2010

Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule

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In recent years, prosecutors—sometimes with the blessing of courts—have argued that when proving the existence of a "conspiracy" to justify admission of evidence under the Coconspirator Exception to the Hearsay Rule, they need show only that the declarant and the defendant were "coventurers" with a common purpose, not coconspirators with an illegal purpose. Indeed, government briefs and court decisions specifically disclaim the need to show any wrongful goal whatsoever. This Article contends that such a reading of the Exception is mistaken and undesirable. Conducted for this Article, a survey of thousands of court decisions, including the earliest English and American cases concerning the Exception as well as approximately 2500 federal court opinions discussing the Exception since its federal codification in 1975, makes clear that a "conspiracy" under the Exception must involve wrongful acts. First, courts and commentators have for centuries described the Exception as concerning illegal or illicit conduct. Second, because the drafters of the Federal Rules of Evidence (and analogous state codes) intended to adopt the common law understanding of the Exception when codifying it in Rule 801(d)(2)(E), encroachment beyond the historical boundaries of the Exception violates existing rules of evidence. Third, such revisionism could also violate the Confrontation Clause of the Sixth Amendment, which has been interpreted to prohibit admission of "testimonial" hearsay in criminal trials.

To adhere to the historical definition of the Coconspirator Exception to the Hearsay Rule, prosecutors should stop arguing that the conspiracy joined by the declarant and defendant may include purely lawful conduct, and courts encountering such arguments should reject them, lest they find themselves conducting new trials after the rights of convicted defendants find vindication on appeal. Civil litigants should also resist the revisionist interpretation of the Exception, which threatens immense and unnecessary discovery burdens.

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* Visiting Assistant Professor, Brooklyn Law School. I thank Shawn Bayern, Bruce Bishop, Michael Cahill, Daniel Capra, Edward Cheng, Neil P. Cohen, Lance Jasper, Alexis Loeb, Jens Ohlin, Paul Shechtman, David Sonenshein, Francine Trachtenberg, Joanna Trachtenberg, and Elizabeth Yale for their feedback on earlier drafts of this Article. I also thank Brooklyn Law School and Dean Joan Wexler for providing support for my research. Finally, I note the yeoman service of the Brooklyn Law School librarians and of my research assistants, Michael Coravos, Martha Lineberger, Matthew Livits, and Nora Valenza-Frost.

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INTRODUCTION

In recent years, federal prosecutors have begun asserting a radical reinterpretation of the Coconspirator Exception to the Hearsay Rule. The revisionists claim that "conspiracy," for purposes of the Exception, means any "joint venture" and that the undertaking of the defendant and declarant need not violate any law. For example, federal prosecutors in New Jersey wrote in a February 2008 filing, "[t]he defendant's main contention is that the conspiracy or joint venture shown for purposes of Federal Rule of Evidence 801(d)(2)(E) 'must have as its object an unlawful purpose.' The law, however, is to the contrary."[1] In other words, if two persons work together for any purpose—be it planning a burglary, making money for a common employer, or filing a grant application—the statement of one "coventurer" may be introduced at the trial of the other, even a trial concerning completely unrelated acts, so long as the statement was made in the course of and in furtherance of the joint activity. Seven federal appellate courts—among other courts—have indicated their agreement. The U.S. Court of Appeals for the District of Columbia Circuit adopted the "joint venture" theory in 2006,[2] and federal district courts in Washington have begun following the new rule as prosecutors have sought its adoption in other jurisdictions.[3] If allowed to take root and spread, the revisionist interpretation would undermine the theoretical justifications for the Coconspirator Exception, would eviscerate limitations governing the principal-agent exception, would add needless burdens to civil litigation, and would admit as evidence countless unreliable statements not subject to cross-examination.

The Hearsay Rule is a study in pragmatism.[4] Like most rules of evidence, it exists to further the adversarial search for truth at trial by admitting reliable evidence and excluding unreliable evidence.[5] Because

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1. Letter Reply Brief of United States at 1, United States v. Schiff, 538 F. Supp. 2d 818 (D.N.J. Feb. 25, 2008) (Crim. No. 06–406).

2. *See* United States v. Gewin, 471 F.3d 197, 200, 201 (D.C. Cir. 2006) (rejecting defendant's claim "that Rule 801(d)(2)(E) of the Federal Rules of Evidence requires, before admission of co-conspirators' out-of-court statements, a showing of an *unlawful* conspiracy, not merely action in concert toward a common goal" because circuit "precedents hold that the doctrine is not limited to unlawful combinations").

3. *See infra* notes 182–203 and accompanying text.

4. The Federal Rules of Evidence provide, "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," FED. R. EVID. 801(c), and, "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress," *id.* R. 802.

5. *See, e.g.*, G. MICHAEL FENNER, THE HEARSAY RULE 5 (2003) ("The hearsay rule is about keeping out evidence that is so unreliable that it does not help us find the truth."); 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (Chadbourne rev. ed. 1974) ("For two

some hearsay evidence is reliable or otherwise desirable, however, myriad exceptions allow admission of evidence that would otherwise be excluded under the Rule.[6] The Coconspirator Exception, a centuries-old common law rule codified at Rule 801(d)(2)(E) of the Federal Rules of Evidence, is simple to state: A statement is admissible against a defendant, even if hearsay, if when uttering the statement, the declarant was in an ongoing conspiracy with the defendant and acting in furtherance of the conspiracy.[7] The Exception represents a compromise between judges' desire on one hand to subject testimony to cross-examination (lest falsehoods reach the jury) and on the other to admit evidence that seems useful (or where admission seems otherwise justified) despite falling under the straightforward definition of the Rule.[8] Like the exceptions allowing admission of a party's own statements and those of her agents,[9] the Exception embodies the presumption that a certain class of utterances, despite being out-of-court statements admitted to prove the truth of the matter asserted, may properly be treated as evidence regardless of the reliability problems inherent to hearsay.[10] Similarly, like every other hearsay exception, the

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centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."). The primary exceptions are legal privileges, such as the attorney-client privilege. The law enforces privileges despite their tendency to deprive factfinders of reliable evidence, under the theory that other societal goals (such as promoting open communication between lawyers and clients) outweigh the search for truth in particular cases. *See* 1 EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 4–11 (5th ed. 2007).

6. *See* FED. R. EVID. 801(d)(2); *see also id.* R. 803, 804. For justifications for accepting into evidence the "admissions" defined as "not hearsay" in Rule 801(d)(2), see James L. Hetlaud, Jr., *Admissions in the Uniform Rules: Are They Necessary?*, 46 IOWA L. REV. 307, 308–10 (1961).

7. The three requirements are often listed as follows: The proponent of the evidence must prove (1) the existence of a conspiracy between the defendant and the declarant, (2) that the statement was made during the pendency of the conspiracy, and (3) that the statement was made in furtherance of the conspiracy. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 701 (1974); Anderson v. United States, 417 U.S. 211, 218 (1974) ("[D]eclarations of one conspirator may be used against another conspirator, if the declaration was made during the course of and in furtherance of the conspiracy . . . ."); City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 558 (11th Cir. 1998).

8. For the remainder of this Article, I will use "the Rule" to refer to the Hearsay Rule and "the Exception" or "the Coconspirator Exception" to refer to the Coconspirator Exception to the Rule.

9. *See* FED. R. EVID. 801(d)(2)(A), (C).

10. Statements of agents, for example, are justly admissible against principals—even if one doubts that statements of agents concerning their work are inherently reliable—because principals have a duty to supervise and take responsibility for their agents. Technically, under the Federal Rules, the classes of statements listed at Rule 801(d) are "not hearsay," as opposed to being a kind of hearsay that is admissible despite being hearsay, such as the classes of statements (including "present sense impression" and "excited utterance") collected at Rule 803. To a defendant seeking to exclude evidence on the basis of the Rule, however, the distinction is immaterial; whether a statement falls

Coconspirator Exception undercuts, at least somewhat, the ability of a criminal defendant to confront her accusers. Despite this tension, the Exception has been a fairly uncontroversial piece of American evidence law for centuries.

Until now. The "joint venture" theory of the Exception advanced by prosecutors across the country and accepted by the D.C. Circuit creates serious problems that proponents have not credibly addressed, to the extent they have acknowledged the risks at all. To rebut the revisionists' claim that their interpretation is neither novel nor cause for alarm, this Article presents the results of a new survey of thousands of federal court decisions applying the Exception to admit statements that would otherwise have been barred by the Rule. The survey covers eight federal circuits, identifying the object of the conspiracy in every case found—whether in a district court or court of appeals, reported or unreported—that mentions the admission of evidence under the Exception. As Part III describes in detail, the survey demonstrates that at least since 1975, it has been the overwhelming practice of the federal courts to apply the Exception only to "conspiracies" involving illegal conduct.

This Article explains that the revisionist theory misinterprets centuries of legal history in pursuit of terrible policy. Courts and commentators have routinely used words such as "criminal," "illegal," "illicit," and "wrongful" when describing the joint conduct relevant to the Exception,[11] for good reason. The primary credible justification for the Exception is that without it, clandestine criminal combinations would evade detection and prosecution. This justification provides no basis for applying the Exception to lawful joint ventures, and revisionists accordingly seek refuge in an analogy to agency theory, likening the Exception to the "principal-agent" hearsay exception applicable to certain lawful relationships. As Part IV shows, however, the agency analogy has little basis and was rejected as a fiction by the drafters of the Federal Rules of Evidence. Other asserted justifications fare equally poorly when applied to lawful joint enterprises.

The revisionist misconstruction of the Exception, already unsound, also presents constitutional difficulties. Pursuant to the Confrontation Clause of the Sixth Amendment, in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[12] Although at first glance the Confrontation Clause would appear to prohibit the admission of all hearsay, courts have never enforced such a reading, for the simple reason that those who wrote and ratified the Bill of Rights knew of hearsay exceptions and had no desire

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within a "hearsay exception" or is defined as "not hearsay" has no effect on the ultimate result—the statement gets to the jury.

11. *See, e.g., infra* notes 237–40.

12. U.S. CONST. amend. VI.

to abolish them.[13] Longstanding exceptions aside, the Confrontation Clause has prevented the admission of most hearsay at criminal trials in the United States.[14] In addition, it has prevented the expansion of existing exceptions because the rationale for respecting ancient exceptions—that the authors and ratifiers of the Sixth Amendment knew of them and approved of them—of course does not apply to exceptions created or expanded after 1791.[15]

Notwithstanding the Confrontation Clause, American courts have always admitted coconspirators' statements at criminal trials.[16] Since America's independence—indeed, even before then—the Exception has been applied in the United States and in Britain with little confusion as to its meaning. There has been, as one might expect, bickering in specific cases as to whether the prosecutor has established one or more of the Exception's prongs, with defendants disputing the existence of a conspiracy between themselves and various declarants, or conceding the existence of a conspiracy and arguing that the statements at issue either were not made during the pendency of the conspiracy or were not in furtherance of its aims. Accordingly, court opinions and learned treatises provide a rich history of the Exception's application, with case after case articulating essentially the same definition and testing particular facts against the well-worn requirements. The "joint venture" theory of the Exception does not appear in these sources. Because the revisionist interpretation represents a new hearsay exception, one unknown in 1791, its increasing acceptance risks the introduction of constitutional error at trials across the country.

This Article rebuts the revisionist interpretation in multiple ways. Part I recounts the history of the Hearsay Rule and of the Exception in England and in the United States, including a discussion of the codification of the Exception at Federal Rule of Evidence 801(d)(2)(E)

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13. *See infra* Part V.A (discussing uncontroversial application of hearsay exceptions in American courts soon after ratification of the Bill of Rights).

14. *See infra* Part V. *See generally* Crawford v. Washington, 541 U.S. 36, 43–56 (2004) (reviewing historical background of the Confrontation Clause).

15. *See Crawford*, 541 U.S. at 54 ("[T]he 'right . . . to be confronted with the witnesses against him,' is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.") (second alteration in original) (citation omitted), *abrogating* Ohio v. Roberts, 448 U.S. 56 (1980) (providing different method for deciding which hearsay survived the Confrontation Clause). The first ten Amendments to the Constitution were proposed by the First Congress on September 25, 1789 and were ratified on December 15, 1791.

16. *See* Bourjaily v. United States, 483 U.S. 171, 175–76 (1987) (discussing procedural requirements for admission of coconspirators' hearsay statements); Am. Fur Co. v. United States, 27 U.S. (2 Pet.) 358, 365 (1829) ("[W]e hold the law to be, that where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gesta, may be given in evidence against the others . . . ."); *see also* United States v. Johnson, 535 F.3d 892, 897 (8th Cir. 2008) (finding no error in admission of out-of-court statement by drug coconspirator).

and the application of the Exception by federal courts. Part II then describes current practice and recent developments. It identifies the court opinions indicating support for the revisionist interpretation and explains the underlying errors of reasoning, including a common misconception concerning Supreme Court precedent. Part III presents the results of the survey discussed above of thousands of federal court decisions applying the Exception since the codification of the Federal Rules of Evidence in 1975.[17] Part IV reconsiders the various rationales advanced to justify the Exception in light of the revisionist interpretation, highlighting how weakly the rationales perform if the Exception is understood to cover joint endeavors with no wrongful objective. Part V analyzes how the incorrect interpretation could also violate the Confrontation Clause. It also illustrates how the revisionist interpretation has already begun afflicting civil litigation. The Conclusion urges prosecutors to stop making an ahistorical revisionist interpretation that violates the Rules of Evidence—and potentially the Constitution—and it asks courts to reject that interpretation if prosecutors (and, soon enough, more civil litigators) continue to advance it.

I. THE HISTORY OF THE HEARSAY RULE AND THE COCONSPIRATOR EXCEPTION

This Part traces the history of the Rule and of the Exception, providing context necessary to a discussion of how the Exception was understood at the American founding. The Rule arose along with the Anglo-American adversary criminal trial, which despite its centrality today to criminal justice in common law countries is a fairly recent phenomenon; for centuries English courts generally prohibited felony defendants from employing counsel at trial.[18] Trial counsel, enjoying newfound freedom to speak for their clients, began objecting to the admission of various kinds of proof, and the resolution of these objections became the common law of evidence.[19] Although the Rule never barred the admission of all hearsay, the several exceptions to it developed piecemeal, the progeny of countless evidentiary rulings across

17. *See* Act of Jan. 2, 1975, Pub. L. No. 93–595, 88 Stat. 1926 (announcing rules of evidence that would become effective 180 days later). One finding of the survey is that although the Exception applies in principle to both criminal and civil trials, nearly all actual use of the Exception occurs in criminal cases, with the few civil cases concerning obviously illegal conduct, such as violations of civil rights laws or the Sherman Antitrust Act. As is discussed *infra* Part V.D, if the Exception means what the revisionists claim it does, it would be a powerful tool in civil litigation that one would expect to see mentioned in judicial opinions.

18. "Prohibited" is a bit of an oversimplification. For a further explanation of the restrictions on counsel at treason and felony trials, including details of lawyers' limited opportunities to speak, see JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 10–66 (2003).

19. *See generally* ANDREW L.-T. CHOO, HEARSAY AND CONFRONTATION IN CRIMINAL TRIALS (1996) (tracing the history of the Rule).

the kingdom rather than any coherent, coordinated effort to craft an ideal set of rules.[20] Accordingly, the origins of the Exception resist the historian's desire to discover a precise birth date or even to identify its first proponent. Fortunately for American practitioners, however, the definition and boundaries of the Exception cohered well in advance of our independence.

A. THE HEARSAY RULE

The criminal jury trial was the product partly of design and partly of happenstance, and its history helped to steer the development of the evidentiary principles that would govern its proceedings.[21]

1. The Days Before Jury Trials and Witnesses, and the Birth of the Jury

Before the trial by jury was the trial by battle, in which parties would fight under the supervision of local authorities according to rules that originated in Germany and reached England during the Norman Conquest. The winner of the battle, presumed to have divine favor, was the winner of the trial.[22] Other ancient techniques included the ordeal, such as when a defendant was burned with a hot iron and his condition assessed in three days to determine the Almighty's view of the case, and the presentation of compurgators.[23] Also called "oath-helpers," compurgators would swear to the reliability of the accused—not to the specific content of his testimony but rather to his status as a truthteller.[24] A party able to present eleven compurgators was said to have "waged law" and won a complete acquittal.[25] The history is obscure; it will suffice to note that in criminal cases, the ancient forms of proof fell into disuse

20. *Id.* at 3–7.

21. *See* LANGBEIN, *supra* note 18 *passim*.

22. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 12–13, 72 (4th ed. 2002). Trial by battle was also known as "wager of battle." *See id.* at 507.

23. *See* JOHN HOSTETTLER, THE CRIMINAL JURY OLD AND NEW: JURY POWER FROM EARLY TIMES TO THE PRESENT DAY 19 (2004). Another ordeal involved drawing a stone from a boiling cauldron, after which the accused's arm would be examined. *Id.*

24. *Id.*

25. *See* Baker, *supra* note 22, at 74. For speculation that only certain persons, those deemed less suspicious by a body that might be considered the precursor of the modern grand jury, could wage law instead of suffering an ordeal, see Roger D. Groot, *The Early-Thirteenth-Century Criminal Jury*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND (1200–1800), at 3, 5 (J. S. Cockburn & Thomas A. Green eds., 1988). Wager of law remained an important part of civil practice until the seventeenth century because it allowed borrowers to avoid repaying debts if they could find fellows willing to swear to their honesty. Even a cursory discussion of the tactics used by civil plaintiffs to avoid defeat by oath-helpers would require a recitation of *Slade's Case*, (1602) 76 Eng. Rep. 1072 (K.B.), and other pronouncements on writs long forgotten in this country. *See generally* KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 9–10, 44–46 (1990) (discussing wager of law and *Slade's Case*).

by the 1200s, with battle strongly discouraged and compurgation and ordeals banned outright.[26]

With compurgators banned by the King and ordeals restricted by the Pope, English judges began to rely more heavily on the trial by jury, which in its infancy had little in common with modern jury trials. Early juries found facts not by sitting passively in a courtroom box but instead through active investigation.[27] In the first place, they lived in a time during which selection of local jurors made it likely that the factfinders would have personal knowledge of the defendant, and perhaps also of the facts giving rise to the charge.[28] Early civil trial practice demonstrated the same reliance on active jury factfinding, especially because civil parties were prohibited from testifying, and various legal impediments discouraged the appearance of knowledgeable third-party witnesses.[29]

Unlike parties to civil suits, criminal defendants enjoyed the ability, perhaps more accurately described as the requirement, to speak in their own defense. Although technically a prisoner could choose not to speak at his trial, several factors combined to compel the accused to speak in nearly all cases.[30] The absence of counsel meant that unless the defendant spoke for himself, no one would cross-examine Crown witnesses. In addition, many defendants were obviously guilty, and for them the trial

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26. Henry II abolished compurgation as a defense to English grand jury charges in the Assize of Clarendon in 1166. The Church prohibited ordeals, or at least clerical assistance therein, at the Fourth Lateran Council, convoked by Pope Innocent III and held in 1215. Battle remained on the books until 1818, when a murder defendant startled the court by invoking his right to combat. The court held long disuse had not abolished the legal right to combat, the victim's brother refused to fight, and the defendant was therefore acquitted. Parliament promptly abolished it for subsequent cases. *See* THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY: FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 42 (Philip A. Ashworth, ed. 6th ed. 1960) (discussing Ashford v. Thornton, 1 Barn. & Ald. 405 (1818)).

27. *See* 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 624–25 (Cambridge, Univ. Press 2d ed. 1899) ("Indeed it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court.").

28. *See* Roger D. Groot, *Petit Larceny, Jury Lenity and Parliament*, *in* "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND": THE JURY IN THE HISTORY OF THE COMMON LAW 47, 51–54 (John W. Cairns & Grant McLeod eds., 2002) (reciting cases of local jurors assigning punishments based on the reputations of defendants); *see also* Thomas A. Green, *A Retrospective on the Criminal Trial Jury, 1200–1800*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND (1200–1800), *supra* note 25, at 358, 362 (describing how prisoners were convinced to consent to trial by local jury).

29. For example, a third-party witness who appeared to testify risked being sued for "maintenance" by the party against whose interests he spoke. *See* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 126–28 (1898). The development of compulsory process ameliorated this particular problem, for a witness testifying in response to court order could not be branded a tortfeasor. *Id.* at 128–29 (distinguishing among situations, before compulsory process, in which a witness arrived in court on his own accord—in which case he might be liable for maintenance—and those in which active jurors found him in his house and questioned him about the facts—in which case his truthful replies would not constitute maintenance).

30. *Id.* at 48–61 (discussing, among other matters, the then-hazy standard of proof at criminal trials).

served more as a sentencing hearing than as a genuine inquiry into guilt and innocence.[31]

When nonparty witnesses did appear—whether testifying for lucky defendants able to produce friendly witnesses or, more commonly, for the prosecution—witnesses testifying in the early jury era freely recounted hearsay.[32] For example, at the celebrated 1571 trial of Thomas Howard, Fourth Duke of Norfolk, the Queen's counsel read into evidence various letters (at least one solicited by the prosecution) recounting the Duke's alleged illegal acts.[33] The hearsay evidence supported prosecution claims that Norfolk had secretly plotted to wed Mary Stuart, Queen of Scots, despite being forbidden to marry her by Queen Elizabeth I. Elizabeth considered Mary Stuart a rival to her claim on the English throne, making Norfolk's courtship dangerous at best.[34] Even more dire for Norfolk, the hearsay depicted him conspiring with the Pope to conquer England by force and murder the Queen.[35] Having been released from prison after his initial courtship, Norfolk was implicated in the "Ridolfi plot," which aimed to assassinate Elizabeth, replace her with Mary Stuart, and wed Mary to Norfolk, who was among England's richest men and had Catholic sympathies.[36] The discovery of the Ridolfi plot led to Norfolk's 1571 trial and 1572 execution.[37]

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31. For example, a defendant who had been caught red-handed in the act of stealing would likely not insult the jury by denying his guilt. Instead, he might explain himself in the hope that the jury would find him guilty of petty larceny instead of grand larceny, which as a felony was punishable by hanging. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 79 (2003). In the United States, courts have noticed that juries would often find sympathetic murder defendants guilty of manslaughter (despite good evidence supporting a murder conviction) to spare them capital punishment. *See* Woodson v. North Carolina, 428 U.S. 280, 302 (1976) ("[T]here is general agreement that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes."); Barkow, *supra*, at 69 n.165.

32. Indeed, even when early-jury era practices such as independent jury factfinding had disappeared, witnesses continued to utter hearsay without objection until the mid-1600s. *See* John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 444 (1904).

33. *See* Trial of Thomas Howard, 1 How. St. Tr. 958 (1571); 1 DAVID JARDINE, CRIMINAL TRIALS 157–58 (Gaunt, Inc. reprint 1999) (1832) (describing letter written to the Earl of Murray, a witness, inquiring what "he knew concerning the doings of the Duke of Norfolk," and then reporting that "the Earl of Murray's answer to the same letter was produced and read"). Such evidence is a near perfect example of the kind of hearsay later rejected by the Rule and by the Confrontation Clause. It is offered to prove the truth of the matter asserted, and it does so through the out-of-court statement of a witness whom the defendant cannot cross-examine.

34. 1 JARDINE, *supra* note 33, at 144.

35. *Id.* at 184–85 (describing contents of letters, written in cipher, that the Queen's attorney described as having come to light after having "been discovered by God himself"). The trial record also contains a more mundane explanation, according to which a servant of Norfolk provided the letters to a member of the Queen's Privy Council. *Id.*

36. *Id.* at 144.

