Essay

HEARSAY, DEAD OR ALIVE?

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Astute observers have written that the hearsay rule is sick and near death.[1] Are they right? The available evidence does not support absolute conclusions, but it does contain clues.

I will start with a clue from outside the world of published judicial opinions. Eleanor Swift's survey of state prosecutors indicated that the respondents found the hearsay rule to be alive and somewhat of an obstacle.[2] Although the respondents were skeptical about trial judges' understanding of the hearsay rule, their responses suggest that judges were trying to enforce it; fifty-two percent responded that judges tend to overexclude when applying the rule incorrectly.[3]

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1. For commentary that leans toward the "hearsay is dead" end of the spectrum, see Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 798 (1992) (arguing that the hearsay rule is in "its death throes"); Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 433 (1986) (noting that "the fundamental hearsay framework adopted in the Federal Rules of Evidence is being subverted"); see also Professor Fenner's tour de force of the holes in the hearsay doctrine and the ways around the hearsay exclusion, G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. REV. 1, 97 (1993) ("I am not advocating abolishing the hearsay rule and substituting relevancy rules so much as I am stating that in very large part this has been done already. While we had our backs turned, the hearsay rule became terminally and incurably ill." (footnote omitted)).

2. Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 501–02 (1992). Professor Swift surveyed 169 prosecutors who attended a National College of District Attorneys' Career Prosecutor Course in the summer of 1991, and received 68 responses. *Id.* at 501 nn.97–98.

3. *Id.* at 501 n.100.

Another clue may be found in the quantity of cases and case reversals. Were the hearsay ban dead or nearly dead, one would rarely see appellate decisions reversing for hearsay error. Yet appellate courts produce an ample number of hearsay reversals. Professor Steve Penrod and I examined the period from 1960 to 1988 as part of a larger study of judicial treatment of hearsay, and found that one in 107 federal reversals was based at least partly on hearsay error,[4] usually error in admitting hearsay.[5] Bearing in mind the prodigious number of substantive and procedural rules vying for vindication, that is an impressive proportion. (If reversals were America, hearsay would be as big as West Virginia.[6]) A partial replication of the study for 1997 produced less impressive results, indicating that one out of 220 federal appellate reversals were hearsay reversals.[7] If future years confirm this diminution in hearsay reversals, then possibly the appellate courts are reducing their policing of hearsay infractions. Conceivably, though, the number of infractions could itself be diminishing. That could be the case if the Federal Rules of Evidence, in the hands of lawyers and

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4. Unpublished data on file with Professor Steve Penrod, Director, Law and Psychology Program, University of Nebraska, College of Law, 103 McCollum Hall, P.O. Box 830902, Lincoln, NE 68583. See *infra* note 7 for a description of the basic search method.

5. Of the reversals, 76% were for erroneous admission of hearsay at trial, the remainder for erroneous exclusion. Unpublished data on file with Professor Steve Penrod, *supra* note 4. Of course, trial judges were also criticized by appellate courts for admitting or excluding hearsay in cases in which the reception of the evidence was deemed harmless error, and this criticism is another, milder way of enforcing the hearsay rule. *See, e.g.*, United States v. Whaler, 844 F.2d 529, 535 (8th Cir. 1988) (finding that the trial court's admission of a hearsay statement by an alleged coconspirator was improper, but holding that it was only harmless error); United States v. Dotson, 821 F.2d 1034, 1036 (5th Cir. 1987) (holding that the admission of a police report was improper but harmless in view of overwhelming evidence supporting the defendant's conviction); Shook & Fletcher Insulation Co. v. Panel Sys., Inc., 784 F.2d 1566, 1571 (11th Cir. 1986) (holding that although the trial court erred by admitting certain testimony under the present sense impression exception to the hearsay rule, the error was harmless).

6. In the 1990 census, the United States had a population of 248,709,873. West Virginia had a population of 1,793,477, or 0.7% of the nation's population (1 in 139 of the nation's residents lived in West Virginia). *See* THE 1992 INFORMATION PLEASE ALMANAC 800 (Houghton Mifflin 45th ed. 1992) (reporting 1990 census figures).

