

ARTICLES

Twist and Shout and Truth Will Out: An Argument for the Adoption of a "Safety-Valve" Exception to the Washington Hearsay Rule

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There is no more obnoxious specimen of migratory waterfowl than the canard that judges and lawyers don't care about truth. Despite the unlimbering of professional shotguns behind thousands of duck blinds, the bird flies on, flapping its wings about our heads and occasionally besmirching us with its ordure. It is borne aloft not by its meager wingpower, but upon the thermal currents of air arising from the fields we have plowed so as to turn under truth in the hope of raising something better. The plowing under of truth is necessary, or at least defensible, when done in the interest of harvesting some worthy privilege.¹ But when done in the interests of the

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1. The test of an evidentiary privilege is ultimately its prevalence in the face of insistent demands for truth. For example, the privilege of a criminal accused to exclude evidence obtained by illegal search and seizure, recognized in *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961), has always been controversial and remains under attack. See Adams & Nock, *Search, Seizure, and Section 7: Standing from Salvucci to Simpson*, 6 U. PUGET SOUND L. REV. 1 (1982). With respect to the cognate privilege arising under the Washington Constitution, see Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, 8 U. PUGET SOUND L. REV. 331 (1984); Note, *The Original Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459 (1986). Relatively new privileges, such as that of a journalist not to reveal his source, often bow to an overriding public interest in the ascertainment of truth. See *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978). Even such a firmly established privilege as that for attorney-client confidential communications has on occasion suffered the same fate. See *Dike v. Dike*, 75 Wash. 2d 1, 448 P.2d 490 (1968). On the whole, privileges prevail only to the extent

profession, it is not merely indefensible, it is futile. Truth, in such cases, will not merely regrow; it will penetrate asphalt, macadam, or even concrete in its relentless effort to reach the light.

That "truth will out" stems not from any quality mystically inhering in truth itself. Rather, in a legal context, it stems from the simple fact that judges and lawyers really do care about truth. In fact, we are enraptured by and endlessly fascinated with truth. As the best-known Barrett of Wimpole Street might have put it, we love truth with the passions put to use on our lost saints, and with our childhood's faith.² But the truth for which our actions show our love is truth incarnate; we work endlessly, tirelessly, and passionately to bring to light truth in any particular case. Our love for truth as an abstraction is manifest, if at all, only in hollow declarations.

It is our differential devotion to truth in the abstract and in the concrete that goes to the heart of the problem dealt with here. We pay lingual homage to truth as an abstraction, while consenting to its subordination to other values, some of them base. But the subordinating institutions fall ultimately in the path of our passionate and relentless pursuit of truth in specific cases.

These maunderings are prompted by reflection upon a venerable, though spare, line of Washington decisions demonstrating the vulnerability of restrictive hearsay rules to the onslaught of truth. This Article will focus on two decisions of the Washington Supreme Court illustrating the unfortunate expansion of certain hearsay exceptions in order to accommodate truth, show that the expansion could have been avoided had Washington adopted a "general" exception comparable to that found in the Federal Rules of Evidence, and propose the adoption of an exception shorn of the defects of the rejected federal version.

The Washington Supreme Court, on the recommendation

that they reflect a broad consensus that they protect values even more important than the accurate determination of litigation. Interestingly, though there is a consensus that these values are more important than truth, there is no consensus on precisely what these values are. The traditional approach is that privileges foster relationships. See 8 WIGMORE, EVIDENCE, § § 2191, 2192, 2285 (McNaughton rev. 1961). Another view is that they further personal autonomy through the protection of privacy. See Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85-94 (1973).

2. See E. BROWNING, *How Do I Love Thee?* in SONNETS FROM THE PORTUGUESE (1850).

of the Judicial Council Task Force on Evidence, adopted Evidence Rules, effective in 1979. The Rules were drawn, and largely adopted verbatim, from the Federal Rules of Evidence. The Federal Rules, which became effective in 1975, were drafted by an Advisory Committee representing all branches of the profession and appointed by the Chief Justice of the United States.³ The Committee presented the Rules to the Supreme Court, which proposed them to Congress, which ultimately adopted them⁴ with significant changes. One of the purposes of the Rules was to have a set of clear, easily applied rules, uniform throughout the federal court system. But the general thrust of these rules, and one of their most attractive features, was to expand the categories of admissible evidence in the hope and belief that truth would thereby more easily be found. One of the key devices employed to expand admissibility was to minimize the exclusionary effect of the hearsay rule by narrowing the definition of hearsay⁵ and by enlarging both the number and scope of exceptions to the rule.⁶ When Congress had finished its surgery on the Rules, and adopted them in their present form, they enumerated twenty-seven specific exceptions⁷ to the hearsay rule and eight categories of statements classified as nonhearsay despite falling within the general definition of hearsay.⁸ The eight categories are classifiable for most purposes as additional exceptions. The Rules also contained two identically worded general exceptions, often given the faintly pejorative appellation, "catch-all" exceptions.⁹

The theory of the hearsay rule is that the truthfulness of out-of-court statements, in general, cannot be properly determined by a trier of fact because of the inability to assess, through cross-examination, the testimonial capacities (memory, perception, sincerity, clarity) of the maker of the state-

3. E. GREEN & C. NESSON, FEDERAL RULES OF EVIDENCE xi (1986).

4. Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. (1983)).

5. FED. R. EVID. 801(a) requires that hearsay involve an "assertion," thus excluding certain kinds of "nonassertive conduct" which the common law excluded as having hearsay dangers. See FED. R. EVID. 801(a) advisory committee's note; Falknor, *The "Hearsay" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MT. L. REV. 133 (1960). In addition, the Rules classify as nonhearsay a number of different kinds of statements falling within the general definition of hearsay. FED. R. EVID. 801(d).

6. *E.g.*, FED. R. EVID. 803(1), (4), (6), (8), (16)-(18), (22).

7. FED. R. EVID. 803(1)-(23), 804(b)(1)-(4).

8. FED. R. EVID. 801(d).

9. *E.g.*, WASH. R. EVID. 803(b) comment.

ment.¹⁰ The theory of exceptions to the hearsay rule, be they characterized as such, or as categories of nonhearsay despite falling within the general definition of hearsay, is that they provide an opportunity to assess these testimonial capacities, or deal with statements made under circumstances guaranteeing the existence of one or more of these capacities.¹¹ Put differently, statements within the exceptions present few or none of the impedimenta to reliability found in rank hearsay.

A lesson, laboriously learned over time, was not lost on the architects of the Federal Rules: neither the wisdom of the common law nor the imaginations of the best minds in the field could foresee all possible circumstances justifying the admission of hearsay. They thus provided for general, or catch-all exceptions, under which hearsay of clear reliability could, on an *ad hoc* basis, be admitted despite its failure to fall within a recognized exception.¹²

The general exceptions were the *pièce de résistance* of the Federal Rules' commitment to the discovery of truth. Though severely attacked and the subject of great attention, they emerged, battered and bloody, but in recognizable form, from the legislative process.

The general exceptions did not, however, survive the process of adapting the Federal Rules to Washington law. Even in their weakened condition, they struck terror into the hearts of the drafters of the Washington Evidence Rules (ER), who dispatched them with a terse death warrant. The reasons given boil down to these: (1) a lack of uniformity among trial judges in applying the exception, "which would make preparation for trial difficult;" (2) the assumption that "even the most conscientious of judges" would find it "extremely difficult to follow" the guidelines of the Federal Rules' exception; (3) the inability of appellate courts to remove "doubt whether an affirmance of an admission of evidence under the catch-all provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial court had abused its discretion;" and (4) the fact that courts have "room to construe an existing hearsay exception broadly in the interest of ascertaining truth"¹³

10. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974).

11. See, e.g., FED. R. EVID. 803 advisory committee's note; Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786 (1980).

12. FED. R. EVID. 803(24), 804(b)(5) advisory committee's notes.

13. WASH. R. EVID. 803(b) comment.

The stated reasons for rejecting a general exception countenance the subordination of truth to lesser values in two ways. First, they betoken a desire for rules capable of mechanistic and predictable application, which will necessarily suppress truth by barring probative evidence. This desire is born of a preference for personal convenience and a conviction that the bench, even aided by the bar, is incapable of making the careful judgments necessary to permit the discovery of truth. Second, they deprecate truth by encouraging the admission into evidence of falsehood through the indiscriminate lowering of existing barriers to admissibility.

Here begins the rise of a veritable Mesabi Range of irony that looms over the entire problem explored in this Article.

The first irony is that the problems of unpredictability and lack of uniformity hypothesized by the Task Force do not appear to exist in the federal courts and other jurisdictions adopting the general exceptions of the Federal Rules.¹⁴ More importantly, the Task Force addressed these phantom problems only by avoidance. The assumed difficulty in preparation for trial when attempting to predict a trial court's ruling on admissibility could easily be solved by requiring a pretrial determination of any issue that could be anticipated to arise under a general exception. The problem of lack of uniformity among trial judges could be solved, or at least ameliorated, by the prescription of detailed criteria for determination of those issues. Instead of addressing these points by creative modification of the Federal Rules, the Task Force simply deleted the general exceptions.

The second irony is that the Washington Supreme Court adopted a report so gratuitously contemptuous of the Washington bench. The suggestion that Washington appellate courts cannot make clear in their opinions which of their rulings have precedential force and which do not is an imputation to those bodies of disqualifying incompetence. The implication that the trial bench, with the assumedly limitless adversarial assistance of bar, is incapable of making reasoned and reasonably consis-

14. Only about ninety reported cases have arisen under FED. R. EVID. 803(24) and 804(b)(5) and their state analogs, S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 905-14, 970-78 (4th ed. 1986) and 172-74, 181-82 (Supp. 1988), and they do not appear to have injected significant uncertainty into any body of state or federal law. The relatively small number of cases, of course, undercuts my argument concerning the practical need for the adoption of such exceptions in Washington.

tent determinations on the probative value of hearsay evidence is calumnious, if not contumacious.

