

Rule 801(d)'s Oxymoronic "Not Hearsay"  
Classification: The Untold Backstory and a  
Suggested Amendment

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## I. INTRODUCTION

Rule 801(d) of the Federal Rules of Evidence classifies two of the most commonly used types of out-of-court statements—admissions of a party and prior statements of a witness—as “not hearsay.” It does so even though these statements, when offered to prove the truth of the matter asserted, are hearsay under the definition of Rule 801(c).<sup>1</sup> By labeling this admittedly hearsay evidence as something that it is not, Rule 801(d) creates an oxymoron.<sup>2</sup>

The term not hearsay (without quotation marks)<sup>3</sup> has traditionally been used to describe evidence that is genuinely not hearsay under the hearsay definition. This traditional use of the term is both descriptively accurate and analytically important. As every law student learns, the threshold issue in hearsay analysis is whether the statement is hearsay, and any out-of-court

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1. Rule 801(c) provides that an out-of-court statement is hearsay if it is “offered to prove the truth of the matter asserted in the statement.” FED. R. EVID. 801(c).

Rule 801(d) is titled “Statements which are not hearsay” and provides:

A statement is not hearsay if—

(1) *Prior statement by witness*: The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent . . . or

(B) consistent . . . or (C) one of identification of a person made after perceiving him; or

(2) *Admission by party-opponent*: The statement is offered against a party and is [the statement of the party or the party’s representative].

The advisory committee’s note to Rule 801 states that “[s]everal types of statements which would otherwise literally fall within the definition [of hearsay] are expressly excluded from it.” FED. R. EVID. 801 advisory committee’s note.

2. GRAHAM C. LILLY, STEVEN A. SALTZBURG & DANIEL J. CAPRA, *PRINCIPLES OF EVIDENCE* 160 n.1 (5th ed. 2009) (“This oxymoron is unlikely to make life easier for trial lawyers, students and judges.”).

3. This article will regularly refer to the two different uses of the term “not hearsay.” To distinguish between them, it will follow the example of 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* 35 (3<sup>rd</sup> ed. 2007) and will place “not hearsay” in quotations when referring to Rule 801(d) “not hearsay” (where the statement is hearsay under Rule 801(c) but is excluded from the hearsay rule by Rule 801(d)) and will not use quotations when referring to the traditional meaning of not hearsay (where the statement is not hearsay under Rule 801(c)).

statements are not hearsay, typically because they are not offered to prove the truth of the matter asserted in the statement.<sup>4</sup> The meaning of “not hearsay” in Rule 801(d) is inconsistent with this traditional meaning of not hearsay.

Commentators have long criticized Rule 801(d)'s “not hearsay” term, calling it “awkward” (*per* Judge Henry Friendly in 1973),<sup>5</sup> “unnecessarily confusing” (*per* Judge Edward Becker in 1992),<sup>6</sup> “wrong” (*per* Professor Faust Rossi in 1993),<sup>7</sup> and “Orwellian”<sup>8</sup> (*per* Professor George Fisher in 2008). By taking a term with a well-known traditional meaning and giving it a different meaning, the rule violates what has been called the “Golden Rule for Drafting”<sup>9</sup> – that the same term should be used consistently and with the same meaning throughout a document.<sup>10</sup> It also offends the command of Rule 1.1 of the Guidelines for Drafting and Editing the Federal

4. The categories of these non-hearsay statements are well-known and include: 1) statements that are offered to prove their effect on the listener; 2) words that have an independent legal significance; 3) statements offered as circumstantial evidence of the declarant's state of mind; and 4) prior statements offered to impeach or rehabilitate. *See, e.g.*, 30B MICHAEL GRAHAM, FEDERAL PRACTICE AND PROCEDURE 41-118 (Interim Edition 2006).

5. *Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93rd Cong. 97 (1973) (correspondence of Henry J. Friendly, Judge, U.S. Court of Appeals for the Second Circuit), *reprinted in* JAMES F. BAILEY, III & OSCAR M. TRELLES, II, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS.

6. *See* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years — The Effect of “Plain Meaning” Jurisprudence, The Need For an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 902 (1992); *See also* STEVEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 4 FEDERAL RULES OF EVIDENCE MANUAL, 801-27 (9<sup>th</sup> ed. 2006) (“... Federal Rules regime is . . . confusing in the end because statements that clearly fit the definition of hearsay are labeled, *ipse dixit*, ‘not hearsay.’”).

7. *See* Faust F. Rossi, *Symposium — Twenty Years of Change*, 20 LITIG. 1, Fall 1993, at 24. (“Treating party admissions as non-hearsay rather than as a traditional exception is wrong and has been roundly condemned.”); *See also* RICHARD O. LEMPert, SAMUEL R. GROSS AND JAMES S. LIEBMAN, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS, AND CASES 538, n.52 (4th ed., 2000) (stating the classification is a “practical mistake”).

8. GEORGE FISHER, EVIDENCE 393 (2d ed. 2008) (“Orwellian labeling”).

9. REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 16 (2d ed. 1986) (*quoting* E. PIESSE, THE ELEMENTS OF DRAFTING 43 (5th ed. 1976)) (“[T]he competent draftsman makes sure that each recurring word or term has been used consistently. He carefully avoids using the same word or term in more than one sense . . . In brief, he always expresses the same idea in the same way and always expresses different ideas differently . . . Consistency of expression has appropriately become the “Golden Rule” of drafting.”).

10. Technically, of course, the Federal Rules of Evidence contain only one meaning for the term not hearsay, as Federal Rule of Evidence Rule 801(d) is the only place where the term appears. However, the antonym of hearsay under the Rule 801(c) definition is not hearsay and drafters and amenders should be aware of in their drafting a well-established, widely-known and regularly-used antonymic use of a term, even if it does not appear in the text of the rule.

Rules: “Be Clear.”<sup>11</sup> As we near the end of a comprehensive project to revise all federal court rules for clarity and consistency using the Guidelines for Drafting and Editing the Federal Rules, it is anomalous to have a rule that fails to meet the prevailing drafting standards and yet remains untouched by the amending and restyling efforts.<sup>12</sup>

We can and should do better. This article presents several alternatives to Rule 801(d) and endorses an amendment that would eliminate the oxymoronic use by repealing Rule 801(d), classifying admissions and prior statements as hearsay exceptions, and placing each in a new, separate, appropriately labeled category.<sup>13</sup> By repealing Rule 801(d) and its “not

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11. BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (5th ed. 2009). Rule 1.1 is titled “Be Clear.”

12. Working through its separate rules committees, the Judicial Conference’s restyling project is designed “to simplify, clarify and make more uniform all of the federal rules of practice, procedure and evidence.” COMMON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF EVIDENCE 2 (2009) (released for public comment on Aug. 11, 2009). The Rules of Appellate Procedure were amended with an effective date of December 1, 1998. FED. R. APP. P. 1 advisory committee’s note. The Rules of Criminal Procedure were amended with an effective date of December 1, 2002. FED. R. CRIM. P. advisory committee’s note. The Rules of Civil Procedure were amended with an effective date of December 1, 2008. FED. R. CIV. P. 1 advisory committee’s note. The restyling project for the Rules of Evidence began in 2007, draft amendments were published for public comment in August 2009, and the Advisory Committee approved those amendments in April 2010 and sent them to the Standing Committee. Memorandum from Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules to the Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. 1-6 (May 10, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2010.pdf>.

13. As discussed in Section VI, I recommend what I call a “four categories” approach, with four separate categories for four types of hearsay exceptions based on the status of the declarant. There would be a category for when 1) the declarant is a party (for admissions) (FED. R. EVID. 801(d)(2)); 2) the declarant is a witness (for prior statements) (FED. R. EVID. 801(d)(1)); 3) the availability of the declarant is immaterial (FED. R. EVID. 803); and 4) the declarant must be unavailable (FED. R. EVID. 804(b)). There is of course a fifth category, the residual exception currently represented by Rule 807. FED. R. EVID. 807. If the residual category represented by Rule 807 were included in the count, the recommendation would be for a “five categories” approach.

Several scholars have suggested modifications to Fed. R. Evid. Rule 801(d) over the years. In 1974, Professor Tribe made what I would call a “four categories” recommendation, stating that such a treatment would be “more likely to keep attention riveted on the underlying reasons for such exceptions and, thereby, on their appropriate limits.” Lawrence Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 973 (1974); See also Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330, 590 (1997) (suggesting a “three categories” approach to hearsay); Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 679 (2000) (stating that the Advisory Committee’s policies underlying its decision to revise particular rules is inconsistent with its practice and that the piecemeal approach to revising the Rules perpetuates and compounds existing problems with the Rules); Freda F. Bein, *Parties’ Admissions, Agents’ Admissions: Hearsay Wolves in Sheep’s*

hearsay” term, the proposed amendment would remove a source of confusion and misunderstanding. By placing admissions and prior statements in new, separate, clearly identified hearsay exceptions, the amendment would also reinforce the distinctiveness of the two types of statements and remind users of the separate rationales for their admissibility.

The path to an amendment will not be easy. The Advisory Committee considered the issue at its October 2010 meeting, during which it reviewed an earlier version of this article and a thoughtful memorandum from Reporter Dan Capra that highlighted issues and choices.<sup>14</sup> At that meeting, the Advisory Committee decided not to take any action on Rule 801(d). While the members “agreed in principle with [my] proposal,” they felt that the rule “was not a source of ambiguity or confusion and was being applied properly in the courts. Moreover, the members felt that the time and expense of making and incorporating a rule amendment outweighed the need for changing the rule at [that] time.”<sup>15</sup>

In light of the Advisory Committee’s decision, I have two goals in telling the story of how the “ungainly category”<sup>16</sup> of Rule 801(d) came into existence and proposing a better alternative. First, I hope to build support for the consideration of an amendment at some future date. Exposing the rule’s flawed historical and intellectual foundation is a necessary part of building that support. As one of the original rules of the Federal Rules of Evidence, Rule 801(d) properly carries a strong presumption of legitimacy. It was proposed by a distinguished Advisory Committee, was enacted by Congress after a nearly two-year review, has been adopted by thirty-four states, and has been the law for over thirty-five years. I attempt to rebut that presumption by presenting the historical and intellectual background of the rule and examining the reasons for its adoption. I conclude that there were and are no good reasons for classifying admissions and prior statements as “not hearsay.” My second goal reflects the possibility that the

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*Clothing*, 12 HOFSTRA L. REV. 393, 400 (1984) (stating that “party admissions should be reclassified as an exception to the hearsay rule”); Roger C. Park, *The Rationale of Personal Admissions*, 21 IND. L. REV. 509, 509 (1988) (“Because admissions are not required to be trustworthy . . . they should not be considered an exception to the hearsay rule, but should be placed in a special category of their own.”).

14. The agenda of October 2010 meeting and Reporter Capra’s September 16, 2010, memorandum to the Advisory Committee are contained in the agenda materials at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/AgendaBooks.aspx>.

15. Letter from Peter G. McCabe, Secretary to the Comm. on Rules and Practice of the Judicial Conference of the United States to author (Nov. 1, 2010).

16. Park, *supra* note 13, at 509.

Advisory Committee may never amend Rule 801(d).<sup>17</sup> In that event, I hope that the article's information and critical perspective will contribute to a better understanding of the current flawed rule.

This article begins in Section II-A by discussing the treatment of admissions and prior statements in the years leading up to the Federal Rules. Two giants of evidence scholarship, John Henry Wigmore of Northwestern and Edmund Morgan of Harvard, debated their classification for much of the first half of the twentieth-century. After some initial reservations,<sup>18</sup> Wigmore decided that admissions and prior statements could be offered as substantive evidence, but instead of classifying them as hearsay exceptions, he placed them in a newly invented category that was the intellectual forerunner of Rule 801(d) and that he called "hearsay rule satisfied." Morgan, on the other hand, treated admissions and prior statements as hearsay that should be admitted under a specific hearsay exception.

Section II-B discusses the three predecessor evidence codes that were adopted in each of the three decades prior to the Federal Rules of Evidence and that strongly influenced the drafters of the federal rules—the A.L.I. Model Code of Evidence in 1942, the first Uniform Rules of Evidence in 1954, and the California Rules of Evidence in 1964. Each of these codes followed Morgan's lead and classified admissions and prior statements as hearsay, admissible under a hearsay exception. If asked in 1965 to predict how the forthcoming Federal Rules of Evidence would classify admissions and prior statements, a thoughtful trial judge, trial lawyer, or evidence professor would almost surely have said, "As hearsay, and then admissible under a hearsay exception." But that prognostication would have been wrong.

While the drafters of the Federal Rules relied on Morgan and the three predecessor codes in many areas, they rejected this guidance as to the classification of admissions and prior statements and instead largely followed Wigmore's lead. Section III examines the drafting process that led to Rule 801(d) and, in particular detail, the recommendations of the Reporter for classifying admissions and prior statements as "not hearsay." For prior statements, the Reporter discussed *whether* such statements

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17. Some commentators would argue that it is virtually inevitable that the Advisory Committee will not amend Rule 801(d). See, e.g., Rice & Delker, *supra* note 13, at 679.

18. In the first edition of his treatise, Wigmore said that admissions and prior statements were admissible only for impeachment purposes as "self-contradiction" and thus were not hearsay (his term was "hearsay rule inapplicable"). See 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES (1st ed. 1904)

should be admitted as substantive evidence or, as under the orthodox rule that prevailed until the adoption of the Federal Rules of Evidence, only for impeachment.<sup>19</sup> For admissions, which have long been received as evidence and without the requirements (such as compliance with the personal knowledge, competence, and opinion rules) imposed on other testimony,<sup>20</sup> the Reporter discussed *why* such statements are allowed without the standard safeguards.<sup>21</sup> Additionally, he explained why both admissions and prior statements were different from the other hearsay exceptions and therefore why it was important to treat them differently. Significantly, the Reporter never adequately addressed what I call the *how* question—given that admissions and prior statements are going to be admitted, and given that they should be treated differently than the other hearsay exceptions, *how* should they be classified. As we will see, the *how* question is the most important one in analyzing the proper classification of and terminology for admissions and prior statements.

Section IV examines the use and treatment of Rule 801(d) in case law, evidence treatises, and law school casebooks. It shows that, while Rule 801(d) is awkward and confusing, it has not caused a crisis in the thirty-five years that it has been the law. Indeed, it has not even created serious practical problems on a day-to-day basis, for two main reasons. First, the

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19. For impeachment, the prior statement is offered simply for the fact that it was made and is inconsistent with the declarant's trial testimony, and not for its truth. Therefore, under the standard definition, it is not hearsay. However, when offered as substantive evidence to prove the truth of the matter asserted in the statement, the prior statement is hearsay. The orthodox rule allowed the impeachment use but not the substantive hearsay use. Arguing that the purposes of the hearsay rule had been met since the declarant was in court and subject to cross-examination and observation, reformers long sought the admissibility of prior statements for their substantive use. See Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573, 575 (1947); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 218-19 (1948); FED. R. EVID. 801(d)(1) advisory committee's note.

20. The absence of these foundational requirements has led one commentator to call admissions "among the least trustworthy of all proof admissible at trial." Bein, *supra* note 13, at 401. See also James L. Hetland, Jr., *Admissions in the Uniform Rules: Are They Necessary?*, 46 IOWA L. REV. 307, 315 (1961). While that remark overstates the point; in most instances the statement is reliable, because in most cases it will be against interest and will be based on the personal knowledge of a party who almost always will be in court; Park, *supra* note 13, at 516-17 – it does emphasize this first corollary for admissions: the lack of doctrinally-required prerequisites of reliability.

21. Scholars have advanced a variety of reasons for receiving admissions as evidence, including the adversary system of litigation, a sense of party responsibility for one's own words and actions, estoppel, basic fairness, and emotion. After reviewing the literature and cases, Professor Park concluded any single reason is reductionist and incomplete and that their favorable treatment is best justified by a series of interlocking reasons. Park, *supra* note 13. See also Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 77-81 (1987).

“not hearsay” terminology affects only the classification of the evidence, not its admissibility.<sup>22</sup> A particular prior statement or admission will be admitted whether classified as “not hearsay” under Rule 801(d) or, as recommended later and as currently done in sixteen states, as a hearsay exception. Second, lawyers and judges soon developed practical ways to “work around” the confusing language, largely by ignoring Rule 801(d)’s “not hearsay” terminology and referring to admissions and prior statements as hearsay exceptions, exclusions, or exemptions.<sup>23</sup> These “work-arounds” are no substitute for clear, consistent drafting in the first place, but they have prevented the trial system from stumbling over Rule 801(d)’s confusing and inapt language.

Section V looks at Rule 801(d) and the second “not hearsay” category from the perspective of state evidence law and finds both conformity with the federal law and creative non-conformity. Thirty-five of the forty-four states that have adopted the federal rules have also accepted Rule 801(d) and the “not hearsay” category. These conforming jurisdictions have simply “followed the leader” on this issue with no record of considering alternatives to Rule 801(d) or independently evaluating the wisdom of introducing a second meaning of “not hearsay” into their evidence lexicon. Sixteen states have not adopted Rule 801(d), and several of these non-conforming states provide important examples of innovative alternative approaches, fresh ideas from our “laboratories of democracy.”<sup>24</sup>

In Section VI, this article identifies and then evaluates six alternative approaches to classifying admissions and prior statements. This evaluation finds that Rule 801(d) is neither practically, doctrinally, nor theoretically sound. It fails the tests of clarity and consistency required by the norms of good drafting and remains a source of awkwardness and potential confusion for busy practitioners and judges, not to mention law students learning the law of hearsay for the first time. This article concludes by evaluating

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22. “There is no practical difference between an exception to the hearsay rule and an exemption from that rule. If a statement fits either an exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other Rule (e.g. Rule 403).” SALTZBURG, ET AL., *supra* note 6, at 801-27.

