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1992

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Of Hearsay and Its Analogues

Mirjan Damaška*

INTRODUCTION

A witness reproduces a previously made probative statement in court. A letter submitted to the court describes an individual's observation of facts to be proved. In both situations, the means of proof—the witness and the letter—draw their probative validity from an ulterior informational source. In this sense they are derivative means of proof.[1] That the use of such informational sources is potentially dangerous to accurate factfinding is an old insight, shared by a great variety of adjudicative systems, past and present, regardless of whether they embraced an encompassing hearsay concept. The Anglo-American hearsay rule, often hailed as a unique flower from the common law garden, is only one of many reactions to this ancient insight, a reaction animated by a heightened sensitivity to second-hand information. This reaction is thrown into sharp relief when it is contrasted with the continental European response to the problem of derivative information. This paper's task is to contrast Anglo-American and European treatment of derivative means of proof and thus to contribute to self-understanding.

Part I examines several features of traditional continental institutions that conditioned indigenous attitudes to derivative information. At the time hearsay doctrines congealed in England, these features were conspicuously absent from the English machinery of justice. The two contrasting institutional environments, when carefully examined, reveal several factors that nourished and sustained adjudicative systems' traditional attitudes to second-hand information. Part II describes the treatment of derivative proof in Roman-canon law of evidence.

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1. I speak of "means of proof" to emphasize that my theme focuses on sources of information rather than on information itself. It is concerned with the reliability of certain messengers rather than with the relevancy (or probative force) of their messages. As the term "evidence" relates both to information and its sources, it may in some contexts inject a degree of confusion.

This law beamed a radiance throughout Europe, and was gradually adopted—*mutatis mutandis*—by most continental jurisdictions. The rejection of this law in the late eighteenth and the nineteenth centuries heavily influenced continental evidentiary thinking.

Part III searches for analogues to the Anglo-American hearsay rule in the contemporary setting and discovers an embarrassment of riches. Since the collapse of the Roman-canon system, continental jurisdictions no longer have a common approach to derivative evidence: even in criminal cases, where the sensitivity to second-hand information is quite similar, the range of reactions to derivative proof is now very broad. Nevertheless, Part III draws a few generalizations from the most frequent continental responses. These generalizations are especially poignant if scholars observe the continental panorama from the distant Anglo-American perspective: habits of thought acquired by the rejection of Roman-canon proof and the perduring similarity of procedural institutions still exert a degree of unifying influence. Discussion in this part is quite general; no more than surveyor's contours are offered of a lush and varied legal landscape.

To compensate for this generality and to supply details for a sharper contrast with hearsay doctrines, Part IV focuses on the law of a single continental jurisdiction. Germany serves as an example of the continental approach. In German jurisprudence, problems of derivative proof were subjected to most penetrating analysis, and the fruits of this analysis were widely disseminated in Europe and beyond. Finally, the Conclusion reexamines institutional pressures that generated the Anglo-American law's comparatively strong distaste for hearsay. Most of these pressures have lost their force in our time. As a result, traditional attitudes regarding hearsay are shifting: old doctrines are increasingly challenged and proponents of the hearsay doctrine seek new justifications for strictures against the use of derivative information. The paper closes with a few remarks on the resulting efforts to reform the law of hearsay.

I. PROCEDURAL ENVIRONMENT

A. UNITARY VERSUS BIFURCATED TRIAL COURT

Because continental factfinders are mostly professional career judges, little danger exists that laymen will over-value the probative force of derivative information. Those who maintain that the Anglo-American hearsay rule is the product of jury

distrust might thus be tempted to think that there are no compelling reasons for strictures against derivative proof on the Continent. Yet, as soon as the Church of Rome fashioned the traditional continental machinery of justice, restrictions on the use of second-hand information appeared. They can still be found—in one form or another—in most continental jurisdictions. Consequently, whatever role distrust of lay adjudicators may have played in the genesis of the Anglo-American hearsay rule, the origin of its continental analogues cannot be traced to fears that amateur factfinders might be mislead by second-hand knowledge.

Another feature of the continental court, however, a feature independent of the factfinders' attributes, significantly influenced the native treatment of derivative proof. Even when lay persons sit on continental trial courts, which happens more often in criminal than in civil cases, there is very little division of responsibility between amateur and professional decision makers. Unlike Anglo-American adjudicative procedure, where the judge decides some issues outside the hearing of the jury, continental lay judges are not isolated acoustically from their professional colleagues: laypersons and professionals jointly decide questions of facts and law. This "unitary" character of the adjudicative body makes the exclusion of derivative proof less practicable than it is in the bifurcated Anglo-American court.

Admittedly, to the extent that inadmissible evidence is excluded before the trial, and trial judges remain ignorant of it, there is no difference between the two institutional settings. However, the derivative nature of information cannot always be ascertained at the early stages of the process. Where the need for screening information arises at the trial, the difference between bifurcated and unitary decision making is highly significant.[2] In a unitary court, a judge cannot keep inadmissible hearsay from the factfinder by a preliminary ruling; the same persons decide the admissibility of evidence and the weight it deserves. If the exclusionary option is exercised in this milieu, factfinders must regularly be warned to ignore information

2. Continental lawyers often discuss the difficulty in their procedural system of identifying hearsay before it has reached the factfinder. *See* H.A. Hammelman, *Hearsay Evidence, A Comparison*, 67 LAW Q. REV. 67, 77 (1951). This difficulty is compounded by the standard continental technique of taking testimony: only after a witness first presents a narrative account of what he or she knows is the witness subject to questioning. The narrative account, of course, may bristle with second-hand knowledge.

that they would otherwise find highly persuasive. Inevitably, exclusionary rules acquire a more pronounced aura of psychological unreality.[3] Accordingly, if a continental jurisdiction chooses to exclude second-hand information, it must be regularly prepared to require its adjudicators to reason in ways distinct from ordinary models of cognition.[4]

B. EPISODIC VERSUS ONE-SHOT PROCEEDINGS

In Anglo-American law, during the period in which hearsay doctrines were formed, trials were not systematically prepared, and no mechanisms for appellate review existed.[5] On the Continent, on the other hand, the "decisive hearing" (trial) was merely one stage in an ongoing sequence that included thorough pre-trial preparation of evidentiary material as well as regular post-trial review of factual findings. Even the "trial" itself was not a continuous affair: it unfolded in phases during which evidence was gradually assembled and examined. Continental adjudication is still characterized by this piecemeal style, especially in civil cases.[6]

The contrast between continuous and episodic proceedings helps to explain the divergent continental and Anglo-American reactions to derivative proof. The unhurried environment of continental litigation illustrates the connection. If a witness reproduces an out-of-court statement in this environment, or if a document contains such a statement, there is usually enough time for the factfinder to seek out the original declarant for

3. Looming large in theory, this difference diminishes in practice. In a variety of circumstances, Anglo-American jurors are also exposed to inadmissible hearsay and are required by judicial instruction to "unbite" the apple of knowledge.

4. Obeying the law's demand that inadmissible information be expunged from the mind may require factfinders to disregard their actual credal states. A fragmented mental process is postulated in which zero weight is assigned to a specified item of information. *See* Mirjan Damaška, *Atomistic and Holistic Evaluation of Evidence, in* COMPARATIVE AND PRIVATE INTERNATIONAL LAW, ESSAYS IN HONOR OF JOHN MERRYMAN 91, 93 (David S. Clark ed., 1990).

5. On the criminal side, only a moderate degree of methodical preparation was injected by the justices of the peace. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial*, 50 U. CHI. L. REV. 1, 56-57, 115, 133 (1983). In the civil process, the preparatory stages (pleadings) were concerned with the formation of issues rather than with the search for material to resolve them. Regular avenues of appeal were opened only at the turn of the century, but with very limited opportunity for the appellant to attack the verdict for insufficiency of evidence.

6. For a portrayal of this "installment" style in civil cases, see RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 434-41 (5th ed. 1988).

production in court at the next phase in proceedings. If the declarant's testimony deviates from that of the hearsay witness, the factfinder can hear them both in court and evaluate their credibility.[7] Even if the declarant is unavailable, there is sufficient time before the next stage of the lawsuit to collect information to gauge the trustworthiness of the out-of-court declaration. In short, a relatively lenient approach to the use of derivative proof is possible in episodic proceedings. This approach prevailed in continental administration of justice when attitudes toward derivative proof were being shaped.

Several centuries later, the temporally compressed and scantilly prepared English trial favored the formation of a different attitude to hearsay. If second-hand information were freely admissible, the affected party would seldom have enough time to track down and produce the original declarant in court.[8] Adjournments could provide this opportunity, of course, but the practical difficulties of reconvening the jury militated against the resulting interruptions of the trial. The "day-in-court" model of traditional common law justice was thus one of the factors that made the exclusion of hearsay appear attractive to eighteenth-century English judges.

Another factor was the absence of regular mechanisms for reviewing factual findings. Since the quality of verdicts could not be checked ex post, the English system was driven to exercise great caution in admitting "second-class" evidence—including various forms of derivative proof—at the trial. The context in which the screening of evidence took place was also important for the treatment of derivative proof. Because judges ruled on admissibility while proof-taking was in progress, they were in no position to evaluate the reliability of second-hand sources of information in the light of all other evidence in the case. The probative value of hearsay was thus determined in relative isolation from other evidence, as a small pebble in a large, partially unknown mosaic.[9] On the Continent, in con-

7. Because of the relatively informal continental style of adducing evidence, the hearsay witness and the declarant can even be confronted. *See infra* note 19 and accompanying text. *See also* LLOYD L. WEINREB, DENIAL OF JUSTICE 111, 142 (1977) (arguing for an alternative trial procedure which, in addition to allowing defendants the opportunity to confront witnesses testifying against them, would also allow witnesses to confront each other).

