1-1-1987

Abolishing the Hearsay Rule

Eleanor Swift
Berkeley Law

Abolishing the Hearsay Rule

Eleanor Swift†

Suppose we abolish the rule excluding hearsay from trials. There is something to learn from imagining the consequences of abolition.

This Essay posits an abolitionist regime that would eradicate all judicial treatment of hearsay as a special category of evidence. Under such a regime, three types of hearsay declarants whose statements are paradigms of what is excluded under the current hearsay rule could be admitted freely. Other rules that regulate the admission of evidence and control the legal sufficiency of cases, I argue, will not regulate use of the three paradigm declarants in any systematic way. Yet reliance on these hearsay declarants threatens important values related to the rationality and fairness of trial adjudication. By exposing those values, this Essay furnishes new grounds for understanding the function of the hearsay rule, as well as new grounds for debate about its abolition.

Many scholars critical of the rule excluding hearsay stop short of advocating the abolition of all special rules regulating its use in trials,[1] but not for the reasons to be advanced in this Essay. Rather, they are

† Acting Professor of Law, Boalt Hall School of Law, University of California at Berkeley. A.B. 1967, Radcliffe College; LL.B. 1970, Yale Law School.

1. Among the most severe critics of the traditional hearsay rule's exclusionary principle, and of categorical exceptions that regulate the admission of hearsay into trials, are Wigmore, Morgan, McCormick, James and Weinstein. *See* 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1427, at 210-11 (3d ed. 1940); E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 169-95 (1956); C. MCCORMICK, HANDBOOK OF THE LAW OF LITIGATION § 245, at 583-84, § 327, at 755-56 (2d ed. 1972); James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 ILL. L. REV. 788, 790-94 (1940); Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338-39 (1961) [hereinafter Weinstein, *Probative Force*]. Weinstein's article contains an even more comprehensive list of critics. *Id.* at 344-46.

In 1942, the drafters of the Model Code of Evidence proposed partial abolition: free admission of all hearsay statements of all declarants unavailable to be witnesses. MODEL CODE OF EVIDENCE Rule 503(a) (1942). Chadbourn evidently agreed with this position, but found it too revolutionary for the majority of the bench and bar. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 950 (1962).

Professor Davis urged abolition of rules regulating the admission of hearsay in nonjury trials. Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362, 1368 (1970). However, not all hearsay would be sufficient, standing alone, to sustain a finding. Judicial scrutiny of the probative force of hearsay would be deferred until the submission stage of trial under a test of reliability: whether the hearsay was "the kind of evidence on which responsible persons are accustomed to rely in serious affairs." *Id.* Thus, Davis still proposed a special rule regulating hearsay, as opposed to an abolitionist regime under which the sufficiency of a case is tested by general sufficiency doctrines. *See infra* text accompanying notes 21-25, 30-31 & 45-46.

Professor Carney urged abolition of all evidence rules, including the hearsay rule, save for allowing the trial judge to exclude evidence as too prejudicial, too time-consuming, or too lacking in

unwilling to risk requiring judges to defer entirely to the jury in evaluating the reliability of hearsay declarants.[2] These critics recognize that abolishing the rule could permit the parties to present more relevant information, and perhaps even more meritorious cases, to the trier of fact. They are critical of the categorical admission of hearsay practiced today because they doubt that preestablished categories of more reliable hearsay can be defined. Therefore, most of these critics propose various discretionary rules mandating individualized judicial evaluation of hearsay for its reliability on an item-by-item basis prior to its presentation to the jury.[3]

---

probity. Carney, *The Constant Factor: Judicial Review of the Fact Finding Process in the Circuit Courts of Appeal*, 12 DUQ. L. REV. 233, 280-82 (1973).

Two student law review commentators have taken criticism of the rule to its extreme and urged abolition of special rules regulating the admission of hearsay. *See* Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1815 (1980); Comment, *Abolish the Rule Against Hearsay*, 35 U. PITT. L. REV. 609, 621-29 (1974).

Professor Younger has proposed that hearsay be excluded only when it could not "reasonably be accepted by the finder of fact as trustworthy." Younger, *Reflections on the Rule Against Hearsay*, 32 S.C.L. REV. 281, 293 (1980). This is equivalent to a test of relevance. *See infra* note 19.

Weinstein may have come closer to an abolitionist position when he described the possibility of admitting all hearsay evidence. Address by Judge Jack Weinstein, Annual Advocacy Institute (Nov. 17, 1967), *reprinted in* Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375, 375-78 (1968) [hereinafter Weinstein, *Alternatives*].

2. Although Morgan analyzed the hearsay rule as a child of the adversary system, *see, e.g.*, Morgan, *Comments on the Proposed Code of Evidence of the American Law Institute*, 20 CAN. B. REV. 271, 282 (1942), most commentators see the hearsay rule as a child of the jury, a tool for judicial protection against inaccurate factfinding. Thus, Davis argued for the abolition of the hearsay rule in bench trials "since exclusion of relevant and reliable hearsay rests heavily on the jury system and may make little or no sense in a nonjury case. . . ." Davis, *supra* note 1, at 1365.

Belief in judicial ability to evaluate the reliability of hearsay has been cited to account for the seeming nonexistence of a hearsay rule in Continental legal systems. *See, e.g.*, R. DAVID, FRENCH LAW 147 (1972) ("The principle of the judge's intuitive conviction, as it is understood in France, diminishes the importance of many evidentiary questions."); Ireton, *Hearsay Evidence in Europe*, 66 U.S.L. REV. 252, 253 (1932) ("European judges through special training and experience . . . are well equipped to draw the line between proofs that are worthy and those which are worthless."). Reliance on judicial ability to evaluate hearsay may derive from the inquisitional role accorded to judges in Continental systems. Hammelmann, *Hearsay Evidence, A Comparison*, 67 L.Q. REV. 67, 79 (1951).

English reform of the hearsay rule was premised on the decline of jury trial in civil cases. "So long as all questions of fact were decided by juries it was reasonable to exclude types of evidence which juries are not well qualified to understand and to weigh. But in civil cases questions of fact are now for the most part decided by judges." ROYAL COMMISSION ON THE DESPATCH OF BUSINESS AT COMMON LAW, REPORT FOR 1934-1936, at 78-79, *reprinted in* McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A. J. 507, 512 n.38 (1938). Culminating in the 1968 Civil Evidence Act, English reform has only achieved partial abolition. Upon notice, hearsay statements of unavailable declarants are admissible; otherwise, the opponent may serve a counter-notice requiring production of the declarant as witness. Judicial discretion to admit may override these provisions. But categorical controls on documentary hearsay, and on oral hearsay in criminal cases, remain. *See generally* R. CROSS & C. TAPPPER, CROSS ON EVIDENCE 481-84, 487-94, 510-32, 557-99 (6th ed. 1985) (describing the Civil Evidence Act of 1968, statements admissible under the Act, and statutory provisions applicable in criminal proceedings).

3. *See, e.g.*, E. MORGAN, BASIC PROBLEMS OF EVIDENCE 254 (1962); 5 J. WIGMORE, *supra*

In contrast, the few writers who do advocate abolition reject the necessity for special judicial control. They argue that juries are as competent at evaluating hearsay as judges.[4] Thus, they say, there is no justification for any rule that first classifies evidence as hearsay and then specifically empowers judges to exclude relevant hearsay from jury trials due to their doubts about its trustworthiness.

The essential premise of this debate is that reliability is the principal focus of the hearsay rule. This premise dominates not only the discussion of abolition, but most critical analysis of the hearsay rule as well. I have argued elsewhere that the issues of what is reliable hearsay, and of who is better at evaluating it, are probably unresolvable.[5] Moreover, this narrow focus has stifled consideration of other problems that hearsay poses for trial adjudication, and of other grounds that justify its regulation.[6] This Essay seeks to move discussion of the hearsay rule beyond

---

note 1, § 1427, at 215; McCormick, *supra* note 2, at 512; Weinstein, *Probative Force*, *supra* note 1, at 338-39. James proposed that exclusion be based on the judge's determination that the declarant could not be obtained as a witness "by reasonable effort and without depending on sources controlled by the opposite party. . . ." James, *supra* note 1, at 798. James rested this standard on, among other things, a general best evidence principle: "Evidence may be excluded because it is inferior to other evidence which could have been produced, so that non-production of the better creates a suspicion concerning the worse." *Id.* at 791. Weinstein considers this justification for exclusion unnecessary. The inference of spoliation, which can be drawn by the trier of fact, will exert pressure on lawyers to produce "the psychologically most satisfying evidence." Weinstein, *Alternatives*, *supra* note 1, at 378.

4. One of the most significant conclusions of the Kalven and Zeisel survey on the jury is that the jury does understand the case and it does follow the evidence; in short, that mistrust for the jury is unjustified. If the jury is to be given the responsibility for deciding a case . . . it makes no sense to keep from it the kind of information which the average juror receives, evaluates, and acts upon in the course of his daily existence.