7. The investigators, Lynn Dean and Shalini Kedia, identified reversals using a Westlaw search of federal appellate cases. They searched Westlaw synopsis fields with the search "revers! or remand! or vacate!" and assumed that cases retrieved by that search were reversals. They then searched the retrieved reversals for the word "hearsay," and read the text of cases retrieved by the second search. They identified 15 cases (out of 3299 retrieved reversals) as hearsay reversals. Of these, 40% were for erroneous exclusion, the remainder for erroneous admission. Unpublished data on file with Professor Roger C. Park, Hastings College of the Law, University of California, 200 McAllister Street, San Francisco, CA 94102.

judges who studied them in law school, were having the desired effect of making the law more clear.[8]

Approaching the issue from another angle, Professor Eleanor Swift's study of five exceptions found a reversal rate for hearsay error that corresponded to the overall federal reversal rates.[9] Litigants raising hearsay error apparently had about the same chance as litigants raising other errors.

The sheer quantity of discussion of hearsay is also a clue, even when the discussion does not lead to reversal. Over twenty-five percent of the United States Code Annotations on the Federal Rules of Evidence deal with hearsay.[10] Judges do not ordinarily write about historical curiosities.

Though the existence of hearsay reversals provides some evidence that the rule lives on, admittedly there are limits to what one can infer from quantitative analysis of reported cases. For example, one cannot tell much about what proportion of hearsay is being excluded by counting reported instances of admission or exclusion. Consider a statistic reported in Professor Raeder's study that in 408 reported cases involving the residual exceptions during the time period she studied, fifty-four percent of the hearsay offered was admitted.[11] The frequent citation of the residual exceptions does show that they are not being reserved for once-in-a-lifetime situations. But the proportion of admissions to exclusions means little. If lawyers offer evidence (and appeal from its exclusion) when they have a given probability of success, then one would expect admissions and exclusions to reach the same equilibrium regardless of the substantive content of the evidence rule. Even if jurisdiction A admitted hearsay liberally and jurisdiction B excluded it rigorously, one could see the same proportion of admissions and exclusion in the published opinions of the two jurisdictions.[12] Lawyers select which evidence to

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8. Using crime statistics as an analogy: A reduction in appellate "arrests" for hearsay infractions could be a function either of a reduction in trial judges' hearsay "crimes," or in a reduction of appellate policing of those crimes. Arrests for a crime can go down either because fewer crimes are being committed, because the police are not enforcing the law, or because of some combination of the two. Of course, it is even possible that evidence teachers are doing a better job of teaching the rules of evidence. To this writer, however, the hypothesis of decreased enforcement at the appellate level seems more plausible in the hearsay context.

9. Swift, *supra* note 2, at 475 & nn.5, 7 (Professor Swift's study considered the following hearsay exceptions under the Federal Rules of Evidence: 803(1) (present sense impressions); 803(2) (excited utterance); 803(3) (then existing mental, emotional, or physical condition); 803(4) (statements for purposes of medical diagnosis or treatment); and 803(6) (records of regularly conducted activity.).

10. Of the 720 pages in the supplement of West's Annotated United States Code, covering the years 1984 through 1997, 184 pages dealt with hearsay.

11. Myrna S. Raeder, Commentary, *A Response to Professor Swift; The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?*, 76 MINN. L. REV. 507, 514 & n.25 (1992) (studying the time period from January 1, 1975, to July 1, 1991). If criminal cases alone were considered, 61% were admitted. *Id.* at 514.