The third irony is that the discretion and resultant uncertainty involved in a general exception to the hearsay rule are substantially less than those inherent in other aspects of the Rules, notably ER 403 and 609, both of which were lifted blithely and without concern from the corresponding Federal Rules.¹⁵

A final irony is the Task Force's reliance on ER 102, identical to its federal counterpart, which directs that the Rules be construed "to secure . . . growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."¹⁶ In justification of its deletion of a general exception, the Task Force refers to ER 102 and states that under it "there will be room to construe an existing hearsay exception broadly in the interest of ascertaining truth."¹⁷ In other words, it is better to enlarge existing exceptions than to provide for a general exception. The drafters of the Federal Rules saw the matter quite differently. They justified the *existence* of a general exception in the following language: "[R]oom is left for growth and development of the law of evidence in the hearsay consistently with the broad purposes expressed in Rule 102."¹⁸ The real irony here, however, is not that Rule 102 was invoked to support the precisely opposite positions of two groups of drafters, nor even that the Task Force failed to acknowledge that fact. The irony is that the Task Force, while disdaining a general exception out of fear of uncertainty and judicial discretion, and opting for the mechanical approach seemingly offered by an exclusive list of hearsay exceptions, had taken some pains to provide its own extensive commentary to ER 102 (none of substance having been provided in the federal version). The commentary is worth quoting at some length:

The Rules of Evidence, like other court rules, give the

15. WASH. R. EVID. 403 allows discretionary exclusion of otherwise admissible evidence on six different grounds that involve balancing the probative value of evidence against its tendency to waste judicial resources that distract the trier of fact. WASH. R. EVID. 609 allows discretionary exclusion of evidence of a witness' prior convictions to impeach him, on grounds of excessive prejudice.

16. WASH. R. EVID. 803(b) comment.

17. *Id.*

18. FED. R. EVID. 803(24) advisory committee's note.

judge authority to interpret the Rules in a way that avoids an unjust result.

"Following the rules is not an end in itself. Rather, the rules are carefully designed to enable judges, lawyers, litigants, and juries to achieve sound results Rule 102 recognizes the responsibility judges bear by enumerating goals which cannot be achieved mechanically, and which will compete with one another at times. . . .

This approach implies a considerable grant of discretion to the trial judge in situations not explicitly covered by the rules which may require differentiated treatment in the light of special factors The rules place a burden on the lawyer to explain his position and the reasons for it at the trial level. It also places [sic] heavy burdens on the trial judge.

Judges should indicate which factors are significant and which goals paramount in a particular case and why, so that members of the Bar can adjust to changing nuances in the law in advising their clients and in conducting litigation. This process of accommodation to change will itself promote desirable change while preserving the sound fundamentals of the law of evidence."¹⁹

Having thus authored a philosophical charter for a general exception, the Task Force abandoned it with the alacrity of a defrocked monk ridding himself of an unwanted celibacy.

But the most important irony is that the drafters' decision not to provide a general exception has proven inimical to the interests which the decision was taken to serve: those of the bench, the bar, and the truth. And this result was not merely foreseeable; it was to a large extent foreseen.²⁰

The pressures to advance truth in specific cases can be contained only by the impregnable structures of privileges recognized by common consent. The lesser barriers of professional and personal convenience cannot contain these pressures. Harmlessly or destructively, the pressures will be released. This fact was recognized by the Senate Committee on the Judiciary: "We feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed)."²¹ As

19. WASH. R. EVID. 102 comment.

20. See *supra* text accompanying note 18.

21. FED. R. EVID. 803(24) Senate Committee on the Judiciary note.

will be seen, the torture to which specific exceptions have been put in Washington would appall even the late Padre Tomas de Torquemada.²²

The thesis of this Article, then, as reflected in the title, is that truth will emerge, even at the price of cruel distortion of inhibiting hearsay rules and, if necessary, with the aid of stentorian asseveration that the vessels of truth can pass through the mangled portals against which they mightily strain. This thesis will be explored in the context of two seminal decisions of the Washington Supreme Court.²³ These decisions outrageously expand the scope of two exceptions to the hearsay rule, opening in the process the door to a great deal of falsehood. The decisions can be criticized on numerous grounds and are fundamentally unsound, but that is not the point. The point is that the rules these cases lay down, though unjustifiable, are the inevitable result of the conflict between the demands of truth and the absence of the only rationally acceptable device to meet these demands—a safety-valve exception to the hearsay rule. Such fundamentally wrong decisions will be handed down because they serve fundamentally right purposes. The only way to avoid the damage which they must do to the law—and to the integrity of the fact-finding process—is to provide a satisfactory means to get at truth. Therefore, this Article does not criticize the decisions, but rather the constraints upon the judiciary which made the decisions inevitable.

But perhaps one person's torturing is another's liberal construction. The Senate committee foretold the first; the Task Force unblushingly urged the second. Let us examine the Washington cases and see which term better describes their holdings.

I. *STATE V. PARRIS*

First in importance, though not in time, *State v. Parris*,²⁴ was a drug sale case, involving the usual dreary cast of dealer, informant, and undercover officer. DeHart was both dealer and declarant, a felicitous alliteration that helps one keep the

22. Padre Torquemada was confessor to Queen Isabella and head of the Spanish Inquisition.

23. These decisions, in order of their consideration in this Article, are *State v. Parris*, 98 Wash. 2d 140, 654 P.2d 77 (1982), and *State v. Smith*, 97 Wash. 2d 856, 651 P.2d 207 (1982).

24. 98 Wash. 2d 140, 654 P.2d 77 (1982).

dramatis personae in mind. Milliron was the informant, Hurley the police officer. Milliron called Hurley and told him that he had arranged a "buy" to take place at the Olympia Taco Time at 10:00 p.m. Hurley and Milliron drove there and kept the rendezvous with DeHart. DeHart said that his source would be along shortly and that he would arrange to go with the source to get the drugs. He was given \$100.00.

Parris, the defendant, then drove up. Milliron recognized him. DeHart got into Parris' car, took something from the pocket where he kept money, gave it to Parris, and left, explaining that Parris did not want DeHart in the car because the latter's presence would make his supplier uneasy. DeHart stated that the drugs were being obtained. The name "John" (Parris' given name) was mentioned, but perhaps not by DeHart. Milliron asked: "Will it be more than a half hour?" and DeHart said that he did not think so.²⁵ When Milliron asked "Well, do you think he'll return with the drugs, or the money, and the quantity and quality would be accurate?"²⁶ DeHart replied: "Yes. I think so. There won't be any problem."²⁷ DeHart drove off and returned half an hour later. He parked behind the Taco Time and brought a quantity of heroin to Hurley and Milliron. Hurley observed the departure from a nearby tavern of a car of the same make, model, and color as that driven by Parris earlier.

Both the court of appeals²⁸ and the Washington Supreme Court upheld the admission of DeHart's statements (after DeHart became unavailable as a witness by invoking his fifth amendment privilege) as "statements against his penal interest." The same courts further rejected Parris' claim that admission of the statements denied him the right to confront a witness against him, guaranteed by the federal and state constitutions.

The hearsay exception deemed applicable is that found in ER 804(b)(3):

(b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .

. . . .

(3) A statement which was at the time of its making so

25. *Id.* at 143, 654 P.2d 77, 78.

26. *Id.*

27. *Id.*

28. *State v. Parris*, 30 Wash. App. 268, 633 P.2d 914 (1981).

far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.²⁹

This provision was adopted verbatim from the federal rule of the same numerical designation.

Both appellate courts also took the view that the requirement of corroborating circumstances ought to apply where, as in *Parris*, a declaration against penal interest is offered against a criminal accused, if only to meet the demands of the Confrontation Clause of the sixth amendment.³⁰

The affirming courts found the demands of both the evidence rule and the constitutional provision met. The former were met because the statements tended to implicate the declarant in criminal activity. The latter were met by a host of corroborating circumstances pointing to the trustworthiness of the statements.³¹ The formula is simple—and simply wrong.

The idea behind the hearsay exception is clear: a person will not ordinarily make a statement against his own interests unless it is true.³² This notion is unexceptionable, but only so far as the person making the statement knows that it is against his interest at the time he makes it. In sharp distinction, statements of a party opponent need not be against the interest of the maker at the time they are made—or even at the time of

29. WASH. R. EVID. 804(b)(3).

30. U.S. CONST. amend. VI guarantees a criminal accused the right to confront the witnesses against him. This clause has been interpreted as not requiring the exclusion of hearsay if certain nonexclusive requirements are met. One of them is that the hearsay must fall within a "firmly rooted exception" to the hearsay rule. *Ohio v. Roberts*, 448 U.S. 56 (1980). The Washington courts reasoned in *Parris* that, in order to qualify as part of a "firmly rooted exception," a declaration against penal interest must be accompanied by corroborating circumstances clearly indicating its trustworthiness. 98 Wash. 2d at 148, 654 P.2d at 80-81; 30 Wash. App. at 276 n.8, 633 P.2d at 9144 n.8.

31. "[P]etitioner appeared at the Taco Time at precisely the time when DeHart had told Milliron and Hurley that he would be meeting his 'source,' giving rise to the all but inescapable inference that he was there by appointment; that he received some object from DeHart, which was taken from the pocket in which DeHart had placed the money given him for the drug purchase; and that his vehicle again was seen being driven away from the scene at the announced time for the delivery, that being the time when the delivery was made." *Parris*, 98 Wash. 2d at 152-53, 654 P.2d at 83.

32. FED. R. EVID. 804(b)(3) advisory committee's note.

trial. Those statements are admitted upon theories quite unrelated to that behind statements against interest.³³

The common law traditionally recognized a hearsay exception for statements against interest only if they were against the declarant's proprietary or pecuniary interest and not merely against his "penal interest." The Supreme Court upheld this principle in *Donnelly v. United States*³⁴ by holding inadmissible a confession by a third party to the murder for which the defendant was on trial. In a famous and influential dissent, Justice Holmes railed against the absurdity of allowing a declaration that harmed the declarant's interest in property but excluding one that rendered him liable to hang for murder.³⁵ Holmes' reasoning led to the eventual recognition of a "penal interest" exception. The drafters of the Federal Rules thought that any statement substantially damaging to the interests of the maker ought to be admitted and they drafted the exception to cover statements against the declarant's propriety, pecuniary, penal, or social interests.³⁶ Congress had trouble swallowing the "social interest" aspect of the exception but did permit statements against penal interest to join those against proprietary and pecuniary interest on the short, exclusive list of "against interest" statements covered by the exception.³⁷

It is clear that development of the penal interest exception focused on the idea that a criminal defendant should be able to introduce a statement that implicates the maker and exculpates the defendant.³⁸ The question posed in *Parris*, and countless other cases, is whether a statement that *inculcates* both the maker and another may be offered against that other person. Posing the question initially in this manner allows inquiry regarding the broad question of admissibility against any party in any kind of action, postponing for further examination the peculiar issues arising from use of such statements against a criminal accused.