8. Had continental justice been equally compressed, a similar problem would have arisen: the judge (rather than a party) would have no time to locate the original declarant.

9. A good example of this "pointillistic" technique is the use of catch-all hearsay exceptions under American Federal Rules of Evidence. Prior to hear-

trast, comprehensive appellate review was embraced as early as the twelfth century. It provided an opportunity for higher judges to verify the propriety of verdicts, and reduced the importance of selectivity in choosing sources of information in trial courts. As a result, continental factfinders were not required to use only "first-class" evidence. Moreover, in assessing the validity of hearsay, they could check whether it was corroborated by other evidence.

In more recent times, the contrast between the continental and the Anglo-American procedural styles has diffused: continental justice has abandoned the extremes of episodic style, and Anglo-American trials are no longer "one-shot" affairs. Mechanisms of mutual discovery and various pre-trial motions now permit thorough trial preparation even in common law procedures, and this preparation can include, of course, a search for the original declarant. But while the "day-in-court" type of trial no longer justifies the prima facie exclusion of hearsay, it still has explanatory value. Habits of thought associated with the temporally compressed model of trial have not completely disappeared from Anglo-American jurisdictions.[10] The weakening of this model may also help to explain why contemporary attitudes toward hearsay have relaxed to the point that the erosion of inherited doctrines is now possible.

C. Official versus Partisan Evidence Processing

Anglo-American and continental responses to derivative proof are also influenced by the allocation of control over factfinding activities. While parties are in charge of these activities in Anglo-American procedure, continental systems obligate the judge (or some other official) to take control of both pre-trial evidence gathering and its development at trial.[11] The manifold implications of this contrast elude internal vision (the eye cannot truly examine itself) because the familiar is taken

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ing all the evidence in the case, the judge must determine whether a particular hearsay item possesses sufficient guarantees of trustworthiness to be admissible.

10. Thus, for example, judges are reluctant to adjourn if surprise occurs at the trial and a party wants to investigate a matter.

11. It is worth noting that this variance is analytically and historically independent from the factfinder's profile; sometimes professional judges decide (where proof-taking is controlled by the litigants), and sometimes lay adjudicators decide (where proof-taking is in the hands of a career judge). The former is exemplified by the Anglo-American bench trial and the latter by the post-revolutionary French *Cour d'assises*.

for granted. When scholars observe domestic arrangements from an external perspective, however, these implications come clearly into view.

In the Anglo-American factfinding process, each party seeks its own evidentiary material, sifts it, prepares it, and uses it in a manner that best advances its tactical interests. This arrangement creates a characteristic bipolar tension field in which there is little undistributed middle. Witnesses are readily associated with one of the litigants, especially if they are tutored by one party's counsel.[12] Means of proof are not seen as "neutral" sources of information, "detached" from the party's interests. The sense that evidence somehow "belongs" to one of the litigants is stronger than in those systems where party's counsel are less involved with the development of evidence.

In this "bipolar" procedural environment the concern with distortion or even fabrication of testimony, which is present in any administration of justice, is greatly exacerbated. As a result, our system recognizes that it is a matter of paramount importance that each party have an opportunity vigorously to challenge proof presented by the other side. Evidence that cannot vigorously be tested by the adversary is flawed, and is likely to be found inappropriate for courtroom use.[13]

How does all this contribute to the malaise about derivative proof? Consider first how difficult it is for a party effectively to test a hearsay witness who is associated with the adversary. A witness who lies about an extrajudicial statement can simply insist, when challenged, that his or her hearing is good. If the witness lies about a visual event, however, the lie must be woven into the fabric of a coherent story, making the exposure of falsehood more likely.[14] More important, the out-of-court declarant, whose utterance the hearsay witness reproduces, es-

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12. Even in England, where "coaching" is disapproved, direct examination is rarely conducted without prior interviews of witnesses by the solicitor. *See* CROSS ON EVIDENCE 248 (6th ed. 1985). In America, where the preparation of witnesses is more acceptable, it has often been noted how readily witnesses identify with the party calling them to the stand. *See, e.g.*, WEINREB, supra note 7, at 99; Blair Sheppard & Neil Vidmar, *Adversary Pretrial Procedures and Testimonial Evidence*, 39 J. PERSONALITY & SOC. PSYCHOL. 320 (1980).

13. The problem of what to do with direct testimony if the witness becomes unavailable for cross-examination, or refuses to be cross-examined, is quite distinctively Anglo-American. *See* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 19, at 48-49 (3d ed. 1984).

14. *See* RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 353-54 (2d ed. 1982). Admittedly, the same problem ex-

capes cross-examination. The party opposing the evidence can thus plausibly depict the out-of-court declarant as an ally of his or her adversary, an ally that cannot be impeached. As reliance on enemies who hide behind other people can easily tip the balance of advantages in an adversarial contest, the reluctance to use hearsay in an adversarial system is closely associated with considerations of fairness.[15]

Another source of heightened sensibility to hearsay in adversarial proceedings, however, is resolutely epistemic. As the litigants decide what evidence will be presented in court, the party's selection of means of proof is governed by the desire to win. Eager to advance their cause, the parties (or their lawyers) may be driven to use derivative evidence even where epistemically superior original information is readily available. (A hearsay witness may sometimes be more likely to impress the factfinder than the original declarant). Independent of fairness considerations, then, strictures against derivative sources become a means by which the court can pressure litigants to employ the epistemically optimal means of proof.[16] To be sure, officials in charge of non-adversarial factfinding may also be tempted, albeit for different reasons, to use derivative evidence in lieu of original proof. Such officials are less likely, however, to require incentives for the proper selection of informational sources than are parties fueled by partisan self-interest.

In continental procedure the pre-trial collection of evidence is the responsibility of the judge or some other official. Lawyers conduct few factual investigations on their own; the system disfavors contacts between attorneys and prospective witnesses.[17] If revealed, these contacts tend to decrease the credibility of the resulting testimony.[18] "Coaching" of witnesses is dangerously close to "tampering" with evidence. The parties, or their lawyers, nominate witnesses and suggest other means of proof, but when the court "accepts" these means of

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ists in less adversarial procedures as well, but witnesses in these settings are less readily identified with the litigants.

15. It is no wonder that where arguments of fairness do not apply, second-hand information may be admissible even if its reliability does not exceed that of inadmissible hearsay. Admissions of the party opponent are a telling example in point.

16. This is the *leitmotif* of Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988).

17. In some countries contacts with prospective witnesses are a breach of legal ethics. *See* SCHLESINGER ET AL., *supra* note 6, at 423 & n.19.

18. *See* Hein Kötz, *Civil Litigation and the Public Interest*, 1 CIV. JUST. Q. 237, 241 (1982).

proof, they are not assigned to one side or the other. Rather, the evidence becomes the court's information, to be tapped in a non-partisan fashion. Under the prevailing continental trial practice, the presiding judge first invites witnesses to present a narrative account, and then questions them extensively from the bench. Parties can address questions to witnesses only after the judge's interrogation has been completed.[19] This interrogation technique (without direct examination by a party) decreases the need for lawyers to contact and interview witnesses in advance of the trial. Because continental witnesses are not assigned to one side or the other, the examination of evidence is a single integrative enterprise without a formal order of proof. Absent is the fission of evidence presentation into "two cases," each orchestrated by a party's lawyer. As a result, the court can acquire information in the sequence most congenial to the cognitive needs of its members. For example, witnesses offered by different parties can be examined back-to-back, and if their testimony conflicts they can be asked informally to confront one another.

It seems plain that under the arrangement just described proof is less readily identified with the litigants than in a setting where parties themselves select the methods of proof. Because sources of information appear more "neutral," the credibility of witnesses is not tested as aggressively on the Continent as in Anglo-American courtrooms.[20] The threat of one-sided testimonial distortions seems less immediate, and the perceived need to subject all evidence to vigorous challenge is less compelling. The continental system's treatment of derivative proof is immediately affected by this difference. Since hearsay witnesses are less readily associated with the litigants, the party's inability to challenge them as effectively as eye-witnesses is not as serious a drawback as it is in an adversarial framework. The party's inability to subject the original declarant to courtroom testing is also less troubling because the origi-

19. Sweden and Spain combine a variant of examination by the parties with retention of narrative accounts by witnesses. Italy is the latest convert to a variant of direct and cross-examination, but only for criminal cases. *See* CODICE DI PROCEDURA PENALE arts. 496-98 (Italy 1988).

20. *See, e.g.*, Benjamin Kaplan et al., *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1236 (1958). It is worth noting, however, that the paucity of vigorous testing at a particular hearing can be deceptive. Extensive pretrial proceedings and prior installments of the trial offer many opportunities for both officials and litigants to check the reliability of information and challenge witnesses.

nal declarant is not as likely to be seen as an "unreacheable enemy" as he is in the partisan *mis-en-scène*.