12. By analogy, two law schools that reject exactly the same percentage of

offer and which cases to appeal, and judges select from among those cases in deciding whether to write and publish opinions. These selection effects throw doubt upon any conclusions one might seek to draw by counting instances in which evidence was admitted or excluded in reported trial court opinions, or in which appellate courts directed the admission or exclusion of evidence.[13]

Still, the counts of published cases, though they cannot give us an exact idea of the proportion of hearsay that is admitted or excluded, can at least suggest that it is unwise to make extreme pronouncements about the death of hearsay. Were the hearsay rule dead or nearly dead, one would expect to find that trial court opinions about hearsay (if they existed) referred almost exclusively to instances in which hearsay was received, not in which it was excluded. Were no one excluding hearsay, then no one would say they were excluding hearsay—at least not in performative utterances. In the Swift study of five exceptions, thirty-three percent of the district court decisions were decisions to exclude.[14] Again, as Professor Swift recognized, there is a limit to what can confidently be inferred from these figures. Her count might overstate the impact of the rule. Perhaps hearsay was offered and received without objection or comment. Or perhaps if excluding hearsay was an unusual thing to do, then judges felt a greater need to justify exclusion by writing an opinion explaining their action. Or the statistic might understate the rule's impact—perhaps lawyers offered live testimony to avoid hearsay objections. Nonetheless, the fact that judges, in a significant proportion of published precedent, send messages to lawyers warning that hearsay is not freely admissible is at least some evidence that they are right in saying so.

Were the hearsay rule dead or nearly dead, one would also find signs through traditional doctrinal research. The results of this type of examination of the rule are mixed. The 1975 Federal Rules of Evidence adopted a relatively traditional set of class exceptions, accompanied by residual exceptions seemingly hedged with restrictions.[15] At the federal level, no new exceptions were added to

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applicants may nonetheless have vastly different admission standards. Self-selection by applicants determines the percentage of rejections. Similar selection effects make it hard to draw inferences from quantitative analysis of opinions rejecting or receiving evidence.

13. Professor Swift observed that in the cases she examined in which admission of hearsay was deemed error by the appellate court, reversals for hearsay error were more frequent in civil cases than in criminal cases, and she stated that "this higher rate of reversal in civil cases contradicts the generally held view that courts strictly enforce the exclusion of hearsay in *criminal* cases." Swift, *supra* note 2, at 479–80. I think the more probable explanation for Professor Swift's observation is that criminal defendants are more likely to appeal from harmless errors.

14. *Id.* at 478 tbl.1. For a vivid example of a reluctant exclusion by a trial judge who stated that the evidence seemed compelling but he was bound by precedent, see *People v. Simpson*, No. BA097211, 1995 WL 21768, at *5 (Cal. Super. Ct. Jan. 18, 1995) (Judge Ito's memorandum excluding evidence of journal entries of murder victim Nicole Brown Simpson).

15. *See* FED. R. EVID. 803–04.

the Federal Rules of Evidence from their adoption in 1975 until late 1997.[16] Some minor activity has taken place at the state level, but it has gone both ways: child hearsay exceptions have been created, but hearsay testimony by experts has sometimes been cut back.[17] The death or near-death of hearsay, if it has happened, has arisen through liberal interpretation of codes by judges, not by express language added to codes.

The strongest evidence of the erosion of hearsay as a rule of exclusion comes from doctrinal analysis of judicial decisions under the residual exceptions,[18] but even there the results are mixed. Admittedly, the residual exceptions, which were probably intended for use only in unusual situations, have been applied in a recurring fashion in some quite ordinary situations.[19] There have been hundreds of reported decisions considering the residual exceptions,[20] some of which seem to leave the floodgates wide open. The requirement of notice before trial, imposed by the plain language of the statute, has been watered down in most, but not all, jurisdictions to allow notice during trial if the opponent is not prejudiced and if there is an excuse for not giving earlier notice.[21] Moreover, the consensus of

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16. Rule 804(b)(6), effective December 1, 1997, adds an "exception" entitled "forfeiture by wrongdoing" that provides that the hearsay rule does not bar admission of "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." FED. R. EVID. 804(b)(6); *see* JON R. WALTZ & ROGER C. PARK, 1997 SUPPLEMENT, EVIDENCE—CASES AND MATERIALS 67 (8th ed. 1997). The exception is merely a codification of recognized law. The Advisory Committee's Note states, "Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied." FED. R. EVID. 804(b)(6) advisory committee's note; *see* WALTZ & PARK, *supra*, at 101 (collecting authorities).