Examining only the face of ER 804(b)(3) and ignoring its legislative history yields a simple answer. The answer depends upon whether the statement "so far tends to subject" the

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

34. 228 U.S. 243 (1913).

35. *Id.* at 278.

36. FED. R. EVID. 804(b)(3) House Committee on the Judiciary note.

37. *See id.*

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

declarant to "civil or criminal liability" that a reasonable person in the declarant's position would not make the statement unless he believed it to be true.

With this textual provision in mind, the Washington Supreme Court answered the posed question with a shouted "Yes!" and only a muted undertone of qualification. It considered that a reasonable person would be aware of the disserving nature of any statements he makes that would have probative value in a criminal prosecution against him and that anything thus stated must therefore bear the hallmark of truthfulness. Only when some clear motive to lie appears, as in the case of someone trying to "curry favor" with authorities, would a trial court have discretion, under ER 403, to exclude the statement on grounds of diminished probative value.³⁹ It makes no difference whether the statement inculcates only the declarant, or another as well; self-condemnation provides the only needed guarantee of trustworthiness.⁴⁰

Of course, the court did not state the matter so baldly. It did not purport to lay down a rule at all. But the foregoing rule is the only one that can fairly be drawn from the opinion. All of the factors the court identified as necessary to invoke the hearsay exception apply in every case where an unavailable declarant makes a statement that tends to show he is guilty of a crime. If the same statement also tends to show that a

39. The supreme court has beaten an unacknowledged retreat from this position. In *State v. St. Pierre*, 111 Wash. 2d 105, 759 P.2d 383 (1988), the court dealt with a statement given to police by a potential defendant, in custody, as part of a plea-bargain arrangement. The statement implicated both the declarant and the defendant in one murder, and the defendant only in another. The court characterized it as "inherently untrustworthy" because of the circumstances under which it was given and held that it did not qualify as a "declaration against interest" at all. *Id.* at 117-18, 759 P.2d at 391. Thus the motivation, referred to in the text accompanying this footnote, to "curry favor" can now be used to exclude a statement altogether from the category of declarations against interest, rather than to exclude it from evidence under the discretionary provisions of WASH. R. EVID. 403.

40. *Parris* has been ably and thoroughly criticized in Beaver & McCleary, *Inculpatory Statements Against Penal Interest: State v. Parris Goes Too Far*, 8 U. PUGET SOUND L. REV. 25 (1984). The authors urge, on both constitutional and nonconstitutional grounds, a total exclusion of statements against penal interest when used to inculcate a third party. They base their conclusions upon both the inherent unreliability of such statements and strong indications that the legislative history of the Federal Rules shows that the exception was not intended to comprehend them. This author joins in much of their criticism, but does not join in their call for a total exclusion of such statements because such statements may carry the necessary probative value to justify their admission and because the legislative history is ambiguous. Nonetheless, the authors are to be commended for their valuable contribution to the debate in which they have vigorously participated.

party to litigation is guilty of a crime, the statement may be admitted against that party.

The aridity of the supreme court's test is demonstrated by the test's purely objective character: the only issue is whether a reasonable person would have been aware that the statements could have evidentiary value against him in a criminal prosecution. It does not matter whether the declarant subjectively appreciated their evidentiary effect or was subjectively aware of the possibility that they might in fact be used against him in a criminal prosecution. As will be shown below, this test wholly misreads the text of ER 804(b)(3) and reads out of that exception any requirement of the presence of the factors that actually guarantee trustworthiness.

I suggest that the starting point for applying the rule is its text, and that the text must be read in light of the theory behind it. The text of ER 804(b)(3) does not speak in terms of penal interest, nor does it ask whether a reasonable person would have been aware of the fact that his statements could have probative value in a criminal prosecution against him. Rather, it asks whether the statement, "at the time of its making . . . so far tended to subject . . . [the declarant] to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."⁴¹ The acknowledged theory behind the admissibility of such statements is that a person will not ordinarily make a statement against his own interests unless he believes it is true.⁴² Thus, only a statement that the declarant actually perceives to be contrary to his interest has the necessary likelihood of truthfulness. On the other hand, inquiry into the actual state of mind of an absent declarant is highly speculative, and it is sensible to impute to the declarant the characteristics of a reasonable person.⁴³ The rule does this, and asks, in essence, whether a reasonable person in the circumstances of the declarant would have been aware of the danger to his interests in making the statement. It is vital to keep in mind that the rule sets up an objective standard only for the purpose of determining whether the declarant is likely to have been sub-

41. FED. R. EVID. 804(b)(3).

42. FED. R. EVID. 804(b)(3) advisory committee's note.

43. See Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(B)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851, 862 (1981) [hereinafter Tague].

jectively aware of some risk to his interests in making the statement.

And that is the point forgotten by the Washington Supreme Court and the substantial and otherwise respectable authority on which it relied. The court thought it sufficient that a reasonable person would have been aware of the theoretically legally damaging effect upon him if the statements were somehow used against him in a criminal prosecution. While acknowledging that "it is not the fact that the declaration is against interest but the declarant's awareness of the fact which gives the statement significance," it took refuge from thought in the proposition that "courts have been willing to assume that a reasonable man would be aware of the dis-serving nature of his remarks even when they are made to a supposed friend."⁴⁴

Indeed, courts have been so willing.⁴⁵ Perhaps that willingness springs from a regrettable but persistent, possibly even ineradicable, confusion: the confusion between declarations against interest and "admissions." The latter, known in the Federal Rules as "statements of a party opponent,"⁴⁶ do not depend for their admissibility upon the proposition that a person will ordinarily not make a statement against his own interest unless it is true, nor upon the connotation of "admission" in the lay sense of the term. Rather, admissibility of such statements rests upon "the adversary system" or, rather, upon the idea that a party to litigation cannot claim that he lacks a right to cross-examine himself to test the truthfulness of his own statements (the party is always free to take the stand and explain or deny his statements), or that his word is not good unless given under oath.⁴⁷ Accordingly, it is enough for exemption of such a statement from the hearsay rule that it be made or adopted by a party and offered by an adverse party. It need not have been against the interest of the party who made it at the time he made it (indeed, it need not be clearly against his interest at time of trial, though an adverse party would probably not be offering it unless it were). It may have been self-serving when made, as by providing an alibi which later proved

44. *State v. Parris*, 98 Wash. 2d 140, 150, 654 P.2d 77, 82 (1982).

45. *E.g.*, *United States v. Alvarez*, 584 F.2d 694, 699-700 (5th Cir. 1978); *United States v. Thomas*, 571 F.2d 285, 209 (5th Cir. 1978); *United States v. Barrett*, 539 F.2d 244, 251 (1st Cir. 1976).

46. FED. R. EVID. 801(d)(2).

47. 4 WIGMORE, EVIDENCE § 1048 (Chadbourne rev. 1972).

false, and the giving of which is offered as an indication of consciousness of guilt.⁴⁸ Or it may have been disserving in ways not contemplated by the maker. The classic example is found in *Escobedo v. Illinois*,⁴⁹ where defendant said to his companion, in front of the police, "I didn't shoot Manuel, you did," thus betraying knowledge of the shooting while attempting to shift the blame.⁵⁰ A "declaration against interest," on the other hand, has probative value only to the extent that the declarant knows it is in fact against his interest. A given statement might be either one, depending upon whether it was made by an unavailable declarant or by the party against whom it is being offered. Confusion of the two is therefore not surprising. That it is not uncommon is shown by the frequent professional and even judicial usage of the phrase "admission against interest,"⁵¹ a term guaranteed to produce gelaemia⁵² in any evidence teacher. But its usage is insufferable. Its existence conduces to the fundamental error that any statement that would be admissible against the declarant when he is a defendant in a criminal prosecution qualifies as a statement covered by ER 804(b)(3).

The supreme court found that DeHart's statements met the test of the "declaration against interest" exception even though DeHart had satisfied himself that he was dealing with genuine buyers who had the same interest in secrecy as he did.⁵³ Moreover, the court ignored the fact that the statements DeHart made did not tend in any way to subject him to criminal liability beyond the actions he took in the presence of his false friends by taking their money and giving them heroin. In other words, he could not have appreciated the risk he incurred when making those statements, even if he had a lawyer's knowledge of their admissibility against him in a criminal prosecution. Without a perception on declarant's part of actual risk to his interests, the requisite guarantee of trustworthiness is simply absent. And a reasonable person's perception of the potential evidentiary significance of his statements is of no con-

48. *E.g.*, *Michigan v. Tucker*, 417 U.S. 433 (1974).

49. 378 U.S. 478 (1964).

50. *Id.* at 483.

51. *E.g.*, *State v. Young*, 50 Wash. App. 107, 116, 747 P.2d 486, 491 (1987) (Thompson, J., concurring). Even Justice White has stooped to this usage. See *Spinelli v. United States*, 393 U.S. 410, 425 (1969) (White, J., concurring).

52. Gelaemia is a Latin hybrid meaning "frozen blood."

53. *State v. Parris*, 98 Wash. 2d 140, 151, 654 P.2d 77, 83 (1982).

sequence if a reasonable person would not perceive a risk of actual criminal prosecution resulting from those statements.