Thus, continental attitudes to derivative proof were shaped by the confluence of factors pertaining to the structure of the tribunal, the episodic style of proceedings, and control over factfinding. As a result of the synergetic operation of these factors, the weaknesses of derivative proof and the best hygiene for combatting them are still seen on the Continent in a somewhat different light than in Anglo-American countries. Qualms about the use of second-hand information are less pronounced. Also, the exclusionary option is a much less attractive response to the problems of derivative proof than in common law systems: the ease with which appellate courts can review the quality of factfinding on the Continent renders the removal of second-hand knowledge from the factfinder's data-base less important, and the unitary nature of the continental court makes this removal more difficult. Because the continental court controls the selection of evidence, the prima facie rejection of derivative proof is less necessary than it is in the Anglo-American setting where it serves as an inducement to parties to use optimal sources of information.

II. THE ROMAN-CANON APPROACH

A. THE FOUNDATIONS

In the twilight of the Middle Ages, several centuries before English judges articulated the hearsay rule, strictures against derivative proof appeared in Roman-canon administration of justice. They were part of an elaborate evidentiary system, a normative edifice created and reared by ingenuous legal scholarship.[21] Among sources of cognition recognized by the scholarly architects of this system, the most important was the judge's personal sensory perception of relevant facts. Since this most desirable path to knowledge was seldom open, however, the attention of the scholars focused on "intermediaries" who were required to convey to the judge what they personally observed about the facts to be proved. If the intermediaries merely related to the court observations of other people, they

21. Original work on the proof-system was largely completed as early as the 13th century. The system was rich in temporal and regional variations, but its most sophisticated form emerged in Italy during the Renaissance. In depicting this variant, I draw heavily on my study, *Hearsay in Cinquecento Italy*, *in* STUDI IN ONORE DI VITTORIO DENTI (Michele Taruffo ed., forthcoming 1992).

were not "truly" witnesses.[22] From their testimony, the judge could acquire only an "indirect indication" of the truth as revealed by the senses. Rather than giving credence to the carriers of such "indirect indications" of *veritas sensus*, Roman-canon authorities required the judge to seek the prime source of the intermediary's information and obtain his or her statement under oath.[23] Thus, whatever the prevailing theories of the time may have been on the ultimate sources of knowledge, the intellectual underpinnings of the Roman-canon proof systems were decisively proto-empirical.[24]

When a witness testified in court, Roman-canon scholars argued, the oath and the "awe-inspiring" presence of the judge increased the testimony's reliability.[25] A judge, upon observing a witness's blushing and similar indications of falsity, could confront the witness with others offering conflicting testimony.[26] These guarantees of testimonial accuracy disappeared, however, if the judge relied on the "dead voice" of a writing or accepted a witness's retelling of someone else's out-of-court utterances. Roman-canon scholars believed that relying on such testimony was analogous to trusting "a copy more than the original."[27] In

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22. *See* PROSPERO FARINACCI, TRACTATUS INTEGER DE TESTIBUS, titulus VII, questio 69, no. 7 (Osnabrugi (Osnabrück), Johannus Georgius Schwänder 1678). The treatise of this famous Roman lawyer (1554-1618) remained a crowded junction of reference to Roman-canon proof until it fell from grace.

23. *Id.* at titulus VII, questio 69, no. 5 (relying on Baldus de Ubaldis (1320-1400)).

24. The emphasis of Roman-canon scholars on reports of sensory perception should not be taken to mean that the founders of Roman-canon proof system did not recognize the value of reasoning or inference from observed data. The view of Bartolus de Saxoferrato (1314-1357) was widely accepted: the judge could attain the same degree of conviction (*credulitas*) either by sensual perception or by argumentation. *See* W. Ullmann, *Medieval Principles of Evidence*, 62 LAW Q. REV. 77, 86-87 (1946). Only in criminal cases, and then only if the judge contemplated imposing the death penalty, did the opinion prevail that conviction could not be predicated on circumstantial evidence. Even on this issue there were dissenting voices. *See, e.g.*, 1 PROSPERO FARINACCI, CONSILIA, consilium 60 note k (Lugduni (Lyon), Horatius Cardon 1610) (endnote of Famiano Centolini, early 17th century annotator of Farinacci); 2 *id.* at consilium 108, nos. 4, 89, 96, 103 (Roma, Alfonso Ciaconi 1615).

25. The "awe-inspiring" presence of the judge must be understood by reference to the right of judges in Renaissance Italy to employ various forms of disciplinary punishments against recalcitrant and lying witnesses. *See, e.g.*, 5 BALDUS DE UBALDIS, CONSILIA, consilium 492, no. 5 (Venetiis (Venice), Domenico Nicolini 1580); 1 FARINACCI, *supra* note 24, at consilium 83, nos. 2-5.

26. *See, e.g.*, BARTOLUS DE SAXOFERRATO ON THE DIGEST, at D. 48.18.10, no. 2 (Augustae Taurinorum (Turin), N. Beuilaqua 1573); BALDUS DE UBALDIS ON THE DECRETALS, at X 2.20 (Augustae Taurinorum, N. Beuilaqua 1578).

27. *See* FARINACCI, *supra* note 22, at titulus VII, questio 69, no. 85; 1 FARINACCI, *supra* note 24, at consilium 13, no. 21.

thus describing the infirmities of derivative proof, Roman-canon scholars displayed awareness of most "hearsay dangers" several centuries before they were articulated by English lawyers. The major difference between Anglo-American and Roman-canon understanding of these dangers concerns the source of the distrust of derivative evidence. The absence of a properly administered oath was a much more serious defect to thirteenth-century canonists than to English judges of the Enlightenment era.[28] While Roman-canon lawyers stressed the absence of "awe-inspiring" judicial examination as a defect, Anglo-American lawyers singled out the absence of cross-examination by the party opponent as a particularly distasteful factor.

B. FOCUS ON ORAL HEARSAY

A major conceptual difference between Roman-canon law and the Anglo-American hearsay rule is that, unlike English judges several centuries later, Roman-canon scholars failed to develop a regulation extending from oral to written forms of derivative proof.[29] Although they realized that reliance on the "dead voice" of writings could be dangerous, their explicit regulation of hearsay covered witnesses only. This feature of the Roman-canon system can be explained by institutional pressures that militated against a unitary regulation of both forms of derivative proof.

The first obstacle to a written hearsay rule was the towering importance that Roman-canon law attached to the official case file. The hierarchical judicial apparatus pioneered by the Church of Rome rested on this informational link to connect officials participating in proceedings at its various levels. Even at a single level, the episodic proceeding required written documentation to allow the judge to refresh his memory about what had transpired earlier. Courts included in this file records of the witness's testimony, and judges used these records regularly as proof. In considering whether this arrangement be-

28. Note, however, that for a while after the time English witnesses began to be interrogated before the jury, oaths played a more important role in English justice than on the Continent. (All sworn testimony seems to have been treated as of equal value, to be counted rather than weighed.) *See* 9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 196, 208 (1st ed. 1926). Such "mechanical" treatment was anathema to Italian Renaissance lawyers.

29. Some other interesting differences between the two systems, such as the apparent absence from Roman-canon law of concerns about implied assertions, or the rule against self-corroboration, are beyond the scope of the present essay.

trays an insensivity to the problems created by reliance on second-hand information, however, it is important to note that the probative use of such records did not entail all the dangers of derivative proof. The witness's testimony, as recorded by the reporter, was always given in court and under oath. In relying on the file, then, Roman-canon judges were in a roughly similar situation to jurors exposed to written hearsay under the standard exception relating to prior testimony.[30] In addition, several features of Italian Renaissance justice alleviated the epistemic dangers of using the file for evidentiary purposes. In criminal cases, for example, defendants confronted witnesses who incriminated them, so that an opportunity for "testing" these statements preceded entry into the record.[31] In important proceedings the reporter was also required to record the facial expression and other "body-language" of the witness to provide the deciding court with a substitute for demeanor evidence.[32]

The other feature of Roman-canon justice that prevented the treatment of hearsay witnesses from extending to writings was the civil court's heavy dependence on public documents attesting the existence of sales, loans and similar transactions. Not surprisingly, these solemnly drafted documents were generously sprinkled with hearsay. Yet the court's decision to use such documents as proof should not be interpreted as a failure of Roman-canon authorities to perceive the dangers inherent to derivative evidence.[33] In spite of these dangers, Roman-canon law prodded parties to use public documents because they discouraged litigation over certain civil transactions (or, at least, reduced evidentiary difficulties in the event of a dispute). Authorities thought that solemnities attendant to the drafting of documents would alert participants to the importance of telling

30. Of course, while the common law hearsay exception is usually predicated on the unavailability of the witness, Roman-canon judges used the record of prior testimony as a matter of course.

31. Testimony obtained without summoning the defendant for confrontation could not support the conviction. *See* IULIUS CLARUS, SENTENCIARUM RECEPTARUM LIBER QUINTUS, questio 45, nos. 13-14 (Lugduni (Lyon), Bailly 1672).

32. *See, e.g.*, BARTOLUS, *supra* note 26, at D. 22.5.3, no. 2. This requirement was later adopted in German lands and inspired the famous "Gebärden Protokoll."