Carney, *supra* note 1, at 279 (footnote omitted); *see* Comment, *supra* note 1, at 624 ("It is submitted that modern jurors are capable of recognizing the inherent unreliability of hearsay."); Note, *supra* note 1, at 1805 ("[E]xclusion of evidence because it is unreliable is grossly inconsistent with our usual view of the jury's ability to process evidence and to make inferences."); *see also* James, *supra* note 1, at 794 ("The contention that hearsay—or some hearsay—cannot properly be evaluated by a common law jury seems highly questionable to this writer."); Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1372 (1985) ("Jurors seem quite capable of assessing the reliability of hearsay evidence, and they would undoubtedly be given this task if reliability alone were at stake."); Weinstein, *Alternatives*, *supra* note 1, at 377 ("The jury system no longer presents an insuperable objection. . . . [J]urors are increasingly well educated and capable, under some guidance from the court, of assessing probative force.").

5. Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. (forthcoming July 1987) (arguing in favor of the jury's institutional competence to evaluate hearsay and proposing a rule governing the admission of hearsay recast on the basis of the full set of implicated values).

6. The discussion in R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 520-25 (2d ed. 1982) is an exception. The authors note the traditional debate "whether exclusion should be by rule or discretion." *Id.* at 355. They then oppose substantial liberalization of the hearsay rule. Their conservative stance, they say, is not rooted in fundamental distrust of the jury system, *id.* at 520, but on the following factors: (1) the added threat to accurate results which mistaken or false descriptions of spoken hearsay pose; (2) the shift in balance of advantage to the state and to wealthy organizations in criminal and civil actions; (3) a shift in advantage between parties bearing the burden of proof, typically prosecutors and plaintiffs, and their opponents, since

the question of evaluating reliability by identifying reasons to reject abolition regardless of whether the trier of fact is a judge or a jury. The Essay shows that the rule buttresses the rationalist assumptions underlying adjudicative factfinding and implements the traditional assignment of comparative burdens borne by the parties. By making these values explicit, this Essay seeks to broaden understanding of the rule's function and of possibilities for its change.

I
ABSTRACT DECLARANTS

As a paradigm Abstract Declarant, consider the unidentified person in *Miller v. Keating*[7] who spoke at the scene of a traffic accident. The plaintiff's car had been hit from the rear by the defendant's truck. In the litigation arising from the accident, the defendant claimed that the first time he saw the plaintiff's car, it was already in his lane and too close to avoid the collision. The dispute thus focused on whether the plaintiff had caused the accident by crossing suddenly into the defendant's lane, or whether her car was in fact in plain view before the truck hit it. The defendant offered to prove that an unidentified person, the Abstract Declarant, ran toward the accident scene and said to another bystander, "[T]he bastard tried to cut in."[8]

The court in *Miller v. Keating* held that this statement must be excluded because it failed to conform to any hearsay exception.[9] The bystander could not identify the man who made it, other than that he was a "white male." Further, the bystander knew nothing about any specific circumstances affecting the man's perception of the accident or his sincerity in making the statement.[10] The bystander could not testify

liberalization will make it easier to establish a prima facie case; (4) a distrust of judicial discretion as the basis for admitting or excluding hearsay (not a problem under an abolitionist regime); and (5) an inevitable systemic trend away from trials based on firsthand testimonial accounts, which the authors believe will "decrease the appearance of fairness . . . [and] lead to substantial injustice as well." *Id.* at 524. Here, the authors do betray distrust of the jury as a basis for their position against liberalization. *Id.* at 522 n.43, and 524.

7. 754 F.2d 507 (3d Cir. 1985).

8. *Id.* at 509.

9. The court held that the hearsay statement failed to satisfy the hearsay exception for excited utterances under Federal Rule of Evidence 803(2) on two grounds: failure to show that the declarant "was in a position to have seen what happened" and failure to show that he "was excited when he spoke." Id. at 512.

10. *Id.* at 509. The bystander who testified about the statement was the driver of a car stopped in the next lane and struck on the side by plaintiff's car after the initial collision. Both the bystander and his wife testified at trial that the defendant's truck had already come to a full stop before plaintiff's car pulled in front of it, a description of the facts seemingly inconsistent with both parties' versions. *Id.* The wife corroborated her husband's testimony about the Abstract Declarant's statement. There is no indication in the *Miller* opinion that these witnesses had any special interest in attributing fault to the plaintiff as opposed to the defendant.

that the statement of the Abstract Declarant was immediately contemporaneous with the accident, or was made in an excited or stressed manner.

Many other cases offer variations of this paradigm. In the famous case of *Johnson v. Lutz*,[11] the unknown declarants at the scene of the accident made statements about it to a policeman when he arrived. In *Cook v. Hoppin*,[12] the unknown declarant stated in the hospital emergency room that the injured plaintiff had been involved "in a shoving or wrestling match" just prior to falling off the stairs of defendant's building. The crucial point about an Abstract Declarant is that the trier of fact receives very little information related to the declarant's four testimonial qualities of perception, memory, sincerity and language use. The trier of fact thus has little factual basis upon which to apply its own general knowledge and experience about what kinds of observers are reliable in making those inferences that are necessary to evaluate the reliability of the particular declarant's statements.[13]

The more information the trier of fact has about a declarant, the more the trier can draw on its own general knowledge to make inferences about reliability. Specific information about the circumstances affecting the declarant's testimonial qualities will be particularly useful. If the hearsay rule were abolished, however, the admission of statements of Abstract Declarants would be subjected only to the test of relevance and the test of discretionary exclusion under a rule such as Federal Rule of Evidence 403. These two tests might not require the proponent of the Abstract Declarant to prove any additional specific facts about the declarant in order to secure admission of a statement.

Relevance is a minimal test of logical connection between an item of evidence and a disputed fact. It is satisfied if there is a *possible* relationship, supported by general knowledge and experience, between a statement and a conclusion about the disputed facts.[14] For example, in *Miller*

11. 253 N.Y. 124, 170 N.E. 517 (1930).

12. 783 F.2d 684 (7th Cir. 1986).

13. Morgan identified the problem of hearsay as risk of error in the declarant's four testimonial qualities (use of language, sincerity, memory, and perception). E. MORGAN, *supra* note 1, at 243-44. The risk of error, in Weinstein's view, must be assessed circumstantially in order to determine the probative value of hearsay. Weinstein, *Probative Force*, *supra* note 3, at 333. Thus, inferences about the declarant's four testimonial qualities form an important part of the trier's evaluation of hearsay: how accurately did the declarant perceive a disputed event? how accurately did she remember it? was she sincere when making her statement about it? how accurately did she use language in making that statement?

14. Federal Rule of Evidence 401 provides that relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Relevance tests the relationship between the item of evidence and the fact it is offered to prove by examining the generalizations underlying each inference. The Notes of the Advisory Committee to the Federal Rules describe these generalizations as "principles evolved by experience or science, applied logically to the situation at hand." FED. R. EVID. 401 advisory committee's note (citing

v. Keating, the out-of-court statement of the paradigm Abstract Declarant is relevant if it possibly concerns the plaintiff's driving prior to the specific accident in question, and possibly is based on first-hand perception.

General knowledge and experience supports the inference that the Abstract Declarant is talking about the plaintiff's driving. He was near the sceue of the accident and the contents of his statement match what the truck driver says occurred.[15] Moreover, a generalization from experience, that people at the scene of an accident who speak about what caused it possibly have perceived it, also raises the inference that the Abstract Declarant is speaking from first-hand perception.[16] The court in the *Miller* case, however, applied a higher threshold of proof to the showing of first-hand perception.[17] The court required more specific facts about the Abstract Declarant in order to raise the likelihood that he had actually perceived the accident. But if the Abstract Declarant had said "*I saw* how that bastard tried to cut in," the court would have been satisfied.[18]

James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 696 n.15 (1941)). Therefore, the generalizations must reflect the generalized knowledge and experience of the trier of fact or the special knowledge of experts. The generalizations cannot be known to the judge to be false, and they cannot be made up. If they are, the final inference about the disputed fact would be either a gross error (based on a false generalization) or a guess (based on a made-up generalization). In either case a judge would exclude the offered item as irrelevant.

15. If the statement were not connected by physical proximity to the plaintiff's accident, there would be no general principle of experience (or statistical knowledge) that the general class of persons who might speak about a driver's conduct has knowledge of the particular accident. A connection between the statement and aceident may also be shown if the declarant asserts knowledge of the particular case ("that white car cut in front of the truck").