37. *See generally* NEVILLE WILLIAMS, THOMAS HOWARD, FOURTH DUKE OF NORFOLK (1964). Viewers of the 1998 movie *Elizabeth* may recognize certain details of the scheme, which was the basis

Elizabeth, initially hesitant to order the death of a fellow monarch, had Mary Stuart executed in 1587 after additional conspiracies against Elizabeth came to light.[38]

2. The Development of the Rule

Hearsay's free rein continued well into the 1600s, with an enforceable Hearsay Rule akin to its modern incarnation not developing until around 1675 or 1690.[39] A few examples will illustrate the important changes seen in the seventeenth century. During the Long Parliament, Dr. William Laud, the Archbishop of Canterbury, was tried for treason in 1644.[40] As in Norfolk's case, Laud's treason trial concerned charges of secret "Popery,"[41] in addition to accusations of "Subversion of the Laws of the realm," among other offenses.[42] Laud, whom history remembers as an able advocate despite his advanced age and the myriad inconveniences facing criminal defendants, repeatedly railed against the prosecution's reliance upon hearsay.[43] For all his eloquence and objections, the hearsay was admitted all the same. Indeed, Laud's complaints were not objections to the admission of hearsay per se; he did not argue that the prosecution was barred by law from proffering hearsay against him. His complaints, rather, were an effort to lessen the power of the evidence already admitted against him.[44]

Day after day, Laud appeared in the House of Lords and listened to evidence allegedly spoken, or written, by witnesses whom he could not confront. A London upholsterer named Grafton testified that he was wrongfully imprisoned by order of Laud, and Laud reported that to support this claim, Grafton stated that "Mr. Ingram, Keeper of the Fleet,

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of the film's plot, albeit changed so much that Ridolfi, the chief conspirator, does not appear in the movie. *See* ELIZABETH (Universal Studios 1998).

38. *See* ANTONIA FRASER, MARY QUEEN OF SCOTS 429–30, 523–39 (1993).

39. *See* Wigmore, *supra* note 32, at 445.

40. *See* Trial of Dr. William Laud, 4 How. St. Tr. 315 (1695). The account of Laud's trial in *Howell's State Trials* purports to be "Written by Himself during his Imprisonment in the Tower" and refers to Laud in the first person; the editor noted that he supplemented the original manuscript after consulting additional sources. *Id.* at 315 & n.*. For a more scholarly report of the trial, see WILLIAM HOLDEN HUTTON, WILLIAM LAUD 203–18 (London, Methuen & Co. 1895). As Hutton puts it, "The Archbishop himself, with painful persistence, each day recorded, after all the strain of the examination and the speaking, the pitiful progress of the trial which would, as he firmly believed, acquit him with honour in the eyes of foreign nations and of posterity." *Id.* at 204.

41. HUTTON, *supra* note 40, at 208–09. Laud defended his honor as an Anglican with great vigor, enumerating many Englishmen whom he had "brought back" from Catholicism's "fold." *Id.* at 210.

42. *Trial of Dr. William Laud*, 4 How. St. Tr. at 316.

43. *See, e.g.*, *id.* at 383 ("[W]hy doth he [a witness] rest upon a hearsay of sir Thomas Ailsbury's man? Why was not this man examined to make out the Proof?"); *id.* at 391 (arguing that certain statements were "all hearsay, and make[] no evidence, unless [the witnesses] were present to witness what was said"); *id.* at 432 ("Why are not some of them examined, but this man's report from them admitted?").

44. The prosecution presented evidence in the morning of each trial day, and Laud rebutted each morning's evidence in the afternoon session. HUTTON, *supra* note 40, at 208.

would not give way to [Grafton's] release . . . till he heard from me."[45] Laud objected, "Here is no man produced that heard Mr. Ingram say so; nor is Mr. Ingram himself brought to testify."[46] All the objections, made by one of the most prominent men in England at a trial of great public importance, underscore that well into the 1600s, hearsay was fully admissible at trial.[47] In Laud's own case, his attack on the reliability of the hearsay admitted against him proved useful in convincing the factfinder to accept his view of the case: the Lords sitting in judgment refused to find Laud guilty.[48] Undeterred, the House of Commons passed a bill of attainder finding Laud guilty of treason,[49] and the Lords eventually passed the attainder under great public pressure, allowing Laud to be executed.[50]

3. The Treason Trials and Other Major Events

Laud's case provides one example of many in which hearsay contributed to the ignominious execution of a prominent English subject. The interregnum[51] and the fractious years before it provided many such cases. After the restoration of the monarchy, continued political and religious instability provided fertile ground for judicial barbarity. Eventually, enough well-placed persons had suffered great injustices that other prominent figures—such as Parliamentarians with sufficient power to enact procedural and evidentiary reforms—decided to change the law.

While a full accounting of the wrongful executions of 1600s England would exceed the scope of even an article far longer than this one, a few examples should demonstrate why powerful subjects became uneasy. In the late 1670s, anti-Catholic hysteria manifested in the "Popish Plot," a fictitious conspiracy wherein prominent Catholics were accused of planning to kill Charles II and replace him with his Catholic brother,

45. *Trial of Dr. William Laud*, 4 How. St. Tr. at 402.

46. *Id.* Even if a witness had testified to hearing Ingram "say so," that testimony would have been hearsay—admitted to prove the matter allegedly asserted by Ingram, that is, that Laud ordered Granton's detention—meaning that unless Grafton himself heard Laud instruct Ingram to detain Grafton, Grafton's testimony was actually *double* hearsay. *Cf.* FED. R. EVID. 805.

47. Lord Coke discussed in his *Institutes* whether a hearsay witness could count toward the minimum number of witnesses required to prosecute treason. The admissibility of the hearsay was assumed without discussion. *See* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 25 (London, W. Clark & Sons 1817) (1669).

48. HUTTON, *supra* note 40, at 216.

49. The bill charged him with attempting to "alter the true Protestant religion into Popery" and "subvert the laws of the kingdom." *Id.* at 217.

50. One observer of the Lords' deliberation said, "They should do well to agree to the ordinance . . . or else the multitude would force them to it." *Id.* at 218. Such bills are prohibited by the Constitution. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

51. The interregnum lasted from the 1649 execution of King Charles I until 1660, when Charles II was restored to the throne.

James Stuart.[52] Titus Oates, one of the leading accusers, was eventually convicted of perjury;[53] however, by then innocent men had already been executed.[54] Among those killed were Oliver Plunkett, the chief Catholic prelate of Ireland, and Edward Coleman, James's secretary.[55]

Upon the death of Charles II, the accession of James Stuart to the throne was at hand, and Charles's illegitimate son raised a woefully inadequate Protestant rebellion in hopes of preventing James Stuart from becoming James II.[56] The resulting trials, overseen by Chief Justice Jeffreys, epitomize the imposition of injustice under color of law and became known as the "Bloody Assizes."[57] More than 200 prisoners were executed, including a deaf widow in her seventies.[58] Jeffreys is said to have sold pardons, intervened in trials to rebut evidence presented by the accused, and to have decided sentences based on utter caprice.[59]

An earlier trial, in which hearsay played a prominent role, has particular resonance in the United States, perhaps because of the accused's role in the settlement of colonial America. The 1603 treason trial of Sir Walter Raleigh, the author, explorer, colonist, soldier, occasional royal favorite, and eventual political liability, has continuing relevance in the development of American law, in particular with respect to hearsay and the Confrontation Clause.[60] Raleigh, like Laud, defended himself with aplomb that has secured his reputation despite failing to prevent his execution.[61] Evidence presented against Raleigh included a

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52. Trial of Titus Oates, 10 How. St. Tr. 1079, 1138 (1685).

53. *Id.* at 1079.

54. *See* JOHN POLLOCK, THE POPISH PLOT: A STUDY IN THE HISTORY OF THE REIGN OF CHARLES II, at 3 (1903) ("Very serious were his lies to the fifteen men whom he brought to death.").

55. *See* PAUL BURNS, BUTLER'S LIVES OF THE SAINTS 282–83 (2003).

56. *See* LANGBEIN, *supra* note 18, at 76–77.

57. *Id.* Lord George Jeffreys moved on up to prominence during the reign of James II. *See generally* DAVID G. CHANDLER, SEDGEMOOR 1685: FROM MONMOUTH'S INVASION TO THE BLOODY ASSIZES (1995) (describing history). His name remains infamous. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 67 (2004) (referring to fear of the likes of "the dread Lord Jeffreys" as motivating the creation of certain constitutional protections).

58. *See* LANGBEIN, *supra* note 18, at 76–77.

59. *Id.* (describing Jeffreys sentencing some to death and others to transportation into indentured servitude based upon their first names, and telling condemned convicts that "their Godfathers hanged them").

60. *See* Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure:* Crawford*'s Birth Did Not Require That* Roberts *Had to Die*, 15 J.L. & POL'Y 685, 712–13 (2007) ("Scalia's very narrow, clear, and definitive account of [Raleigh's trial in *Crawford v. Washington*] amounts to a selective recitation that arguably produces an erroneously narrow confrontation doctrine."). Even before the reexamination of "testimonial" hearsay in *Crawford*, some had expressed skepticism concerning the popular belief that Raleigh's trial provides useful guidance in interpreting the Confrontation Clause. *See, e.g.*, Roger Park, *A Subject Matter Approach to Hearsay*, 86 MICH. L. REV. 51, 90 (1987).

61. In Raleigh's case, however, the robust defense likely contributed to a significant delay in imposing sentence: Raleigh was convicted in 1603 but not executed until 1618. *See generally* WILLARD M. WALLACE, SIR WALTER RALEIGH 217 (1959).

letter written to the Privy Council by Lord Cobham, whom Raleigh was given no opportunity to cross-examine.[62] In addition to Cobham's statements, which have received particular attention from the Supreme Court centuries later,[63] Raleigh also faced testimony from a ship's pilot named Dyer, who claimed that an unnamed Portuguese gentleman had said to Dyer that Raleigh would cut the throat of the English king.[64] Despite Raleigh's complaints about the unreliability of the prosecution's hearsay, the evidence came in, and Raleigh was convicted, a result that eventually became known as a great injustice.[65]

In response to infamous treason trials, reformers following the Glorious Revolution began describing how defective trial procedures had contributed to the unjust results.[66] Although the proposed reforms concerned matters other than hearsay, their eventual enactment supported the development of an effective Hearsay Rule. For example, the Treason Trials Act of 1696[67] allowed treason defendants to "hold over" defense witnesses with compulsory process, which until then was available only to the prosecution.[68] More important with respect to hearsay were provisions allowing defendants to retain attorneys to represent them at trial (as well as at pretrial hearings) and solicitors to

62. *See* Mosteller, *supra* note 60, at 713–14.

63. *E.g.*, *Crawford*, 541 U.S. at 44, 52 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.").

64. Trial of Sir Walter Raleigh, 2 How. St. Tr. 1, 25 (1603); *see also* Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 318–19 (2005) (noting the significant nontestimonial hearsay implicating Raleigh).

65. 1 JARDINE, *supra* note 33, at 520 (quoting trial judge reflecting that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh"); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 109–17 (1998) (discussing resonance in newly-independent America of Raleigh trial and later injustices, which together motivated certain constitutional provisions).

66. *See* LANGBEIN, *supra* note 18, at 78–79. The Glorious Revolution of 1688 to 1689 replaced King James II with the joint monarchy of Mary II and William III. Mary was the Protestant daughter of the deposed James; William was her Dutch Protestant husband and the Prince of Orange. The Revolution ensured that British monarchs would thereafter all be Protestants. *See generally* REDEFINING WILLIAM III: THE IMPACT OF THE KING-STADHOLDER IN INTERNATIONAL CONTEXT (Esther Mijers & David Onnekink eds., 2007).

67. Treason Act of 1695, 7 & 8 Will. 3, c. 3 (Eng.), *reprinted in* 7 STATUTES OF THE REALM 6–7 (1820).

68. *Id.* § 7 ("[A]ll Persons soe accused and indicted for any such Treason as aforesaid shall have the like Processe of the Court where they shall bee tryed to compell their Witnesses to appeare for them att any such Tryal or Tryals as is usually granted to compell Witnesses to appeare against them."). The inability to secure witnesses had posed unsurprising practical problems for defendants. The record of the trial of William Ireland reports that the defendant "observed [upon calling his first witness], 'It is an hundred to one if he be here; for I have not been permitted so much as to send a scrap of paper.'" 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 388 (London, MacMillan & Co. 1883) (quoting Trial of William Ireland, 7 How. St. Tr. 79, 121 (1678)). The account then notes, "All the prisoners were convicted and executed." *Id.*

assist their attorneys by performing investigations.[69] Competent counsel could object to improper evidence—as hearsay came to be known—far more effectively than could malnourished, desperate defendants. The development of the Rule was surely hastened by the environment of reform, in which the procedural rights of defendants received serious consideration and commentators openly discussed the hazards of undue royal influence on judicial proceedings. Whereas before the Revolution there had been little public outcry on behalf of the wrongly accused, the political climate at the end of the seventeenth century allowed the development of rules—some, like those of the Treason Trials Act, enacted by Parliament and others, like the newly robust Hearsay Rule, crafted by judges—that won elite approval despite their tendency to increase the difficulty of criminal prosecution.

4. Crystallization of the Rule

A few decades after Archbishop Laud railed against out-of-court statements with no hope of winning their exclusion, the law of hearsay had changed dramatically, developing into a rule of evidence that excluded certain testimony much as the Rule does today. At the 1683 treason trial of William Russell, the former leader of the Whigs in the House of Commons, the presiding judge announced that "the giving of evidence by hear-say, will not be evidence; what colonel Rumsey or Mr. Ferguson told Mr. West, is no evidence."[70] By 1690, the Rule was solid, as the rulings of Justice Dolben at the murder trial of John Cole illustrate:[71]

> Mrs. *Milward.* My lord, my husband declared to me, that he and Mr. Cole were in the coach with Dr. Clenche, and that they two killed Dr. Clenche.
>
> Just. *Dolben.* That is no evidence at all, what your husband told you; that won't be good evidence, if you don't know somewhat of your own knowledge.
>
> Mrs. *Milward.* My lord, I have a great deal more that my husband told me to declare.
>
> Just. *Dolben.* That won't do; what if your husband had told you that I killed Dr. Clenche, what then? That will stand for no evidence in law: we ought by the law to have no man called in question, but upon very

69. *See* Treason Act § 1; *see also* LANGBEIN, *supra* note 18, at 92–96 (describing distinction between attorneys and solicitors).

70. Trial of William Lord Russell, 9 How. St. Tr. 577, 613 (1683) (documenting argument by attorney general that hearsay exception might apply). For more on Lord Russell and his role in the "Rye House Plot" against King Charles II, see Lois G. Schwoerer, *William, Lord Russell: The Making of a Martyr, 1683–1983*, 24 J. BRIT. STUD. 41, 49–50 (1985). The exception stressed in Russell's case, that hearsay should be admissible if proffered to support other testimony, appeared also at a 1683 inquest into the alleged suicide of Arthur, Earl of Essex. *See* Trial of Laurence Braddon & Hugh Speke, 9 How. St. Tr. 1127, 1272 (1683) ("It is true, no man ought to suffer barely upon hearsay evidence, but such testimony hath been used to corroborate what else may be sworn . . . .").

71. Trial of John Cole, 12 How. St. Tr. 875 (1692).

> good grounds, and good evidence, upon oath, and that upon the verdict of twelve good men.[72]

The jury acquitted Cole.[73] Subsequent cases in the early 1700s repeat the Rule and show little dispute about its general meaning,[74] and contemporary treatises agree.[75] Wigmore concluded that by the mid-1700s, "the rule is no longer to be struggled against; and henceforth the only question can be how far there are to be specific exceptions to it."[76]

B. THE COCONSPIRATOR EXCEPTION

From the Rule's earliest days, judges applying it allowed for exceptions. The use of "dying declarations," for example, wherein a person's last words may be admitted to prove the matter asserted so long as they concern the decedent's cause of death,[77] predated the Hearsay Rule by centuries and seems never to have been threatened by the development of the Rule.[78] Similarly, the Rule's judicial crafters did not attempt to prevent the admission of regular entries in public rolls, ancient documents, and hearsay concerning family pedigree.[79]

1. Development of the Exception in England

The Coconspirator Exception, while perhaps not as old as the rules providing for admission of dying declarations and hearsay concerning parish boundaries,[80] easily predates American independence. The 1683

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72. *Id.* at 876. Mrs. Milward's husband had died before the trial. *Id.*

73. *Id.* at 884.

74. *See, e.g.*, Trial of Thomas Earl of Macclesfield, 16 How. St. Tr. 767, 1137 (1725) (rejecting evidence despite complaint by proponent that declarant's death suspends the Rule—"by his death you have lost your evidence"); Trial of George Earl of Wintoun, 15 How. St. Tr. 806, 856 (1716) ("For the sake of evidence, it is incumbent on us to desire that my lord confines himself to ask the [witness] what he knows, and not to what he heard said."); Trial of Wm. Kidd, 14 How. St. Tr. 147, 177 (1701) ("[W]e cannot read certificates; they must speak *viva voce*.").

75. *See, e.g.*, 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 596–97 (London 1716) ("As to . . . how far hearsay should be admitted. . . . It seems . . . agreed, that what a . . . stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination . . . .").

76. Wigmore, *supra* note 32, at 448 (footnote omitted). As a practical matter, the strengthening of the Rule was aided immeasurably by the Treason Act and other reforms discussed above.

77. *See* FED. R. EVID. 804(b)(2) ("Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .(2) Statement under belief of impending death.—In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.").

78. *See* THAYER, *supra* note 29, at 519–20 (providing examples of such declarations coming into evidence as early as 1202 and noting that they remained admissible in the 1700s).

79. *See id.* at 520; *see also* FED. R. EVID. 803(8) (public records and reports); *id.* R. 803(16) (statements in ancient documents); *id.* R. 803(13) (family records).

80. *See* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 139, at 225–27 (Boston, Little, Brown, & Co. 16th ed. 1899) (noting use of maps and other old documents as "reputation" evidence concerning boundaries of parishes and other places); RANSOM H. TYLER, A TREATISE ON THE LAW OF BOUNDARIES AND FENCES 317–17 (Albany, William Gould & Son 1876) (collecting cases).

treason trial of Lord Russell, discussed above,[81] involved the admission of coconspirator statements that clearly were hearsay. That Russell may have suffered unjust prosecution is not without irony; he had proposed that James Stuart—then the Duke of York and not yet King James II—be tried and executed for participation in the Popish Plot, which, as it turned out, was a fictitious conspiracy.[82] Accused of conspiring to kill King Charles II and his brother, Russell was confronted with testimony by a government witness, himself a confessed plotter who spoke against Russell to save his own life, concerning the statements of a third person also alleged to have participated in the treason.[83] The third person, who was not available for cross-examination, purportedly said, "There is above ten thousand brisk boys are ready to follow me" in a rising against the King.[84] Recall that at this same trial, the court sustained a general objection by Russell to the admission of hearsay;[85] the statements of coconspirators received different treatment.[86]

As Professor Mueller has explained, the Exception arose somewhat accidentally, resulting from the conflict of two principles of English law.[87] On the one hand, the substantive law of criminal conspiracy provided (as it does now) that the *actus reus* of the crime consisted of the *agreement* to commit illegal conduct. Admittedly, in certain jurisdictions some overt act eventually became necessary to obtain a conviction,[88] yet every criminal law student can recite the rule that a single overt act by one conspirator will suffice to convict multiple malefactors.[89] The out-of-court statements of criminal conspirators accordingly became *criminal acts* of obvious relevance to proving criminal allegations. On the other hand, black-letter evidence law teaches that unsworn out-of-court statements are hearsay and must as a result be excluded. The tension can be resolved, at least in part, by recalling that certain utterances are both

81. *See supra* note 70 and accompanying text.

82. *See* Schwoerer, *supra* note 70, at 47–48 (discussing anti-James statements by Russell); *supra* notes 52–55 and accompanying text (describing the "Popish Plot").

83. Schwoerer, *supra* note 70, at 49 & n.38 ("William Howard, third Baron Howard of Escrick, who had turned state's evidence, made the charge at William Russell's trial.").

84. *See* Trial of William Lord Russell, 9 How. St. Tr. 577, 604 (1683); *see also* Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323, 325–26 (1984) (discussing early cases).

85. *Trial of William Lord Russell*, 9 How. St. Tr. at 613.

86. *Id.* at 608, 635.

87. *See* Mueller, *supra* note 84, at 326.

88. *Compare* Hogan v. O'Neill, 255 U.S. 52, 55 (1921) ("[At] common law, a conspiracy to commit a crime is itself a criminal offense, although no overt act be done in pursuance of it . . . ."), *with* CAL. PENAL CODE § 184 (West 1999) ("No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement . . . .").

89. *See* Braverman v. United States, 317 U.S. 49, 53 (1942) ("The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime.").

statements (in that they convey information from the declarant to the listener) and acts. A chairman who says, "I call this meeting to order," has said something and has also done something—called the meeting to order. An attorney who exclaims, "I object," has not only communicated her displeasure to everyone in the courtroom but has also performed an act with legal significance.[90] Similarly, if the average person were to gaze upon the seashore, spot a passing vessel, and declare, "I name this ship the *U.S.S. George Washington*," the statement would likely be somewhat confusing, and almost surely ineffectual. If the right person, however, says the same thing at the right time and place, the ship might actually receive a new name.[91]

Coconspirator statements, or at least some of them, exhibit the same statement-act duality. Imagine one acquaintance, *A*, saying to another, *B*, "I mean to kill the King. Will you help me?" If *B* replies, "You can rely on me," those words are both a statement and an act. Indeed, the words compose an act of sufficient gravity to justify *B*'s execution at common law. Let us further imagine the trial of *A* for treason, at which *C*, who clandestinely overhead the conversation, is called to recount what *A* and *B* said. Counsel for *A* cannot object to the admission of *A*'s initial question of *B*; it comes in as a party admission.[92] But what of *B*'s reply? If *B* is not on trial, her reply is not a party admission. Regardless, a prosecutor seeking to admit *B*'s statement might argue that he need not cite any hearsay exception whatsoever because *B*'s statement is not hearsay; the prosecution does not offer it "in evidence to prove the truth of the matter asserted."[93] The prosecution's argument has some sense to it. After all, it does not matter to *A*'s substantive guilt whether *A* actually could "rely on" *B*; at issue is whether *A* and *B* entered an illegal conspiracy. The prosecutor proposes to admit *B*'s statement not to prove that it is true—that *A* could rely on *B*—but instead to prove that *A* and *B* agreed to kill the king. More than a mere statement to *A*, the law deems the words of *B* a criminal act, and it is the *act* that the prosecutor means to show to the jury.[94] In a jurisdiction following the modern trend toward

90. Even if the presiding judge ignores the verbal act, the attorney has preserved her objection.

91. *See generally* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975) (exploring statement-act duality). Consider also the words "I do."

92. *See* FED. R. EVID. 801(d)(2)(a).

93. *Id.* R. 801(c).