23. For example, if opposing counsel makes a hearsay objection to evidence of the out-of-court statement of a party, the proponent will more likely respond by saying, “Yes, it is hearsay, Your Honor, but it comes in under the admissions exception [or exclusion or exemption] under Rule 801(d)(2)(A)” than by saying, “Your Honor, it is not hearsay under Rule 801(d)(2)(A).”

24. *Cf.* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Nine states have adopted the Federal Rules but rejected the Rule 801(d) terminology. *See infra* Section V. Seven other states — two (California and Kansas) that have their own evidence codes and the five states that have not yet adopted the Federal Rules — treat these statements as hearsay exceptions. *See infra* Section V.

proposed amendments to Rule 801(d) in terms of the standards by which the Advisory Committee decides whether to amend the evidence rules and concludes that the benefits of such an amendment outweigh its modest costs.

## II. PRELUDE TO THE DRAFTING OF THE FEDERAL RULES

### A. *Wigmore, Morgan, and the Debate over the Classification of Admissions and Prior Statements and the Organization of the Hearsay Exceptions*

Dean John Henry Wigmore (1863-1943) and Professor Edmund Morgan (1878-1966) were two giants of American evidence scholarship during the first half of the twentieth century. Wigmore has been called the “greatest legal writer in our history”<sup>25</sup> and his famous treatise, known colloquially as *Wigmore on Evidence*, established the framework for the discussion of most major evidence issues during the first six decades of the twentieth century.<sup>26</sup>

Upon its publication in 1904, Wigmore’s treatise was acclaimed as one of “the most complete and exhaustive treatises on a . . . single branch of our law that has ever been written,”<sup>27</sup> and the second and third editions were similarly praised.<sup>28</sup> But that first reviewer also noted that Wigmore’s work was in some respects “new and strange . . . [and used] extravagantly novel terms.”<sup>29</sup> After praising the second edition, another reviewer observed that:

[Wigmore] has an instinct for vocabulary, and an instinct for classification; – but these instincts, unfortunately, are not always under control. If the law calls a thing by one name, he is ever on the alert for another; the inevitable result is a classification

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25. McCormick, *supra* note 19, at 583.

26. JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES* (1st ed. 1904)[hereinafter, *Wigmore*, (1st ed. 1904)].

27. Joseph H. Beale, *Book Review*, 18 HARV. L. REV. 478, 478-80 (1905) (reviewing *Wigmore*, (1st ed. 1904)).

28. John M. Maguire, *Book Review*, 22 ILL. L. REV., 688, 692 (1928). Reviewing the third edition, Morgan wrote, “Not only is [it] the best, by far the best, treatise on the Law of Evidence, it is also the best work ever produced on any comparable division of Anglo-American law.” Edmund M. Morgan, *Book Review*, 20 B.U. L. REV. 776, 793 (1940).

29. Beale, *supra* note 27, at 479-80. Professor Beale was relentlessly critical of Wigmore’s “novel” nomenclature. “In place of well-known terms, to which we are all accustomed, Professor Wigmore presents us with such marvels as restrospectant evidence, prophylactic rules, viatoriol privilege, integration of legal acts, autoptic preference, and other no less striking inventions. It is safe to say that no one man, however great, could introduce into the law three such extravagantly novel terms, and Professor Wigmore proposes a dozen.” *Id.*

which, even after all these years, seems not only new but queer.<sup>30</sup>

As we will see, this observation about his “vocabulary and instinct for classification . . . not always [being] under control” applies all too well to the Wigmore classification that was the intellectual forerunner of Rule 801(d), his “hearsay rule satisfied” category.

Morgan’s numerous articles and extensive professional service made him “one of the greats.”<sup>31</sup> Morgan and Wigmore both served on the two major blue ribbon evidence committees of their time,<sup>32</sup> as well as on the first important attempt to draft a modern evidence code, the A.L.I. Model Code of Evidence.<sup>33</sup> Their competing views on the proper classification of admissions helped to shape the drafting of both the three predecessor codes and the Federal Rules of Evidence.

### 1. Wigmore and His Distinctive “Hearsay Rule Satisfied” Category

In contrast to the traditional two step approach to hearsay analysis, which asked two questions (is the evidence hearsay; if so, is there an exception) and involved three categories (not hearsay, hearsay-not-within-an-exception, and hearsay-within-an-exception), Wigmore created a third step and a fourth hearsay category, an approach which the Reporter adopted for the Federal Rules of Evidence. He developed his distinctive approach in

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30. Ralph Clifford, *Book Review*, 24 COL. L. REV. 440, 441 (1924). A more recent reviewer wrote: “I am newly aware that Wigmore in massive doses is frequently irritating, [and] his personally coined language as often obscuring as illuminating.” Ronan E. Degnan, *Book Review*, 87 HARV. L. REV. 1590, 1591 (1970).

31. Mason Ladd, *Edmund M. Morgan*, 79 HARV. L. REV. 1546 (1966). The American Bar Association awarded Morgan a distinguished service medal in 1965, with a citation that read: “. . . your name, with that of Wigmore, is synonymous with the law of evidence.” *Professor Edmund M. Morgan Is Awarded the American Bar Association Medal*, 51 A.B.A.J. 844 (1965).

32. These were the Commonwealth Fund Committee in the late 1920s, chaired by Morgan, and the ABA Committee on Improvements in the Law of Evidence (the “Wigmore Committee”) in 1938, chaired by Wigmore. American Bar Association Committee on Improvements in the Law of Evidence, 63 ANN. A.B.A. REP. 1, 570 (1938).

33. Morgan served as Reporter and Wigmore as Chief Consultant, and there was tension both in the selection of Morgan (as opposed to Wigmore) as Reporter and in their competing views on many issues. Professor Twining suggests that the conflicts between Wigmore and Morgan over the Model Code were similar to the clash between Williston and Llewellyon over the Uniform Commercial Code a decade later:

In each case the leading scholar of an earlier generation resisted changes in form and substance in his area of expertise and justified this opposition partly in terms of the established ways of thought of the practicing profession. In each case the older scholar was vulnerable to charges of having a vested interest in the status quo, as both Wigmore and Williston were well aware.

1899, when he served as editor and revisor of the sixteenth edition of what had long been the leading American treatise on evidence, Greenleaf on Evidence.<sup>34</sup> To the traditional two hearsay questions, Wigmore added a third, writing in 1899 that:

[T]hree distinct groups of questions present themselves in connection with the Hearsay rule, viz.: A. Is the Hearsay rule applicable to the case at hand, *i.e.* is the evidence offered as a testimonial assertion? B. Is there any exception to the Hearsay rule to be made for the evidence offered? C. If the Hearsay rule is applicable, and if no recognized exception covers the case in hand, is the Hearsay rule satisfied, *i.e.* has there been, in fact, an oath and cross-examination?<sup>35</sup>

These three questions (and the accompanying four categories) formed the analytic structure of Wigmore's approach to the hearsay rule. While his treatment of the first two questions was largely traditional, the third question—and his creation of the fourth “hearsay rule satisfied” category—exemplified both his originality and his “instinct for classification . . . [that was] not always under control.”<sup>36</sup> The importance of the new question and the new category has never before been clearly identified, probably because his own treatise never articulated the third question or developed the fourth category with the clarity and focus of the 1899 Greenleaf book.<sup>37</sup> Nevertheless, they were central to his approach to hearsay and the hearsay exceptions and were the intellectual forerunner of Rule 801(d).<sup>38</sup>

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34. First published in 1842 by Professor Simon Greenleaf, Royall Professor of Law at Harvard, the book was the leading evidence treatise of the nineteenth century. Wigmore's work on the 16<sup>th</sup> edition was described as “. . . more than a re-editing of the book, it is a remoulding of it.” J.P.C., Jr., *Book Review*, 13 HARV. L. REV. 227, 228 (1899).

35. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 185 (Boston, Little, Brown, and Co., 16th ed. 1899).

36. Clifford, *supra* note 30, at 441.

37. Instead of the three questions and three-part classification of the Greenleaf book, Wigmore wrote in his own treatise that: “An exposition of the Hearsay rule embraces four general topics: I. The Hearsay rule's requirements, and their satisfaction . . . II. The kinds of assertions admitted as Exceptions to the Hearsay rule; III. Utterances, not being testimonial assertions, to which the Hearsay rule is not Applicable; and IV. Sundry statements to which the Hearsay rule is Applicable.” 1 Wigmore (1<sup>st</sup> ed. 1904), *supra* note 26, §1366, at 1696. However, these “four general topics” are discursive and descriptive, not analytical. They fit into the original three categories as follows: 1) is the Hearsay rule applicable – included as parts of his topics I, III and IV; 2) is there an exception—covered in topic II; and 3) is the Hearsay rule satisfied—discussed in I. As we will see, while Wigmore placed admissions and prior statements in the “hearsay rule satisfied” category, he discussed them in the impeachment, not the hearsay, section of his treatise.

38. See, e.g., ROGER C. PARK, DAVID P. LEONARD & STEPHEN H. GOLDBERG, EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 287-88 (2d ed. 2004) (posing what essentially are Wigmore's three questions in the context of analyzing

a. The Hearsay Rule and the Hearsay Exceptions

While Wigmore never offered a precise definition of hearsay, his description of the rule showed his approach: “[T]he Hearsay rule, as accepted in our jurisprudence, signifies *a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination[.]*”<sup>39</sup> For Wigmore, “[t]he theory of the Hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed . . . by the test of cross-examination.”<sup>40</sup>

However, the hearsay rule did not exclude all untested assertions. Noting that “[t]he purpose and reason of the Hearsay rule [to test assertions through cross-examination] is the key to the exceptions to it[.]”<sup>41</sup> Wigmore then recognized that “[the] test . . . may in a given instance be superfluous . . . [where] the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.”<sup>42</sup> Furthermore, “the test may be impossible of employment [for example, if the declarant dies], so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape.”<sup>43</sup>

Wigmore generalized from these observations to find that two principles, Necessity and Trustworthiness, were “responsible for most of the Hearsay exceptions.”<sup>44</sup> While they are “only imperfectly carried out . . . they play a fundamental part. It is impossible without them to understand the exceptions. In these principles is contained whatever of reason underlies the exceptions. What does not present itself as an application of them is the result of mere precedent, or tradition, or arbitrariness.”<sup>45</sup> In

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the federal rules).

39. 2 WIGMORE (1<sup>st</sup> ed. 1904), *supra* note 26 §1362, at 1675. Twenty pages later, he penned his famous praise of cross-examination as “beyond any doubt the greatest legal engine ever invented for the discovery of truth.” *Id.* at §1367, p. 1697.

40. *Id.* § 1420, at 1791 (citation omitted). Testimonial assertions also had to satisfy a second test, which he called Confrontation. While this article will not discuss his views on non-constitutional and constitutional confrontation, it must be noted that they are idiosyncratic, dated, and conflated by the Confrontation Clause and hearsay exceptions. *Id.* § 1397, at 1757.

41. *Id.* § 1420, at 1791.

42. *Id.*

43. *Id.*

44. *Id.* § 1420, at 1792. Wigmore stated that “Mr. Starkie, in 1824, was the first writer to state plainly the philosophy of the Exceptions.” *Id.* § 1422, at 1793 n.2 (citation omitted).

45. *Id.* § 1423, at 1794. Wigmore’s view of Necessity was broader and more flexible than the current understanding of unavailability as expressed in Federal Rules of Evidence, Rule 804(a). This covered not only situations where the declarant was “dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing,” what he called “the commoner and more palpable reason,” but also situations where “[t]he assertion may be such that we cannot

applying these principles in all three editions of his treatise, Wigmore listed the exceptions in the following order, starting with the most unavailable:

1. Dying Declarations; 2. Statements against Interest; 3. Declarations about family history; 4. Attestation of a Subscribing Witness; 5. Regular Entries in the Course of Business; 6. Sundry Statements of Deceased Persons; 7. Reputation; 8. Official Statements; 9. Learned Treatises; 10. Sundry Commercial Documents; 11. Affidavits; 12. Statements by a Voter; 13. Declarations of Mental Condition; 14. Spontaneous Exclamations.<sup>46</sup>

Besides showing that there were far fewer hearsay exceptions in Wigmore's time, his list reveals two other interesting points. First, there was the crude beginning of the modern division of the hearsay exceptions into two categories, one based on necessity (the Rule 804 category) and the other based on reliability (the Rule 803 category). Second, former testimony, admissions, and prior statements are missing from his list of hearsay exceptions. As discussed in the next sub-section, Wigmore placed these statements in the "hearsay rule satisfied" category, not with the hearsay exceptions.

Morgan was critical both of Wigmore's view that "the hearsay rule and its exceptions in outline, though not in detail, form a logically coherent whole"<sup>47</sup> and of Wigmore's claim that the two principles in fact explained

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expect, again or at this time, to get evidence of the same value from the same or other sources . . . [as] in the exception for Spontaneous Declarations, for Reputation, and in part elsewhere." *Compare* 2 WIGMORE (1st ed. 1904), *supra* note 26 §142, at 1793, *with* FED. R. EVID. 804(a).

46. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA § 1426, at 159 (2d ed. 1923) [hereinafter WIGMORE (2d ed. 1923)]. In the first edition, Wigmore ended his introduction to the hearsay exceptions with the above listing of the fourteen exceptions. In the second and third editions, Wigmore included another section titled "The Future of the Exceptions." He began the new section by writing that "[t]he needless obstruction to investigation of truth caused by the Hearsay rule is due mainly to the inflexibility of its exceptions and to the rigidly technical construction of those exceptions by the Courts." *Id.* at 1427. He urged the adoption of a general exception for all statements of deceased persons and, in the third edition, also supported the formation of a committee to codify the exceptions to the hearsay rule. 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA § 1427, at 209 (3d ed. 1940) [hereinafter WIGMORE (3d ed. 1940)]. The third edition also supported a liberalization of the hearsay rule to grant the trial judge flexibility and discretion in applying the hearsay rule in individual cases. *Id.* at 215. Then-Professor Jack Weinstein elaborated and extended Wigmore's suggestion in his famous article, *Probative Force of Hearsay*. Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).

47. Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at*

the many different and varied hearsay exceptions. Morgan had a very different perspective. Far from a “logically coherent whole,” in his view, “the hearsay rule with its exceptions . . . resemble[s] an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists . . . .”<sup>48</sup> Writing at a time when the Federal Rules of Civil Procedure were in the process of being adopted and hoping for a similar modernization of the evidence rules, Morgan believed that the solution lay not in judicial refinement or further scholarly classifications but rather in a codification governed by “practical considerations.”<sup>49</sup> While Wigmore also favored legislation,<sup>50</sup> Morgan thought that Wigmore’s stated belief in the overall rationality of the common law of evidence undermined the support for the urgency of the needed codification.

#### b. The “Hearsay Rule Satisfied” Category

Wigmore invented the “hearsay rule satisfied” category, the forerunner of Rule 801(d)’s “not hearsay” category, as he was preparing the sixteenth edition of Greenleaf on Evidence. Wigmore was considering how to classify evidence of two types of out-of-court statements: the former testimony of an unavailable witness and a deposition of either an available or unavailable witness.<sup>51</sup> The common law and previous treatise writers had long treated both former testimony and depositions as hearsay and admitted them as hearsay exceptions, but Wigmore was not satisfied with

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*Evidence*, 50 HARV. L. REV. 909, 920 (1937). Professor Morgan co-authored this article with his long-time Harvard colleague, John Maguire, who described their working relationship as “a kind of unarticled partnership in legal education with Morgan as senior and Maguire as junior.” John MacArthur Maguire, *Edmund M. Morgan as a Colleague*, 79 HARV. L. REV. 1541 (1965).

48. Morgan & Maguire, *supra* note 47, at 921. He and his colleague Professor Maguire further explained:

There is in truth no one theory which will account for the decisions. Sometimes an historical accident is the explanation; in some instances sheer need for the evidence overrides the court’s distrust for the jury; in others only the adversary notion of litigation can account for the reception; and in still others either the absence of a motive to falsify, or a positive urge to tell the truth as the declarant believes it to be, can be found to justify admissibility. Within a single exception are found refinements and qualifications inconsistent with the reason upon which the exception itself is built. *Id.*

49. *Id.* Morgan was a member of the Advisory Committee on Civil Procedure.

50. See American Bar Association, *supra* note 32; 3 Wigmore (3d ed. 1940), *supra* note 46, § 1427.

51. In the paradigm case of former testimony, witness W has testified under oath and has been cross-examined in Trial 1. After the case is reversed on appeal and remanded for a new trial, Trial 2, the witness W becomes unavailable and the proponent offers the transcript of the former testimony from Trial 1. In a deposition, the witness testifies under oath and subject to cross-examination at the out-of-court deposition, and then is either available or unavailable at trial.

this traditional treatment. Examining the issue “more in detail,”<sup>52</sup> he found a 1892 Minnesota case with *dicta* stating that: “[Former] testimony . . . is frequently inaccurately spoken of as an exception to the [Hearsay] rule . . . . The chief objections to hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine, neither of which applies to testimony given on a former trial.”<sup>53</sup>

Using the Minnesota case as his authority, he created the new third category and presented it in a newly titled chapter “Hearsay Rule Satisfied; Testimony by Deposition and Testimony at a Former Trial.” With depositions and former testimony, the declarant was under oath and subject to cross-examination (or at least the opportunity for cross-examination) at the time of making the out-of-court statement. Because a major purpose of the hearsay rule had already been accomplished, Wigmore decided to change the classification of former testimony and depositions from their traditional category as hearsay exceptions to “hearsay rule satisfied.”