16. Facts that form the basis for an inference of first-hand perception are necessary to relevance. Federal Rule of Evidence 602 requires proof of facts about a witness's basis for first-hand knowledge, meaning facts that the judge believes provide a sufficient basis for making an inference that the witness perceived what she is testifying about. FED. R. EVID. 602. Even if the hearsay rule were abolished, equivalent proof of facts showing first-hand pereeption could be required for all declarants. Such a requirement can be derived from Rule 602 and from the concept of authenticity in Rule 901, which requires proof of facts about tangible evidence sufficient to make the inference that the evidence actually is what its proponent claims it to be. FED. R. EVID. 901. Under this derived requirement, every declarant whose speech or behavior is offered for testimonial use must be offered as "a person with first-hand knowledge." A sufficient showing is made either if the declarant asserts that first-hand perception occurred ("I saw the white car cut in front of the truck"), or if facts trigger an inference that the declarant had the opportunity to perceive the accident.

17. Miller v. Keating, 754 F.2d 507, 511 (3d Cir. 1985).

18. The court in *Miller v. Keating* proceeded on the assumption that all preliminary fact questions were for the trial court to decide under Federal Rule of Evidence 104(a). *Id.* It held that absent the assertion of perception in the hearsay statement itself (such as "I saw how that bastard tried to cut in") or of facts that sustain an inference that the declarant had the opportunity to perceive the accident (such as if a witness had reported that the declarant was in the car right behind the accident vehicles), the declarant's statement alone does "not show more likely than not that the declarant saw the event." *Id.* This and other language in the court's opinion demonstrate that it is applying the preponderance of the evidence test under Rule 104(a). This standard of proof is higher than that required by Rule 602 and thus could not survive abolition of the hearsay rule.

Once these inferences of case-specific reference and first-hand perception are made, all of the necessary inferences about the possible accuracy of the Abstract Declarant's sincerity, perception, memory, and language use also pass the minimal test of relevance. General knowledge and experience would support a possible inference that people like the Abstract Declarant are sincere and accurate when they make their statements. Admittedly, if the trier of fact knows nothing more about the Abstract Declarant, the trier's ability to evaluate the probative force of the hearsay statement is limited to possibilities. But a declarant's statement heard at the scene of an accident, asserting that she saw how the accident happened, could not be excluded as irrelevant.[19] The statement does affect one's beliefs about the disputed facts. Imposing a requirement of proof of additional facts about the testimonial qualities of the paradigm Abstract Declarant beyond what is required for relevance would reestablish a special threshold for the admission of hearsay, reincarnating the hearsay rule.

The general discretionary power of a judge to exclude relevant evidence under a rule like Federal Rule of Evidence 403 might also operate at the admission stage against the Abstract Declarant. Rule 403 permits exclusion of evidence posing risk of harm to efficiency in the trial system ("considerations of undue delay, waste of time, or needless presentation of cumulative evidence") and to rational decision-making ("danger of unfair prejudice, confusion of the issues, or misleading the jury") if the risk "substantially outweighs" the probative value of the evidence.[20] Low probative value alone does not justify exclusion under this standard.

However, Abstract Declarants would not systematically trigger the categories of harms in Rule 403. First, harm to trial efficiency could not be systematic, since that would depend on how much other evidence the proponent had produced on point. Second, Rule 403 equates "unfair prejudice" with the risk of improper use of evidence by the jury.[21] Reli-

19. Some statements of declarants might violate the standards of relevance. For example, a declarant talking nonsense would make an inference of accurate language use false. Or the declarant's own speech may reveal a fact that belies accurate sincerity or memory in human experience: "I don't remember what happened, but I'll say it anyway." Unless disabling facts like these are known, all Abstract Declarants' assertions of first-hand knowledge of case-specific facts would be admissible were the hearsay rule abolished. No more specific facts would be required by the minimal concept of relevance. Thus, in my view, Younger's proposal—that only hearsay that cannot reasonably be accepted as trustworthy be excluded—seems equivalent to the test of relevance. Statements by the paradigm Abstract Declarant would satisfy Younger's test.

20. Federal Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

21. Unfair prejudice means, according to the advisory committee's note, "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note. This kind of harm is raised by items of evidence that

ance on declarants' knowledge of facts is not an improper use of out-of-court statements. The generalizations of knowledge and experience that support reliance on Abstract Declarants are not emotional or otherwise improper. Moreover, under an abolitionist regime there can be no assumption that these generalizations will mislead the jury to attribute unjustified value to a declarant's statement. Calling the use of such generalizations a threat to rational decision-making would contradict the logic of abolishing the hearsay rule by making a special class out of hearsay after all. Finally, confusion of issues is not likely to be a consistent objection to admission of statements by Abstract Declarants.[22] The trier of fact could confuse the issues only if it gets too embroiled in deciding facts about the declarants, rather than facts about the dispute. But this is highly unlikely since, by definition, the use of Abstract Declarants presents the trier with so few facts.

Even if the Abstract Declarant occasionally triggers the risks to rational decisionmaking catalogued in Rule 403, exclusion of the hearsay must be justified by a finding that the risk "substantially outweighs" the probative value of the hearsay statements. This standard can only be applied on a case-by-case basis since part of the value of an item of evidence depends on whether any other evidence on point has been produced. Probative value under Rule 403 is judged to be greater when other evidence is unavailable, making exclusion unlikely except where the hearsay is cumulative. Routine exclusion of Abstract Declarants because judges systematically attribute low probative value to their testimonial qualities would again violate the premises of abolition.[23]

---

have a proper, relevant significance for deciding the disputed issues *and* an improper, even irrelevant connection (such as prejudice against racial groups) to outcome. Such items can be excluded if the likelihood of their improper use overwhelms their relevant, proper use. Something about the declarant herself, or the content of the speech, may inject the potential for improper emotional response (sympathy, repugnance, fear, etc.) into the case. But this type of risk would not systematically occur with hearsay, particularly not with Abstract Declarants, and would be considered on a case-by-case basis.

22. Confusion of the issues refers to introducing tangential issues of fact that distract from the principal issues. To spend much courtroom time and energy proving and disproving marginally relevant issues adds to the burdens of figuring out what is important to the final decision. Exclusion due to confusion can occur with witnesses or with all kinds of traditional hearsay declarants. It is not a systematic threat to any of the new declarants created by abolition.

23. There are two reasons why it may be particularly difficult for the judge to assess the probative value of hearsay evidence for purposes of Rule 403. First, the probative value of each of the three distinct steps in the chain of inferences underlying the relevance of hearsay is independent. The first step involves a witness's description of hearsay or a document's record of it, and concludes with the inference that the statement was in fact made. The second step consists of the inferences about the declarant's testimonial qualities. These inferences enable the trier to decide whether or not to rely on the declarant's knowledge in making further inferences about the disputed facts. As the final step, the case-specific facts asserted by the declarant are connected to a fact of consequence to the litigation, to make that fact's existence more or less probable. Probative value, or the judge's rough estimate of the positive or negative effect of hearsay on the ultimate disputed fact, requires taking into account the probabilities in all three steps. The problematic nature of Abstract

If Abstract Declarants routinely pass the tests of relevance and discretionary exclusion, the parties will be free to use their hearsay statements. The question remains whether the most extreme effects of abolition will materialize—whether a party will be free to build a prima facie case on the knowledge of an Abstract Declarant expressed in a hearsay statement. This question would be raised primarily in civil cases, by motions made to test the legal sufficiency of a plaintiff's case or a defendant's affirmative defense. Criminal cases submitted on the basis of the statement of a single Abstract Declarant, or of any other new type of declarant to be discussed in this Essay, are unlikely to survive a motion for acquittal.[24]

We can pose the legal sufficiency issue by changing the facts in *Miller v. Keating*. Assume that the Abstract Declarant's statement is critical to the prima facie case of a different plaintiff, injured in the chain of rear-end collisions caused by the initial accident. This new plaintiff sues the driver of the passenger car, claiming that this driver crossed into the lane of on-going traffic in a negligent manner and caused the initial collision. In opposing a motion for directed verdict, the new plaintiff relies on the Abstract Declarant's statement "I saw how that bastard tried to cut in" to prove that the driver of the passenger car was at fault. Had a *witness* testified that she had seen the car cut in, this testimony

Declarants affects only the second step. Due to the lack of information about the declarants and their circumstances, the inferences about testimonial qualities cannot be described as highly probable. But the inferences that connect the asserted case-specific facts to the dispute may be highly probative. If the Abstract Declarant has made a direct assertion of the plaintiff's fault or guilt based on first-hand perception, as in the paradigm case, then assigning an overall *low* probative value to the statement would be questionable.

Second, the proponent's need for an item of evidence may increase its probative value under Rule 403. If the speech of the Abstract Declarant is relevant to the existence of an ultimate fact on which the proponent offers no other proof, or there is "hot dispute" about the facts, as in *Miller v. Keating*, then from the proponent's perspective the value of this item is high. Even though the opponent presents evidence that contradicts the declarant, the probative value of the proponent's *offer* of the Abstract Declarant is not diminished. Contradictory evidence may lower the persuasive impact of the declarant on the jury, but this is not how probative value is measured for purposes of Rule 403. If it were, the independence of the jury would be threatened. If the judge were to exclude the speech of any declarant under Rule 403 on grounds that more witnesses or declarants contradict that speech, the judge effectively would be deciding the case. Evaluation of conflicting proof is the trier's proper role. In sum, the higher the probative value, the less likely a judge could find that its concomitant risks *substantially* outweigh its value at the admission stage of trial.