Any analysis of the rule must ask whether a reasonable person in declarant's position would have made the statement in question if he did not believe it to be true. I suggest that this highly individualized analysis can be aided by initially placing the statement into one of three broad categories. Category One consists of those statements which do not in fact have any realistic tendency from the perception of the declarant to damage his interests. Such statements carry no circumstantial guarantee of trustworthiness for any purpose. In this category I would place statements of a declarant who knew he was about to die, who had immunity from prosecution for his statement or in connection with the transaction discussed, who was domiciled in a jurisdiction from which he could not be extradited to face trial for the crime to which he was referring, who knew that the statute of limitations had run as to the offense, or who had been acquitted of the offense. To this list I would add all others who reasonably perceive no significant risk of criminal prosecution as a result of making the statements. I would include drug dealers such as DeHart, who have assumed a tolerable risk that they are talking to police officers or agents, but who have no reason to think their statements will increase their exposure to criminal liability. In none of these cases can it be said that the statement so far tends to subject the maker to criminal liability that a reasonable person in his position would not make it if it were not true. Where no substantial risk is or should be perceived, the truth guarantee dependent upon that risk is absent.⁵⁴

Category Two consists of statements which, however much they may inculcate the declarants, do not reliably inculcate third parties, such as the persons against whom they are being offered. The most common example of a statement in this category is that of a person who, whether or not he is in custody, has been "caught" and knows it. His statements inculcating a third person spring from a clear effort at blame shifting or blame sharing. Regardless of the extent to which, if at all, the statement inculcates the declarant, he has a strong motive to lie about the culpability of the third person. He may think, as did Escobedo, that he is wriggling off the hook altogether by accusing another. He may know he is damaging himself, but

54. See Tague, *supra* note 43, at 943-44.

entertain some unsophisticated hope that he may derive some profit by implicating another. Or he may be simply protecting his own psychological integrity by blaming someone else. Whatever his reasoning, his motive to lie is patent. Statements such as this have traditionally been assumed to be inadmissible.⁵⁵

Category Three is a residual category consisting of statements that have such a realistic tendency to put the declarant at risk of criminal liability that a reasonable person in his position would not make them unless they were true, and statements that are devoid of a perceptible motivation to falsely inculcate another. The most common example is a statement made to a cellmate. One must be terribly naive to be unaware of the substantial risk that the person with whom he shares a cell will scurry off to the authorities with even the slightest bit of information that could redound to his own benefit; honor among thieves is still no more common than gingivitis among poultry. Casual statements to friends generally are probably of this genre. In each case, the motive to get something off one's chest seems to predominate over a perceived risk of damage to the declarant's penal interests.

This category would also embrace the rather peculiar circumstances of *State v. Valladares*,⁵⁶ the oldest child of *Parris*. Declarant there had called police to her hospital room long before she was suspected of any wrongdoing, confessed to her drug use, expressed her fear that she would suffer dire consequences from her inability to meet a debt to Valladares, her supplier, and requested help. She cooperated in an investigation of Valladares, which amassed a great deal of evidence. But her initial statements implicating Valladares were admitted under ER 804(b)(3).⁵⁷ Although she had a strong motive to inculcate the person she was accusing, the fact that she brought upon herself the potential for criminal liability that

55. In *Bruton v. United States*, 375 F.2d 355 (1968), the court dealt with a statement by one defendant, implicating himself and a codefendant, offered in a joint trial of both. The court assumed the inadmissibility of the confession against the nonconfessing codefendant (against whom it had not even been offered) and held that his constitutional rights were not protected by an instruction that the confession should not be considered against him. Such statements have since been held inadmissible, on constitutional grounds, against criminal defendants. See *Cruz v. New York*, 109 S. Ct. 1714 (1987); *Lee v. Illinois*, 476 U.S. 530 (1986). See also *State v. St. Pierre*, 111 Wash. 2d 105, 759 P.2d 383 (1988) discussed in *supra* note 39.

56. 99 Wash. 2d 663, 664 P.2d 508 (1983).

57. *Id.* at 670, 664 P.2d at 512.

would not have existed but for her own statements greatly enhances the reliability of her statements and takes them out of Category Two.

I suggest that statements in Categories One and Two be excluded (categorically, indeed) from the scope of ER 804(b)(3). These statements simply lack sufficient reliability to be properly deemed within this exception. Statements in Category Three should be carefully scrutinized on an individual basis to determine whether, under their particular circumstances, they really "so far tended to subject [their declarants] to civil or criminal liability" that reasonable persons in the positions of the declarants would not have made the statements unless they were true. Only this exacting individual scrutiny can properly assess the presence or absence of the necessary guarantee of reliability.

The Washington Supreme Court, however, has opened the floodgates of the exception to all three categories (though belatedly recognizing the excludibility of some statements in Category Two).⁵⁸ That this is wrong is demonstrable, but somewhat beside the point. The court has sounded forth the trumpet and this author does not expect to live long enough to hear it call retreat. Nor, though desecrating the error, can I decry it. The real questions are why the court expanded the exception beyond all reason, and what can be done to save other exceptions from the same fate? And neither question is particularly difficult.

The *Parris* court wrenched aside the portals of the declaration against interest exception in order to admit highly reliable evidence. Love of truth prevailed over all else. The statements made by DeHart were extremely trustworthy, though for reasons having little or nothing to do with their status as declarations against penal interest. They were made by someone who plainly knew what he was talking about (i.e., who had firsthand knowledge that was based upon a full opportunity to observe and was not dependent upon possible faulty memory). The declarant in *Parris* had a motive to tell the truth, to advance his business enterprise, and no apparent motive to lie⁵⁹ (providing a guarantee of sincerity). Moreover,

58. See *St. Pierre*, 111 Wash. 2d 105, 759 P.2d 383 (1988) discussed in *supra* note 39.

59. The dissent in *Parris* postulated a motive for DeHart to lie:

"Here, DeHart, as a dealer in drugs, had a strong interest in protecting his supplier. By acquiescing in Milliron's suggestions that Parris was his supplier, DeHart drew suspicion away from himself and/or the real supplier. Thus, if

to the extent that he incriminated the accused at all, the declarant did so in such ambiguous language that no jury could have overvalued the probative effect of his statements. Indeed, the veracity of his statements is evident without even considering their supposed self-inculpatory character. They enjoy the reliability commonly, though by no means always, shared by statements of coconspirators. In point of fact, I am completely at a loss to understand why they were not admitted as such. Nothing in any of the opinions in the case suggests that the coconspirator rule was ever considered. Yet DeHart's statements clearly seem to be statements made "by a coconspirator of a party during the course and in furtherance of the conspiracy."⁶⁰ There is ample evidence from which to infer that DeHart and Parris were engaged in a conspiracy to sell drugs and that DeHart's statements were made while the conspiracy was in existence and to further its purposes. But whether the coconspirator doctrine was unavailable to the court because counsel had not brought it to the court's attention or for some undisclosed reason,⁶¹ it must be deemed unavailable.

That being the case, the only way the Washington Supreme Court could uphold the admission of DeHart's highly reliable statements was to expand to the utmost the exception for declarations against interest. Placing truth above technicality, it did just that.

Nor are the consequences of this decision quite as bad as they might sound. For more was required for admission of these statements than their qualification as declarations

he was walking into a setup, the police would go after Parris as the one most likely to have a quantity of drugs."

98 Wash. 2d at 163, 654 P.2d at 88. With enough imagination, one can always conjure a speculative possibility that a declarant might have some reason to lie. Absent some clear indication of an actual motive to lie, such speculation should not be sufficient to negate an apparent lack of motive.

60. FED. R. EVID. 801(d)(2)(v).

61. After *Parris*, the Washington Supreme Court developed the doctrine that use of the coconspirator rule required substantial evidence of the conspiracy independent of the statement sought to be introduced. *State v. Dictado*, 102 Wash. 2d 277, 687 P.2d 172 (1984). The Washington court reiterated this doctrine even after the United States Supreme Court, in *Bourjaily v. United States*, 107 S. Ct. 2775 (1987), had reached a contrary conclusion, interpreting language identical to that found in the Washington Evidence Rules. The Washington court cited *Bourjaily* for another purpose, but did not consider its holding on this point. *St. Pierre*, 111 Wash. 2d 105, 759 P.2d 383 (1988). In *Parris*, however, there would seem to have been ample evidence, apart from the statement itself, of the factors bringing it within the coconspirator rule, and the court did not suggest otherwise. The failure to consider the coconspirator rule thus remains unexplained.

against interest. Since these statements were hearsay being offered against the accused, they had to meet the demands of the Confrontation Clause of the sixth amendment⁶² and its state constitutional counterpart.⁶³ To see that those demands were met, the court felt itself obliged to read into the law a requirement that statements used to incriminate, like those offered to exculpate, be supported by corroborating circumstances clearly indicating the trustworthiness of the statement. To that end, the court drew upon *Dutton v. Evans*,⁶⁴ a leading decision of the United States Supreme Court interpreting the Confrontation Clause, and *United States v. Alvarez*,⁶⁵ the parent federal case allowing the use of declarations against penal interest to inculcate third parties, for a list of factors bearing on reliability. *Dutton* focused on the classic testimonial capacities of perception, memory, sincerity, and clarity.⁶⁶ *Alvarez* added some more specific guidelines:

(1) [W]hether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness.⁶⁷

This nonexclusive list of guidelines means that, when the Confrontation Clause is implicated, even declarations against penal interest must be scrutinized for individual indicia of reliability.

So it is only in civil cases that the twisting of the declaration against interest exception has consequence. There is no reason why it should not be used widely in such cases, and when it is used widely, it will inevitably pollute the fact-find-

62. See *supra* note 30.

63. WASH. CONST. art. 1, § 22.

64. 400 U.S. 74 (1970). There was no majority opinion in *Dutton*, and references to that case are to the plurality opinion of four justices.

65. 584 F.2d 694 (5th Cir. 1978). The doctrine of *Alvarez* is actually dictum, since the statements involved therein did not meet the standards of the doctrine laid down in that case. Nor was *Alvarez* the first case to state that declarations against penal interest could be used to inculcate third parties. It is "parent" only in the sense of being the most influential of such cases.

66. The plurality in *Dutton* found no significant possibility that the statements therein could be founded on faulty memory or perception, disposed of the sincerity issue by noting that the statements were spontaneous and against declarant's interest, and dealt with the problem of clarity by pointing out that the statement was so patently ambiguous that it carried its own warning against overvaluation. 400 U.S. at 88-89.