94. One can easily imagine words being deemed acts for evidentiary purposes outside the criminal law. For example, a civil suit for wrongful death might concern "survivorship" claims, which are claims based on injuries suffered by the decedent before death. *E.g.*, Moore-McCormack Lines, Inc. v. McMahon, 235 F.2d 142, 145 n.2 (2d Cir. 1956) (Frank, J., dissenting). If the parties disputed the time of death, and accordingly how long the victim suffered before death, a third-party witness could testify that he heard the victim shout "I'm alive" without fearing a hearsay objection. For that matter, testimony that the victim inaccurately shouted "I'm dead" would be just as useful. *See* Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 415 (1992) (providing "I'm alive" example).

the criminalization of unilateral conspiracies, the "truth" of *B*'s reliability would be especially irrelevant at *A*'s trial.[95]

Professor Mueller recounts that most coconspirator statements admitted at prominent English trials did not actually have hearsay significance because the statements at issue were themselves criminal acts, such as letters from one conspirator to another listing locations for potential invasions of England.[96] Nonetheless, the confusion among acts and statements, in addition to the confounding existence of other hearsay exceptions that might justify admissions of coconspirator statements not qualifying as acts,[97] soon led prominent judges and commentators to deduce a hearsay exception from the various cases in which coconspirator statements came into evidence—a principle of evidence law essentially identical to the modern Exception.

2. Adoption of the Exception in the United States

The Exception is noted in early American evidence treatises and appears in cases older than the Republic. Considering the origin of the Exception, it is no surprise that the earliest American references to it explicitly refer to the illegality of the conduct performed by the coconspirators. Thomas Starkie, whose English treatise on evidence was republished in multiple American editions and received great respect from American jurists, described the Exception as follows:

> Where several combine together for the same *illegal purpose*, each is the agent of all the rest, and any act done by one in furtherance of the unlawful design is, in consideration of law, the act of all. . . . And as a declaration accompanying an act strongly indicates the nature and intention of the act, or, more properly, perhaps, is to be considered as part of the act, a declaration made by one conspirator at the time of doing an act in furtherance of the general design, is evidence against the other conspirators.[98]

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95. *See, e.g.*, State v. Rambousek, 479 N.W.2d 832, 833–34 (N.D. 1992) ("Under the unilateral approach, as distinguished from the bilateral approach, the trier-of-fact assesses the subjective individual behavior of a defendant, rendering irrelevant in determining criminal liability the conviction, acquittal, irresponsibility, or immunity of other co-conspirators. Under the traditional bilateral approach, there must be at least two 'guilty' persons, two persons who have agreed." (quoting State v. Kihnel, 488 So. 2d 1238, 1240 (La. Ct. App. 1986))); *see also* Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1135–36 (1975).

96. *See* Mueller, *supra* note 84, at 328 & n.15.

97. For one such confounding example, see *supra* note 92 and accompanying text.

98. 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 402 (Phila., P.H. Nicklin & T. Johnson 3d American ed. 1830) (emphasis added). For examples of American courts relying on Starkie in the first decade of the nineteenth century, see, for example, *Murdock v. Hunter*, 17 F. Cas. 1013, 1016 n.4 (C.C.D. Va. 1808) (No. 9941), which relied on Starkie for "the general rule" deduced from review of cases. The opinion in *Murdock* was written by Chief Justice John Marshall, sitting as Circuit Justice. *See id.* at 1014; *see also, e.g.*, Chase v. Lincoln, 3 Mass. (3 Tyng) 236, 237 n.3 (1807).

S.M. Phillipps, another scholar well respected when the United States was young,[99] used a similar formulation to discuss when statements of conspirators could be admitted against their confederates despite the Hearsay Rule:

> It is an established rule, that where several persons are proved to have combined together for the same *illegal purpose*, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party.... It follows, that any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and therefore part of the *res gestae*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were used in furtherance of a common design.[100]

Phillipps went on to distinguish cases involving letters from one conspirator to another written to encourage the common plot, which would be admissible, from a "mere relation of some part of the transaction," which would depend "on the credit of the narrator, who is not before the court, and therefore it cannot be received."[101] It would appear that by the early-nineteenth century, American recitations of the Exception strongly resembled the modern incarnation codified in the Federal Rules of Evidence. As Starkie and Phillipps summarize, the law allowed for admission of the statements of one conspirator against another, but only so long as the out-of-court statement was made during the conspiracy's pendency and in furtherance of it. That said, the Coconspirator Exception did not appear only in learned treatises, and a review of early cases reveals some differences from modern practice, as well as some uncertainty among early American practitioners concerning the precise scope of the Exception.

The Exception existed in American substantive law at least as early as 1791, and was discussed by the Supreme Court in 1827 and 1829.[102] A decision by the Supreme Judicial Court of Massachusetts shows that the Exception was not controversial in 1830. In *Commonwealth v. Crowninshield*, the prosecution alleged a conspiracy to commit murder.[103] Objecting to the admission of certain coconspirator statements, counsel

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99. *See, e.g.*, Turner v. Austin, 16 Mass. (16 Tyng) 181, 185 (1819) (rejecting plaintiff's objection to the admission of certain testimony after defendant's counsel "referred to the American edition of *Phillips's Law of Evidence*"); Rumsey v. Lovell, Ant. N.P. Cas. 17, 29–30 n.2 (N.Y. Sup. Ct. 1808).

100. 1 S. MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 199–200 (N.Y., Banks, Gould & Co. 3d ed. 1849) (emphasis added).

101. *Id.* at 201.

102. *See* Am. Fur Co. v. United States, 27 U.S. (2 Pet.) 358, 363–65 (1829); United States v. Gooding, 25 U.S. (12 Wheat.) 460, 468–70 (1827); Patton v. Freeman, 1 N.J.L. 134, 136 (1791); Michael L. Seigel & Daniel Weisman, *The Admissibility of Co-Conspirator Statements in a Post-*Crawford *World*, 34 FLA. ST. U. L. REV. 877, 883 (2007).

103. 27 Mass. (10 Pick.) 497, 497 (1830).

for the defendant did not challenge the principle that such statements were generally admissible, arguing instead that the prosecution had failed to connect the defendant on trial to the particular declarant at issue.[104] Following argument by the prosecution that included a reference to Starkie's treatise on evidence, the court, itself citing Phillipps, held that the evidence was admissible.[105] The *Crowninshield* court relied in part on a Supreme Court decision of the previous year,[106] *American Fur Co. v. United States*, which stated that "where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gesta, may be given in evidence against the others."[107] Importantly, the *American Fur* decision clarified the Court's earlier opinion in *United States v. Gooding*.[108]

In *Gooding*, the owner of a ship was charged with violating the Slave Trade Act[109] by arranging for Hill, the ship's captain, to bring African slaves to Cuba.[110] As evidence, the prosecution offered the testimony of Coit, another sailor, who said that Hill attempted to recruit Coit to serve as his mate on the slaving voyage.[111] Justice Story described Coit as having testified

> that he, Captain Coit, was at St. Thomas while the General Winder [Gooding's ship] was at that island in September, 1824, and was frequently on board the vessel at that time, that Captain Hill, the master of the vessel, then and there proposed to the witness to engage on board the General Winder as mate for the voyage then in progress, and described the same to be a voyage to the coast of Africa, for slaves, and thence back to Trinidad de Cuba; that he offered to the witness seventy dollars per month, and five dollars per head for every prime slave which should be brought to Cuba; that on the witness inquiring who would see the crew paid in the event of a disaster attending the voyage, Captain Hill replied, "Uncle John," meaning (as the witness understood) John Gooding, the defendant.[112]

Although *Gooding* has become known as the first Supreme Court case to employ the Exception,[113] the Court's opinion demonstrates that

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104. *Id.* at 498.

105. *Id.* at 499 & n.1 (citing 2 SAMUEL MARCH PHILLIPPS, PHILLIPPS' EVIDENCE 177 *et seq.* (Cowen & Hill's Ed.)).

106. *Id.* at 499 n.1.

107. *Am. Fur Co.*, 27 U.S. at 365. *American Fur* concerned a trader convicted of bringing liquor into Indian country with the intention to sell whiskey to Indians in violation of federal law. *Id.* at 358–59.

108. *Gooding*, 25 U.S. 460; *see also Am. Fur. Co.*, 27 U.S. at 364–65.

109. Ch. 91, 3 Stat. 450 (1818).

110. *Gooding*, 25 U.S. at 468.

111. *Id.*

112. *Id.* at 468.

113. *See Measures Relating to Organized Crime, Hearing Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 91st Cong. (1969), *reprinted in* 115 CONG. REC.

the evidence was actually admitted pursuant to the principal-agent exception to the Hearsay Rule,[114] under the theory that Hill was acting in the scope of his employment when he tried to recruit another sailor for his boss's ship. Gooding's counsel argued

> that the testimony is not admissible, because, in criminal cases, the declarations of the master of the vessel are not evidence to charge the owner with an offence; and that the doctrine of the binding effect of such declarations by known agents, is, and ought to be, confined to civil cases.[115]

The Court rejected this theory, holding, "In general the rules of evidence in criminal and civil cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act.... Nor is there any authority for confining the rule to civil cases."[116] Indeed, the Court buttressed its reasoning with a citation to Starkie, referring not to a section on the Coconspirator Exception, but instead to Starkie's discussion of statements by agents.[117] Because the holding of *Gooding* concerned principals and agents, the Supreme Court needed to clarify the law when presented with true coconspirator statements in *American Fur*. Responding to the argument that the declarant in *American Fur* acted in concert with the defendant instead of as the defendant's agent, and that

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23,433, 23,435, 23,439 (1969) (testimony of Henry S. Ruth, Professor, University of Pennsylvania School of Law) ("The exception has come to rest in American jurisprudence ... as articulated by Mr. Justice Storey [sic] in *United States v. Gooding* ...."); Norman M. Garland & Donald E. Snow, *The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1, 5 & n.43 (1972) (citing *Gooding*, 25 U.S. 460, to support claim that the Exception "has long been accepted"); *see also* John Bilyeu Oakley, *From Hearsay to Eternity: Pendency and the Co-Conspirator Exception in California—Fact, Fiction, and a Novel Approach*, 16 SANTA CLARA L. REV. 1, 14–15 (1975) ("*Gooding* involved a business venture which was every bit as commercial as it was illicit, and which was accordingly organized and operated along conventional business lines. As a result, the conspirators shared a classic civil agency relationship.").

114. *See* FED. R. EVID. 801(d)(2)(D) (defining as "not hearsay" any "statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship"). The existence of the agent exception undercuts arguments that the Coconspirator Exception is justified because each conspirator is the agent of all his fellows. Were that the case, the Coconspirator Exception would be unnecessary, but the agent exception is not nearly so broad. If nothing else, the agent exception is narrower because it runs in only one direction: although the agent's statements may be admitted against the principal, the principal's may not be used against the agent. Other limitations are discussed *infra* notes 276–78 and accompanying text.

115. 25 U.S. at 469.

116. *Id. Gooding* likely became associated with the Exception because, after the Court stated that the principal-agent exception applied in criminal cases, it then went on to mention that

> in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to, or command, what is done by any other in furtherance of the common object.

Id.

117. *Id.* at 470 & n.a.

accordingly the rule of *Gooding* could not justify admitting the declarant's out-of-court statement, the *American Fur* Court expressly adopted the Exception:

> The principle asserted in the decision of that point [in *Gooding*], and applied to the case was, that whatever an agent does, or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal.
>
> The opinion of the court in the present case is not less correct, whether Davis was considered by the jury as having acted *in conjunction* with Wallace, or strictly as his agent. For we hold the law to be, that where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gesta, may be given in evidence against the others . . . .[118]

The Exception as stated in *American Fur*, and applied in *Crowninshield* and many other cases,[119] strongly resembles the modern codified rule, and it clearly refers to criminal combinations.[120] And so it went for the rest of the century, with American courts routinely applying the Exception without much debate about the underlying legal principles. Instead, the cases show agreement on the basics—that the proponent must establish a criminal conspiracy, furtherance, and pendency—along with disagreements about the application to particular cases. The Supreme Court of Colorado considered in 1905 whether a woman who allowed her fetus to be aborted could be said to "conspire" with the abortion provider, a finding that would allow her out-of-court statements to be introduced at the abortionist's trial.[121] In 1904 the Supreme Court of Iowa vacated a murder conviction after the trial court admitted a coconspirator's hearsay statement that the appellate court found "was not made in furtherance of the unlawful plan."[122] The

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118. Am. Fur Co. v. United States, 27 U.S. (2 Pet.) 358, 364–65 (1829).

119. *See* CHARLES HUGHES, HUGHES' CRIMINAL LAW 327 n.65 (1901) (collecting cases).

120. To be sure, there was some uncertainty about the scope of the Exception. *See* Seigel & Weisman, *supra* note 102, at 904–07 (discussing history suggesting that early American practitioners might have thought the Exception even narrower than *American Fur* and the current Federal Rules of Evidence would indicate).

121. Johnson v. People, 80 P. 133, 137–38 (Colo. 1905) ("If the woman is not technically an accomplice, she may nevertheless conspire with others to produce the abortion; and, the conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against others engaged with her in the criminal act." (quoting Solander v. People, 2 Colo. 48, 63 (1873))). The hearsay statement of Pearl Gordon, who died from the procedure, was repeated at trial by her husband. *Id.* at 138.

122. State v. Walker, 100 N.W. 354, 357 (Iowa 1904) ("What Levich said, as testified to by the witness, was, in substance, that he had a grudge or grievance against Finkelstein, and that he had hired defendant to do him an injury. This declaration was not made in furtherance of the unlawful plan; it had no relevancy to the carrying out of that plan; but it was a mere narrative of a fact, made by Levich upon his own responsibility, and not purporting in any way to represent the defendant.").

Supreme Court of Wisconsin, declaring the rule at issue "too elementary to require discussion,"[123] vacated a conviction in 1909 after holding that the trial court improperly admitted a coconspirator statement made after the conclusion of the criminal plot.[124] The cases applying the Exception provide a tour of the penal code, discussing crimes ranging from bribery to embezzlement to liquor-selling to revenue frauds.[125]

In the mid-twentieth century, the Supreme Court repeatedly expressed reluctance to expand the Exception, for example refusing to construe the "in furtherance of" requirement to include efforts to conceal the acts after the primary objectives of the conspiracy had been reached, and requiring instead that admissible statements concern overt acts as charged in the indictment.[126] In *Dutton v. Evans*, the Court held in a plurality opinion that the states may offer a broader hearsay exception than federal rules or holdings provide, reasoning that the narrowness of the federal exception was derived from federal rulemaking power, not from the Confrontation Clause itself.[127] *Dutton* concerned a Georgia homicide conviction based upon testimony about coconspirator statements from the "concealment phase," and the Court declined to grant a writ of habeas corpus despite acknowledging that the statements would not have been admitted at a federal trial.[128]

3. Codification in the Federal Rules of Evidence and Other Codes

The federal evidence rule at issue in *Dutton* was judicially created; the Federal Rules of Evidence did not yet exist in 1970. Although the idea of codifying the federal evidence rules had been floated in the 1930s soon after the enactment of the Rules Enabling Act, not much work occurred before 1961, when Chief Justice Earl Warren appointed a Special Committee on Evidence.[129] After extensive effort from 1965 to

123. Miller v. State, 119 N.W. 850, 862 (Wis. 1909) (holding that a statement "was mere hearsay . . . because the admissions of one of two persons concerned in a criminal act, after the fact, is not evidence against the other").

124. *Id.* at 864.

125. *See* JOHN HENRY WIGMORE, A SUPPLEMENT TO A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1079 (2d ed. 1915) (listing cases decided since publication of previous edition of Wigmore's treatise).

126. Krulewitch v. United States, 336 U.S. 440, 444 (1949) (rejecting admission of statement "not made in furtherance of the alleged criminal transportation conspiracy charged, but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment"); *see also* Grunewald v. United States, 353 U.S. 391, 399 (1957); Lutwak v. United States, 344 U.S. 604, 616–18 (1953).

127. 400 U.S. 74, 82 (1970) (plurality opinion).

128. *Id.* at 81, 90. In a dissent joined by three other Justices, Justice Marshall argued that the admission of coconspirator statements made during the "concealment phase," as opposed to statements made in furtherance of an ongoing scheme, manifested "a clear violation of Evans' constitutional rights." *Id.* at 100, 106 n.8 (Marshall, J., dissenting).

129. *See* Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 682–83 (2000).

1974, Congress eventually passed the Rules, which were signed into law on January 2, 1975.[130] A review of statements by drafters, legislative history, and scholarly commentary reveals two important facts about the codification of the Exception in Rule 801(d)(2)(E). First, the codified rule was meant to have precisely the same substance as the Exception had at common law when the Rules took effect.[131] Second, it was widely understood by contemporary observers—albeit rarely stated explicitly because so obvious—that the word "conspiracy" in Rule 801(d)(2)(E) refers to illegal activity.[132]

Concerning proposed Rule 801(d)(2)(E), the entire comment of the Advisory Committee was the following:

> The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (iv) [i.e., Rule 801(d)(2)(D)] might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. See Levie, Hearsay and Conspiracy, 52 Mich.L.Rev. 1159 (1954); Comment, 25 U.Chi.L.Rev. 530 (1958). The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. Krulewitch v. United States, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949); Wong Sun v. United States, 371 U.S. 471, 490, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). For similarly limited provisions see California Evidence Code § 1223 and New Jersey Rule 63(9)(b). Cf. Uniform Rule 63(9)(b).[133]

The Advisory Committee referred directly to Supreme Court cases concerning the scope of the Exception and explicitly stated its desire to codify the rule set forth in those cases. In addition, the Committee cited two law review commentaries on the Exception. The article and student

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130. Pub. L. No. 93-595, 88 Stat. 1926 (1975) (effective date July 1, 1975).

131. *See, e.g.*, 117 CONG. REC. 33,642, 33,646-47 (1971) (letter from Senator McClellan to Judge Maris) (objecting that proposed version of Exception "follows uncritically the 'accepted pattern'" and advocating that its scope be "enlarged"). The provision was enacted as proposed, without the change suggested by Senator McClellan.

132. For example, in *United States v. Dennis*, 183 F.2d 201, 230-32 (2d Cir. 1950), the Second Circuit considered whether certain statements were properly admitted pursuant to the Exception. Judge Learned Hand concluded that when confederates who had engaged in lawful conduct continued the conduct after it was criminalized, statements made in furtherance of the effort were admissible even if made when the project was legal. *Id.* at 231-32. Once some criminal conduct occurred, the pendency of the conspiracy was found to extend back to the beginning of the project. *Id.* An inquiry concerning lawful projects transformed into crimes would have been unnecessary had all lawful ventures been within the Exception. *Id.*; *see* Joseph H. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1172, 1177 (1954) (discussing "support for admitting declarations made during a legal venture which subsequently turns illegal"); *see also* BLACK'S LAW DICTIONARY 382-83 (4th ed. 1951) (defining "conspiracy" as an agreement to pursue illegal aims).

133. FED. R. EVID. 801(d)(2)(E) advisory committee's note.

comment cited concern themselves throughout with criminal conspiracies. The comment begins, "The conspiracy charge, long established as an important weapon of prosecution, has lately been subject to severe judicial and scholarly criticism. However, there has been little discussion of the rule of evidence which plays so large a part in the effectiveness of the charge—the co-conspirators' hearsay exception."[134] It then goes on to discuss the "illegal ends" that conspirators agree to pursue,[135] and it explores the analogy of the "vicarious criminal responsibility of co-conspirators for acts in furtherance" to "their vicarious evidential responsibility for declarations in furtherance."[136] In short, an assumption of criminal design pervades the entire review of the "conspiracy" exception.

The other article cited is no different; it justifies the Exception in part on the need to convict dangerous criminal conspirators. After surveying various justifications advanced, the author concludes that "[t]he true reason for the exception . . . is simple: there is great probative need for such testimony. Conspiracy is a hard thing to prove. The substantive law of conspiracy has vastly expanded. This created a tension solved by relaxation in the law of evidence."[137] The existing evidence codes cited in the Advisory Committee note are, if possible, even worse for the revisionist camp. The note referred to the analogous California rule, which it described as a "similarly limited provision[]." Section 1223 of the California Evidence Code, which became law in 1967, reads: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by the declarant while participating in *a conspiracy to commit a crime or civil wrong* and in furtherance of the objective of that conspiracy . . . ."[138] Similarly, the New Jersey rule, then numbered Rule 63(9)(b),[139] declared that a "statement which would be admissible if made by the declarant at the hearing is admissible against a party if . . . at the time the statement was made the party and the declarant were participating in *a plan to commit a crime or civil wrong* and the statement was made in furtherance of that plan."[140] The Uniform Rule of Evidence, with which the note asks readers to compare the California and New Jersey provisions, would

134. Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 U. CHI. L. REV. 530, 530–31 (1958) (footnotes omitted).

135. *Id.* at 537.

136. *Id.* at 538–39.

137. *See* Levie, *supra* note 132, at 1166. Levie's "relaxation in the law of evidence" refers to the Exception itself, not to any expansion of it to cover lawful combinations.

138. CAL. EVID. CODE § 1223 (West 1995) (emphasis added).

139. The rule now appears at N.J. R. EVID. 803(b)(5) (West 2010).

140. N.J. R. EVID. 63(9) (1967) (emphasis added); *see also* State v. Phelps, 476 A.2d 1199, 1203 n.2 (N.J. 1984) (discussing history of New Jersey rule and stating that drafters limited it to statements "in furtherance of the illegal plan"); State v. Boiardo, 268 A.2d 55, 59 (N.J. Super. Ct. App. Div. 1970).

have required only that a declaration be "relevant" to a conspiracy (rather than "in furtherance" of it);[141] this broader formulation was rejected.[142] In short, the Advisory Committee note, often cited to support the revisionist position, actually bolsters the traditional view that the Exception covers only unlawful activity.

Similarly, the legislative history contained in congressional committee reports provides no indication that those voting for the Federal Rules intended Rule 801(d)(2)(E) to cover statements made in furtherance of lawful ends. Courts have cited the Report of the Senate Committee on the Judiciary,[143] but context reveals that the phrases cherry-picked from the report provide no support for the revisionist interpretation. The Senate Report discussion of the Exception states in its entirety:

> The House approved the long-accepted rule that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay as it was submitted by the Supreme Court. While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged. *United States v. Rinaldi*, 393 F.2d 97, 99 (2d Cir.), cert denied 393 U.S. 913 (1968); *United States v. Spencer*, 415 F.2d 1301, 1304 (7th Cir., 1969).[144]

The words "joint venture," music to revisionist ears, allow the initial misconception that no criminal act is required to create a "conspiracy" under the Exception. Not so. What the Senate Report makes clear is that despite the explicit inclusion of the word "conspiracy" in the codified Exception, the drafters did not intend to limit the scope of the Exception to *charged* conspiracies. Under Rule 801(d)(2)(E), a "conspiracy" may be uncharged, but it must still be a conspiracy. The two cases cited in the Senate Report make clear that lawful conduct was not on the legislative agenda. In *United States v. Rinaldi*, which concerned a conspiracy to lie to immigration officers, the Second Circuit wrote,

> The testimony concerning what was said in the hearing room in the absence of Rinaldi was properly received as Lentini and Rinaldi were engaged in an *illegal* joint enterprise, which makes statements by any

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141. UNIF. R. EVID. 63(9)(b) (1953).

142. *See* 117 CONG. REC. 33,642, 33,647 (1971) (letter from Senator McClellan to Judge Maris) (quoting approvingly professor who supported the interpretation of the Exception embodied in the Uniform Rules, instead of that in the California and New Jersey rules, which the Advisory Committee had preferred).

143. *E.g.*, United States v. Gewin, 471 F.3d 197, 201 (D.C. Cir. 2006) (noting that in a previous case, the court "quoted the 1974 Senate Advisory Committee note to Rule 801(d)(2)(E)"); United States v. Postal, 589 F.2d 862, 886 n.41 (5th Cir. 1979) (stating that "the agreement need not be criminal in nature," and quoting "the legislative history of rule 801(d)(2)(E)").