All three editions of Wigmore’s treatise had a section entitled “Hearsay Rule Satisfied,” containing several sub-sections and hundreds of pages of general discussion, with many examples of the importance of cross-examination and the value of confrontation. But the actual subsection applying the category was, in each edition, less than one page and was entitled “Cross-examined Statements not an Exception to the Hearsay Rule.”<sup>54</sup> Pointing out that, in the case of former testimony and depositions, there has been prior cross-examination, Wigmore wrote that the evidence “has satisfied the rule and needs no exception in its favor. This is worth clear appreciation, because it involves the whole theory of the rule.”<sup>55</sup>

The “hearsay rule satisfied” category is characteristic of Wigmore’s “instinct for classification.” It highlighted an important feature of former testimony and depositions—oath and cross-examination at the time of the making of the out-of-court statement—and therefore was analytically

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52. 1 GREENLEAF, *supra* note 35, §§ 163-163a, at 277.

53. *Minneapolis Mill Co. v. Minneapolis & St. L. Ry.*, 53 N.W. 639, 642 (Minn. 1892). The quoted language is *dicta* because the hearsay issue in the case was the scope of unavailability under the former testimony exception and whether the declarant had to be dead or could be unavailable in some other manner. The court required only that the declarant be unavailable. *Id.*

54. See generally JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES (1st ed. 1904); JOHN HENRY WIGMORE, A TREATISE ON ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA (2nd ed. 1923); JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA (3rd ed. 1940).

55. *Id.* at 1710.

interesting. However, it was also problematic in one minor and one more serious way.<sup>56</sup> As a minor point, it is descriptively inaccurate. Since the fact-finder in the current trial still does not have the opportunity to view the declarant's demeanor, not all of the concerns of the hearsay rule have been satisfied. For this reason, one of Wigmore's disciples, Professor Strahorn, renamed the category as "hearsay rule partially satisfied."<sup>57</sup> More importantly, the new category abandoned a well-accepted approach (treating these statements as hearsay exceptions) and introduced a new approach—with a new legal category and legal term—without assessing their costs and benefits or evaluating alternatives. Such unexamined innovation is not a virtue even in an author's individual treatise. It becomes a serious vice when followed in an evidence code, especially if the new term conflicts with a well-established one.

## 2. Wigmore and Morgan On Admissions

Wigmore and Morgan had competing positions on the classification of admissions. While Wigmore changed his initial views as a result of Morgan's 1921 article, his changed position was still different than Morgan's, just in a narrower way. In the 1899 edition of Greenleaf's Treatise, Wigmore treated admissions as an example of self-contradicting impeachment evidence, not as substantive evidence.<sup>58</sup> Since he thought that admissions were used only to contradict and to impeach, they were not testimonial, and the hearsay rule was "inapplicable" (i.e., they were not hearsay).<sup>59</sup>

In the first edition of his own treatise in 1904, Wigmore continued to

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56. As an observation and not a criticism, it should also be noted that this category is Wigmore's invention, with very modest case support. In addition to the dictum from the Minnesota case previously described in footnote 53, Wigmore used a quotation from an early opinion in the famous *Wright v. Tatum* case. The opinion from which Wigmore quoted was from the first round of appeals and concerned the former testimony of a deceased attesting witness to the will (and not from Baron Parke's opinion in a later appeal that addressed the admissibility of letters for their "implied assertions" and used the ship captain's hypothetical. *Wright v. Doe*, (1837) 112 Eng. Rep. 488 (K.B.)). Wigmore quoted Chief Judge Tindall for the point that "the evidence resulting from the written examination of the deceased witness, in the former suit between the same parties, is of as high a nature, and as direct and immediate, as the viva voce examination of one of the witnesses remaining alive and actually examined in the cause." *Wright v. Tatham*, (1834) 110 Eng. Rep. 1108, 1116. This statement established that such former testimony should be received as evidence but had absolutely no bearing on whether it should be admitted as a hearsay exception or under the "hearsay rule satisfied" category.

57. John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 501 (1937).

58. GREENLEAF, *supra* note 35, at 292.

59. *Id.*

regard admissions as admissible only as impeachment evidence, viewing them as another form of self-contradiction, "when it appears that on some other occasion he has made a statement inconsistent with his present claim."<sup>60</sup> He located his discussion of admissions in the treatise section on Testimonial Impeachment, immediately following the chapter on Prior Statements, not in his 673 page treatment of the hearsay rule. He wrote that:

The use of admissions is on principle not obnoxious to the Hearsay rule; because that rule affects such statements only as are offered for their independent assertive value after the manner of ordinary testimony, while admissions are receivable primarily because of their inconsistency with the party's present claim and irrespective of their credit as assertions; the offeror of the admissions, in other words, does not necessarily predicate their truth, but uses them merely to overthrow a contrary position now asserted. Just as the Hearsay rule is not applicable to the use of a witness' prior self-contradictions, so it is not applicable to the use of an opponent's admissions.<sup>61</sup>

While Wigmore recognized that admissions might also have "an additional and testimonial value, independent of the contradiction and similar to that which justifies the Hearsay exception for declarations against interest,"<sup>62</sup> he believed that this second, substantive use was permitted only if the statement satisfied the requirements of the declaration against interest exception.<sup>63</sup> For Wigmore in 1904, there was no permissible substantive use for admissions *qua* admissions.

In 1921, Morgan wrote an influential law review article, *Admissions as an Exception to the Hearsay Rule*,<sup>64</sup> that attacked Wigmore's view that admissions were not hearsay. Morgan reviewed the history of admissions and demonstrated that Wigmore's position was unsound in theory and unsupported by case law. Summarizing his argument, he wrote:

Certain it is that extra-judicial admissions are received in evidence. Equally certain is it that they are received for proving

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60. 2 WIGMORE (1st ed. 1904), *supra* note 26, §1048, at 1217.

61. *Id.* at 1218-19 (citations omitted).

62. *Id.* at 1218 (citations omitted).

63. *See Id.* (suggesting the statement would have to be against interest at the time it was made, and the declarant would have to be unavailable.).

64. Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921).

the truth of the matter admitted. It is likewise certain that they do not fall within that exception to the rule against hearsay [sic] which admits declarations against interest. These are the facts, and from them the conclusion is inevitable that they are received as an exception to the rule against hearsay, and not that they are received on any theory that they are not hearsay.<sup>65</sup>

Morgan ended his article by posing and then providing an affirmative answer to his question: Is there a justification in principle for such an exception? He noted that, in creating hearsay exceptions, courts “have appeared to require only some guaranty of truth . . . and some measure of necessity.”<sup>66</sup> And he posited that the reason for these requirements was “chiefly the protection of the party against whom the evidence is to be used, rather than . . . eliminat[ing] the possibility of false testimony.”<sup>67</sup> He supported this view by noting that courts regularly receive hearsay (as well as other) evidence if the opponent does not object to it.<sup>68</sup>

Morgan then stated, as “too obvious for comment,” that in the case of an admission, “the party whose declarations are offered against him is in no position to object on the score of lack of confrontation or lack of opportunity for cross-examination” and that “[a]ll the substantial reasons for excluding hearsay are therefore wanting.”<sup>69</sup> He concluded by asserting that the party against whom the admission is offered “cannot object to it being received as prima facie trustworthy, particularly when he is given every opportunity to qualify and explain it.”<sup>70</sup>

In the second edition of his treatise, published in 1923, Wigmore stated that Morgan’s “acute criticism” had led him to revise his views on admissions and to recognize that admissions can be admitted for two purposes: for impeachment, as self-contradiction, and substantively, to

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65. *Id.* at 359-60. (Notice that in the last sentence of the quotation, Morgan uses the phrase not hearsay. He is referring to Wigmore’s original position that admissions were not offered for their substantive use, but only as self-contradiction. Thus, since they were not used for the truth of the matter asserted, admissions—in Wigmore’s original view—were not hearsay in the traditional sense.).

66. *Id.*

67. *Id.*

68. *Id.* n.13.

69. *Id.* at 361.

70. *Id.* (In a footnote, Morgan also mentioned a quasi-estoppel argument made in a 1911 treatise: “The competency of an admission is not so much an exception to the rule excluding hearsay as based upon a quasi-estoppel which controls the right of a party to disclaim responsibility for any of his statements.” 2 CHARLES FREDERIC CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE § 1292, at 1636 (1911).” Morgan then stated: “The so called ‘quasi-estoppel’ may furnish one of the reasons for making an exception to the hearsay rule, but it cannot prevent its being an exception.”).

prove the truth of the matter asserted.<sup>71</sup> He wrote that, as substantive evidence, they are hearsay but “pass the gauntlet [of the hearsay rule] when offered *against* him as opponent, because he himself is in that case the only one to invoke the Hearsay rule and because he *does not need to cross-examine himself*.”<sup>72</sup> Elaborating further, Wigmore wrote:

The theory of the Hearsay rule is that an extrajudicial assertion is excluded unless there has been sufficient opportunity to test the assertion by the cross-examination by the party against whom it is offered; *e.g.* if Jones had said out of court, “The party-opponent Smith borrowed this fifty dollars,” Smith is entitled to an opportunity to cross-examine Jones upon that assertion. But if it is Smith himself who said out of court, “I borrowed this fifty dollars,” certainly Smith cannot complain of lack of opportunity to cross-examine himself before his assertion is admitted against him. Such a request would be absurd. Hence the objection of the Hearsay rule falls away, because the very basis of the rule is lacking, *viz.* the need and prudence of affording an opportunity of cross-examination. In other words, the *Hearsay rule is satisfied*; Smith has already had an opportunity to cross-examine himself; or (to put it another way) he now as opponent has the full opportunity to put himself on the stand and explain his former assertion.<sup>73</sup>

While Wigmore accepted the substantive use of admissions, he rejected Morgan’s view that admissions should be treated as an exception to the hearsay rule. However, he never fully elaborated the reasons for his rejection. His only discussion of the classification issue was in a single footnote, which reads in its entirety:

In the following article is found an acute criticism of the theory of Admissions as originally here expounded, and in the light of that article the above text has been revised: Professor Edmund M. Morgan, “Admissions as an Exception to the Hearsay Rule”, *Yale L. Journal*, 1921, XXX, 355. It is believed that the reasoning now set forth in §§1048, 1049, places the theory of Admissions on the sounder basis.<sup>74</sup>

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71. 2 WIGMORE (2d ed. 1923), *supra* note 46, §1048, at 504, n.1.

72. *Id.* at 505.

73. *Id.* (citations omitted).

74. *Id.* at 504 n.1. The third edition of the Treatise was unmodified on this point.

There are several interesting yet disappointing aspects to Wigmore's treatment of admissions in the 1923 treatise (which continued unchanged in the 1940 edition). First, although he used the phrase "the hearsay rule is satisfied" in his discussion, he kept his treatment of admissions in the Testimonial Impeachment section of the treatise, where he had discussed admissions (as not hearsay) in the first edition, not in the "hearsay rule satisfied" chapter, §1370. Furthermore, section 1370 of the treatise remained unchanged and still discussed only former testimony and depositions—and did not mention admissions.

Second, Wigmore did not make any attempt to compare admissions to former testimony and depositions—the two types of evidence for which he had originally created the "hearsay rule satisfied" category. Had he done so, he would have noted that in the case of former testimony and depositions, evidence law imposes a requirement of cross-examination when making the out-of-court statement, whereas there is no such cross-examination requirement for admissions. For former testimony and depositions, there is actual cross-examination (or, at the least, an actual opportunity to cross-examine); with admissions, there is only the fact that the party "cannot complain of lack of opportunity to cross-examine"<sup>75</sup> and will ordinarily have the opportunity to take the stand and explain the prior statement. Accordingly, the way in which admissions *might* or *should* satisfy the hearsay rule would be quite different from the way that former testimony and depositions unquestionably *do* satisfy the cross-examination aspects of the rule. Whereas, the actual cross-examination in the case of former testimony goes to traditional hearsay concerns like reliability, the favorable treatment of admissions stems instead from notions of party responsibility for their own statements and the adversary theory of trials. One can reasonably expect a treatise writer to acknowledge and discuss such differences.

Third, although aware of Morgan's article advocating the treatment of admissions as a hearsay exception, Wigmore did not discuss the comparative advantages and disadvantages of placing admissions into the "hearsay rule satisfied" section as opposed to the "hearsay exception" category. Instead, he simply placed it in that category and announced that it was "on [a] sounder basis."<sup>76</sup> Finally, and related to the third aspect, he did not cite any case law or scholarly writing in support of his decision. In the grand manner of the respected oracle that he was, he simply announced the

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75. *Id.* at 505.

76. *Id.* at 504 n.1.

classification on his own authority.<sup>77</sup>

Morgan continued to advance his argument that admissions should be treated as hearsay exceptions and to attack Wigmore's placement of admissions into the "hearsay rule satisfied" category. He also argued that Wigmore classified admissions and former testimony as he did for an ulterior motive: to support his broader project of rationalizing the hearsay exceptions. Morgan wrote:

So long as Mr. Wigmore agrees with the courts and other commentators that admissions, confessions and former testimony, when received in evidence, are properly used as tending to prove the truth of the matter asserted in them, why argue about classification? Only for this reason,—by excluding these from the hearsay class, Mr. Wigmore is able to give to this whole subject an apparent coherence and rationality which it totally lacks. By this device of classification he purports to show that in each recognized exception to the hearsay rule some necessity for using the hearsay evidence in place of the declarant's testimony is present, and some guaranty of trustworthiness is to be found which distinguishes the admissible utterance from hearsay in general and serves, however feebly, as a substitute for cross-examination. This enables him to champion the rules and direct his fulminations against the foolish refinements in their application. It permits him to slur the fact that the law governing hearsay today is a conglomeration of inconsistencies developed as a result of conflicting theories.<sup>78</sup>

Morgan thus suspected that Wigmore placed admissions (and former testimony) in the "hearsay rule satisfied" category not primarily for the

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77. In his book on Bentham and Wigmore, William Twining observed that "one of the difficulties of debating with Wigmore was that, so great was his influence, once he had perpetrated a doctrine on the basis of little or no authority, precedents would soon follow to fill the gap. Great treatise writers are among those who can pull themselves up by their own bootstraps." TWINING, *supra* note 33, at 111.

78. Edmund M. Morgan, *Book Reviews*, 20 B.U. L. REV. 776, 790-91(1940) [hereinafter Morgan, *Book Review*]; see also Edmund M. Morgan, *The Future of the Law of Evidence*, 29 TEX. L. REV. 587, 593-94 (1951) (By classifying admissions, confessions, and admissible reported testimony as nonhearsay, he made the other exceptions appear to have a consistency and rationality which I believe non-existent. In each exception he found a necessity for the use of secondary evidence and a guaranty of trustworthiness in the admitted hearsay which is lacking in ordinary hearsay. In so doing he furnished ammunition for that large segment of the profession which asserts, and sometimes seems to believe, that the accepted rules represent the 'crystallized wisdom of the ages,' and which, therefore, opposes changes that Wigmore would ardently champion.").

affirmative reason that they belonged there but for the negative reason that he wanted to exclude them from the roster of hearsay exceptions, in order to maintain the rationality—and to Morgan, the false rationality<sup>79</sup>—of his organizational plan for the hearsay exceptions. As we will see, rationalizing the hearsay exceptions was precisely the reason that the Reporter gave for placing admissions in the Rule 801(d) “not hearsay” category.

The debate between Wigmore and Morgan was never fully joined, primarily because Wigmore never again addressed the classification issue after announcing his amended position in the 1923 edition of his treatise. Reviewing the third edition in 1940, Morgan mildly criticized Wigmore for not engaging this and other issues,<sup>80</sup> but with no response. Wigmore died in 1943.

### 3. Wigmore and Morgan on Prior Statements

The extensive pre-Federal Rules scholarship and case law on prior statements focused almost exclusively on the issue of admissibility—whether prior statements should be admitted as substantive evidence or used only for impeachment—and not on their classification. The orthodox rule permitting prior statements to be used only for impeachment was the prevailing law up to the time of the enactment of the federal rules in 1975, and the writers and judges discussed whether, and to what extent, to overturn the orthodox rule. There was very little writing—by Wigmore, Morgan, or anyone else—on the *how* issue and classification.

Under the orthodox rule, the classification of prior statements was easy. Prior statements offered only to impeach were not hearsay, because they were not offered for their truth. Prior statements offered substantively, to prove their truth, were hearsay and were excluded by the hearsay rule. To admit them substantively, most writers advocated creating a hearsay

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79. Edmund M. Morgan, *Some Suggestions for Defining and Classifying Hearsay*, 86 U. PA. L. REV. 258, 273 (1938) (“It, therefore, seems not only futile but positively harmful to make a classification of utterances which appears to give to the decisions an element of coherent reasonableness which they lack.”). Another writer observed, “Rather than embarrass the symmetry of his logical generalizations, he simply expelled admissions from the realm of the hearsay exceptions.” Carl H. Harper, *Admissions of Party-Opponents*, 8 MERCER L. REV. 252, 253 (1957). Mr. Harper was the co-author of a book on the Georgia Rules of Evidence with Professor Thomas Green, who went on to become a member of the Advisory Committee.