17. *See, e.g.*, MINN. STAT. ANN. § 595.02(3) (West 1988) (expansion of admissibility of statements by children in sexual abuse cases); MINN. R. EVID. 703(b) (limitation, adopted in 1990, on hearsay testimony by experts); *cf.* CALIF. EVID. CODE § 1370 (West Supp. 1998) ("OJ exception" for victim statements).

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

19. *See* Jonakait, *supra* note 1 (discussing the residual exceptions in the context of grand jury testimony).

20. *See* Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. L. REV. 925, 933 (1992). A Westlaw search on December 5, 1997, indicated that 1149 federal cases have cited FED. R. EVID. 803(24) or 804(b)(5)—the two residual exceptions.

21. *See* Joseph W. Rand, Note, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 GEO. L.J. 873, 885–86 (1992) (collecting authorities). This trend does not mean that notice never poses an obstacle, for courts will refuse to apply the exception when there is no excuse for not giving notice. *See, e.g.*, United States v. Benavente Gomez, 921 F.2d 378, 383–84 (1st Cir. 1990). It simply means that the obstacle can be overcome at the trial stage when the proponent has a good excuse. Moreover, it is quite possible that the trend will be reversed if the Supreme Court applies its evolving "plain meaning" philosophy to the notice provisions of the residual exceptions. *See* Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 762–64 (1990).

scholarly opinion seems to be that courts construing the residual exceptions have been quite liberal in finding evidence trustworthy enough to be received.[22]

Certainly, some cases have been startlingly permissive in dealing with the residual exceptions. For example, some federal courts have admitted grand jury testimony of absent witnesses, even though the witnesses had a motive to lie, so long as the testimony was corroborated by other evidence.[23] Extension of this line of cases threatened for a time to allow all grand jury testimony to come in so long as the other evidence against the defendant was good.[24] Some courts have been equally permissive in civil cases.[25]

If followed to the extent of their logic, the permissive residual exception cases would indeed vitiate the hearsay rule.[26] Yet often the cases are merely examples of appellate courts upholding district court rulings under an abuse of discretion standard.[27] In any event, there are decisions of equal status that are less permissive.[28] For example, the proposition that grand jury testimony is admissible

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22. *See* Randolph N. Jonakait, *Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551, 582–84 (1996); Jonakait, *supra* note 1, at 458–62; Raeder, *supra* note 20, at 933; Faust F. Rossi, *The Federal Rules of Evidence in Retrospect*, 28 LOY. L.A. L. REV. 1271, 1279 (1995); David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982); Jeffrey Cole, *Residual Exceptions to the Hearsay Rule*, LITIG. MAG., Fall 1989, at 26.

23. *See, e.g.*, United States v. Guinan, 836 F.2d 350 (7th Cir.) (grand jury testimony by estranged wife admissible when corroborated by other evidence); Jonakait, *supra* note 1 (discussing Fourth Circuit cases in the context of grand jury testimony).

24. The trend has, however, run into the obstacle of *Idaho v. Wright*, 497 U.S. 805, 822 (1990), which stated that extrinsic corroboration cannot save hearsay from a Confrontation Clause challenge. *See* cases discussed *infra* note 28.

25. *See, e.g.*, Turbyfill v. International Harvester Co., 486 F. Supp. 232, 234–35 (E.D. Mich. 1980) (employee's statement, helpful to his employer, admitted against third party under residual exception).

26. For example, the *Turbyfill* case, read generously, would stand for the proposition that self-serving statements are admissible so long as the declarant's memory was fresh; *Guinan* would mean that grand jury testimony is admissible if corroborated, even if the grand jury witness had a motive to fabricate.