24. It is doubtful that uncorroborated out-of-court statements would be sufficient to sustain the "beyond reasonable doubt" standard of proof in criminal prosecutions. Several state and federal courts have held that uncorroborated hearsay evidence is not sufficient to sustain the prosecutor's burden of proof in a criminal case. *See, e.g.*, United States v. Orrico, 599 F.2d 113 (6th Cir. 1979); United States v. Keller, 512 F.2d 182 (3d Cir. 1975); *In re* Miguel L., 32 Cal. 3d 100, 649 P.2d 703, 185 Cal. Rptr. 120 (1982); Moore v. State, 473 So. 2d 686 (Fla. Dist. Ct. App. 1984). Phillips v. Neil, 452 F.2d 337 (6th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972), further held that conviction based solely on hearsay evidence where defendant had no opportunity to cross-examine the declarant, violates defendant's sixth amendment confrontation right. *But see* State v. Boutte, 384 So. 2d 773 (La. 1980); State v. Paquette, 146 Vt. 1, 497 A.2d 358 (1985).

would be legally sufficient to require consideration of the negligence issue by the trier of fact. But because the statement was made out of court, its probative value depends on a *declarant's*, not a witness's, testimonial qualities. Would this difference change the result under current doctrines that test the sufficiency of a prima facie case?

Under current law, a case based on the statement of an Abstract Declarant would not be resolved by either extreme of the spectrum of sufficiency doctrines. The case would not be held insufficient as a matter of law: the decision that the Abstract Declarant is reliable would not violate "reason," "the laws of nature," or "principles of science."[25] But neither is the case clearly sufficient to sustain a finding made in plaintiff's favor, as it would be if based on an eyewitness's testimony. The legal system's deference to the trier's evaluation of eyewitness testimony has traditionally rested in part on the trier's opportunity to observe eyewitnesses while they testify, an input missing from the evaluation of most declarants. Cases built on out-of-court statements are thus treated as circumstantial, requiring use of other sufficiency doctrines.

Consider analogous cases in which courts hold generalizations drawn from indiscriminate statistical data insufficient to support the ultimate inference. In *Smith v. Rapid Transit, Inc.*, the court directed a verdict against the plaintiff's case because the court considered her proof as to the identity of the bus that caused her accident insufficient.[26] Mrs. Smith proved that the defendant operated the only franchise bus line on the street where the accident occurred, and thus, the likely involvement of one of its buses. But the court noted that private and chartered buses could use the street and held: "The most that can be said of the evidence in the instant case is that perhaps the mathematical chances somewhat favor the proposition that a bus of the defendant caused the accident. This was not enough."[27] The court thus required more particular proof about the identity of the very bus that caused Mrs. Smith's accident.

One explanation of cases like *Smith* is that only particularistic proof justifies the use of the elaborate system of adjudicative factfinding. Particularistic proof permits decisions to be based on the trier's knowledge and experience, rather than on the indiscriminate application of general probabilities. Such decisions fulfill the model of rational decision-making, that in turn justifies the use of adjudication to change the status quo to the detriment of a specific defendant.[28]

25. *See generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.11 (3d ed. 1985).

26. 317 Mass. 469, 58 N.E.2d 754 (1945).

27. *Id.* at 470, 58 N.E.2d at 755.

28. Professors Hart and McNaughton correctly point out that judicial rejection of "coldly" statistical cases may relax where the complaining party is deprived of other evidence or where the stakes are very low. Hart & McNaughton, *Evidence and Inference in the Law*, 87 DAEDALUS 40, 46-47 (1958). This view accords with the idea that fairness to defendants underlies a requirement of

By analogy, the inferences about the reliability of the Abstract Declarant's perception and sincerity also can be supported by nothing more than a generalization about events at too basic a level of generality—declarants speaking about dangerous driving, or about almost anything else they have perceived. It may be true that most statements about perception are accurate. But no specific fact about the individual Abstract Declarant's qualities particularizes this broad and abstract generalization. No other proof corroborates the reliability of the statement. The trier has nothing that facilitates its using its own knowledge and experience to conclude that the declarant is reliable. Abstract testimonial probabilities, like abstract probabilistic generalizations about the franchise buses in *Smith*, are indiscriminate. They may not justify a verdict against a defendant. Without more particularistic proof on the issue of the Abstract Declarant's reliability, the paradigm case could be held legally insufficient.

However, if the plaintiff's proof about the Abstract Declarant's testimonial qualities ascends the scale of specificity, or if some circumstantial evidence does tend to corroborate the facts asserted in the hearsay statement, the grounds for refusing to sustain a finding for the plaintiff disappear. Consider the facts of *Miller v. Keating* itself. The Abstract

---

proof beyond the application of indiscriminate probabilities. Other commentators explain cases like *Smith* in various ways. Professor Tribe acknowledges that such decisions make no sense in terms of minimizing objective judicial error. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1341 n.37 (1971). However, Tribe argues that these decisions are defensible on rational and policy grounds because absence of particularized proof potentially lowers the jury's "subjective probability," that is, the jury's willinguess to bet that defendant's bus was involved, below 50%. He also argues that to give any more weight to such evidence "would eliminate any incentive for plaintiffs to do more than establish background statistics." *Id.* at 1349.

Professor Nesson argues that cases like *Smith* can be explained by the judiciary's interest in promoting public acceptance of verdicts and articulating behavioral norms. When plaintiff's only evidence is statistical, "the public cannot view whatever statement the factfinder makes as anything other than a bet based on the evidence." Nesson, *supra* note 4, at 1379.

Professor Rosenberg criticizes the requirement of particularistic proof because it incorrectly posits a qualitative difference between statistical evidence and "particularistic evidence," which is equally probabilistic. Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System* 97 HARV. L. REV. 849, 870 (1984). He also argues that courts are capable of handling statistical evidence and that it is in fact no more untrustworthy than "particularistic" evidence. *Id.* at 869-74.

Professor Posner argues that permitting a plaintiff like Smith to get to the jury would have several adverse effects. Even if the probability of the defendant's liability were 80%, the margin of error would be *at least* 20%. More importantly, the defendant would in effect indemnify his competitors for free, thereby increasing his competitors' market share and decreasing their incentive to maintain safety. Although Posner calls for a rule requiring the plaintiff to produce particularized proof, he acknowledges that such a measure is "an appropriate economizing measure only if it is cheaper for the plaintiff to introduce additional evidence than it is for the defendant to do so." R. POSNER, ECONOMIC ANALYSIS OF LAW § 21.2, at 521 (3d ed. 1986). Nesson criticizes Posner for failing to recoguize that the extra burden on the plaintiff would result in nonrecovery by some "deserving" plaintiffs and escape from liability by some negligent defendants who would then lose the incentive to exercise care. Nesson, *supra* note 4, at 1381 n.80.

Declarant's knowledge is highly case-specific. The statement asserts perception of the car cutting in, the primary disputed event. If something more specific were known about the Abstract Declarant's circumstances at the time of perception or the time of speaking, current sufficiency doctrines would not provide a way to reject this case without effectively establishing a special policy against hearsay at the submission stage of trial.[29] Thus, cases close to the paradigm could be held legally sufficient.

Under an abolitionist regime, the degree to which litigants would choose to use more abstracted declarants is a matter of speculation. But it is likely that abolition would lower the quality and quantity of information produced about declarants, since no special threshold for admission would exist. The dynamic of more permissive admission is to exploit new opportunities to get more cases to the trier. Therefore, one result of abolition would be not only the admission of more statements by more abstracted declarants, but probably the submission to the trier of more cases built on such statements. Since fewer particularistic facts about such declarants' testimonial qualities need be proved, the burden on entry into the system of adjudicative decisionmaking would be lightened. Moreover, the ability of the trier of fact to contribute its own generalized knowledge and experience in the decisionmaking process could decrease.[30] This would challenge the model of rational adjudicative

29. In civil cases that impose a lessened burden of proof by a preponderance of the evidence on plaintiffs, some courts have held that either oral or written hearsay evidence alone can sustain a verdict. *See, e.g.*, Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958) (admission against employer); Compton v. Davis Oil Co., 607 F. Supp. 1221 (D. Wyo. 1985) (ancient document); John Scowcroft & Sons Co. v. Roselle, 77 Idaho 142, 289 P.2d 621 (1955) (business record).