80. “It may . . . be both ungrateful and unreasonable to wish that after his second edition he had given a major portion of his limitless energy and extraordinary talent to a reexamination of the entire subject, including his analysis and classification, paying particular attention to those topics in which he had theretofore accepted the conclusions of other scholars.” Morgan, *Book Review*, *supra* note 78, at 778.

exception for all or some prior statements.

In the first edition of his treatise, Wigmore endorsed the orthodox position on prior statements: they were admissible for impeachment purposes but not for the truth of the matter asserted in the statements. Wigmore placed his discussion of prior statements in the treatise section entitled Testimonial Impeachment, in a chapter called Self-Contradiction. He wrote that “the *prior statement is not hearsay*, because it is not used assertively, *i.e.* not testimonially.”<sup>81</sup>

In the second edition, Wigmore changed his position slightly, becoming the first major writer to endorse the substantive use of prior statements. He amended his earlier statement to say that: “the *prior statement is not primarily hearsay* . . . .”<sup>82</sup> Wigmore then added a new sub-section, in which he said:

It does not follow, however, that Prior Self-Contradictions, when admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the Hearsay rule. But the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination. Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. *The whole purpose of the Hearsay rule has been already satisfied.* Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve.<sup>83</sup>

In a footnote explaining the reason for his changed view, Wigmore wrote, “Further reflection . . . has shown the present writer that the natural and correct solution is the one set forth in the text above. Compare the theory of Admissions (*post*, §1048).”<sup>84</sup> This is the extent of Wigmore’s discussion of the substantive use of prior statements. He was an early supporter, but his writing on this point was very sparse.

Morgan’s writing on the classification of prior statements was less developed than his work on admissions and showed some ambiguous and

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81. 2 WIGMORE (1st ed. 1904), *supra* note 26, §1018, at 1179.

82. 2 WIGMORE (2d ed. 1923), *supra* note 46, §1018, at 459 (added word in boldface).

83. *Id.* at 460 (emphasis added) (citation omitted). The text was identical in the 1940 edition.

84. *Id.* at 460 n.2.

perhaps inconsistent use of language and concepts. Writing in 1938, discussing prior recorded recollections and comparing them to prior statements, he wrote that “it is universally agreed that . . . prior statements [when used as substantive evidence] are hearsay.”<sup>85</sup> Ten years later, however, Morgan wrote that prior statements do “not in fact involve in any substantial degree any of the hearsay risks” and that “there is no real reason for classifying the evidence [of prior statements] as hearsay.”<sup>86</sup>

It is unclear if Morgan was answering the *whether* question—should prior statements be received as substantive evidence or excluded by the hearsay rule—or the *how* question: If received, how should they be classified? The fact that the witness is in-court, under oath, and subject to cross-examination and observation meant, for Morgan, that there were no significant “hearsay dangers” and, for Wigmore, that the purposes of the hearsay rule had been “satisfied.” We shall see that the Reporter used this very reason both to admit prior statements as substantive evidence and to classify them as “not hearsay” in the federal rules. Notwithstanding his answer to his own question, as Reporter for the Model Code of Evidence, Morgan drafted a code that treated prior statements as hearsay and then placed them in a separate hearsay exception.

#### B. *The Three Predecessor Codes*

A major evidence code was drafted in each of the three decades prior to the enactment of the Federal Rules of Evidence. The first of these was the Model Code of Evidence, approved by the American Law Institute in 1942. It was followed by the Uniform Rules of Evidence in 1954 and then the California Evidence Rules in 1964. Each code influenced its successor, and all of them strongly influenced the shape and content of the Federal Rules of Evidence. The Model Code contributed the “code” framework used by the Federal Rules of Evidence, using general rules of broad applicability on a selected number of topics, as opposed to a detailed “catalog” of very detailed rules covering all topics or a “creed” announcing general principles.<sup>87</sup> The Uniform Rules of Evidence provided the outline

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85. Morgan, *supra* note 79, at 265.

86. Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 192, 196 (1948).

87. EDMUND M. MORGAN, *Foreword to MODEL CODE OF EVIDENCE* 1, 13 (1942). The issue of the level of generality or specificity of the rules of evidence was very controversial at the time and occasioned a sharp public disagreement between Wigmore and Morgan. The question was: Should the model code be “a catalog, a creed or a code”? *Id.* Wigmore wanted a “catalog,” a detailed set of concrete rules, rather than a set of general principles. He had drafted such a catalog in his own Code of Evidence, first published in 1910 and updated in 1935 and 1942. He also

of code sections—nine articles, each on a different topic—that the Federal Rules of Evidence followed with only few changes.<sup>88</sup>

The following paragraphs summarize each code's treatment of admissions and prior statements. For purposes of the Rule 801(d) story, these codes teach several important lessons. First, each of the codes classified admissions and prior statements as hearsay and then provided a specific hearsay exception to assure their admissibility. Second, two of the codes simply listed the hearsay exceptions *seriatim* and did not attempt to classify or organize them; California made a modest attempt at organization with a separate grouping for prior statements and admissions, but did not use Wigmore's trustworthiness/necessity template. Finally, although each code had extensive commentary on many code sections, none of them discussed the reason for treating admissions and prior statements as hearsay exceptions and rejecting Wigmore's "hearsay rule satisfied" classification. They simply did what they did.

### 1. Admissions

The Model Code defined hearsay in Rule 501, Rule 502 excluded its subject to exceptions, and Rules 503-529 listed all the exceptions, with four exceptions for different categories of admissions.<sup>89</sup> The commentary,

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explained his preferred approach in a speech setting forth his six postulates of method and style. John H. Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A. J. 23 (1942). Judge Charles Clark preferred a "creed," consisting of several statements of general principles. WM. DRAPER LEWIS, *Introduction to MODEL CODE OF EVIDENCE* vii, xiv-xv (1942). The A.L.I. held a debate on this topic at its 1941 meeting, with Wigmore, Clark, and Morgan each presenting his approach to the members. After hearing the presentations, the Institute voted for the "code" framework, and every evidence codification since that vote has used that framework and its intermediate level of generality. Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 431-36 (1989). See generally, Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence Law*, 17 LAW & SOC. INQUIRY 213 (1992).

88. The Federal Rules of Evidence follow the topics and headings of the Uniform Rules of Evidence for seven of the nine sections: Articles I, II, III, V, VII, VIII, and IX. Article IX of the Uniform Rules incorporates both authentication and contents of writings while the Federal Rules split those topics into two Articles: Article IX for authentication and Article X for contents. The two codes differ only on the coverage in Articles IV and VI. Instead of relevance, Article IV of the Uniform Rules deals with witnesses (covered in Article VI of the Federal Rules). And Article VI of the Uniform Rules covers "extrinsic policies" (found in Article IV, Rules 404-415 of the Federal Rules).

While both codes are similar in their use of these Articles, they use different numbering systems within each article and throughout the rules. The Uniform Rules proceed from Rule 1 to Rule 72, with no separate numbering within each Article as is the case with the Federal Rules. Thus, while the hearsay rules of the Uniform Rules are located in Article VIII, the hearsay rules are numbered Rules 62-66. Under the Federal Rules, the hearsay rules, also located in Article VIII, were numbered Rules 801-806 (and now, Rule 807).

89. The four separate exceptions for admissions were: Rule 505 for confessions, Rule 506

written by Morgan as Reporter, noted that “some commentators [such as Wigmore] insist that admissions and confessions fall without the reason for the hearsay rule . . . “ but concluded that “there is now general agreement that such evidence is received as tending to prove the truth of the matter stated [and therefore is hearsay].”<sup>90</sup>

The Uniform Rules had Rule 63 as an all-purpose hearsay rule both defining hearsay and the hearsay exclusionary rule and then setting forth thirty-one exceptions:

Rule 63. *Hearsay Evidence Excluded* — Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (1) . . . ; (2) . . . ; (3) . . .<sup>91</sup>

Exceptions (6), (7), (8) and (9) covered admissions. The only comment to the admissions exceptions of the Uniform Rule is that “[t]hey adopt the policy of Model Rules 506, 507 and 508.” The California Evidence Code treated admissions as hearsay and provided a basic exception with several specific exceptions covering more detailed categories.<sup>92</sup>

## 2. Prior Statements

The Model Code made prior statements admissible under an exception, Rule 503(b), which provided simply: “Evidence of a hearsay declaration is admissible if the judge finds that the declarant . . . (b) is present and subject to cross-examination.”<sup>93</sup>

The Uniform Rules used similar language in Rule 63(1), providing an exception for a “statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness.”<sup>94</sup>

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for party admissions, Rule 507 for authorized and adoptive admissions, and Rule 508 for vicarious admissions.

90. MODEL CODE OF EVIDENCE RULE 501 cmt. b, at 227 (1942). The Comment also noted that “Hearsay within the definition includes admissions, confessions and former testimony.” *Id.*

91. UNIF. R. EVID. 63.

92. CAL. EVID. CODE §1220-1227 (West 1967).

93. This Model Code language requiring the witness to be “present and subject to cross-examination” was used in the first draft of the Federal Rules of Evidence and changed in the second and subsequent drafts to require actual testimony, not just a presence in court. *See infra* Section III-A.

94. UNIF. R. EVID. 63(1) (1963) (repealed).

The exceptions created by both the Model Code and the Uniform Rule applied to *all* prior statements and required only that the declarant be “present” and available for cross-examination, not actually testify. The California Evidence Code—in a decision followed by the federal rules—changed both these aspects. It created exceptions only for some prior statements: prior inconsistent and prior consistent statements, past recollection recorded, and statements of personal identification. And it required that the declarant actually testify as a witness, and not simply be present and available.<sup>95</sup>

The main story of the treatment of prior statements is consistent: the predecessor codes classified them as hearsay and then created specific exceptions. However, certain aspects of the Model Code and Uniform Rules illustrate the difficulty of thinking clearly about the classification issue and also foreshadow the problems with the drafting of Rule 801(d). With the Model Code, it was the decision to treat depositions differently than other types of prior statements. Instead of classifying them as a hearsay exception, it “excepted” them from its hearsay definition: “A hearsay statement is a statement of which evidence is offered as tending to prove the truth of the matter intended to be asserted . . . *except a statement . . . contained in a deposition or other record of testimony taken and recorded pursuant to law for use at the present trial.*”<sup>96</sup> But more interesting than this rule was its explanation. The Model Code comment stated that the “definition . . . distinguishes between testimony given in another trial, making it hearsay (see Rule 511 [the exception for former testimony]), and a deposition taken for use at the trial at which it is offered, classifying it as *non-hearsay*. Some writers insist that no such distinction is justifiable.”<sup>97</sup> This comment to Rule 501 is the first recorded use of the term “not hearsay” in the Rule 801(d) sense, to describe evidence that is offered to prove the truth of the matter asserted and is thus hearsay according to the traditional definition but is then treated as “non-hearsay” for a policy

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95. CAL. EVID. CODE §1235-1237 (West 1967). The California exception for prior inconsistent statements was broad (“if the statement is inconsistent with his testimony at the hearing.”). *Id.* at §1236. This exception became very well-known after the 1970 Supreme Court decision in *California v Green*, an important early case discussing the Confrontation Clause boundaries on hearsay exceptions. 399 U.S. 149 (1970).

96. MODEL CODE OF EVID. 501(2) (1942) (emphasis added). The rule also “excepted” a statement “made by a witness in the process of testifying at the present trial.” *Id.* As we will see in Section III-A, the first draft of the Federal Rules of Evidence included both of these exceptions. The deposition part was dropped in the second draft; the “made by a witness” part in the third draft.

97. MODEL CODE OF EVID. rule 501 cmt. at 228 (1942) (emphasis added).

reason.<sup>98</sup> The Model Code made depositions non-hearsay by “excepting” them from the definition of hearsay, which was precisely the approach used for both admissions and prior statements in the first two drafts of the Federal Rules of Evidence. And this comment—the first such use of “not hearsay”—was written by Morgan, the strong advocate of treating admissions and prior statements as hearsay exceptions.

The Uniform Rule’s wrinkle is similarly instructive. It appeared in the Comment to Rule 63(1), the rule that created a hearsay exception for prior statements. The comment read: “[Rule 63(1)] has the support of modern decisions which have held that evidence of prior consistent statements . . . is not hearsay because the rights of confrontation and cross-examination are not impaired.”<sup>99</sup>

Note the anomaly: The drafters of the Uniform Rule had just created a new hearsay exception for prior statements in Rule 63(1). Then, in the comment to this exception, they wrote that “evidence of prior consistent statements is not hearsay.”<sup>100</sup> The drafters of the Federal Rules were not the only ones who were confused and inconsistent.

### III. THE DRAFTING OF RULE 801(d)

Led by Chairperson Albert Jenner and Reporter Edward Cleary, the members of the Advisory Committee on the Rules of Evidence<sup>101</sup> worked

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98. Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 218-19 (1948). As mentioned in Section II-A, Morgan suggested in 1948 that “there was no real reason for classifying the evidence of prior statements as hearsay.” *Id.* at 196. However, in no other place did he use the term “non-hearsay” in this sense.

99. UNIF. R. EVID. 63(1) cmt. at 198 (1953). The drafters concluded the comment with a bit of cheerleading: “When sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay.” *Id.*

100. *Id.*

101. A contemporary account described the membership of the Advisory Committee as follows:

The committee chairman was the well-known Illinois trial attorney and Warren Commission counsel Albert Jenner, who had participated in drafting the *Uniform Rules of Evidence* as a longtime Commissioner on Uniform State Laws. The panel also included Judges Simon Sobeloff, Joe Estes, and Robert Van Pelt; Professors (now federal judges) Jack Weinstein and Charles Joiner; Professor Thomas Green; Herman Selvin, father of the pioneering *California Evidence Code*; former chief of the Justice Department’s Criminal Appeals Division, Robert Erdahl; and famed litigators David Berger, Egbert Haywood, Frank Raichle, Craig Spangenberg, Edward Bennett Williams, and the late Hicks Epton. The reporter was Professor Edward Cleary [of the University of Illinois and then Arizona State].

Paul Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 125 n.3 (1973).

for six years (from June 1965 through November 1971). The committee produced at least three internal drafts and then three separately published versions of the Federal Rules of Evidence in 1969, 1971, and 1973.<sup>102</sup>

At the first Advisory Committee meeting on June 18, 1965, after general introductions,<sup>103</sup> the Reporter gave the committee an overview of the materials that he would be using in drafting the rules: "Wigmore, . . . McCormick, . . . a collection of law review articles, edited by a committee of the American Law School Association, the Model Code of Evidence, . . . Uniform Rules of Evidence, . . . and the report from the drafting of the California code."<sup>104</sup> Jenner handed out the table of contents of the three predecessor codes and said that he would distribute a copy of the Kansas Evidence Code (a state adoption of the Uniform Rules of Evidence) prior to the next meeting.<sup>105</sup> Cleary asked committee member Herman Selvin, a member of the California Law Revision Commission, to speak briefly about the California experience.<sup>106</sup> He then led a discussion of federal-state issues that would necessarily arise in a federal evidence code.<sup>107</sup>

The Committee discussed the Reporter's draft rules for the first time at the second meeting in October 1965. The minutes reflect that the Reporter made several basic points about his approach to drafting the federal rules, before turning to a discussion of the specific rules on the agenda for that meeting.<sup>108</sup> He said that in preparing the drafts, he had consulted the

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102. See Standing Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161 (1969); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Draft Of Proposed Rules Of Evidence For The United States Courts And Magistrates*, 51 F.R.D. 315 (1971); *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183 (1973).

103. In addition to the members of the Advisory Committee, several members of the Standing Committee on Federal Rules, including Professors William James Moore of Yale, and Charles K. Wright of Texas, and Judge Alfred Maris, attended many of the committee's meetings. Advisory Committee on Practice and Procedure, Minutes of June 28, 1965, meeting 6, available at <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/minutes/ST06-1965-min.pdf>.

104. Advisory Committee on Rules of Evidence, Minutes of June 18, 1965, meeting 5, available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx>

105. *Id.* at 8.

106. *Id.* at 5.

107. *Id.* at 7. The Reporter had addressed these issues in his Memorandum No. 1, as had Professor Green's study of the advisability and feasibility of promulgating federal rules of evidence. See Albert B. Maris, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 75-77 (1962).

108. See United States Courts, Minutes of Rules Committee Meetings, (October 1965) available at <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/minutes/EV10-1965-min.pdf>. The first topics addressed were authentication (discussed in the Reporter's

Uniform Rules and the California Code.<sup>109</sup> He then made three points about style and approach, the second and third of which he overlooked when drafting Rule 801(d): (1) definitions should be avoided whenever possible; (2) words should be used in their ordinary meaning whenever possible; and (3) he was drafting the rules to be as usable and accessible as possible.

In the next sub-sections, I describe in some detail the three drafts that led to the creation of Rule 801(d) and the “not hearsay” category. I then present the reasons that the Reporter gave for the drafting choices and criticize both those reasons and the failure of the Reporter and the Advisory Committee to consider alternative approaches to the classification of admissions and prior statements.