33. Since these documents incorporated transactions, they were often used for "non-hearsay" purposes, as is the case in America under the "verbal acts" doctrine. *See* MCCORMICK, *supra* note 13, ¶ 249. This article discusses situations where the document contained constatory rather than performative ("verbal acts") language.

the truth, and the "dignity" of the notary who drafted them was supposed to guarantee accurate recording of what the parties asserted.[34] Assumptions behind these expectations were not altogether different from those justifying many standard common law exemptions from the ban on the use of written hearsay.

Roman-canon reliance on documentation thus muted but failed to suppress caution of the courts in using written derivative proof. More importantly, even explicit strictures against such proof in Roman-canon law surfaced as soon as institutional pressures to use official documents dissipated. For example, courts subjected testimony contained in "private" writings, such as letters, diaries or notes, to the same restrictions as testimony reproduced orally by a hearsay witness.[35] This was the case not only where writers reproduced observations of consequential facts by third parties (that is, in a double hearsay situation), but also when they simply recorded their own observations of these facts. Demonstrating their keen sense for separating hearsay from non-hearsay uses of writings, Roman-canon lawyers acknowledged many cases where the dangers of derivative proof evaporated, or were significantly reduced, thereby allowing unrestricted use of private documents. For example, courts were free to use writings which themselves embodied a crime, or contained the admission of a party or a criminal defendant's confession.[36] It is worth noting that these provisions had their exact counterpart in the law of oral hearsay. Courts did not classify testimony about legal transactions (American lawyers would say "verbal acts") as hearsay. Similarly, testimony about admissions by a party opponent or about

34. Abuses of notarial office were visited with harsh punishments. *See* PROSPERO FARINACCI, VARIUM QUESTIONUM LIBER QUINTUS, DE FALSITATE ET SIMULATIONE TITULUS, questiones 153-57 (Lugduni (Lyon), Horatius Cardon 1612).

35. For more extensive treatment of this problem, see Damaška, *supra* note 21; *see also* JEAN PHILIPPE LÉVY, LA HIÉRARCHIE DES PREUVES DANS LE DROIT SAVANT DU MOYEN-AGE 78 (Annales de l'Université de Lyon, 3d series in Law, vol. 5, 1939) (in cases brought to collect on debts the receipts, books of accounts, etc. were analysed the same as oral hearsay when written by a third party, and as a confession when they originated from the debtor himself).

36. A colorful illustration is Farinacci's treatment of a note in which a servant promised to continue a homosexual liaison with his master, a Rabelaisian priest. Normally, argues Farinacci, this "private" writing would fall within the ambit of the maxim *delictum non probatur per scripturam*. As the promise itself is criminal, however, the note containing it can be used as proof. *See* 1 FARINACCI, *supra* note 24, at consilium 25.

confessions of a criminal defendant were not hearsay.[37] Roman-canon law also recognized what we now consider exceptions to the hearsay rule: even if private writings, or hearsay witnesses, raised all the "hearsay dangers," courts often lifted restrictions on their use when necessary. Some of these dispensations from the usual restrictions on the use of private writings were quite similar to "classical" common law exemptions from the ban on written hearsay.[38]

In summary, while Roman-canon authorities explicitly referred to "hearsay" only in regard to oral testimony, they extended strictures against secondary informational sources to many types of writings as well. Although a general approach to derivative proof can thus be detected, submerged, in Roman-canon law, a terminology limiting "hearsay" to its oral form became habitual and survives on the Continent to the present day.

C. THE CHARACTER OF RESTRICTIONS

Because Roman-canon authorities included hearsay witnesses among those who could be "opposed," some characterize the Roman-canon law's response to the weaknesses of derivative proof as a system of exclusionary rules, or rules of testimonial disqualification.[39] In fact, however, when the law of proof was in its formative period, deciding judges still personally interrogated witnesses and examined writings, and thus could regularly identify second-hand information only after having acquired it. Moreover, as judges also acted as investigators in criminal cases, they were often *required* to interrogate hearsay witnesses in order to identify the original declarant. Under these circumstances it did not appear to make much sense for Roman-canon authorities to create barriers to the admission of secondary means of proof.[40] It seemed more sensible to admit

37. *See* FARINACCI, *supra* note 22, at titulus VII, questio 69, nos. 155, 157.

38. For example, regularly kept books of merchants or craftsmen, and various business receipts were fully competent evidence. LÉVY, *supra* note 35, at 111.

39. *See, e.g.*, Karl H. Kunert, *Evidence Rules*, 16 BUFF. L. REV. 122, 144-45 (1966) (the group of incompetent witnesses was very large and included hearsay witnesses).

40. This is not to say barriers could not have been erected similar to those created by Roman-canon law to "oppose" the testimony of certain classes of persons (e.g., infidels, vagrants, etc.). The law could have required that the judge—prior to beginning interrogation on the merits—first establish the source of a witness's knowledge and stop the interrogation if the information was second-hand. Roman-canon authorities realized, however, the practical

information conveyed by such means of proof, and spell out conditions under which second-hand information—if sufficiently confirmed by other evidence—could justify factual findings.[41] The complex Roman-canon law of hearsay thus took the form of corroboration rules, richly embroidered by scholastic "expansions," "limitations" and "sub-limitations." In other words, the Roman-canon law responded to the weaknesses of derivative proof by adopting rules of sufficiency rather than rules of admissibility.[42]

Scholars who developed this scheme had no intention of creating a normative straight jacket for judges, turning them into automatons. For example, although the testimony of a hearsay witness was confirmed by additional evidence exactly as specified by authority, the judge still had discretion to hold that the proper support for the hearsay was missing.[43] Roman-canon law also recognized many exemptions to its restrictions on the use of hearsay witnesses, usually conditioned on the unavailability of the original declarant.[44] Ultimately, then, successful corroboration of derivative proof depended on the judge's subjective evaluation, rather than the mechanical application of objective criteria.

This is not to say, however, that the original Roman-canon scheme was merely a collection of flexible guidelines which never interfered with judicial discretion. Although without *positive* bite, the regulations could produce a binding *negative* effect; they could prevent judges from declaring proof of a factual proposition successful, no matter how strongly they be-

limitations of this arrangement; the derivative nature of *testimony* can often be established only after the witness has spoken. It is significant in this connection that Farinacci discussed hearsay witnesses in a section of his treatise devoted to opposition against dicta (rather than the person) of witnesses. This section discusses witnesses whose testimony is inconsistent or obscure, that is, witnesses who clearly were permitted to testify. FARINACCI, *supra* note 22, at titulus VII, questiones 65-68.

41. *See, e.g.*, *id.* at titulus VII, questio 69, nos. 45-46.

42. Early in the 18th century, English judges would sometimes adopt a similar approach, admitting hearsay but "with diminished credit." *See* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 302 (1978).

43. *See, e.g.*, FARINACCI, *supra* note 22, at titulus VII, questio 69, no. 47.

44. *See id.* at titulus VII, questio 69, no. 69. This should not be interpreted as indicating that the only rationale for the Roman-canon law of hearsay was the desire to stimulate the judge to use the best available evidence. Roman-canon strictures against hearsay often applied in situations where the judge could not find the original declarant, so that second-hand information was the best evidence available in the case.

lieved it to be successful. In criminal matters, if the judge contemplated imposing the death penalty, this negative effect was quite dramatic. According to the prevailing view, the ban on the use of hearsay in this situation was absolute, and information conveyed by derivative sources could never support the finding of incriminating facts.[45] Roman-canon law also placed demanding requirements on the background of both the hearsay witness and the out-of-court declarant: unless both were people "beyond reproach," the court could not use their testimony—even if it was otherwise properly corroborated.[46]

D. The Decline

As originally designed, the Roman-canon proof system was quite flexible. The main source of law was malleable scholarly opinion, and seemingly stringent rules were actually hedged with numerous qualifications.[47] In the course of the seventeenth century, however, the system acquired somewhat greater rigidity, especially outside of Italy. The judicial apparatus changed as the functions of investigators and adjudicators became more sharply differentiated than they were before. This change played an important role in the law's loss of pristine elasticity.[48] Adjudicators began regularly to render their judgments on the basis of the "cold" file that incorporated the products of the investigator's work. In many deciding courts, the practice also evolved in which only one judge on the panel studied the documents in the case, and reported findings to his colleagues. The full court would then decide on the basis of this report.[49] In short, while scholars who shaped attitudes to

45. This rigid ban followed from the rule that a criminal could be condemned to death only upon the direct testimony of two eye-witnesses or following confession in court. *See supra* note 24.

46. *See* FARINACCI, *supra* note 22, at titulus VII, questio 69, nos. 85, 94.

47. Even as a theoretical matter, the system's founders voiced strong skepticism that the value of evidence, especially when conflicting, can be expressed in hard and fast rules. As an example of how numerical rules of sufficiency were readily brushed aside in practice, see 4 BALDUS, *supra* note 25, at consilium 455, no. 3; 5 *id.* at consilium 69, no. 2. Accordingly, it is a mistake to believe that the Roman-canon system, especially in its early forms, attempted to turn a judge into an automaton, mechanically applying rules. I have tried to dispel this mistaken belief in my review of John Langbein's stimulating book "Torture and the Law of Proof." Mirjan Damaška, *The Death of Legal Torture*, 87 YALE L.J. 860 (1978) (book review).

48. There were other reasons for the loss of flexibility. Prominent among them was the move toward codifying the law of evidence.