144. S. REP. NO. 93-1277, at 26-27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7073.

> member of the venture admissible against the others and each of them, whether or not a conspiracy is charged.[145]

In *United States v. Spencer*, the Seventh Circuit affirmed a conviction for the possession and sale of heroin.[146]

> It is hardly open to question but that defendant and Davis were engaged in a common enterprise, with the objective of dealing in and disposing of narcotics. There was evidence that Davis negotiated to sell heroin to Boyles upon terms and conditions of sale dictated by defendant. Pursuant to such arrangement, Davis transferred money to defendant and received from him the quantity of heroin that Davis had agreed to procure for Boyles. Defendant's acts of receiving money from Davis and delivering the heroin are proof of his participation in the *joint criminal venture*.[147]

If revisionists seek support for the expansion of the Exception to cover lawful joint ventures, they will find nothing helpful in the legislative history.

Another article, published after the initial drafting of the Federal Rules of Evidence but before their enactment, further rebuts the claim that Rule 801(d)(2)(E) means what federal prosecutors now argue. In 1972, Norman Garland and Donald Snow released *The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*.[148] As if to demonstrate the centrality of criminal conduct to those considering the proper scope of the Exception, the article begins with various definitions of the phrase "criminal conspiracy."[149] The authors then analogize the scope of the substantive crime of conspiracy to that of the Exception,[150] and they later, like the authors cited by the Advisory Committee, state that "[o]ne justification offered in support of the co-conspirators exception is that, because the crime of conspiracy is difficult to prove, a co-conspirator's" words are necessary.[151] Finally, they warn that absent Supreme Court guidance, practitioners cannot know when the Exception's use might violate the Confrontation Clause.[152]

4. Recent Decisions Construing the Exception

Since the enactment of the Federal Rules, the Supreme Court has revisited the Exception in a few key cases, clarifying the acceptable method for deciding what evidence satisfies the Exception, and also

145. 393 F.2d 97, 99 (2d Cir. 1968) (emphasis added).

146. 415 F.2d 1301, 1305 (7th Cir. 1969).

147. *Id.* at 1304 (emphasis added).

148. Garland & Snow, *supra* note 113.

149. *See id.* at 1 & nn.5–6.

150. *Id.* at 2–3 & n.23.

151. *Id.* at 5. They do not actually state that the Exception cannot apply to lawful conduct. Had that question been up for debate, however, it seems quite likely they would have mentioned it.

152. *Id.* at 14–15, 22.

musing on the Exception's place in the Court's changing Confrontation Clause jurisprudence. *Ohio v. Roberts*—a landmark Confrontation Clause decision that sharply limited the admissibility of hearsay at criminal trials, even pursuant to hearsay exceptions[153]—could have been read as holding that the Sixth Amendment requires unavailability of the declarant in order to admit statements under the Coconspirator Exception. The Court, however, rejected this reading in *United States v. Inadi*, holding that the Exception does not require unavailability.[154] The Court found that coconspirator hearsay, unlike other forms, is not reproducible and derives significance from the circumstances in which it is made; accordingly, the principles of best evidence do not mandate an in-court reenactment of such statements.[155]

Just one year later, the Court decided *Bourjaily v. United States*, in which it set forth three rules governing the admission of statements under the Exception.[156] First, trial courts may admit statements only if the admitting party can show by a preponderance of the evidence that a conspiracy existed.[157] The Court noted that this inquiry is completely separate from any evaluation of the merits of the underlying case.[158] Second, the statement itself may be considered as evidence supporting admissibility.[159] The Court held that the proffered statement could be used as a part of the decision concerning admissibility but reserved judgment on whether such statements could be viewed as sufficient for admissibility in and of themselves.[160] Third, the trial court need not inquire into independent indicia of reliability for coconspirator hearsay statements.[161] In other words, the Exception allowing admission of coconspirator statements is "firmly enough rooted" that *Roberts* does not require any additional indicia of reliability.[162] The Court explained in a footnote that although its decision abolished the "bootstrapping rule,"[163]

153. 448 U.S. 56, 66 (1980).

154. 475 U.S. 387, 394–95 (1986).

155. *Id.* at 395.

156. 483 U.S. 171 (1987).

157. *Id.* at 175–76.

158. *Id.* at 175 ("[T]he evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case or a civil case." (citation omitted)).

159. *Id.* at 180–81.

160. *Id.* A 1997 amendment to the Federal Rules subsequently resolved this matter, stating, "The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority." FED. R. EVID. 801(d)(2)(E) (amended 1997).

161. *Bourjaily*, 483 U.S. at 176, 182.

162. *Id.* at 183.

163. The rule against "bootstrapping" had prohibited using the proffered coconspirator testimony to prove the admissibility of the statements themselves, by using them to show existence of a conspiracy, the membership of relevant parties in the conspiracy, or that the statements were made in furtherance of that conspiracy; the Court required that the conspiracy be proved entirely by independent evidence. *See* United States v. Nixon, 418 U.S. 683, 701 & n.14 (1974); *see also* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917) ("[I]t is necessary to show by independent

it did not remove coconspirator hearsay from the "firmly rooted" classification.[164]

The most significant recent decision with the potential to affect the Exception is *Crawford v. Washington*.[165] This case, explained in more detail in Part V.B, overruled *Ohio v. Roberts* by holding that for "testimonial" hearsay, the only sufficient indicia of reliability is cross-examination.[166] *Crawford* mentioned the Coconspirator Exception twice, making it clear that statements admitted thereunder will not be affected because of their nontestimonial nature.[167] By saying this, the Court has effectively created a bright-line rule holding that coconspirator statements are always nontestimonial.[168] As a result, the majority of the circuits have held that coconspirator statements are nontestimonial and therefore do not receive special review under the rules handed down in *Crawford*.[169] For example, the Seventh Circuit stated, "As to the Confrontation Clause argument, *Crawford* does not apply. The recordings featured the statements of co-conspirators. These statements, by definition, are not hearsay. *Crawford* did not change the rules as to the admissibility of co-conspirator statements."[170] Accordingly, *Crawford*, especially viewed alongside *Bourjaily*, has no real effect on the Exception as long as coconspirator statements continue to be categorized as non-testimonial. Michael Seigel and Daniel Weisman argue against this bright-line rule and its effects, suggesting that it is unnecessary and

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evidence that there was a combination between [declarants] and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves."). The Court overturned this rule in 1987 in *Bourjaily*, 483 U.S. at 177–81, allowing the statements themselves to be considered during all inquiries concerning their admissibility.

164. *Bourjaily*, 483 U.S. at 184 n.4. The tension is that a newly-defined hearsay exception can hardly be "firmly rooted."

165. 541 U.S. 36 (2004).

166. *Id.* at 51, 55–56 ("testimonial" statements, as distinguished from more casual remarks, include "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02–9410), 2003 WL 21939940, at *23)). "Indicia of reliability" refer to factors that, under *Roberts* but not under *Crawford*, allowed the admission of certain hearsay absent cross-examination. *Id.* at 68–69.

167. *Id.* at 56, 59 n.9.

168. *See* Seigel & Weisman, *supra* note 102, at 879. The discussions of the Exception in *Crawford* were, of course, *obiter dicta*.

169. *See* United States v. Ramirez, 479 F.3d 1229, 1249 n.12 (10th Cir. 2007); United States v. Bobb, 471 F.3d 491, 499 (3d Cir. 2006); United States v. Underwood, 446 F.3d 1340, 1347 (11th Cir. 2006); United States v. Hansen, 434 F.3d 92, 100 (1st Cir. 2006); United States v. Allen, 425 F.3d 1231, 1235 (9th Cir. 2005); United States v. Jenkins, 419 F.3d 614, 618 (7th Cir. 2005); United States v. Logan, 419 F.3d 172, 178 (2d Cir. 2005); United States v. Franklin, 415 F.3d 537, 545–46 (6th Cir. 2005); United States v. Delgado, 401 F.3d 290, 299 (5th Cir. 2005); United States v. Lee, 374 F.3d 637, 644 (8th Cir. 2004).

170. *Jenkins*, 419 F.3d at 618.

should be replaced with a rule under which certain statements would continue to be admitted but the results of sustained questioning by an undercover agent would be barred by the Confrontation Clause as interpreted in *Crawford*.[171]

II. CURRENT PRACTICE IN THE TRIAL COURTS AND RECENT DEVELOPMENTS

The absence of Supreme Court guidance on two key questions—first, the precise method of deciding how evidence should be admitted under the Exception, and second, whether a venture neither illegal nor illicit may qualify as a "conspiracy"—has allowed the development of diverse practice among the various federal circuits, and occasionally within the same circuit. This Part provides an overview of the process by which trial courts decide what evidence to admit under the Exception. It then reviews some troubling recent developments as it surveys the case law concerning whether a "conspiracy" must violate the law (or, at a minimum, social norms) before the proponent of otherwise inadmissible hearsay may invoke the Exception.

A. DECISIONS TO ADMIT PARTICULAR COCONSPIRATOR STATEMENTS

In a footnote in *Bourjaily*, the Court asserted that it does "not express an opinion on the proper order of proof that trial courts should follow in concluding that the preponderance standard has been satisfied in an ongoing trial."[172] The district and circuit courts have therefore been left to their own devices in creating a workable and fair process by which coconspirator statements may be admitted.[173] After the Federal Rules of Evidence became law in 1975, the First Circuit had one of the earliest chances to examine the codified Exception, deciding the frequently-cited *United States v. Petrozziello* in 1977.[174] Although portions of this opinion have been overruled,[175] the basic structure for the admission of evidence under Rules 801(d)(2)(E) and 104(b)[176] remains intact.[177] The court held that a trial judge should admit coconspirator statements when it is "more likely than not that the declarant and the defendant were members of a

171. Seigel & Weisman, *supra* note 102, at 903–04.

172. 483 U.S. 171, 176 n.1 (1987).

173. Before 1975, the decision of admissibility was sometimes left up to the jury. *See* United States v. Petrozziello, 548 F.2d 20, 22 (1st Cir. 1977). The Federal Rules shifted that responsibility to the trial judge. *See id.* at 20, 22 & n.1.

174. *Id.* at 23.

175. *See* United States v. Goldberg, 105 F.3d 770, 775–76 (1st Cir. 1997).

176. Rule 104(b) states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

177. *See* United States v. Castellini, 392 F.3d 35, 49–53 (1st Cir. 2004) (applying *Petrozziello* to evaluate claim that statements were improperly admitted pursuant to Rule 801(d)(2)(E)).

conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy."[178]

There has been debate within and among circuits about whether the trial judge must make this determination at a pretrial hearing or if she may reserve this determination until the close of evidence, instructing the jury to ignore portions of testimony that the court chooses not to admit. In the Fifth and Tenth Circuits, for example, a "*James* hearing"[179] is preferred, but coconspirator testimony may also be admitted on "forthcoming proof of a 'predicate conspiracy through trial testimony or other evidence.'"[180] While the circuits do not agree on the precise order of proof and the exact standard for admissibility, in general the party attempting to offer the evidence (nearly always the prosecution) must provide some proof independent of the proffered statements themselves that a conspiracy exists, that the declarant and the party against whom the statement will be used were both members of the conspiracy, that the statements were made before the primary objectives of the conspiracy failed or were achieved, and that the statements were made in furtherance of the conspiracy. The trial judge then determines whether it is "more likely than not" that all of these requirements have been satisfied and decides whether to let the jury hear the statements, or—if the jury has already heard the testimony—whether to instruct that the jury should disregard certain statements.[181]

B. THE OBJECT OF A "CONSPIRACY"—TROUBLING RECENT DEVELOPMENTS

Against this backdrop of varied practice for determining what statements satisfy the requirements of Rule 801(d)(2)(E), in recent years certain federal prosecutors have advanced a revised definition of the Exception itself, arguing that the "conspiracy" joined by the defendant and declarant need not "have as its object an unlawful purpose."[182] In

178. *Petrozziello*, 548 F.2d at 23.

179. A "*James* hearing" is a pretrial hearing at the conclusion of which the court rules on the admissibility of tendered coconspirator declarations using the preponderance-of-the-evidence standard. *See* United States v. Ricks, 639 F.2d 1305, 1309 (5th Cir. 1981).

180. United States v. Townley, 472 F.3d 1267, 1273 (10th Cir. 2007) (quoting United States v. Owens, 70 F.3d 1118, 1223 (10th Cir. 1995)).

181. The myriad differences among the practice in the several circuits are discussed in greater depth in Ethel R. Alston, Annotation, *Admissibility of Statement by Co-Conspirator Under Rule 801(d)(2)(E) of Federal Rules of Evidence*, 44 A.L.R. FED. 627 (1979) (updated 2010).

182. *E.g.*, Letter Reply Brief of United States, *supra* note 1; Government's Opposition to Defendant's Motion to Strike Exhibits and Exclude Witnesses at 6, 9–10, United States v. Ring, 628 F. Supp. 2d 195 (D.D.C. Sept. 7, 2009) (No. 1:08–CR–274), 2009 WL 2956731 ("[I]f the Court finds that the evidence does not establish by a preponderance that Coughlin joined the Count I conspiracy, it certainly establishes that Ring and Coughlin acted together in furtherance of a lawful joint enterprise."); United States' Motion *in Limine* for Admission of Certain Statements from E-mail and Other Correspondence at 3–4, United States v. Stevens, 593 F. Supp. 2d 177 (D.D.C. Sept. 30, 2008) (No. 1:08–CR–231), 2008 WL 4498621 ("The joint enterprise need not be illegal, rather out-of-court

other words, government lawyers contend that a "conspiracy" may, for purposes of the Exception, involve purely lawful, even laudable, conduct. In *United States v. Schiff*, for instance, federal prosecutors in New Jersey wrote, "The defendant's main contention is that the conspiracy or joint venture shown for purposes of Federal Rule of Evidence 801(d)(2)(E) 'must have as its object an unlawful purpose.' The law, however, is to the contrary."[183] References to "joint ventures" recur in the government's revisionist pleadings. Prosecutors in the Southern District of New York contend, for example, that "the objective of the joint venture that justifies deeming the speaker as the agent of the defendant need not be criminal at all."[184] Some courts have accepted the revisionist interpretation, stating that a lawful "joint venture" can trigger the Exception.[185] I use the word "stating," as opposed to "holding," advisedly. Although a few courts have stated that lawful activities may constitute "conspiracies," instances of courts admitting under the Exception statements made in furtherance of lawful objectives resist diligent efforts to find them. In *United States v. Russo*, the case quoted by the Southern District prosecutors just mentioned, the Second Circuit wrote that "the defendant and the declarant were involved together in a conspiracy to maintain an organized crime syndicate."[186] After writing the quoted dictum, the court cited two cases, one involving "statements by a corrections officer in [a] prisoner's civil rights action under Section 1983

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statements made in furtherance of a lawful joint enterprise may be admitted as nonhearsay."). In a subsequent brief in Senator Stevens's case, prosecutors wrote that statements should be admitted because the declarant and defendant "collaborated closely and over a long period of time on renovating defendant's chalet." Government's Opposition to Defendant's Motion for a New Trial at 2, United States v. Stevens, No. 1:08-CR-231 (D.D.C. Jan. 16, 2009), 2009 WL 192240. More recently, prosecutors in the Northern District of New York argued in preparation for an "honest services" trial of State Senator Joseph Bruno, "In view of Bruno's contractual associations with [various businesses], documents of those entities, as well as oral statements made by their representatives, are admissible pursuant to Fed. R. Evid. 801(d)(2)(E) as co-conspirator statements." Government's Trial Memorandum at 14–15, United States v. Bruno, No. 09-CR-029 (N.D.N.Y. Oct. 5, 2009).

183. Letter Reply Brief of United States, *supra* note 1 (citation omitted) (quoting Defendant's February 19, 2008 Response Brief at 3, United States v. Schiff, 538 F. Supp. 2d 818 (D.N.J. 2008) (Crim. No. 06-406)).

184. Government's Memorandum of Law in Support of Its Motion *in Limine* at 10–11, United States v. Stein, 488 F. Supp. 2d 370 (S.D.N.Y. June 13, 2007) (S1 05 Crim. 888), 2007 WL 1833480 (quoting United States v. Russo, 320 F.3d 37, 45 (2d Cir. 2002)). The prosecution's argument conflates, at least in part, the Coconspirator Exception and the principal-agent exception. As is discussed *infra* Part IV.A, if the declarant truly had been the defendant's "agent" when uttering the statements at issue, the prosecution would not need the Coconspirator Exception at all.

185. *See, e.g.*, United States v. Gewin, 471 F.3d 197, 200, 201 (D.C. Cir. 2006) (rejecting defendant's claim "that Rule 801(d)(2)(E) of the Federal Rules of Evidence requires, before admission of co-conspirators' out-of-court statements, a showing of an *unlawful* conspiracy, not merely action in concert toward a common goal" because circuit "precedents hold that the doctrine is not limited to unlawful combinations").

186. 302 F.3d at 46. The "joint venture" at issue for certain statements deemed admissible was "a conspiracy to operate the Colombo family." *Id.* at 46 n.3.

alleging officers participated in or encouraged assault by other inmates,"[187] and the other a "scheme to rig bids on [New York State] contracts."[188] Prosecutors can now find choice quotable phrases among the opinions of various respected courts, increasing the odds that dicta will one day become holding.

In addition to those of the Second Circuit, statements endorsing the revisionist interpretation of the Exception appear in opinions of the Courts of Appeals for the Third,[189] Fifth,[190] Seventh,[191] Ninth,[192] Tenth,[193] and District of Columbia[194] Circuits, as well as a few trial courts.[195] The D.C. Circuit's opinion in *United States v. Gewin* demonstrates how a court can *state* that the revisionist interpretation of the Exception is good law without actually so *holding*.[196] In *Gewin*, the Court of Appeals rejected the defendant-appellant's claim that the trial court improperly admitted coconspirator statements without expressly finding that the

187. *Id.* at 45 (citing Fischl v. Armitage, 128 F.3d 50 (2d Cir. 1997)). The government brief also cites a treatise that itself relies on *Russo*. *See* Government's Memorandum of Law in Support of Its Motion *in Limine*, *supra* note 184.

188. *Russo*, 302 F.3d at 45 (citing New York v. Hendrickson Bros., 840 F.2d 1065, 1073–74 (2d Cir. 1988)).

189. *See In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 262 (3d Cir. 1983) (stating that it would be error to require "a showing not only that there was a combination between the defendants, but also that the combination was unlawful"), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The statements concerned "a conspiracy to fix low prices in the United States" in violation of the Sherman Act. *Id.* at 263 n.32; *see infra* notes 204–13 and accompanying text (discussing this case in greater detail).

190. See United States v. Postal, 589 F.2d 862, 886 n.41 (5th Cir. 1979) (stating that "the agreement need not be criminal in nature" and quoting "the legislative history of rule 801(d)(2)(E)"). The statements at issue were entries in the logbook of the ship used by defendants to smuggle eight thousand pounds of marijuana. *Id.* at 867–68. Portions of the logbook were thrown overboard as the Coast Guard approached the ship. *Id.* at 890.

191. *See* United States v. Kelley, 864 F.2d 569, 573 (7th Cir. 1989) (citing United States v. Coe, 718 F.2d 830, 835 (7th Cir. 1983)) ("Rule 801(d)(2)(E) applies not only to conspiracies but also to joint ventures . . . ."); *Coe*, 718 F.2d at 835–38 & n.3 (rejecting, in a civil case, the theory "that the government must establish that the conspiracy or joint venture was illegal before the coconspirator hearsay exception may be invoked" and stating that the law "simply requir[es] that the statements relate to the crime charged in a criminal case"). *Kelley* concerned a prosecution for "willfully assisting others in filing false income tax returns." 864 F.2d at 570–71.

192. *See* United States v. Layton, 855 F.2d 1388, 1398–1400 (9th Cir. 1988); *see also infra* notes 215–29 and accompanying text (discussing *Layton* in greater detail).

193. *See* United States v. Bucaro, 801 F.2d 1230, 1231–32 (10th Cir. 1986) (declaring that object need not be illegal after detailing how declarant made statements in furtherance of his and defendant's cocaine distribution plan).

194. *See* United States v. Gewin, 471 F.3d 197, 200–02 (D.C. Cir. 2006).

195. *See, e.g.*, United States v. Anderson, 85 F. Supp. 2d 1047, 1079 (D. Kan. 1999) (rejecting defendants' argument that the Exception "requires the government to prove by a preponderance of the evidence not only that the declarants were involved in a joint venture, but also that they were involved in a criminal conspiracy" (footnote omitted)). The case concerned a scheme to collect fees in exchange for referral of Medicare patients, in violation of the Medicare Anti-Kickback Act. *Id.* at 1052–53; *see infra* notes 260–65 and accompanying text (discussing *Anderson* in greater detail).

196. *See* 471 F.3d 197.

activity conducted by the defendant and declarant was illegal.[197] Declaring that "such a showing was not required," the Court of Appeals stated that "the district court properly admitted out-of-court statements upon finding a lawful joint enterprise."[198] The entire discussion, however, is dicta because the "enterprise" at issue was a "'pump and dump' scheme" wherein the defendant and his coconspirators "pumped up the share price through a campaign of strategically-timed, fraudulent press releases, and sold its holdings into the artificially inflated market."[199] It appears that the appellate court, perhaps convinced by prior dicta that the revisionist interpretation was circuit law,[200] refused Gewin's request that it require that the trial court find the underlying "conspiracy" to be illegal before admitting the statements.[201] The Court of Appeals, rather than finding from the record that the "pump and dump" scheme for which Gewin was convicted obviously had an illegal aim, decided instead to opine that no such finding was required.[202] Government lawyers have begun citing *Gewin* in their efforts to have its construction of the Exception adopted elsewhere.[203]

The Third Circuit purported to rely on Supreme Court precedent when stating that a "conspiracy" under the Exception need not be illegal.[204] Parties in a civil case had objected that the trial court failed to

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197. *Id.* at 201–02.

198. *Id.*

199. *Id.* at 198.

200. A prior Court of Appeals opinion concerning the Exception had stated, "Although Rule 801(d)(2)(E) refers to 'conspiracy' and statements of a 'coconspirator,' its use of those terms is not intended to limit applicability of the doctrine to unlawful combinations . . . ." United States v. Weisz, 718 F.2d 413, 433 (D.C. Cir. 1983). The "combination" in *Weisz* was a conspiracy to bribe a United States Congressman. *Id.* at 416. Counsel for Gewin duly noted that *Weisz* and other cases cited by the government "do not support the claimed proposition, much less establish the law of the Circuit," Final Reply Brief of Appellant Barry W. Gewin at 12, *Gewin*, 471 F.3d 197 (D.C. Cir. Apr. 27, 2006) (No. 05–3086), 2006 WL 1197220, to no avail.

201. *Gewin*, 471 F.3d at 200 ("The [district] court rejected Gewin's claim, renewed here, that Rule 801(d)(2)(E) of the Federal Rules of Evidence requires, before admission of co-conspirators' out-of-court statements, a showing of an *unlawful* conspiracy, not merely action in concert toward a common goal.").

202. *Id.* at 201–02. The D.C. Circuit recently piled further dicta upon that in *Gewin* by citing it to support the "admission of statements by individuals acting in furtherance of a lawful joint enterprise" in *United States v. Brockenborrugh*, 575 F.3d 726, 735 (D.C. Cir. 2009). The "joint enterprise" at issue in *Brockenborrugh* was an attempt to steal a parcel of real property, a scheme that included the impersonation of a United States Marshal and the filing of a false deed with the District of Columbia Recorder of Deeds. *Id.* at 730–32.