67. *State v. Parris*, 98 Wash. 2d 140, 146, 654 P.2d 77, 80 (1982).

ing process with unreliable hearsay. On the other hand, no Washington appellate civil case has used it at all. So perhaps this Jeremiah ought to be reading Ecclesiastes.⁶⁸

But if the danger to truth has thus far been shown to be more theoretical than real, it is time to react to, rather than ignore, the threat. We are now in this situation: the Washington Supreme Court has demonstrated that it will wreak havoc with the procedures designed to further the search for truth in order to see that the search succeed in a particular case. It would be hard to find any court so bloodless as to be willing to do otherwise. But the court has been forced into this dilemma by the absence of a safety-valve exception to the hearsay rule. Any reasonably designed safety valve would admit evidence of the sort involved in *Parris*. If such a valve is not made available there will be an explosion, of untold potential hazard, whenever the pressures of truth sufficiently gather. And—one more delicious irony—the “broad construction” (an exercise in litotes) foreseen by the Task Force⁶⁹ has indeed taken place. But it has been accompanied by the Task Force’s *bete noir*: the kind of unpredictable, individualized scrutiny of hearsay statements that was advanced as the reason for rejecting a safety-valve exception in the first place.⁷⁰ At least in criminal cases, declarations against penal interest must now be evaluated for reliability on an individual basis.⁷¹ Conclusion: We need a safety-valve exception and there is no valid reason not to have one. But this conclusion needs to be buttressed, informed, and refined by consideration of one more case.

II. *STATE V. SMITH*

*Smith*⁷² involved a very different kind of statement. A woman was assaulted in a motel room “which she kept for work-related activities.”⁷³ She went from the hospital to a police station, where she wrote out a statement in her own words, and swore to it before a notary, identifying defendant as her assailant. Later that day, defendant chased the victim, took her car keys by force, and left. At trial, the victim described the assault, but identified one Gomez as the assail-

68. See, e.g., *Ecclesiastes* 1:2 (Authorized Version).

69. WASH. R. EVID. 803(b) comment.

70. *Id.*

71. See *State v. Smith*, 97 Wash. 2d 856, 651 P.2d 207 (1982).

72. 97 Wash. 2d 856, 651 P.2d 207.

73. *Id.* at 858, 651 P.2d at 208.

ant. She admitted giving the sworn, voluntary statement, but testified that she was upset with defendant at the time. She also testified that she had lived with defendant both before and after the assault and had left \$150.00 for him at the jail for cigarettes. She denied he was her pimp.⁷⁴ Surprised, the prosecutor successfully moved for the admission of the prior sworn statement in evidence. It turned out to be the only evidence given at trial identifying defendant as the assailant. The Supreme Court of Washington upheld the admissibility of the statement, reversing the trial court's grant of a new trial.

The statement had been admitted pursuant to ER 801(d)(1)(i), which provides:

A statement is not hearsay if—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition⁷⁵

The court actually accepted certification of an issue from the court of appeals, the issue being whether this provision "permits the admission of a trial witness' prior inconsistent statement, as substantive evidence, when that statement was made as a written complaint (under oath subject to penalty of perjury) to investigating police officers."⁷⁶ Having accepted certification of the issue, the court ostensibly refused to decide it. Instead, it held that the statement was admissible under the facts of the particular case.⁷⁷

The issue was whether the term "other proceeding" could encompass a police investigation. The court's approach to resolving this issue was to examine the reliability of the statement. In fact, the opinion contained a generalization that, for all its breathtaking inaccuracy, expressed a deep judicial yearning: "In determining whether evidence should be admitted, reliability is the key."⁷⁸ That particular key was found in the facts that the victim "voluntarily wrote the statement herself, swore to it under oath with penalty of perjury before a notary,

74. *Id.* at 859, 651 P.2d at 209.

75. WASH. R. EVID. 801(d)(1)(i) (emphasis added).

76. 97 Wash. 2d at 857, 651 P.2d at 208.

77. *Id.*

78. *Id.* at 861, 651 P.2d at 210. If the statement were literally true, the rules of evidence could be reduced to a few sentences, an enormous body of constitutional law would disappear, and evidence teachers would have to find honest work.

admitted at trial she had made the statement[,] and gave an inconsistent statement at trial where she was subject to cross-examination.”⁷⁹ The court further noted that the police investigation was undertaken in order to assist the prosecutor in determining whether to file an information. The filing of an information was identified as one of four methods for determining the existence of probable cause, thus allowing the filing of charges. The other methods were grand jury indictment, inquest proceedings, and filing of a criminal complaint before a magistrate.⁸⁰ The court reasoned that since the latter three methods all involve “other proceedings,” as that term is used in ER 801 (d)(1)(i), so must a police investigation.⁸¹

The result in the case is fine, even compelled. Unfortunately, it cannot be reached without severe distortion of existing law. I will briefly point out the distortion that the court employed, and suggest how it might have found a more sophisticated distortion. The point, however, is the same made in connection with *Parris*: distortion on the grand scale will inevitably become ordered to accommodate the demands of truth.

Examination of the opinion requires some background on ER 801(d)(1)(i). Ostensibly, the section is not a hearsay exception. Rather, it classifies as nonhearsay those statements it describes. It does so notwithstanding the fact that such statements clearly fit within the general definition of hearsay found in ER 801(a)-(c). The classification of such statements as nonhearsay, rather than as exceptions to the hearsay rule, seems arbitrary, but is actually the proud assertion of a mutilated and bloodied notion: that a statement ought not be considered hearsay when its maker can be examined in court concerning its truthfulness. The idea behind this notion is that such in-court examination provides an adequate basis for assessing the truthfulness of the statement. The Federal and Washington Rules, as presently written, identify two general classes of such statements. The second such class, found in ER 801(d)(2) and its federal counterpart, consists of five different categories of statements by a party opponent. The idea is that, as previously noted, a party can always take the stand and explain or deny his prior statement, allowing the trier of fact

79. *Id.* at 863, 651 P.2d at 211.

80. *Id.* at 862, 651 P.2d at 210-11.

81. *Id.*

to assess his credibility as a witness and thus the truthfulness of the prior statement. Unfortunately, this idea is pure fiction when it is applied to statements other than those that the party has made, adopted, or authorized, such as statements of an agent unauthorized to speak, or of a coconspirator.⁸²

The second category of constructive nonhearsay consists of certain prior statements of a witness. Thereby hangs a tale. The Advisory Committee, the United States Supreme Court, and the Senate, all adopted the view that prior statements of a witness should not be excluded on hearsay grounds. This view is based upon the idea that there are no hearsay dangers in the reception of a witness' prior statements. If the statements are consistent with the witness' testimony, and the witness affirms them, they become part of his testimony. If they are inconsistent, the trier of fact can discern from cross-examination of the witness (and other guides to the assessment of credibility) whether his testimony is truthful and thus whether his prior statement is accurate.⁸³ The doctrine has compelling logic and impeccable credentials.⁸⁴ It has been adopted by ten American jurisdictions,⁸⁵ most notably California⁸⁶ and most recently Pennsylvania.⁸⁷ Even before recommending it as a rule of evidence, the Supreme Court held that it satisfied the demands of the Confrontation Clause.⁸⁸ And it has been vigorously opposed, often by those with considerable trial experience who are skeptical of the effectiveness of cross-examination concerning statements not made or adopted on the witness stand.⁸⁹ This author takes no position in this debate. But the opponents of this view prevailed in the House of Representatives and forced the political compromise that produced the enacted

82. See WASH. R. EVID. 801(d)(2)(iv), (v).

83. FED. R. EVID. 801(d)(1) advisory committee's note.

84. The doctrine received the judicial endorsement of Judge Learned Hand in *Di Carlo v. United States*, 6 F.2d 364 (2d Cir. 1925), and the professorial endorsement of commentators such as Edmund M. Morgan, in *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

85. Arizona, California, Georgia, Indiana, Kansas, Kentucky, New Jersey, Pennsylvania, Utah, and Wisconsin. The authorities are collected in *Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66, 70 (1986).

86. CAL. EVID. CODE § 1235 (West 1966).

87. See *Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66, 70 (1986).

88. See *California v. Green*, 399 U.S. 149 (1970).

89. See, e.g., *Ruhala v. Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967); *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939).

language.⁹⁰ Under that language, the prior inconsistent statement of a witness is admissible as substantive evidence only if it is given under oath subject to penalty of perjury at a "trial, hearing, or other proceeding, or in a deposition." The legislative history makes clear that the term "other proceeding" is intended to cover grand jury proceedings. The only other clue to what else it might cover is a passing reference to a "formal proceeding."⁹¹ (The remainder of ER 801(d)(1) and its federal counterpart, incidentally, classify as nonhearsay certain prior consistent statements and prior identifications.)⁹²

The rule in its present form is thus the product of two competing theories: the idea that hearsay dangers do not exist when the prior statements of a witness are used, even as substantive evidence, and the notion that hearsay dangers can be overcome by circumstances imparting reliability to a hearsay declaration. The hybrid (or perhaps faunlike) nature of the rule produces mischief in attempting to construe the sadly vague term "other proceeding." Congress thought, wisely or otherwise, that an opportunity to cross-examine a witness about her own prior inconsistent statement was insufficient to justify removing it from the exclusionary ban of the hearsay rule. More was required, in the form of a guarantee of reliability. The best statement of what it takes to provide that guarantee was made in a comment quoted by the *Smith* court itself:

Inquiry into what other statements are encompassed by the Rule should be informed by the two purposes Congress had in mind in narrowing the provision originally proposed by the Court. The first was to remove doubt as to the making of the prior statement The second purpose was to provide at least the minimal guarantees of truthfulness which an oath and the circumstance of a formalized proceeding tend to assure.⁹³

It follows that the definition of "other proceeding" ought to be

90. FED. R. EVID. 801(d)(1)(A) House and Senate Committees on the Judiciary notes, conference committee notes.

91. *United States v. Cunningham*, 446 F.2d 194 (2d Cir. 1971), cited in FED. R. EVID. 801(d)(1)(A) House Committee on the Judiciary notes.

92. Prior consistent statements are admissible under largely the same conditions as at common law, but as substantive evidence, and not merely for rehabilitation purposes. FED. R. EVID. 801(d)(1)(B). A witness' prior statement identifying a person after perceiving him is classified as non-hearsay under FED. R. EVID. 801(d)(1)(C).

93. *State v. Smith*, 97 Wash. 2d 856, 861-62, 651 P.2d 207, 210 (1982) (quoting 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 419 (1980) [hereinafter LOUISELL & MUELLER]).

informed by a consideration of the extent to which the proceeding tends to guarantee truthfulness, such as by impressing the declarant that she is making statements of consequence. A "formalized proceeding" tends to have this effect. The proper question for the *Smith* court was whether, or when, a police investigation does so.