27. *See, e.g.*, United States v. Valdez-Soto, 31 F.3d 1467, 1473 (9th Cir. 1994) (holding that admission of a government witness' prior inconsistent statements as substantive evidence under the residual hearsay exception was not an abuse of discretion); United States v. Ellis, 935 F.2d 385, 394–95 (1st Cir. 1991) (holding that the trial court's decision to allow certain testimony under the Rule 803(24) residual exception was not an abuse of discretion); King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1026 (5th Cir. 1990) (holding that admission of deposition testimony from an unrelated case under the residual hearsay exception was not an abuse of discretion).

28. *See* United States v. Gomez-Lemos, 939 F.2d 326, 332–34 (6th Cir. 1991) (reversing trial judge who admitted grand jury testimony under residual exception, noting that *Idaho v. Wright*, 497 U.S. 805, does not allow trustworthiness to be established by extrinsic corroboration); United States v. Fernandez, 892 F.2d 976, 982–84 (11th Cir.

under the residual exceptions is by no means universally accepted, even in situations in which there are indicia of reliability beyond those inherent in oath and solemnity.[29]

About all that can be said about a doctrinal analysis of the residual exception cases is that the results are not conclusive. There have been some very permissive cases, and some significant countercases. Even if the permissive cases win out, what may emerge is not death of the hearsay rule, but a discretionary hearsay rule in which trial judges will be upheld when they admit evidence under a residual exception, but will also be upheld when they refuse to use a residual exception to admit evidence.

Showing that the hearsay rule has become more flexible is not the same thing as showing that the hearsay rule is dead.[30] No one would assert that free speech died when Justice Black's absolutist view was passed over in favor of a more flexible approach.[31] A flexible approach can be used to undermine a rule of exclusion, but it does not per se signal the end of the rule.

To digress for a moment from the theme of the hearsay ban's health to the issue of how the rule should be structured, if the residual exception cases have made the ban more flexible, then one can certainly question the value of maintaining a detailed codification. One might sensibly argue that the elaborate structure of rule and exception should be abandoned for a simpler approach. However, even if the trial judges have (or come to have) great discretion in administering the residual exceptions, the specifically enumerated exceptions could conceivably still serve a useful purpose. Those exceptions define what *is*

1989) (refusing to admit grand jury testimony under the residual exceptions, and noting that the Eleventh Circuit has never done so); *see also* United States v. Dent, 984 F.2d 1453, 1462–63 (7th Cir. 1993) (refusing to admit, under the residual exception, the grand jury testimony of a witness who had since left the country, even though the witness was seemingly disinterested and his testimony was corroborated by other evidence). In *United States v. Tome*, 61 F.3d 1446, 1451–53 (10th Cir. 1995) (on remand from the Supreme Court), the court refused to admit, under the residual exception, statements made by a child sex abuse victim to a social worker, even though the social worker was experienced, the interview with the victim consisted of open-ended, nonleading questions, and the victim described the incidents of abuse in graphic detail and with childlike language.

29. *See Dent*, 984 F.2d at 1462–63.

30. In fact, the death or the near death of hearsay must be put into perspective. Certainly, we have nothing approaching the Continental system, where out-of-court statements are much more freely admitted. *See e.g.*, Doorson v. The Netherlands, No. 54/1994/501/583 (Eur. Ct. H.R. Mar. 26, 1996) (upholding admission of out-of-court statements from anonymous witnesses, finding no violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms under the circumstances).

31. For an account of Justice Black's view and its rejection by the Court, see 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.7(b), at 21–24 (2d ed. 1992).

admissible as well as attempting to say what is not.[32] If half a loaf of certainty is better than none, perhaps it is worth retaining class exceptions for their value in carving out a predictable core of admissible hearsay, even if (arguably) there is no longer a predictable core of inadmissible hearsay.