Other courts have stated that uncorroborated oral hearsay evidence cannot by itself sustain the plaintiff's burden of proof due to the asserted inherent unreliability of such evidence. *See, e.g.*, Potter v. Robinson, 233 Iowa 479, 9 N.W.2d 457 (1943); Goldthwaite v. Sheraton Restaurant, 154 Me. 214, 145 A.2d 362 (1958); Shaw v. McKenzie, 131 Me. 246, 160 A. 911 (1932). Several other courts have commented on the unreliability of oral hearsay evidence but have merely indicated that such evidence is entitled to very little weight. *See* Shepard v. Purvine, 196 Or. 348, 373, 248 P.2d 352, 363 (1952); Binewicz v. Hagin, 103 Minn. 297, 115 N.W. 271 (1908); and Chapman v. Chicago & N.W.R. Co., 26 Wis. 295 (1870) (both discussed in Annotation, *Admissibility and Weight of Party's Admissions as to Tort Occurring During His Absence*, 54 A.L.R.2d 1069, 1082-83 (1957)). Such reasoning about inherent unreliability reflects the tradition of excluding hearsay, and would not be proper under an abolitionist regime.

30. Professors Lempert and Saltzburg make the point that widening the range of admissible hearsay *vel non* changes the balance of advantage between plaintiffs (and prosecutors) and defendants "since it makes it easier to introduce the evidence necessary to establish a prima facie case." R. LEMPERT & S. SALTZBURG, *supra* note 6, at 522. The paradigm Abstract Declarant shows just how light the proponent's foundational burden can be. Whenever the proponent's burden is lifted, plaintiffs and prosecutors who bear the burden of proof are systematically advantaged. What the paradigm Abstract Declarant shows is that this lighter foundational burden adversely affects the trier of fact's reasoning process, depriving the trier of the specific information it needs to draw meaningful inferences based on knowledge and experience. This danger is not forecast by Lempert and Saltzburg, who instead betray a general distrust of the jury's willingness to apply its skepticism to the particular case or to "appreciate the weakness of the evidence." *See supra* text accompanying note 6.

factfinding, whether the trier of fact is a judge or a jury.

II
RISKY DECLARANTS

As a paradigm Risky Declarant, the second new type of admissible declarant under an abolitionist regime, consider Mrs. Land in *Land v. American Mutual Insurance Co.*[31] The case involved a personal injury action against the manufacturer of an industrial cutting machine that Mrs. Land operated at work. The blade of the machine descended on her hand, severing four fingers. She died ten months later from causes unrelated to the accident. Her husband, as executor, sought damages against the manufacturer of the cutting machine, alleging that the manufacturer breached its implied warranties and that the machine malfunctioned due to its negligent design, manufacture, and testing.

Mrs. Land's out-of-court statement contained the only account of the accident. She was not deposed prior to trial, and there were no other eyewitnesses. But eight days after her accident, Mrs. Land had been interviewed by a claims adjuster for her employer's workers' compensation insurance carrier. The purpose of the interview was to determine whether Mrs. Land was entitled to workers' benefits under Michigan law. The adjuster prepared a three-page written statement consisting of Mrs. Land's statements, that she signed and dated. At the end of the statement Mrs. Land also wrote:

> I realize that this statement was taken to help determine my right under the Workers Comp. Act of the State of Michigan. I've read the above statement of 3 pages and fine (sic) it to be true and correct to my knowledge. I received a copy of the statement.
>
> Helen Land 12/20/78[32]

The account of her accident given in the adjuster's statement was as follows:

> About 8:30 on 12-12-78 I started working on the guillotine. To operate the machine I first have to push down a lever with my left hand and then push down a lever with my right hand to bring the blade down and cut the material. I have only used my left hand to operate the left handle. After I would push the right handle the blade would come down, cut the material and then go back up and click into place locking into place. When I heard the blade click in its up position I reached into the machine to take the material out of the machine. I put both of my hands under the blade to remove the foam material. As I had both of my hands under the blade to remove the material the blade started coming down slower than it usually did in a normal cycle. As I saw the blade coming

31. 582 F. Supp. 1484 (E.D. Mich. 1984).
32. *Id.* at 1485.

> down I tried to get my hands out but I could not get my left hand out and the blade cut off the first 2 joints of my little finger and the total other 3 fingers. In order for me to push both levers down I had to reach under the table of the machine. It would be impossible to accidentally bump the handles with a hip or knee because they are up under the table of the machine. I know for sure that I did not bump the handles. When I let go of the left handle the only way the blade would come down again would be if the safety catch didn't go into place. There is no way to see if the safety catches or not because it is hidden from view because of the machine.[33]

The crucial point about a Risky Declarant is that there are facts about her that suggest a risk in relying on her as a source of knowledge. The trier of fact must decide between at least two contradictory ways of characterizing one of her crucial testimonial qualities, typically sincerity. Mrs. Land, for example, has asserted she is telling the truth. Yet her obvious interest in exculpating herself raises a specific risk that her description of the accident is not honest. One characterization would permit the trier to rely on Mrs. Land's statement, the other would justify rejecting the statement. The problem is whether the trier can pick between these two options.

In *Land,* the defendant moved for summary judgment on the ground that Mrs. Land's statement was inadmissible under the hearsay rule. The plaintiff had no other evidence to offer as to how the accident occurred. The trial judge excluded Mrs. Land's statement under all traditional hearsay exceptions, and also under the Federal Rules' residual exception, Rule 803(24),[34] and granted summary judgment. But if the hearsay rule were abolished, statements of Risky Declarants like Mrs. Land's would be admitted.[35]

First, Mrs. Land's statement asserts facts that are case-specific, and she asserts her own first-hand perception. The hearsay statement thus satisfies the minimum requirements of relevance.[36] The negative founda-

---

33. *Id.* at 1485-86.

34. *Id.* at 1486.

35. Other Risky Declarants have been excluded under the Federal Rules of Evidence residual exceptions, FED. R. EVID. 803(24), usually because of circumstances that generate a specific motive for the declarants' insincerity, such as a motive to exculpate oneself after indictment or investigation exemplified by United States v. Ferri, 778 F.2d 985 (3d Cir. 1985), *cert. denied,* 106 S.Ct. 2896; United States v. Woosley, 761 F.2d 445 (8th Cir. 1985); United States v. DeLuca, 692 F.2d 1277 (9th Cir. 1982); *see also,* NLRB v. United Sanitation Serv., 737 F.2d 936, 940 (11th Cir. 1984) (excluding self-serving affidavit of alleged victim of employment discrimination); United States v. Pinto-Mejia, 720 F.2d 248, 258 (2d Cir. 1983) (Venezuelan Certificate contains "aura of eagerness" to deny Venezuelan nationality to ship); United States v. Fredericks, 599 F.2d 262, 265 (8th Cir. 1979) (excluding statement by declarant, a girlfriend of defendant's brother, with possible motive to exculpate defendant); Dogan v. Hardy, 587 F. Supp. 967, 969 (N.D. Miss. 1984) (excluding self-serving statement by driver of car involved in accident).

36. *See supra* notes 14-16.

tion fact that Mrs. Land had an interest in misrepresenting how the accident occurred does not make her statement irrelevant. The terms of Rule 401 state that if an item of evidence has "any tendency" to affect the probabilities of a disputed fact—here whether the safety catch malfunctioned—it is relevant. To exclude Mrs. Land's statement from the factfinding process as irrelevant based on the likelihood of insincerity would violate the minimalist test of logical relevance.[37] If a stricter test of relevance were applied only to items of Risky Declarants' speech, this would improperly reestablish a specific rule against hearsay.

Second, the risks cognizable under Rule 403[38] do not arise systematically with Risky Declarants. Risky Declarants do not present problems of unfair prejudice. Evidence that forces the jury to choose between two conflicting inferences about Mrs. Land's testimonial qualities is not unfair and does not suggest decision on an improper basis. Picking between mutually exclusive inferences about credibility is a quintessential factfinding task.[39] Nor do Risky Declarants present risk of confusing the issues, unless their statements are tangential or cumulative. Certainly Mrs. Land's statement was neither. Nor was Mrs. Land's statement misleading, in the sense of conveying false value. The point about Risky Declarants is that the trier knows the negative facts about their possible insincerity.

If statements of Risky Declarants are admitted, the trier has to decide on which of the available facts to base its inferences about sincerity and any other risky testimonial qualities. If other evidence descriptive of the disputed fact exists, a confluence of inferences may affect the trier's evaluation. But assuming no other evidence—for example, if Mrs. Land's description of the accident is the sole basis for an inference that the machine's safety catch failed—the question becomes whether the paradigm Risky Declarant makes a legally sufficient case.

Doctrines at neither end of the sufficiency spectrum resolve the sufficiency question. Again, because Mrs. Land was not a witness, a case based on her statement is not clearly sufficient to sustain a finding in her favor. At the other extreme, a judge could not find insufficiency as a

37. Commentators agree that relevance does not demand that every generalization underlying an evidentiary item's connection to the fact sought to be proved be so positive that the desired inference is more probable than not. The estimated degree of probability may be below 50%. E. CLEARY, MCCORMICK ON EVIDENCE 542-43 (3d ed. 1984) ("It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence.") Nor is relevance under Federal Rule of Evidence 401 interpreted to mean that only one inference is possible. Allowing the trier to choose among competing inferences is essential to its use of its own general knowledge.