But the court did not address that issue, despite the precision of the question of which it had accepted certification.⁹⁴ Instead, it embarked upon a search for factors, quite unrelated to the question of whether a police investigation is a "proceeding" designed to give credibility to the witness' prior sworn statement under the totality of the circumstances attendant upon its making.⁹⁵ The court found these factors in the witness' having voluntarily written the statement in her own words, sworn "before a notary" and admitted at trial that she had made the statement.⁹⁶ The court's only direct inquiry into the question of whether a police investigation could be a "proceeding" consisted of its likening the investigation to other enterprises, clearly "proceedings" the purpose of which is to determine the existence of probable cause for the filing of criminal charges.⁹⁷

Some of these considerations make sense; others do not. The "voluntary" character of the statement obviously enhances its reliability. So does the fact that the witness wrote it out in her own words, as opposed to signing an affidavit composed by another, which she might not fully understand.⁹⁸ The fact that she admitted in court the making of the prior statement should not be given significance, as long as there is sufficient other evidence "to remove doubt as to the making of the . . . statement."⁹⁹ And the fact that a police investigation has a *purpose* identical to that of certain "proceedings" has nothing to do with whether the *manner* of its conduct is designed to impress a declarant with its solemnity and importance, or otherwise to contribute to reliability.

94. *Id.* at 857, 651 P.2d at 208. See *supra* text accompanying note 76.

95. *Id.* at 862, 651 P.2d at 210-11.

96. *Id.*

97. *Id.* at 862-63, 651 P.2d at 211.

98. "Although the meaning of 'proceeding' is not yet clear, it has been observed that the words of limitation were designed in part to prevent the admission of affidavits given by a coerced or misinformed witness. 4 J. WEINSTEIN, EVIDENCE ¶ ¶ 801(d)(1)[01], 801(d)(1)(A)[01] (1975)." WASH. R. EVID. 801 comment.

99. LOUISELL & MUELLER, *supra* note 93.

In *Parris*, the court drastically expanded the scope of a hearsay exception by giving it the broadest possible reading. In *Smith*, the court took a rather broad rule classifying statements as nonhearsay and seemed to narrow it by requiring indicia of reliability not contemplated by the rule itself. Although the court's approach in *Smith* was implosive, rather than explosive, the result was the same: obliteration of certain arguably sensible and legislatively-demanded barriers to the admission of hearsay. Close analysis of the opinion shows that the court did indeed lay down a rule, despite its stated refusal to do so, and that the rule is a broad, if not altogether defensible one: a witness' prior statement inconsistent with her trial testimony, voluntarily written in her own words, sworn to under oath with penalty of perjury before a notary, taken during a police investigation, and admitted by the witness at trial to have been made, is not excluded by the hearsay rule.¹⁰⁰ The features of the kind of statement thus approved are common to most statements taken during police investigations and can be made common to all (except perhaps for the absurd requirement, which the court, it is to be hoped, would reconsider, that the witness admit on the stand that she made the statement, written and signed by her which is offered in evidence). Police officers therefore know that, if they take certain steps, they can produce a statement that will be admissible in evidence should the witness turn coat. For that matter, the court may have unwittingly made surplusage of everything but the giving of an inconsistent statement under oath, subject to the penalty of perjury, before a notary. Under the Washington perjury statutes, perjury is committed only by knowingly giving a materially false statement under an oath required or authorized by law, in an "official proceeding" or with intent to mislead a public officer.¹⁰¹ The latter term includes any proceeding (a term not itself defined) before a notary.¹⁰² If an oath is not authorized or required by law, then its maker is not subject to penalty of perjury, and Rule 801(d)(1)(i) has no application. If it is so authorized or required and is administered by a notary, and the term "official proceeding" as defined in the perjury statutes is deemed to be a "proceeding" for purposes of the rule, then a statement made under such an oath is

100. *State v. Smith*, 97 Wash. 2d 856, 863, 651 P.2d 207, 211 (1982).

101. WASH. REV. CODE § 9A.72.020, 9A.72.030 (1987).

102. *Id.* § 9A.72.010(4).

per se within the rule.¹⁰³

I do not object to this result. I could accept with equanimity the broad notion that all prior inconsistent statements of a witness ought to be admissible as substantive evidence. The reliability-enhancing effects, however marginal, of requiring an oath, perhaps of notarial administration, certainly appease my meager appetite for guarantees of verity. But those who think the language of the rule has meaning ought to be at least moderately alarmed at its evisceration. And those who believe evidentiary rules ought to be amended formally, rather than by judicial construction, might wish to take at least a shadow of umbrage at the partial eclipse of their credo.

Could the court have done otherwise and still have admitted the statement? Two options, neither terribly attractive, were available. The court might simply have decreed that a police investigation, of whatever form or character, was a "proceeding." Such a rule would have been simple and easy to apply, qualities prized by bench and bar alike. Given the vagueness of the quoted term, such a construction would be well within the bounds of judicial authority. Such a decree, however, would have opened the doors to an infinite variety of sworn statements, many of dubious validity, which can be quite properly collected by police.¹⁰⁴ As a second opinion, the court might have set forth some guidelines, or even criteria, for determining when a police investigation is a proceeding. Such guidelines would presumably focus on factors designed to impress the maker of a statement with its importance and the concomitant need for truthfulness. Such factors as the location where the statement was made (*e.g.*, the police station versus the crime scene), the identity or rank of the interrogators, the giving of warnings or other solemn abjurations, the administration of an oath before the making of the statement, or the presence or absence of a stenographer, all might have some

103. There is, of course, no indication that the drafters of the Washington Evidence Rules were aware of, much less acted upon, the niceties of the Washington perjury statutes. Given their verbatim adoption of the Federal Rule, it is unlikely that they intended to make application of the rule dependent upon those peculiar niceties.

104. Police routinely take statements from anyone having knowledge of a particular case. They could take the trouble to have any of these statements sworn to before a notary for any purpose, including the purpose of "locking in" a witness who might give inconsistent testimony at trial. There is nothing inherent in a police investigation which distinguishes it from any other activity that might involve the taking of sworn statements, and therefore nothing which contributes to enhanced reliability.

bearing on whether the declarant knew or should have known of the seriousness of her statement. The difficulty with such guidelines, however, is that they would obscure the simple fact that a police investigation, regardless of its inherent trappings, is quite different from a trial, hearing, deposition, or grand jury proceeding. All of those customarily involve structured (and, except for grand jury proceedings, adversarial) questioning by officers of the court in a judicial or quasi-judicial setting (except for a deposition, which usually has the specific safeguards of counsel acting as adversaries and the possibility of judicial recourse). They are characterized by a lack of the solicitousness for a victim or other traumatized witness that might impede the search for truth in a police interrogation, and are usually conducted when the witness has had the time to calm down after the event. Thus, any characterization of a police investigation as a "proceeding" carries the appreciable risk, which the court may have indeed appreciated, of opening the door to questionable hearsay. It is not surprising, therefore, that the court sought some indicia of reliability beyond the taking of a sworn statement in the course of a police investigation. The fact that it ended up expanding the rule to embrace the product of cleverly conducted police investigations is merely an unfortunate consequence of a rather sloppy approach to the question of how to distort the rule to admit the statement in *Smith*.¹⁰⁵

The court was, of course, bound and determined to find a way to admit that statement, as indeed it should have been. The statement so reeks of veracity that its admission is demanded by any rational jurisprudence. Its reliability springs from factors which the court did not expressly consider, to a much greater extent than those which it did. The victim called the police to the hospital, bearing the fresh marks of a severe assault.¹⁰⁶ She unequivocally identified her assailant as someone she knew very well. In short, there was no possibility that her statement was the product of faulty memory or perception, or ambiguous on the issues of assault or the identity of the assailant. The only question concerned its sincerity. On this question, the trial court had much more than the statement itself. Defendant had offered violence to the victim on the very day of the assault. She continued to live with him after

105. See *State v. Smith*, 97 Wash. 2d 856, 651 P.2d 207 (1982).

106. *Id.* at 858, 651 P.2d at 208.

the assault, indicating a motive to exculpate him. But she waited until trial was in progress to change her story, perhaps to bring about an acquittal, rather than a pretrial dismissal without prejudice. His domination of her was evidenced by her leaving him \$150.00 at the jail "for cigarettes."¹⁰⁷ An all-too-familiar pattern of abuse, complaint, repentance, and recantation was being followed. The jury had an excellent opportunity to observe her under cross-examination and to resolve the one question in dispute: was she lying on the stand, or to the police, in her identification of her assailant? Whatever doubts there may be generally concerning the efficacy of cross-examination in determining the truthfulness of a witness' prior inconsistent statement, *Smith* was surely a case where the truth could be counted upon to emerge.

But these factors were not considered by the court, perhaps because they could not properly be considered. They show the reliability of the particular statement in issue. But the rule does not concern itself with the reliability of a particular statement. Rather, it asks only whether the circumstances, which it posits as guaranteeing reliability in general, were present in this case. Pretty clearly, they were not. Some torturing of the rule was necessary to permit admission, a fact of much greater importance than the court's use of the rack when the thumbscrew might have been adequate to the occasion.

We now have two cases in which the Washington Supreme Court found itself forced to rend irreparably the fabric of two rules designed to admit good evidence and exclude bad. One of these involved an exception to the hearsay rule, the other the functional equivalent thereof. The rending was compelled by the demands of truth and the inability of the rules to accommodate those demands. Other rules await similar rupture. Rather than suppress truth, the Washington judiciary will attack, with meat axe or scalpel, its barriers.

Most in need of rescue from potential mutilation is the "speaking agent" rule, a favorite of the Task Force. Federal Rule 801(d)(2)(D) treated as a statement of a party opponent one which was made "by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship"¹⁰⁸ This is a broad and highly controversial provision. Its principal effect is

107. *Id.* at 859, 651 P.2d at 209.