Returning to the hearsay rule's health, it is worth noting that the essence of the rule is not in danger if its existence has led to widespread use of procedures that, though they do not involve traditional courtroom testimony, still protect against hearsay dangers. Professor Ronald J. Allen has suggested that the rule allowing discovery depositions to be received when witnesses are outside the subpoena power has significantly weakened the hearsay rule.[33] I respectfully disagree. To be sure, depositions play an important role in the trial of civil cases. Yet depositions preserve the essence of the hearsay rule. They are taken under oath and subject to cross-examination. The only thing that full courtroom testimony would add is demeanor evidence (and increasingly videotape provides a proxy for that). The deposition is an alternative way of serving the core values of the hearsay rule, not of defeating them.

In criminal cases, the hearsay ban has an anchor in the Sixth Amendment that should help it weather legislative storms. The Supreme Court has shown wavering, but sometimes surprisingly strong, inclinations to exclude hearsay under the aegis of the Confrontation Clause.[34] Exclusion of hearsay on grounds that it violates the right to confront witnesses is still exclusion of hearsay, at least where the confrontation decision is based upon the supposed danger of relying upon out-

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32. *See* United States v. DiMaria, 727 F.2d 265, 270–72 (2d Cir. 1984). The Second Circuit, in *DiMaria*, held that statements falling under the class exceptions to the hearsay rule are admissible even if the trial judge believes them to be untrustworthy:

> [T]he scheme of the Rules is to determine [credibility] by categories; if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge, save for the "catch-all" exceptions of Rules 803(24) and 804(b)(5) and the business records exception of Rule 803(6)....

Id. at 272. *But cf.* Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 272–73 (1984) (stating that the question is unsettled of whether trial judges may exclude statements that satisfy the requirements of specific hearsay exceptions on general Rule 403 grounds because judges believe hearsay dangers exist).

33. Allen, *supra* note 1, at 798–99.

34. Recent decisions are hard to categorize. On one hand, in *Idaho v. Wright*, 497 U.S. 805 (1990), the Court upheld a Confrontation Clause challenge to admission of child hearsay under Idaho's residual exception. Its opinion contains surprisingly restrictive language. *See infra* text accompanying note 41. On the other hand, in *White v. Illinois*, 502 U.S. 346, 353–57 (1992), the Court held that when the prosecution relies upon "firmly rooted" exceptions to the hearsay rule, such as the spontaneous declaration and medical examination exceptions, it need not demonstrate that the declarant is unavailable or make any particularized showing that the hearsay is trustworthy.

of-court statements in lieu of trial testimony. To the extent that the hearsay rule has been constitutionalized, it is stronger, not weaker.

In its constitutional incarnation, the hearsay rule has gained strength in the long haul. First, as an original matter, it would have been possible to interpret the Sixth Amendment provision that "the accused shall enjoy the right...to be confronted with the witnesses against him" to mean only that the accused must be confronted with whatever witnesses the prosecution chose to present at trial. Under this interpretation, the Confrontation Clause would have no impact upon the exclusion of hearsay statements. This interpretation was urged by Justice Harlan and by Dean Wigmore.[35] However, it has been consistently rejected. For over a century, the Court has viewed the Confrontation Clause as applying to out-of-court statements,[36] and the contrary argument now lies buried under the weight of this precedent. The applicability of the Confrontation Clause to *some* out-of-court statements was not disputed even in the restrictive concurring opinion by Justice Thomas in the Court's most recent treatment of the topic in 1992.[37] Second, the Court's decision in 1965 to extend the Confrontation Clause to the states[38] also represented a substantial expansion of the protection of core hearsay values. That ruling also seems virtually invulnerable.

The Court's Confrontation Clause cases in the past three decades have been a mixed bag. Some of the decisions—for example, those dealing with confessions of codefendants[39] and with use of statements against defendants under state court residual exceptions[40]—erect significant protections against hearsay. The requirement in *Idaho v. Wright* that when a statement is offered under a residual exception, particularized guarantees of trustworthiness must be shown by examination of circumstances that "surround the making of the statement" and not by "other evidence at trial that corroborates the truth of the statement" is an

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35. *See* Dutton v. Evans, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1397, at 131, 134 (3d ed. 1940) (arguing Confrontation Clause should be construed so that it merely confers a right to confront and cross-examine live witnesses offered by the prosecution, that is, so that it provides protection against secret or ex parte proceedings).

