statute or by common law.¹⁰⁰ While rules vary from state to state, it is generally required that the party propounding the lost will must prove by clear and convincing evidence: (i) that the will was executed in accordance with the usual statutory requirements, (ii) that a diligent and unsuccessful search was made for the lost will, and (iii) that, with some degree of certainty, the terms of the will were as alleged.¹⁰¹ If the testator had access to the will before his death, the party seeking to probate the lost will must also overcome with convincing proof a presumption that the will was revoked by the testator.¹⁰²

To carry this heavy burden, proponents of lost wills frequently offer statements similar to the three illustrative examples above.¹⁰³ The evidentiary

voluntarily embodied in a single document, no other utterance of intent or will on the same subject can be given jural effect. Hence, such a declaration is excluded from consideration even in the process of interpretation, not because it would not for that purpose be useful, but because it would be improper for the other purpose. There being two conceivable purposes for which it could be used, the one proper, the latter improper, it is excluded because of the risk that the latter would dominate and that the temptation to abuse would be too strong.

This conclusion might have been declined by the courts; and certainly the rule as it stands does not obey the principle . . . that a fact relevant for one purpose but not for another may still be received for the former. Nevertheless, the rule is intelligible and its policy rational. It rests on an attempt to insure an observance of the integration rule . . . even at the cost of losing some useful data for the process of interpretation.

9 J. WIGMORE, *supra* note 93, § 2471, at 238-39 (citations and footnotes omitted).

See also *In re Cook*, 44 N.J. 1, 11-13, 206 A.2d 865, 870-71 (1965) (Hall, J., dissenting); A. CLAPP, *supra* note 78, at § 197, at 309 ("The reason for excluding the testator's direct statements of his intention is because the Wills Act has required the wishes of the testator to be integrated into a formal document, as a safeguard against fraud. . .").

⁹⁸ T. ATKINSON, *supra* note 78, § 97, at 506 (The will may never have existed, been validly executed, or the testator himself may have destroyed it.).

⁹⁹ Gulliver & Tilson, *supra* note 83, at 6-7.

¹⁰⁰ 3 PAGE ON WILLS, §§ 27.3-.4 (Bowe-Parker rev. 1961); T. ATKINSON, *supra* note 78, § 97, at 506-13.

¹⁰¹ T. ATKINSON, *supra* note 78, § 97, at 508-11; 3 PAGE, *supra* note 100, §§ 27.1-.6, 27.11. Atkinson says that the proof must be "clear and convincing." T. ATKINSON, *supra* note 78, § 97, at 508. Clapp alludes to cases in which the requirement was claimed to be "beyond a reasonable doubt." A. CLAPP, *supra* note 78, § 145, at 271-72 & n.22. See also *Hollon's Ex'r v. Graham*, 280 S.W.2d 544, 547-48 (Ky. 1955); *In re Will of Roman*, 80 N.J. Super. 481, 483, 194 A.2d 40, 41 (Hudson County Ct. 1963); Annot., 41 A.L.R.2d 393, at 191-93 (1955 & Later Case Ser. 1980). See generally Evans, *The Probate of Lost Wills*, 24 NEB. L. REV. 283 (1945).

¹⁰² See sources cited *supra* note 101.

¹⁰³ See cases cited *infra* notes 123-25.

issue — the appropriate use of the state of mind exception — is now somewhat different from the previous examples. Here the proponent generally offers the testator's utterances not to show the testator's state of mind, because that is not usually contested, but to prove the material facts necessary for probate: the due execution, the contents and the nonrevocation of the allegedly lost will. The proponent thus seeks the benefit of favorable inferences from the testator's informal utterances to prove that the testator performed certain acts conforming to the thoughts so expressed.

There is strong support in the general body of evidence law for the use of all of these statements. The admissibility of each, however, is rationalized on its own distinct basis. Statements allegedly made contemporaneously with the doing of an act (*e.g.*, "I am leaving my estate to X," if spoken at the time the testator allegedly signed the will) have long been admitted because they are viewed as part of the *res gestae*.¹⁰⁴ When there is other evidence of the act, and there usually is, the statements are admitted technically only to explain the act, and not as evidence of it.¹⁰⁵ For this reason, and for reasons explained more fully below, admissibility of these contemporaneous statements presents no problems in lost wills cases.¹⁰⁶

Forward- and backward-looking statements such as "I intend to leave my estate to X" and "I left my estate to X," however, are not received readily on all issues in lost wills cases. The reason, however, is not traceable to the law of evidence. Forward-looking statements of intention were held generally admissible under the state-of-mind exception to prove a declarant's subsequent conduct more than a century ago in the famous case *Mutual Life Insurance Co. v. Hillmon*.¹⁰⁷ There the defendant life insurers claimed that a body found at Crooked Creek, Kansas was that of one Walters, and not the insured, Hillmon. To prove the point, the defendants offered in evidence two letters written by Walters and mailed from Wichita to his fiancée and sister stating his intention to go to Crooked Creek with Hillmon.¹⁰⁸ After observing the inherent reliability of statements of intention and the difficulty of proving mental state

¹⁰⁴ The term "*res gestae*" is used with various meanings, see Morgan, *A Suggested Classification Of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922) [hereinafter cited as Morgan, *Suggested Classification*]; Morgan, *Res Gestae*, 12 WASH. L. REV. 91 (1937) [hereinafter cited as Morgan, *Res Gestae*].

¹⁰⁵ It is usually required that the statements have accompanied the act, or been near enough in time to the act to be viewed as part of it. See, *e.g.*, *In re Morrison's Estate*, 198 Cal. 1, 7-8, 242 P. 939, 941-42 (1926) (statement of testator that paper he showed to witnesses was his will). See also explanation in Morgan, *Suggested Classification*, *supra* note 104, 232-33; Morgan, *Res Gestae*, *supra* note 104, 92-94.

¹⁰⁶ See *infra* text at notes 126-28. If there is acceptable evidence of the making of the will in the form of eyewitness testimony to the event, then the courts will admit the testator's contemporaneous utterances. *In re Burbank*, 104 A.D. 312, 93 N.Y.S. 866 (1905) (testator's statements are generally inadmissible unless part of *res gestae*) *aff'd mem.*, 185 N.Y. 559, 77 N.E. 1183 (1906).

¹⁰⁷ 145 U.S. 285 (1892). For a complete history of the *Hillmon* case see J. WIGMORE, *PRINCIPLES OF JUDICIAL PROOF* 856-96 (1913). For a very interesting and thorough discussion of *Hillmon* and its doctrinal ramifications see 4 D. LOUISELL & C. MUELLER, *supra* note 37, §§ 441-443.

¹⁰⁸ 145 U.S. at 287-89.

when the condition itself is in issue, the Supreme Court ruled the letters admissible even though Walters' state of mind was not an ultimate issue in the case.¹⁰⁹ The letters were "competent" evidence because they made it "more probable both that [Walters] did go [to Crooked Creek] and that he went with Hillmon, than if there had been no proof of such intention."¹¹⁰

While the Court's holding was criticized for expanding the state of mind exception to include statements not needed to effectuate substantive purposes,¹¹¹ it generally has been followed¹¹² — but not in lost wills cases. That the reason for the refusal to admit such statements in lost wills cases lies in the substantive policies reflected in the statute of wills is partly indicated by the absence of any reason under normal evidentiary principles for the exclusion. Indeed, in lost wills cases, there is an even stronger evidentiary argument that expansion of the exception is needed to assure that most such cases do not fail for lack of evidence. While state of mind is not the central issue, absence of the actual will often makes proof of the testator's utterances the only evidence available on the questions of due execution and contents. Moreover, in lost wills cases, just as in the use of Walters' letters to prove that he went to Crooked Creek, there is no extra hearsay danger involved in the use of forward-looking declarations to prove due execution and contents. The Trier need not rely upon the testator's perception or memory. Rather, in crediting the statement, the Trier relies solely on the sincerity and narrational skills of the testator in the same way it would rely on these skills if state of mind were the issue. The statement is then probative of the testator's later conforming act by a process of inference from belief in the sincerity of the statement to the probability that he acted on his intentions. No further reliance on the testator's credibility is necessary for the second step.¹¹³ The strength of the inference to be drawn from the statement of intention to an act of execution or to conforming contents, of course, necessarily would vary from case to case. Where the declaration of intention is uttered close to the time of the act alleged, however, and no further circumstances are shown that shed doubt on the testator's good faith or ability to act, the statement would be admissible under general principles of relevance.¹¹⁴

As with forward-looking hearsay statements, backward-looking statements of a testator such as "I left my estate to X" have been urged admissible

¹⁰⁹ 145 U.S. at 295-96.

¹¹⁰ 145 U.S. at 296.

¹¹¹ See 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 442 n.91; Hinton, *supra* note 77, at 404 *et seq.*; Hutchins & Slesinger, *Some Observations On The Law Of Evidence — State Of Mind To Prove An Act*, 38 YALE L.J. 283, 285-88 (1929); Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 155-56 (1912).

¹¹² FED. R. EVID. 803(3); 6 J. WIGMORE, *supra* note 7, § 1714, at 90-98; MCCORMICK, *supra* note 7, § 295, at 697-701.

¹¹³ Hinton, *supra* note 77, at 404.

¹¹⁴ For an interesting discussion of the factors that might be considered in evaluating the probativeness of the statement, see 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 442, at 549-58.

in wills cases by most eminent evidence scholars¹¹⁵ and now are admissible in such cases under the federal rules of evidence.¹¹⁶ In other cases, however, these statements are usually banned, because of their inherent unreliability.¹¹⁷ Indeed, the strongest criticism of *Hillmon* was addressed to the seemingly offhand holding that Walters' letters could be used to show that Hillmon went to Crooked Creek, too.¹¹⁸ Viewing Walters' letters as probative of Hillmon's actions requires reliance not just on Walters' sincerity and narrational skills, but also on his perception and memory of Hillmon's conduct or communications. Although it has been argued that by treating the backward-looking statement as only circumstantially probative of the acts that caused the memory asserted the Trier could avoid these extra hearsay steps, the point is hard to grasp.¹¹⁹ To

¹¹⁵ See sources cited *supra* note 91, and MCCORMICK, *supra* note 7, § 296, at 701-04.

¹¹⁶ FED. R. EVID. 803(3). The rule is rather strange since the federal courts have no jurisdiction over probate matters. The rule, however, may influence the way state courts view the matter. See 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 443, at 586.

¹¹⁷ *Shepard v. United States*, 290 U.S. 96, 106 (1933); FED. R. EVID. 803(3). In a very few cases they have been admitted. See, e.g., *United States v. Annunziato*, 293 F.2d 373, 377-78 (2d Cir.) (declarant's statement of memory of another's conduct included in utterance expressing declarant's existing intention to do an act, admitted to show both declarant's later act and prior conduct of other person), *cert. denied*, 368 U.S. 919 (1961); *Nuttall v. Reading Co.*, 235 F.2d 546, 551-52 (3d Cir. 1956) (deceased worker's statements saying he was being forced to work by employer's agent despite his illness admitted in FELA action to prove agent's conduct). Other cases are collected and discussed in 4 D. LOUISELL & C. MUELLER, *supra* note 37, §§ 442-43, at 562-83.

¹¹⁸ 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 442, at 558-64; Hinton, *supra* note 77, 409-20. The federal rule appears to exclude statements offered to show the conduct of another. But see 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 442, at 560-64, and cases cited and discussed therein.

¹¹⁹ For attempts to explain the reasoning, see Seligman, *supra* note 111, at 151-53 and Hinton, *supra* note 77. In *Shepard v. United States*, 290 U.S. 96 (1933), the defendant claimed his decedent wife committed suicide. *Id.* at 102. The prosecution charged the death was murder. *Id.* at 98. The trial court permitted the prosecution to show a statement the decedent made to her nurse, "Dr. Shepard poisoned me," as a dying declaration. *Id.* The Court of Appeals upheld the conviction. *Id.* at 102. The appeals court ruled that the statement was not a dying declaration (as offered) but determined that it was nevertheless admissible under the state of mind exception to show a belief inconsistent with a suicidal frame of mind. *Id.* The Supreme Court, after observing that the defendant "would have no grievance" had use of the statement been "narrowed to that point," *id.* at 104, then went on to rule, in seemingly unequivocal language, that the statement was inadmissible as either circumstantial evidence of Mrs. Shepard's will to live or her memory of Dr. Shepard's conduct.

It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. *It is for ordinary minds, and not for psychoanalysis, that our rules of evidence are framed.* They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out. . . .

The ruling in *Mutual Life Ins. Co. v. Hillmon* marks the high water line beyond which courts have been unwilling to go. . . . Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that,

avoid destroying the hearsay rule entirely, therefore, backward-looking statements, at least those expressly articulated as utterances of memory, are almost always inadmissible.¹²⁰

While the use of backward-looking statements in most instances is unsupported by evidentiary principles, in wills cases it has been argued that the opposite is true. In wills cases, the person with the most intimate knowledge of the events, the testator, is always unavailable; his prior statements about the execution and contents of the will are likely to be the most reliable evidence of his conduct available.¹²¹ This proposition is especially true in cases where the alleged will has disappeared. Thus in such cases there is ample justification from the standpoint of evidence doctrine for the special exception in the federal rules for the backward-looking statements of the testator.¹²²

Despite this wealth of evidence law authority, only one jurisdiction seems to admit freely the forward- and backward-looking statements of a testator in proof of the execution and contents of lost wills.¹²³ In another jurisdiction they are completely inadmissible,¹²⁴ and in most they are granted only a limited

to the rule against hearsay if the distinction were ignored.

The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be distinguished by a jury. [emphasis added] [citation omitted].

Id. at 104-06.

¹²⁰ See quotation from *Shepard v. United States*, set out in *supra* note 119. FED. R. EVID. 803(3); FED. R. EVID. 803(3) advisory committee note.

¹²¹ 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 443, at 585-89. See also MCCORMICK, *supra* note 7, § 296, at 636-39; 6 J. WIGMORE, *supra* note 7, § 1738, at 180.

¹²² FED. R. EVID. 803(3). The advisory committee note, however, contains the following enigmatic language: "The carving out, from the exclusion [of statements of memory and belief], of declarations relating to the execution, revocation, identification or terms of declarant's will represents an *ad hoc* judgment . . . resting on grounds of necessity . . . rather than logic." FED. R. EVID. 803(3) advisory committee note.

The Federal Rule has been characterized as a complete repudiation of *Throckmorton v. Holt*, 180 U.S. 552 (1901), which was widely understood as making inadmissible the testator's statements of execution or contents to prove or disprove the genuineness of a will contested as a forgery. See 4 WEINSTEIN'S EVIDENCE, *supra* note 14, § 803(3)[05], at 103-10. Courts seem to have qualms about the admissibility of statements similar to those articulated in the lost wills cases. See Annot., 62 A.L.R.2d 855, 866-73 (1958). There may be less danger, however, in the use of such statements where the issue is forgery. If the will offered is duly executed on its face, the testator's statements will not be used as a substitute for the will; the disposition will be by the terms of the document if it is not held to be a forgery, or intestate if it is held to be a forgery.

¹²³ In New Jersey these statements appear to be freely admissible to prove execution and contents of the will. *McTamney v. McTamney*, 138 N.J. Eq. 28, 30-31, 46 A.2d 444, 446 (Ch. 1946); *In re Schnebel's Will*, 141 A. 313 (N.J. Prerog. Ct. 1928), *aff'd*, 104 N.J. Eq. 488, 146 A. 916 (1929); *Campbell v. Cavanaugh*, 125 A. 569, 570 (N.J. Ch. 1923), *aff'd sub nom. Campbell v. Smullen*, 96 N.J. Eq. 724, 125 A. 926 (1924); A. CLAPP, *supra* note 78, § 145, at 273 and cases cited therein. In New Jersey, however, the usual policy of the law relating to formalism is changing generally. The courts there are apparently more interested in the testator's subjective desires. A. CLAPP, *supra* note 78; § 196 at n.10.5; § 197 & n.3 (Supp. 1980).

¹²⁴ In New York these declarations, unless part of the *res gestae*, are inadmissible to prove due execution and contents. *In re Will of Bonner*, 17 N.Y.2d 9, 11, 214 N.E.2d 154, 155, 266 N.Y.S.2d 971, 973 (1966); *In re Burbank*, 104 A.D. 312, 323, 93 N.Y.S. 866, 873 (1905), *aff'd*

form of admissibility.¹²⁵ None of the cases examined distinguish between forward- and backward-looking statements. The rules apply to *all* informal statements of the testator except those considered part of the *res gestae*, where there is eyewitness testimony of the acts. The prevailing rule, whether mandated by statute, statutory interpretation or common law development, appears to be that a will's due execution and contents must be proved by the testimony of one or two witnesses with direct knowledge of the making of the will.¹²⁶ The testator's informal statements are admissible solely to corroborate the eyewitness testimony.¹²⁷ In some cases, the statements are inadmissible unless the eyewitness testimony is produced. In other cases the statements are admissible, but are held by themselves to be insufficient proof of due execution or of contents.¹²⁸ The courts, however, admit more freely the testator's declarations to support and rebut the presumption of nonrevocation.¹²⁹ Thus, despite the presence of evidentiary principles to support the use of hearsay in all instances, the prevailing rule is to allow such evidence only to show nonrevocation, and to reject such proof to show due execution and contents.

The reasons for this unequal treatment of hearsay statements relate directly to the courts' awareness of the relationship between the use of the evidence and the policies underlying the statute of wills. When the testator's statements,

mem., 185 N.Y. 559, 77 N.E. 1183 (1906); *In re Yanover's Will*, 16 Misc. 2d 128, 131, 182 N.Y.S.2d 961, 965 (Sur. Ct., Nassau Co. 1959); *In re Karcher's Estate*, 172 Misc. 947, 949, 16 N.Y.S.2d 577, 578 (Sur. Ct., Bronx Co. 1939); *In re Estate of Pardy*, 161 Misc. 77, 81, 291 N.Y.S. 969, 974 (Sur. Ct., Clinton Co. 1936). *See also* *Brownfield v. Brownfield*, 249 S.W.2d 389, 391 (Mo. 1952).

¹²⁵ T. ATKINSON, *supra* note 78, § 97, at 509; 3 PAGE, *supra* note 100, § 27.3; Annot., 126 A.L.R. 1139, 1156-58 (1940); Cases collected in Annot., 41 A.L.R.2d 393, 399 (1955).