49. *See, e.g.*, ADHÉMAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 232 (John Simpson trans., 1913).

derivative proof focused on "private" go-betweens, "official" intermediaries now regularly inserted themselves between the sensory apparatus of the factfinders and the sources of evidence. Significantly, these official intermediaries conveyed to the deciding court not only factual perceptions, but also their opinion on various matters, including the probative force of evidence.

This multiple filtering of experience weakened the judiciary's sensibility for the messy welter of life, a sensibility to which stringent rules of proof are procrustean. In the calm of their offices, removed from the drama of life, judges applied corroboration rules in a more mechanical fashion. From their hierarchical *hauteur*, they found it desirable that unruly oral testimony be tamed by conversion into the documentary form before being submitted to the deciding court. Yet, even in this new, more bureaucratic environment, rules of evidence never affirmatively compelled judges to declare the proof of a factual proposition successful.[50] Especially in criminal matters, the effect of the rules thus remained negative; in the absence of legally specified evidence, these rules sometimes prevented the court from finding that proof of an incriminating fact was successful.

E. THE FALL

When, in the late eighteenth century, the Roman-canon proof system came under full scale attack, the most powerful weapons in the critics' arsenal were political and process based arguments. Especially damaging was the system's longstanding association with coercive interrogations and judicial torture in criminal matters. Adjudicators decided factual issues, critics ar-

50. The opinion that Roman-canon rules of proof positively mandated conviction has little support in relevant texts and even less support in what is known of court practice. A frequent source of confusion is that the Roman-canon system prohibited judges—as opposed to Angevin jurors—from using their "private knowledge" in deciding cases. *See, e.g.*, M. JOUSSE, TRAITÉ DE LA JUSTICE CRIMINELLE DE FRANCE, Tom II, Partie III, Liv. II, Titre 25, no. 147 (Paris, DeBure Père 1771). In assessing information acquired in performing official duties, however, the judge was not using private knowledge.

Consider how judges softened the rule that two eye-witnesses constitute affirmative "full proof." The law required that both eye-witnesses be "above all objection"; inquiry into whether this requirement was satisfied opened the door to vast judicial discretion. For example, establishing that one eye-witness was *sibi varius* (i.e., that the witness was self-contradictory) entitled the judge to declare that "full proof" was not made. For a case in point, see 2 FARINACCI, *supra* note 24, at consilium 174, no. 4.

gued, in the secrecy of investigative offices, at great costs to human dignity, rather than in open court under controllable conditions. What appeared particularly reprehensible was that members of the discredited judiciary—investigating judges or court rapporteurs—mediated witness testimony.[51]

For a variety of reasons, rules of sufficiency also came under fire. Background generalizations on which they rested were redolent with class, religious and other prejudices which Enlightenment ideologues exposed and effectively castigated. Epistemic considerations also tended to undermine the system. The critics argued that the probative force of evidence is inextricably connected with myriad concrete circumstances and that binding rules regulating the sufficiency of evidence cannot be drafted without placing the ultimate decision's accuracy at risk. Inspired by abstract theory, these rules cannot do justice to the particularity of experience and inevitably involve over-generalizations.[52] Also, critics came to accept the politically alluring assumption, propagated especially by the encyclopedists, that ordinary people possessed the capacity to estimate the probative value of evidence properly.[53] This assumption formed the

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51. Critics of the use of records of prior examinations did not solely press "human rights" issues. They also claimed that official investigators tended to smuggle their subjective viewpoints into the record as they organized and summarized testimony. *See, e.g.*, CARL J.A. MITTERMAIER, DIE MÜNDLICHKEIT, DAS ANKLAGEPRINZIP, DIE OEFFENTLICHKEIT UND DAS GESCHWORENENGERICHT 295 (photo. reprint 1970) (Stuttgart und Tübingen, J.O. Cotta'scher Berlag 1845). For modern confirmation of these insights, see FRIEDRICH ARNTZEN, VERNEHMUNGSPSYCHOLOGIE: PSYCHOLOGIE DER ZEUGENVERNEHMUNG 32-35 (1978).

52. Jeremy Bentham influentially exposited this view. *See* 1 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 39-50 (1827). Bentham stated:

> To take the business [of judging the connection between evidence and facts] out of the hands of instinct, to subject it to rules, is a task which, if it lies within the reach of human faculties, must at any rate be reserved, I think, for the improved powers of some maturer age.

Id. at 44. Bentham was not without influence on continental reformers. *See* Antonio P. Schioppa, *La giuria all' Assemblea Costituente francese*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, at 75, 86-87 (Antonio P. Schioppa ed., 1987) (influence of Bentham on revolutionary France). Carl Mittermaier, the great German evidentiary scholar and one of the fathers of the "immediacy principle," referred frequently to Bentham. *See, e.g.*, CARL J.A. MITTERMAIER, DIE LEHRE VOM BEWEISE IM DEUTSCHEN STRAFPROZESSE 76 *passim* (photo. reprint 1970) (Darmstadt, Johann Wilhelm Heyer's Verlagshandlung 1834).

53. *See* MASSIMO NOBILI, IL PRINCIPIO DEL LIBERO CONVINCIMENTO DEL GIUDICE 131 (1974). Commentators sometimes spoke of this capacity in romantic terms, reminiscent of Pascal's thought that "reasons of the heart" exist about which reason knows nothing.

basis of the critics' demand to abolish all rules that regulate the validity of proof. Although a new system of corroboration, based on different background generalizations, could still have been defended as a protection against judicial arbitrariness, Enlightenment critics dreamt of a future in which ordinary citizens could be trusted as judges without such legal safeguards. As a result of all these attacks, opponents were ready to dump the Roman-canon system of proof, now politically vulnerable and epistemically suspect, on the dustheap of history.[54]

III. THE NEW CONTINENTAL RESPONSE

Shaped in the aftermath of the French Revolution, the new continental response to the problem of derivative evidence was greatly influenced by the criticism of the Roman-canon law of proof. Consequently, the rejection of legally controlled proofs, and the hostility to officials interposing their opinions and findings between the decision maker and the means of evidence, were important determinants of the new response. Framers of the system adapted new ideas, of course, to a judicial organization that retained a great deal from the Roman-canon prototype.[55] Although factfinding arrangements had begun to vary significantly from country to country, a few general observations about the genesis of the new continental approach are nevertheless possible, especially if the continental legal landscape is observed from the Anglo-American viewpoint.

In the post-revolutionary period, the architects of modern law no longer accepted sufficiency rules as a response to the problem of derivative proof on the grounds that these rules clashed with the newly-adopted ideal of free evaluation of evidence.[56] What alternative strategies were available to continen-

54. Spearheaded by Enlightenment ideologues, these attacks distorted both black-letter law and actual practices. Enlightenment propaganda thus contributed to the patina of partially misleading cliches that now covers the Roman-canon proof system, especially as depicted in Anglo-American writing.

55. The machinery of justice continued to be hierarchically organized and dominated by the professional judiciary, especially in civil cases. The new system used the lay jury to adjudicate a limited class of crimes, but in a few continental countries only. Everywhere, factfinding continued to be organized to proceed episodically, and following brief hesitation in revolutionary France, examination of evidence continued to be regarded as primarily the responsibility of the court.

56. Yet these rules remained sporadically in force even in the second half of the nineteenth century. *See, e.g.*, Austrian Code of Criminal Procedure, STRAFPROZESSORDNUNG ¶ 269c (Aus. 1853); SVOD ZAKONOV, Book 15, t. II, ¶ 334 (Tzarist Russia 1857).

tal reformers?

A. ANTIPATHY TO CATEGORICAL EXCLUSION

Rules excluding hearsay could have appeared to reformers as an acceptable solution because, as a theoretical matter, they do not interfere with the factfinder's freedom in evaluating evidence.[57] Viewed analytically, the rules only shrink the pool of information available to factfinders, and do not compel them to process admissible information in a designated way. At a deeper level, however, rules that exclude hearsay create a tension with the premise that the probative force of evidence eludes regulation by binding legal rules. If the evidence's validity is indeed so heavily dependent on context that regulators cannot make adequate advance assessments of its reliability, then all admissibility rules that express a negative ex ante judgment about the value of second-hand information (that is, all relevance based admissibility rules), are equally spurious. Under some circumstances, hearsay could be more reliable than direct oral testimony.[58] It is no wonder, then, that reformers accepted categorical exclusion of derivative proof only if it was mandated, not by epistemic reasons, but by collateral concerns, such as the desire to protect citizens against governmental overreaching.[59]

One must consider yet another factor to explain the Continent's negative reaction to rules excluding derivative information. Reformers thought that even if these rules were theoretically reconcilable with the ideal of free proof, they could still offend that ideal in practice. The continental courts remained unitary and actively involved in the examination of evidence, so that routine exposure to inadmissible second-hand information could not be prevented. In this environment, the law—if it embraced admissibility rules—would have to develop a remedy for this exposure. Letting other judges decide the

57. Whether continental reformers ever explicitly considered the exclusionary rule as an option is open to doubt. Although they often invoked the example of English law of evidence in their discussions, especially after the middle of the 19th century, exclusionary rules (*Beweisverbote*) became an object of serious study on the Continent only in the first decade of this century. For an early continental view of the English proof system, see MITTERMAIER, *supra* note 52, at 82-83.

58. *See* A. von Kreis, *Das Prinzip der Unmittelbarkeit im Beweisverfahren der deutschen Prozeßordnung*, 6 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTWISSENSCHAFT 88, 105 (1886).