#### *A. The Hearsay Rules: The First Three Drafts*

The Advisory Committee discussed the hearsay rules over the course of four meetings beginning in October 1967. Prior to the first hearsay meeting, the Reporter presented the Advisory Committee with his first draft of Rules 801-804, accompanied by Memorandum No. 19, a 185-page memorandum that presented his suggested approach to hearsay and included his reasons for not treating admissions and prior statements as hearsay exceptions.<sup>110</sup> After discussing the first draft in several meetings, the Advisory Committee made changes and in December 1968 approved a second draft. The second draft was published as the Preliminary Draft in March 1969, being the first published work of the Advisory Committee.<sup>111</sup> The third draft was prepared after the review of public comments on the

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Memorandum No. 2), contents of writings (Memorandum No. 3), and expert testimony (Memorandum No. 4). *Id.* at 2. The Chairperson and Reporter set the agenda for the Advisory Committee’s work and decided to address less controversial topics in their early meetings and to leave the discussion of the hearsay rules and presumptions until the end. Prior to a meeting on a topic, the Reporter prepared and circulated a memorandum on the topics for discussion at the meetings, usually accompanied by a first draft of particular rules. *See, e.g.*, Thomas F. Green, Jr., *Highlights of the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 1, 3-4 (1969).

109. Edward W. Cleary, *The Plan for the Adoption of Rules of Evidence for United States District Courts*, 25 REC. ASS’N B CITY N.Y. 142, 145-46 (1970). While not reflected in the minutes, his drafting followed the general approach of the Model Code and the structure of the Uniform Rules. *Id.*

110. *See generally* Advisory Committee on Evidence Memorandum No. 19: Article VIII Hearsay: The Components of Credibility (Oct. 9, 1967-March 9, 1968), *microformed on* Nos. EV-120-05 to EV-127-03 (Cong. Info. Serv.) [hereinafter Memorandum No. 19]. Parts of Memorandum No. 19 became, in considerably reduced form, the Introductory Note on Hearsay and the Advisory Committee Notes that accompanied the published drafts of the rules. The Reporter did not include any of Memorandum No. 19’s discussion of the reasons for classifying admissions and prior statements as “not hearsay” in the Advisory Committee Notes.

111. *Preliminary Draft of Proposed Rules of Evidence*, 46 F.R.D. 161 (1969).

Preliminary Draft and was published in 1971 as the Revised Draft.<sup>112</sup> This third draft created Rule 801(d) and the “not hearsay” classification.

There are two important storylines in these three drafts, one involving the classification of admissions and prior statements, the other the treatment of the hearsay exceptions generally. With admissions and prior statements, the form of the classification changed from Draft One to Draft Three, but not the content. From the beginning, the Reporter recognized that, when offered to prove their truth, these statements were not hearsay under the traditional definition. In thinking about how to classify them, he had two goals: first, to assure that they would be received into evidence and not be excluded by the hearsay rule; and second, to make sure that they were not classified as hearsay exceptions. Using two different techniques, he accomplished the first goal by excluding them from the definition of hearsay. In Drafts One and Two, in the definition section, Rule 8-01(c), he explicitly excluded admissions and prior statements from the definition of hearsay. In Draft Three, he created the new “not hearsay” category in Rule 801(d) and placed them there. However, the goal, the result, and his reasons were the same for all three drafts—to assure that these statements would be received into evidence. With respect to the second goal, he could and did keep them from being treated as hearsay exceptions, but he still needed some other category in which to place them. In the first two drafts, the category was only implied: if they were expressly excluded from the hearsay definition, they must be “not hearsay.” In the third draft, Rule 801(d) made the “not hearsay” category explicit.

With the hearsay exceptions, there was a dramatic change from the second to the third draft. The first two drafts followed an innovative approach favored by the Reporter. Instead of the traditional list of categorical exceptions, these drafts had only two hearsay exceptions, each expressed in very general terms: “A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness.”<sup>113</sup>

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112. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315 (1971). The Advisory Committee and the Standing Committee submitted the second draft to the Supreme Court in October 1970, with the expectation that the Court would promulgate it as the proposed rules. However, in order to give the public the opportunity to comment on the many changes between the second and third drafts, the Court decided instead to publish them as a revised draft.

113. FED. R. EVID. 8-03(a)-(b)(Preliminary Draft of Proposed Rules 1969). Rule 8-04(a) provided: “A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is

The purpose of these two general exceptions was to introduce flexibility into what was seen as a “rigid rule [marked] by numerous rigid exceptions.”<sup>114</sup> However, after receiving a barrage of critical responses during the public comment phase, the Reporter abandoned the innovative approach and returned to the traditional categorical exceptions.

#### 1. The Drafts: Admissions and Prior Statements

In the first draft, Rule 8-01(c)<sup>115</sup> both defined hearsay and listed several types of evidence (including admissions and prior statements) specifically excluded from that definition:

8-01(c) Hearsay. “Hearsay” is a statement, offered in evidence to prove the truth of the matter intended to be asserted, unless

(1) Testimony at hearing. The statement is one made by a witness while testifying at the hearing;<sup>116</sup> or

(2) Declarant present at hearing. The declarant is present at the hearing and subject to cross-examination concerning the statement; or

(3) Deposition. The statement was made by a deponent in the course of a deposition taken and offered in the proceeding in compliance with applicable Rules of Civil or Criminal Procedure; or

(4) Admission by party-opponent. As against a party, the statement is

(i) his own statement, in either his individual or a representative capacity, or

(ii) a statement by a person authorized by him to make a statement concerning the subject, or

(iii) a statement of which he has manifested his adoption or belief in its truth, or

(iv) a statement concerning a matter within the scope of an

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unavailable as a witness.” Professor Wellborn described these as “nonformal” exceptions. Olin Guy Wellborn III, *Article VIII: Hearsay*, 20 HOUS. L. REV. 477, 481 (1983).

114. Charles T. McCormick, *The Borderland of Hearsay*, 30 YALE L.J. 489, 504 (1930). The first two drafts used the traditional hearsay exceptions, not as categorical exceptions as in the common law and the prior codes, but as examples to illustrate the nature and scope of the two general categories.

115. The numbering system in the first two drafts was 8-01, 8-02, 8-03, etc. See, e.g., *Preliminary Draft of Proposed Rules of Evidence*, 46 F.R.D. at 168. Not until the third draft did the Reporter propose the numbering system, 801, 802, 803, etc., used in the current rules. See, e.g., Committee of Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 320 (1971).

116. This awkward approach—explicitly excluding an in-court witness’s testimony from the definition of hearsay—was pioneered by the Model Code. See Section II-B, *infra*. The third draft rejected this language, replacing it with the “other than by a witness. . .” language from Uniform Rule 63. Uniform Rules of Evidence, Rule 63(1).

agency or employment of the declarant for the party, made before the termination of the relationship, or  
 (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy, or  
 (vi) a statement tending to establish the legal liability of the declarant when that liability is in issue.<sup>117</sup>

The second draft continued the same approach but tightened the requirements for prior statements, both to specify that the declarant must testify (and not merely be present) and to exclude from the definition of hearsay only certain specified prior statements, not all as in the first draft. It also deleted the treatment of depositions, on the grounds that the Federal Rules of Civil Procedure already addressed the topic.<sup>118</sup>

Language new in the Second Draft is highlighted in a light grey; language stricken from the First Draft is marked by a single ~~strikethrough~~.

8-01(c) Hearsay. "Hearsay" is a statement, offered in evidence to prove the truth of the matter intended to be asserted, unless

(1) Testimony at hearing. The statement is one made by a witness while testifying at the trial or hearing; or

(2) ~~Declarant present at hearing~~. Prior Statement By Witness The declarant ~~is present at the hearing~~ testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (iii) one of identification of a person made soon after perceiving him, or (iv) a transcript of testimony given under oath at a trial or hearing or before a grand jury;

(3) ~~Deposition~~. ~~The statement was made by a deponent in the course of a deposition taken and offered in the proceeding in compliance with applicable Rules of Civil or Criminal Procedure; or~~

(3) Admission by party-opponent. The statement is offered ~~As~~ against a party, the statement is

(i) his own statement, in either his individual or a representative capacity, or

(ii)<sup>119</sup> a statement of which he has manifested his adoption or

117. *Preliminary Draft of Proposed Rules of Evidence*, supra note 102, 46 F.R.D. at 168.

118. Minutes of the Advisory Committee on Rules of Evidence Meeting of Oct. 9-11, 1967, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-1967-min.pdf>

119. The second draft switched the order of the placement of adoptive admissions and

belief in its truth,

(iii) a statement by a person authorized by him to make a statement concerning the subject, or

(iv) a statement concerning a matter within the scope of an agency or employment of the declarant for the party, made before the termination of the relationship, or

(v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy, ~~or~~

~~(vi) a statement tending to establish the legal liability of the declarant when that liability is in issue.~~<sup>120</sup>

The big change came in the third draft with the creation of Rule 801(d) and the “not hearsay category.” Once created, this classification portion of Rule 801(d) remained untouched and unchanged, notwithstanding the numerous revisions and amendments to other rules. The admissions and prior statements sections were transferred from Rule 8-01(c)(2) and (3) into the newly created Rule 801(d)(1) and (2). With the transfer out of those sub-sections and the addition of the “out-of-court” language (“other than one made by the declarant while testifying at the trial or hearing”), Rule 801(c) assumed its current form as the now-familiar hearsay definition.

Language new to the third draft is highlighted in a dark grey. Language stricken from the second draft is marked by a ~~double strikethrough~~.

801(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter intended to be asserted. ~~unless~~

~~(1) Testimony at hearing~~

~~(2) Declarant present at hearing~~ [moved to Rule 801(d)(1)]

~~(3) Admissions by party-opponent~~ [moved to Rule 801(d)(2)]

**(d) Statements Which Are Not Hearsay.** A statement is not hearsay if

**(1) Prior Statement by Witness.** [content of rule transferred from the former 801(c)(2)]

**(2) Admission By Party-Opponent** [content of rule transferred from the former 801(c)(3)]<sup>121</sup>

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authorized admissions.

120. *Preliminary Draft of Proposed Rules of Evidence*, supra note 102, 46 F.R.D. at 331, 332.

121. FED. R. EVID. 801(c); see also *Revised Draft of Proposed Rules*, 51 F.R.D. 315, 413 (1971).

## 2. The Drafts: The Hearsay Exceptions

Using the Reporter's innovative approach to the hearsay exceptions, the first two drafts had only two general hearsay exceptions, followed by list of specific exceptions "by way of illustration."

### 8-03 Hearsay Exceptions. Declarant Not Unavailable

(a) GENERAL PROVISIONS. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.

(b) ILLUSTRATION. By way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of this rule: (1) present sense impression, (2), . . . (23)

### 8-04 Hearsay Exceptions. Declarant Unavailable

(a) GENERAL PROVISIONS A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness.

(b) ILLUSTRATION. By way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of this rule: (1) dying declaration; (2) . . . <sup>122</sup>

There were only two minor changes from the first to the second draft. The title of Rule 8-03 was changed to "Availability of Declarant Immaterial," and the illustrative exception of Past Recorded Recollection was changed from 8-03(21) to 8-03(5).

There was a major change in the third draft, which was prepared after the review of public comments on the Preliminary Draft and published in 1971 as the Revised Draft.<sup>123</sup> In response to strong objections from the bar, the third draft abandoned the innovative approach of using two general exceptions, with the traditional hearsay exceptions only as illustrative guides, and returned to the common law approach of categorical hearsay exceptions. It still retained the two general categories—declarant availability immaterial and declarant unavailable—and grouped the hearsay exceptions within these two categories, but these two categories were now

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122. FED. R. EVID. 8-03-8-04 (Preliminary Draft of Proposed Rules).

123. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Courts and Magistrates, 315 F.R.D. 315 (1971).

just groupings of specific categorical exceptions, and not themselves general exceptions. The third draft also created the new residual exceptions, Rule 803(24) and Rule 804(b)(5), combined and recodified in 1997 as Rule 807. Finally, it changed the numbering system from one with a hyphen after the first number (1-01, 2-01, 3-01) to one with 3-digit numbers (101, 201, 301).

803 Hearsay Exceptions. Availability of Declarant Immaterial

- ~~(a) GENERAL PROVISIONS. A statement is not excluded . . .~~  
~~(b) ILLUSTRATION. By way of illustration only, . . .~~

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: [803(1)-(23) transferred from 803(b); 803(24) is the new residual exception]

804 Hearsay Exceptions: Declarant Unavailable

- ~~(a) GENERAL PROVISIONS. A statement is not excluded . . .~~  
~~(b) ILLUSTRATION. By way of illustration only, . . .~~

**(a) Definition of Unavailability.** – From former 8-01(d)

**(b) Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: [804(b)(1)-(4) are same; 804(b)(5) is the new residual exception]<sup>124</sup>

*B. The Reasons Given for the “Not Hearsay” Classification*

This part presents, in the Reporter’s own words, the reasons—separate for each type of statement—for the Federal Rules treatment of admissions and prior statements. Section III-C then discusses those reasons and demonstrates why they did not justify the decision to classify them as “not hearsay.”

1. Admissions

In Memorandum No.19, the Reporter noted that “the question whether

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124. Compare FED. R. EVID. 803-804; with 51 F.R.D. 315, 419-40 (Revised Draft of Proposed Rules 1971).

a particular type of statement-evidence is classed as nonhearsay or as hearsay-but-under-exception may seem on first impression to be mere terminological quibbling: in either event the hearsay rule does not call for exclusion.<sup>125</sup> He then went on to say:

If, however, the Committee is favorably disposed to the general design of the over-all proposed approach to hearsay, it is desirable to eliminate admissions from the category of hearsay as it will not fit comfortably into either of the major exception groups laid out in proposed Rules 8-03 and 8-04.<sup>126</sup>

The phrase—"it will not fit comfortably"—was the Reporter's reason for his treatment of admissions.<sup>127</sup> This "bad fit" rationale is in part tautological: if Rule 8-03(a) and its illustrative exceptions required reliability and Rule 8-04(a) and its illustrative exceptions required unavailability, then admissions by definition did not meet those requirements. But there were also policy reasons: the Reporter wanted to avoid the harms that he felt a "bad fit" would cause both to admissions and to the hearsay exceptions. What were those harms?

The "bad fit" had two possible negative consequences: (1) a contraction in the scope of the admissions exception, so that all admissions would have some "assurances of accuracy" or (2) an expansion in the hearsay admitted with no assurance of accuracy.<sup>128</sup> The Reporter wrote that if admissions were placed as an illustrative exception in Rule 8-03(b), there would be pressure on courts "to discard the traditional free-wheeling common law treatment [for admissions] and to search instead for some assurances of reliability."<sup>129</sup> Courts might narrow the admissions exception in order to make it more reliable (as required by Rule 8-03), and the Reporter thought that this would be an undesirable outcome.

While the Reporter did not directly discuss the impact of a "bad fit" on

125. Memorandum No. 19, *supra* note 107, at 86.

126. *Id.* This passage concluded, "See Reporter's Memo of 9/12-67." *Id.* Unfortunately, an exhaustive search of the Judicial Conference records has failed to produce that memo. See record of an August 2, 2010 voicemail from Elizabeth Endicott, librarian at the Administrative Office of the United States Courts in Washington, D.C. (Aug. 2, 2010) (on file with author).

127. Memorandum No. 19, *supra* note 107, at 86.

128. As discussed in the next sub-section, while an expansion of the unenumerated exceptions seems to this writer a more likely outcome than a contraction of the admissions exception, the impact either way would likely be quite small. And any impact, in either direction, could be easily eliminated by placing admissions into its own, separate hearsay exception, apart from either Rule 803 or Rule 804, so that neither the admissions exception nor the Rule 803 or 804 exceptions would cross-contaminate the other. But there is no indication that the Reporter or the Advisory Committee considered or evaluated such a separate exception.

129. Memorandum No. 19, *supra* note 107, at 87.

the hearsay exceptions, one can easily infer the harm that he feared—that admissions would distort (and likely expand) the interpretation of the new general hearsay exception. If admissions were listed as an “illustrative exception” as an example of the type of evidence that has the “assurances of accuracy” required by Rule 8-03(a), then courts would be inclined (or pressured) to admit other statements which, like some admissions, have no “assurances of accuracy.”

There was only mild questioning of the Reporter’s treatment of admissions during the drafting stage. At the first hearsay meeting, the Reporter provided a general overview of his approach to hearsay and, in response to introductory questioning, said that he would “exclude admissions from hearsay by definition” and that “he would simply say that admission is not hearsay.”<sup>130</sup> The minutes reflect that the members were pleased with his overall approach.<sup>131</sup> At the December 1967 meeting, Advisory Committee member Craig Spangenburg asked why admissions should not be treated as a hearsay exception.<sup>132</sup> The Reporter responded by saying that he would prefer to wait to discuss that issue until the next meeting, when they would be discussing Rule 803 and his suggested approach to the hearsay exceptions.<sup>133</sup> At the next meeting in March, 1968, the Reporter raised the issue again and pointed out how admissions have “no real circumstantial guarantee of proof . . . [and] . . . just did not fit into Rule 8-03.”<sup>134</sup> After that presentation, the Advisory Committee voted unanimously to approve the treatment of admissions.<sup>135</sup>

Although there is no further record of Committee discussion of the matter, Advisory Committee member Professor Thomas Green wrote briefly in support of the original Rule 8-03(c) position in an article published while the preliminary rules were still under consideration. Professor Green gave two distinct and internally inconsistent reasons for excluding admissions from the definition of hearsay. His first reason was the same as the Reporter’s—that admissions do not fit well into the general

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130. Minutes of The Advisory Committee on Rules of Evidence meeting of October 9-11, 1967, at 33, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-1967-min.pdf>.