¹²⁶ *See* sources cited *supra* at note 125. In New York, the matter is governed by statute. *See* N.Y. Surr. Ct. Proc. Act § 1407, (McKinney 1980-1981) (requiring two "credible" witnesses or one witness plus a draft). The courts assume, without discussion, that the statute means *eye-witnesses* to execution and contents. *See* cases cited *supra* in note 124. *See also* the following cases as examples of sufficient evidence under the statute: *In re Graeber*, 53 Misc. 2d 640, 279 N.Y.S.2d 429 (Sur. Ct. 1967); *In re Will of Haefner*, 4 Misc. 2d 835, 162 N.Y.S.2d 596 (Sur. Ct. 1956). In Oklahoma, the question is apparently considered to be a matter of statutory interpretation. *Cf. In re Estate of Robb*, 581 P.2d 1327 (Okla. Ct. App. 1978) (statutory words "clearly and distinctly proved by two witnesses" held to mean that witnesses must have direct knowledge of execution to satisfy statute). In New Jersey, a rule requiring at least one attesting witness was developed by common law, but it has now been expressly eradicated by Rule 71 of the N.J. Rules of Evidence. *See* A. CLAPP, *supra* note 78, § 145, at 126-27 n.30 (Supp. 1980).

¹²⁷ *See* sources cited *supra* in notes 124-26. *See also* Sparks, *Admissibility of Oral Declarations Of A Testator To Prove A Lost Will In Kentucky*, 36 Ky. L.J. 431, 436 (1948).

¹²⁸ *See* sources cited *supra* notes 125 and 126. *Compare In re Estate of Robb*, 581 P.2d 1327, 1328-29 (Okla. Ct. App. 1978) (evidence admissible but insufficient to prove execution), with *Loy v. Loy*, 246 S.W.2d 578, 579-80 (Ky. 1952) (evidence admissible only in corroboration of testimony of direct eyewitnesses). A perusal of the cases collected at 41 A.L.R.2d 393, 399, 410 (1955) shows that many courts are themselves confused about whether they are applying a rule of admissibility or sufficiency.

¹²⁹ T. ATKINSON, *supra* note 78, at § 97; *Hollon's Ex'r v. Graham*, 280 S.W.2d 544, 549 (Ky. 1955); Annot., 3 A.L.R.2d 943 (1949). T. ATKINSON, *supra* note 78, § 97, at 511; Sparks, *supra* note 127, at 434-36; Note, *Admissibility in Indiana*, *supra* note 78, at 395-97. *But see In re Will of Fox*, 9 N.Y.2d 400, 406-07, 174 N.E.2d 499, 503, 214 N.Y.S.2d 405, 410-11 (1961); *In re Yanover's Will*, 16 Misc. 2d 128, 131-32, 182 N.Y.S.2d 961, 965 (Sur. Ct. Nassau Co. 1959).

"I intend to leave my estate to X" or "I left my estate to X," or even, "I have (or have not) revoked my will"¹³⁰ are offered on the issue of revocation of the lost will, the statements are admissible because there is no danger of a conflict with substantive policies. The testator's statement itself cannot constitute the act of revocation because statutes almost always require revocation to be accomplished by one or more specified acts (*e.g.*, burning, mutilation, tearing) that do not include informal words.¹³¹ The formal act, however, must be accompanied by a deliberate intention to revoke.¹³² As a result, proof that the requisite intention was lacking makes the formally sufficient act ineffective.¹³³ Thus the testator's declarations are not used in proof or disproof of the ritual requirements of the statutes relating to revocation.¹³⁴ Moreover, if confined to the issue of revocation, there is no danger that these informal statements would form a substitute basis for distribution of the testator's assets contrary to the mandated distribution by a formally executed will.¹³⁵

Use of the same statements to prove due execution or contents of a lost will, however, could result in a conflict with the policy of ritualism expressed in the statute of wills. The danger is that an informal statement, rather than the statutorily prescribed formal will, would become the basis for distributing the testator's assets. The possible conflict with the statute in the use of such statements, however, is not direct. The testator's utterances are not made irrelevant by the statute. Unlike cases involving ambiguities in a will, where the testator's direct statements are regarded as offering substitutes for language incorporated into a formally executed will, the statements are here urged admissible only to prove compliance with the statute. The testator's statements are circumstantial proof of both the ritual conduct required by the statute of wills and the language formally incorporated into the document in accordance with the ritual requirements.¹³⁶

¹³⁰ The first two statements might be misconstrued as not hearsay because they do not directly state the intention to revoke, but only a state of mind inconsistent with an intention to revoke. The last statement, however, is a direct statement of the matter, and almost everyone would classify it as hearsay. See *supra* note 77, and sources cited therein.

¹³¹ T. ATKINSON, *supra* note 78, §§ 84, 86; 2 PAGE ON WILLS, §§ 21.24, .36-.37 (Bowe-Parker rev. 1960) [hereinafter cited as 2 PAGE]; 3 PAGE, *supra* note 100, § 29.143, at 707 & n.2; Sparks, *supra* note 127, at 433.

¹³² T. ATKINSON, *supra* note 78, § 84, at 420-22; 2 PAGE, *supra* note 131, § 21.24, at 384 & n.12; 3 PAGE, *supra* note 100, §§ 29.139-.141, .143-.146.

¹³³ See sources cited *supra* notes 131 and 132; *In re Spiegelglass*, 48 N.J. Super. 265, 268, 137 A.2d 440, 441-42 (1958).

¹³⁴ 6 J. WIGMORE, *supra* note 7, § 1757. Sparks, *supra* note 127, at 433-34; Note, *Admissibility in Indiana*, *supra* note 78, at 397.

¹³⁵ In other words a statement "I revoked my will" or language from which the fact may be inferred, would not, if held sufficient only on the issue of revocation, result in disposition of the property according to the language in the statement. Where statements of intention or memory of the execution and contents of a will are used to prove *those* facts, the statement *itself* if relied upon, may become the equivalent of the operational language according to which the property is distributed if there is no other direct evidence of these facts. That usage would violate the principle of formality. Use of the same statements in cases where issue is genuineness of a duly executed document is discussed *supra* note 122.

¹³⁶ See cases cited *supra* at notes 124-26 and 137.

Nonetheless, the courts view the temptation to rely heavily on such statements in the process of weighing all the bits and pieces of evidence pro-
pounded on the issues as presenting a grave risk of abuse.¹³⁷ If the testator's
statements were at all decisive in the weighing process, those statements could
replace the statutory formalities by facilitating dispositions according to the in-
formal, unsettled desires of the testator¹³⁸ whenever a will allegedly disap-
peared. Thus the prevailing rule of limited admissibility may be seen as one
that effectuates the substantive policy of formalism.¹³⁹

ii) The Evidentiary Policy — Relative Reliability

The limited admissibility rule in lost wills cases also has been justified as
one that preserves the evidentiary policy of the statute of wills. Despite the per-
suasive arguments of evidence commentators, and even the Supreme Court,
that state-of-mind declarations are reliable and necessary,¹⁴⁰ probate courts ap-
parently consider both the testator's declarations and the testimony reporting it
too unreliable to credit.¹⁴¹

The admission of oral declarations of a deceased person in corrobor-
ation of other evidence of the main facts to establish a lost will is a broad ex-
ception to the hearsay rule. To weaken this rule by allowing the contents of a
lost will to be proved only by the oral statements of a testator would make the
establishment of spurious wills a comparatively easy matter. Third persons
would be given an opportunity to testify without fear of contradiction as to
the oral statements of the maker of the missing will after his own lips have
been sealed by death. Persons often make false or misleading statements
when talking about their own wills for the very purpose of concealing the
truth. There is probably no secret that is more jealously guarded than the
contents of one's will. It would be dangerous indeed to permit the statements
a testator might have made with the intent to mislead or to mystify curious
or expectant relatives to be used as the truth in establishing the contents of
his lost will after his death.¹⁴²

These observations are especially interesting since there is no apparent
reason for limiting them to lost wills cases. Witnesses with motives to falsify
their testimony appear in all sorts of trials. The sincerity of almost every "state
of mind" declaration can be questioned. For social and family reasons, people

¹³⁷ See, e.g., *In re Will of Bonner*, 17 N.Y.2d 9, 11, 214 N.E.2d 154, 155, 266 N.Y.S.2d 971, 973 (1966); *In re Burbank*, 104 A.D. 312, 319-22, 93 N.Y.S. 866, 869-72 (1905).

¹³⁸ Wigmore makes almost the same argument to show why statements of intention should not be used, even as evidence, to correct ambiguities in otherwise formally executed wills. See *supra* note 97.

¹³⁹ See Sparks, *supra* note 127, at 438.

¹⁴⁰ In addition to sources cited throughout this section, see Hinton, *supra* note 77, at 412-13 (discussing lost wills cases, as well as others, seems critical of the "inconsistencies" in use of the exception for state of mind, but resigned to accepting them as "accidental anomalies").

¹⁴¹ *Loy v. Loy*, 246 S.W.2d 578, 579 (Ky. 1952). See also Sparks, *supra* note 127, at 438, 441-42.

¹⁴² *Loy v. Loy*, 246 S.W.2d 578, 579 (Ky. 1952). But see *Goodale v. Murray*, 227 Iowa 843, 859, 289 N.W. 450, 457-58 (1940).

"mislead" and "mystify" their friends and relatives about all manner of things: their feelings and affections; their intentions to perform chores, get haircuts, pay their debts; their commitments to previous social engagements; their motives for attending or not attending at work, social gatherings, appointments with dentists and doctors; their reasons for failing to accept and return phone calls. Indeed, Walters may not have intended to go to Crooked Creek at all! It is hardly unusual for persons distant from their fiancées to express their plans with less than perfect candor. In most situations, however, cross-examination and criminal penalties are considered adequate safeguards against perjury,¹⁴³ and declarations of state of mind are touted as highly reliable evidence.

Why, then, is a declaration of intention reliable enough to get Walters — and even Hillmon — to Crooked Creek, but not reliable enough to prove the execution or contents of a missing will? The reason for the distinction cannot be supported readily by vague and subjective notions of intrinsic and circumstantial trustworthiness. Rather, by examining the differing substantive ends for which the statements are offered, a more simple and, hopefully, rationally appealing explanation can be found.

II. RELATIVE RELIABILITY

A. *A Comparison Between Use of State-of-Mind Declarations in Cases Involving Probate of Lost and Destroyed Wills and Those Involving the Tort of Wrongful Destruction of a Will*

In some substantive contexts hearsay declarations are viewed as reliable and admissible. In others the same statements may be inadmissible or deemed worthy of only the slightest credit. That the difference cannot be explained by the inherent trustworthiness of the statements is illustrated by comparing the treatment of a testator's state of mind declarations offered in actions to probate lost or destroyed wills with the treatment of the same statements in tort actions for the malicious destruction of a will. In the probate action, a testator's declaration offered to prove the execution or contents of a will is inadmissible or granted only "limited admissibility."¹⁴⁴ Conversely, in a tort action it is not only admissible, but is probably sufficient proof on both issues, *i.e.*, that there

¹⁴³ In federal courts, and in most jurisdictions (except to the extent that dead man's statutes apply), a witness is not rendered incompetent to testify because of an interest in the outcome of the litigation, FED. R. EVID. 601 & advisory committee note. Punishment for perjury is possible as long as the witness takes an oath, FED. R. EVID. 603 & advisory committee note; 6 J. WIGMORE, *supra* note 7, §§ 1831-1832. In most lost wills cases, although the rule is not altogether clear, interested persons are permitted to testify. *See* cases cited in Annot., 41 A.L.R.2d 393, 400-01 (1955) and later cases *service*. Apparently some jurisdictions may still have dead man's statutes that affect the question. *See* cases cited at 41 A.L.R.2d 393, 401 (1955). *See also* Callihan v. Luster, 305 S.W.2d 530, 532 (Ky. 1957); Gibbs v. Terry, 281 S.W.2d 712, 714-15 (Ky. 1955).

¹⁴⁴ *See supra* text at notes 123-39.

was a duly executed will and that the contents were as alleged. Although identical statements are involved, the substantive bases for the suits are different. Thus, the reason for the inconsistent treatment of the hearsay must lie in the change of substantive context.

The cynic might conclude that free use of hearsay in one case and limited use in another case means that courts care less for the substantive law in the former area than in the latter. Further, by making the due execution and contents of destroyed wills more difficult to prove in probate than in tort actions, the courts may be regarded by the cynic as biased in favor of intestate heirs or against defendants in tort cases.

While the cynical view may make sense in cases other than those involving probate and tort actions on destroyed wills,¹⁴⁵ there is in the present context only a benign and sensible reason for the different treatment of the testator's hearsay declarations. The origins of the tort of wrongful destruction of a will and the goals which that tort effectuates warrant this difference. The unusual tort of malicious destruction of a lost will is a recent development of the action on the case.¹⁴⁶ Like all case actions, it is "an outgrowth of the principle that whenever the law gives a right or prohibits an injury, it will also afford a remedy."¹⁴⁷ The tort action performs what one expert has called "the classic function of the law of torts, providing a safety net under the law [of wills]."¹⁴⁸ To achieve this goal the courts must admit, and rely on, the type of proof most likely available to the wronged plaintiff: the hearsay declarations of the testator.

In wrongful destruction of wills cases, plaintiff bears a burden analogous to that borne by plaintiffs in actions for the willful interference with prospective business advantage¹⁴⁹ and willful suppression of evidence.¹⁵⁰ To prevail, the plaintiff must show that the defendant's intentional and unjustifiable destruction of the will resulted in a direct loss to the plaintiff.¹⁵¹ To avoid awarding

¹⁴⁵ See cases and sources cited *infra* notes 163-248.

¹⁴⁶ Cases on the tort seem rare. *Creek v. Laski*, 248 Mich. 425, 227 N.W. 817 (1929) (the opinion notes that authorities prior to this case were sparse) 248 Mich. at 428, 227 N.W. at 818-19; Annot., 65 A.L.R. 1119 (1930); *Dublin v. Bailey*, 172 N.C. 608, 90 S.E. 689 (1916). See also *Morton v. Pettit*, 124 Ohio St. 241, 177 N.E. 591 (1931) (allowing tort action where forged will admitted to probate and time for contesting it had elapsed); 2 PAGE, *supra* note 131, § 24.3, at 604. See generally Note, *Destruction of Evidence*, 30 HARV. L. REV. 527 (1916).

¹⁴⁷ *Creek v. Laski*, 248 Mich. 425, 430, 227 N.W. 817, 819 (1929).

¹⁴⁸ The language is a direct quotation from a private lecture by Prof. Robert Carter.

¹⁴⁹ Harper and James discuss the tort of willful destruction of a will under the general heading "Interference with Reasonable Economic Expectancies," 1 F. HARPER AND F. JAMES, *THE LAW OF TORTS*, § 6.11, at 510, 512 n.9 (1956). See also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 130, at 950-51 (4th ed. 1971).

¹⁵⁰ The courts appear to treat the gravamen of the injury as the destruction of evidence. See *Dulin v. Bailey*, 172 N.C. 608, 609, 90 S.E. 689, 689-90 (1916); *Creek v. Laski*, 248 Mich. 425, 429, 227 N.W. 817, 819 (1929). See also Evans, *Torts To Expectancies In Decedents' Estates*, 93 U. PA. L. REV. 187, 198 (1944); Note, *Tort Action in Kentucky for the Wrongful Destruction of a Will*, 36 KY. L.J. 299 (1947) [hereinafter cited as Note, *Tort Action in Kentucky*].

¹⁵¹ *Creek v. Laski*, 248 Mich. 425, 428, 227 N.W. 817, 818-19 (1929); 1 HARPER & JAMES, *supra* note 149, § 6.11, at 510-12.

damages based on mere speculation, the court may require the plaintiff to prove that his benefits were "substantially certain." Thus, recovery may be limited to those instances where the possibility of revocation of the will had disappeared, as where it was destroyed after the testator's death.¹⁵² The gravamen of the complaint is that the defendant's wrongful action has deprived the plaintiff of his right to a legacy which vested at the testator's death.¹⁵³ Since there would be no deprivation if the destroyed will or legacy could be proved in probate, the plaintiff must either seek probate first¹⁵⁴ or show that it would be useless.¹⁵⁵

If the wronged legatee were required to prove his injury in tort with the same degree of exactitude required in probate, the tort action would afford no remedy, merely another right. Accordingly, courts that have confronted the issue hold that lesser proof of due execution and contents are sufficient in the tort action.¹⁵⁶ A plaintiff may prevail on a preponderance of the evidence rather than on the more burdensome "clear and convincing" evidence standard required in the probate action.¹⁵⁷ Consistent with evidence rules in analogous tort actions, it is assumed that once the defendant's wrongful destruction of the testator's purported will is shown, a presumption, or at least a permissible inference, arises that the will and its contents were as represented by the plaintiff.¹⁵⁸

Furthermore, on general evidentiary principles, the testator's out-of-court declarations are freely admissible in the tort action under the state of mind exception to prove the will's due execution and contents.¹⁵⁹ The declarations often will be the most probative evidence available to the plaintiff, because the wrongdoer's simultaneous destruction of the operative instrument and the best

¹⁵² 1 HARPER & JAMES, *supra* note 149, § 6.11, at 512 & n.9.

¹⁵³ 1 HARPER & JAMES, *supra* note 149, § 6.11, at 512.

¹⁵⁴ Allen v. Lovell's Adm'x, 303 Ky. 238, 243, 197 S.W.2d 424, 426 (1946).

¹⁵⁵ Creek v. Laski, 248 Mich. 425, 431-32, 227 N.W. 817, 820 (1929). *But see* McGregor v. McGregor, 201 F.2d 528, 529 (10th Cir. 1953) (apparently ruling that probate must be sought first to avoid a jurisdictional conflict between probate courts and law and equity courts). The reason for the rule urged in the text above is suggested in Creek v. Laski, 248 Mich. 425, 431-32, 227 N.W. 817, 820 (1929). That reason seems more sound because it also avoids potential *res judicata*/collateral estoppel problems when the probate court refuses the will and the plaintiff seeks the tort remedy. In *Creek v. Laski*, a strong dissenting opinion argued against the majority's resolution of the jurisdictional and estoppel problems. *See* 248 Mich. 425, 434-36, 227 N.W. 817, 820-21 (1929) (Wiest, J., dissenting).