36. *See* Kirby v. United States, 174 U.S. 47 (1899). Earlier decisions indicated in dictum that the Confrontation Clause applied to out-of-court statements. *See* Reynolds v. United States, 98 U.S. 145 (1878); Mattox v. United States, 156 U.S. 237 (1895).

37. *See White*, 502 U.S. at 365 (Thomas, J., concurring) (Justice Thomas, joined by Justice Scalia, rejected a broad construction of the Confrontation Clause and suggested as "one possible formulation" that "[t]he federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.").

38. Pointer v. Texas, 380 U.S. 400 (1965).

39. *See* Lee v. Illinois, 476 U.S. 530 (1986); Bruton v. United States, 391 U.S. 123 (1968).

40. *See* Idaho v. Wright, 497 U.S. 805 (1990).

obstacle to expansive use of residual exceptions against criminal defendants.[41] However, the Court's decisions considering hearsay admitted under traditional, "firmly rooted" exceptions are more permissive in allowing state courts to receive it.[42] Still, the Confrontation Clause acts as a significant outer limit on the free admission of hearsay under broad new legislative exceptions.

Moreover, it is striking that in its three most recent nonconstitutional hearsay cases, the Court has interpreted the Federal Rules of Evidence in a way that disfavored the admission of hearsay.[43] In two of these cases the Court ruled in favor of criminal defendants despite respectable arguments that the prosecution's hearsay should have been received. In *Tome v. United States*, it ruled that a child victim's statements could not be received in a child sex abuse case under the aegis of Federal Rule of Evidence 801(d)(1)(B), despite scholarly commentary favoring free admission of prior consistent statements.[44] In *Williamson*, it rejected Wigmore's argument that collateral statements not individually against interest could be received if part of a broader narrative that was against interest.[45]

Descending from the realm of Supreme Court jurisprudence, I will end with a humble clue from commercial publications aimed at lawyers. Making the reasonable assumption that both lawyers and publishers are motivated by practical self-interest rather than nostalgia, it is striking that evidence treatises often devote twenty percent and more of their pages to hearsay.[46] Moreover, one even finds

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41. *Id.* at 819–21.

42. *See, e.g., White*, 502 U.S. 346 (discussed *supra* note 34); Bourjaily v. United States, 483 U.S. 171 (1987) (holding that prosecution need not make a particularized showing of trustworthiness when a hearsay statement is offered under the "firmly rooted" exemption for declarations of coconspirators); United States v. Inadi, 475 U.S. 387 (1986) (holding that prosecution may introduce statements by coconspirators even when declarant is available but not produced for testimony).

43. Tome v. United States, 513 U.S. 150 (1995) (holding statements offered under FED. R. EVID. 801(d)(1)(B) to rebut a charge of recent fabrication or improper influence or motive are admissible only when made prior to the charged fabrication, influence or motive); Williamson v. United States, 512 U.S. 594 (1994) (holding statements are not admissible as declarations against interest unless they inculpate the declarant; it is not enough that they be part of a broader narrative that is generally self-inculpatory); United States v. Salerno, 505 U.S. 317 (1992) (holding grand jury testimony exculpating defendant not admissible under former testimony exception when prosecutor did not have similar motive to develop testimony at grand jury stage).

44. *See* 513 U.S. at 164 (rejecting positions of Weinstein, Morgan, and Ladd).

45. *See* 512 U.S. at 611–14 (Kennedy, J., concurring in judgment) (describing and relying upon Wigmore's position).