131. *Id.* at 33-35.

132. Minutes of The Advisory Committee on Rules of Evidence meeting of December 14 & 15, 1967, at 4 available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV12-1967-min.pdf>.

133. *Id.*

134. Minutes of the The Advisory Committee on Rules of Evidence, Meeting of March 1968, at 17 available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV03-1968-min.pdf>.

135. *Id.* at 17-18.

theory of the hearsay exceptions.<sup>136</sup> Secondly, he wrote that admissions should be thought of as circumstantial evidence of conduct, and not as hearsay.<sup>137</sup> He did not (nor did the Reporter or any other Advisory Committee member) advance Wigmore's "hearsay rule satisfied" position to justify the different treatment of admissions.

Only three of the many comments recorded in the Advisory Committee's internal records addressed Rule 8-01(c)'s exclusion of admissions from the definition of hearsay. Two letters expressed support.<sup>138</sup> A third letter, from attorney Leonard Rubin, opposed it and suggested that admissions be treated as a hearsay exception.<sup>139</sup> Stating that admissions had always been treated as exceptions and were so treated by the Model Code and the Uniform Rules, he argued that "[t]here seems to be no justification for excluding the statements . . . from the definition of hearsay."<sup>140</sup> Recognizing that admissions did not fit within the parameters of the Rule 803 and Rule 804 exceptions, attorney Rubin suggested that admissions and prior statements should be listed separately as "General Exceptions," a suggestion very similar to the "four categories" approach recommended in Section VI.<sup>141</sup>

While the Reporter did not expressly comment on attorney Rubin's suggestion, he did discuss the treatment of admissions in his response to the comments from several organizations on Rule 8-01(c) and Rules 8-03 and 8-04 in a May, 1970 memo.<sup>142</sup> In several fascinating sentences, he described two alternative approaches, one that became Rule 801(d) and the other that never surfaced again. First, he wrote, "An alternative [will] be to place them in a special subsection (d) with a prefatory statement, 'A

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136. Thomas F. Green, Jr., *Highlights of the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 1, 39 (1969).

137. *Id.* This was the approach favored by the early Wigmore and, as we will see, one of his supporters, Professor John Strahorn.

138. Letters from American College of Trial Lawyers and ABA Section on Litigation, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, CIS No. EV-305-01, EV-614-58 (Cong. Info. Serv.).

139. Letter from Leonard H. Rubin to Committee on Rules of Practice and Procedure (August 27, 1969), *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, CIS No. EV-501-19 (Cong. Info. Serv.).

140. *Id.*

141. *Id.*

142. Memorandum from Edward Cleary, May 21-27, 1970, *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988 CIS No. Ev-214-94 (Cong. Info. Serv.). He stated that adding the phrase "other than one made by the declarant while testifying at the trial or hearing" to Rule 8-01(c) "may [be] an improvement," and noted that, if the change were made, Rules 8-01(c)(2)(prior statements) and (3)(admissions) would have to be renumbered. *Id.*

statement is not hearsay if . . . .”<sup>143</sup> Here, in May, 1970, is the first expression of the “special” Rule 801(d) and the new “not hearsay” category. While the memo did not provide his reasons for the special section concept, he advanced it while he was reworking the text of Rule 801(c), the hearsay definition section. It is likely that the Reporter decided to keep Rule 801(c) clean, uncluttered, and focused on the definition of hearsay, which meant that he needed another place for admissions and prior statements. Perhaps the Reporter also decided that, in drafting terms, it was clearer and better to have an explicitly labeled “not hearsay” category under Rule 801(d), as opposed to relying on a default non-hearsay category implied from the exclusion from hearsay in Rule 8-01(c).

Even more dramatically, the Reporter immediately followed this suggestion by briefly sketching another possibility:

A further alternative treatment of (2) and (3) is available if the Advisory Committee should adopt the general approach to hearsay suggested by the ABA Committees and the American College Committee, i.e., transpose the present illustrations into exceptions and add a growth and development section. Prior statements . . . and admissions . . . coul[d] then be included in the itemization of exceptions, since the pressures of logic and organization would no longer require that they be excluded from the definition of hearsay rather than included in the exceptions.<sup>144</sup>

Including admissions and prior statements “in the itemization of exceptions” was precisely the approach of the three predecessor codes.<sup>145</sup> His brief presentation did not address how to deal with the distinctiveness of admissions and prior statements and the fact that, as he had previously argued, they do not fit well with either the Rule 803 or Rule 804 categories. However, once he had abandoned his initial innovative approach to the hearsay exceptions, he was free of “the pressures of logic and organization” imposed by that approach and was able, for one brief moment in May 1970, to consider treating admissions and prior statements as exceptions.<sup>146</sup>

His May 1970 memorandum is the final written word on the classification issue.<sup>147</sup> In its third draft, the Advisory Committee selected

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. The classification was addressed one additional time, but only indirectly. The Senate Committee on the Judiciary noticed a potential coverage gap in Rule 806, the rule governing impeachment of hearsay declarants, for the makers of out-of-court statements falling under Rule

the first alternative presented in the memo—the creation of Rule 801(d). There is no record of the reason(s) for this selection. By the time of the third draft, the Reporter and Advisory Committee were near the end of a six-year drafting process, and the documentation of their work, in terms of minutes and memoranda, had virtually stopped.<sup>148</sup> The lack of contemporaneous records at this final, critical moment is a disappointment. However, working from the records that we do have, it seems clear that the reason for creating a new Rule 801(d) with the “not hearsay” terminology in the third draft was the same as the reason for excluding admissions and prior statements from the definition of hearsay in Rule 8-01(c) in the first two drafts. It was the “will not fit comfortably” reason given at the outset in Memorandum No. 19.<sup>149</sup>

## 2. Prior Statements

Most of the Reporter’s discussion of prior statements in Memorandum No. 19 concerned the admissibility issue, not the classification issue. This focus was understandable because, at the time of the drafting, the orthodox rule was still the majority rule. The Reporter, like reformers before and since, wanted to change the orthodox rule and make most prior statements generally admissible. He used the pertinent sections of Memorandum No. 19, and later the text of the ACN, to make the case for this broader admissibility.

When he did touch briefly on the classification issue, his treatment of prior statements was quite different than admissions. Whereas his discussion of admissions omitted the predecessor codes, his discussion of prior statements began by noting that both the Model Code and the Uniform Rules treated prior statements as a hearsay exception and then stated that his proposal treated them “as not falling in the category of hearsay in the first

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801(d)(2)(C), (D) and (E). It proposed amending Rule 806 to read, “[w]hen a hearsay statement, or a statement defined in Rule 801(d)(2),(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked . . . .” FED R. EVID. 806 advisory committee’s note (emphasis added to indicate new language). The Committee report seemed to understand and to accept the Reporter’s classification, noting “the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz. some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay.” FED R. EVID. 806 advisory committee’s note.

148. The May 1970 memorandum is the last memo in the microfiche file. The Committee had meetings in May and December, 1970. There are minutes for the May meeting, which discussed the revisions through Rule 406, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV05-1970-min.pdf>. There are no records of minutes of the December 1970 meeting, where the decision to adopt Rule 801(d) was presumably discussed and approved.

149. Memorandum No. 19, *supra* note 107, at 86.

place.”<sup>150</sup> Observing that “the result is the same, . . . [i]n either event the hearsay rule does not operate to exclude the evidence,”<sup>151</sup> he concluded, “[I]n view of the Reporter, the basis for not excluding the evidence is that the conditions of giving testimony are satisfied, and hence logic dictates a classification as non-hearsay.”<sup>152</sup> Although he did not cite Wigmore at this point, this rationale for classifying prior statements as non-hearsay is identical to Wigmore’s rationale for placing all prior statements in the “hearsay rule satisfied” category. Because the witness is in court and testifying under oath, the testimonial conditions are met and the purposes of the hearsay rule are satisfied.

Interestingly, the Reporter did not use “bad fit” and incompatibility with Rule 803/Rule 804 as a rationale for treating them as “not hearsay.” If he had done so, however, he would have observed that prior statements have the same issue as admissions—they do not “fit comfortably” with either Rule 803 or Rule 804, because of the requirement with prior statements that the declarant appear as a witness.<sup>153</sup>

The minutes indicate that, when the Advisory Committee discussed the treatment of prior statements at both the October 1967 and May 1968 meetings, their discussion focused almost exclusively on whether, and to what extent, to admit prior statements as substantive evidence, and not on the how question. Interestingly, in support of admitting prior statements, Judge Weinstein made reference to New Jersey Rule 63(1), adopted from the Uniform Rules, and the Reporter made reference to the California Evidence Code.<sup>154</sup> Both of these states had recently decided to admit prior statements as substantive evidence, but as a hearsay exception, not as “not hearsay.” The minutes do not reflect whether Judge Weinstein and the Reporter called attention to the “hearsay exception” aspect, as well as the substantive admissibility aspect, of the New Jersey and California codes.

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150. *Id.* at 65.

151. *Id.* at 66.

152. *Id.*

153. Presumably the Reporter would have also thought that “bad fit” would cause analogous distorting effects, although the direction of the distortion would be different, since prior statements have such strong assurances of reliability. It would tend to shrink the exceptions, whereas including admissions as an exception would tend to enlarge them.

154. Minutes of the Fed. R. Evid. Advisory Committee Meeting of October 9-11, 1967 at 40, 42, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-1967-min.pdf> (last visited Nov. 6, 2010). Dean Joiner cited a Kansas case, which was decided under the Kansas version of the Uniform Rules. *Id.* at 46. Chairperson Jenner also cited the New Jersey rule and said that it was “equivalent to what was being presented by this proposed rule.” *Id.*

### C. *Evaluating the Reporter's Reasons*

The assessment of the Reporter's reasons for treating admissions and prior statements as he did and creating Rule 801(d) depends on the question asked and the criteria used to evaluate the answer. If the question is 'are admissions and prior statements different from the other hearsay exceptions and should they be treated differently?' then the answer is yes, and the Reporter's reasons are fully satisfactory. Those reasons fully support the *negative* decision of how *not* to classify admissions. If there are only two categories of hearsay exceptions, one based on reliability and with the availability of the declarant immaterial and the other based on necessity and requiring that the declarant be unavailable, it makes sense not to place admissions and prior statements into either of those exceptions.

However, his reasons do not help in making the more important affirmative decision and answering the *how* question actually before the Advisory Committee: how should admissions and prior statements be classified in an evidence code? Should they be treated, as Wigmore once urged, as non hearsay in the traditional, definitional sense? Should they be excluded from the definition of hearsay (as in drafts one and two)? Or is it better to follow the Model Code, the Uniform Rules and the California Evidence Code, and treat admissions and prior statements as hearsay but then, in recognition of their distinctiveness, place them in their own hearsay exception? Or should they be placed in new, separate categories and, if so, should those new categories be separate hearsay exceptions or something called "not hearsay"?

There are two possible approaches to answering the *how* question. The one that I favor and demonstrate in Section VI uses criteria drawn from the standards of rule drafting—primarily clarity and consistency—and then applies those criteria to the various possible ways of classifying admissions and prior statements.<sup>155</sup> Unfortunately, the Reporter and the Advisory Committee did not follow this approach.

Instead, to the extent that they even recognized the *how* question, the Reporter and Advisory Committee used an approach that relied on two other factors: first, the protection of the Reporter's goal of rationalizing the hearsay exceptions; and second, a scholarly assessment of the essential nature of admissions and prior statements. I will discuss and evaluate these

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155. See discussion *infra* Part VI. As discussed in Section VI, there is also a secondary factor that I call "educational": the ability of the classification to educate users as to the distinctiveness of admissions and prior statements and their differences from the out-of-court statements covered by the other hearsay exceptions.

two factors in turn.

### 1. Rationalizing the Hearsay Exceptions

The Reporter was strongly committed to creating a rational system for the hearsay exceptions. While noting that some writers had been skeptical about such a project,<sup>156</sup> “the Reporter believes that the hearsay exceptions may be seen in larger outlines of acceptable rationality.”<sup>157</sup> His plan for achieving “acceptable rationality” consisted “of recognizing two general exceptions to the rule excluding hearsay, one prescribing conditions for declarations of unavailable declarants and the other prescribing conditions for declarations without regard to whether declarant is unavailable.”<sup>158</sup> He used the traditional hearsay exceptions, not as categorical exceptions as in the common law and the prior codes, but as examples to illustrate the nature and scope of these two general exceptions. He hoped that the general exceptions would “encourage growth and development in this area of the law” while the illustrative traditional exceptions would “preserv[e] the values of the past . . . .”<sup>159</sup>

The Reporter’s approach to the exceptions drew strong criticism during the public comment period following the publication of the Preliminary Draft. Critics argued that the “illustrative” approach would vest too much discretion with the trial judge and create conditions of uncertainty that would make it difficult to prepare adequately for trial. Several groups suggested that the Committee return to the common law

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156. Memorandum No. 19, *supra* note 107, at 23. He quoted two of the skeptics: Morgan (hearsay is “a conglomeration of inconsistencies due to the application of competing theories haphazardly applied,”) and Chadbourne (“To admit some, but to stop short of admitting all, declarations of unavailable declarants and to perform the operation on a rational basis is, as experience has proved, a difficult endeavor.”). *Id.*

157. *Id.* at 24. In the Introductory Hearsay Note that accompanied the preliminary draft, the Reporter identified three approaches to the hearsay exceptions and wrote that the federal rules were taking the third approach, that of “rationalizing the hearsay exceptions.” In remarks to the New York City Bar shortly after the publication of Preliminary Draft, he said that he sought to accomplish two things in the proposed hearsay rules:

[O]ne is to weave the values of the traditional hearsay rule into a cohesive pattern, in lieu of a crazy quilt, and the other is to reverse the unhappy process . . . by which justifications are transformed into requirements, resulting in more and more and smaller and smaller pigeonholes into which things must be fitted. Accordingly Rule 8-03 and 8-04 set forth in broad outline two large categories of hearsay exceptions . . . .

Edward W. Cleary, *The Plan for Adoption of Rules of Evidence for United States District Courts*, 25 REC. ASS’N B. CITY N.Y. 142, 150 (1970).

158. Memorandum No. 19, *supra* note 107, at 24.

159. *Id.*

approach, change the illustrations to categorical hearsay exceptions, and then add a separate residual exception to provide for future growth.<sup>160</sup>

In the 1971 Revised Draft, the Reporter yielded to the criticism and retreated to the current system of categorical exceptions. He revised the Introductory Note: *The Hearsay Problem* for the third draft, so that the rules were no longer "rationalizing" the hearsay exceptions (as stated in the first draft of the Introductory Note) but instead used the approach "of the common law, i.[.]e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay."<sup>161</sup> The exceptions were then "collected under two rules."<sup>162</sup> The Third Draft thus transformed Rules 8-03(a) and 8-04(a) from broadly-phrased general exceptions into largely ceremonial headings in which the traditional hearsay exceptions were "collected."

As we have seen, the Reporter thought that admissions and prior statements were a "bad fit" that would undermine the rationality and distort the interpretation of the hearsay exceptions. There are two minor problems with this view. First, like Wigmore, he achieved some semblance of rationality for the hearsay exceptions by using Wigmore's technique of not considering some types of evidence as hearsay exceptions. Second, the importance of the Reporter's concern was undermined when he replaced the general exceptions with the categorical exceptions in the third draft, as he recognized in his May 20, 1970 memorandum.<sup>163</sup> But the fundamental problem with the Reporter's "bad fit" concern is that it addresses only the negative decision to exclude admissions and prior statements from those categories of hearsay exceptions and is simply non-responsive to the important question of how they should be classified. It does not

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160. REPORT OF AMERICAN COLLEGE OF TRIAL LAWYERS: Committee to Study the Proposed Rules of Evidence for United States District Courts and Magistrates (Feb. 1970), *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988 CIS, No. EV-305 (Cong. Info. Serv.).

161. FED. R. EVID. 801 advisory committee's note (Introductory Note: *The Hearsay Problem*); see also *Revised Draft of the Proposed Rules of Evidence*, 51 F.R.D. 315, 411 (1971).

162. *Id.*

163. There are two supplemental points about the rationalizing goal after the third draft. First, one might argue that that it is still necessary to avoid treating admissions and prior statements as exceptions, to prevent them from distorting the residual exceptions (then 803(24) and 804(b)(5), now Rule 807), in the manner discussed with the "bad fit" *supra*. To the extent that there is a distortion problem, it can be addressed and eliminated in the language of the residual exception more effectively than by creating a "not hearsay" category. Second, the validity, if any, of the rationalizing/ anti-distortion goal has been somewhat undermined by the promulgation of the Rule 804(b)(6), a hearsay exception that has no claim to reliability and therefore could, if the Reporter's fears are correct, distort the interpretation of the residual exception. FED. R. EVID. 804(b).

affirmatively justify the decision to classify them as “not hearsay.”

## 2. Scholarly Assessment

The Reporter’s treatment of the extensive scholarship on admissions was incomplete, inaccurate, and misleading. Because the Reporter’s inaccuracies and misrepresentations were so striking, I discuss his treatment of admissions at considerable length and then follow with a much briefer review of prior statements.