¹⁵⁶ Creek v. Laski, 248 Mich. 425, 433, 227 N.W. 817, 820 (1929); Dulin v. Bailey, 172 N.C. 608, 609, 90 S.E. 689, 690 (1916) (cases holding a single attesting witness' statement sufficient where probate rules required two witnesses). Allen v. Lovell's Adm'x, 303 Ky. 238, 243, 197 S.W.2d 424, 426 (1946) (since petition not adequate to show an excuse for failing to proceed in probate first, no question of sufficiency of proof presented, although "it is possible" proof inadequate to support probate might be sufficient in tort action).

¹⁵⁷ *Id.*

¹⁵⁸ Note, *Tort Action in Kentucky*, *supra* note 150, at 300-01. Harper and James and Prosser by categorizing the tort under the same heading with the other torts involving interference with prospective advantage, which are sufficiently proved by a preponderance of the evidence, seemingly agree. *See supra* note 149.

¹⁵⁹ *See infra* note 160.

evidence of it have put more reliable proof beyond the plaintiff's reach. In combination with the inference permissibly drawn from the defendant's unjustifiable act, therefore, the statements would probably be held sufficient to prove the case against him.¹⁶⁰

The uneven treatment accorded the hearsay exception in probate and tort actions may be thus seen as necessary to assure the results fostered by both substantive laws. In the probate action, exactitude of proof is demanded to effectuate vital policies of formalism: to protect decedents' estates and beneficiaries from fraud, and to assure distribution according to the settled intentions of the testator. In the tort action, a much lesser degree of exactitude is tolerated in order to effectuate the vital policies of that law: providing the wronged legatee with a remedy and depriving the wrongdoer of the fruits of his wrong.¹⁶¹ Thus, identical treatment of the hearsay exception in tort and probate cases seemingly would achieve procedural symmetry, but only at the expense of one or the other of the substantive rules. A discriminating application of the adjective rule instead assures results consistent with the underlying policy aims of both laws.¹⁶²

*B. A Comparison Between Use of Hearsay to Prove Conspiracy in
Antitrust Cases and General Criminal Cases*

Two substantive laws may include within them the same operative element but the utility of the element may be different in each context. That judges do recognize such differences, and adjust evidentiary rulings accordingly, is demonstrated by examining the very different approaches to admissibility of hearsay offered to prove conspiracy in antitrust cases and general criminal cases. These cases illustrate that uneven treatment is necessary to assure the realization of the policies of both laws. Unlike other instances of divergent treatment, however, the courts in the conspiracy cases do not recognize expressly the uneven treatment accorded identical hearsay statements. Technically, any relevant declaration that fits within a recognized exception is admissible to prove conspiracy equally in both antitrust and general criminal cases. Nevertheless, a comparison of rulings on admissibility of identical hearsay under these laws shows that courts require different foundational proof and different degrees of reliability in the two cases. By examining the function of the conspiracy element in the two laws, the reason for the different treatment of hearsay evidence may be demonstrated.

The general criminal law makes it unlawful for a person to "conspire" to commit a crime.¹⁶³ Under the federal antitrust laws, criminal and civil sanc-

¹⁶⁰ Evans, *supra* note 150, at 198; Note, *Destruction of Evidence*, 30 HARV. L. REV. 527 (1916); Note, *Tort Action in Kentucky*, *supra* note 150, at 301.

¹⁶¹ Note, *Tort Action in Kentucky*, *supra* note 150, at 305. On the general principle of lesser evidence, see sources cited in notes 149-150, 156 *supra*.

¹⁶² The drafters of the Model Probate Act suggested that the evidence rules of proof for probate of lost wills should be relaxed, and that the need for relaxation was demonstrated by the tort cases cited in this section. MODEL PROBATE CODE, app. A § 77, part II (A.B.A. 1946).

¹⁶³ MODEL PENAL CODE § 5.03 (1962); W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 62, at 470-74 (1972).

tions are available against those who engage in a "conspiracy" to restrain trade.¹⁶⁴ Conspiracy, as defined in both the general criminal law and the federal antitrust statutes, includes any form of agreement, express or tacit.¹⁶⁵ There is, however, one significant difference. The general crime of conspiracy involves an agreement to commit an act which is itself unlawful, even if engaged in by an individual acting alone.¹⁶⁶ Conversely, under Section 1 of the Sherman Act, conspiracies to restrain trade include agreements to commit acts which would be lawful if engaged in by individuals who had no agreement between them.¹⁶⁷

The difference between these two types of conspiracy mandates a different approach in each case to determine the sufficiency of the foundation laid to justify use of coconspirators' statements under the federal rules of evidence.¹⁶⁸ The federal rules technically define as not hearsay statements of a party's coconspirators made in the course of and in furtherance of a conspiracy.¹⁶⁹ Since only the most strained reasoning can justify the "not hearsay" definition, such declarations more usually are regarded as hearsay but admissible as an exception to the rule.¹⁷⁰ Whether classified as not hearsay or an exception,

¹⁶⁴ 15 U.S.C. § 1 (Supp. 1976). This provision is § 1 of the Sherman Act, 15 U.S.C. § 15 (Supp. 1976), provides that any person injured "in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover three fold the damages by him sustained." This provision is § 4 of the Clayton Act.

¹⁶⁵ See, e.g., *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939) (under 15 U.S.C. § 15 tacit understandings between horizontally arranged competitors are sufficient); *W. LAFAVE & A. SCOTT*, *supra* note 163, § 61, at 460-61 (criminal conspiracies generally may be express or tacit).

¹⁶⁶ See sources cited *supra* note 163. See also Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137, 1143-46 (1973) (The author points out that in theory the object of a conspiracy need not be a crime, but "no informed body of opinion today supports the rule that a conspiracy may be criminally punishable even if its object is only a civil wrong." *Id.* at 1144).

¹⁶⁷ 15 U.S.C. § 1 (Supp. 1976). It is a truism, for example, that a seller may lawfully set his own price. See generally Turner, *The Definition Of Agreement Under The Sherman Act: Conscious Parallelism And Refusals To Deal*, 75 HARV. L. REV. 655 (1962). It is per se unlawful, however, for unrelated suppliers of the same product, at the same level of distribution to agree amongst themselves about almost anything even remotely related to the price, or terms and conditions of sale of their products. The crux of the crime is the injury to competition that occurs solely by virtue of the combination. The actual price charged, the motive for the agreement, its power to affect competition, or its actual effect on competition are all irrelevant. See *United States v. Topco Assoc.*, 405 U.S. 596, 605-06 (1972); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214 (1951); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396 (1927); *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 283 (6th Cir. 1898) *aff'd*, 175 U.S. 211 (1899). P. AREEDA, *ANTITRUST ANALYSIS*, ¶ 317 at 345-46 (3d ed. 1981).

Like all truisms, the one above is limited. Provisions of the Robinson-Patman Act, 15 U.S.C. § 13 (Supp. 1976), make certain independent pricing decisions unlawful (price discrimination) and 15 U.S.C. § 2 (Supp. 1976), makes illegal all monopolization and attempts to monopolize, (including "predatory pricing"). See P. AREEDA, *supra*, ¶¶ 214, 700-01.

¹⁶⁸ FED. R. EVID. 801(d)(2)(E).

¹⁶⁹ The federal rule makes the statement not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E).

¹⁷⁰ To the extent that the statement is offered to prove the truth of its contents, thus requiring reliance on the perceptions and memory of the declarant, this article defines the state-

admissibility is said to be justified because the coconspirator's statement is deemed an admission of the party.

Evidentiary attribution to one party of his coconspirator's hearsay statements has been rationalized in part by reference to the criminal law of conspiracy. The criminal law holds one coconspirator liable for all acts in furtherance of the conspiracy committed by all other members of the conspiracy.¹⁷¹ The criminal law is sometimes explained, in turn, by analogy to the laws of partnership. In most cases, however, this analogy is little more than a fiction.¹⁷² Furthermore, this substantive rule of coconspirators' liability has

ment as hearsay. See *supra* text and notes at notes 7-13. Sometimes the statement of a coconspirator may have a non-hearsay use as well, as where it is an operative fact because it constitutes the words of agreement, or is itself an act in furtherance of the conspiracy. The federal rule exception is not confined to the latter use. For a very thoughtful discussion of this point, see 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 427, at 357-62 (1980). See generally 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 801(d)(2)(E)[01], at 801-166-185; R. LEMPERT & S. SALTZBURG, *supra* note 7, at 374-80; Kessler, *The Treatment of Preliminary Issues Of Fact In Conspiracy Litigations: Putting The Conspiracy Back In The Coconspirator Rule*, 5 HOFSTRA L. REV. 77 (1976) (non-hearsay categorization seems to have arisen from fact that all admissions, of which coconspirators' statements are a part, were originally not encompassed in hearsay rule); Note, *Developments in the Law, Criminal Conspiracy*, 72 HARV. L. REV. 920, 984-88 (1959) [hereinafter cited as Note, *Criminal Conspiracy*]; Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 U. CHI. L. REV. 531 (1958) [hereinafter cited as Comment, *The Hearsay Exception for Co-Conspirators' Declarations*].

¹⁷¹ *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946); W. LAFAVE & A. SCOTT, *supra* note 163, § 65, at 512-13.

¹⁷² "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime.' What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all." *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir. 1926) (Learned Hand, J.).

The laws of agency and partnership relating to lawful commercial enterprises generally operate to avoid creation of fictional agency relationships, but even they have been bent out of shape from time to time to foster or implement other substantive policies. J. SLAIN, C. THOMPSON & F. BEIN, *AGENCY, PARTNERSHIP AND EMPLOYMENT*, chs. 1, 2, 4 and 5 (1980). Nevertheless, a criminal conspiracy "partnership" may be fairly characterized as "fictional" because its existence can usually be determined only as a matter of surmise from evidence presented at trial. Even assuming certitude about the existence of a conspiracy to achieve an unlawful end, the precise scope and terms of that conspiracy are rarely known. Thus the acts ultimately held to be "in furtherance" of a conspiracy may have had nothing to do with the "real" conspiracy, whose true scope is known only to the criminal defendants. While it is possible that one partner in a lawful commercial enterprise may be erroneously held responsible for the acts of another partner that were actually outside the scope of the partnership, there will usually be some basis in knowable, frequently stipulated, fact that causes the Trier to make a connection between the act and the partnership business (like use of a partnership car). In many conspiracy prosecutions the connection must presumably be made without such references.

Furthermore, the criminal conspiracy doctrine that places responsibility on one member of the conspiracy for the acts of the others treats all who are involved in the "conspiracy" as equals. A retailer or even a messenger for a drug ring, for example, may become liable for every sale of narcotics made by every retailer and seller in the ring despite his lack of knowledge about the number of the sellers and retailers or their identities. W. LAFAVE & A. SCOTT, *supra* note 163, § 65, at 514, and cases cited therein; MODEL PENAL CODE § 2.04 Comment (Tent. Draft No. 1, 1953); Johnson, *supra* note 166, at 1147-49 and cases cited therein. Here the parallel to the usual rules of partnership seems to dissolve. The normal partner may be generally characterized as the *owner* of a business who becomes vicariously liable for the contracts and torts of his employees and partners. A messenger or retailer in a large drug ring is not analogous to the

been criticized severely as unnecessary to achieve criminal law purposes.¹⁷³ The exception for coconspirators' statements also has been criticized because it goes beyond even the substantive fiction by attributing to the party responsibility for the verbal declarations of his coconspirators.¹⁷⁴ Under the coconspirators' exception, statements which are not themselves acts to which criminal liability would attach regularly are admitted. Coconspirators' statements may evidence the terms or existence of the conspiracy or a defendant's participation in it. As such they are proof from which the defendant's criminal responsibility may be inferred, but are not themselves acts for which the defendant is separately responsible. Nevertheless, the fictional agency which makes one coconspirator liable for the acts of all others is extended by the hearsay exception to make him responsible for all statements by the others about matters concerning the conspiracy and made in the course and in furtherance of it.¹⁷⁵

In applying the hearsay exception to general criminal conspiracy cases, preliminary facts must be shown to establish a foundation for the use of a coconspirator's statements. Hence, for a statement made by one alleged coconspirator to be admissible against another who is charged as a defendant in the case, separate proof of the existence of the conspiracy and the defendant's participation are required.¹⁷⁶ The prevailing rule in criminal conspiracy cases is that the independent proof must be sufficient to justify a finding of these preliminary facts by a preponderance of the evidence.¹⁷⁷ The requirement of

owner, but much more realistically analogous to an employee. By virtue of the illegality of the employment, the "employee" in a criminal conspiracy ends up liable for the crimes of his employer and all his co-employees.

¹⁷³ W. LAFAVE & A. SCOTT, *supra* note 163, § 65, at 514-15; Johnson, *supra* note 166.

¹⁷⁴ 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 427, at 363; Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159 (1954); Note, Criminal Conspiracy, *supra* note 170, at 988-89; Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, *supra* note 170.

A truly bizarre extension of all these fictional agency concepts is found in *United States v. Renfro*, 620 F.2d 569 (6th Cir.), *cert. denied*, 449 U.S. 902 (1980), where Renfro is claimed to have conspired to sell heroin, and the buyer's agent's statements are attributed to Renfro.

The Federal Rules of Evidence 801(d)(1)(C) and (D) may be similarly criticized for their expansion of hearsay exceptions for employee statements beyond the rationales of the agency principles which allegedly justify them. See J. SLAIN, C. THOMPSON & F. BEIN, *supra* note 172, at 4-104 to -129 (1980). There is an interesting discussion of how and why limits might be placed on that expansion in making preliminary rulings under 801(d)(1)(D) in 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 426, at 311-30.

¹⁷⁵ FED. R. EVID. 801(d)(2)(E). *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974); *United States v. Cryan*, 490 F. Supp. 1234, 1241 (D.N.J.), *aff'd*, 636 F.2d 1211 (3d Cir. 1980). See also sources *supra* cited in notes 170 and 174.

¹⁷⁶ *United States v. Cryan*, 490 F. Supp. 1234, 1241 (D.N.J.), *aff'd*, 636 F.2d 1211 (3d Cir. 1980); 1 D. LOUISELL & C. MUELLER, *supra* note 34, § 35 (1977); S. SALTZBURG & K. REDDEN, *supra* note 34, at 462-69; 1 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 104[05] (1981); 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 801(d)(2)(E)[01] at 801-116 & n.5.

¹⁷⁷ Prof. Saltzburg has argued that the standard of proof is properly tied to substantive concerns. Saltzburg, *Standards of Proof*, *supra* note 32, at 302-04.

For purposes of clarity, the text somewhat oversimplifies what the courts do. Courts do not always make separate rulings on the sufficiency of the foundation before admitting the

separate proof avoids the unseemliness of the statement's "bootstrapping" itself into admissibility.¹⁷⁸

The evidence held to constitute a sufficient showing of these preliminary facts, however, is sometimes surprising. For example, in *United States v. Dalzotto*,¹⁷⁹ the named defendant and a codefendant, Young, were convicted of conspiracy to sell PCP, but were acquitted of the substantive offense of distribution.¹⁸⁰ One Holden testified that on September 30, 1976, Dalzotto supplied him with three ounces of the dangerous substance.¹⁸¹ On February 11, 1977, Young supplied him with eight ounces of the same substance.¹⁸² Holden also testified that sometime after the first sale Dalzotto named Young as his (Dalzotto's) supplier.¹⁸³ The latter out-of-court declaration was admissible against Dalzotto as his own admission.¹⁸⁴ It was only admissible against Young under the exception for coconspirators' statements, however, on a showing by a preponderance of independent evidence that there was a conspiracy between Young and Dalzotto.¹⁸⁵ Despite the defendants' acquittal of the substantive offense of sale,¹⁸⁶ the court of appeals held that a sufficient showing of a con-

evidence, but frequently admit it subject to a later ruling if sufficient evidence is shown. The later ruling, if counsel remembers to request it, may then be improperly influenced by the statement itself. If the ruling is to strike the proof of the statement, no jury can be expected to follow an instruction to that effect. See sources *supra* cited note 176.

Even the standard being used is somewhat difficult to determine in many cases. A showing of independent evidence is uniformly required throughout the circuits, but the weight is variously described. Bergman, *The Coconspirators' Exception: Defining The Standard Of The Independent Evidence Test Under The New Federal Rules Of Evidence*, 5 HOFSTRA L. REV. 99, 101-02 (1976). Preponderance of the evidence is apparently the most popular. See *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). According to one commentator, it is also the *minimum* which must be met. Bergman, *supra*, at 102. The maximum standard, according to the same commentator, is apparently the *prima facie* case standard articulated in *United States v. Oliva*, 497 F.2d 130 (5th Cir. 1974), which was there explained as proof sufficient to support a finding by the jury that the defendant was himself a conspirator. *Id.* at 132-33. Whatever that means, it doesn't appear to require proof beyond a reasonable doubt. *Id.* at 102-03.

The Bergman article presents an interesting argument that judges should consider the hearsay statement itself in determining whether to admit it, and then only admit it where, in combination with other admissible evidence, the court is satisfied that there is proof beyond a reasonable doubt that the defendant was a member of the conspiracy. The argument is rebutted in 1 D. LOUISELL & C. MUELLER, *supra* note 34, § 35.

¹⁷⁸ 1 D. LOUISELL & C. MUELLER, *supra* note 34, § 35. Some commentators seem to believe that bootstrapping has risen to epidemic proportions anyway. Bergman, *supra* note 177, at 101 (bootstrapping is inevitable because judges cannot perform "mental gymnastics" required to avoid it.); Levie, *supra* note 174, at 1176 (bootstrapping can also occur if *other* hearsay is considered to establish foundation); Note, *Criminal Conspiracy*, *supra* note 170, at 987 (bootstrapping problem exists when courts provisionally admit evidence subject to later ruling on admissibility).

¹⁷⁹ 603 F.2d 642 (7th Cir.), *cert. denied*, 444 U.S. 994 (1979).

¹⁸⁰ *Id.* at 646.

¹⁸¹ *Id.* at 643.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 644.

¹⁸⁵ *Id.* at 643-44.