203. *See, e.g.*, Letter Reply Brief of United States, *supra* note 1, at 1–2; SEC's Trial Brief & Motion Pursuant to FRE 801(d)(2)(A) & (E) to Admit Defendant Jordan's Prior Testimony into Evidence Against All Defendants at 5–6, SEC v. Pietrzak, No. 1:03–CV–1507 (N.D. Ill. July 16, 2007), 2007 WL 4994098.

204. *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 262 (3d Cir. 1983) (citing Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917)), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)

require that a venture be unlawful before admitting evidence under Rule 801(d)(2)(E).[205] The Court of Appeals held that

> [i]f the trial court had so ruled, that ruling would be error, for in order to admit coconspirator statements "it is necessary to show by independent evidence that there was a combination between them, . . . but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful."[206]

Because the language quoted by the Court of Appeals appears in *Hitchman Coal & Coke Co. v. Mitchell*, a Supreme Court opinion construing the Exception,[207] the revisionists might initially appear to stand on firm ground. If anything, however, *Hitchman Coal* undermines the revisionist position. The objection at issue in that case was that certain hearsay statements were "not admissible because the existence of a criminal or unlawful conspiracy is not made to appear by evidence *aliunde*."[208] The Supreme Court responded with the text quoted by the Third Circuit. The holding of *Hitchman Coal* is not that the "conspiracy" may be lawful but rather that one must have "independent evidence"—that is, evidence other than the coconspirator statements the proponent desires to admit under the Exception—showing that the declarant and the defendant were in "a combination." Further, "independent evidence" is not needed to "show . . . that the combination was criminal or otherwise unlawful."[209] The latter point is worth mentioning only if the proponent must show, in one way or another, that the combination was criminal or otherwise unlawful. *Hitchman Coal* accordingly set forth that the proponent may use the hearsay statements themselves to demonstrate the "illegal" nature of the conspiracy, but only if he can show with independent evidence that a combination exists.[210] The decision surely did not dispense with the need for an illegal object. Indeed, the sentence that immediately follows the text quoted by the Third Circuit is, "[t]he element of illegality may be shown by the declarations themselves."[211] A number of courts have understood that

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205. *Id.*

206. *Id.* (second alteration in original) (quoting *Hitchman Coal*, 245 U.S. at 249).

207. 245 U.S. at 249.

208. *Id.* "Evidence *aliunde*" is the same as "extrinsic evidence," meaning "it comes from other sources." *See* BLACK'S LAW DICTIONARY 81–82 (8th ed. 2004). For purposes of the Exception, "from other sources" means from sources other than the proffered statements themselves.

209. *Hitchman Coal*, 245 U.S. at 249.

210. The rule as stated in *Hitchman Coal* is no longer good law. A court now may consider the statements themselves to determine whether a combination existed among the declarant and defendant, although the statements cannot prove the conspiracy's existence by themselves. *See* Bourjaily v. United States, 483 U.S. 171, 177–81 (1987); *see also supra* notes 158–60 and accompanying text.

211. *Hitchman Coal*, 245 U.S. at 249. To give the Third Circuit its due, the *Hitchman Coal* Court confused matters somewhat by musing, after mentioning the need to prove the "element of illegality," on the origin of the Exception:

while *Hitchman Coal* required different forms of proof for a conspiracy's existence and its purpose, the Supreme Court did not abolish what it called the "element of illegality."[212] Prosecutors supporting the revisionist interpretation of the Exception have misread *Hitchman Coal* in the same way as the Third Circuit;[213] courts reviewing such arguments should be sure they are not misled by selective quotations.[214]

The Ninth Circuit has also announced its support for the revisionist interpretation: "The novel question before us is whether the common enterprise or joint venture must have an illegal objective. The rationale underlying Rule 801(d)(2)(E) supports the conclusion . . . that the common enterprise need not have an illegal objective."[215] As it happens, however, the court's detailed discussion of the question hardly seems necessary to the result. The defendant, Laurence John Layton, shot two people during the catastrophic visit of Congressman Leo Ryan to the "Peoples Temple" compound of Jim Jones in the Republic of Guyana.[216] Ryan had organized a trip to the compound, known as "Jonestown," in

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> It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them.

Id. In theory, the reference to an "enterprise, lawful or unlawful" might suggest that legal combinations fall within the scope of the Exception. More likely, the Court's analogy to agency theory—which mostly concerns lawful activity—was not meant to nullify the Court's statement concerning how a proponent may prove the "element of illegality."

212. *See* United States v. Jackson, 627 F.2d 1198, 1216 (D.C. Cir. 1980) ("What must be proved by independent evidence is merely that a *combination* existed between the third parties and the defendant. It is not necessary to show by such evidence that the combination was unlawful. That element may be shown by the hearsay declarations and may be shown after proof of the existence of the combination." (citing *Hitchman Coal*, 245 U.S. at 249–50)); Braatelien v. United States, 147 F.2d 888, 893 (8th Cir. 1945) ("Declarations of a conspirator, however, made in the absence of an objecting defendant, can not be admitted against him when independent evidence is lacking to show the existence of the conspiracy and defendant's connection with it, but it is not necessary to show by independent evidence that the conspiracy was criminal or otherwise unlawful." (citing *Hitchman Coal*, 245 U.S. at 249)); *see also* United States v. Coe, 718 F.2d 830, 835–36 & n.3 (7th Cir. 1983) (suggesting that the "conspiracy" need not be illegal, but not suggesting that *Hitchman Coal* commands such a holding); United States v. Craig, 522 F.2d 29, 31 & n.2 (6th Cir. 1975).

213. *See, e.g.*, Government's Memorandum of Law in Support of Its Motion *in Limine*, *supra* note 184, at 12; Final Reply Brief of Appellant, *supra* note 200, at 11–14.

214. The confusion found in briefs and judicial opinions is reflected in at least one treatise collecting the conflicting authority. *See* DAVID F. BINDER, HEARSAY HANDBOOK § 35.10 (4th ed. 2009). The treatise states: "That the purpose of the agency relationship was unlawful, i.e., that it was conspiratorial, may be proved by the assertion itself, though this should be without evidential consequence." *Id.* (citing *Hitchman Coal*, 245 U.S. at 249, *United States v. Gewin*, 471 F.3d 197, 200–02 (D.C. Cir. 2006), and *United States v. Postal*, 589 F.2d 862, 886 n.41 (5th Cir. 1979), among other cases). Why something "without evidential consequence" would be proved is not explained. For further discussion of *Postal*, see *infra* note 259.

215. United States v. Layton, 855 F.2d 1388, 1398 (9th Cir. 1988).

216. *Id.* at 1392–94.

response to complaints that residents suffered poor living conditions and mistreatment.[217] Before Ryan's arrival, Jones made multiple speeches intimating that Ryan would not escape Jonestown alive, saying among other things that "if he stays long enough for tea he's gonna regret it."[218] After Ryan's arrival, Layton informed the delegation that he wished to leave and, despite concern among other departing residents "that Layton was merely feigning his desire to leave and that his true intent was to harm those departing from the settlement," was allowed onto one of the delegation's two aircraft, on which he shot two passengers during its attempted takeoff.[219] Around the same time, Ryan was shot dead by Peoples Temple members attacking the other aircraft.[220]

Despite evidence showing that Layton and Jones had agreed upon an illegal objective—many potential aims spring to mind—of which Jones's threatening speeches might be found to have furthered, the trial court held instead that the defendant and declarant were engaged in "a conspiracy, or common enterprise, to conceal from Congressman Ryan the truth about the conditions at Jonestown."[221] The Court of Appeals agreed and, based on its conclusion that the joint enterprise need not violate any law, found no error in the admission of the tape recorded speeches.[222] Surely the prosecution could have shown by a preponderance of the evidence that Layton, who "had been a member of the [Jonestown] security force,"[223] had entered into an illegal combination with Jones and that Jones furthered their joint objectives with his speeches.[224] If Layton and Jones jointly pursued an illegal aim, the entire examination of the Exception's scope is dicta.[225]

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217. *Id.* at 1393.

218. *Id.* at 1401. Jones also said, "I want to shoot someone in the ass like him so bad, so long, I'm not passing this opportunity up. Now if they come in, they come in on their own risk." *Id.*

219. *Id.* at 1393–94.

220. *Id.*

221. *Id.* at 1400.

222. *Id.* at 1400–01. At Layton's first American trial, which ended in a hung jury, the trial judge refused to admit the statements. *See* United States v. Layton, 720 F.2d 548, 555 (9th Cir. 1983). The prosecution took an interlocutory appeal before the second trial, and the Court of Appeals announced that Jones's speeches were made in furtherance of a conspiracy to kill Ryan. *Id.* at 554–58. The ruling at issue in the postconviction appeal discussed above followed the interlocutory appeal. *See Layton*, 855 F.2d at 1397.

223. *Layton*, 855 F.2d at 1393.

224. *See* Katherine Bishop, *1978 Cult Figure Gets Life Term in Congressman's Jungle Slaying*, N.Y. TIMES, Mar. 4, 1987, at A13 ("[T]he Government contended that Mr. Layton conspired with Mr. Jones and other cult members to kill the Congressman and others in his group to prevent them from returning to the United States with negative reports about Jonestown."). Recall also that if one joins an existing conspiracy, he becomes "on the hook" for statements made in furtherance of it before he joined. *See infra* note 277. Accordingly, so long as Jones had conspired with *anyone* to attack the Congressman's delegation, Layton would be deemed to have "ratified" Jones's statements as soon as he agreed to board the rescue aircraft and shoot passengers.

225. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1257–58 (2006) ("A judge's power to bind is limited to the issue that is before him; he cannot

The alternative, that Layton and Jones had no illegal objective that Jones's inflammatory speeches can be said to have furthered, highlights the intuitive wrongness of the revisionist position. If we assume that Layton and Jones had entered no illegal conspiracy, and Layton had no illegal intentions whatsoever when Jones uttered the threatening speeches, then why should Layton's jury hear the damning remarks?[226] The court's theory would seem to be that "[i]f the appropriate basis for admitting the statements of a confederate is that his participation in a common enterprise with the defendant makes him an agent of the accused, then the goal or objective of the common enterprise would appear to be irrelevant."[227] But even the most talented prosecutor could not have convinced a United States district judge that Jim Jones, the cult leader who ordered hundreds of men, women, and children to commit mass suicide, was an "agent" of Larry Layton.[228] As will be discussed more fully in Part IV.A, common justifications of the Exception that rely upon agency theory cannot withstand scrutiny. Instead, the primary actual justification—that criminal conspiracies are hard to prove and that the Exception is therefore a necessary compromise between widespread lawlessness and strict adherence to the Hearsay Rule—makes no sense at all when applied to a lawful "common enterprise."

Had the court been so inclined, *United States v. Layton* would have been a good vehicle for holding that the Exception covers joint action with an illegal *or illicit* purpose. It has long been settled that a "conspiracy" used to justify admission of evidence need not be a crime for which the defendant was charged; any conspiracy will do.[229] To the

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transmute dictum into decision by waving a wand and uttering the word 'hold.'" (quoting United States v. Rubin, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring))). *But see* Barapind v. Enomoto, 400 F.3d 744, 750–51 (9th Cir. 2005) (en banc) (indicating that dicta is binding in the Ninth Circuit); *cf. id.* at 758 (Rymer, J., concurring in part and dissenting in part) ("[T]he discussion about dicta is dicta.").

226. Frank Bell, who represented Layton at his first trial, at which the jury voted eleven to one in favor of acquittal, has argued that Layton was convicted at his second trial only because "Robert Peckham, the very experienced and universally respected federal judge who had also presided over the first trial, felt compelled by the [Court of Appeals] to allow the introduction of highly inflammatory evidence which he had barred from the earlier trial." Frank Bell, *Larry Layton and Peoples Temple: Twenty-Five Years Later*, ALTERNATIVE CONSIDERATIONS OF JONESTOWN & PEOPLES TEMPLE, Nov. 16, 2008, http://jonestown.sdsu.edu/AboutJonestown/PersonalReflections/bell.htm. Layton had been acquitted by a Guyanese jury, on a "brainwashing" theory, for his own acts of shooting. *Id.* Lacking jurisdiction to charge Layton for those acts, the United States charged him under 18 U.S.C. § 351(d), which prohibits conspiracy to kill members of Congress. *Layton*, 855 F.2d at 1394.

227. *Layton*, 855 F.2d at 1399.

228. *See id.* ("The critical inquiry is simply whether the confederate was acting in his capacity as an agent of the defendant when he uttered the statements sought to be admitted, *i.e.*, whether the statements were made 'during the course and in furtherance of' the common enterprise.").

229. *See* United States v. Martinez, 430 F.3d 317, 326 (6th Cir. 2005) ("[T]he scope of the conspiracy itself, as alleged in the indictment, does not necessarily limit the application of the co-conspirator exception." (quoting United States v. Pope, 574 F. 320, 328 (6th Cir. 1978))); *id.* at 326 n.4 ("In fact, coconspirator statements may be admissible under Rule 801(d)(2)(E) even when no

extent the Exception makes sense for criminal combinations, it might be sound to apply it also to lawful but illicit actions, such as adultery.[230] The arguments concerning reliability—that people are unlikely to confess falsely to criminal activity—would apply to illicit acts. Similarly, if one views the Exception as a punishment of sort imposed upon those who combine forces to commit crimes, the justification would apply nearly as well to noncriminal activity of which society disapproves.[231] Layton's cooperation with Jones in planning to hide the truth about Jonestown from Congressman Ryan, while arguably not in violation of any United States law, would likely strike most observers as socially detrimental behavior. It would of course be difficult to decide what counts as "illicit" under the proposed doctrine, and the Exception would remain on firmer ground if limited to illegal activity. That said, "legal yet illicit" is a smaller category than "legal."[232] Even the "illegal or illicit" definition of "conspiracy" for purposes of the Exception would be better than that sought by prosecutors, who have explicitly advocated the application of the Exception to completely respectable activity, such as showing up at the office and putting in a day's work for a day's pay.[233]

A few courts appear to reject the revisionist interpretation. The Second Circuit, contrary to the language quoted above from *United States v. Russo*, has repeatedly suggested (albeit without squarely holding) that a conspiracy must be "illegal" to satisfy the Exception.[234] For example, it observed in *United States v. Gigante* that "it is the unity of interests stemming from a specific shared criminal task that justifies

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conspiracy has been charged."); United States v. Piper, 298 F.3d 47, 54–55 (1st Cir. 2002) ("[T]he rigors of Rule 801(d)(2)(E) may be satisfied by showing that both the declarant and the defendant belonged to some conspiracy other than the substantive conspiracy charged in the indictment . . . .").

230. Even when legal, adultery has been treated as illicit activity that may have negative legal consequences. It was not until 1981 that Congress repealed the immigration law provision that authorized the deportation of aliens who commit adultery, despite many states having earlier decriminalized adultery. *See* Morgan v. Attorney Gen., 432 F.3d 226, 232–33 & n.2 (3d Cir. 2005) (noting 1981 amendment of Immigration and Nationality Act); City of Portland v. Dollarhide, 714 P.2d 220, 227 n.9 (Or. 1986) (noting 1971 repeal of Oregon law); Succession of Thompson, 367 So. 2d 796, 799 & n.9 (La. 1979) (listing states that had repealed adultery laws and noting that no such law existed in Louisiana).

231. The necessity argument would also apply nearly as well to illicit conduct as it does to crimes. Much antisocial conduct is not fit for criminal punishment on any number of policy grounds—in addition to constitutional reasons. Nonetheless, society would like to reduce its incidence, and the application of the Exception to illicit conduct would add one more weapon, however small-bore, to our policymakers' arsenal.

232. *See* BLACK'S LAW DICTIONARY, *supra* note 208, at 763 (defining "illicit" as "[i]llegal or improper").

233. *See* Government's Memorandum of Law in Support of Its Motions *in Limine*, *supra* note 184, at 13 n.2 (arguing that court should reject older Second Circuit cases that "seem[] to suggest that the prosecution 'must establish at least the likelihood of an *illicit* association between the declarant and the defendant'" (quoting United States v. Garcia-Duarte, 718 F.2d 42, 45 (2d Cir. 1983))).

234. *See* United States v. Stein, No. S1 05 Crim. 0888, 2007 WL 3009650, at *5–6 & nn. 34–36 (S.D.N.Y. Oct. 15, 2007) (collecting cases and declining to decide the question).

Rule 801(d)(2)(E)."[235] In *United States v. Ragland*, it wrote that "[t]he threshold requirement for admissibility is satisfied by a showing of a likelihood of an illicit association between the declarant and the defendant."[236] In addition, the reporters brim with cases in which courts use the words "criminal,"[237] "unlawful,"[238] "illegal,"[239] or "illicit"[240] when describing the sort of joint venture relevant to the Exception. Perhaps because few lawyers have been bold enough to present the revisionist interpretation in court, actual holdings rejecting the theory are no easier to find than cases squarely holding that lawful conduct can satisfy the Exception.[241] Although a shortage of cases supporting one's position is

235. 166 F.3d 75, 83 (2d Cir. 1999) ("The district court's rationale would allow the admission of any statement by any member of the Mafia regarding any criminal behavior of any other member of the Mafia. This is not to say that there can never be a conspiracy comprising many different Mafia families; however, it must be a conspiracy with some specific criminal goal in addition to a general conspiracy to be members of the Mafia.").

236. 375 F.2d 471, 477 (2d Cir. 1967).

237. *See, e.g.*, United States v. Bellomo, 176 F.3d 580, 586 (2d Cir. 1999) ("Under the rule set out by *Gigante*, in order to comply with Fed.R.Evid. 801(d)(2)(E) and admit the testimony of a coconspirator, the district court 'in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the Mafia.'" (quoting *Gigante*, 166 F.3d at 82)); United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990) ("[I]t is not necessary to *charge* a conspiracy in order to take advantage of Fed.R.Evid. 801(d)(2)(E); it is enough to show that a criminal venture existed and that statements took place during and in furtherance of that scheme.").

238. *See, e.g.*, United States v. Beckham, 968 F.2d 47, 51 (D.C. Cir. 1992) ("[T]he independent evidence here—mere physical proximity and friendship—does not provide support for inferring that Monroe and Beckham 'had the specific intent to further [a] common unlawful objective.'" (second alteration in original) (quoting United States v. Tarantino, 846 F.2d 1384, 1392 (D.C. Cir. 1988))).

239. *See, e.g.*, United States v. Manfre, 368 F.3d 832, 839 (8th Cir. 2004) ("conspirators' illegal objectives"); United States v. Garcia, 995 F.2d 556, 561 (5th Cir. 1993) ("Statements regarding the payment of money for services rendered in accomplishing the illegal goals of a conspiracy can be considered to be 'in the course and in furtherance of the conspiracy.'" (citing United States v. Miller, 664 F.2d 94, 98–99 (5th Cir. 1981); United States v. McGuire, 608 F.2d 1028, 1032–33 (5th Cir. 1979))).

240. *See, e.g.*, United States v. Garcia-Duarte, 718 F.2d 42, 45 (2d Cir. 1983) ("[T]he totality of the independent evidence marshalled by the prosecution must establish at least the 'likelihood of an *illicit* association between the declarant and the defendant.'" (quoting United States v. Terry, 702 F.2d 299, 320 (2d Cir. 1983))); United States v. Kiefer, 694 F.2d 1109, 1112 (8th Cir. 1982) ("Proof of the . . . existence of a conspiracy, requires a showing of a 'likelihood of illicit association between the declarant and the defendant.'" (quoting United States v. Scholle, 553 F.2d 1109, 1117 (8th Cir. 1977))).

241. The traditionalists are not completely bereft of cases. In *State v. Tonelli*, 749 N.W.2d 689, 690–91 (Iowa 2008), the Supreme Court of Iowa considered the meaning of "conspiracy" under Iowa Rule of Evidence 5.801(d)(2)(E), which allows the admission of evidence against a party of "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." The Court held that the Exception "may be applied where there is evidence of a conspiracy to accomplish a criminal or unlawful act, or to do a lawful act in an unlawful manner, but not to combinations or agreements in furtherance of entirely lawful goals advanced by lawful means." *Id.* at 694; *see also* New York v. Anheuser-Busch, Inc., 811 F. Supp. 848, 868–69 (E.D.N.Y. 1993) ("Although the wholesalers and A-B knowingly entered into an agreement, the State never offered proof showing that the wholesalers and A-B entered into such agreement with an intent to violate the law, or 'consciously avoided' such knowledge. Thus, the existence of a conspiracy was never proven. Without such a conspiracy, the statements offered could not be 'in furtherance of a conspiracy.'" (quoting United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1196 (2d Cir. 1989))).

hardly great proof of its veracity, here the lack of cases directly addressing the revisionist interpretation—whether adopting it or rejecting it—supports the belief that the revisionist theory represents a change from the traditional common-law Exception. When one considers the immense number of "lawful combinations" and innocent "joint ventures" in which citizens participate every day, it seems highly improbable that (1) there exists a rule of evidence allowing any statement made in furtherance of such a licit venture to be admitted at the trial, civil or criminal, of any other fellow participant; yet (2) this rule, despite its immense potential utility both to prosecutors and to civil litigators, has not been clearly stated in actual court holdings. The Exception applies in civil as well as criminal cases.[242] If, as prosecutors argued just a few years ago to the D.C. Circuit, the "Court has squarely held [in 1983] that co-conspirator statements made during and in furtherance of a lawful common plan are admissible under Rule 801(d)(2)(E),"[243] one would expect to see reports of civil litigators invoking the Exception to avoid the Hearsay Rule, gambits which would lead courts to decide the question one way or another.[244] One would also expect to see evidence treatises citing these cases and announcing the majority rule.[245] Instead, one finds uncertain statements suggesting that legal objectives may count as "conspiracies" in a few circuits, supported mostly by dicta from cases concerning conspiracies of an obviously criminal nature.[246]

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242. *See* Earle v. Benoit, 850 F.2d 836, 841 n.6 (1st Cir. 1988) ("Although most of the cases discussing the co-conspirator evidentiary exception are criminal, the exception is equally applicable in civil cases."); New York v. Hendrickson Bros., 840 F.2d 1065, 1073–74 (2d Cir. 1988) (upholding admission of testimony pursuant to Rule 801(d)(2)(E) in civil antitrust suit).

243. Final Brief of the United States at 39, United States v. Gewin, 471 F.3d 197 (D.C. Cir. Apr. 27, 2006) (No. 05-3086).

244. Such efforts would be expected not only in federal courts. Many, if not all, of the states have a rule of evidence similar to Federal Rule of Evidence 801(d)(2)(E). *See, e.g.*, CAL. EVID. CODE § 1223 (West 1995); MINN. R. EVID. § 801(d)(2)(E) (2006).

245. Demonstrating that the revisionist position is indeed novel, at least one professor of law has been travelling the country advising civil litigators to apply the Exception to lawful ventures. *See* E-mail from Professor David Sonenshein, Temple Univ. Sch. of Law, to Author (Mar. 5, 2009, 08:51 am EST) (on file with the Hastings Law Journal) ("Although I may doubt the wisdom of courts' extending the co-conspirator admission rule to joint ventures with a legal purpose, I make both law students and practicing lawyers aware of the fact that a number of federal circuits have indicated their willingness to affirm the admission of co-conspirator statements where the object of the combination or joint venture is neither criminal nor in violation of the civil law.").