59. A case in point is the ban found in many continental criminal proceedings on the probative use of police records.

case would have been too costly and time-consuming. The only remaining practical measure would have been for the law to mandate that judges "disregard" inadmissible information. Hence, even if hearsay appeared highly convincing to the judges, the law would still require that they not attribute any weight to it. Thrown out the door, rules on the evaluation of evidence would thus come back in through the window.

All rules excluding derivative proof were not, however, equally anathema to continental reformers. They accepted rules which prohibited the use of secondary sources if original ones were readily available to the court. The reason for this different attitude was that these rules did not express a categorical negative judgment about derivative proof, merely a preference for primary evidence over its secondary refractions. The reformers permitted the courts always to consider derivative proof *in addition* to original evidence, and even give credence to "proxies" if it appeared warranted under the concrete circumstances of the case.

Because the reformed continental law accepted neither sufficiency rules nor most admissibility rules, some lawyers might expect that the new continental approach would permit judges to use derivative proof without restriction, and to freely determine its probative force. While most continental jurisdictions did indeed adopt this position for the adjudication of civil cases,[60] virtually all countries adopted new limitations on the free use of second-hand information in criminal procedure.

B. THE PRINCIPLE OF IMMEDIACY IN THE NARROW SENSE

The genesis of the oldest and most prominent type of these restrictions is traceable to the eighteenth century resentment of the role of investigating judges and court rapporteurs of the *ancien régime*. This resentment generated the requirement that there be direct contact between decision makers and their sources of information. The law demanded that evidence be presented to the full court, and witnesses appear personally

60. In most continental systems of civil procedure, the court can delegate factual investigations to one of its members, and rely for factfinding on that member's report. *See* HEINRICH NAGEL, DIE GRUNDZÜGE DES BEWEISRECHTS IM EUROPÄISCHEN ZIVILPROZEß 62-66 (1967). Moreover, some systems permit witnesses to give written testimony. *See, e.g.*, CODE DE PROCÉDURE CIVILE arts. 200-202 (Fr.) (new French Code of Civil Procedure). Oral hearsay is everywhere admissible, but the civil judge can refuse to hear a witness whose information is clearly second hand. Yet, as we shall soon see, the civil judge typically must justify reliance on derivative proof to superior judges.

before the decision maker. In continental legal discourse these restrictions appeared under the rubric of "the principle of immediacy." In its original form, however, this principle—sometimes called "immediacy in the formal sense"—is not opposed to *all* mediation between the decision maker and evidentiary sources.[61] Narrowly conceived as a weapon against "official" mediation, the principle does not apply to hearsay witnesses, although they also "mediate" between the factfinder and original sources of information. While without effect on witnesses, however, the principle of immediacy, adopted in many countries in statutory form, came to restrict the use of certain categories of evidence that Anglo-American lawyers would classify as "written hearsay."

C. THE PRINCIPLE OF IMMEDIACY IN THE BROAD SENSE

In the course of the nineteenth century, some continental authorities began to interpret the principle of immediacy in a much more encompassing sense. They construed "immediacy" to require that courts use the means of proof in their "original" form. As defined by these scholars, original meant means of proof closest to the fact to be proved, or phrased differently, those that draw their probative force from themselves rather than from an ulterior source.[62] In contrast to the original variant, the new version of the principle of immediacy had the potential of reaching hearsay witnesses as "private" mediators between the factfinder and primary sources of information. Yet, even those authorities who argued for this broader interpretation of "immediacy" did not contemplate an absolute ban on the use of derivative proof. Insisting that only original proof be relied upon would practically constitute a surrender to the blackmail of perfection. The broader version of the principle thus expressed only a preference: evidentiary "surrogates," including hearsay witnesses, could legitimately be used whenever original sources of information were unavailable.[63] In this new

61. For the origin of the term "immediacy in the formal sense," see KLAUS GEPPERT, DER GRUNDSATZ DER UNMITTELBARKEIT IM DEUTSCHEN STRAFVERFAHREN 125 (1979).

62. One of the most influential early expositors of this novel interpretation of the immediacy principle was the German lawyer August von Kreis. *See* von Kreis, *supra* note 58, *passim*. The principle so understood is sometimes termed "substantive immediacy."

63. Until quite recently, support for the broader principle of immediacy came only from scholarly authority, with courts sporadically adopting only some of the principle's demands. However, in 1988 an interesting change occurred; the main implications of the broader principle were incorporated in a

garb, then, the principle of immediacy came to resemble the old English "best evidence" rule.[64]

D. JUSTIFICATION CONSTRAINTS

The final type of restriction on the use of derivative proof is linked to the requirement that continental judges specify their factual findings and justify their reliance on particular informational sources in reasoned opinions.[65] Despite the fact that evaluation of evidence was no longer regulated by binding legal rules, modern continental justice refused to interpret this freedom from rules as a license for subjective judgment. Experience supported the assumption that original carriers of information are usually the optimal sources of that information. Therefore, a court's reliance on second-hand reports, though permitted, called for a contextual explanation. This was especially the case where the court, having examined both original and derivative information, decided to give greater weight to the latter. Significantly, the judge's duty to provide a justification existed even if original sources were completely unavailable, a situation where judges could hardly be blamed for bypassing first-hand information.

Superior courts reviewed the trial judge's justification and,

piece of legislation. The new Italian Code of Criminal Procedure provides that hearsay testimony cannot be used unless the original declarant "has died, is infirm, or cannot be located." CODICE DI PROCEDURA PENALE art. 195 (Italy 1988). Strangely, this legislative ban on oral hearsay (unprecedented on the Continent) is, on its face, stricter than its common law inspiration. For example, the Italian Code provides no dispensation from the hearsay ban for admissions of criminal defendants. In what shape this bold legislative innovation will survive immersion in the realities of the continental institutional environment remains to be seen.

64. It is quite possible that the shapers of the "immediacy principle" were inspired by English evidentiary thought. As noted before, Carl Mittermaier, one of the fathers of the principle, was familiar with English evidentiary treatises. For example, he read Starkie, a votary of the best evidence principle. *See* MITTERMAIER, *supra* note 52, at 28. Because original evidence need not always be epistemically optimal, there are minor discrepancies between "best evidence" and "immediacy" principles. However, these discrepancies involve complex technical issues beyond the scope of this essay.

65. For a while, post-revolutionary France was intoxicated with the idea that, because they sprang from subjective factors (*intime conviction, logique du sentiment*), verdicts could not be justified. *See supra* note 53 and accompanying text. The idea still has some currency in France, and may reflect the psychological realities of individual belief formation. However, it is now generally acknowledged in Europe that the absence of binding legal rules does not imply that factfinding decisions need not be "rationally" justified. *See infra* text accompanying note 68.

if they found it unpersuasive, reversed the judgment.[66] Considering that the post-revolutionary apparatus of justice continued strongly to espouse hierarchical values inherited from the Roman-canon process, it is no wonder that the demise of sufficiency rules generated the need for this particular mechanism of superior control.[67] In fact, it is so widespread in contemporary continental justice, in both civil and criminal cases, that it can safely be regarded as the most common restriction on the court's freedom to use derivative sources of information. This restriction's effectiveness varies from country to country depending on institutional practices concerning the techniques of writing opinions and the rigors of appellate review. The importance of the device can easily be exaggerated, but it should not be dismissed as *pro forma*. It is true that the reasons the trial judge advances for reliance on derivative proof seldom, if ever, reflect the actual decision-making process. Nevertheless, requiring the trial judge to provide plausible grounds for relying on second-hand evidence, even if those grounds were not present in his or her mind at the time of the decision, discourages judicial arbitrariness.[68]

The operation of all these continental restrictions on the free use of derivative evidence is illustrated by the German criminal process.

IV. THE GERMAN APPROACH

A. Written Hearsay

The first sentence of section 250 of the German Code of Criminal Procedure, adopted in 1877 but still in force, broadly proclaims: "If evidence of a fact rests upon a person's observation, this person must be examined at the trial."[69] Although this passage can be understood as applying to a broad spectrum of derivative means of proof, the prevailing opinion is that it applies only to writings, and is designed to reduce the evidentiary

66. The next section discusses a decision of the German Supreme Court as an example of this superior review.

67. In the Roman-canon system, judges were seldom required to justify their finding in an opinion; sufficiency rules were expected to guarantee decisional rectitude, and appellate courts simply checked their observance by the court below. Even so, some authorities admonished judges to give specific grounds for finding particular testimony trustworthy. *See* BARTOLUS, *supra* note 26, at D. 29.5.3, no. 1.

68. *See* MICHELE TARUFFO, LA MOTIVAZIONE DELLA SENTENZA CIVILE 107 (1975).

69. STRAFPROZEßORDNUNG [StPO] § 250 (F.R.G.).

role of written records. This narrow interpretation is supported by the next sentence of section 250, which prohibits the court from substituting a written record of a witness's testimony for actual in-court interrogation.[70] The effect of the potentially far-reaching proclamation of the first sentence of section 250 is thus limited to a class of official documents which would be written hearsay in common law parlance.[71] In other words, section 250 expresses only the narrow version of the immediacy principle, aimed at preventing "official" mediation between the decisionmaker and informational sources.