46. *See, e.g.*, 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 186–681 (4th ed. 1996 & Supp. 1998) (27%); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 785–1120 (1995) (27%); 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE 90–381 (4th ed. 1992) (19%); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE app.4, at 801–1 to 806 (2d ed. 1997) (13%); GLEN WEISSENBERGER, FEDERAL EVIDENCE 385–608 (2d ed. 1995 & Supp. 1997/98) (25%).

books written for practitioners that deal solely with hearsay.[47] If the rule had no exclusionary impact, one would expect its books to have no market. Were it a content-free charade, it would not fool the pocketbooks of so many lawyers.

The hearsay rule's institutional and social environment will rule its future. There are at least three influences that might weaken its sway.

First, fear of crime could cause judges and rule makers to weaken protections granted to criminal defendants, including the protection against hearsay accorded by current interpretations of the Confrontation Clause. But at long last, we may be entering a time when even the daily newspapers believe that crime is declining. So the tide may actually flow in the other direction, lessening the pressure on the hearsay rule.

Second, if trial by jury declines, the influence of the hearsay rule may lessen. After all, one of the rule's purported justifications is to protect against inferential error by jurors.[48] Judges have a large measure of discretion in administering the hearsay rule, and they are less likely to find themselves in need of protection than to find the jury in need of it. At any rate, a nonjury trial means a unitary decision maker. Exclusion is more difficult to manage in the absence of a bifurcated court. Parties will be less ready to object; it is harder to argue the danger of misdecision when the screener is also the decision maker. Even when there is an objection, a judge charged with screening hearsay from herself will be influenced by tempting hearsay because she will learn its contents in exercising the screening function.[49]

Third, the proliferation of expert witnesses (in part, but not wholly, a response to the pervasiveness of science and technology) may weaken the hearsay ban. Expert testimony is inherently at tension with the hearsay rule because experts are typically brought in after the relevant events have occurred. They must acquire their knowledge through hearsay. To require that they limit their reliance on hearsay to that which has been screened and placed in evidence is, at best, cumbersome and expensive, and, at worst, subversive of the expert's reasoning process. Experts who have roles outside the courtroom typically do not restrict themselves to evidence that qualifies for a hearsay exception by the law's standards, and to pretend that they do so when testifying is artificial. At any rate, the trend of modern evidence codes has been to allow expert witnesses to use

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47. *See, e.g.*, DAVID F. BINDER, HEARSAY HANDBOOK (3d ed. 1991 & Supp. 1997); MARK A. DOMBROFF, TRIAL HEARSAY: OBJECTIONS AND EXCEPTIONS (1991); IRVING YOUNGER, HEARSAY: A PRACTICAL GUIDE THROUGH THE THICKET (1988).

48. *See* Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 61–62 (1987).

49. *See* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 46–52 (1997) (discussing impact of divided trial court upon rules excluding evidence). Professor Damaška also notes that common law trials are becoming more episodic, and that if an opponent has the opportunity to seek information about a declarant between episodes, there is less reason to exclude hearsay. *Id.* at 58–73.

hearsay in forming opinions when the hearsay is reasonably relied upon by experts in the field.[50] There has been controversy about whether experts may repeat the hearsay statements in their testimony, but the basic approach of allowing them to use hearsay in forming opinions seems to have taken strong hold.[51] That being so, it seems likely that they will also be allowed to allude in some way to hearsay data during their testimony, since to require otherwise would be to put in conclusions without giving the trier of fact a chance to examine their basis.

Institutional forces may lead to a long-term decline of the hearsay rule. In our current legal environment, however, the sources I have examined indicate that the hearsay rule retains significant influence.

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50. See, for example, FED. R. EVID. 703, which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

51. For discussion, see Ronald L. Carlson, *Experts, Judges, and Commentators: The Underlying Debate About an Expert's Underlying Data*, 47 MERCER L. REV. 481 (1996); Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447 (1996); Paul R. Rice, *The Allure of the Illogic: A Coherent Solution for Rule 703 Requires More than Redefining "Facts or Data,"* 47 MERCER L. REV. 495 (1996).