246. *See, e.g.*, MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801:25, at 857 n.3 (6th ed. 2006) (citing one case); EDWARD J. IMWINKELRIED, COURTROOM CRIMINAL EVIDENCE § 1110, at 72 n.5 (4th ed. 2005 & supp. 2008) (citing three cases); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:59, at 478 n.4 (2008) (citing three cases); 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 801.34, at n.5.1.1 (2d ed. 2002) (citing five cases, most containing only dicta on the question).

III. THE SURVEY: REPORTED FEDERAL CASES SINCE 1975

The revisionist theory depends upon a key premise: that it is not truly revisionist at all. Instead, the revisionists argue that their view of the Exception, which holds that a "conspiracy" need be neither illegal nor illicit to qualify, has been around for years.[247] They bolster this position by citing old cases.[248] As shown above, however, many cases seemingly supporting the revisionist position cannot be said to hold that lawful ventures satisfy the Exception because the cases concern illegal schemes.[249] To test the revisionist theory, I—along with indefatigable research assistants—reviewed around 2500 cases from eight federal circuits.[250] By searching Westlaw for district and circuit court cases containing either a reference to Rule 801(d)(2)(E) or words indicating use of the Exception,[251] the survey likely found the overwhelming majority of cases discussing the Exception since the codification of the Federal Rules.[252] The survey covers the Courts of Appeals for the First, Second, Fourth, Fifth, Sixth, Eighth, Tenth, and District of Columbia Circuits, as well as all district courts under their supervision.[253] Both reported and unreported cases were included.

A. METHODOLOGY AND RESULTS

For each circuit, the search string yielded tens or hundreds of cases. Each case was then reviewed, and whenever the opinion indicated the

247. *See, e.g.*, *supra* notes 182–87, 243 and accompanying text.

248. *E.g.*, Government's Memorandum in Support of Its Motions *in Limine*, *supra* note 184, at 12–13 (citing, among others, cases from 1979, 1984, and 1986).

249. *See supra* Part II.B.

250. Thanks are due to the attorneys and legal assistants at Skadden, Arps, Slate, Meagher & Flom LLP, who compiled a similar chart covering the Third Circuit that served as a partial inspiration for this Article. According to the brief to which the chart was attached as an appendix, "Of the one-hundred forty nine opinions [Skadden was] able to locate, *not one* permitted the introduction of statements where the conspiracy, or to use the government's term—'joint venture'—had a benign purpose . . . ." Memorandum of Law in Support of Defendant Frederick S. Schiff's Response to the Government's Motion *in Limine* to Admit Statements of Co-Conspirators Pursuant to Federal Rule of Evidence 801(d)(2)(E) at 5, United States v. Schiff, 538 F. Supp. 2d 818 (D.N.J. Feb. 19, 2008) (Crim. No. 06-406).

251. The searches were conducted between May and December 2008. For each circuit studied, the search string was ["801(d)(2)(e)" (hearsay /10 (co-conspir! conspir!)) (801(d)! /10 conspir!)]. The search string also included an entry to exclude Supreme Court cases, which otherwise would have been returned for every circuit. *See* Ben Trachtenberg, Circuit Master Chart (Mar. 4, 2009) (unpublished Microsoft Excel spreadsheet, on file with the Hastings Law Journal). The Circuit Master Chart incorporates the results of all the circuits surveyed.

252. Because of the search terms used, as well as Westlaw's more limited scope for older cases, only a small minority of the cases reviewed predate the enactment of the Federal Rules in 1975.

253. The choice of circuits was largely arbitrary. Care was taken to include a few of the circuits from which dicta support the revisionist position, such as the Fifth Circuit and the D.C. Circuit. Once the pattern of results became apparent, it was deemed unnecessary to complete an exhaustive survey of all circuits.

admission of evidence pursuant to the Exception, the case was recorded on that Circuit's chart. For each case, the chart records the object of the conspiracy in furtherance of which the admitted statements were made. The chart also indicates whether the case was criminal or civil. Finally, the chart records whether the object of the conspiracy was (1) illegal; (2) legal, but illicit; or (3) legal and licit.

The results are stark: Of 2516 cases recorded, 99 were civil cases and 2417 were criminal. Of the 2516 opinions for which the object of a conspiracy was recorded, all but four concerned an illegal object.[254] Three of the four outliers concerned the same criminal case, which yielded multiple opinions discussing the issue.[255] The other outlier is a civil case in which the trial judge noted that he was bound to follow *Gewin*.[256] For the remainder, the conspiratorial aims ran the gamut of crime and vice, including auto theft, bribery, counterfeiting, drug trafficking, extortion, false statements, gambling, health care fraud, and so on through the alphabet of illegality. Some of the more obscure illegal aims included importing illegal swordfish[257] and communicating with the East German Secret Service in violation of the Uniform Code of Military Justice.[258] Other than in two cases described below, none of the "conspiracies" included ordinary lawful activity such as "making money for a common employer," "taking a recreational boat trip," or "seeking grant money to support the justice system of an Indian tribe in Mississippi."[259]

The first outlier case is *United States v. Anderson*, in which the court found that a group of declarants "all were participants of a common plan to put together and facilitate and operate and carry out the relationship of Baptist Medical Center and Blue Valley Medical Group for the continuum of care. They participated in a joint venture, if you will, for

254. *See* Trachtenberg, *supra* note 251.

255. *Infra* note 260.

256. *See* Miller v. Holzmann, 563 F. Supp. 2d 54, 86 n.29 (D.D.C. 2008); *see also infra* Part V.D (discussing *Miller* in greater detail).

257. *See* United States v. Cranston, 686 F.2d 56, 57 (1st Cir. 1982).

258. *See* Kauffman v. Sec'y of the Air Force, 415 F.2d 991, 992 (D.C. Cir. 1969).

259. These examples are not hypothetical. *Cf.* Memorandum in Support of the Motion *in Limine* of the United States to Admit Statements of Co-Conspirators Pursuant to Federal Rule of Evidence 801(d)(2)(E) at 7, United States v. Schiff, 538 F. Supp. 2d 818 (D.N.J. Feb. 12, 2008) (Crim. No. 06-406) (common employer, seeking admission of statements, by coworkers of defendants whom the government did not accuse of wrongful conduct, concerning lawful activities by pharmaceutical company to sell products); *supra* text accompanying note 1 (quoting reply brief in same case). For the boat trip, see *United States v. Postal*, 589 F.2d 862, 867, 886 n.41 (5th Cir. 1979), stating in dicta notwithstanding that sailors had been caught with about 8000 pounds of marijuana, "the voyage was a 'joint venture' in and of itself apart from the illegality of its purpose," meaning that the sailors' "logbook was therefore admissible as nonhearsay". For the grant money, see Government's Opposition to Defendant's Motion to Strike Exhibits and Exclude Witnesses at 9-10, United States v. Ring, No. 1:08-CR-274 (D.D.C. Sept. 7, 2009), characterizing as coconspirator hearsay an e-mail message stating, of a Department of Justice grant application, "[M]aybe we could come [up] with some strategy in order to make sure [the Choctaw] get the rest of the money." (alterations in original).

the purposes of 801(d)(2)(E)."[260] Unfortunately for purposes of the survey, the trial judge did not make findings concerning the legality of each declarant's activity, concluding instead that no such finding was required by the Exception:

> The rule is rooted in agency principles, as are its siblings, Rules 801(d)(2)(C) and 801(d)(2)(D). The court rejects the overly cynical view that 801(d)(2)(E)'s relaxation of hearsay standards is really based on a perceived need to convict criminal conspirators, and, thus, the alleged joint undertaking must have a criminal purpose. The Federal Rules of Evidence do not relax out of expediency other evidentiary standards, merely upon a finding by the court by a preponderance of the evidence that the party or parties against whom the evidence is offered are criminal conspirators.[261]

As discussed in Part IV below, the "agency principles" justification for the Exception has a weak theoretical basis,[262] and the "need to convict criminal conspirators"—cynical though it may be—seems indeed to be the primary justification for the Exception's existence. Regardless, at least some of the declarants at issue were convicted of "one or more substantive violations of the Medicare Anti-Kickback Act,"[263] suggesting that the "joint venture" of carrying out a relationship between Baptist and Blue Valley may have violated the law.[264] With respect to other declarants, however, who served in good faith as attorneys for the defendants, the court found that "there was no evidence that . . . they were involved in criminal activity."[265] Accordingly, *Anderson* is a true example of a court admitting evidence pursuant to the revisionist interpretation of the Exception. The only other such case found by the survey, *Miller v. Holzmann*,[266] is discussed in Part V.D below.

In all the other cases reviewed in which evidence was admitted pursuant to the Exception, the "conspiracy" justifying the invocation of Rule 801(d)(2)(E) had an unlawful object. This includes not only the

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260. United States v. Anderson, 85 F. Supp. 2d 1047, 1079 (D. Kan. 1999). The survey also reviewed another opinion related to this case, United States v. LaHue, 261 F.3d 993, 1009 (10th Cir. 2001), which declined to address the question after finding that "even if the district court erroneously admitted the disputed documents, we hold their admission constituted harmless error." A third related opinion is reported at *United States v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000), which found that defendant waived objections related to the Exception because his brief "fails to identify the specific statements which he now contends were wrongly admitted."

261. *Anderson*, 85 F. Supp. 2d at 1079.

262. This is admitted in the Advisory Committee note to Rule 801(d)(2)(E). *See supra* notes 133–42 and accompanying text.

263. *Anderson*, 85 F. Supp. 2d at 1052.

264. If not all declarants could be found to have committed illegal conduct, perhaps their roles in the referral scheme were illicit. *But see infra* note 265.

265. United States v. Anderson, 55 F. Supp. 2d 1163, 1168–70 (D. Kan. 1999) (finding that prosecution violated declarants' due process rights by identifying them in publicly-filed pretrial papers as "unindicted coconspirators").

266. 563 F. Supp. 2d 54 (D.D.C. 2008).

criminal cases but also the civil cases at which coconspirator statements were presented. The joint action allowing the admission of statements in civil cases included antitrust law violations, conspiracies to violate civil rights, securities fraud, and insurance fraud.[267] In certain of the cases, the conspiracy involved conduct that could have been charged criminally. In others, it constituted a civil wrong only.[268]

B. Analysis of Results

The survey results resoundingly prove that, at least in practice, courts and practitioners do not apply the Exception to joint ventures with lawful aims. Discovering the state of the law is not the same as illustrating what it should be, and the survey results cannot in themselves answer whether the Exception ought to cover legal combinations. They do, however, refute the revisionists' ongoing argument that their position is old hat, nothing new, and no cause for debate on whether courts should adopt a new interpretation of a rule of evidence codified in 1975 and understood largely in its current form since around the founding of the United States. The survey almost certainly missed some cases applying the Exception to admit evidence, but even if a surprising number of the overlooked cases concerned completely lawful conduct,[269] the results of the survey would remain materially the same. In cases applying the Exception to admit evidence of coconspirator statements, nearly every single one out of thousands—the overwhelming majority—concern conspiracies with unlawful objectives. Accordingly, the argument made by prosecutors over the past several years—and on a few occasions before then—would, if accepted, cause a material change to Federal Rule of Evidence 801(d)(2)(E). The change would have the effect of expanding the Exception, allowing statements previously excluded as hearsay to be admitted at civil and criminal trials.

IV. Justifications for the Exception and Their Relation to Lawful "Conspiracies"

In considering whether the change sought by the revisionists should be adopted, a review of the practical and theoretical support for the

267. Battle v. Lubrizol Corp., 673 F.2d 984, 990–91 (8th Cir. 1982) (antitrust); Zaken v. Boerer, 964 F.2d 1319, 1324 (2d Cir. 1992) (civil rights); Paul F. Newton & Co. v. Tex. Commerce Bank, 630 F.2d 1111, 1120–21 (5th Cir. 1980) (securities fraud); United States v. Gravatt, 83 F.3d 434 (10th Cir. 1996) (insurance fraud). The exception is *Miller*.

268. *See* Gray v. Sage Telecom, Inc., No. 3:05-CV-1677-G, 2006 WL 2820075, at *5 n.8, *17 (N.D. Tex. Oct. 2, 2006) (civil claims concerning retaliation in violation of Title VII and conspiracy to ask questions prohibited by Texas labor law); Delta Educ., Inc. v. Langlois, 719 F. Supp. 42, 46–47 (D.N.H. 1989) (civil complaint alleging criminal fraud).

269. The existence of an independent survey of the Third Circuit, which found zero such cases, makes such a result unlikely. *See supra* note 250.

Exception is useful. This Part reviews the primary justifications presented for the existence of the Exception, and it then considers how each fares when used to justify an expansion of the Exception to include lawful combinations. The leading arguments put forth to support the Exception are (1) an analogy to agency law and the principal-agent exception to the Rule, wherein each conspirator is said to adopt his confederates as his agents; (2) the proposition that statements within the Exception are not hearsay at all because they constitute verbal acts; (3) the argument that, like other categories of hearsay for which exceptions exist, coconspirator statements are generally reliable and so ought not be barred by the Rule; and (4) the practical position that absent the Exception, necessary prosecutions of many crimes—ranging from treason to drug distribution—would be impossible, or at least severely impeded.[270] Of these, only the practical argument from necessity survives serious scrutiny. Because the primary justification is practical rather than principled, the revisionist attempts to expand the scope of the Exception merit particular suspicion, lest zealous efforts to convict more offenders allow more inherently unreliable evidence into criminal trials without the safeguard of cross-examination.

A. Analogy to Agency Theory

Perhaps the most popular justification for the Exception is an analogy to the law of agency and to the principal-agent exception to the Rule. In *Van Riper v. United States*, Learned Hand wrote that coconspirator

> declarations are admitted upon no doctrine of the law of evidence but of the substantive law of the crime. 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.[271]

The theory is simple enough to state: Because each member of a conspiracy has willingly joined the criminal combination, each becomes the agent of all the others. When one recalls that the "overt act" of a single conspirator can secure the conviction for conspiracy of others who merely agree to commit crime[272]—and that one member of a conspiracy may be punished for the substantive crimes of another[273]—the idea that

270. *See* David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1384 (1972) ("[T]he major development of the exception has been the result of a seemingly random appeal to [these] rationales . . . .").

271. 13 F.2d 961, 967 (2d Cir. 1926).

272. Braverman v. United States, 317 U.S. 49, 53 (1942).

273. *See* Pinkerton v. United States, 328 U.S. 640, 647 (1946).

one conspirator's statements may be used against another has an intuitive appeal.

It turns out, however, that this explanation is very weak, as the drafters of the Federal Rules of Evidence acknowledged.[274] As a preliminary matter, the Exception does not include the limitations and protections that govern the admission into evidence of hearsay statements by agents. In addition to the limitations already discussed,[275] the principal-agent exception excludes statements made by the agent before the start of the principal-agent relationship.[276] A conspirator, on the other hand, is deemed to have "ratified" the statements made by his confederates before he joined an existing criminal scheme.[277] In addition, because the cases construing the Exception differ from those announcing the substantive law of conspiracy, "neither collateral estoppel nor res judicata automatically bars the use of statements by a person who has been acquitted of the crime of conspiracy."[278]

More importantly, the analogy of the relationship among two coconspirators to that of a principal and her agent fails even as a theoretical matter. As one observer put it, "[t]he practical considerations which justify forcing a principal to adopt, for business and evidence purposes, the statements of his authorized agent are not present with a conspiracy, because its members often lack the power to control or authorize other members' actions."[279] The principal-agent exception makes sense in light of the underlying purpose of agency law, which allows persons dealing with agents to have confidence that the agents' principals will not later avoid making good on the agents' promises. Principals have a strong incentive to monitor the statements of their servants and agents, and they can do so because of their employment or agency relationships.[280] It is hard to understand, however, what analogous social good is advanced through the use of one coconspirator's

274. *See* FED. R. EVID. 801(d)(2)(E) advisory committee's note ("[T]he agency theory of conspiracy is at best a fiction . . . .").

275. *See supra* notes 114–18 and accompanying text.

276. *See* SEC v. Geon Indus., Inc., 531 F.2d 39, 43 n.3 (2d Cir. 1976) (excluding deposition by employee offered against employer because employee was on suspension when deposed).

277. *See* United States v. Baines, 812 F.2d 41, 42 (1st Cir. 1987) ("[A] conspiracy is like a train. When a party knowingly steps aboard, he is part of the crew, and assumes conspirator's responsibility for the existing freight . . . ."); United States v. Badalamenti, 794 F.2d 821, 826–28 (2d Cir. 1986) (holding that "statements of Badalamenti's co-conspirators are admissible against him, even if made before he joined the conspiracy" and rejecting defendant's argument that limitations applicable to principal-agent exception should apply).

278. United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979). The *Gil* Court was generous enough to concede that "an acquittal might be relevant and persuasive in the determination of whether the Government has demonstrated the requisite criminal joint venture." *Id.*

279. James W. Jennings, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 755 (1965) (footnote omitted).

280. Similar theories undergird the rule of respondeat superior in tort law.

statements against another.[281] It is not as though the law wishes to ensure that one coconspirator will make good on the (presumably unlawful) promises of another. Does the law say to would-be criminals, "Make sure not to choose confederates who will talk too much"?[282] Indeed, considering that a conspirator is on the hook for statements made before his arrival, perhaps the law instructs a would-be criminal, "Make sure not to choose confederates who *have talked* too much."

The agency analogy is a jumble, and courts' continuing reliance on it suggests strongly that the Exception survives for practical reasons rather than because it fits neatly into a unified theory of evidence law.

B. Analogy to Verbal Acts or "*Res Gestae*"

Another justification of dubious credibility is that statements admitted under the Exception are not hearsay at all, and accordingly should be accepted without objection from hearsay purists, because they constitute verbal acts.[283] If they are acts instead of statements, then they cannot be hearsay, which is defined as a class of statements.[284] The primary problem with this explanation is that no one really believes it. After all, if a piece of evidence proffered for admission at trial is not a "statement," and accordingly cannot be "hearsay," the proponent need not resort to any "hearsay exception." Such exceptions allow the admission of evidence that would otherwise be inadmissible hearsay. When a prosecutor offers into evidence at a murder trial the 911 call of the victim identifying the defendant as the killer, a defense objection based on the Hearsay Rule would yield a prosecutorial reference to the appropriate hearsay exception.[285] If the prosecutor then offers into evidence the baseball bat used to kill the victim, a defense objection based on the Hearsay Rule would yield a confused look from the prosecutor and judge.

The belief that statements admitted under the Exception are not actually statements may result from the somewhat odd, and almost

281. Other than increasing the ease of prosecution, discussed *infra* Part IV.D.

282. If anything, such an incentive might make it more difficult to detect and prosecute criminal conspiracies because participants will act with knowledge that "loose lips sink ships."

283. For example, when a defendant accused of illegal whiskey distillation objected to the admission of a coconspirator's statement "telling the [government] witness Brown that he needed fruit jars at the still," the Fourth Circuit admitted the statement. *See* United States v. Copeland, 295 F.2d 635, 637 (4th Cir. 1961). "The imparting of this information was in furtherance of the plan or scheme .... This being true, the declarations ... of all of the conspirators are a part of the res gestae and, therefore, admissible." *Id.*; *see also* Myers v. United States, 377 F.2d 412, 419–20 (4th Cir. 1967). The phrase "*res gestae*" is Latin for the "things done" or "thing transacted." Black's Law Dictionary, *supra* note 208, at 1335.

284. *See* Fed. R. Evid. 801(c) ("'Hearsay' is a statement ....").

285. *See id.* R. 804(b)(2); *supra* text accompanying note 77.

certainly accidental, creation of the Exception as a black-letter rule.[286] Many of the iconic English cases in which coconspirator statements were admitted—cases that American jurists and scholars subsequently cited as support for what they concluded was a rule allowing for the admission of such statements generally—involved statements that easily could have been admitted without any special hearsay exception.[287] A conspirator's letter informing England's enemies of convenient places for an armed invasion is itself an act of treason; it is no mere statement.[288]

Contrast the treasonous letter with a common application of the Exception today, in which statements by a drug seller to an undercover agent are admitted against a coconspirator of the seller.[289] Imagine that at the trial of Washington for selling illegal drugs, the government calls to the stand Agent Jefferson, who testifies that while undercover, he purchased drugs from a dealer named Adams. Under the Exception, Jefferson could freely testify that after he asked Adams why he should buy the drugs in question, Adams replied, "Because George Washington only sells the best stuff." Adams's out-of-court statement would come in against Washington regardless of whether Adams could be cross-examined. Unlike the treasonous letter, Adams's statement is just that, a mere statement. Unlike inviting a foreign army to invade, it is no crime to state that George Washington sells only the best stuff;[290] the crime Adams committed was selling drugs.

Another reason statements composing criminal acts are not hearsay is that they are not admitted for the truth of what they assert. If the invitation to invade reads, "Attack New Jersey tonight, for the defenses are weak," the writer has committed treason even if the defenses are strong. If anything, the analogy to verbal acts and *res gestae* undermines

286. *See supra* Part I.B.

287. *See supra* Part I.B.

288. *See, e.g.*, Trial of William Stone, 25 How. St. Tr. 1155, 1288 (1796) (accepting as evidence of high treason a conspirator's letter stating that "in Ireland, a conquered, oppressed, and insulted country the name of England, and her power is universally odious, . . . [and] the great bulk of the people would be ready to throw off the yoke in this country, if they saw any force sufficiently strong to resort to for defence," making Ireland "directly favourable to invasion"); *see also* Mueller, *supra* note 84, at 328 & n.15.

289. *E.g.*, United States v. Mooneyham, 473 F.3d 280, 285–86 (6th Cir. 2007) ("McMahan was indisputably Mooneyham's co-conspirator, and the statement in question was clearly made in furtherance of the conspiracy because it was directed at a potentially recurring customer (Agent Williams) with the intention of reassuring him of Mooneyham's reliability as a supplier."); United States v. Piper, 298 F.3d 47, 53 (1st Cir. 2002); United States v. Romo, 914 F.2d 889, 896 (7th Cir. 1990) (upholding admission, at trial of Ann, of testimony concerning "statement of Juanita to an undercover police officer that Juanita was going to Ann's house to pick up cocaine"); *see also* United States v. Henderson, 307 F. App'x 970, 977 (6th Cir. 2009) ("Statements have been found to be in furtherance of a conspiracy where they . . . indicate 'the source or purchaser of controlled substances.'" (quoting United States v. Hitow, 889 F.2d 1573, 1581 (6th Cir. 1989))).

290. One could imagine an undercover officer testifying to the same facts, should he learn through his work that Washington enjoys such a reputation.

the case for the Exception because, even without the Exception, statements constituting criminal acts are admissible. Accordingly, the statements that seem to best justify the Exception do not need it, meaning that the Exception's existence serves in practice to admit only the least justifiable coconspirator statements.[291]

C. RELIABILITY

In a justification that does not require elaborate analogy or appeals to the theory of substantive conspiracy law, some argue that coconspirator statements should be admitted for the same reason that many other statements come in under a hearsay exception: reliability.[292] Because sensible people do not falsely accuse themselves of criminal acts, the argument goes, one can expect the statements of conspirators to be true. In practice, the reliability of statements admitted under the Exception is much disputed.[293] Any such statement must be viewed with at least some suspicion because, by definition, it was uttered by a

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291. The use of the Exception only for the worst statements is especially problematic when one considers that at least some coconspirator statements (albeit by no means all of them) could be properly admitted under the principal-agent exception, and these would tend to be among the coconspirator statements most worthy of admission. *See, e.g.*, Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1010–12 (6th Cir. 1999). If a loan shark's enforcer punches a victim in the face while saying, "My boss, Smith, is tired of waiting for your money," the statement likely could be admitted against Smith under Rule 801(d)(2)(D). *See* United States v. Martel, 792 F.2d 630, 635 (7th Cir. 1986); *see also The Simpsons: The Twisted World of Marge Simpson* (Fox television broadcast Jan. 19, 1997) (Fat Tony to Homer: "You see, my wife, she has been most vocal on the subject of the pretzel monies."); *supra* note 113 (discussing civil agency relationship among conspirators in *Gooding*).