The continuing importance of pretrial dossiers, however, renders even this limited ban subject to important qualifications.[72] For example, the court may use the record of a prior judicial examination when a witness is hindered from appearing at trial.[73] Under somewhat more restrictive conditions, the court can even admit records of police interrogations.[74] Only the defendant's confession cannot be proved by reading police files. This last restriction is a rare example of an unconditional exclusionary rule in the continental context. It should be realized, however, that this rule is mandated as much by the desire to protect citizens' rights as by the desire to assure the accuracy of factfinding.[75]

The Code also contains a provision which allows the court to use both judicial and police files to confront testifying wit-

70. *Id.* This interpretation is supported by legislative history. *See* GEPPERT, *supra* note 61, at 107, 109.

71. This survey of German law employs the Anglo-American terms "oral hearsay" and "written hearsay." These terms are used even though German lawyers, following usage established in Roman-canon law, restrict the term "hearsay" to oral testimony alone.

72. STPO § 251 (F.R.G.).

73. *Id.* § 251(1).

74. *Id.* § 251(2). The use of police records is widespread in practice, especially in the case of traffic offenses, where police officers frequently are unable to recall necessary details by the time of trial.

75. *See supra* note 59 and accompanying text. Nevertheless, police records containing a defendant's confession can worm their way into trial proceedings through darkly shadowed corners of the system. In Germany, as in common law countries, police officers are permitted to testify about the defendant's confession. There is nothing to prevent them from using police memoranda in preparing their testimony. Moreover, the presiding judge is familiar with the entire police file, including the suspect's confession, providing another way for information from the police file to enter the decision maker's chamber. Furthermore, the records of the defendant's pre-trial examination by a judge can be read for the purpose of receiving evidence of a confession. STPO § 254(1) (F.R.G).

nesses with prior conflicting statements.[76] Although this provision is sometimes understood as designed solely to enable the court to expose the witness's own inconsistencies, in practice witnesses are often confronted with inconsistent statements made by other persons as well.[77] The prevailing view is that such statements can be used to determine, not only the ancillary fact of the witness's credibility, but also all other facts of consequence.[78] Phrased in common law terms, the prior conflicting statements can be employed both for impeachment and substantive purposes.[79] It is also important that the presiding judge studies the dossier in advance of the trial; absent familiarity with documents contained in the dossier, he or she could not effectively examine witnesses. Since it would be unrealistic to deny that documents in the dossier leave at least some imprint upon the presiding judge's mind, this most important member of the trial court is regularly exposed to written hearsay. In sum, the extent to which the principle enunciated in section 250 of the Code prevents the use of records of prior official interrogations can be vastly exaggerated.[80]

Another type of written hearsay includes letters, diaries, and similar documents. Continental systems generally recognize the derivative nature of information from these sources in double-hearsay situations, that is, where the author of a writing has conveyed the observations of another person.[81] Where a person has committed his or her *own* perceptions to writing, however, the derivative character of evidence is not clear to continental theorists, and "hearsay dangers" are seldom dis-

76. STPO § 253(2) (F.R.G.). Another permitted use of the dossier is to refresh the testimony of a witness. *Id.* § 253(1).

77. For a sharp academic attack on these practices, see the still influential views expressed in 1 EBERHARD SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG 192 (1952). *Contra* THEODOR KLEINKNECHT & KARLHEINZ MEYER, STRAFPROZEßORDNUNG 895 (38th ed. 1987).

78. *See* CLAUS ROXIN & EDUARD KERN, STRAFVERFAHRENSRECHT 202 (9th ed. 1969). For a contrary opinion, see 2 SCHMIDT, *supra* note 77, at 724 (1957). *See also* MAX ALSBERG ET AL., DER BEWEISANTRAG IM STRAPROZESS 330 (5th ed. 1983).

79. Note that the law's mandate that information be used for only a specified purpose conflicts with the post-revolutionary continental ideal that legal rules should not interfere with the factfinder's processes of belief formation.

80. Contemporary common law systems also admit many types of official documents under exceptions to the hearsay rule.

81. Although, as suggested, continental lawyers do not use the term "hearsay" in this context, *see supra* note 71, parallels to hearsay witnesses are readily drawn.

cussed in this context.[82] However, in Germany, in contrast with other continental systems, these dangers seem to be regularly diagnosed even in regard to single hearsay.[83] What remains controversial in Germany is whether such writings should be used only if the person whose observations are reported is unavailable (or if other exceptional circumstances exist).[84] Most German courts require the defendant's unavailability only in situations where writings were made in contemplation of litigational use.[85] As a result, memoranda, letters and similar documents often escape exclusionary provisions that are routinely applied to official records of prior interrogations. However, there may be other obstacles in the path of their probative use, such as the requirement that the judges justify their reliance on such derivative sources of information.

The final picture that emerges of the treatment of written hearsay in Germany is that this form of hearsay, with minor exceptions, is freely admissible. In the Anglo-American doctrinal scheme, the situation is reversed; written hearsay is excluded in principle, but the principle is "islandized"[86] by exceptions. Consequently, in terms of the volume of actually admissible second-hand information, the contrast between Germany's criminal procedure and our evidentiary system is not nearly as overwhelming as is often thought.

B. ORAL HEARSAY

There are no explicit statutory provisions limiting the use

82. It is thus often thought that concerns of immediacy (understood in the broader sense) require only that the originals of memoranda and similar documents be used, and that "surrogates," especially oral reports of the writings' content, be used only if the originals are unavailable. *See, e.g.*, 2 VLADIMIR BAYER, JUGOSLAVENSKO KRIVIČNO PROCESNO PRAVO 197, 218-19 (1978).

83. *See, e.g.*, GEPPERT, *supra* note 61, at 173. Yet, even this author defines hearsay as "transfer of somebody else's observations" (*Weitergabe fremder Tatsachenwahrnehmungen*). *Id.* at 36.

84. These circumstances include those discussed above in connection with the use of official records of prior interrogations. *See supra* notes 73-79 and accompanying text.

85. This opinion finds support in the text of § 250, which prohibits not only the reading of official records of prior examination, but also the reading of "written statements" (*schriftliche Erklärung*). STPO § 250 (F.R.G); *see* ALSBERG ET AL., *supra* note 78, at 462-63; *cf.* GEPPERT, *supra* note 61, at 201. The German Supreme Court seems to have left the issue undecided. *See* Decision of July 14, 1954, BGH 5th Strafsenat, 6 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 206, 212 (F.R.G.).

86. "In the sea of admitted hearsay, the rule excluding hearsay is a small and lonely island." Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 346 (1961).

of hearsay witnesses in Germany. However, in practice they are usually called to testify only when primary witnesses are unavailable, or to supplement primary witnesses' testimony.[87] It is tempting to think that this practice reflects the German courts' tacit acceptance of the principle of immediacy in its broad sense, that is, as a general demand that original means of proof be used whenever available. Most German courts, however, refuse to interpret "immediacy" in this broad sense, and those few German authorities that do embrace the broad version of "immediacy" do not hold that it explains the treatment of hearsay witnesses. Their reasoning, however, is of dubious validity.

Hearsay, their argument runs, is processed in two stages. In the first, the factfinder seeks to ascertain whether the declarant really made an out-of-court statement. In the second, the factfinder uses this finding as circumstantial evidence that the statement is true. In other words, hearsay is used as a basis for an indirect inference, rather than testimonially as a direct assertion of a fact. On this view, then, the hearsay witness is not a derivative source, but instead is a first-hand source of information concerning the evidentiary fact that the declarant made a statement.[88] This argument is unconvincing because "circumstantial evidence" used by the factfinder in the second processing stage includes judgments about the credibility of the declarant. It is precisely the frailty of such judgments that lies at the root of the ubiquitous preference for original means of proof. If a justice system is not troubled by such judgments, it is difficult to see why it espouses the principle of immediacy in the first place.[89]

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87. In this supplementary role, hearsay witnesses are frequently police officers called to clarify inconsistencies between a witness's statements to the police and testimony in court. There is some authority for the proposition that a hearsay witness's testimony can be used in lieu of direct oral testimony even where the latter is readily available. *See, e.g.*, ALSBERG ET AL., *supra* note 78, at 461.

88. The Austrian scholar Julius Glaser laid out the initiating path for this reasoning. *See* JULIUS GLASER, BEITRÄGE ZUR LEHRE VOM BEWEIS IM STRAFPROZEß 263-64 (photo. reprint 1978) (Leipzig, Neudruck der Ausgabe 1883). Probably the clearest statement of this position is still in 1 SCHMIDT, *supra* note 77, at 196. Note that this view is shared by the German Supreme Court. Judgment of Aug. 1, 1962, 3d Strafsenat, 17 BGHSt 382, 383 (F.R.G.).