38. *See supra* note 20.

39. Thus in United States v. Renville, 779 F.2d 430, 440 (8th Cir. 1985), the court admitted the hearsay statement of an alleged child abuse victim who had recanted the statement at trial; the court reasoned "this simply provided the jury with a routine question of credibility."

matter of law; an inference of her sincerity is not based on a generalization that is either false or invalidated by principles of nature or science. Nor would it be proper for the judge to dismiss the case as legally insufficient based on a finding that Mrs. Land was insincere. This finding would require weighing the evidence, a concept distinct from evaluating the sufficiency of circumstantial cases.[40]

A sufficiency doctrine developed to decide cases that appear *to judges* to present the jury with two "equally probable inferences" clarifies the problem of Risky Declarants. Current judicial opinion is that such cases must be submitted to the jury.[41] Submission is mandated because

40. F. JAMES & G. HAZARD, *supra* note 25, § 7.11, at 349. Courts have repeatedly stated that if evidence conflicts on a material issue or if conflicting inferences may be drawn from undisputed facts, the plaintiff's case must be given to the jury. *See* Croce v. Kurnit, 737 F.2d 229, 237 (2d Cir. 1984) (affirming directed verdict in breach of contract and fraud action where "the evidence is such that, without weighing the credibility of witnesses or otherwise considering the weight of the evidence, there can be but one conclusion . . . that reasonable men could have reached") (quoting Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970)); Laskaris v. Thornburg, 733 F.2d 260, 264 (3d Cir. 1984) (stating that in a directed verdict motion a court cannot "weigh the evidence or judge its credibility" and may not grant the motion if there is conflicting evidence that could reasonably lead to "inconsistent inferences," but affirming lower court's grant of defendant's Federal Rule of Civil Procedure 41(b) motion because the evidence was so deficient that no jury could have found for the plaintiff), *cert. denied*, 469 U.S. 886 (1984); Inventive Music Ltd. v. Cohen, 617 F.2d 29, 31 (3d Cir. 1980) (reversing directed verdict for defendant in action for tortious interfence with contract because in the case of "conflicting or inconclusive evidence, it is for the trier of fact to resolve the conflict and to draw inferences therefrom"); Cockrum v. Whitney, 479 F.2d 84, 85-86 (9th Cir. 1973) (reversing judgment n.o.v. for defendant where judge apparently reweighed evidence and substituted his own judgment of the more reasonable of two inferences).

If the hearsay rule were abolished, judges might apply the historic deference that they show juries' inferences about a witness's testimonial qualities to juries' inferences about a hearsay declarant's reliability.

41. Lavender v. Kurn, 327 U.S. 645, 653 (1946), a leading case on this issue, states

> [W]henever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required . . . [in] choosing what seems to . . . be the most reasonable inference. . . . [Where] there is an evidentary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

After *Lavender*, a FELA case, there was question as to whether the scintilla test apparently adopted in that case was applicable in non-FELA cases. *See* 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 50.02(1) (1986). Another question was whether the plaintiff in a non-FELA case could get to the jury when two reasonable inferences were possible. *See also* C. WRIGHT & A. MILLER, 9 FEDERAL PRACTICE & PROCEDURE § 2528; Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 920-24 (1971). In Pennsylvania R. R. v. Goldie, 182 F.2d 9 (6th Cir. 1950) and Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869, 874-81 (5th Cir. 1967), *cert. denied*, 389 U.S. 930 (1967), the courts expressly adopted *Lavender* in permitting plaintiffs in non-FELA negligence actions to reach the jury despite equal contrary evidence supporting the defendant. In *Planters* the court stated, "If proven facts do give support to the inferences necessary to sustain a plaintiff's case, then, under the rule of *Lavender*, it is immaterial that they give equal support to a contrary inference." 380 F.2d at 874. The court then appeared to endorse the scintilla rule in asserting that a directed verdict is appropriate only in the "complete absence" of contradictory evidence. *Id.* In Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969), the court rejected the scintilla rule but adopted the rule permitting plaintiffs to reach the jury despite equal or substantial

judges have no way of knowing whether the inferences, such as one about Mrs. Land's sincerity, are "equally" probable to the jury or even whether one is more probable than not. Either might actually preponderate, if the issue were subjected to factual study. If the jury does decide to rely on Mrs. Land, it could be making a decision against the odds. But this simply acknowledges the ineffability of the jury's decision and the leeway the jury has to make decisions about which reasonable people can and do differ.[42] Thus under prevailing doctrines, cases made by Risky Declarants could be legally sufficient.

The trier itself can always decide that the two inferences about the Risky Declarant are equally compelling—that is, that it has no criteria from its general knowledge and experience to pick between the two. Its decision is then governed by the risk of nonpersuasion. If the plaintiff has not moved the trier beyond equipoise, the trier is instructed to return

---

evidence to the contrary. *Id.* at 374. The court stated that motions for directed verdict and judgment n.o.v.

> should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh the conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 375.

This position has been widely adopted by federal courts. *See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-01 (1962) (criticizing Court of Appeal's conclusion that a directed verdict for defendant was merited in antitrust case even though different inferences of causation could be drawn because "it is the jury which weighs the contradictory evidence and inferences and draws the ultimate conclusion as to the facts"); Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980) (reversing judgment n.o.v. for defendant union in action for breach of duty of fair representation when some of the conclusions but not others would sustain plaintiff's claim), *cert. denied*, 420 U.S. 927 (1975); Mays v. Pioneer Lumber Corp., 502 F.2d 106, 108 n.2 (4th Cir. 1974) (reversing judgment n.o.v. for defendant in negligence action and expressly rejecting rule that the verdict must go against the party with the burden of proof when "facts give equal support to conflicting inferences"); Cockrum v. Whitney, 479 F.2d 84, 86 (9th Cir. 1973) (reversing judgment n.o.v. for defendant in civil rights action alleging city marshal unjustifiably shot plaintiff because it was improper for the judge to reweigh the evidence "merely because the jury could have drawn different inferences or conclusions or because [the judge feels] that other results are more reasonable"); *see also* C. WRIGHT & A. MILLER, *supra*, §§ 2524, 2527-2528; J. MOORE & J. LUCAS, *supra*, § 50.02(1).

42. Courts have approved use of directed verdicts only when "reasonable men" would reach but one conclusion from the evidence. *See* J.E.K. Indus. v. Shoemaker, 763 F.2d 348, 352 (8th Cir. 1985) (affirming directed verdict for defendant in replevin action because "the evidence points all one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party" emphasis omitted); Cook v. Branick Mfg., 736 F.2d 1442, 1445 (11th Cir. 1984) (holding directed verdict is appropriate when evidence points "so strongly in favor of one party that reasonable persons could not decide against the movant" and affirming directed verdict for defendant franchisor on all claims and for defendant on wantoness claim); Oboler v. Goldin, 714 F.2d 211, 212 (2d Cir. 1983) (affirming directed verdict for plaintiff in copyright action in which burden of proof shifted to defendant to show invalidity or waiver of copyright because "a reasonable jury could reach only one proper conclusion"); United Cal. Bank v. THC Fin. Corp., 557 F.2d 1351, 1356 (9th Cir. 1977) (affirming directed verdict for plaintiff where evidence in action alleging breach of agreement to purchase a promissory note was capable of only one interpretation).

its verdict against her. Presumably both judges and juries, as triers of fact, would follow these instructions in the paradigm case. There is no principled way to submit some cases and reject others out of concern that a jury will not obey its instructions. Case-by-case rejection of individual Risky Declarants on these grounds would evolve into a categorical rule of exclusion, identifying categories of insufficient declarants like categories of incompetent witnesses. That would be a reincarnation of the hearsay rule.