108. FED. R. EVID. 801(d)(2).

to benefit civil plaintiffs against deep-pocket defendants by making most statements by employees admissible against their employers. It is subject to the criticism that such statements are neither possessed of necessary guarantees of reliability nor capable of being explained or denied by the party who made them, as is the case with true statements of the parties opponent. The rule thus has enormous potential consequence for wealth redistribution and the admission of unreliable evidence. Recognizing this, the Task Force recommended (in light of previous Washington law) the retention of what it called the "speaking agent" approach¹⁰⁹ and adopted, as ER 801(d)(2)(iv), a rule classifying as nonhearsay not all statements of an agent of the party, but only "a statement by his agent or servant acting within the scope of his *authority to make the statement for the party . . .*"¹¹⁰ The adoption of this drastically restrictive rule, in preference to its federal analog, reflected a clear policy choice by the Task Force, a choice justifiable by considerations of both economics and the integrity of the fact-finding process. But if a clearly reliable statement by an agent or employee is offered against a principal, there will be considerable pressure to find "authority to make the statement" when none, in fact, exists.¹¹¹ The adoption of lax criteria for finding such authority could seriously jeopardize the policies underlying the choice of the restrictive rule.

No hearsay exception or nonhearsay classification is exempt from the pressures of truth. For example, the exception for a "statement describing or explaining an event or condition, or *immediately* thereafter . . ." ¹¹² contains an adverb capable of highly elastic construction. The "excited utterance"¹¹³ exception invites imaginative determinations that a declarant was "under the stress of excitement . . ." ¹¹⁴ The term "predecessor in interest," as used in the former testimony

109. WASH. R. EVID. 801 comment.

110. WASH. R. EVID. 801(d)(2)(iv) (emphasis added).

111. There is some indication that this pressure has had its effect. In *Lockwood v. A C & S, Inc.*, 109 Wash. 2d 235, 744 P.2d 605 (1987), the Washington Supreme Court dealt with some highly reliable business records, and was quick to assume that the person keeping them had been authorized to speak through the records. The result may have been the fault of counsel for failing to make a proper record, but is nonetheless admonitory.

112. WASH. R. EVID. 803(1) (emphasis added).

113. WASH. R. EVID. 803(2).

114. *Id.*

exception,¹¹⁵ appears sufficiently mystifying as to admit all sorts of constructions¹¹⁶ and is thus highly susceptible to an interpretation that would open the door in civil cases to the use of wide varieties of former testimony against persons having no realistic opportunity to cross-examine the declarants.¹¹⁷

If there is hope for an end to the torture, it lies in the creation of a safety-valve exception to the hearsay rule. Such an exception, properly drawn, would accommodate both the need for truth and the integrity of existing rules removing certain kinds of hearsay from the exclusionary ban, and thus remove the pressures to violate that integrity. It may not work. Indeed, it is clear that the existence of a general exception, by itself, will not prevent such violation, since the perversion of the declaration against interest exception had its inception and full development in the federal courts,¹¹⁸ where such a general exception exists.¹¹⁹ The success of the safety valve would depend upon its inherent efficacy and the willingness and ability of bench and bar to use it effectively.

With those factors in mind, this Article will next address the problem of formulating a promising safety-valve exception to the Washington hearsay rule, in light of both the demonstrated need for such an exception and the legitimate criticisms that have been directed at the residual exception, which the Task Force refused to adopt.

III. A PROPOSED AMENDMENT TO THE EVIDENCE RULES

The Task Force, in deciding "not to adopt any catchall pro-

115. WASH. R. EVID. 804(b)(1).

116. Compare *In re Master Key Antitrust Litig.*, 72 F.R.D. 108 (D. Conn.), *aff'd per curiam*, 551 F.2d 300 (2d Cir. 1976) with *In re IBM Peripheral EDP Devices Antitrust Litig.*, 444 F. Supp. 110 (N.D. Cal. 1978).

117. The exception applies, by its terms, "if the party against whom the testimony [of an unavailable declarant] is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." WASH. R. EVID. 804(b)(1). The mere opportunity to cross-examine the witness at the earlier proceeding, by somebody, is not enough. The party against whom the testimony is offered must have had his own opportunity to develop the testimony, unless that opportunity was enjoyed by a "predecessor in interest" of the party. Obviously, liberal construction of the term "predecessor in interest" could effectively wipe away the requirement that the party against whom the testimony is offered must have had, in the ordinary case, the opportunity to develop the testimony.

118. See *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978).

119. FED. R. EVID. 803(24), 804(b)(5).

vision,"¹²⁰ seemed to think that the choice was between the federal provision or none at all and found the former distasteful in certain particulars. The federal provision referred to a "statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . ." ¹²¹ The Task Force's characterization of this standard as "elastic" is not unreasonable, particularly given the diversity of the circumstantial guarantees of trustworthiness offered by the various exceptions and the difficulty of determining equivalence thereto. But the problem of elasticity can be substantially remedied by setting forth a nonexclusive list of factors that the trial court should consider in assessing the reliability of any statement and the propriety of its use. There is fortunately at hand an initial list of factors bearing upon reliability. The *Parris* court, drawing upon *Dutton v. Evans*¹²² and *United States v. Alvarez*,¹²³ has, as noted above, identified a number of relevant factors.¹²⁴ The *Dutton* criteria deal with specific guarantees of the testimonial capacities of perception, memory, sincerity, and clarity.¹²⁵ The *Alvarez* factors relate specifically to sincerity and to the question of whether the statement was made at all.¹²⁶ For purposes of Confrontation Clause analysis, these criteria are now clearly a part of Washington law. They can therefore usefully be made part of the list of reliability criteria. To these may be added such criteria as whether the declarant had a motive to tell the truth (which is not the same as not having a motive to lie), whether the declarant made inconsistent statements, and the presence or absence of corroborating circumstances.¹²⁷

The appropriateness of using a given statement should be determined by considering its reliability in conjunction with the need for its use. The Federal Rule requires that the statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts . . ." ¹²⁸ As an absolute require-

120. WASH. R. EVID. 803(b) comment.

121. FED. R. EVID. 803(24), 804(b)(5).

122. 400 U.S. 74 (1970).

123. 584 F.2d 694 (5th Cir. 1978).

124. See *supra* text accompanying notes 66, 67.

125. *Dutton*, 400 U.S. at 74. See *supra* note 66.

126. See *supra* text accompanying note 67.

127. The presence of corroborating circumstances is, of course, an express requirement for certain applications of FED. R. EVID. 804(b)(3).

128. FED. R. EVID. 803(24), 804(b)(5).

ment, this seems to impose an unnecessary bar. Other provisions can discourage casual use of a safety-valve exception. Nonetheless, the court should be able to consider the importance of the statement to the proponent's case. Similarly, it should consider whether the declarant is available. The idea of the "unavailability" exceptions is that they embrace statements, the probative value of which is inferior to that of live testimony, but sufficiently great to justify admission when the declarant's testimony cannot be had.¹²⁹ Similarly, the needs of justice may require the admission of a given statement when its maker is not available as a witness, but not if its maker can testify.

The drafters also expressed concern that trial preparation would be made difficult by the uncertainty concerning the admissibility of a given statement engendered by the elasticity of the admissibility standard of the federal catchall exception.¹³⁰ There are ways to ameliorate, and perhaps eliminate altogether, this difficulty. The most obvious device is to require pretrial determination, wherever feasible, of admissibility issues arising under a safety-valve exception.¹³¹ Such a provision would not, of course, solve the problem of the lawyer who wants to know the admissibility of certain evidence before deciding whether to prosecute or defend a claim. But lawyers can never predict admissibility decisions with certainty, particularly before the filing of a complaint or answer. The list of criteria mentioned earlier would remove considerable elasticity from the standard and permit a lawyer to make a highly informed prediction concerning admissibility, even before determination.

The requirement of a pretrial determination, with the burden on the proponent to arrange for a hearing, would also tend to ensure that the safety-valve exception would not be used lightly or frequently. A requirement that the trial court state for the record the reasons behind its admissibility decision¹³² would also serve this end (presumably because counsel would be reluctant to impose upon the court) and, more importantly,

129. 4 S. WEINSTEIN & M. BERGER, EVIDENCE 804-35 (1985).

130. WASH. R. EVID. 803(b) comment.

131. Such a provision for mandatory pretrial determinations of admissibility would not be new. See WASH. REV. CODE § 9A.44.020 (1987), providing for such a hearing in certain sexual-offense cases.

132. Such a requirement has been judicially imposed in other contexts. See *State v. Alexis*, 95 Wash. 2d 15, 621 P.2d 1269 (1980).

would ensure some degree of attention to criteria pertinent to admissibility, with a consequent reduction of elasticity in the admissibility standard. The pretrial determination should be as informed as possible. Hence, the rule would require the proponent, in the language of the federal provision, to make "known to the adverse party sufficiently in advance of the . . . hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address [if known] of the declarant."¹³³ The phrase "if known" has been inserted to avoid the implication of the Federal Rule that the death or disappearance of the declarant would necessarily be fatal to admissibility of his statement.

The Task Force's doubt "that an appellate court could effectively apply corrective measures"¹³⁴ because of "doubt whether an affirmance of an admission of evidence under the catch-all provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial court had abused its discretion"¹³⁵ is, as noted earlier, somewhat far-fetched. But if it has some legitimacy, it could also be assuaged by a provision specifying that appellate review of an admissibility decision under the safety-valve exception would be limited to the issues of whether the procedures mandated by that rule had been followed, and whether the trial court abused its discretion. Presumably, even the moderately able appellate courts envisioned by the Task Force could follow such a simple rule.

Apart from meeting the Task Force's objection, however, there is positive merit in making every effort to preclude the creation of binding precedent in appellate review of decisions made under the proposed rule. If new hearsay exceptions are to be created, they should be adopted through the rule-making process. Precedent-setting decisions under the rule would unduly complicate the law. More importantly, the keystone of my proposal is that the admissibility of any hearsay declaration not covered by an existing exception should be determined by assessing its reliability in light of the unique facts of each case. There is nothing more natural for judges and lawyers than to seek out rules as a substitute for reasoning and responsibility.

133. FED. R. EVID. 803(24), 804(b)(5).

134. WASH. R. EVID. 803(b) comment.

135. *Id.*

It is my aim to restrain that tendency and to compel, insofar as possible, those who make and those who urge admissibility decisions to focus on the search for truth, rather than the search for precedent.

I would delete from the federal version, as vague and redundant, the requirement that the statement be "offered as evidence of a material fact."¹³⁶ The red tape envisioned by my proposal would satisfactorily guarantee that counsel would not go to the considerable effort of attempting to remove it in order to offer evidence of an "immaterial fact."