89. Observe the Pickwickian use of the term "circumstantial evidence" in the description of the second stage of the factfinder's reasoning. The distinction between direct and circumstantial evidence normally relates to the *content* of information conveyed by an informational source. It addresses the question whether information transmitted by the source concerns an ultimate

Nevertheless, most German courts refuse to subscribe to the principle of immediacy in its broad sense. It is therefore puzzling why they tend to rely on hearsay witnesses only where first-hand testimonial reports are unavailable, or in addition to direct oral testimony. The answer is provided by a further restriction on the use of hearsay adopted by the German justice system.[90] Like their continental confreres, German judges control factfinding and—at least in criminal cases—are responsible for the comprehensiveness and accuracy of the evidentiary material. Expressing this traditional orientation, the German Code of Criminal Procedure requires the court to extend the reception of evidence to "all means of evidence which are important for the decision."[91] It follows that a German judge who examines a hearsay witness while refusing to call the original declarant (if available) faces a difficult task in justifying this omission to the appellate court. To be sure, there are no *binding* rules premised on the notion that original witnesses are more trustworthy than those reporting hearsay. Yet, because evidence filtered by intermediaries contains sources of error absent from direct oral testimony, judges are required to explain their decision to rely on hearsay. If the appellate court is not satisfied with this explanation, the trial court's decision will be reversed on the ground that the judge violated his or her duty "to clarify the case."[92] It is no wonder that the typical

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or an evidentiary fact. In contrast, the distinction between original and derivative means of proof concerns the "*carriers*" of information and is indifferent to the content of information they convey. (Hearsay witnesses can testify to both ultimate and evidentiary facts, and the same holds for primary witnesses). The argument presented in the text thus conflates concepts pertaining to messages with concepts concerning messengers.

The argument criticized in the text surfaces—in slightly changed form—in Anglo-American legal theory as well. It is used, for example, to limit the scope of the hearsay curse by admitting testimony containing inferences from the "state of mind." *See* LEMPERT & SALTZBURG, *supra* note 14, at 425 (critical of "state of mind" admissions). The confusion of concepts relating to messages and messengers is also not limited to continental theory. In the United States, for example, the hearsay rule is often included among relevancy rules, even though relevancy concerns the probative value of messages rather than the credibility of messengers. While the judge normally rules on the relevancy of information, the credibility of informational sources is usually assessed by the jury.

90. This restriction is but a variant of the last type of mechanism mentioned in the preceding section in discussing the genesis of the modern continental approach to hearsay.

91. STPO § 244(2) (F.R.G.).

92. *See, e.g.*, Judgment of Oct. 30, 1951, 1st Strafsenat, 1 BGHSt 373, 375; 17 BGHSt at 382.

judge tries to avoid difficulties of justification, and tends to rely on hearsay only when original means of proof are unavailable or to complement direct oral testimony.[93]

The threat of appeal gives trial judges an incentive to justify their reliance on hearsay testimony with care even where original means of proof are unavailable. The interplay between the trial court justification of this reliance on hearsay and appellate review can be glimpsed from a recent decision of the German Supreme Court.[94] In this case, the trial court convicted the defendant of sexually abusing his minor daughter. The verdict rested (in part) on oral hearsay: three witnesses reported what the daughter had told them about her sexual contacts with the defendant.[95] The trial judge attempted to justify his decision to give credence to the hearsay witnesses by pointing out that these witnesses—of whom one was a social worker and another a teacher—had ample experience with children, and were all firmly convinced that the girl had told them the truth. In addition, the trial judge explained that, in his opinion, the victim's description of the incidents was identical on three separate occasions, except for a few minor details that were a source of embarrassment to the child.

The supreme court reversed, holding that the trial judge erred in relying on hearsay witnesses without first establishing the concrete circumstances (such as the victim's demeanor in

93. Deserving of note is the sporadically encountered opinion that the subsidiary use of oral hearsay, far from contradicting free evaluation of evidence, may in some situations be mandated by it. A judge who relies on hearsay witnesses, it is urged, is sometimes completely at their mercy to determine the credibility of the declarants. An illustration in point is the use of statements obtained by the police from unidentified informers. In this situation, the court is deprived of most information required to adequately assess the declarant's trustworthiness. The assessment of credibility is thus transferred to police officers. But, the argument concludes, free judicial evaluation is hostile to this transfer, and assumes that the credibility of informational sources is established by the factfinder personally. *See, e.g.*, Karl Peters, *Individualgerechtigkeit und Allgemeininteresse im Strafprozeß*, *in* SUMMUM IUS, SUMMA INIURIA 191 (Tübinger Rechtswissenschaftliche Abhandlungen 1963).

94. Decision of Nov. 11, 1987, as reported in 1988 NEUE ZEITSCHRIFT FÜR STRAFRECHT No. 3, p. 144. It is instructive to compare this judgment with the Eighth Circuit decisions collected by Eleanor Swift in her contribution to this Symposium. *See* Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 496 n.72 (1992).

95. At trial, the daughter successfully invoked her privilege, provided by German law, to refrain from testifying against her father. STPO § 52(1) (F.R.G.). Thus, the daughter's pretrial testimony could not be used at trial, nor could officials who examined her in pretrial proceedings testify about her prior testimony. *See id.* § 252.

relating the story of her predicament) which led the hearsay witnesses to believe the girl. Their experience with children, no matter how significant, was too remote and general a ground to support their credibility judgments. Nor was it enough for the trial judge merely to refer to minor discrepancies in the victim's reports of the incidents, notwithstanding the fact that they can be explained away as embarrassing to the child. He should have specified the variance, so that higher courts could establish whether it leaves the victim's credibility intact.

C. SUMMARY

The final picture that appears from the German variation of modern continental approaches to derivative proof is that the rejection of the Roman-canon scheme, coupled with the refusal to embrace a comprehensive exclusionary response to hearsay, has not resulted in a system where the use of derivative information is left entirely in the discretion of the trial judge. Leaving aside statutory strictures against the use of records of pretrial interrogations, the most common obstacle to the judge's freedom is the requirement that he or she justify recourse to epistemically suspect informational sources. The impact of this requirement is that hearsay evidence is seldom used when better sources of information are easily accessible. Where both original and derivative information are used to prove a proposition of fact, the justification requirement has the further practical effect of keeping cases where hearsay is accorded greater weight than firsthand testimonial accounts to the minimum.

CONCLUSION

This historical and comparative survey provides several lessons for Anglo-American legal scholars. The survey clearly shows that strictures against the use of derivative proof are by no means unique to the common law culture; restriction on its use existed on the Continent of Europe long before Anglo-American law of evidence first made its appearance. Even today, although continental justice is conducive to the admission of hearsay, courts recognize the weaknesses of derivative proof and generate restrictions on its free use. The Anglo-American wariness of hearsay, although not unique, acquired a special poignancy in the environment of traditional procedural institutions. The characteristic prima facie exclusion of hearsay can thus be explained, at least in part, by the pressure exerted by these institutions.

More recently, Anglo-American justice has changed. Most pressures that gave birth to strictures against hearsay have ceased to operate, or have been seriously weakened. In modern jury trials, for example, the argument that the trier of fact should be protected from hearsay no longer carries much weight in light of complex instructions to the contemporary jury on how to separate hearsay from non-hearsay uses of evidence. Even a sophisticated and detached professional judge would be hard put to follow these instructions. More importantly, the insufficiently prepared, "one-shot," "day-in-court" trial is no longer the norm: potent discovery mechanisms, pretrial motions and many other devices known to modern litigation, especially in civil cases, have alleviated difficulties that a free admission of hearsay could create in the traditional procedural system.[96] The support for inherited hearsay doctrines is thus quickly fading in virtually all Anglo-American jurisdictions. Courts are lowering barriers against the admission of hearsay virtually everywhere, and some critics even advocate a system that freely admits derivative evidence. But here the experience gained from our comparative *tour d'horizon* suggests a measure of caution.

It is easy to see that by lifting restrictions on the admission of hearsay, courts produce a stronger "liberating" effect in Anglo-American justice than in continental procedure. In the latter, the absence of admissibility rules does not mean that the use of hearsay becomes a matter relegated to judicial discretion. As shown, judges in the "unitary" tribunal must give grounds for their reliance on derivative proof, and the prospect of review by superior courts injects some restraint in their decision making. The appellate review of these grounds also permits higher courts to establish a degree of predictability in the treatment of secondary informational sources. In common law systems, on the other hand, the removal of admissibility rules could usher in unstructured judicial discretion in the treatment of derivative proof. Because jury verdicts are difficult to attack for insufficient evidentiary support, the abolition of all limitations on the use of hearsay may be a risky proposition.

Furthermore, a powerful factor supporting the increased

96. Some difficulties remain because, in a system of trial preparation controlled by the parties, mutual exchange of information cannot be complete. Compelled cooperation and a competitive factfinding style create zones of tension. *See* MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 57-66, 131-32 (1986).

sensitivity to second-hand information, a factor that was present in the formative period of hearsay doctrines, still operates in Anglo-American administration of justice: the parties (their lawyers) continue to gather evidence and present it at trial. The resulting competitive style of processing evidence requires restrictions on the use of derivative information, both for reasons of fairness to the opponent of evidence, and as an inducement for the parties to seek and employ the best means of proof available. So long as this competitive style of proof-taking prevails, attempts to modify hearsay doctrines should not neglect considerations of "adversarial fairness" and the realities of lawyer-driven factfinding. This is especially true in those Anglo-American jurisdictions where the professional ethos of trial lawyers is weak. Even continental countries, where judicial control over factfinding reduces the strength of fairness arguments, nevertheless provide incentives for factfinders to rely on original sources of information—at least in criminal cases. These mild strictures against derivative proof in continental courts are not controversial. To the extent that reforms are contemplated on the Continent, they seem to be in the direction of erecting more serious obstacles to the free use of second-hand information. Subtle parallels of experience thus indicate that great caution should be exercised in using derivative means of proof for purposes of adjudication.