Therefore, another result of abolition would be not only the admission of more statements by Risky Declarants, but also the submission to the trier of more cases based on such statements. While the presentation of Risky Declarants along with facts about their testimonial qualities makes them more amenable to rational evaluation than Abstract Declarants, it also requires the trier to make hard choices between conflicting inferences. And, to a bench and bar acculturated by centuries of hearsay exclusion, such use of Risky Declarants would change the appearance of trials as well.[43]

Some commentators have suggested that appearances are important: the hearsay rule promotes social acceptance of trial outcomes because the deficiencies of hearsay, particularly of Risky Declarants, "can be observed readily by anyone outside the system . . . [unlike witnesses about whom] the jury ostensibly has additional information that those absent could not possibly duplicate and those present could not fully communicate."[44] This analysis of appearances presents a cynical view of why one might value a rule that prefers live, physical presence of witnesses over declarants, particularly those declarants who possess obvious motives for not telling the truth. But values other than preserving appearances are served by requiring proponents of evidence to produce live sources of proof. In criminal cases, the confrontation clause may impose a moral limit on the extent to which the government may depart from offering witnesses.[45] In civil cases, fairness to defendants is at stake,

43. Lempert and Saltzburg state that if "an increasing proportion of trial evidence will be hearsay rather than firsthand testimonial accounts . . . such a change would decrease the appearance of fairness." R. LEMPERT & S. SALTZBURG, *supra* note 6, at 524. Based on the authors' fear of jury misevaluation of hearsay, they also believe "it is likely to lead to substantial injustice as well." *Id.*

44. Note, *supra* note 1, at 1808.

45. Requiring production of witnesses controls tactical advantage-taking by government prosecutors and places less risk and burden of impeaching and discrediting on criminal defendants. This restraint legitimizes the use of government coercion and upholds the integrity of public officials. The prosecution is held to be above the morals of the marketplace and must refrain from some of the adversarial behavior that free choice of declarants would otherwise permit.

The preference for face-to-face accusation also represents a basic political commitment to shared responsibility for outcomes underlying our system of trial adjudication. The presence of witnesses in criminal cases, as well as the use of juries, contributes individual conscience to judgments of guilt. The prosecution cannot succeed without witnesses whose knowledge is stated in court in the presence of the defendant, and whose credibility is tested by nonaccountable lay juries.

as considered in the following discussion of the third new type of admissible declarant.

III
BURDEN-SHIFTING DECLARANTS

For a paradigm Burden-Shifting Declarant, consider several documents offered by the plaintiffs in *Zenith Radio Corp. v. Matsushita Electronic Industrial Co.*[46] Plaintiffs alleged an antitrust conspiracy among the major Japanese manufacturers of electronic equipment, primarily televisions, and some American manufacturers to monopolize the American market. Plaintiffs' strategy was to use documents exclusively in proving their prima facie case that a price-fixing conspiracy existed in Japan. The documents, all in Japanese, consisted of various types of business records, public records, recorded admissions of employees of certain defendants, and depositions given at prior Japanese legal proceedings, and had been obtained through extensive document production.[47] Although many of the declarants were available and living in Japan, none were to be offered as live witnesses. Obviously many of these declarants were beyond the subpoena power of the federal court. But plaintiffs took no depositions in Japan, except on issues of personal jurisdiction and venue, thus allowing no cross-examination by defendants.

In considering defendants' motions for summary judgment, the trial judge excluded most of the Japanese documents because of their inadequate foundation under the hearsay exceptions and exemptions of the Federal Rules of Evidence. The Third Circuit reversed, interpreting the Rules' requirements in an extremely liberal manner, and remanded for

---

A commitment to interpose the personal moral responsibility of witnesses as accusers and juries as decisionmakers between the individual defendant and the state may distinguish criminal prosecutions from civil trials.

The United States Supreme Court's current formulation of the interests protected by the confrontation clause is narrower. In United States v. Inadi, 106 S. Ct. 1121 (1986), the Court declined to impose a general obligation on the prosecution to produce declarants as witnesses whenever available. In Ohio v. Roberts, 448 U.S. 56, 66 (1980), the Court held that the requirements of the confrontation clause are satisfied if a hearsay declarant is unavailable as long as the statement "bears adequate indicia of reliability," meaning either that it falls within a "firmly-rooted" hearsay exception or bears "particularized guarantees of trustworthiness." If the hearsay rule were abolished, the hearsay exceptions might still function for a time as prototypes for confrontation analysis in criminal cases, but the corpus of civil case law would wither away, thus requiring a more complex case-by-case constitutionalized inquiry—the very result the Court sought to avoid in *Ohio v. Roberts*.

46. The opinions on the hearsay issue are at 505 F. Supp. 1190 (D. Pa. 1980), *rev'd in part and aff'd in part, In re* Japanese Elec. Prods. Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 106 S.Ct. 1348 (1986). The evidentiary rulings were not considered by the Supreme Court, which reversed the standard applied by the Court of Appeals to the summary judgment question. *See* 105 S.Ct. 1863 (1985) (limiting grant of certiorari).

47. Plaintiffs referred to some 250,000 documents as establishing the conspiracy. 723 F.2d at 225. The trial court analyzed plaintiffs' strategy at 505 F. Supp. 1215-17.

reconsideration of some of the documents. Thus some personal documents might have eventually been admitted under the Federal Rules' exception for business records, without the testimony of any "custodian or other qualified witness." This result belies both the letter and spirit of the exception.[48] Were the hearsay rule abolished, however, admission of these documents would not even be questionable.[49]

The crucial point about Burden-Shifting Declarants is that their systematic use allows plaintiffs and prosecutors to present hearsay statements, often in documentary form, without simultaneously producing a witness knowledgeable about the declarant, the statement, or any of her testimonial qualities or circumstances. Thus these parties expend fewer resources and take fewer risks while requiring defendants to bear more burdens in responding to a prima facie case. Zenith's strategy, deliberate in this regard, deviated from the traditional practice of taking depositions to lay the foundation for admission of business records.[50] Although some of the declarants in *Zenith* were employees of the defendant companies, and thus the companies were not unduly burdened, many were not employed by the companies against which their statements were to be offered. None of the Japanese declarants was employed by the American defendants.

Burden-Shifting Declarants can be chosen deliberately to avoid the costs and risks of presenting either live witnesses or foundation witnesses for cross-examination. Burden-shifting is a tactical choice whenever a person can be used by a proponent either as a live witness, or in cases like *Zenith* at least as a deponent, or as a hearsay declarant. Today, the tactical choice is limited by the requirements of fitting the declarant's statement into one of the hearsay exceptions or exemptions that does not require the declarant.

Abolition of the hearsay rule would greatly increase the proponent's opportunities to take advantage of burden-shifting. Public investigative reports and learned treatises are just two examples of documents that a proponent might so use. Admission of these types of documents today depends on the proponent's production of a foundation witness. Under an abolitionist regime, it would not. Other types of documentary accounts of events would also routinely be admissible if found to be rele-

48. Federal Rule of Evidence 803(6), the exception for regularly kept business records, requires that the proponent of the records present a foundation witness to testify about the facts that qualify the records under the terms of the exception. FED. R. EVID. 803(6).

49. For a description of some of the more questionable business records, see *Zenith*, 505 F. Supp. at 1267-86. Even the diaries excluded by the Third Circuit for lack of a sufficient showing of first-hand knowledge, 723 F.2d at 290-93, would be admissible were the hearsay rule abolished since the requirement of the preponderance standard under Federal Rule of Evidence 104(a) would not apply.

50. 505 F. Supp. at 1217.

vant and authentic, that is, written by a person with first-hand knowledge about the case-specific events. The writings themselves, or the circumstances of their production through discovery, could contain sufficient information to satisfy the test of relevance.[51]

Presentation of hearsay always allows the proponent to reduce the risks inherent in presenting a witness at trial. Facts about the witness that might generate inferences of low testimonial reliability can be obscured.[52] The proponent's use of hearsay may even be based on knowledge of specific negative facts she hopes to conceal. To the extent that the proponent can shield persons whose testimonial qualities would be discounted by in-court testimony, this disadvantages the unwilling opponent.

Presentation of a witness necessarily provides the opponent with the opportunity to cross-examine—to test and question the witness's testimonial qualities at little cost. Use of a declarant shifts the burden of producing facts about testimonial qualities. The opponent bears the risk that there are negative facts about the declarant to be uncovered.[53] The opponent also bears the burden that these facts, whether known to others—for example, the declarant's poor eyesight, or her public relationship to the party for whom she is testifying—or only to the declarant herself—she wasn't wearing her glasses, she was secretly engaged to the defendant—are costly to discover, prepare, and present.

Use of Burden-Shifting Declarants shifts even more costs of providing foundation information, and more risks of not doing so, to the oppo-

51. Both Federal Rules of Evidence 401 and 901 were satisfied by the appearance and contents of many of the documents in *Zenith* and by facts concerning their production during discovery.

52. Use of hearsay foregoes presenting as witnesses those persons who could not withstand the courtroom events of oath or competency. For example, a person who could not affirm she was telling the truth or who could give no information as to how she obtained first-hand perception could be used as a declarant. The deviance from the norm of being a witness is concealed. Of course, a lawyer is under an obligation not to present the testimonial knowledge of persons who are lying or whose knowledge is irrelevant.

Use of hearsay also avoids the trier's face-to-face observation of particular persons. When a lawyer predicts an unfavorable reaction (whether fair and accurate or unfair and prejudiced), the proponent will not want to produce that witness but will use her as a declarant if possible. To the extent that a proponent predicts that the trier will react favorably to observation of a certain live witness, the proponent will want to produce that witness. The proponent may predict incorrectly and suffer adverse effects from her choice. Nevertheless, having this choice is a tactical advantage.