¹⁸⁶ *Id.* at 643. The court explained the well-established rule that acquittal does not bar conviction for conspiracy as follows: "Since conviction requires proof beyond a reasonable

spiracy and Young's participation in that conspiracy had been made by the coincidence of the sales of PCP by each defendant to Holden, and Holden's and a police officer's testimony placing Dalzotto in a car by the side of a road while Holden and Young, outside the car, were arranging Young's sale to Holden.¹⁸⁷ Young also testified that he had known Dalzotto for some months prior to the latter meeting, and they apparently left the rendezvous point together in the same car.¹⁸⁸

While it was deemed adequate in *Dalzotto*, this evidence would not have been sufficient to establish a conspiracy by anything near a preponderance of the evidence if, instead of being charged with conspiracy to sell PCP, the defendants there had been charged with an antitrust offense, like a concerted refusal to deal. Under antitrust law, absent an agreement, or an intent to create or maintain a monopoly, a supplier of a product is privileged to sell to whom he pleases, on any terms he likes.¹⁸⁹ For example, suppose supplier A,

doubt, it follows that acquittal on a substantive count does not bar a preliminary finding of conspiracy, which need only satisfy the lesser 'preponderance' standard." *Id.* at 646.

¹⁸⁷ *Id.* at 644-45. The police officer testified that he saw all three talking together outside the car, but he apparently did not hear what was being said. Holden's version is reported in the text since he was a direct participant in the alleged conversation and his version is not inconsistent with the three talking outside the car at some point. *Id.* at 644.

¹⁸⁸ *Id.*

¹⁸⁹ *United States v. Colgate & Co.*, 250 U.S. 300 (1919). See also *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954) (holding that plaintiff was not entitled to a directed verdict in its favor on a showing that all defendant motion picture distributors had deprived plaintiff of first-run films, since it would be lawful for each motion picture distributor independently to restrict first-run motion pictures to downtown theatres thereby depriving plaintiff's suburban theatres of such films, but unlawful for several to agree amongst themselves to do so).

Concerted refusals by suppliers to deal with retailers are per se unlawful, however. *Klor's v. Broadway-Hale Stores*, 359 U.S. 207 (1959). Express agreements between a buyer and seller have also been banned. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Nevertheless, there is some question whether such an agreement is now per se unlawful, or only unlawful if "unreasonable." *Continental T.V. v. G.T.E. Sylvania*, 433 U.S. 36 (1977). P. AREEDA, *supra* note 167, ¶¶ 503-521. The hypothetical in the text is designed to avoid any implication of vertical agreement.

Under certain circumstances a court might be willing to find a prohibited vertical agreement to fix retail prices where one of the parties to the alleged agreement either has no anti-competitive motive or only unwillingly agrees. For example, in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), plaintiff newspaper distributor at first acceded to the defendant's demand, but was later discontinued for refusing to maintain maximum retail prices on the defendant publisher's newspapers. *Id.* at 147. The plaintiff's allegation of an unlawful agreement between the defendant and a short-term distributor defendant had hired to solicit customers on the plaintiff's exclusive route (in an effort to force the plaintiff to lower his prices) was upheld. *Id.* at 147, 149. The court also said that the plaintiff could have claimed a combination between himself and the defendant, "at least as of the day [the plaintiff] unwillingly complied with [the defendant's] advertised price." *Id.* at 150 n.6. The court also characterized as "not . . . frivolous" the plaintiff's allegation that there was an unlawful agreement between the defendant and those of the plaintiff's customers the defendant had thus spirited away. *Id.* In *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960), the court found an unlawful agreement between the defendant drug manufacturer and its wholesalers and retailers to maintain minimum retail prices because the defendant did not content itself with "announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that

one of several suppliers of product X, refused to sell to retailer C on September 30, 1976 and supplier B refused to sell product X to retailer C on February 11, 1977. Suppose further that A and B happened to know each other and were in one another's company (say, at a Trade Association meeting) immediately prior to B's communication to C stating his refusal to sell to C. Absent some further evidence of an agreement, a showing of these facts and nothing more, would not get C past a motion for summary judgment in a civil action against A and B under the Sherman Act section 1.¹⁹⁰ Therefore, it is highly unlikely that in a criminal action for the alleged antitrust law violation the showing would be held to demonstrate a conspiracy, or B's participation in it, by the "preponderance" required as a foundation for receipt of a coconspirator's statement.¹⁹¹ Although C might have proof of a statement by A, such as "B and I have agreed that we will not sell to you," it would not be admissible

policy." *Id.* at 45. Instead, the defendant's use of its refusal to deal with wholesalers to "elicit their willingness to deny . . . products to retailers and thereby help gain the retailers' adherence . . . created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." *Id.*

These last cases are interesting in that they present a different approach to what may be perceived as a problem similar to that in the general criminal conspiracy cases. Here the courts have all but written out of Sherman Act § 1 the element of conspiracy, or at least redefined it in a rather unique way. The reason appears to be that they believe that the suppliers' conduct, to the extent that it results in minimum or maximum price uniformity at the retail level should be unlawful even in the absence of any traditionally-formed conspiracy or agreement. In other words, the substantive element is *minimized* or made nonexistent by common law development where effects believed to be anti-competitive can be traced to other conduct by the defendant. That, it should be carefully noted, is not quite the same thing as allowing in unreliable proof of the extant element of conspiracy in the general criminal conspiracy cases. In the antitrust cases the crime itself and the conduct that gives rise to it has been substantively redefined. Antitrust defendants must still be proved, by whatever the applicable standard (preponderance or beyond a reasonable doubt) to have engaged in some prohibited conduct that caused price uniformity or another anti-competitive effect. In the general criminal conspiracy cases the object of the conspiracy is frequently unprovable by the standard required, and the conspiracy itself, which remains an element of the substantive crime charged is provable primarily by the use of the coconspirators' statements.

¹⁹⁰ It should be noted that the hypothetical situation in the text does not specify whether A and B were aware of one another's refusal to deal, nor whether B's action was in any way motivated by A's. Even a showing of conscious parallelism, however, is not enough to support a finding of an agreement under Sherman Act § 1, 15 U.S.C. § 1 (1976). See, e.g., *Theatre Enterprises v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954); *Delaware Valley Mach. Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 202-03 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962). But see *Interstate Circuit v. United States*, 306 U.S. 208 (1939).

Evidence of conscious parallelism may, however, along with other evidence, serve as circumstantial evidence, from which an agreement may be inferred. *Theatre Enterprises v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954). Such other evidence might include facts showing, for example, that it was against each defendant's individual financial interest to refuse to deal unless each was certain that the others would do the same, *Interstate Circuit v. United States*, 306 U.S. 208, 222-23 (1939), and/or that the conduct complained of was so unusual, idiosyncratic or complicated that it is unlikely that more than one of the defendants could have conceived of it without consultation. *Id.*; *Trist v. First Fed. Sav. & Loan Ass'n*, 466 F. Supp. 578, 581-84 (E.D. Pa. 1979). On all of the above, see P. AREEDA, *supra* note 167, ¶¶ 319-325; Turner, *The Definition Of Agreement Under The Sherman Act: Conscious Parallelism And Refusals To Deal*, 75 HARV. L. REV. 655 (1962). The hypothetical situation in the text contains none of these "plus" factors.

¹⁹¹ See *infra* text and note at note 206. The same standard, "preponderance of the

against B on such a flimsy foundation,¹⁹² although it would be admissible against A as an admission.¹⁹³

The different results in the two cases cannot be attributed to differences in the cogency of the inferences from the circumstantial evidence to the existence of a conspiracy, for the inferences are identical. In *Dalzotto* it was plausible to conclude that the coincidence of sales of the same drug to Holden by the two defendants were made pursuant to a common plan. In the hypothetical antitrust case it is equally plausible to conclude that the coincidence of the refusals to deal by the two defendant suppliers were pursuant to a common plan. In both cases, too, there are inferences that point in the opposite direction. The businessmen-suppliers in the hypothetical situation may have many independent reasons for refusing to deal with the retailer other than an agreement between them. Likewise, they may have many common interests to share at trade association meetings, aside from any unlawful agreement to refuse to deal. The defendants in *Dalzotto* also may have had many independent reasons for selling PCP to Holden exclusive of any agreement between them. They, too, may have had common interests to share in their car trip away from Young's meeting with Holden that had nothing to do with an agreement between them to distribute PCP.

evidence'' is used to describe the plaintiff's burden of persuasion in civil antitrust cases. See cases cited *supra* note 190. If the evidence is not sufficient to get a plaintiff past a motion for summary judgment in the civil case, therefore, it would probably not be held to be preponderance of evidence in a criminal case. See sources *infra* note 206.

¹⁹² See *Trist v. First Fed. Sav. & Loan Ass'n*, 466 F. Supp. 578 (E.D. Pa. 1979). On its denial of a motion for summary judgment, the *Trist* court held that the plaintiff had shown enough evidence from which a jury might properly infer (by a preponderance of the evidence) an agreement among the defendant banks to collect certain charges in advance from mortgagors at closings. *Id.* at 583-84. The plaintiff had proof that (1) the method for computing the charges was idiosyncratic; (2) it was improbable that 20 defendants could have arrived at the identical practice without consultation; (3) the defendants had a financial motive to enter into the agreement and (4) the defendants had many opportunities to discuss these matters at trade association meetings. *Id.* at 581-92. The court noted, however, that proof of any one of these factors alone would not be sufficient to support an inference of agreement by a preponderance of the evidence, and emphasized that the simple opportunity to meet at a trade association was not alone sufficient. *Id.* at 590. See also *supra* note 190 and *infra* note 206.

¹⁹³ It is admissible against A under one or all of the usual rationales for admissions by a party-opponent: (i) that the statement is not hearsay because A has an opportunity to explain the statement and no need to cross-examine himself, 4 J. WIGMORE, *supra* note 42, § 1048, at 4; or (ii) that A is loosely "estopped" because he can hardly object for lack of cross-examination of himself or that he is unworthy of credence unless under oath (even though the statement is hearsay), MORGAN, BASIC PROBLEMS OF EVIDENCE, 266 (5th ed. 1962); or (iii) that A's statement is not hearsay because it is the equivalent of conduct inconsistent with a belief in the truth of his position at trial, Strahorn, *A Reconsideration Of The Hearsay Rule And Admissions*, 85 U. PA. L. REV. 564, 570 (1937). The first of these rationales is particularly inappropriate in a criminal trial where A must give up his right to remain silent in order to "explain" the statement. If A did not make the statement he cannot explain the perceptions, narrational skills, memory and sincerity underlying it, he is certainly not estopped from complaining of lack of cross-examination of these "dangers" and, the statement is hearsay as to him and not the equivalent of conduct inconsistent with a belief in his position at trial. See generally Bein, *Prior Inconsistent Statements: The Hearsay Rule*, 801(d)(1)(A) and 803(24), 26 U.C.L.A. L. REV. 967 (1979). In civil cases, the possibility that A made the statement may be seen as probative enough to admit it on the theory that the system should jealously guard against abuse by persons who, rightly or wrongly, do not believe that they

The divergent conclusions in the two cases are better explained by the substantial difference in the function of the conspiracy element in general criminal law and in antitrust law. In general criminal law, the separate crime of conspiracy has been justified in part by the observation that combinations of persons with a criminal design are more dangerous than those acting alone.¹⁹⁴ Most observers agree, however, that this is not the true utility of the law. Instead, the function of the law of conspiracy is to facilitate convictions, and enhance the punishment of persons who are suspected of involvement in one or more substantive crimes but who otherwise cannot be linked directly to the criminal acts.¹⁹⁵ The head of an organization of criminals, who may order but never directly participate in any other crime, is a good example.¹⁹⁶

Either to facilitate this end, or as a cause of it, the addition of a charge of conspiracy to an information or indictment carries with it procedural advantages not otherwise available to the prosecution. It enables a prosecutor (i) to choose a venue more favorable to it than permitted for the substantive offense that is the alleged object of the conspiracy; (ii) to take advantage of a joint trial of defendants with the concomitant likelihood that in the confusion the jury will be unable to separate evidence admissible solely against one defendant from that admissible against the others;¹⁹⁷ and, most importantly here, (iii) to use the coconspirators exception making admissible the hearsay statements of one alleged coconspirator against the defendant charged as a conspirator at trial.¹⁹⁸ While, the general law of conspiracy may well be offensive to the accepted purposes and aims of the larger body of criminal law,¹⁹⁹ fuller exploration of this

are entitled to recover. In a criminal case, however, the purpose of the law is *not* furthered by convicting people who may wrongly believe that they should be convicted. Since admissions — even if the defendant uttered them — are of only dubious probative value of the objective truth that is all important in *most* criminal cases, they should probably be held inadmissible. But see the discussion of real values in general conspiracy cases in text and notes at notes 246, 247 *infra*.

¹⁹⁴ MODEL PENAL CODE § 5.03 comment (Tent. Draft No. 10, 1960). W. LAFAVE & A. SCOTT, *supra* note 163, § 61, at 458-59; Johnson, *supra* note 166, at 1143; Note, *Criminal Conspiracy*, *supra* note 170, at 923-24.

¹⁹⁵ See Note, *Criminal Conspiracy*, *supra* note 170, at 922. See generally Johnson, *supra* note 166, at 1141-64. Judge Learned Hand once called the crime of conspiracy "that darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). Cf. W. LAFAVE & A. SCOTT, *supra* note 163, § 61, at 455 (it is clear that a charge of conspiracy gives the prosecution a unique and undue advantage).

¹⁹⁶ It is the example given in Johnson, *supra* note 166, at 1143-44, and Note, *Criminal Conspiracy*, *supra* note 170, at 992.

¹⁹⁷ W. LAFAVE & A. SCOTT, *supra* note 163, § 61, at 458-59; Johnson, *supra* note 166, at 1172, 1177; Note, *Criminal Conspiracy*, *supra* note 170, at 975-91.

¹⁹⁸ See sources cited *supra* in note 197. Recent Supreme Court decisions have relaxed hearsay and constitutional barriers to the use of out-of-court declarations of one defendant against another even where conspiracy is not charged, and the coconspirators' exception is not urged as the appropriate vehicle for use of the statement. See *Parker v. Randolph*, 442 U.S. 62 (1979); *Nelson v. O'Neil*, 402 U.S. 622 (1971).

¹⁹⁹ The failure of the general law of conspiracy to serve any of the acceptable aims of the criminal law is fully demonstrated in Johnson, *supra* note 166. Conspiracy law seems to be used in many cases to convict people where their allegedly "real" crimes (the objects of the conspiracy) cannot be proven beyond a reasonable doubt using normal rules of evidence. The normal rules of hearsay, by barring unreliable and therefore excessively prejudicial evidence in criminal cases,

point is beyond the scope of this article.²⁰⁰ Instead, the focus here is on the relationship between the hearsay rule and the various substantive purposes for which hearsay may be used.

Assuming, therefore, that the function of the general conspiracy law is to facilitate the conviction of defendants whose criminal activities otherwise might go unpunished, the use of coconspirators' statements in evidence may be seen as a necessary aid to it. Reliability of the hearsay statements is probably of no concern to a law thus justified. In light of the admitted lack of reliable evidence tying the defendant to any other crime, these hearsay statements may be as good, or better, evidence of his involvement in criminal activity as any available.²⁰¹

In contrast, the function of conspiracy in antitrust law is to *define* a crime which injures competition.²⁰² The utility of the substantive law, therefore, is to facilitate greater competition. Competition is believed best fostered by the aggregate of many suppliers making selfish, independent, profit-motivated

also help to ensure that defendants are not convicted unless proven guilty beyond a reasonable doubt. The suspension in conspiracy cases of normal evidence rules through use of the coconspirators' exception in the manner set forth herein along with the suspension of other rules of procedural fairness, thus serve to implement suspension of the reasonable doubt standard in proving the crime of conspiracy. The decision to do so, however, is a "substantive" decision. The procedural rules are justified or manipulated to achieve the perceived purpose of the substantive law.

The substantive law leaves the decision whether to add a "conspiracy" charge on a day-to-day basis to the prosecutor. Since no crime has at that point been proven against a defendant by the normal reasonable doubt standard, the prosecutor and the judge (by ruling on use of the hearsay and the other procedural questions) may thus be characterized as determining, in whatever intuitive way these matters are determined, whether *this* defendant *deserves* the benefit of a reasonable doubt or not. The suspension of the reasonable doubt standard, it must be recognized, may result in (1) increasing the risk of convicting a defendant for a crime he did not commit and (2) increasing the risk that a defendant will be convicted although no crime ever occurred. The latter is a special danger in political conspiracy cases. This substantive law policy is hard to characterize even by so mild a criticism as subject to abuse. The law itself seems, by leaving these matters to an *ad hoc* subjective determination, to abuse all normal notions of substantive and procedural fairness.

²⁰⁰ Generally, adjective rules should *serve* the substantive law and not make it. Here, however, the substantive law is based on a fictional principle apparently composed largely to justify the creation and implementation of adjective rules which, in turn, can be explained by neither normal adjective nor acceptable substantive principles. There may be some sense here for a backward attack on the faulty substantive principle through the adjective rules since they are its most tangible manifestation. At least one criminal law expert has argued, however, that chipping away at adjective rules is not the best approach. Johnson, *supra* note 166. Prof. Saltzburg has argued that despite reliability problems and potential prejudice in use of coconspirators' statements, no increased standard of proof should be applied to preliminary fact determinations. "Although the need for a conspiracy offense has provoked controversy, as long as legislators are convinced that the need exists, evidentiary rules that might completely frustrate the ability of the prosecution to prosecute successfully should not be established." Saltzburg, *Standards of Proof*, *supra* note 32, at 303.

²⁰¹ See Saltzburg, *Standards of Proof*, *supra* note 32, at 302-04. Discussions about how use of these statements might be justified on grounds of reliability and necessity may be found in 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 427, at 364-67; 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 801(d)(2)(E)[01], at 801-169 to -170; Note, *Criminal Conspiracy*, *supra* note 170, at 989.

²⁰² See *supra* text and notes at notes 167-69, 189-92.

decisions about virtually everything relating to the price and terms on which they sell, including the identity and location of their wholesalers and retailers.²⁰³ If two or more suppliers facing the same or similar competitive pressures each separately determines that his selfish advantage lies in dealing or not dealing with retailer C, the decisions are not only lawful, but laudable. Under section 1 of the Sherman Act only an agreement turns these otherwise pro-competitive refusals to sell into an anti-competitive offense.²⁰⁴ Hence, independently legal acts become unlawful under the antitrust provisions only when carried out in furtherance of an agreement between two or more persons.

Because the acts are not in themselves unlawful, courts are properly loath to permit an inference of conspiracy solely from two competitors' parallel, otherwise lawful conduct. Even the combination of their lawful actions with evidence that they had an opportunity to meet and conspire in an otherwise unsuspicious atmosphere would not be permitted to raise the value of the inference of unlawful behavior to a preponderance of the evidence.²⁰⁵ To hold otherwise would result in penalizing conduct that was intended to be affirmatively encouraged by the law. If that result in turn caused businessmen to purposefully avoid activities otherwise dictated by their desire for competitive advantage, the law would be stood on its head.