The Reporter began his discussion of admissions by observing that “[t]he authorities have differed in some measure” in their views on admissions and then noting that Wigmore changed his position based on the influence of Morgan’s writing.<sup>164</sup> However, he never clearly explained either Wigmore’s original or Morgan’s contrary position. After noting that Wigmore placed the admissibility of admissions on two grounds (inconsistency and self-contradiction of a witness, and the incongruity of a party objecting to the lack of opportunity to cross-examine himself), the Reporter stated that “[Wigmore] concluded that admissions were not hearsay.”<sup>165</sup>

His claim that Wigmore “concluded that admissions were not hearsay” was an oversimplification that obscured three important points in thinking about the appropriate classification. First, when admissions are offered for self-contradiction, they are not offered for their truth and thus are not hearsay under the traditional definition (Wigmore called this use “hearsay rule inapplicable”). Wigmore held this position in the first edition of the Treatise but modified it in the second and third editions. Second, Wigmore treated admissions used as substantive evidence as “hearsay rule satisfied,” a category that also included former testimony and depositions. Thus, using Wigmore as authority for classifying admissions as non hearsay would also suggest using him as authority for similarly classifying former testimony (or explaining the reasons for not doing so). Finally, Wigmore never used the term “not hearsay” in this manner. For Wigmore, admissions offered as substantive evidence were hearsay, but the hearsay exclusionary rule did not apply because its purpose had been satisfied.

The Reporter was even more misleading when he discussed the views of two other scholars, Professor John Strahorn and Dean Charles McCormick. The Reporter praised one of Strahorn’s articles as “perhaps the most searching examination yet made of the hearsay rule.”<sup>166</sup> Like

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164. Memorandum No. 19, *supra* note 107, at 87.

165. *Id.*

166. *Id.* at 89; *See generally* John S. Strahorn, *A Reconsideration of the Hearsay Rule and*

Wigmore, Strahorn was a relentless classifier. Modifying Wigmore's terminology, he placed all out-of-court statements into three categories: (1) the hearsay rule inapplicable (for evidence that was not offered to prove its truth and thus was not hearsay under the traditional view); (2) the hearsay rule partially satisfied (for former testimony and past recollection recorded); and (3) the "genuine hearsay exceptions."<sup>167</sup> Strahorn placed admissions in the hearsay rule inapplicable category.

For Strahorn, admissions did not qualify as a "genuine hearsay exception" or fit into his "hearsay rule partially satisfied" category. After looking at the special circumstances under which admissions are received into evidence (including the lack of personal knowledge or competence requirements and the allowance of opinions),<sup>168</sup> he concluded that admissions have "nothing in common with the genuine hearsay exceptions and totally lack[] the identifying features found in all of them."<sup>169</sup> They also did not fit his "hearsay rule partially satisfied" category, which was for out-of-court statements that met most, but not all, of what he called the "conditioning device[s]" that assured the trustworthiness of the testimony.<sup>170</sup> That category contained only two types of statements: former testimony (where only demeanor is missing) and past recollection recorded (where the "conditioning devices" are applied to the witness in the courtroom and not at the time of the making of the statement).<sup>171</sup> Admissions did not fit this category because "the concept of the party's 'cross-examining' himself, or applying the conditioning devices to himself, seems an awkward one."<sup>172</sup> At this point, Strahorn considered either adding a fourth category for admissions, "hearsay rule waived," or making admissions a second sub-category of the hearsay rule inapplicable category, but decided that "to have to fall back on waiver or estoppel is very weak analysis."<sup>173</sup>

Strahorn concluded that admissions fit into the hearsay rule

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*Admissions* (pts. 1 & 2) 85 U. PA. L. REV. 484, 564 (1937). In the Advisory Committee note to Rule 801(d), the Reporter used the Strahorn article as his first citation.

167. John S. Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 487 (1937).

168. Park, *supra* note 13, at 509.

169. Strahorn, *supra* note 57, at 575.

170. *Id.* at 484. In addition to oath, presence in the courtroom and cross-examination, these "conditioning devices" also include sequestration, discovery and publicity. *Id.* Surprisingly, despite the author's knowledge of Wigmore's views and the similarity between his "hearsay rule partially satisfied" and Wigmore's "hearsay rule satisfied" category, Strahorn does not cite Wigmore in his discussion of this category.

171. *Id.* at 494, 496.

172. *Id.* at 577.

173. *Id.* at 577-578.

inapplicable category because, in his view, admissions were “. . . offered not to prove the truth of their content, but for some other relevant purpose . . . .”<sup>174</sup> He made a distinction between statements used as conduct (where the hearsay rule was inapplicable) and statements used as narration (where the hearsay rule applies). With admissions, he believed that the statements themselves were relevant conduct, regardless of their truth or falsity. As Strahorn put it:

The fact of the utterance by the party and his opponent’s desire to use it throw some light on the separate and non-contemporaneous conduct of the party-speaker, viz., his conduct of the affair on which the instant case hinges. The justification for using admissions, as for circumstantial utterances generally, is the relation between the utterance and the other relevant conduct of the speaker.<sup>175</sup>

Strahorn then tied this approach to the view Wigmore expressed in his first edition and to the analogy to prior inconsistent statements:<sup>176</sup> “Just as a prior inconsistent statement of a witness is admissible [for impeachment] without reference to whether it is the present or the previous statement which is false, so it is that the admissions comes in equally soon whether it, standing alone, be true or false.”<sup>177</sup> In such a case, “there is no concern for their trustworthiness,”<sup>178</sup> therefore, the hearsay rule is inapplicable. Though never using the term not hearsay to describe admissions, Strahorn placed them in his “hearsay rule inapplicable” category because he believed that they were not hearsay in the traditional sense of that term.

Dean Charles McCormick was an evidence luminary of the rank of Wigmore and Morgan.<sup>179</sup> He was one of the main drafters of the Uniform Rules of Evidence, and his 1954 Handbook on Evidence was the first major Evidence treatise since the publication of Wigmore’s third edition in

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174. *Id.* at 488

175. Strahorn, *supra* note 158, at 572-73.

176. Strahorn described Wigmore’s position as a “modified” one, but this characterization seems inaccurate. Strahorn emphasized only the inconsistency/self-contradiction strand of Wigmore’s writing on prior statements and quoted from the 1935 edition of his Code of Evidence and his Student Textbook on Evidence (1935). *Id.* at 572, n.49. But the 1940 edition of the Wigmore treatise repeats the language of the 1923 treatise, thus strongly suggesting that Wigmore did not “modify” but rather retained his dualistic view of admissions.

177. *Id.* at 573.

178. *Id.*

179. When Wigmore was forced to retire in 1934, he recruited McCormick, then Dean at the North Carolina, to teach evidence at Northwestern, where he stayed until he returned to the University of Texas Law School as dean in 1940. Roy R. Ray, *McCormick’s Contributions to the Law of Evidence*, 40 TEX. L. REV. 185, 187 (1961).

1940.<sup>180</sup> In his handbook, McCormick summarized the views of different scholars on the classification of admissions. He identified Wigmore's initial ("hearsay rule inapplicable) and revised ("hearsay rule satisfied") positions, as well as Morgan's (hearsay exception) and Strahorn's (hearsay rule inapplicable) views.<sup>181</sup> He also divided admissions into two different types, recognizing both "express admissions" (by which he meant a party's oral or written statements) and admissions by conduct (the acts of a party such as fleeing the scene of a crime or refusing to call a witness or produce evidence.)<sup>182</sup>

After concluding his presentation of the different positions of the writers, McCormick wrote "The present writer finds Morgan's classification of admissions as an exception to the hearsay rule, and his explanation therefor, most convincing as to express admissions and Strahorn's theory of admissions as circumstantial evidence most satisfactory as to admissions by conduct."<sup>183</sup>

McCormick thus agreed with Morgan that oral and written admissions should be treated as hearsay and classified as a hearsay exception. For admissions by conduct, he agreed with Strahorn (and the Uniform Rules and both the proposed and enacted Rule 801(a)) that such "non-assertive conduct" should be excluded from the definition of statement and thus not

180. Charles T. McCormick, *McCormick's Handbook of the Law of Evidence* (1954)[hereinafter, McCormick, HANDBOOK]. McCormick died in 1963, shortly before the beginning of the drafting of the Federal Rules.

181. I have one quibble with McCormick's summary. After describing Strahorn's views, he stated that "the affinity between this [Strahorn's] view and Wigmore's is apparent." Memorandum No. 19, *supra* note 107, at 89 (citing MCCORMICK, *supra* note 180, at 503). This statement obscured the important fact that, in Strahorn's view, admissions are not hearsay because they are not offered to prove the truth of the matter asserted, whereas in later Wigmore's view, admissions were considered for their truth but were excluded from the hearsay rule because the concern about cross-examination has been satisfied (causing him to place them in his "hearsay rule satisfied" category).

182. *See id.* at 525-547. Wigmore had originally made this distinction, using the terms "express" and "implied" admissions.

183. *Id.* at 503. Interestingly, when Professor (former Reporter) Cleary became editor of the hornbook for the second edition in 1972, he deleted this concluding paragraph. Instead, he inserted a new paragraph, which stated:

On balance, the most satisfactory justification of the admissibility of admissions is that they are the product of the adversary system, sharing, though on a lower and non-conclusive level, the characteristics of admissions in pleadings or stipulations. This view has the added advantage of avoiding the need to find with respect to admissions the circumstantial guarantees of trustworthiness which traditionally characterize hearsay exceptions; admissions are simply classed as non-hearsay.

MCCORMICK'S HANDBOOK, *supra* note 180, at 629. Professor Cleary then continued: "Nevertheless, the usual practice is to regard admissions as an exception to the hearsay rule, and as a matter of convenience the discussion of them is located at this point in this textbook." *Id.*

be regarded as hearsay.<sup>184</sup>

In Memorandum No. 19, the Reporter inaccurately implied that McCormick might support his proposed treatment of admissions. Concluding his discussion of Wigmore, Morgan, Strahorn, and McCormick, the Reporter stated: “McCormick took a position straddling Morgan and Strahorn.”<sup>185</sup> This statement was literally true but terribly misleading. On the critical issue of how to classify the most common type of admissions—verbal or “express admissions”—McCormick came down squarely on the side of treating admissions as hearsay and then as a hearsay exception. Far from a straddle, it was a clear vote for classifying admissions as a hearsay exception, not as not hearsay.

In addition to the Reporter’s misleading discussion of the authorities, he also failed to mention or discuss the Model Code, the Uniform Rules, or the California Code, each of which, as we have seen, treated admissions as hearsay with a separate exception. This omission contributed to the failure to present and evaluate other alternatives for classifying admissions.

The Reporter’s discussion of the classification issues for prior statements was better than for admissions, but was still incomplete and flawed. It was incomplete because it did not mention McCormick’s famous article, at the end of which he drafted a model statute that treated prior statements as a hearsay exception.<sup>186</sup> Then, while his observation about prior statements—that the “conditions for giving testimony are satisfied”—as correct, his next statement that “logic dictates a classification as non-hearsay”<sup>187</sup> does not necessarily follow. The classification should be determined by practical reason and experience, not by “logic” (by which he presumably meant deductive, syllogistic reasoning). Practical reason and experience, not logic, establish the definitions and categories for evidence law (indeed, as we have known at least since Holmes,<sup>188</sup> for all law). “Logic” then operates somewhat mechanistically to place the objects (in our case, the out-of-court statements offered for their truth) into the correct categories.

Our current definition of hearsay as an out-of-court statement offered for its truth is the product of practical reason and experience. In light of this definition, it logically follows that a prior out-of-court statement offered for its truth is hearsay. If we had a different hearsay definition—

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184. *Id.*

185. Memorandum No.19, *supra* note 107, at 89.

186. McCormick, *supra* note 19.

187. Memorandum No. 19, *supra* note 107, at 70.

188. “The life of the law has not been logic; it has been experience.” Oliver Wendall Holmes, Jr., *The Common Law* 1 (1881).

say, "Hearsay is a statement by a person who is not a witness in the current trial"—then we would logically have a different result, and prior statements of witnesses would "logically" not be hearsay.<sup>189</sup>

Given the fact that prior statements of witnesses are hearsay under the current definition, two subsequent policy questions arise: (1) the whether question—whether, even though hearsay, prior statements should be admitted as substantive evidence—and (2) the how question: if so, should this be accomplished by creating a hearsay exception or by creating, either implicitly or explicitly, a new classification of "not hearsay." The answers to these questions should be and are based on practical reason and experience. As the Reporter himself recognized, when discussing which prior statements to include and exclude from Rule 801(d), "[t]he judgment is one more of experience than logic."<sup>190</sup>

#### IV. RULE 801(d) IN PRACTICE

Rule 801(d), while poorly written, has not caused significant problems for lawyers and judges, because they have largely ignored the "not hearsay" terminology and instead have used other, more useful and descriptive words. This adaptive practice has been true in the courtroom and in most reported cases, treatises and law school casebooks.

The Supreme Court has decided four cases involving Rule 801(d). In those cases, the Court has used the terms "exemption,"<sup>191</sup> "exception,"<sup>192</sup>

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189. Of course this alternative definition is not and never has been the legal definition of hearsay. The fact that the declarant is a witness goes to concerns about cross-examination, oath, and demeanor that are policy issues that underlie the hearsay definition, but have not been made a part of that definition.

190. FED. R. EVID. 801(d) advisory committee's note. The Reporter wrote this in explaining whether he should follow the Model Code and Uniform Rules and allow all prior statements to be admitted as substantive evidence, or follow California and exclude some. It of course echoes Holmes' famous statement quoted *supra* note 188.

The Reporter also relied on practical reason in deciding how to classify depositions and former testimony, both of which Wigmore had placed it in his "hearsay rule satisfied" category. Drawing on (although not citing) McCormick, the Reporter wrote, "It is believed that the thinking of the profession generally does not put depositions in the category of hearsay . . . [o]n the other hand, a lawyer seeking to explore the admissibility of former testimony . . . would probably turn to hearsay as the appropriate classification." Memorandum No. 19, *supra*. note 107, at 84; See McCormick, HANDBOOK, *supra* note 180, at 480 ("it follows the usage most familiar to the profession . . .") Using "the thinking of the profession" as a criteria is an excellent example of practical reason in this context.

191. *United States v. Inadi*, 475 U.S. 387 (1986). While the opinion uses the term "exemption" in several places, it states it most clearly in footnote 12: "Federal Rule of Evidence 801 characterizes out-of-court statements by co-conspirators as exemptions from, rather than exceptions to, the hearsay rule. Whether such statements are termed exemptions or exceptions, the same Confrontation Clause principles apply." *Id.* at 398 n.12.

192. *Bourjaily v. United States*, 483 U.S. 171 (1987). The Court uses the phrase "co-

and “exclusion”<sup>193</sup> more frequently than “not hearsay.” The proposed Advisory Committee Note for the stylistic revisions to the current Federal Rules refers to the “hearsay exclusion” in Rule 801(d).<sup>194</sup> Lower court cases regularly used similar terminology.<sup>195</sup>

Most treatises are similarly eclectic and relaxed with their terminology. Professors Saltzburg, Martin, and Capra tell us that: “The Federal Rule provides for exemptions rather than exceptions” and that the fact “that the Federal Rules choose the redefinition approach, rather than the approach of creating exceptions, is of no great moment.”<sup>196</sup> Law school casebooks provide similar treatment.<sup>197</sup> The reason for this relaxed eclecticism is simple; “There is no practical difference between an exception to the hearsay rule and an exemption from that rule. If a statement fits either an exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other rule (e.g. Rule 403).”<sup>198</sup>

Thirty-five years of experience have shown that Rule 801(d) can work without creating a crisis or even serious problems. This does not mean,

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conspirator exception” and “exception” four times in the opinion. Justice Blackmun’s dissent uses the phrase “co-conspirator exemption” ten times.

193. United States v. Owens, 484 U.S. 554 (1988).

194. Memorandum from Advisory Comm. On Evidence Rules to the Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure (May 10, 2010) (*available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2010.pdf>).

195. See, e.g., United States v. Brockenborough, 575 F.3d 726, 733 (D.C. Cir. 2009); United States v. DiSantis, 565 F.3d 354, 360 (7th Cir. 2009) (for “exemption”); United States v. Holden, 557 F.3d 698, 706 (6th Cir. 2009); Bennett v. Saint-Gobain Corp., 507 F.3d 23, 28 (1st Cir. 2007) (for “exclusion”); United States v. Ayala, 601 F.3d 256, 268-69 (4th Cir. 2010); United States v. Mitchell, 596 F.3d 18, 22-23 (1st Cir. 2010) (for “exception”).

196. 4 SALTZBURG ET AL., *supra* note 6, at 801-41. A recent hornbook says: “Most courts and commentators refer to these two classes of evidence . . . as hearsay *exemptions* or *exclusions*. In this text, we will denote these special classes with the term ‘exemptions’ or, occasionally, with the phrases ‘statutory nonhearsay’ or ‘definitional nonhearsay’” Lilly, Et Al, *supra* note 2, at 160-61. Professor Michael Graham uses the term “exemption” and writes that “[u]se of the term ‘exemption’ to apply to prior statements . . . as well as admissions . . . helps to relieve the confusion.” 30B MICHAEL GRAHAM, FEDERAL PRACTICE AND PROCEDURE: 28, n.19 (Interim ed. 2006). Professors Mueller and Kirkpatrick note that “Rule 801(d)(2)(A) creates what amounts to an exception for personal or individual statements made by a party and offered against him” and that “it is more convenient to refer to admissions doctrine as a hearsay exception.” MUELLER & KIRKPATRICK, *supra* note 3, at 360-61.