As to the form of the proposed rule, it would be feasible to treat it as the last in a list of hearsay exceptions. Indeed, ER 803(b) and 804(b)(5), corresponding to the federal residual exceptions, are already "Reserved" for "Other Exceptions."¹³⁷ There is only one difficulty with this approach. Under the Federal Rules, an identically worded general exception is, for reasons not entirely clear, found in the following two places: at the end of the list of exceptions that apply only when the declarant is unavailable,¹³⁸ and at the end of the list of exceptions that apply regardless of the availability of the declarant.¹³⁹ In my proposal, availability of the declarant is a factor to be considered by the trial court on the issue of admissibility. It would engender confusion to place such a provision on either list of exceptions, or on both. Accordingly, I recommend that it be the subject of a separate rule. I would number it Proposed Rule 808, since that is the lowest appropriate number still unfilled. The disadvantage of this approach is that it places a hearsay exception at some distance from the other exceptions, and may thus be overlooked.¹⁴⁰ That seems to be less of a problem than the engendering of perhaps insoluble confusion.

With the foregoing explanation, the proposed rule is as follows:

ER 808: A FURTHER EXCEPTION

A hearsay statement not otherwise excepted from the exclusionary effect of this title may be so excepted, in the discretion of the court, under the following conditions:

136. FED. R. EVID. 803(24), 804(b)(5).

137. These terms are the only entries under these rules.

138. FED. R. EVID. 804(b)(5).

139. FED. R. EVID. 803(24).

140. Two intervening rules, having nothing to do with hearsay exceptions, would stand between the specific exceptions and the proposed rule.

(1) The proponent of the statement shall file a noticed motion to determine whether the statement is to be excepted under this rule. The motion must be timely filed to allow a hearing thereon not less than ten days prior to the beginning of the trial or other proceeding in which the statement is to be offered. The proponent shall make known to the adverse party, sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to meet it, his intention to offer the statement and the particulars of it, including the name and address, if known, of the declarant. The foregoing requirements shall not apply to statements that the proponent satisfies the court were not, and could not in the exercise of reasonable diligence have become, known to the proponent in time to meet those requirements, nor as to statements, the admissibility of which depends upon the surprise of the proponent. Where these requirements do apply, no order admitting a statement shall be entered within ten days prior to the beginning of the trial or other proceeding in which the statement is to be offered.

(2) A statement offered pursuant to this rule may not be admitted unless the court finds that it is sufficiently reliable to justify its consideration by the trier of fact on the same basis as statements not excluded by this title. In making this finding, the court shall consider, in light of all the circumstances made known to it, the extent to which the trustworthiness of the statement is guaranteed, or capable of evaluation by the trier of fact, by the declarant's perception, memory, and sincerity, and the clarity of the statement. All factors germane to the determination of reliability may be considered by the court, including, but not limited to, the following:

- (a) Whether declarant had an apparent motive to lie;
- (b) Whether declarant had an apparent motive to speak truthfully;
- (c) The declarant's general character;
- (d) Whether the statement was made spontaneously;
- (e) The timing of the declaration;
- (f) The relationship between declarant and the witness testifying to the declaration, or between declarant and a party;
- (g) Whether declarant made other statements consistent or inconsistent with the declaration; and
- (h) The presence or absence of circumstances corroborating the statement.

In addition, the court should consider evidence bearing on

whether the statement was actually made or accurately recounted, such as the number of people who heard the statement. The court should also consider the necessity for using the statement, in light of such factors as the availability or unavailability of the declarant, and the importance of the statement to the proponent's case and the interests of justice.

(3) An order favorable to the proponent of a statement, made pursuant to this rule, shall state, on the record, the reasons supporting its decision, including the factors supporting a finding of reliability.

(4) Appellate or other review of a decision made pursuant to this rule shall be limited to the questions of whether the procedures mandated by this rule were followed and whether the court abused its discretion.

As proposed, the rule provides for a pretrial hearing on the issue of whether a statement may be excepted from the exclusionary effect of the hearsay rule. This is not precisely a hearing on the issue of admissibility since a trial court may be disinclined to determine admissibility until the statement is actually offered and its relevance can be determined in light of the totality of the circumstances and the existence of possible other grounds for exclusion.¹⁴¹ In most cases, however, the only real issue will be whether the hearsay rule requires exclusion, and a determination of that issue will ordinarily be a determination of admissibility or inadmissibility.

The burden is placed on the proponent of the statement not only to arrange a pretrial hearing but to obtain an affirmative ruling at least ten days before trial. A simple failure of the trial court to rule on the issue will be fatal to the proponent's attempt to utilize this rule (though, of course, the proponent is always free to find some other way around the hearsay rule). This guarantees ample notice to the opponent and facilitates his trial preparation. There is a separate requirement, with no specific time period, for advance notice to the opponent sufficient to provide a fair opportunity to litigate the issue of admissibility. These provisions not only protect the opponent but guarantee that the rule will not be lightly invoked. The only exception from these requirements is for newly-discovered evidence, or evidence admissible only if the proponent is surprised. As an example of the latter, the prosecutor in

141. *E.g.*, relevance, privilege, authenticity, and the "original document rule."

Smith was able to offer the witness' prior statement only after the witness testified inconsistently therewith, to the prosecutor's surprise.¹⁴²

The requirement that an order favorable to the opponent state for the record the reasons justifying it is absolute and is both a further assurance that the rule will not be used casually and an effort to provide assistance in the process of appellate review.

The requirement of a judicial finding of reliability is obviously central to this rule. The formulation avoids the "equivalent trustworthiness" language of the Federal Rule, which the Task Force found objectionable, in favor of a more generalized standard with a focus upon specific factors guaranteeing reliability. Both *Parris* and *Smith* purport, for somewhat different reasons,¹⁴³ to demand inquiry into the reliability of individual statements, but neither offers clear guidelines in assessing reliability. The proposed rule provides rather clear guidelines and should enhance predictability and uniformity of decision. Since the factors bearing upon reliability also go to the evidentiary weight to be given a statement, lawyers accustomed to arguing to a jury regarding the weight of evidence should be able to render helpful assistance to the court in determining admissibility.

Finally, the limitation of appellate review to the issues of procedural regularity and abuse of discretion should ensure that no precedential effect is given to an appellate court's decision on application of the rule. Each case would be limited to its own peculiar facts, and there would be no risk of the improper creation of a new exception. It would be theoretically possible to find abuse of discretion in excluding evidence under this rule, but the thrust of the prescribed procedures is, except in highly unusual cases, to provide review only for orders admitting such evidence.

How would our principal cases have been decided under the proposed rule? In *Parris*,¹⁴⁴ a finding of reliability would clearly have been sustained. As noted earlier, there were no

142. *State v. Smith*, 97 Wash. 2d 856, 859, 651 P.2d 207, 209 (1982).

143. In *Parris*, the reliability inquiry was in response to the demands of the Confrontation Clause. *Parris*, 98 Wash. 2d at 145, 654 P.2d at 79. See *supra* note 30. In *Smith* there was no Confrontation Clause problem. See *California v. Green*, 399 U.S. 149 (1970). However, the court required specific guarantees of reliability without fully stating why. *Smith*, 97 Wash. 2d at 860, 631 P.2d at 209.

144. 98 Wash. 2d 140, 654 P.2d 77 (1982).

problems of memory or perception; no apparent motive to lie; a motive to speak truthfully (to further the drug sale operation in which declarant was engaged); no latent ambiguity; no likelihood of unclarity leading to potential overvaluation of the statement; making of the declaration during, rather than after, the operation to which it referred; and a host of corroborating circumstances. The fact that two persons heard the statements increases the likelihood of accurate recountal. The necessity or importance of the statements, however, is far from clear. The prosecutor seems to have had quite a strong case without them, and they may have contributed little to the conviction. The prosecutor may have been disinclined to go to the trouble of following the procedural demands of the rule, and if he had done so, the court might not have been satisfied with the importance of the evidence. An exclusion under such circumstances could hardly have harmed the ends of justice. And admission would not have required the drastic expansion of the exception for declarations against interest which has afflicted us ever since.

In *Smith*,¹⁴⁵ by contrast, the evidence in question was virtually the whole case against the defendant, and its importance was thus clear. No one doubted that the statement was actually made. As noted, it was unambiguous and not subject to the possibility of faulty memory or perception. And its sincerity was obviously guaranteed. Its admission would be virtually mandated under the rule. The absence of a pretrial hearing or order would be no bar because the statement did not become admissible until the prosecutor was surprised by the witness' turning coat.¹⁴⁶

IV. CONCLUSION

The problem addressed in this Article is a manifestation of the best and the worst in the judicial system. What is best about the system is that those who operate it love truth. What is worst is that the system far too often compels a choice

145. 97 Wash. 2d 856, 651 P.2d 207 (1982).

146. It would be pointless for a prosecutor, under the proposed rule, to move for an order excepting a sworn statement of a prospective witness from the hearsay rule, absent some indication that the witness would testify inconsistently at trial. In nearly every case, of course, the witness will testify in accordance with his prior statement. If the prosecutor is legitimately surprised by inconsistent testimony, then a predicate for admissibility is established by the inconsistency and lack of a pretrial motion is excused by the surprise.

between truth and law, a variant of the much too familiar choice between law and justice. The problem is a reminder that "every mature system of justice must cope with the tension between rule and discretion"¹⁴⁷ and that we fall short in maturity as we imperfectly thus cope. Our readiness to choose discretion or rule, truth or law, obscures the fact that we can often have both.

The demand for truth in specific cases will burst all barriers. When the barriers are rules of evidence that keep a little truth and a lot of falsehood from polluting the judicial system, their destruction poses serious threats to the overall pursuit of truth. I have proposed a procedural device designed to protect the integrity of the hearsay rule against the assaults of evidence of such truthful character that it will be admitted, at whatever cost, to the rule itself. Adoption of this device, in some form, may have some immediate practical benefit. But it would, at all events, symbolically reaffirm our commitment to the rule of law, or at least the law of rules.

147. *United States v. Barker*, 546 F.2d 940, 965 (D.C. Cir. 1976) (Leventhal, J., dissenting).