It might be argued that such untoward consequences could not follow solely from a holding that blameless circumstantial conduct sufficiently proves conspiracy for purposes of laying a foundation for use of the hearsay exception. In theory, a ruling that such preliminary facts suffice to support the admission of coconspirators' hearsay statements does not mean that the preliminary proof itself is necessarily sufficient to prove conspiracy on a motion for directed verdict or acquittal. Thus, this argument concludes, unless courts found that such evidence was sufficient by itself to prove an unlawful conspiracy, there would be no effect on behavior in the business community.

There are two reasons, however, why this normal distinction between admissibility and sufficiency does not hold sway here. The first is the coincidental use of the "preponderance of the evidence" standard for determining both the admissibility of coconspirators' statements and for holding defendants liable in civil cases for antitrust conspiracy. It is unlikely that the standard is understood to have one meaning when applied to questions of the admissibility and another when applied to questions of the sufficiency of evidence. At least one court has held expressly that an identical standard applies in both contexts.²⁰⁶

²⁰³ See generally P. AREEDA, *supra* note 167, ¶¶ 114-135 and sources cited therein; W. SAMUELSON, *ECONOMICS* 426-74 (11th ed. 1980).

²⁰⁴ 15 U.S.C. § 1 (Supp. 1976). See *supra* text and notes at notes 167-71, 189-92, 203.

²⁰⁵ See *supra* text and notes at notes 189-92.

²⁰⁶ *United States v. Aluminum Co. of Am.*, 1 F.R.D. 1, 3-5 (1939). At least one commentator has also concluded that the standards are identical. Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, *supra* note 170, at 536 n.39 (1958). Of course, the coincidental use of the words need not indicate identity in the standard, and in light of the observations made in the sources cited at note 177 it may be hazardous to assume exact congruence in every case. The

Moreover, precedents established in antitrust criminal and antitrust civil cases on almost all issues are used interchangeably, despite the allegedly greater burden of persuasion necessary to prove the criminal offense.²⁰⁷ It would be counterintuitive, therefore, to assume that this precedent, if established, would be treated differently.

Second, and more importantly, antitrust policy would be undermined if conspiracy could be sufficiently proved by combining such foundational facts with the evidence whose admissibility they support. There is no reason to believe that coconspirators' statements are generally reliable. Indeed, these statements usually are proved by the testimony of another coconspirator who at the time has every motive to lie about whether the statements were made. In criminal cases generally, the statements frequently are reputed to have been made by one of the defendants on trial who is known or suspected to be of a criminal disposition, and who, to further his own criminal purposes, may have misrepresented the involvement of others in his design.²⁰⁸ In an antitrust case, a supplier's out-of-court statement might well be similarly motivated. A statement to a retailer, for example, that another supplier also will not deal with the retailer might be uttered solely for the purposes of coercing the retailer into behavior financially advantageous to the declarant.²⁰⁹

Using evidence of suppliers' parallel lawful behavior as a predicate for admitting highly unreliable evidence and then combining these two bits of evidence to prove an unlawful conspiracy, would not serve the ends of antitrust law any better than a direct holding that the lawful behavior alone proves the unlawful agreement. Mistaken imposition of liability for lawful behavior would become prevalent. The business community, ever alert to the nuances of antitrust law, would change its behavior to avoid liability. Thus, the competitive

argument in the text herein, however, persuades this author that if the courts do not apply the same standard generally, they should do so. *See also* note 225 *infra*.

One reason that it is hard to be absolutely certain that the courts are applying the same standard is that a fairly extensive search of recent cases revealed absolutely no antitrust case in which a coconspirator's statement was offered on anything even close to the paltry foundational proof urged in *United States v. Dalzotto*, 603 F.2d 642 (7th Cir.), *cert. denied*, 444 U.S. 994 (1979). Rather, in the few cases found where there was a ruling on admissibility under the coconspirators rule, there was, comparatively, an enormous amount of independent proof shown of conspiracy and participation in it. *See, e.g.*, *United States v. David E. Thompson, Inc.*, 621 F.2d 1147, 1152-54 (1st Cir. 1980); *United States v. Continental Group*, 603 F.2d 444, 452-54 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980). This may reflect an assumption by counsel preparing these cases that such a showing would be required, the more extensive discovery and time for it generally undertaken and allowed in antitrust cases, or simply luck of the draw.

²⁰⁷ A perusal of the citations and reasoning in any of the cases cited in this article at notes 167-71, 189-92, *supra*, or almost any other case arising under the Sherman Act, will verify the observation.

²⁰⁸ Making related observations: 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 801(d)(2)(E)[01], at 801-170 to -171; Levie, *supra* note 174, at 1165-66; Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, *supra* note 170, at 541.

²⁰⁹ *See, e.g.*, *Standard Oil Co. v. Moore*, 251 F.2d 188, 196 (9th Cir.) (statements by agents), *cert. denied*, 356 U.S. 975 (1958) and discussion of possible motives for those statements suggested by P. AREEDA, *supra* note 167, ¶ 322.

behavior the antitrust law initially intended to encourage would in fact be discouraged.²¹⁰

The dichotomous treatment of hearsay evidence mandated by variances in the substantive policies of antitrust and general criminal conspiracy laws is not restricted to the exception for coconspirators' declarations. Rather the different functions of the conspiracy doctrine in these two substantive areas also compel different results under the class of hearsay exceptions which expressly require a preliminary ruling that the hearsay offered is reliable. Here, however, while at least some courts seem motivated by substantive differences, they fail to articulate their holdings in those terms, relying instead on usual evidence parlance. This lack of direct expression may indicate either an unawareness of substance as an influencing factor or a reluctance to confront directly the controversy surrounding the criminal conspiracy doctrine. That some courts are in fact influenced by substantive law differences, however, may be demonstrated by comparing two cases decided by the United States Court of Appeals for the Ninth Circuit involving the use of hearsay offered under the business records exception to prove conspiracy.

Under the business records exception to the hearsay rule, records kept in the regular course of a business are admissible to prove the truth of the matters reported therein.²¹¹ Ordinarily the custodian of the records must testify that it is the usual routine of the business to keep such records accurately and to record the transactions reflected therein at the time of their occurrence or shortly thereafter. Like other hearsay exceptions, the business records exception is justified on grounds of reliability and necessity. Business records are thought to be highly reliable proof of the information reflected therein if the persons who participated in compiling the entries were under a duty to the business to perform their respective tasks accurately. Necessity for the records lies in the inconvenience of producing the declarants, the practical unavailability of many of them due to lack of memory, and the difficulties in identifying all those in the reporting chain.²¹²

In *Standard Oil Co. of California v. Moore*,²¹³ the Appeals Court for the Ninth Circuit held that for a record to have been made in the "regular course" of a business it must reflect only those day-to-day commercial operations "in which it is directly concerned as a participant."²¹⁴ In that case, the records of seven oil company defendants were offered to prove that they had unlawfully conspired to maintain artificially high prices and to favor those service stations they individually owned.²¹⁵ The plaintiff's competitive retail gasoline station

²¹⁰ A similar argument may be made to counter use of coconspirators' statements in political conspiracy cases. There, mistaken conviction is directly connected to discouraging people from exercising their first amendment freedoms. Johnson, *supra* note 166, at 1153-56.

²¹¹ See, e.g., FED. R. EVID. 803(6).

²¹² See generally MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 304-314 (2d ed. E. Cleary 1972); 5 J. WIGMORE, EVIDENCE §§ 1517-61 (Chadbourn rev. 1974).

²¹³ 251 F.2d 188 (9th Cir.), *cert. denied*, 356 U.S. 975 (1958).

²¹⁴ *Id.* at 213.

²¹⁵ *Id.* at 195-97, 212-13.

closed after one of the defendants stopped dealing with him and the others refused to supply his station.²¹⁶ The plaintiff claimed that the defendants' parallel refusals to deal were pursuant to the price fixing conspiracy alleged.²¹⁷ At trial, which resulted in a verdict and judgment for the plaintiff,²¹⁸ the district court allowed the plaintiff to introduce hundreds of exhibits which the defendants admitted were accurate reproductions of documents that came from their files.²¹⁹ A large number of the exhibits dealt with the "pricing and marketing policies of oil companies other than the one in whose files the writings were found."²²⁰ Others dealt with the practices of service station operators who were not customers of the oil company in whose files the records were found.²²¹ Although the records might have been offered to establish a pattern of business conduct or as admissions by each of the defendants from whose file each record came, they were not offered as such.²²² Instead, in each instance the records were offered to prove the truth of the matter contained in them: the marketing practices of the other defendant companies and their retailers.²²³ Reversing the district court, the appeals court held that the records were not admissible because they reflected activities in which the business was not engaged. The circuit court reasoned that exclusion was compelled because, first, much of the information in the record was supplied by persons not employed by the company that maintained the records, and, second, in some instances it was not shown that the employees who compiled the records were under a duty to maintain them accurately.²²⁴ The judgment against defendants was accordingly vacated.²²⁵

The Ninth Circuit's ruling itself is unexceptionable. The records of an alleged coconspirator, Defendant 1, ultimately might be admissible to prove the actions of another coconspirator, Defendant 2, where there is sufficient independent proof of the conspiracy. First it must be shown, however, that

²¹⁶ *Id.* at 195-97.

²¹⁷ *Id.* at 196-97.

²¹⁸ *Id.* at 198.

²¹⁹ *Id.* at 212.

²²⁰ *Id.* at 213.

²²¹ *Id.*

²²² *Id.* at 217 n.36.

²²³ *Id.* at 213.

²²⁴ *Id.* at 214-16.

²²⁵ The court held that if none of the inadmissible exhibits had been received, the evidence would have been insufficient to sustain the jury's finding of conspiracy by a preponderance of the evidence. *Id.* at 217. Since the court could not tell from the record whether any of the exhibits offered could have been received on other grounds, or whether a proper foundation might have been laid for them, it remanded for a new trial. *Id.* at 217-18, 223. The holding that admissible evidence of conspiracy in this case was not sufficient to prove conspiracy by a preponderance of the evidence is also an indication of the very different views of reliability courts have of evidence used to prove antitrust conspiracies and general criminal conspiracies. The admissible evidence is reviewed at pages 198-212 of the court's opinion and in the text *infra* and may be contrasted with that which sustained the convictions beyond a reasonable doubt in *United States v. Dalzotto*, 603 F.2d 642 (7th Cir.), *cert. denied*, 444 U.S. 994 (1979), and *United States v. Smith*, 609 F.2d 1294 (9th Cir. 1979).

Defendant 1, not some volunteer, kept these records as part of its business and relied on them.²²⁶ Moreover, where, as in *Standard Oil v. Moore*, the court holds the evidence independent of the records insufficient to establish a conspiracy, at least some of the documents must qualify independently of the coconspirators exception to provide the sufficient independent foundation. That presents a multiple hearsay problem. Defendant 1's business record says that Defendant 1's employees say, that someone outside Defendant's business said, that Defendant 2 is operating according to the terms of the conspiracy.

As in any multiple hearsay problem, each level of hearsay must be admissible for the whole to be admissible.²²⁷ Thus, for Defendant 1's business record to be admissible under the business records exception to prove Defendant 2's operations, all levels of included hearsay must be shown to conform with either the mandate of the business record exception or some other hearsay exception.²²⁸ To satisfy the first hearsay level, each of Defendant 1's employees in the reporting chain must be acting pursuant to a business duty to report accurately. To satisfy the second hearsay level the information supplied to Defendant 1's employees must issue from a declarant who is either under a business duty to supply it to Defendant 1, or who has uttered it under circumstances fitting within another exception. Under the latter alternative, if the original declarant who supplied the information to Defendant 1's employees was an employee of Defendant 2 acting in the course of his duties to Defendant 2, the second level of hearsay would presumably be covered by the exception for admissions of a party's employees.²²⁹ As was recognized by the court in *Standard Oil v. Moore*, each hearsay step in the chain would have to fit within a hearsay exception before the business record could be viewed as reliable enough to be admitted for its truth.

²²⁶ This seems to be the meaning of the court's rulings regarding use and admissibility of each defendant's records against the others as coconspirator's declarations. *Standard Oil*, 251 F.2d at 210, 218-19.

It is interesting to note, however, that when more directly confronted with the question, at least one court has held, and another indicated, that employers are liable for the anti-competitive activity of employees — even if the employees are acting directly contrary to express instructions and for personal reasons. *United States v. Hilton Hotels*, 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied sub nom. Western Int'l Hotels v. United States*, 409 U.S. 1125 (1973). *Cf. Continental Baking Co. v. United States*, 281 F.2d 137, 149-50 (6th Cir. 1960) (failure to object to acts and subsequent "ratification" sufficient to make employer liable). *But see United States v. Ward Baking Co.*, 243 F. Supp. 713, 717 (1965) (employee's acts were not attributable to the corporation because the employee had no authority to set prices).

The court's ruling that there was an insufficient showing that the employees were acting pursuant to a duty to maintain these records accurately despite the sheer volume thus may reflect a reluctance to hold the employers liable for employees' intentional and unauthorized wrongful activities. Such a reluctance would not be unique to antitrust law (although the courts sometimes overcome it for reasons unrelated to their dislike of the agency doctrine). *See J. SLAIN, C. THOMPSON & F. BEIN, supra* note 172, at 1-76 to -125, 4-120 to -121, 1-26 to -33 and sources cited therein.

²²⁷ FED. R. EVID. 805.

²²⁸ *Id.*

²²⁹ *See* FED. R. EVID. 801(d)(2)(C) and (D) (defines such admissions as not hearsay).

Its holding in *Standard Oil v. Moore* notwithstanding, the Ninth Circuit in *United States v. Smith*,²³⁰ held similar records admissible without such a showing.²³¹ The court in *Smith* upheld the defendants' convictions for conspiracy to possess heroin and cocaine with intent to distribute, which conviction was obtained with the aid of certain documents.²³² The challenged documents were the registration and billing records of certain hotels at which defendant Lama allegedly had attended meetings relating to the conspiracy.²³³ Those documents were offered under the business records exception to corroborate the testimony of two self-confessed coconspirators that Lama participated in the conspiracy.²³⁴ The guest name signed on the records and the address given therein were names and an address that Lama sometimes used.²³⁵ The signature, however, was apparently not authenticated as Lama's since the records were not offered as his admissions.²³⁶ Lama argued that the records were not admissible under the business records exception on the same grounds urged in *Standard Oil Co. v. Moore*, namely, that the hotel clerk who made the record had no duty to verify the identity of the signator and that the person who supplied the information reflected in the record had no duty to accurately report it to the hotel.²³⁷ Lama also complained that the hotel employees who testified at trial in authentication of the records were not even employed by the hotels at the time the records allegedly were made.²³⁸ The appeals court, however, rejected Lama's arguments and held that the records were "properly admitted into evidence without direct evidence as to their authenticity. Circumstantial evidence connecting Lama with the documents was sufficient."²³⁹ The circumstantial evidence held sufficient by the court consisted of the very testimony of the two government witnesses that the records were supposed to corroborate and the coincidence of the names and address in the hotel register with those that Lama sometimes used.²⁴⁰

The court distinguished *Standard Oil* by reasoning that in *Smith* the records related to "the registration and billing of guests, a matter in which the hotel was a direct participant."²⁴¹ This distinction, however, does not withstand analysis. There is nothing in the case that suggests that the hotels were in the business of accurately identifying their guests. They therefore were not direct

²³⁰ 609 F.2d 1294 (9th Cir. 1979).

²³¹ *Id.* at 1301.

²³² *Id.* at 1297.

²³³ *Id.* at 1301.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 1301 n.7.

²³⁷ *Id.* at 1301-02.

²³⁸ *Id.*

²³⁹ *Id.* at 1301.

²⁴⁰ *Id.* at 1301-02. Furthermore, the court held that the statements of the hotel employees, who were available for cross-examination, demonstrated that the records were those of the hotels. *Id.* at 1302.

²⁴¹ *Id.* at 1301.

participants in the matters reflected in the records within the meaning of *Standard Oil*. Unless the hotel employees were operating under a duty to record the information accurately and the original declarant was under a duty to supply the information accurately, or was covered by some other hearsay exception, the multiple hearsay in *Smith* did not conform to the requirements for admissibility relied on in *Standard Oil*.

Moreover, even if connecting the defendant with the event reflected in the record could properly replace the foundation requirement for the business record exception, that connection was stronger in *Standard Oil* than in *Smith*. In *Standard Oil* there was testimony and non-hearsay evidence from the plaintiff and other dealers that demonstrated that many of the defendants refused to deal with price cutters, that complaints were made to the headquarters of several defendant companies about price cuttings by retailers not connected with the companies to which the complaints were made, that one defendant's employees bragged about their power to cause all the defendant retailers to keep the price up, and that price-cutting signs mysteriously disappeared from several of the defendant companies' retail outlets, after phone calls or promises made by other defendants' sales representatives.²⁴² Certainly this evidence was of at least equal weight to connect the defendants to the matters reflected in those records as was the testimony of the two informants to connect Lama to the matter reflected (presence) in the hotel records in *Smith*. Furthermore, in *Standard Oil* the large number and continuity of the business record entries in question could have been held to establish coincidentally that it was the practice of the businesses involved to keep such records and that their employees were under a duty to do so.²⁴³ In *Smith*, on the other hand, the testimony of the two informants relied on did not attest to the only issue relevant to admissibility — the accuracy of the record-keeping methods of the hotels. The coincidence that the names signed on the records were the same as those Lama sometimes used did not verify the record as an accurate reflection of the truth of the matter contained in it. Rather, the coincidence merely made the record, had it been shown to be accurate, *probative* of the contention that Lama was at the hotels.

These two cases, therefore, cannot be reconciled by any differences in the proof offered to satisfy the reliability requirements of the hearsay exception. Indeed, there was a better foundation in *Standard Oil*, the civil antitrust case, where the evidence was held inadmissible than in *Smith*, the criminal case, where the records were held admissible. In both cases the issues which the records were offered to prove were the existence of a conspiracy and defendants' participation in it. The court's divergent treatment of the records might be explained by noting that in *Smith* the record was kept by a disinterested hotel employee, and in *Standard Oil* the records were kept by employees of alleged coconspirators. Were more known about the manner in which the *Standard Oil* conspiracy allegedly was implemented, there might appear some motive for the

²⁴² *Standard Oil*, 251 F.2d at 198-213.