292. *See* Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1437 (1966). As the note author observed,

> Inevitably, any hearsay rule is arbitrary. The judge cannot halt the trial to ponder the reliability of every item of hearsay evidence; nor can attorneys calculate reliability in time to object to hearsay in a running narrative. They must have broad categories of admissibility which yield an effortless decision. In this area, rules of law must be rules of thumb. All we can ask is that the categories of admissible hearsay be generally reliable; any particular example may be suspect and call for the exercise by a trial judge of his discretion to exclude unreliable evidence.

Id.

293. *Compare, e.g.*, United States v. Morrow, 39 F.3d 1228, 1235 (1st Cir. 1994) ("Arguably, the co-conspirator hearsay exception is an historical anomaly, there being nothing especially reliable about such statements . . . ."), *and* Park v. Huff, 506 F.2d 849, 863 (5th Cir. 1975) (Wisdom, J., dissenting) ("The reliability of a co-conspirator's out-of-court statement is shaky at best."), *with* 4 WIGMORE, *supra* note 5, § 1077 ("[A]s a matter of probative value, the admissions of a person having precisely the same interests at stake will in general be likely to be equally worthy of consideration."). The Supreme Court seems to have sided with Wigmore on the reliability question, declaring that coconspirator statements belong to a class of hearsay exceptions whose reliability need not be examined. *See* Bourjaily v. United States, 483 U.S. 171, 182–83 (1987) ("We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that . . . a court need not independently inquire into the reliability of such statements."); *see also* Crawford v. Washington, 541 U.S. 36, 56 (2004) (stating that "statements in furtherance of a conspiracy" are "not testimonial").

criminal.[294] Further, the secretive nature of a criminal conspiracy can create situations in which the extrajudicial declarant whose statement is admitted at trial had no personal knowledge of the defendant or her activities.[295]

Let us return to Adams, the drug pusher. When speaking with Agent Jefferson, whom Adams believes to be a bona fide prospective customer, Adams must decide how to convince Jefferson to buy. He states that "George Washington only sells the best stuff." One could ascribe many motives to Adams in making this statement. Perhaps Washington truly is Adams's supplier and is known for selling top-quality drugs; information about the provenance of the drugs might help close a sale. Then again, perhaps Washington is known for selling top-quality drugs, but Adams buys schwag from Burr and attempts to pass it off as Washington-quality stuff. Or perhaps Adams has obtained good stuff on his own and now seeks to enter Washington's good graces by associating Washington's name with such a fine product. We just don't know. What we do know is that if Adams's statement comes into evidence through Jefferson's testimony, Washington's prospects for acquittal look a lot worse.

This simple example, which relies on a fact pattern all too common in American courts, illustrates the problem with assuming that criminals tell the truth, especially when they speak about other people. Joseph Levie described the problem well fifty years ago: "Of course sane men do not falsely admit to conspiracy. Conspirators' declarations are good to prove that some conspiracy exists but less trustworthy to show its aims and membership."[296] In this case, Adams would indeed be reckless to go about town claiming to be a drug dealer were he not actually selling drugs. The analogy to statements against interest is sound as far as it goes. This Article has already presented, however, multiple reasons that Adams might lie *about Washington*, and the specific facts of actual cases applying the Exception provide countless more motives for criminals to lie about one another's actions.

One might wish to ignore the questionable reliability of coconspirator statements if they were admitted only against criminal conspirators. Society visits much worse punishment upon criminal conspirators, with long prison terms being but one example. One could therefore describe the admission of coconspirator statements against a person as an additional cost of crime. The difficulty arises upon the

294. *See* Levie, *supra* note 132, at 1166 ("It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law.").

295. *See* S. Douglas Borisky, Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1307–09 (1985).

296. Levie, *supra* note 132, at 1165.

realization that while a prosecutor must prove a defendant's guilt beyond a reasonable doubt before sending him to prison, a proponent of statements under the Exception need prove their admissibility only by a preponderance of the evidence, and the unreliable statement itself can help the prosecutor meet her burden.[297] As David Davenport observes, "It is one thing to say that because we hate all conspirators, we will treat conspirators especially harshly. But it is quite another to say that because we hate conspirators, we will treat harshly everyone *accused* of conspiracy."[298]

D. NECESSITY

When all else fails, proponents of the Exception appeal to necessity, arguing that absent the Exception certain important criminal prosecutions would be impossible. The U.S. Court of Appeals for the First Circuit provides a candid acknowledgement of the Exception's weak theoretical basis in *United States v. Goldberg*:

> Frankly, the underlying co-conspirator exception to the hearsay rule makes little sense as a matter of evidence policy. No special guarantee of reliability attends such statements, save to the extent that they resemble declarations against interest. The exception derives from agency law, an analogy that is useful in some contexts but (as the Advisory Committee noted) is "at best a fiction" here. The most that can be said is that the co-conspirator exception to hearsay is of long standing and makes a difficult-to-detect crime easier to prove.[299]

Justice Blackmun, dissenting from the Court's opinion in *Bourjaily* abolishing the prohibition on "bootstrapping,"[300] pointed out that the Exception already allows for the admission of often-unreliable evidence: "The co-conspirator 'admission' exception was also justified on the ground that the need for this evidence, which was particularly valuable in prosecuting a conspiracy, permitted a somewhat reduced concern for the reliability of the statement."[301] Indeed, Justice Powell's majority opinion in *Inadi* makes much of how "irreplaceable" coconspirator statements are "as substantive evidence."[302]

The appeal to necessity should not surprise anyone familiar with the substantive crime of conspiracy. Clandestine criminal combinations are

297. *See* United States v. Nixon, 418 U.S. 683, 701 (1974); *supra* note 163 and accompanying text.

298. *See* Davenport, *supra* note 270, at 1391.

299. United States v. Goldberg, 105 F.3d 770, 775 (1st Cir. 1997); *see also* United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979) ("It has also been candidly proposed by commentators, and implicitly acknowledged by the Advisory Committee for the Federal Rules of Evidence, that the exception is largely a result of necessity, since it is most often invoked in conspiracy cases in which the proof would otherwise be very difficult and the evidence largely circumstantial.").

300. *See supra* note 163 and accompanying text.

301. Bourjaily v. United States, 483 U.S. 171, 190 (1987) (Blackmun, J., dissenting).

302. 475 U.S. 387, 395–96 (1986).

difficult to prove, and nearly impossible to prove absent testimony—obtained one way or another—from participants. At the 1696 trial of Robert Charnock and others for high treason, Lord Chief Justice Holt addressed a defense objection that defendants' conspirators "cannot be good witnesses" because they "are involved in the same crime."[303] After instructing the jurors that the weight of such evidence was a matter for their discretion, Lord Holt then provided a spirited defense of its admission:

> [Y]ou may consider that traitorous conspiracies are deeds of darkness as well as wickedness, the discovery whereof can properly come only from the conspirators themselves; such evidence has always been allowed as good proof in all ages; and they are the most proper witnesses, for otherwise it is hardly possible, if not altogether impossible, to have a full proof of such secret contrivances; such discoveries are to be encouraged in all governments, without which there can be no safety.[304]

In the end, necessity stands alone in believably supporting the Exception. Judges from Lord Holt to the *Bourjaily* majority have recognized the importance of the statements of a defendant's confederates to the prosecution of a conspirator. This conclusion does not undermine the Exception completely; the rules of evidence are nothing if not a stab at balancing fairness and practicality. It should, however, encourage great caution whenever someone suggests expanding the Exception, a procedural change that would inevitably cause the admission of additional false statements not subject to cross-examination.

E. Application of the Justifications to Lawful "Conspiracies"

Acknowledging the true justification for the Exception requires that one reject the revisionist interpretation. The expansion of the principal-agent doctrine to criminal conspiracies depends on a belief that criminals become one another's agents when joining an illegal scheme. Although tenuous as a matter of theory, it can be argued that suffering such a rule is a risk that criminals assume when they form illegal combinations. Not so, however, for lawful ventures. When someone becomes a corporate employee, few would agree that every statement made in support of the corporation's profit-making objectives by any fellow employee, whether known or unknown to him, should be admissible at totally unrelated trials without cross-examination. While the shadowy nature of criminal gangs may allow the legal fiction that every member is the agent of all others, no respected theory of agency law holds that every employee of a corporation is the agent of all fellow servants.

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303. Trial of Robert Charnock, 12 How. St. Tr. 1377, 1454 (1696).
304. *Id.*

The verbal acts justification fares even worse when applied to lawful cooperation, for it makes sense only as an analogy to the substantive law of crime. Whereas a treasonous statement is both a communication and a verbal act (or "*res gestae*"), and so may be properly deemed "not hearsay" because of its dual nature as speech and *actus reus*, no such duality applies to statements made to further the aims of everyday lawful organizations.[305] Similarly, the argument that coconspirator statements should be admissible because of their inherent reliability has no credibility when applied to legal behavior. If the theory is that only a fool would falsely implicate himself in crime, the theory cannot support an extension to statements that "implicate" their speakers in totally respectable behavior.

A simple example shows how unjustifiable the Exception appears when applied to lawful conduct. Imagine that Langdell, a law review articles editor, is on trial for a murder in New York. His alibi is that he was at lunch with Holmes, the editor-in-chief, at the time of the murder—in Boston, no less. As it happens, for suspicious but unknown reasons, Holmes cannot be found to testify at trial. On the day of the murder, however, Holmes said by telephone to another articles editor, Pound, "I can't be at the articles committee meeting today because I'm waiting for the cable guy all day at my apartment in Brooklyn." The statement is hearsay, so Pound cannot repeat it at trial to undercut the alibi. Holmes is an out-of-court declarant, and the prosecution would offer his words to prove the truth of the matter asserted: that Holmes was in Brooklyn on the day of the murder, not lunching in Boston as Langdell had claimed. Were Pound to testify about Holmes's statement, Langdell would be unable to cross-examine the declarant about the statement, preventing him from effectively attacking Holmes's credibility. It could be, for example, that Holmes indeed said what Pound remembers but was simply lying, perhaps because he needed an excuse for skipping the committee meeting. Or perhaps the cable guy came early (implausible as that scenario might seem), allowing Holmes to catch a Boston train arriving in time for a late lunch with Langdell. Without producing Holmes and exposing him to questioning by the defense, the prosecution cannot use his statement, which is the basest hearsay, regardless of how reliable and honest Pound may be.[306]

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305. If the revisionists are correct, statements that are admissible under the Exception as "not hearsay" would include (1) any statement by one employee to a fellow servant "in furtherance" of their employer's business objectives, which might include a call to one's boss explaining why the caller will be late for work; (2) a statement by one recreational sailor to another about their common boat trip; and (3) statements among members of a nonprofit organization, such as a charity or a law journal, about their work. Potential examples are as varied as lawful human activity.

306. *Cf.* Crawford v. Washington, 541 U.S. 36, 51 (2004) ("Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.").

But if a statement in furtherance of lawful joint action satisfies the Exception, Langdell has big problems. Langdell, the defendant, is in a "conspiracy" with Holmes to run a law journal. Holmes's statement, made to a law journal colleague concerning an organizational meeting, was uttered "in furtherance" of the journal's work and during the "pendency" of the joint effort. Accordingly, the prosecution could offer Holmes's statement to Pound pursuant to Rule 801(d)(2)(E). In what material way is the statement different from ordinary hearsay that common law courts have excluded for centuries? The prosecution would produce Pound, who has no personal knowledge of Holmes's whereabouts on the day of the murder, to repeat Holmes's statement ("I'm waiting for the cable guy all day at my apartment in Brooklyn") in an effort to prove the matter that Holmes asserted—that he was in Brooklyn. Consider again the justifications asserted for the Exception's existence in our law of evidence. If Holmes is the editor-in-chief, one could hardly argue that he is Langdell's "agent" when transacting law review business.[307] Holmes's statement, an explanation for missing a meeting, is no "verbal act" or "*res gestae*." And unless law journal editors are known for unflinching honesty and pinpoint accuracy with respect to the excuses they offer one another, there is no particular reason to believe that Holmes's statement is any more inherently reliable than other "my friend told me he did such-and-such" declarations commonly excluded by the Hearsay Rule.

The appeal to necessity is all that remains. It may indeed be necessary that participants in criminal conspiracies be condemned by the statements of their confederates, and centuries of practice indicate that eminent jurists so believe. If, however, one realizes that the Exception results in the admission of unreliable evidence, that no justification but bare necessity supports its admission, and that courts in practice have always limited the Exception's scope to criminal conspiracies, then a proposal to expand the exception can hardly be taken seriously. It would be one thing if the revisionist position, which flies in the face of commonsense understandings of the word "conspiracy" (to say nothing of definitions in dictionaries[308]), were some quirk of the law handed down since the reign of Henry II. Such history would provide no independent proof that the law is what it ought to be, but it would at least bring

307. Then again, that theory is about as credible as what the government asserted in *United States v. Layton*, where prosecutors argued (and the Ninth Circuit found) that cult leader Jim Jones was the "agent" of one of his minions. *See* 855 F.2d 1388, 1399 (9th Cir. 1988); *see also supra* notes 215–29 and accompanying text.

308. *E.g.*, BLACK'S LAW DICTIONARY, *supra* note 208, at 329 (defining "conspiracy" as "agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose").

tradition to the revisionists' side. Instead, zealous prosecutors would have courts abandon decades, even centuries of practice, all to support the argument that, somehow, the word "conspiracy" in the evidence code enacted by the Congress of the United States does not mean "conspiracy."

V. THE CONFRONTATION CLAUSE AND OTHER LOOMING PROBLEMS

In addition to exemplifying bad policy, the revisionist interpretation creates additional tension between the Exception and the constitutional right of criminal defendants to confront adverse witnesses. This Part reviews the treatment of the Exception under the Supreme Court's interpretation of the Confrontation Clause of the Sixth Amendment to the Constitution, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[309] It also discusses a more mundane problem: the possibility that the revisionist interpretation could create crushing discovery obligations—among other problems—if applied to complex civil litigation.

A. THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

The existence of a constitutional right to confront one's accusers is popularly traced to the infamous trial of Sir Walter Raleigh, in which Raleigh argued that a witness against him had no choice but to lie in response to prosecutorial pressure, and that he would recant if only Raleigh had the chance to confront him.[310] If taken literally, the Clause would bar all hearsay, or at least all hearsay uttered by a declarant unavailable for examination at trial. No serious observer, however, has argued that the Clause is so broad. Its guarantee is rooted in the tradition of adversary common-law trials, and American courts have carved out exceptions found under the common law of evidence, as well as their modern codified equivalents.[311] Indeed, hearsay was accepted as evidence in criminal trials in the decades after ratification pursuant to established exceptions.[312] Chief Justice Marshall acknowledged the practice,[313] writing

309. U.S. CONST. amend. VI.

310. *See Crawford*, 541 U.S. at 44; *see also supra* notes 60–65 and accompanying text.

311. *See* Salinger v. United States, 272 U.S. 542, 547–48 (1926). Professor John Maguire, who identified "adversary practice" as a "motive" for the creation of hearsay exceptions, illuminates the tension inherent in the Rule. *See* JOHN MACARTHUR MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 140–44 (1947). If it exists to create fair trials, some exceptions will almost surely be necessary—lest good evidence be kept out with bad—and over centuries judges and commentators have forged the common ones into black-letter rules of evidence. *Id.*

312. *See, e.g.*, State v. Baynard, 1 Del. Cas. 662, 662 (1794) (Read, C.J.) (stating, in murder case, that although "the rule be general that hearsay evidence is illegal, yet this rule is subject to many exceptions"). Chief Justice George Read, a signer of the Declaration of Independence and of the Constitution, led the ratification movement in Delaware. 3 HENRY CLAY CONRAD, HISTORY OF THE

a lengthy opinion about whether particular coconspirator statements could be admitted at the trial of Aaron Burr, an opinion in which Marshall does not question the principle that hearsay exceptions do sometimes apply.[314]

The Supreme Court has stated that the primary purpose of the Confrontation Clause is to ensure the right to cross-examination, not merely a face-to-face encounter between witness and defendant.[315] The right of the accused to confront and cross-examine witnesses against her is important in ensuring the reliability of the evidence, a benefit not obtainable by the cross-examination of a witness who is repeating the words of others.[316] A recurring problem concerning the application of the Confrontation Clause to hearsay arises when a codefendant confesses. In *Delli Paoli v. United States*, the Court held that confessions of codefendant coconspirators are admissible at the joint trial even when made after the conspiracy ended, as long as the jury is instructed to use the confession against only the confessing defendant.[317] Overruling *Delli Paoli*, the Court in *Bruton v. United States* held that when one codefendant confesses, multiple defendants must either have separate trials or separate juries, so that the jury deciding the fate of the nonconfessing defendant does not hear the postconspiracy confession of his confederate.[318]

STATE OF DELAWARE 858–59 (1908). In *Baynard*, the court found that although the Rule did not prevent the witness from testifying as to certain statements by the victim, the statements were inadmissible because originally uttered by a black man:

> Many of our laws recognize the servile state of Negroes among us and seem to require them to be deprived of many privileges enjoyed by white persons. . . . While these laws and this system continue in force, it would be both illegal and impolitic to admit the testimony of Negroes in any cases whatever wherein white persons are interested.

1 Del. Cas. at 662.

313. *See* United States v. Burr, 25 F. Cas. 187, 193 (C.C. Va. 1807) (No. 14,694) (Marshall, C.J.) ("This rule [prohibiting admission of hearsay] as a general rule is permitted to stand, but some exceptions to it have been introduced, concerning the extent of which a difference of opinion prevails, and that difference produces the present question.").

314. Burr was on trial for a misdemeanor, charged "with beginning, with setting on foot, with preparing, and with providing the means for a military expedition to be carried on against [the dominions or territory of the king of Spain]." *Id.* at 195. Chief Justice Marshall was aware of the problems inherent in hearsay, observing, "The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed all essential to the correct administration of justice." *Id.* at 193.

315. *See* Pointer v. Texas, 380 U.S. 400, 407 (1965). This case also served as the Court's opportunity to formally apply the Confrontation Clause to the states through the Due Process Clause of the Fourteenth Amendment. *See id.* at 406.

316. *See* Foster v. California, 394 U.S. 440, 449 (1969) (Black, J., dissenting).

317. 352 U.S. 232, 239–43 (1957).

318. 391 U.S. 123, 137 (1968). *Bruton* does not apply when the statement can come in under Rule 801(d)(2)(E). *See* United States v. Alcantar, 271 F.3d 731, 739 (8th Cir. 2001).

The Court resolved an important unsettled issue in *California v. Green*, holding that although the Confrontation Clause and the Hearsay Rule had similar goals and limitations, they were not identical.[319] In other words, a statement could violate the Rule but not the Clause, or in the alternative could be admissible under the Rule but inadmissible under the Clause.[320] This case led to a series of decisions attempting to parse out the differences between the Confrontation Clause and the Rule, culminating with the Court's landmark 2004 decision in *Crawford*.[321]

After *Green*, the Court struggled to delineate a clear rule to indicate exactly what kinds of admissible hearsay statements were admissible under the Confrontation Clause. In *Ohio v. Roberts*, the Court held that hearsay evidence "absent a showing of particularized guarantees of trustworthiness" is inadmissible at criminal trials,[322] which led to a complicated and unpredictable system for determining which hearsay and nonhearsay statements violated the Confrontation Clause. In *Roberts*, the Court set forth a two-tiered analysis that automatically admits any statement covered by a "firmly rooted hearsay exception" without analysis of its "particularized guarantees of trustworthiness."[323] The circuits split on whether the coconspirator exception was considered a firmly rooted exception.[324]

B. *CRAWFORD* AND ITS PROGENY

The Court overturned *Roberts* with *Crawford v. Washington*, holding that court-determined indicia of reliability are not a substitute for actual cross-examination, and that all "testimonial" statements must be subject to cross-examination unless included on a very narrow list of exceptions.[325] The Court used a historical analysis of the Confrontation Clause and of the Rule to conclude that there is no real substitute for cross-examination in cases of testimonial hearsay, unless the declarant is legally unavailable and the defendants had an opportunity to cross-examine him previously.[326] The Court, however, made a special note of certain types of hearsay—including coconspirator statements—carving them out as "non-testimonial" by definition.[327] After *Crawford*, the next

319. 399 U.S. 149, 155 (1970).

320. *Id.* at 155–56.

321. 541 U.S. 36 (2004).

322. 448 U.S. 56, 66 (1980).

323. *Id.*

324. *See* Sanson v. United States, 467 U.S. 1264, 1265 (1984) (White, J., dissenting) (denying cert. to 727 F.2d 1112 (7th Cir. 2004)).

325. 541 U.S. at 68–69.

326. *Id.*

327. *Id.* at 55. Trial judges have noted, however, "that *Crawford* did not 'issue a mandate that *all* co-conspirator statements are to be considered non-testimonial.'" United States v. Stein, 51 05 Crim.

major Supreme Court case to interpret the clause was *Davis v. Washington*, in which the Court evaluated whether a 911 emergency call was testimonial, holding that the parts of the phone call that had been played for the jury were not testimonial because their purpose was to "address the exigency of the moment."[328] In *Whorton v. Bockting*, the Court held that the principle announced in *Crawford* was not a "watershed rul[e]," and therefore need not be applied retroactively in cases where lower courts followed *Roberts* before *Crawford* was decided.[329]

C. Application of Confrontation Clause Jurisprudence to the Coconspirator Exception

As a flood of commentary has discussed at length, *Crawford* substantially changed how American trial courts apply the Confrontation Clause to hearsay.[330] Although *Crawford* described most statements admitted under the Exception as "non-testimonial," proponents of the revisionist interpretation should remember that, first, such statements are dicta and, second, the *Crawford* Court almost surely did not consider the potential application of the Exception to lawful ventures when mentioning the Exception in passing. It is not necessary here to summarize the *Crawford* literature, only to note that the Supreme Court has in recent years become far more vigorous in protecting the Confrontation Clause rights of defendants. For example, in *Giles v. California*, the Court struck down "a provision of California law that permits admission of out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the prior statements are deemed trustworthy."[331] The *Giles* Court held that wrongdoing by the accused resulting in the unavailability of a witness forfeits the right to confrontation only when the conduct was *intended* to render the witness unavailable.[332] Last year the Court decided another case, *Melendez-Diaz v. Massachusetts*, in which the Justices held that a laboratory report prepared for use in a

888, 2007 WL 3009650, at *1 n.2 (S.D.N.Y. Oct. 15, 2007) (quoting United States v. Baines, 486 F. Supp. 2d 1288, 1300 (D.N.M. 2007)).

328. 547 U.S. 813, 828 (2006).

329. Whorton v. Bockting, 549 U.S. 406, 416–18 (2007) (alteration in original).

330. *See, e.g.*, Thomas Y. Davies, *Revisiting the Fictional Originalism in* Crawford's *"Cross-Examination Rule": A Reply to Mr. Kry*, 72 Brook. L. Rev. 557 (2007); Michael H. Graham, Crawford/Davis *"Testimonial" Interpreted, Removing the Clutter; Application Summary*, 62 U. Miami L. Rev. 811 (2008); Seigel & Weisman, *supra* note 102 (paying particular attention to *Crawford*'s effect on the Exception.).