53. Two lost opportunities harmful to the opponent illustrate this point. The first opportunity relates to testing language use. If the proponent uses a declarant whose language on its face is favorable to her version of the case, the proponent gets the benefit of the high degree of probability attached to the generalization that people usually use language according to its ordinary meaning. All of the risks of mistake, peculiarity, and ambiguity in the declarant's use of language are borne by the opponent who could test the language if a witness were used. The second lost opportunity concerns sincerity. A unique type of impeachment is foreclosed to the opponent if a declarant rather than a witness is used. Only a witness may be asked on cross-exmaination about her own specific acts that show a dishonest character. The opponent cannot ask anyone else about them when a declarant is used.

nent. If no foundation witness is produced to present the declarant's statement, the opponent has no one to cross-examine. The opponent must investigate, prepare, and present information in hopes of providing the trier with alternative ways of characterizing the declarant.[54] The opponent must either suffer the risk that the jury will rely on the Burden-Shifting Declarant on the basis of a self-contained foundation or assume the burden of cost, time, and energy in proof production needed to overcome the risk. In *Zenith,* for example, the declarants' presence in Japan meant that effective discrediting and impeachment, or even counterinterpretation of their language use, depended on defendants' incurring the costs that the plaintiffs had avoided by not producing a custodial or other knowledgeable witness to lay the foundation for the Japanese records. Thus in addition to the immediate tactical advantages to the proponent's own case, the proponent also adds to the burdens of her opponent.[55]

Rule 403 does not recognize as grounds for exclusion the harm to opponents caused by the parties' choice of Burden-Shifting Declarants. The American adversary system of proof assumes that tactical advantages will be sought and taken. A private purpose—winning—motivates the parties in courtroom litigation. If the proponent of a Burden-Shifting Declarant has made information about that declarant inaccessible to the opponent outside of court, a trial judge might exclude the out-of-court statement on grounds of misleading the jury under Rule 403. But insofar as the use of out-of-court declarants simply allows the proponent to put her best facts forward, leaving the negative facts for the opponent to discover, as the plaintiffs in *Zenith* presumably did, no explicit rule of legal ethics is offended and Burden-Shifting Declarants would not be excluded.

Neither could judges direct verdicts against cases like *Zenith* for legal insufficiencies. Sufficiency doctrines currently do not take into account that the particular proof chosen by the plaintiff has increased the burden of work and cost for the particular defendant. Adjustments in burdens of proof typically have been made to permit plaintiffs' cases to go to the trier. These adjustments have attempted to free substantive law

54. When the proponent does not produce even a knowledgeable foundation witness for documents, the opponent has three options. First, the opponent can try to produce the declarant as a witness, if the declarant is known and available. Second, the opponent can try to investigate and produce other witnesses to furnish the foundation facts that the proponent has ignored or tried to suppress—for example, specific negative facts about the declarant's testimonial qualities or facts simply individualizing the declarant if the identity of the declarant is known. Finally, the opponent can try to present case-specific proof that contradicts the version of the facts as testified to by the declarant. If the declarant's identity is unknown, this latter option is the opponent's only means to discredit or impeach the declarant's perceptions.

55. Lempert and Saltzburg view the extension of this advantage to prosecutors through liberalization of the hearsay rule as a threat to the integrity of the system. R. LEMPERT & S. SALTZBURG, *supra* note 6, at 524-25. This refers, however, only to the risk of introduction of false evidence, not to the burdens of cost in overcoming risk that is shifted onto defendants.

enforcing values from the restraint of conservative and skeptical sufficiency doctrines. For example, when the burdens of proof on plaintiffs and prosecutors are difficult to fulfill due to lack of access to proof—such as in the blasting cap and DES cases, or prosecutions of conspiracies—or to the law's rigorous terms that stifle socially desirable results—such as compensation for product-related injuries—judges have responded by redefining the substantive law.[56] Doctrines of *res ipsa loquitur* and strict liability for defective products have changed the elements of prima facie cases, the effect of which is to increase the generality of the problem about defendants' conduct that is requisite to liability and thus to lighten plaintiffs' burdens. In cases of discrimination and social welfare, courts have developed an exception to usual practice and permit prima facie cases to be based heavily on statistical generalizations about conduct.[57] These adjustments, made on a class basis by changes in substantive law, could not properly be made on a case by case basis by individual motions for directed verdicts.

Thus, cases built on Burden-Shifting Declarants that bear lower costs for plaintiffs and prosecutors would be sufficient to sustain a verdict. Defendants would of course be able freely to introduce hearsay on their own behalf, and the formal standards of proof and risk of nonpersuasion borne by plaintiffs and prosecutors would not be reduced. But the balance between the parties would be changed. If simply filing a law-

56. *See e.g.* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 610, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied*, 449 U.S. 912 (1980). In adopting market-share theory of liability in DES litigation, the California Supreme Court noted:

> In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs.

Id. See also Batson v. Kentucky, 106 S. Ct. 1712, 1722-23 (1986) where the Supreme Court relaxed the crippling burden of proof imposed on defendants in Swain v. Alabama, 380 U.S. 202 (1965) to show purposeful discrimination in the exercise of peremptory challenges to potential jurors. Based on policies articulated in subsequent cases, the Court held that a prima facie case of purposeful discrimination could be established "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. . . . [T]he burden [then] shifts to the State to come forward with a netural explanation for challenging black jurors." *Id.*

57. In Rosado v. Wyman, 322 F. Supp. 1173, (E.D.N.Y. 1970), *aff'd*, 437 F.2d 619 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971), the court permitted plaintiffs to prove solely by use of statistical data that the state's AFDC payments were insufficient. The court noted that because the state did not have adequate data from the relevant period and it was "entirely impracticable" to review all individual case records, a statistical sample of cases was "the only feasible technique." *Id.* at 1181. Similarly, statistical evidence can make out a prima facie case of discrimination in selection of jury venire. *See* Jones v. Georgia, 389 U.S. 24 (1967) (state failed to meet its burden to explain the disparity between blacks and whites on jury venires after plaintiffs had established a prima facie case of discrimination based solely on statistical evidence); Hernandez v. Texas, 347 U.S. 475 (1954) (prima facie case of discrimination against Hispanics in jury selection established by statistical discrepancy between number of Hispanics who qualified for jury duty and number who actually served).

suit is coercive, the threat of being able to make a legally sufficient case is even more powerfully coercive. To the extent that increased costs and burdens make defense more difficult, more outcomes favorable to plaintiffs will result regardless of the substantive law, making adjudication a less conservative, more interventionist institution.

CONCLUSION

The current hearsay rule excludes many Abstract, Risky and Burden-Shifting Declarants. If, as this Essay asserts, their statements are relevant and non-prejudicial, why should the rule be maintained? Justification can be found in the values served by burdening the proponent to prove more facts about the testimonial qualities of hearsay declarants.

First, more information about declarants sustains the model of rational factfinding. This model, that pertains to both judges and juries as institutional triers of fact, abhors the application of broad and abstract generalizations that have little to do with the trier's knowledge and experience. Abstract Declarants are thus problematic for this model, and are justifiably excluded.

Exclusion of Risky Declarants is not justifiable, absent application of the confrontation clause, unless the problems engendered by Burden-Shifting Declarants are also present. The quality of risk they bear is not a special problem to adjudication because it is the trier's function to choose between mutually contradictory inferences. However, under current practice, Risky Declarants are excluded because the current categorical rule requires proof of specific kinds of circumstances that in theory provide positive incentives to the declarant to be truthful, overcoming any motives to fabricate. The traditional debate about the hearsay rule has focused on whether these categories succeed at avoiding sincerity risks in practice, and whether they ought to be imposed, traditionally by judges, on the trier of fact. Unless this debate can be empirically resolved, this Essay asserts that the risk-avoiding categories are unnecessary.

The burden to prove more facts about hearsay declarants, including Risky Declarants, generally requires that the proponent produce foundation witnesses. This ensures some live source of knowledge for the trier to evaluate and for the opponent to cross-examine. Abolition could flood the trial with documentary hearsay, offered with no additional information about the underlying hearsay declarants. The absence of live foundation witnesses to be cross-examined would shift the burdens of making, and defending against, a prima facie case as between plaintiffs and defendants. It would relax the traditional restraint against coercive government intervention, through adjudication, into the particular case. Burden-Shifting Declarants are thus problematic for maintaining the

traditional allocation of burdens between the parties. Although these declarants may not be completely excluded at present, the categorical structure of the current rule limits their use.

The conclusion of this Essay, then, is that there must be new grounds for debating abolition. These would be to address the assumption that general knowledge and experience form the basis of rational decision-making and to more self-consciously calculate the proper balance of burdens between the parties. Traditionally, the hearsay rule has not been analyzed in these terms, but it should be. Proposals for changing the rule, as well as evaluation of its current performance, should take these values into account.