²⁴³ See discussion of alternative reasons for courts not so holding *supra* at note 226.

employees of each alleged coconspirator to report falsely in their employers' records the operations of the other alleged coconspirators.²⁴⁴ The scenario is unlikely, however, since most of the records were compiled by lower echelon employees and since any pecuniary advantage to each of the seven defendants in conforming to the terms of the alleged conspiracy would depend heavily on accurate information about the conformance or nonconformance of the others. Such a conspiracy, therefore, would create incentives for accurate, rather than inaccurate, reports. Thus, it is unlikely that the motives of the employee declarants explain the different results.

Instead of comparing foundational proof, focus on the different substantive contexts is of much more help in explaining the different holdings in *Standard Oil* and *Smith*. The conspiracy alleged in *Standard Oil* had to be proven by more reliable evidence than the conspiracy alleged in *Smith* because a mistaken finding of conspiracy in an antitrust case undoubtedly is perceived as a greater danger than a mistaken finding of conspiracy in a heroin distribution case.²⁴⁵

²⁴⁴ Alternatively, the employees might have been overzealously pursuing their own ends, or what they perceived to be their employers' interests, by creating a mini-conspiracy of their own. If the court suspected these motives, and there is no hint of such suspicion in the opinion, then the cases and discussion in note 226 *supra* may be at least equally relevant to explain the court's insistence on strict adherence to the business records exception requirements. It doesn't explain, however, the failure of the court in *Smith* to demand at least some showing of the reliability of the records there.

²⁴⁵ It is not hereby suggested that hearsay exceptions are always strictly applied in antitrust cases — only that they are *more* strictly applied than in general criminal conspiracy cases. For example, in cases where a judge is sitting without a jury, especially where an injunction against anti-competitive activity (preventive relief) is sought, rather than damages, the courts have bent many hearsay exceptions — especially the business records rule. See, e.g., *Schine Theatres v. United States*, 334 U.S. 110, 116-17 (1948); *United States v. United States Gypsum Co.*, 333 U.S. 364, 393 (1948); *American Tobacco Co. v. United States*, 147 F.2d 93, 118 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946). (Levie criticized these cases for going beyond the "in furtherance" requirement of the coconspirator's exception, Levie, *supra* note 174, at 1170.) The reason the courts do so may be the lesser importance of exacting truth where the only effect can be to enjoin allegedly anti-competitive activity. If a defendant is not actually engaging in the unlawful activity, the holding that it is may not be perceived as deterring the company from lawful behavior. While taking passing notice of the above, however, Judge Wyzanski carefully reasoned that the use of admissible hearsay in these cases is more the result of the courts' concurrent jurisdiction with the Federal Trade Commission which is not bound by the hearsay rules.

It is difficult to imagine any satisfactory ground for deciding that evidence which is admissible before the Federal Trade Commission is inadmissible before a judge sitting without a jury in a civil anti-trust case brought by the Government. There is no difference between the substantive anti-trust law applied by the Commission and that applied by the Court. In a *civil* anti-trust case the Government has the unfettered choice of going before a Commission or before a court without a jury. The Commission's cease and desist order may in many cases be as drastic as the decree of a District Court, except for the one point that the District Court's decree unlike the Commission's order can be used as *prima facie* evidence in a private treble damage suit. 15 U.S.C.A. § 16. The Commission's hearing officer may be no more experienced or skillful than a District Judge in sifting the reliable hearsay from the untrustworthy hearsay. And the admission of hearsay evidence by a Commission undercuts just as effectively as the admission of hearsay evidence by a Court the fundamental objective of the hearsay rule — the opportunity to hear the

In the antitrust case, a mistaken imposition of liability could undermine the policy of the law and the behavior the law seeks to encourage. In the criminal conspiracy case, however, the court does not seem to perceive a similar danger.

As the court in *Dalzotto* observed in justifying the comparatively paltry foundation laid for admitting a coconspirator's statement against the defendant, general criminal conspiracy cases are not like cases where the hearsay evidence is sought to implicate "otherwise innocent" parties.²⁴⁶ The certainty of the court that the defendants involved have committed some, albeit unprovable, crime related to the conspiracy charged is a premise that provides justification for the use of the hearsay exceptions in these cases.²⁴⁷ The courts consider the possibility of mistaken convictions for general criminal conspiracy through use of evidence of dubious reliability a risk worth taking. While the reasoning is debatable, accepting a high risk of mistakes may be rationally perceived as a better inducement to lawful behavior and deterrence of crime than not taking the risk; the opposite result would be achieved in the antitrust cases.

It may thus be seen that whether the courts will regard hearsay as reliable enough to fit within an exception cannot be determined by simply comparing the "circumstantial" or "inherent" reliability of the declarations. Reliability can be meaningfully determined only by examining the declaration in light of the substantive context in which the hearsay is offered and inquiring into the relationship between the use of the hearsay and the goals of the substantive law.²⁴⁸

witness under oath and to subject him to cross-examination.

... [T]he original demand for administrative adjudication was traceable, in part at least, to the unwillingness of courts to admit evidence which they allowed administrative agencies to receive and act upon. And that demand would be reinforced if the courts were to continue to say that in social and economic controversies where the remedy is not imprisonment, or fine, or damages but an order prescribing future conduct, a court sitting without a jury cannot receive hearsay evidence even though without statutory authority an administrative agency could do so. To preserve their own jurisdiction the courts must in this type of controversy relax the rigidity of the hearsay rule.

United States v. United Shoe Mach. Corp., 89 F. Supp. 349, 356 (D. Mass. 1950).

²⁴⁶ 603 F.2d at 645.

²⁴⁷ Professor Alan Schwarz of the Rutgers Law School faculty, has observed that it may be logical to conclude that if this assumption is the premise in conspiracy prosecutions, there may be reason to believe that hearsay and other evidence rules are regularly bent in other cases in which a court believes that the defendants are guilty of some crime (or liable for some civil wrong) but where careful application of evidence rules would make proof of the defendant's guilt or liability impossible. Private conversation July, 1981. For example, wouldn't a court be more willing to take less reliable hearsay in an antitrust case where it believes that the defendants are guilty of a prohibited conspiracy than in those antitrust cases where the court does not believe the conspiracy existed? While the subject is beyond the scope of this article, it may be observed that even if found true in some cases, it is to be hoped that it is not a regular pattern. Such a manipulation would be *unjustified* by the substantive law in most cases. In criminal conspiracy cases the law is the vehicle that justifies, and indeed commands, the manipulation.

²⁴⁸ Although not specifically comparing antitrust and criminal conspiracies, Prof. Saltzburg's observations on adjustments of standards of proof on preliminary facts to account for factors such as need to avoid frustrating prosecution of criminal conspiracies seem in accord. Saltzburg, *Standards of Proof*, *supra* note 32, at 302-04.

It may not be possible in every case for the courts to identify with exactitude why a particular hearsay declaration seems reliable, when a similar declaration offered in another case is not reliable enough. Instead, standard references to circumstantial guarantees of trustworthiness may have to suffice in some cases. Where there is a substantive distinction between the cases, however, it would certainly facilitate understanding and predictability to have express recognition of the substantive distinction if it is a motivating factor.

While it is possible that the *Smith* court was unaware that it was responding to the divergent substantive laws, it seems more likely that the court was unwilling to address this difference directly because the court was unwilling to confront the controversy surrounding the criminal conspiracy doctrine. The cloaking of its reasons in code words relating to "reliability," however, only makes the ultimate decision more suspect than it need be. Only slightly worse, it destroys the semblance of predictability of decisions and misleads the practitioner attempting to prepare a case, producing unnecessary objections and arguments over the admissibility of evidence. Finally, while the court may be saved the trouble of having to explain why antitrust and criminal conspiracies are different, its very failure to attempt the explanation may keep it wedded to a substantive principle that, on more careful examination, it might decide to change.

*C. A Comparison of Hearsay to Prove Falsity in False Pretenses Actions
and the Central Elements of Other Claims*

In the same way that identical hearsay fairly may be treated differently in two cases when the issues on which it is offered seem identical, identical hearsay also may be treated differently when the issues on which it is offered in two cases are radically different from one another and the laws and policies involved display that same divergence. In the antitrust and general criminal conspiracy context it was not hard to imagine some embarrassment at articulating a rationale for the different treatment accorded identical hearsay evidence. In the case involved in this section, however, it is very hard to imagine any embarrassment at drawing substantive distinctions, because the utility of using hearsay is bound to vary where laws and issues are different. Where, as here, all the laws are perceived as "fair," admissibility or inadmissibility cannot be reasonably misconstrued as improperly motivated.

Nevertheless, the decision discussed in this section is probably a fair representative of most courts' failures to draw express substantive distinctions when ruling on the admissibility of hearsay. Courts are either unaware of substantive influences or are unwilling to utter even so mild a statement as, "In cases involving false pretenses only very reliable hearsay, if any, will be admitted to prove that defendant's statement was false. Hearsay may be more readily used in auto negligence cases to prove fault." By not drawing such distinctions, however, courts may be forced to unduly complicated and prolix opinions. In the attempt to articulate distinctions in evidence terms, even the appearance of

uniformity in application of hearsay exceptions dissolves. Worse still, a decision not confined to the substantive issues involved may become precedent "against itself" by then being cited as a general standard for receipt of hearsay in other cases involving very different substantive laws. *State v. Moore*²⁴⁹ illustrates this point.

In *Moore*, instead of a simple statement along the line suggested above to justify holding certain hearsay statements inadmissible, the court attempted to articulate an evidence rationale for distinguishing a series of decisions on three New Jersey evidence rules:²⁵⁰ the hearsay exceptions for business records,²⁵¹ the exception for reports of public officials,²⁵² and the rule relating to findings of preliminary facts.²⁵³ As a result of its unnecessarily strained reasoning, the court managed to rule the hearsay inadmissible, but only on the narrowest and most questionable grounds available. A cure of the technical defect that provided the excuse for inadmissibility, however, will not achieve the court's objective, namely, an enhanced assurance of reliability or an increased opportunity for defendants to show errors in the hearsay declarations used to support prosecutions for false pretenses. A more direct ruling couched in terms of the goals of the substantive law involved would have better achieved that purpose.

The substantive issue in *Moore* was relatively simple. The defendant was convicted in a nonjury trial of obtaining unemployment compensation by false representations, a misdemeanor.²⁵⁴ The prosecution claimed that the defendant falsely stated that he was not working for Barrett & Co., Inc. (hereinafter Barrett or employer) from June through November, 1972. The defendant allegedly made the false representation periodically during those months, at least each time he signed a certification on the back of unemployment compensation checks payable to him.²⁵⁵

²⁴⁹ 158 N.J. Super. 68, 385 A.2d 867 (App. Div. 1978).

²⁵⁰ *Id.* at 75-81, 385 A.2d at 871-74.

²⁵¹ N.J.R. EVID. 63(13), set out *infra* in note 263.

²⁵² N.J.R. EVID. 63(15), set out *infra* in note 267.

²⁵³ N.J.R. EVID. 8.

²⁵⁴ 158 N.J. Super. at 72, 385 A.2d at 870. N.J. STAT. ANN. § 2A:111-2 (West 1969) provided:

Any person who, knowingly or designedly, by means of any false statement made orally or in writing, or by means of concealing or failing to disclose a material fact which it is his duty to reveal, obtains for himself or for any other person from any agency of the State or from any county or municipality, or from any agency of such county or municipality, or from any private or charitable organization or association of any kind, under pretense that he or such other person is poor and needy or out of employment, any money, property or other thing of value, is guilty of a misdemeanor.

This statute was repealed in 1978 and replaced by N.J. STAT. ANN. § 2C:20-4 (West 1981).

²⁵⁵ 158 N.J. Super. at 72-73, 385 A.2d at 870. The defendant admitted at trial that he was called to work two or three times for Barrett during this period. He testified that each time he worked two or three days and was laid off again. The prosecution's theory was that the defendant worked almost full time for the entire time. The record [form S-27] showed that the defendant worked all but one of the weeks during this period; sometimes "less than a full week," sometimes "almost a complete week." In any event, the trial court found that the defendant concealed the fact that he was employed during the period from clerks of the Unemployment Compensation of-

Ordinarily, the most readily available evidence of the defendant's employment during this period would have been the employer's business records.²⁵⁶ By the time of the trial, however, the prosecution learned that Barrett's original records were lost and the company, "if it was in existence at all," no longer had a place of business in New Jersey.²⁵⁷ The prosecution therefore offered its next "best evidence," an alleged copy of Barrett's time and payroll records relating to the defendant which appeared on a standard form S-27 used by the Division of Unemployment Benefits in its fraud investigation.²⁵⁸ The form was compiled by the Division's claims investigator, who testified to the method of preparation, accuracy and authenticity of the S-27 form. The claims investigator testified that he had been assisted in copying the relevant portions of the company's time and payroll records by Barrett's head bookkeeper and office manager.²⁵⁹ The Barrett's employee then signed the S-27 form "in certification of its accuracy."²⁶⁰ No representative of the alleged employer, however, was called to testify about the record-keeping methods of the company.

The record thus presented a multiple hearsay problem: form S-27 said that Barrett's business records said that employees said that defendant worked for Barrett between June and November, 1972. If each level of the hearsay was admissible under an exception, the S-27 form was admissible to prove the truth of its contents.²⁶¹ As the court acknowledged, established precedents on the hearsay question strongly supported admissibility.²⁶² The first level of the hearsay, Barrett's record, was admissible under New Jersey's version of the business records exception, which does not expressly require the testimony of the custodian of the records to establish admissibility.²⁶³ Under the state's rules

fice and "positively represented that he was not employed." That finding was left undisturbed in the appellate court opinion. 158 N.J. Super. at 72-74, 385 A.2d at 870-71.

²⁵⁶ In the more usual case, persons who worked with or supervised an alleged employee might also have been available. Of course, their memories of the dates and times of employment might be hazy, especially if it is conceded that the employee worked at the same place at *some* time, and the issue is narrowed to particular dates or times, as it apparently was here. See *supra* note 255. In this case, the alleged company employer was no longer in existence and its former owner had moved to Pennsylvania. See *infra* text and notes at notes 307-08. It is probably not wise, however, to admit business records to prove employment in cases involving false pretenses where, as here, the truth of the matter reflected in the record is disputed. See *infra* text at notes 281-87.

²⁵⁷ 158 N.J. Super. at 83, 385 A.2d at 875.

²⁵⁸ *Id.*, 385 A.2d at 875. Another Claim's Division record, Form S-28, was also introduced. It showed "what was done during the investigation," and the Division's claims investigator's testimony apparently was consistent with the information contained therein. *Id.* at 72, 385 A.2d at 870.

²⁵⁹ *Id.* at 73, 385 A.2d at 870.

²⁶⁰ *Id.* at 76, 385 A.2d at 871, 872.

²⁶¹ See discussion of multiple hearsay analysis *supra* in notes and text at notes 228-29.

²⁶² See cases cited in 158 N.J. Super. at 75-76, 385 A.2d at 871-72, and *infra* text and notes at 263-75.

²⁶³ N.J.R. EVID. 63(13) states:

A writing offered as a memorandum or record of acts, conditions or events is admissible to prove the facts stated therein if the writing or the record

the foundation may be laid by any proof that establishes the necessary preliminary facts, including hearsay and otherwise inadmissible evidence.²⁶⁴ In *Moore* the preliminary facts appeared to be sufficiently shown by the evidence set out in the margin.²⁶⁵ In any event, the court explained, there was ample authority for using admissibility of the second level of the hearsay to admit incidentally the included hearsay, Barrett's business records, without separate foundational proof for the latter.²⁶⁶

The second leg of the hearsay in *Moore*, form S-27, was clearly admissible under either the business records exception or the exception for reports of officials.²⁶⁷ The claims investigator's official duties unquestionably included compiling the record and observing the matters reflected in it. The court

upon which it is based was made in the regular course of a business, at or about the time of the act, condition or event recorded, and if the sources of information from which it was made and the method and circumstances of its preparation were such as to justify its admission.

See also 1963 Report of the New Jersey Supreme Court Committee on Evidence, 1963 Report Rule 63(13) comment, at 179-80 (1963), quoted in 158 N.J. Super. at 77 n.1, 385 A.2d at 872 n.1.

²⁶⁴ N.J.R. EVID. 8(1) provides:

When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In his determination the rules of evidence shall not apply except for [rules of relevance and privilege].

See also cases cited in 158 N.J. Super. at 81-84, 385 A.2d at 874-75. Of special interest is *State v. Cardone*, 146 N.J. Super. 23, 28-29, 368 A.2d 952, 955 (App. Div. 1976), cert. denied, 75 N.J. 3, 379 A.2d 234 (1977) where the author of the opinion in *Moore*, Judge Botter, held a manufacturer's certificate verifying the accuracy of breathalyzer equipment sufficient to lay a foundation for receipt of results of breathalyzer test.

²⁶⁵ The trial court had before it (i) the bookkeeper's verification of form S-27, (ii) the investigator's testimony, apparently based on his own observations and representations to him by Barrett's bookkeeper, that the records "were those maintained by Barrett & Company in the ordinary business — as an ordinary business record," 158 N.J. Super. at 76, 385 A.2d at 872, and (iii) the employer's statutory duty to maintain accurate employment records for purposes of such inspection. *Id.* at 76-77, 385 A.2d 871-72. The court observed that the investigator's testimony was not given until after the trial court had ruled on the defense's objection to the report and then later observed, "[t]here was no evidence, hearsay or otherwise, describing the procedures used in making the records . . . [although] [s]ome conclusions can be drawn from [the investigator's] testimony." *Id.* at 84, 385 A.2d at 875. Since the investigator's testimony on the point would have been sufficient, along with the circumstantial evidence noted above, to justify receipt of the included hearsay, (and the court suggests that it would have been if "necessity" for form S-27 was shown under the best evidence rule) the point is hard to grasp. The exact reason for reversal at the end of the opinion is not entirely clear. The most likely meaning of the court's language is set out *infra* in the text accompanying notes 309-12. If the reason for reversal was the trial court's failure to consider the claims investigator's testimony before ruling form S-27 admissible, then the holding of the appellate court would be even more counter-productive than it appears to be, since the "error" had already been cured.

²⁶⁶ See 158 N.J. Super. at 77-78 & n.1, 385 A.2d at 872 & n.1 and sources cited therein, some of which are discussed *infra* in text accompanying notes 276-305.