331. 128 S. Ct. 2678, 2682 (2008). The California Court of Appeal had "concluded that [defendant] had forfeited his right to confront [a witness] because he had committed the murder for which he was on trial, and because his intentional criminal act made [the witness] unavailable to testify." *Id.*

332. *Id.* at 2688.

criminal prosecution is considered "testimonial" under *Crawford*, meaning it cannot be admitted unless its author appears in court and is subject to cross-examination.[333] It remains difficult to predict the resolution of any number of questions asked in *Crawford*'s wake. The Justices issued five separate opinions in *Giles*, and Justice Scalia accused his dissenting colleagues of implicitly seeking to overrule *Crawford*.[334] The possibility of changes in Court personnel beyond the succession of Justice Souter by Justice Sotomayor further complicates any attempt to predict how the Justices will treat any particular species of statement admitted without cross-examination.[335]

Although the odds are good that the historical Exception is safe under *Crawford*—after all, the Court said so explicitly, even if in dicta[336]—*Crawford* and its progeny have focused on the Court's interpretation of legal history, with opinions debating the state of the law in England and America hundreds of years ago.[337] Because the revisionist interpretation of the Exception so clearly defies centuries of usage, with American cases and commentaries from the early 1800s (if not earlier) stating that the Exception applies to "illegal" conspiracies, the Court may well balk if prosecutors continue to seek the expansion of Rule 801(d)(2)(E). It is not uncommon for prosecutors, or civil parties, to introduce under Rule 801(d)(2)(E) deposition testimony taken from a witness unavailable at trial.[338] Normally, statements made at a hearing

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333. 129 S. Ct. 2527, 2532 (2009). In *Briscoe v. Virginia*, No. 07-11191 (U.S. Jan. 25, 2010) (per curiam), the Court declined an opportunity to revisit the holding of *Melendez-Diaz*. *See* Transcript of Oral Argument at 50, *Briscoe*, No. 07-11191 (Justice Scalia: "Why is this case here except as an opportunity to upset *Melendez-Diaz*?"), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html.

334. 128 S. Ct. at 2680–81 (noting that Justice Scalia "delivered the opinion of the Court, except as to Part II-D-2"); *id.* at 2691 (plurality opinion) ("[T]he dissent issues a thinly veiled invitation to overrule *Crawford* and adopt an approach not much different from the regime of *Ohio v. Roberts*, under which the Court would create the exceptions that it thinks consistent with the policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood." (citation omitted)).

335. Justice Scalia wrote for a five-Justice majority in *Melendez-Diaz*, and the majority included the since-retired Justice Souter. *See* 129 S. Ct. at 2530. In *Giles*, Justice Souter wrote a separate opinion concurring in part. *See* 128 S. Ct. at 2694 (Souter, J., concurring in part).

336. *See supra* notes 167–68 and accompanying text.

337. *See, e.g.*, *Giles*, 128 S. Ct. at 2683 (going back to *Lord Morley's Case*, from 1666, in evaluating when a defendant's wrongful conduct forfeits his right to confront an absent witness); Crawford v. Washington, 541 U.S. 36, 69–70 (2004) (Rehnquist, C.J., concurring in the judgment) (citing eighteenth-century cases and treatises and concluding that the majority's "distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine" under *Ohio v. Roberts*).

338. *See, e.g.*, United States v. Holmes, 406 F.3d 337, 346–47 (5th Cir. 2005) ("Holmes contends the district court admitted the videotaped and transcribed deposition testimony of Pauline Gonzalez in contravention of his Sixth Amendment right of confrontation. The government proffered Gonzalez's deposition testimony as a co-conspirator's statement under Federal Rule of Evidence 801(d)(2)(E)...."). The alleged underlying conspiracy involved mail fraud. *Id.* at 343–44; *see also*

would qualify as archetypical "testimonial" statements and would trigger the Confrontation Clause.[339] The introduction of prior deposition testimony at a criminal trial would accordingly seem in tension with *Crawford*, despite *Crawford*'s dicta to the effect that the Exception does not concern "testimonial" statements. If the Exception were expanded to include entirely lawful conduct, thereby dubbing much of the vast universe of civil deposition testimony "not hearsay,"[340] the tension would increase considerably.[341]

Deponents testifying in the course of employment (for example, answering questions about business practices as part of discovery in a commercial dispute) would presumably be considered to speak "in furtherance" of their employer's objective. Under the revisionist position, nearly any remark made by a civil deponent who testified "on the clock," should it later become useful to a criminal prosecutor, would be admissible at subsequent criminal trials of fellow employees without any need for cross-examination of the absent deponent. Consider again Langdell, the hypothetical law journal editor accused of murder. Had his colleague Holmes been deposed in his capacity as an editor (perhaps in a case concerning a slip and fall at the journal's offices), he might have

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United States v. Hendricks, No. 95-21072, 1997 WL 304169, at *2 (5th Cir. May 15, 1997) ("The district court admitted portions of deposition testimony given by Frye and Verkin in a related bankruptcy proceeding as well as Frye's answers to interrogatories pursuant to Rule 801(d)(2)(E), as statements of co-conspirators."); United States v. Brennan, 994 F.2d 918, 927 (1st Cir. 1993): SEC v. Tome, 833 F.2d 1086, 1094–95 (2d Cir. 1987) (insider trading enforcement action); Marino v. Mayger, 118 F. App'x 393 406 (10th Cir. 2004) (attempt to use, in a civil case, hearsay deposition testimony concerning alleged illegal conspiracy).

339. *See Holmes*, 406 F.3d at 348–49 (declining to decide whether civil deposition testimony by a coconspirator was "testimonial" under *Crawford*).

340. For an example of SEC lawyers seeking, in an enforcement action, to introduce testimony from a civil proceeding, see SEC's Trial Brief and Motion Pursuant to FRE 801(d)(2)(A) and (E) to Admit Defendant Jordan's Prior Testimony into Evidence Against All Defendants, *supra* note 203, at 5–6, arguing that the underlying "common goal" of declarant and defendant need not be "an unlawful conspiracy" to justify admission of prior testimony pursuant to Rule 801(d)(2)(E) (citing United States v. Gewin, 471 F.3d 197, 200–03 (D.C. Cir. 2006)).

341. The Supreme Court would likely resolve the tension by holding that even if the Exception converts certain deposition testimony into "not hearsay," such evidence is nonetheless inadmissible under *Crawford*. The majority stated in *Melendez-Diaz* that admissibility under *Crawford* depends not on whether certain evidence fits into a hearsay exception but instead on whether it fits the Court's definition of "testimonial." *See* 129 S. Ct. 2527, 2539–40 (2009) ("Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment."); *see also id.* at 2543 (Thomas, J., concurring) ("I write separately to note that I continue to adhere to my position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part))).

testified about what editors were in the office on a certain day. Perhaps he mentioned Langdell's absence. If Langdell later claimed at his unrelated murder trial that he was in the office on the day in question, the prosecution could introduce the prior statement of Holmes—Langdell's "coconspirator" at the journal—which Holmes made "in furtherance" of the journal's operations.[342] The statement is surely testimonial, and the revisionist interpretation of the Exception would allow its admission regardless of whether Holmes is subjected to cross-examination. Whatever people had in mind when the Sixth Amendment was written and ratified, such a giant loophole in the Confrontation Clause can hardly have been imagined.[343]

Civil deposition testimony is just one category of the boundless number of statements uttered every day in furtherance of lawful joint ventures. Under the rule stated in *Gewin*, deposition statements "in furtherance" are not hearsay, and a prosecutor may introduce them at will.[344] Because the Supreme Court has not addressed the revisionist interpretation of the Exception, much less how such an enlarged exception to the Hearsay Rule would fare under *Crawford*, trial courts should be careful to avoid infecting their proceedings with constitutional error.[345] The revisionist position is bad enough as a matter of history and of policy. The potential for constitutional violations only bolsters the case against such a radical revision of the rules of evidence.

The new *Crawford* regime also highlights how implausible the revisionist argument becomes when suggesting that the authors of the Federal Rules of Evidence meant to apply the Exception to lawful ventures not previously considered "conspiracies." In the 1970s and early 1980s, a circuit split arose concerning the application of the

342. Because Langdell would have had no motive to cross-examine Holmes at the time of the deposition, the normal hearsay exception for former testimony, FED. R. EVID. 804(b)(1), would not apply.

343. Again, I expect the Supreme Court would reject the admission of such deposition testimony regardless of how it construes Rule 801(d)(2)(E). *See supra* note 341. The likely rejection under *Crawford* of sworn testimony that might fall within the revisionist interpretation of the Exception further illustrates the odd nature of the proposed revision. If the Exception applies to lawful joint ventures, then casual remarks made in furtherance of a normal business would be admissible as "not hearsay" with no Confrontation Clause problems, *see, e.g.*, *infra* note 356 and accompanying text, but sworn deposition testimony concerning a commercial dispute—which one would expect to be far more reliable than water cooler chatter—would be a form of "not hearsay" barred by *Crawford* from admission at criminal trials. Perhaps this possibility says more about *Crawford* than about the revisionists.

344. *See* 471 F.3d 197, 200–02 (D.C. Cir. 2006).

345. Even if the Supreme Court does not decide that the revisionist version of the Exception violates the Constitution, it could of course simply reject it as an inaccurate statement of the Federal Rules of Evidence. Either way, defendants convicted after the introduction of improper evidence would have grounds for appeal.

Confrontation Clause to coconspirator hearsay.[346] With courts debating whether coconspirator statements possess the "indicia of reliability" required by *Dutton* and *Green*, and commentators worrying that the Confrontation Clause decisions then in force might provide too little protection against admission of unreliable coconspirator hearsay,[347] it is highly unlikely that the Advisory Committee would have neglected to note, even in passing, an expansion of the Exception to include statements in furtherance of lawful combinations. In particular, courts evaluating whether the Exception was "firmly rooted" for purposes of *Roberts*[348] ought to have struggled with the question of whether "joint venturer hearsay" had deep roots in American constitutional soil, if any litigant had been bold enough to introduce such evidence. Instead, some judges noted explicitly that coconspirator hearsay was not inherently reliable but was admissible instead "because of the legal fiction that each conspirator is an agent of the other and that the statements of one can therefore be attributable to all. In effect, the Rules have adopted the agency rationale, although the framers recognized that this theory is 'at best a fiction.'"[349] These judges recognized that, contrary to the revisionist position that the Exception applies to lawful ventures, Rule 801(d)(2)(E) exists specifically to cover the statements of lawbreakers. Whereas the principal-agent exception codified at Rule 801(d)(2)(D) is limited to only certain statements made in furtherance of legitimate enterprises,[350] the Coconspirator Exception lacks those limitations precisely because it covers the statements of those who have agreed to conduct illegal activities.[351]

Under the revisionist position, by contrast, the principal-agent exception might as well be stricken from the Rules of Evidence. Rule 801(d)(2)(D) allows the admission of a "statement . . . offered against a party . . . [made] by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." If the Coconspirator Exception covers all

346. *See supra* notes 322–24 and accompanying text; *see also* United States v. Wright, 588 F.2d 31, 37–38 (2d Cir. 1978).

347. *See* Davenport, *supra* note 270. As readers will expect by this point, Davenport's analysis concerns *unlawful* conspiracies. *See id.*

348. *See, e.g.*, United States v. Ammar, 714 F.2d 238, 254–57 (3d Cir. 1983); United States v. Peacock, 654 F.2d 339, 349–50 (5th Cir. 1981).

349. *Ammar*, 714 F.2d at 255–56 (citation omitted) (quoting FED. R. EVID. 801(d)(2)(E) advisory committee's note); *see also* United States v. Goldberg, 105 F.3d 770, 775–76 (1st Cir. 1997); United States v. Morrow, 39 F.3d 1228, 1235 (1st Cir. 1994); United States v. Fielding, 645 F.2d 719, 725–26 & n.13 (9th Cir. 1981).

350. *See supra* notes 114, 274–78 and accompanying text.

351. *Ammar*, 714 F.2d at 256 (listing, among other factors determining if a coconspirator statement is reliable for purposes of *Roberts*, "whether the declarant had personal knowledge of the identity and role of the participants in the *crime*" (emphasis added) (quoting United States v. Perez, 658 F.2d 654, 661 (9th Cir. 1981))).

statements made in furtherance of and during the pendency of any joint undertaking, whether lawful or unlawful, nearly every statement admissible under the principal-agent exception would also be covered by the Coconspirator Exception. The only statements admissible exclusively under Rule 801(d)(2)(D) would be utterances of agents or employees that (1) concern "a matter within the scope of the agency or employment," (2) are "made during the existence of the [agency or employment] relationship," yet (3) are not "in the scope of" the relationship's common goal. This is not a null set; employees can certainly make statements about their work that are not within their assigned duties but would nonetheless be relevant to litigation. Regardless, I believe the drafters of the Federal Rules would be surprised to see the principal-agent exception construed to have so narrow a purpose, particularly because the Advisory Committee affirmatively chose to expand the scope of this particular class of admissions.[352]

D. The Threat to Civil Litigation—A Discovery Nightmare

In addition to creating tension with the Confrontation Clause if applied in criminal trials, the revisionist interpretation poses a serious threat to civil litigation. Because the Exception applies in civil as well as criminal cases, the revisionist interpretation would allow civil parties to introduce statements uttered by any declarant in furtherance of any "joint venture" with another party to litigation. Imagine a complex lawsuit among corporate giants Alpha Corp. and Beta Corp. Already, many statements made at work by Alpha and Beta employees would be "party admissions" and therefore admissible even if hearsay.[353] Similarly, certain corporate records would be admissible if produced in the ordinary course of business.[354] The party admission exception, however, applies only to employees of the party against whom the evidence is offered; it does not apply to other parties, much less to entities uninvolved in the lawsuit.[355] Let us now imagine that prior to the filing of Alpha's suit against Beta, while the acts and omissions giving rise to the litigation were ongoing, Beta participated in a joint venture with Gamma, Inc., a relationship that ended with accusations of incompetence flying in all directions. During the pendency of the venture, Gamma

352. *See* Fed. R. Evid. 801(d)(2)(D) advisory committee's note (justifying expansion on ground that although "tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency," the "loss of valuable and helpful evidence" had increasingly led to a "trend [that] favors admitting statements related to a matter within the scope of the agency or employment" even when the speaker was not "acting in the scope of his employment").

353. *See* Fed. R. Evid. 801(d)(2)(D).

354. *See id.* R. 803(6) ("Records of regularly conducted activity.").

355. *See id.* R. 801(d)(2).

employees made a variety of statements that depict Beta in a negative way. At the Alpha-Beta trial, hearsay statements by Gamma employees would not be admissible against Beta under Rule 801(d)(2)(D) because the Gamma employees are "servants" of Gamma, not Beta. An enterprising Alpha attorney might then turn to Rule 801(d)(2)(E), arguing that certain statements by Gamma are "by a coconspirator of a party [Beta] during the course and in furtherance of the conspiracy." If lawful joint ventures satisfy the Exception, then any Gamma statements "in furtherance of" the Beta-Gamma project would be admissible against Beta. If the Gamma CEO said to her general counsel, "Those Beta guys are a bunch of chumps who are giving Alpha Corp. total junk, so we need to watch them extra carefully during this project," the statement would clearly be "in furtherance" of the venture.[356] Even if the Gamma CEO is not available to testify at the Alpha-Beta trial, the Gamma GC could be deposed—with accompanying expense and inconvenience—about the CEO's statements. Alpha could then introduce those statements to prove what the CEO asserted, "Those Beta guys are a bunch of chumps who are giving Alpha Corp. total junk."[357]

If this theory prevails, diligent corporate counsel would have the duty to investigate what unflattering hearsay might be admissible against corporate defendants under the new understanding of the Exception. After all, the universe of newly-admissible evidence would hardly be confined to statements by Gamma, Inc. If Beta had relationships with Delta Corp. and Epsilon Corp., then Alpha attorneys would be wise to contact Delta and Epsilon employees to see what might have been said in furtherance of those ventures. Beta's attorneys, knowing what Alpha has in mind, would naturally reach out to Delta and Epsilon too. One or another of the parties would soon enough transmit a third-party discovery request to counsel for Gamma, Delta, and Epsilon, seeking records of statements in furtherance of Beta-related ventures. Custodians of such records, in addition to whoever said or wrote the statements recorded, would become prime candidates for interrogatories and depositions. Further, third-party corporations would not be the only entities whose records might contain valuable "coconspirator" statements. While courts have held that Rule 801(d)(2)(D) does not allow criminal defendants to introduce hearsay statements made by

356. Badmouthing one's coventurers would be "in furtherance" of the venture in that it would encourage vigilance and could ferret out bad members of the venture. For a concrete example, see *infra* notes 363–73 and accompanying text (discussing *Miller v. Holzmann*).

357. If the revisionist interpretation of the Exception prevails, one can only hope that trial judges will reject many statements made in furtherance of ordinary businesses pursuant to Rule 403, which provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

government agents in furtherance of their work,[358] with reasoning that would likely apply to Rule 801(d)(2)(E) even if the revisionist position were adopted, civil litigation is a different matter. When a government agent is sued in her personal capacity,[359] the revisionist interpretation of the Exception would allow the admission against the agent of statements by government employees in furtherance of their work,[360] even statements made before the agent began her employment.[361]

In addition to inspiring the hypothetical examples presented above, the rule set forth in *Gewin* has already infected civil litigation.[362] In *Miller v. Holzmann*, a relator brought a *qui tam* action[363] alleging fraud against the United States, claiming that companies hired to perform American-funded construction projects in Egypt had engaged in a broad "bid-rigging" conspiracy.[364] The contract at issue, known as Contract 20A, "was awarded to a Joint Venture between Defendants Harbert International, Inc. and J.A. Jones Construction Company, [and] was valued at over $100 million."[365] Richard Miller, the relator, was a former Vice President and Treasurer of J.A. Jones, Inc., the parent company of Defendant J.A. Jones Construction Company.[366] Upon hearing "that every U.S. contractor that was prequalified to do USAID work in Cairo was a member of a club that had been set up and met in Frankfurt to essentially setup or rig the bids," Miller informed his boss, Jones President Charles Davidson, who "advised Miller that he would inform Johnie Jones, CEO of parent company J.A. Jones, Inc."[367] When Miller testified at trial about Davidson's statement, Harbert objected to the testimony as hearsay.[368] Neither Miller nor Davidson was in on the fraud; their only "joint venture" was the construction contract.[369] Harbert also objected to the admission of statements by other innocent J.A. Jones employees, including one who recounted what he heard about someone

358. *See* Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 402–03 (2002).

359. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389–90 (1971).

360. The theory would be that the defendant agent was in a "conspiracy" with the employee declarants, a conspiracy to perform the lawful task of operating a government agency.

361. *See supra* note 277.

362. The case discussed here is the "other outlier" mentioned in the discussion of the survey results. *See supra* notes 255–56 and accompanying text.

363. In a *qui tam* action, the plaintiff (called the "relator") sues on behalf of the United States. If the suit succeeds, the relator gets a share of the government's recovery. *See generally* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768–69 & n.1, 772 (2000).

364. *See* Miller v. Holzmann, 563 F. Supp. 2d 54, 73–75 (D.D.C. 2008).

365. *See* Relator's Fifth Amended Complaint for False Claims Act Violations & Demand for Jury Trial ¶ 1, United States *ex rel.* Miller v. Bill Harbert Int'l Constr., Inc., 563 F. Supp. 2d 54 (D.D.C. 2008) (No. 1:95-CV-1231), 2007 WL 4705249.

366. *Id.* ¶ 4.

367. *Miller*, 563 F. Supp. 2d at 86.

368. *Id.*

369. *Id.*

"paying other contractors to refrain from bidding."[370] The District Court, finding that Davidson's statement was in furtherance of "the joint venture [which] would [benefit] from uncovering any illegality among its activities," admitted the statements pursuant to Rule 801(d)(2)(E).[371] The District Court also addressed the defendants' objection to the interpretation of the Exception provided in *Gewin*: "[Defendants] contend *Gewin* 'is contrary to the plain language of Rule 801(d)(2)(E) and Supreme Court precedent.' Whatever else it may be, however, *Gewin* is binding precedent to which this Court must adhere."[372] Accordingly, the District Court admitted out-of-court statements made in furtherance of a lawful objective, the construction of Cairo's sewers, pursuant to the Exception.[373]

Statements like those admitted in *Miller* are not within the traditional scope of the Exception. As the trial judge acknowledged, "Rule [801(d)(2)(E)] exempts statements of a party's co-conspirators during the course and in furtherance of the conspiracy, when they are offered against the party. *Gewin* extends the exception to joint venturers' statements during and in furtherance of the joint venture."[374] This hearsay has no place in American trials, yet civil litigators providing zealous advocacy will continue offering it so long as *Gewin* remains the law of the Circuit. In addition, until other courts—or perhaps Congress—explicitly reject the revisionist interpretation, litigators and prosecutors will continue their efforts to bring the *Gewin* rule to other circuits.[375]

CONCLUSION

Centuries of practice in England and America produced an exception to the Hearsay Rule covering statements by a party's coconspirator made during and in furtherance of joint illegal activity. The definition and scope of the Coconspirator Exception cohered by the nineteenth century, with early American treatises and cases using materially identical language to describe what hearsay it would allow into

370. *Id.* at 87–88 (noting report was made in reply to a "query about a large and seemingly inexplicable payment"); *see* Reply of Harbert International, Inc. & Harbert Corp. in Support of Their Motion for a New Trial as to All Claims at 10–13, *United States ex rel. Miller*, 563 F. Supp. 2d 54 (No. 1:95-CV-1231), 2007 WL 4702300. The statements would be admissible against J.A. Jones under the principal-agent exception or as party admissions. The plaintiff could use them against Harbert only if statements by Davidson and other Jones employees, who were lawful participants in Contract 20A, were admissible not only against their employer but also against all participants in the joint venture.

371. *Miller*, 563 F. Supp. 2d at 86–87.

372. *Id.* at 86 n.29 (citation omitted).

373. *See id.* at 73.

374. *Id.* at 85 n.28 (citation omitted).

375. *See supra* note 203 and accompanying text. It is possible that this Article will convince prosecutors and litigators to cease their revisionist efforts. Judicial decisions would likely provide valuable additional encouragement.

evidence. Over the past few decades, however, revisionists have advocated expanding the Exception to include statements made in furtherance of lawful "joint ventures," arguing that Federal Rule of Evidence 801(d)(2)(E), and the common law rule of evidence on which it was based, have always covered such statements. In dicta, and occasional holdings, some courts have accepted the revisionist theory. Courts—or Congress, should it prove necessary—must reject this radical alteration of the Exception. Indeed, prosecutors should immediately stop advocating the "joint venture" theory lest they taint otherwise sound prosecutions with improper evidence.

The revisionist interpretation would worsen a rule with an already-weak theoretical basis. Revisionist arguments often misconstrue court precedents, and they nearly always include inaccurate legal history. Applying the Exception to lawful joint undertakings, by abrogating the Federal Rules of Evidence, would permit the admission of unreliable evidence now soundly rejected by the Hearsay Rule, and it would burden civil litigation with needless additional discovery. As the survey recounted in Part III demonstrates, in actual practice the federal courts have limited the Exception to statements made in furtherance of unlawful objectives. This policy should be celebrated, and courts should continue doing what they have done, irrespective of invitations in dicta—and the rare holding—to revise a settled rule in contradiction of history and common sense.

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