²⁶⁷ *Id.* at 75, 385 A.2d at 871. N.J.R. EVID. 63(15) provides:

[A] statement is admissible if in the form of (a) a written statement of an act done, or an act, condition or event observed by a public official it was within the scope of his duty either to perform the act reported or to observe the act, condi-

acknowledged that the S-27 form "appears to satisfy the quest for accuracy and reliability."²⁶⁸

Instead of the double, or included hearsay analysis followed in the cases cited in the opinion, however, the *Moore* court analyzed the offer as a single hearsay step. The court ultimately excluded form S-27 on the questionable ground that a proper foundation had not been laid under the best evidence, or original writings rule.²⁶⁹ The court's articulated reason for avoiding the double hearsay analysis was to sidestep "the troubling question of the admissibility of a report made by an agent investigating a possible violation of the law administered by that agency."²⁷⁰ The reasoning is not persuasive. While a "troubling question" would be presented in cases where the investigator is not present for cross-examination since, in the court's words, "his conclusions and motives may be questioned,"²⁷¹ *Moore* was not such a case.²⁷² The investigator was present and testified to facts consistent with those reported in the document. His motives and conclusions were fully open to cross-examination. Indeed, depending upon the extent to which he claimed a present memory of the information reflected in form S-27, some portions of the form might have been admissible under the exception for past recollection recorded.²⁷³ Other portions might have been characterized as not hearsay at all,²⁷⁴ or admitted only to refresh the witness' recollection.²⁷⁵

The *Moore* court's route of analysis through the best evidence rule to inadmissibility, however, provided it with a means for skirting precedents it cited

tion or event reported and to make the written statement, or (b) statistical findings made by a public official whose duty it was to investigate the facts concerning the act, condition or event and to make statistical findings.

²⁶⁸ 158 N.J. Super. at 84, 385 A.2d at 875.

²⁶⁹ See N.J.R. EVID. 70. See also discussion of court's analysis on this point *infra* in text and notes at notes 306-12.

²⁷⁰ 158 N.J. Super. at 75, 385 A.2d at 871.

²⁷¹ *Id.*

²⁷² FED. R. EVID. 803(8) excludes from the hearsay exception for reports of public officials "in criminal cases matters observed by police officers and other law enforcement personnel." The language was originally proposed in a debate in the House of Representatives and seems to have been motivated by the same concerns expressed in *Moore* and the text. See 4 WEINSTEIN'S EVIDENCE, *supra* note 14, at 803-16 to -17 and ¶ 803(8)[01], at 803-194 to -195. See also *United States v. Oates*, 560 F.2d 45, 66-68 (2d Cir. 1977) (reversing a criminal conviction for erroneous admission of a chemist's report, but ultimately defendant was convicted when chemist testified) 445 F. Supp. 351 (E.D.N.Y.), *aff'd*, 591 F.2d 1332 (2d Cir. 1978). There is some disagreement about what reports are excluded by the rule. See 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 803(8)[04] and cases cited therein.

²⁷³ N.J.R. EVID. 63(1)(b). The exception generally admits a witness' own writing of an event, made when the witness' memory was fresh if the witness now has no memory or only a very limited memory of the event and testifies that he knew the writing was correct when he made it. Cross-examination of the witness' motives, habits for accuracy and accuracy on the occasion he made the writing are thus possible.

²⁷⁴ See Bein, *supra* note 193, at 1004-07.

²⁷⁵ Generally, a memorandum used to refresh a witness' recollection is not considered "evidence." The witness' testimony, with his memory thus refreshed, is the evidence. *United States v. Riccardi*, 174 F.2d 883, 888 (3d Cir.), *cert. denied*, 337 U.S. 941 (1949). See also *Kazanjan v. Atlas Novelty Co.*, 34 N.J. Super. 362, 370, 112 A.2d 592, 596 (App. Div. 1955).

that would have rendered the hearsay admissible. Solely in evidence terms, four of the cited cases the court thus avoided involved hearsay issues that were all but indistinguishable from those in *Moore*.²⁷⁶ There is no hint in the *Moore* opinion that the court disagreed with the results of those cases, so presumably direct confrontation with their holdings would not have been a desirable path. Direct confrontation was, however, unnecessary. The substantive laws and issues involved in the four sidestepped cases were radically different from those in *Moore*. Thus, the court could have easily supported the distinction on substantive grounds. This analysis also would have effectuated the court's express determination that the hearsay was too unreliable to be used as "the only evidence . . . to prove an essential element of the crime,"²⁷⁷ better than the narrow path taken.

Of the four precedent cases thus avoided by the *Moore* court, the one most closely similar involved a prosecution for drunk driving.²⁷⁸ In that case, a hospital record incorporated into a police department file was held admissible to prove that tests showed the defendant's blood alcohol level to be 0.222% by weight.²⁷⁹ As in *Moore*, the hearsay was offered to prove an essential element of the crime, the defendant's drunkenness, and no declarant connected with the lab test nor the entries in the record was called to testify.²⁸⁰ Narrowly viewed, the evidence issue thus was virtually identical to that in *Moore*. The two cases, however, were distinguishable on at least two grounds. First, the two defendants' stakes in the outcome were different. While they both faced identical legal sanctions on conviction,²⁸¹ the social stigma attached to a conviction for false pretenses arguably is greater than the stigma attached to a drunk driving conviction. Second, different degrees of reliability were necessary to make the proof probative of the substantive issues in the two cases. Had the *Moore* court

²⁷⁶ See *infra* text and notes at notes 277-306.

²⁷⁷ 158 N.J. Super. at 84, 385 A.2d at 875. See also *id.* at 77-78, 385 A.2d at 872.

²⁷⁸ *State v. Martorelli*, 136 N.J. Super. 449, 346 A.2d 618 (App. Div. 1975), *cert. denied*, 69 N.J. 445, 354 A.2d 642 (1976). The *Moore* court distinguished *Martorelli* as follows:

We do not imply that all cases require proof that each item of included or multiple hearsay in business records or reports of public officials satisfies the included hearsay rule or that in all situations copies of the original documents contained in or attached to business records must independently satisfy the best evidence rule.

158 N.J. Super. at 77 n.1, 385 A.2d at 872 n.1. It should be noted that the case could not be distinguished on the severity of punishment. Both cases carried the possibility of jail terms and fines. In both, the defendants were fined, and jail terms suspended.

²⁷⁹ 136 N.J. Super. at 452, 346 A.2d at 620.

²⁸⁰ *Id.* The *Martorelli* court held the hospital record admissible apparently on only the testimony of the police officer to whom the report had been given by the laboratory. *Id.* at 451, 346 A.2d at 620. The court discussed the reliability of procedures normally used in hospitals and the simplicity of the diagnosis involved. *Id.* at 455, 346 A.2d at 621. The court observed that the defendant was free to call any witnesses he liked, including the doctor and lab technician, to rebut the report. *Id.*, 346 A.2d at 622. Each observation might also have been made in the *Moore* case. Time and payroll records are usually kept accurately by the businesses that keep them for their own purposes, tax purposes, to comply with other federal and state statutes. The defendant in *Moore* was also free to call any witnesses he could find.

²⁸¹ See *supra* note 278.

considered these two distinctions, a more durable rationale for its exclusion of the offered hearsay could have been realized.

In *Moore* the hearsay was offered to prove the falsity of the defendant's periodic representation that he was not working. The hearsay was urged to reflect the objective truth against which the defendant's deviation was to be measured. The very danger of hearsay, of course, is that it may deviate from objective truth in any number of ways. In *Moore*, the absence of an opportunity to cross-examine the hearsay declarants made it impossible for the defendant to discover whether the report contained one or more of all the possible errors. Given the number of likely declarants and layers of hearsay involved, the probability of *some* error was fairly high. A single correction, on cross-examination, of any one of the number of possible errors in the report might have shown that the truth was the opposite of what the report was offered to prove. Moreover, a coincidence between one error and the defendant's assertions if shown, might have proved that all or one of the defendant's representations were true, or explainable as an honest mistake.²⁸²

In the drunk driving case, too, the hospital record might have deviated from exacting truth in numerous ways. Only one, the least likely of the possible deviations, however, would have completely destroyed the report as probative of what it was offered to prove. Under the criminal statute, any alcohol weight in excess of 0.05% was admissible and probative of drunkenness.²⁸³ While the

²⁸² For example, an error in the last digit of the year reported would have destroyed the value of the report altogether as it was not denied that the defendant worked for Barrett prior to the period in question. A mistake in one or more of the dates of the weeks and months the defendant reportedly worked might have destroyed the value of the report or shown that some of his representations were true (thus supporting a claim that the others were an honest mistake). A mistake overstating the number of hours the defendant reportedly worked or the salary he received might have proved that the defendant was honestly mistaken about whether he was employed at the time he received unemployment insurance. The defendant admitted at the trial that he had worked two or three times for two or three days each during that period in question but believed that he was entitled to compensation anyway. The court held that while his claim for those periods might have been based on a good faith belief in entitlement he nevertheless represented that he was *not working*. See *supra* note 255. If revelation of errors in the hearsay record supported the defendant's contention that he did not work for Barrett other than once or twice, the court would presumably have been more willing to conclude that the defendant made a mistake of *fact* that led to his erroneous statements, and not a mistake of law. Moreover, the defendant was ordered by the lower court to make restitution in the amount he had allegedly wrongly received. 158 N.J. Super. at 72, 385 A.2d at 870. That amount would have been substantially reduced by such a showing.

²⁸³ N.J. STAT. ANN. § 39:4-50 (West 1973) provided at the time that a person who operated a motor vehicle while under the influence of intoxicating liquor was subject for a first offense to a fine of not less than \$200 nor more than \$500 or a term of imprisonment of not less than 30 days nor more than 3 months or both in the discretion of the magistrate. (The statute was amended and penalties changed somewhat in 1977 to reduce to maximum fine to \$400 and the maximum jail term to 30 days. See N.J. STAT. ANN. § 39:4-50 (West Supp. 1981)). Under N.J. STAT. ANN. § 39:4-50.1 (West 1973), in effect at the time, in any prosecution under the preceding section, (1) if there was .05%, or less, by weight of alcohol in the defendant's blood, "it shall be presumed that the defendant was not intoxicated" and (2) if there was in excess of .05%, but less than .15% that fact "may be considered with other competent evidence in determining the guilt" of defendant. (In *Martorelli* the police officers who arrested the defendant

alcohol level shown in the lab report might have been inaccurate, overstating the true percentage amount, only the grossest of errors could have resulted in reporting an actual level of less than 0.05 % as 0.222 %.

In both *Moore* and the drunken driving case, the number of ways in which the report entries potentially might have misreflected objective reality probably was identical. In that sense the reports were equally reliable or unreliable of the truth of the assertions contained in them. In *Moore*, however, most of the possible deviations from the truth would have destroyed the probative value of the report. Since the chance of at least one error was high, the report properly was characterized as unreliable in relationship to what it was offered to prove. In the drunk driving case, only one of the possible errors would have destroyed the probative value of the report. While there was a good chance of at least some error in that report, too, there was much less of a possibility that that error would turn out to be the only one that would make a difference in the probative worth of the report.²⁸⁴

As argued more fully elsewhere, the lesser "utility" of cross-examination to defendant in the drunk driving case than to defendant in *Moore* does not justify denying either of them the opportunity.²⁸⁵ That is not the comparison invited here, nor was it the issue in *Moore*. Instead, it is suggested that a hearsay declaration may be characterized as "more reliable" when revelation of most of its conceivable errors would have little or no effect on its value in proving the ultimate proposition it is offered to prove. The same statement might be properly characterized as "less reliable" where demonstration of almost any of

testified that they saw his automobile weaving before a collision and that afterwards they smelled alcohol on his breath. 136 N.J. Super. at 451, 346 A.2d at 619.) A weight by alcohol of .15% or more gives rise to a presumption that the defendant was under the influence of alcohol. (The statute was amended in 1977 and the weight triggering the presumption lowered to .10%. See N.J. STAT. ANN. § 39:4-50.1 (West Supp. 1981)).

²⁸⁴ In addition to numerical differences, there may have been a "quality" difference in the possible errors. The employer in *Moore*, for example, may have used various symbols or codes to identify employees, time worked, payments, etc. There may thus have been a question of the meaning of the entries that the claims investigator examined, not just a question whether he copied them correctly. While the investigator was available for cross-examination of the accuracy of his copy, he could only offer hearsay testimony on the meaning of the original entries. The lab report in the drunk driving case, on the other hand, was in court and no mention is made in the opinion of any coding or symbols in the report.

²⁸⁵ Bein, *supra* note 193, at 1026, 1034. The "utility" of cross-examination cannot be measured by the scarcity of errors that may be found, for any one of them alone, or in combination with other matters shown or disproved by the defendant, could result in an acquittal to the defendant. In the drunk driving case, cross-examination might have revealed an error resulting in a misstatement of the alcohol weight by a percentage below that necessary to trigger the statutory presumption. See *supra* note 283. While there was sufficient evidence independent of the alcohol level there to convict the defendant in the testimony of the police officers, the probative value of their testimony, too, might have been diminished by cross-examination.

The analysis used in the text herein is similar to that used by the Supreme Court in *Nelson v. O'Neil*, 402 U.S. 622 (1971). While not the author's preferred approach, the point is that the analysis does not lead inevitably to the conclusion that hearsay *must* be admitted in every case, or that it is constitutionally permissible to admit it. Rather, it may itself be used as a basis for distinguishing some cases from others in terms that are acceptable to the current Supreme Court.

its conceivable errors would have the opposite effect. The admissibility of hearsay would thus depend on the degree of accuracy mandated by the substantive law at issue.

The law of false pretenses, since it penalizes untruth, demands highly reliable evidence to prove the "truth" against which the falsity of the defendant's representation are measured. As illustrated by the cited case, the drunk driving law demands less reliable proof, since drunkenness may be demonstrated by any number of included possibilities that the hearsay was reliable enough to prove.²⁸⁶ Thus, the court in *Moore* might have distinguished the latter case with the simple observation that a higher degree of reliability is demanded where hearsay is offered to prove truth as a measurement of an alleged untruth.²⁸⁷

The three other cases avoided by the *Moore* court were civil cases.²⁸⁸ All three contained multiple levels of hearsay offered under the business records

²⁸⁶ An interesting counterpoint to the distinction drawn here is found in *Courtney v. Dollar Sav. Bank*, 54 A.D.2d 868, 869, 388 N.Y.S.2d 593, 595 (1976) where the court held that the defendant could not show a hospital record to prove that the deceased had made material misrepresentation in an insurance application. The defendant claimed that the deceased falsely stated that he was not an alcoholic when he was. *Id.* at 869, 388 N.Y.S.2d at 595. The hospital record showed that the deceased had a long history of an excessive alcohol consumption. *Id.* The court refused the record on the ground that there was no showing as to the source of the statement. *Id.* (Note: There were only two or three likely sources and each was covered by an exception — a statement by deceased or a member of his family for purposes of treatment and observation and tests of the doctor or hospital staff.)

²⁸⁷ Two other cases cited elsewhere in the *Moore* court's opinion could have been distinguished on the same grounds. *State v. Cardone*, 146 N.J. Super. 23, 28-29, 368 A.2d 952, 955-56 (App. Div. 1976), (holding certificate of calibration and accuracy of radar machine usable, despite its inadmissibility as hearsay, to provide foundation for admissibility of radar readings in speeding cases) *cert. denied*, 75 N.J. 3, 379 A.2d 234 (1977); *State v. McGeary*, 129 N.J. Super. 219, 224-25, 322 A.2d 830, 833 (App. Div. 1974) (holding an authenticated state police official's inspection certificate of breathalyzer machine admissible to help prove drunkenness).

Another case cited in the court's opinion, however, was better distinguished on evidentiary than substantive grounds. *State v. Reddick*, 53 N.J. 66, 248 A.2d 425 (1968). In *Reddick*, the defendant was convicted of manslaughter. *Id.* at 66, 248 A.2d at 425. There was testimony at trial that he assaulted the decedent with a knife, but apparently the cause of the decedent's death was the issue. *Id.* at 67-68, 248 A.2d at 425-26. The medical examiner who performed the autopsy had died and his report (with the opinion as to cause of death deleted) was admitted into evidence to provide a foundation for the testimony of the state's expert as to cause of death. *Id.* at 68, 248 A.2d at 426. *Reddick* is cited in the portion of the *Moore* opinion dealing with the defendant's confrontation objection, to support the *Moore* court's holding that there is no bar to receipt of the hearsay under the confrontation clause. 158 N.J. Super. at 79, 385 A.2d at 873. While it is always possible to argue that a higher risk of mistaken conviction for murder of known assailants will not discourage lawful behavior as would a mistaken conviction for false pretenses, the argument has a hollow ring. Since the stakes were so much higher in terms of societal interest and punishment in *Reddick* than in *Moore*, it is hard to rationalize receipt of the hearsay in *Reddick* on that basis. In usual evidence terms, however, death of the medical examiner gave rise to an indisputable "need" for his report and to that extent the holding in *Moore*, requiring a greater showing of necessity for use of the secondary proof is perfectly consistent with *Reddick*.

²⁸⁸ *Schneiderman v. Strelecki*, 107 N.J. Super. 113, 257 A.2d 130 (App. Div. 1969); *Brown v. Mortimer*, 100 N.J. Super. 395, 242 A.2d 36 (App. Div. 1968); *Fagan v. Newark*, 78 N.J. Super. 294, 188 A.2d 427 (App. Div. 1963). These cases are discussed in further detail *infra* at notes 291-305.

exception. In all three, as in *Moore*, the declarants responsible for the original level of the hearsay statements were unavailable to testify and the declarations were offered to prove central issues in the cases. Each of these cases, however, also involved issues, laws and substantive policies extremely different from those in *Moore*.

The first case involved a claim against New Jersey's Unsatisfied Claim and Judgement Fund.²⁸⁹ The hearsay, a policeman's report of an auto accident, was based partly on an eyewitness account of a declarant not called to testify.²⁹⁰ It was admitted to prove that the plaintiff-pedestrian's injuries were proximately caused by an unidentified hit-and-run driver, and that the plaintiff was not contributorily negligent.²⁹¹ The second case concerned a private auto negligence action.²⁹² The hearsay was a policeman's diagram of the vehicles' positions and skid marks, drawn an hour after the accident.²⁹³ It was admitted to prove the direction in which the cars were traveling at the time of impact.²⁹⁴ As in the first case the declarant policeman was not called to testify.²⁹⁵ The third case involved a worker's compensation case in which the plaintiff alleged that the decedent's death was caused by a work-related injury.²⁹⁶ The hearsay admitted was a business record containing the decedent-worker's declaration that he had suffered an injury (that might have contributed to his death) while working.²⁹⁷

²⁸⁹ *Schneiderman v. Strelecki*, 107 N.J. Super. 113, 116, 257 A.2d 130, 131 (App. Div. 1969).

²⁹⁰ *Id.* at 116, 257 A.2d at 131.

²⁹¹ *Id.* at 117-18, 257 A.2d at 132. In *Schneiderman*, the court upheld a receipt of a policeman's report, which was a "routine" report of an automobile accident, despite the fact that the policeman testified (and thus there was apparently no need for it), and despite the fact that it contained statements by the plaintiff consistent with her version of the accident. *Id.* at 119-20, 257 A.2d at 133. The court reasoned that even though there may not have been an exception for the plaintiff's statement, it could not "understand how defendant was prejudiced by this in view of the somewhat different version she testified to at the trial." *Id.* at 119, 257 A.2d at 133. The report, however, apparently also was based on statements of an eyewitness to the event — and there is no discussion of any exception under which that witness' declarations might have come into evidence.

²⁹² *Brown v. Mortimer*, 100 N.J. Super. 395, 399, 242 A.2d 36, 38 (App. Div. 1968).

²⁹³ *Id.* at 400, 242 A.2d at 38.

²⁹⁴ *Id.* at 406, 242 A.2d at 38.

²⁹⁵ *Id.* at 402, 242 A.2d at 39.

²⁹⁶ *Fagan v. Newark*, 78 N.J. Super. 294, 297-98, 188 A.2d 427, 429 (App. Div. 1963).

²⁹⁷ *Id.* at 299, 316-17, 188 A.2d at 429, 438-39. This is a fascinating opinion by Judge Conford discussing the requirements of the business records exception and the substantive utility of hearsay exceptions. The deceased fireman died of a heart attack at home. *Id.* at 300, 188 A.2d at 430. He was an "older" worker who had been assigned to a company not directly involved in firefighting. *Id.* at 298, 188 A.2d at 429. According to the fellow fireman, who entered the deceased fireman's complaint in the record, the deceased claimed that he injured himself carrying a heavy fire extinguisher. *Id.* No one else saw the alleged injury occur. *Id.* at 299, 188 A.2d at 429. Judge Conford was forced to conclude that the declaration does not technically fit under the *res gestae* exception. *Id.* at 307, 188 A.2d 434. He argued, however, that "unwitnessed accidents in employment eventuating ultimately in death to the employee are so frequent that unless a statement by the decedent to fellow employees . . . is admitted . . . recovery will be denied so frequently as to impair the basic objective of the workmen's compensation law." *Id.* at 305, 188 A.2d at 433.

It appears to us that the most candid approach to this problem would be for the ap-

While the *Moore* court might have relied on the usual civil-criminal distinction to demand a higher degree of reliability,²⁹⁸ it is not apparent that that distinction alone would have justified inadmissibility of the hearsay at issue.²⁹⁹ The civil-criminal dichotomy, however, when coupled with the other substantive distinctions present, certainly would have justified a demand by the *Moore* court for more reliable evidence than that admitted in the three civil cases. In the civil cases, none of the particular facts which the hearsay was used to prove had to be determined with the degree of exactitude required to prove the truth in *Moore*.³⁰⁰ In the private auto accident suit, where both parties probably were insured, the policy of the law toward the need for correct answers to the question of "fault" might be characterized as close to indifference. Recent pressures and rationalizations for no-fault and other systems of social insurance and general welfare legislation have made great inroads into traditional beliefs

propriate tribunal to make a value judgment as to whether the social policy subserved by the compensation law warrants frank formulation of a special rule for compensation cases, admitting declarations of deceased workmen made reasonably close to the time of the accident . . . rather than to persist in these cases with illogical application of the excited utterance rule.

Id. at 306-07, 188 A.2d at 433-34 (footnote omitted).

Judge Conford then ruled that the statement was admissible because it was made in the course of the fireman's duty to report it. *Id.* at 316-17, 188 A.2d at 438-39. His finding that the fireman had a duty to report the injury — and even that the person to whom he reported it had a duty to write it down — is, however, clearly based on some legerdemain. Judge Conford was able to infer that the writer had a duty to write it down, because the company journal contained a number of "comparable entries of accidents or injuries to firemen in the course of duty." *Id.* at 316, 188 A.2d at 439. Such writings are therefore "obviously in the interest of prudent conduct of the department." *Id.* The fireman, then, had a duty to report it if we accept the premise that it was the general, known practice for injured firemen to report any injury or illness. This approach should be contrasted with that in *Standard Oil Co. v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958), discussed in detail *supra* in text and notes at notes 209, 213-26, and 242-44.

²⁹⁸ See *supra* note 280 discussing the usual statements that more reliable proof is demanded in criminal than civil cases. The doctrine is often recited in New Jersey opinions. See, e.g., *State v. McGee*, 131 N.J. Super. 292, 298, 329 A.2d 581, 585 (App. Div. 1974); *State v. Taylor*, 46 N.J. 316, 332, 217 A.2d 1, 10, *cert. denied*, 385 U.S. 855 (1966).

²⁹⁹ Because the claims investigator was available for cross-examination the defendant in *Moore* had a better opportunity to cross-examine than in *Brown v. Mortimer*, 100 N.J. Super. 113, 242 A.2d 36 (App. Div. 1968). In *Brown* the investigating officer was serving in Vietnam at the time of trial. *Id.* at 399, 242 A.2d at 39. The other two cases, *Schneiderman v. Strelecki*, 107 N.J. Super. 113, 257 A.2d 130 (App. Div. 1969) and *Fagan v. Newark*, 78 N.J. Super. 294, 188 A.2d 427 (App. Div. 1963), contained an original leg of hearsay that did not even have sufficient guarantees of reliability to make that leg admissible under an exception. The hearsay in *Moore* might thus have been viewed as more reliable anyway.

³⁰⁰ It should be noted carefully that other issues in cases involving accidents may require, if they are contested, more exacting proof to effectuate legislative policies. In auto accident cases, for example, more reliable proof should presumably be required on the identity of the defendant as the owner or driver of the automobile. In the state insurance scheme case, presumably more exacting proof should be required of the difficulty of identifying the hit-and-run driver or the uncollectibility of any claim against him. In the workers' compensation case the status of the claimant as an employee should be determined with more exactitude. In most instances, if these issues are contested, the testimony of the claimant based on his personal knowledge would presumably be offered. If there is some reason for offering hearsay presumably courts would, and should, demand some showing of its reliability greater than that required on the issues addressed in the cases discussed in the text. See *infra* text and notes at notes 263-305.

about the economic benefit and deterrent effect of carefully identifying which of the parties' negligence caused a loss.³⁰¹ Whatever function a finding of fault continues to play in such cases, presumably it is served well enough by allowing those who bear the costs of the suit to choose the exactitude of the proof they care to present.³⁰² In addition, reliance on evidence that gives a roughly accurate approximation of the truth on issues whose resolutions otherwise are socially unimportant serves well enough the separate interest of the court system in achieving accuracy of results.

In the workers' compensation and state insurance cases, there arguably is a somewhat larger social interest in preserving the economic viability of the two funds. Proof of "fault" in the state insurance case and work-relatedness in the workers' compensation case is necessary for the same reason that those facts are made elements of a cognizable claim, namely, to provide a measure of the losses appropriately distributed or allocated in the manner provided for by the statutes. The actuarial soundness of the two schemes, however, presumably was not envisioned as turning on perfectly correct determinations of the appropriateness of each claim. It seems apparent that a more certain measure than "fault" or "work-relatedness" would have been used if absolutely correct determinations were required. Instead, "roughly" correct answers to the instant questions in most cases are deemed good enough to assure the social interest in the viability of the schemes so long as the total of the losses so allocated thereby is not made radically greater or less than that deemed appropriate when the systems were enacted.³⁰³ On these issues then, too, it may be wiser to leave the question of exactitude of the proof presented to the parties who bear the costs of the suit. Indeed, increasing costs of these suits by forcing the parties to present more exacting proof may be counterproductive. Requiring presentation of more reliable proof or live testimony may not produce any overall benefit by making more exact the determination of appropriate total allocations. In addition, such a strict rule may lead to more incorrect results than would have occurred otherwise due to the unavailability of such proof.³⁰⁴ In-

³⁰¹ G. CALABRESI, *THE COST OF ACCIDENTS* (1970) (there is a critique of what the author refers to as proposals for social insurance and general welfare legislation in the first chapter); 2 HARPER & JAMES, *THE LAW OF TORTS*, § 11.5, at 743; § 12.1, at 744-47, and §§ 13.1, 13.2, at 759-64 (1956).

³⁰² While there is some public interest, similar to that noted in the text, *see infra* note 303, in assuring that private individuals do not pay for more than the losses they cause, and that private insurance schemes, too, do not fail, that interest is presumably best protected by the individuals and insurance companies involved.

³⁰³ *See* J. SLAIN, C. THOMPSON & F. BEIN, *supra* note 172, at 2-150 to -190 (1980); Calabresi, *Some Thoughts On Risk Distribution And The Law Of Torts*, 70 YALE L.J. 499, 514, 518, 544-45 (1961).

³⁰⁴ The policies of courts applying both of these insurance schemes are generally believed to heavily favor inclusion of claims against the funds rather than exclusion, (once, presumably, facts such as those outlined in note 300 *supra* are found). This policy, however, should not affect rulings on the admissibility of evidence.

Rules relating to the sort of proof that may be presented are generally perceived as designed solely to make the process of litigation fair and efficient, assisting in the search for "truth" by giving parties a "fair opportunity to present their sides of the story," Ely, *The Ir-*

deed, in the workers' compensation case noted, the court argued that there should be a special hearsay exception created for statements by deceased workers to avoid just that result.³⁰⁵

A final and important distinguishing feature of *Moore* from each of the four other cases is that the law of false pretenses penalizes making assertions which, if not untrue, are to be encouraged, by the general policies of other laws (involving commercial and social interactions). The costs of mistaken findings of falsity thus are quite high for they potentially include discouraging behavior considered desirable. In the other four cases, however, the costs of mistaken findings on the issues for which the hearsay was used would not have included potentially discouraging desirable behavior.

Instead of drawing the distinctions suggested above, the *Moore* court distinguished the four precedent cases by viewing form S-27 as a *copy* of the employer's business records offered as "secondary" evidence of that hearsay under the best evidence rule.³⁰⁶ The best evidence rule, which is intended to

repressible Myth Of Erie, 87 HARV. L. REV. 693, 724 (1974). The policy of the substantive law in workers' compensation and insurance cases favoring inclusion of most claims is presumably reflected in the definition of, and burdens of persuasion necessary to show, work-relatedness in the first case, and "fault" of the hit-and-run driver in the second. If hearsay exceptions were lopsidedly used, favoring reception of proof by plaintiffs on these issues and disfavoring identical proof offered by defendants, then, if carried to an extreme, the substantive law would be thereby changed to mean that all injuries are compensable by workers' compensation whether work-related or not, and all pedestrian injuries are compensable whether caused by the hit-and-run driver or not. While a decision to change substantive laws in this manner may seem desirable to some, use of rules relating to presentation of proof is an inappropriate way to do it. Such manipulation may cause unnecessary hardships, and, if not a hard and fast rule in every case, could also be an ineffective way to implement such a change. See *supra* Section I(A)(1). The hearsay rule and its exceptions are not generally perceived, nor should they become, substantive rules. Rather they should remain rules that effectuate deliberately-made substantive policies.

It should be noted that recent innovations in the admissions exception, such as those making admissible *against* an employer declarations by employees to the employer, FED. R. EVID. 801(d)(2)(C) and FED. R. EVID. 801(d)(2)(C) advisory committee note, and statements made by an employee about any matter within the scope of his employment, FED. R. EVID. 801(d)(2)(D), may be perceived as resulting in such a lopsided application of evidence rules in similar situations. The employer against whom such evidence is offered cannot take advantage of the same exceptions against an opponent in the litigation. Thus a bus driver employee's statement after an accident, "it was my fault," will be admissible against the driver's employer. If the employee instead said, "it was not my fault" that statement probably would not be admissible if offered on the employer's behalf. The reason is supposedly that, if offered by the employer, the statement would be self-serving. That reasoning also applies if the statement is offered under the next most likely exception available — the business records exception. See *Palmer v. Hoffman*, 318 U.S. 109, 113 (1943). Agency and tort policies favoring vicarious liability and placing losses on the enterprises with which they are connected are said to justify the exceptions. 4 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 801(d)(2)(D)[01], at 801-160 to -164; 4 D. LOUISELL & C. MUELLER, *supra* note 37, § 426 at 321-30. The hearsay exceptions, however, go beyond the law of agency in attributing responsibility for these statements to the employer. The evidence rationale barring the statement as "self-serving" when offered by the employer also depends on attribution of the statement to the employer, which attribution is not traceable to the law of agency. See J. SLAIN, C. THOMPSON & F. BEIN, *supra* note 172 at 4-97 to -120.

³⁰⁵ See *supra* note 297. For reasons similar to those expressed in the text, most worker's compensation claims are now handled by administrative tribunals where normal rules of hearsay need not apply. See *supra* note 34.

³⁰⁶ N.J.R. EVID. 70.

prevent fraud, requires proponents of writings to present the original writing itself, unless some excuse is shown. Under the New Jersey rule, "showing that the writing was not reasonably procurable by use of the Court's process or by other available means" justifies admission of a copy.³⁰⁷

By employing the best evidence rule approach, the *Moore* court narrowed the issue to whether the prosecution had sufficiently shown that it was unable to present the employer's original business records. At the trial, the prosecutor had explained that Barrett apparently was no longer in business. Representatives of Barrett's apparent successor did not have the original records. Furthermore, the former owners of Barrett, by then located in Pennsylvania, informed the prosecutor that many of Barrett's records had disappeared during one of three or four moves. The former owners searched for the defendant's records among those remaining and located only the defendant's W-2 form.³⁰⁸ The *Moore* court held this showing insufficient to establish the unavailability of the original records.

While all the precedents established that hearsay representations of an attorney were sufficient to establish the unavailability of evidence and witnesses generally,³⁰⁹ the court in *Moore* held that this case was different because the prosecutor's representations were used "to admit secondary evidence as proof of hearsay."³¹⁰ The court, therefore, remanded for a retrial. To use form S-27 there, the court declared, the prosecutor would have to make a greater showing of his inability "reasonably to produce more and better evidence on these subject."³¹¹ The "subject" apparently included the "procedures used in making [Barrett's business records]."³¹²

Curing the foundational deficiency thus described by the *Moore* court, however, will not cure the unreliability of form S-27. The prosecution presumably could offer its own affidavit and the affidavits of Barrett's former owners swearing that the business records were unavailable. Those affidavits, however, will not improve the reliability of form S-27. Alternatively, the prosecution could find and produce a witness connected with the keeping of the missing records. Yet, even the most knowledgeable of the possible witnesses, the bookkeeper, could add little. Her certification on form S-27, already in evidence, would be even more reliable than her in-court testimony based on her subsequent memory. In the absence of original records, she would not be able to verify in court even the apparent regularity of the relevant entries. In any event, the availability of the keeper of the records for cross-examination would be of no help. She could not testify to the only relevant question: which of the many possible deviations from the objective truth did the records con-

³⁰⁷ *Id.*

³⁰⁸ 158 N.J. Super. at 83, 385 A.2d at 875.

³⁰⁹ See cases and sources cited in 158 N.J. Super. at 82-84, 385 A.2d at 874-75, and *supra* notes 262-75.

³¹⁰ 158 N.J. Super. at 84, 385 A.2d at 875.

³¹¹ *Id.*

³¹² *Id.* at 83, 385 A.2d at 875.

tain. Like most custodians, it is unlikely that she had any knowledge of the events reflected in the records.

Thus, the *Moore* court wove a tangled web to reach a result that cannot remedy the real defect it perceived. Clearly the court was correct in its observations that the hearsay was too unreliable to prove the essential element of the crime. Had it simply distinguished the cases that held differently on substantive rather than evidentiary grounds and ruled accordingly, its opinion would have presented no obstacle to future cases. On the other hand, since the opinion is not expressly confined to one substantive area, it now will have to be followed, distinguished or confronted in cases involving all substantive issues and laws. Unless future courts are willing to articulate those substantive distinctions, the effect of *Moore* in future cases may be diametrically opposed to what the *Moore* court intended.

CONCLUSION

This article has demonstrated that failure to adjust rulings on the admissibility of hearsay under exceptions to the rule to suit substantive policies can result in undermining those policies. To avoid this result, identical hearsay statements may be held admissible in some cases and inadmissible in others, reliable enough for some purposes and too unreliable for others.

While the results of most cases examined in this article seemed to conform to the substantive distinctions urged, in only one of the areas examined, the lost wills cases, did the courts consistently express the relationship between their rulings and the substantive policies involved. It is hoped that this article demonstrates that there is nothing to be lost and much to be gained by express recognition of substantive influences on rulings about the admissibility of hearsay. An unwillingness to express that influence can lead to unintended results, lack of predictability, confusion and unnecessary and unfounded suspicion. As long as the proof offered by litigants on both sides of an issue is treated evenhandedly, there is no cause for complaint that similar proof is not treated identically when offered on different issues involving different substantive laws and policies.

Current rationalizations for exceptions to the hearsay rule and the indicia of reliability they incorporate lend no meaningful guidance to judges attempting to conform rulings on admissibility to the concerns of substantive law. Moreover, the present design of class exceptions is occasionally misunderstood as embodying a legislative determination that use of particular classes of hearsay will or will not facilitate substantive policies in every case. This legislative inattention to the relationship between hearsay exceptions and the needs of various substantive laws, coupled with the unwillingness of courts to articulate substantive concerns, has impeded rational development of this area of evidence law.

The scope of this article has been limited to illustrating the connection between some substantive policies and the use of exceptions to the hearsay rule. Before concrete suggestions about redesign of hearsay exceptions can be made, more work must be done in (i) exploring the relationship between the use of hearsay and other substantive laws and (ii) fashioning indicia of reliability that obviate the concerns raised here. It is thus hoped that this article will stimulate further research, thinking, and debate about these matters.