197. See, e.g., RONALD J. ALLEN ET AL., EVIDENCE: TEXT, CASES AND PROBLEMS 452 (4th ed. 2006) (stating that there are eight exemptions and twenty-nine exceptions and that “there is no difference”); RICHARD O. LEMPERT ET AL. A MODERN APPROACH TO EVIDENCE 534 (4th ed. 2000) (treats them as exceptions); DENNIS D. PRATER ET AL., EVIDENCE: THE OBJECTION METHOD 591 (3rd. 2007) (uses exemption and exclusion interchangeably); PAUL F. ROTHSTEIN, ET AL., EVIDENCE: CASES, MATERIALS, AND PROBLEMS (3rd ed. 2006) (treats them as exemptions); GEORGE FISHER, EVIDENCE 392-93 (2d ed. 2002) (treats them as exceptions).

198. 4 SALTZBURG ET AL., *supra* note 6, at 801-27.

however, that it is the best rule or that its confusing “not hearsay” terminology is the best terminology. Some states have recognized the shortcomings of Rule 801(d) and have adopted innovative alternative approaches. I look at those approaches in the following section, before concluding in Section VI with an evaluation of several different approaches and the prospects for amending the rule.

#### V. RULE 801(d) AND THE “NOT HEARSAY” CLASSIFICATION IN THE STATES

Early on, even before the final enactment of the Federal Rules, states began to adopt some version of the Federal Rules as their state evidence code. Acting first, Nevada adopted the Preliminary Draft in 1971.<sup>199</sup> New Mexico and Wisconsin modeled their new rules on the proposed rules promulgated by the Supreme Court in 1972.<sup>200</sup> Several other states jumped on the bandwagon soon after Congress enacted the federal statute, as did the National Conference of Commissioners on Uniform State Laws (NCCUSL), which stated, when it discarded the 1954 Uniform Rules in 1974 and adopted the federal rules as the new Uniform Rules: “We believe uniformity in the Law of Evidence is desirable. To conform state and federal practice is to require a lawyer to learn one set of rules instead of two. The lawyer will better serve the public in whichever of these forums he may be litigating.”<sup>201</sup> The state adoptions continued apace and as of August 2010, forty-four states have adopted some version of the Federal Rules.<sup>202</sup>

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199. Nev. Rev. Stat. Ann. § 51.035 (West 2006).

200. New Mexico amended its rules in 1976 to conform to the rules that Congress enacted. See N.M. STAT. ANN. § 11-801 (2003); WIS. STAT. ANN. § 908.01 (West 2009).

201. National Conference of Commissioners on Uniform State Laws, *Prefatory Note to UNIFORM RULES OF EVIDENCE* 915 (1974). The 1974 Uniform Rules did not include Rule 801(d)(1)(C) (prior statements of identification), because it was adopted before Congress reinstated that provision.

202. The states are Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Kentucky, Illinois, Iowa, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, North Carolina, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. The citations are available at BARBARA E. BERGMAN & NANCY HOLLAND, 6 WHARTON’S CRIMINAL EVIDENCE §66, 283-72 (15th ed. 1998) (2009-2010 supp.). Illinois adopted its rules on September 27, 2010, effective January 1, 2011. Christopher Bonjean, *Supreme Court Approves Illinois Rules of Evidence* (Sept. 27, 2010), available at <http://www.illinoislawyernow.com/2010/09/27/supreme-court-approves-illinois-rules-of-evidence/> (last visited May 5, 2011). I included both Connecticut and Massachusetts as adopting jurisdictions, although each state was clear that it was adopting only the general organization and numbering system of the federal rules and was simply restating its existing evidence rules in the federal format. For Connecticut, see CONN. EVID. CODE § 1.2 (2009) (one of “[t]he purposes of the

Especially in light of the experience with the Model Code and the Uniform Rules, this record of state adoptions is a remarkable achievement.

While uniformity has been the primary goal of the state adoptions, no jurisdiction adopted the federal rules *verbatim*, and most have modified them in two or more ways.<sup>203</sup> When making these modifications, states have decided that the advantages of a customized state rule in expressing or protecting an important state interest outweighed the disadvantages of non-uniform language. In such instances, the “quality” of a particular provision matters more than uniformity.<sup>204</sup> As a result, states have added considerable variety into the putatively uniform rules.

The non-adoption of Rule 801(d) has been part of that variety. Nine of the adopting states have rejected Rule 801(d) either in whole or in part and have instead classified admissions or prior statements, or both, as hearsay exceptions.<sup>205</sup> Adopting the federal rules in 1979, Florida rejected Rule 801(d) and instead classified admissions as a Rule 803 exception and placed prior statements as an exclusion in the definition section—as was done in the first two drafts of the federal rules.<sup>206</sup> When North Carolina adopted the

[c]ode [is] to adopt Connecticut case law regarding rules of evidence as rules of court . . . ” in a “readily accessible body of rules to which the legal profession conveniently may refer” and not to adopt “the Federal Rules of Evidence or cases interpreting those rules.” CONN. EVID. CODE 1-2(a) cmt. In a 2008 case, the Connecticut Supreme Court held that the evidence rules in the Code of Evidence were binding on the Superior Court judges but that the appellate courts “retain the authority to develop and *change* the rules of evidence through case-by-case common-law adjudication.” *State v. DeJesus*, 953 A.2d 45, 90-91 (Conn. 2008), *aff’d*, 288 Conn. 418 (Conn. 2008). For Massachusetts, see SUPREME JUDICIAL COURT ADVISORY COMMITTEE ON MASSACHUSETTS EVIDENCE LAW *Introduction*, MASSACHUSETTS GUIDE TO EVIDENCE (2010) (These are “not rules, but rather . . . a guide to evidence based on the law as it exists today . . . . Ultimately, the law of evidence in Massachusetts is what is contained in the authoritative decisions of the Supreme Judicial Court and of the Appeals Court, and the statutes duly enacted by the Legislature.”).

203. See L. Kinvin Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315 (1985); Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 310 (1990).

204. See, e.g., Neil P. Cohen, *A Meta-Analysis of the Tennessee Rules of Evidence*, 57 TENN. L. REV. 30, 30 (1989) (“The many areas where the Tennessee rules improve on federal language and content are also impressive. The Commission resisted the temptation to adopt the Federal Rules of Evidence in toto. Rather, the Commission did a careful analysis of each rule and made some courageous changes in the federal approach.”).

205. In alphabetical order, the nine states that adopted the federal rules but have not followed Rule 801(d) are: Connecticut; CONN. EVID. CODE § 8.5(1) (2009), Florida; FLA. STAT. ANN. § 90.803(18) (West 2009), Hawaii; HAW. REV. STAT. § 626-1 (1988), Kentucky; 2009 KY. REV. STAT. Adv. Legis. Serv. 77 (LexisNexis), Maryland; MD. ANN. CODE art. 5, § 802.1 (2006); New Jersey; N.J. R. EVID. § 803 (2005), North Carolina; N.C. GEN. STAT. § 8C-1 (2009), Pennsylvania; PA.R.E. 803 (1998), and Tennessee; TENN. CODE ANN. § 803 (2007).

206. Florida also created three different exceptions for former testimony: one for former testimony in a prior civil trial with the same parties and issues, FLA. STAT. ANN. § 90.803(22) (West 2009), and one for former testimony in civil trials and one for former testimony in criminal

federal rules in 1984, it treated admissions as a hearsay exception but did not permit any substantive use of any prior statements.<sup>207</sup> Tennessee treated admissions as a hearsay exception and also created an exception for statements of prior identification and, in accordance with its case law, not for prior inconsistent or consistent statements.<sup>208</sup> Kentucky classified both admissions and prior statements as hearsay exceptions,<sup>209</sup> as did New Jersey, which had adopted the Uniform Rules in 1967 and then, in 1993, amended its rules to conform to the numbering system of the Federal Rules of Evidence.<sup>210</sup>

Four jurisdictions in particular—Hawaii, Maryland, Pennsylvania, and Connecticut—have developed innovative approaches to the classification of admissions and prior statements, with Hawaii leading the way. Guided by the Reporter for the Hawaii Rules of Evidence, Professor Addison Bowman decided to maintain the common law approach of treating admissions and prior statements as hearsay exceptions and then to create separate declarant-based exceptions to highlight their distinctiveness for Hawaii's rules. It created a new category, Rule 803(a), exclusively for admissions and then placed all the "Rule 803" exceptions as sub-sections in a new Rule 803(b) category.<sup>211</sup> It also created a new Rule 802.1 for statements by a witness and, following the California Evidence Code, included the exception for past-recorded recollections in the new category.<sup>212</sup> The Hawaii model is one variation of what I call the "four categories" approach, with categories based on whether the declarant is a witness, a party-opponent, unavailable, or where their availability is immaterial.

In 1986, Maryland followed the Hawaii model, using identical language.<sup>212</sup> Pennsylvania (in 1992)<sup>213</sup> and Connecticut (in 1999)<sup>214</sup> each

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trials. FLA. STAT. ANN. § 90.804(2)(a) (West 2009) is an exception inspired by Wigmore's "hearsay rule satisfied" treatment of former testimony.

207. N.C. GEN. STAT. § 801 (West 2009).

208. TENN. CODE ANN. § 803-1-1 (2007); *See also* Cohen, *supra* note 204.

209. KY. REV. STAT. ANN. 77 (LexisNexis 2009).

210. *See* N.J. R. EVID. (1967) and N.J. R. EVID. 803 (1993).

211. HAW. REV. STAT. § 626-1.803(a) (2007); In addition to the admissions categories of the federal rules, the Hawaii rule also includes several sub-categories drawn from the California Evidence Code. 212 HAW. REV. STAT. § 626-1.802.1 (2007).

212. MD. R. EVID. Rule 5-802.1, 5-803. Justice Chasanow supported the state adoption of the rules but, in a separate opinion, objected to the fact that Maryland modified "over 80% of the Federal Rules" in its adoption." Order Adopting New Title 5, Rules of Evidence, 333 Md. XXXV, XXXIX (1993) (Chasanow, J. dissenting). Interestingly, he specifically objected to Rule 803(a): "In an unnecessary attempt to imply that Wigmore, the other evidence scholars, and the Federal Rules of Evidence were in error when they classified admissions as non-hearsay, the Rules Committee . . . classified them as hearsay, but an exception to the hearsay rule. This change, like so many others, is unnecessary and a potential source of confusion and

created a new category for prior statements, but treated admissions as a general hearsay exception where the availability of the declarant was immaterial.<sup>215</sup>

There were six states that, as of October, 2010, had not adopted the Federal Rules of Evidence, and all six treat admissions and prior statements as hearsay exceptions. Two of them already had their own state evidence codes prior to the enactment of the federal rules and retained those codes: California, with the California Evidence Code, and Kansas, as the first adopter of the original Uniform Rules. The four remaining non-adopting states—Georgia, Missouri, New York, and Virginia—have no overall evidence codes and instead rely for their evidence law on a mix of case law, statutes, and court rules.<sup>216</sup> Each jurisdiction follows the traditional common law approach of classifying admissions and prior statements as hearsay exceptions.<sup>217</sup>

My final comment on state practices concerns the reasons given—or, more often, not given—for adopting or not adopting Rule 801(d). In only one of the thirty-four jurisdictions that adopted Rule 801(d), Texas, is there any record of reasons for selecting Rule 801(d).<sup>218</sup> One might expect for at

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misinterpretation.” *Id.* at XLIV-XLV. He also objected to the changes in prior statements. *Id.*

213. PA. R. EVID. 803.

214. CONN. GEN. STAT. § 8-3 (2000).

215. Connecticut’s category for witnesses is called “Declarant Must Be Available” CONN. EVID. CODE §805 (2000); Pennsylvania’s is “Testimony of Declarant Necessary” PA.R.E. 803.1 (1998). Pennsylvania (but not Connecticut) included Past Recollection Recorded in the “declarant is a witness” category. *Id.*

216. Georgia has an evidence code—the Code of 1863. However, because of the age of the code, Georgia’s evidence law today is the old code, newer statutes and common law. PAUL S. MILICH, THE PROPOSED NEW GEORGIA RULES OF EVIDENCE: A BRIEF OVERVIEW (2010), available at [http://www.gabar.org/public/pdf/news/proposed\\_new\\_evidence\\_rules\\_milich.pdf](http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules_milich.pdf). The proposed new rules treat admissions as a hearsay exception but prior statements as not hearsay. GA. R. EVID. 801(d)(1), (2) (proposed June 6, 2005), available at [http://www.gabar.org/public/pdf/news/proposed\\_new\\_evidence\\_rules.pdf](http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules.pdf).

217. *Lumpkin v. Deventer N.Am., Inc.*, 672 S.E.2d 405, 409 (Ga. Ct. App. 2008) (admission by agent is admissible under exception to rule against hearsay); *but see Carroll v. State*, 408 S.E.2d 412 (1991) (prior statements are not hearsay because “concerns of the rule against hearsay are satisfied when the witness . . . is present at trial, under oath, and subject to cross-examination.”); *Gamble v. Browning*, 277 S.W.3d 723, 729 (Mo. Ct. App. 2008) (Excerpt of videotape in which defendant admitted to setting up plaintiff in a burglary was an admission by a party opponent and, thus, was admissible as an exception to the hearsay rule in a malicious prosecution action.); *Albert v. Denise*, 181 A.D.2d 732, 732 (N.Y. App. Div. 1992) (Statement that mother had used cocaine in his presence and had attempted to have him take cocaine was admissible under hearsay exception for prior statements); *Parker v. Commonwealth*, 587 S.E. 2d 749, 751-52 (Va. Ct. App. 2003) (prior statements admissible as an exception to the hearsay rule).

218. The Texas *Commentary*, written by Professor Olin Guy Wellborn as Reporter, gave a short statement of reasons: “Even though these statements inform would fit the hearsay definition, they are not excluded as hearsay because they do not invoke all the policies behind the hearsay

least one jurisdiction to discuss the possible problems of adding a new, contradictory meaning for the not hearsay term; however, there have been none.<sup>219</sup> The *imprimatur* of the federal rules and the desire for uniformity have been sufficient in themselves.

Two of the nine states that rejected Rule 801(d) did give reasons for their action—terse and conclusive, but reasons nonetheless. The Pennsylvania Advisory Committee Notes stated:

The Pennsylvania rules, like the common law, call an admission by a party-opponent an exception to the hearsay rule. The Pennsylvania rules, therefore, place admissions by a party opponent in Pa.R.E. 803 with other exceptions to the hearsay rule in which the availability of the declarant is immaterial. The difference between the federal and Pennsylvania formulations is organizational. It has no substantive effect.<sup>220</sup>

And “Subsection (a) is similar to F.R.E. 801(d)(1)(A), except that the Pennsylvania rule classifies those kinds of inconsistent statements that are described therein as exceptions to the hearsay rule, not exceptions to the definition of hearsay.”<sup>221</sup>

The Hawaii comments said that admissions were treated “as exceptions to the hearsay rule rather than as non-hearsay.”<sup>222</sup> The comments also pointed out that admissions were placed in Rule 803, where the availability of the declarant was immaterial and then in a separate exception, (a), with the other Rule 803 exceptions placed in a sub-section (b), because “[t]he rationales for paragraphs (a) and (b) of this rule differ markedly . . . .”<sup>223</sup>

For prior statements, placed in a new Rule 802.1, the comment noted

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rule.” Olin Guy Welborn III, Article VII Hearsay: Commentary, 20 Hous. L. Rev. 477, 494 (1983). Interestingly, several states noted, in their state Advisory Committee Notes, that Rule 801(d) marked a departure from the state tradition of treating admissions (and sometimes prior statements) as hearsay exceptions. See the Advisory Committee Notes or comments to Rule 801(d) for Alabama, Mississippi, Vermont, and Ohio. Showing some ambivalence about its adoption, Alabama’s Advisory Committee says, “These statements [prior statements in Rule 801(d)(1)] . . . are declared *arbitrarily* not to be hearsay.” AL. R. EVID. 803 advisory committee’s note (emphasis supplied).

219. One might have especially expected some commentary from Utah, which adopted the original Uniform Rules in 1971 and then switched to the federal rules in 1983. Ronald N. Boyce & Edward L. Kimball, *Utah Rules of Evidence 1983—Part III*, 1995 UTAH L. REV. 717, 718 (1995).

220. PA. R. EVID. 803 advisory committee’s note.

221. PA. R. EVID. 803.1 advisory committee’s note.

222. HAW. REV. STAT. § 626-1 cmt. (2010).

223. *Id.* at Rule 803(a).

that “[t]his rule [a]ffects a reorganization of certain of the hearsay provisions found in Article VIII of the federal rules. The formulation follows generally the scheme of Cal. Evid. Code in treating all appropriate prior witness statements in a single rule.”<sup>224</sup>

As has been the case from the time of the Model Code in 1942 to today, the classification of admissions and prior statements has not been the subject of expansive discourse or commentary by the codifiers.

#### VI. AN EVALUATION OF SIX ALTERNATIVES AND A SUGGESTED AMENDMENT

This section evaluates six different approaches to classifying admissions and prior statements and selects what I call the “four categories” approach as the best solution. This approach creates separate categories for hearsay exceptions, each based on the status of the hearsay declarant. There would be a category for (1) the declarant as a party—for admissions; (2) the declarant as a witness—for prior statements; (3) when the availability of the declarant is immaterial; and (4) when the declarant must be unavailable. The section also discusses the several different ways that an amending body—state or federal—might implement the preferred approach.<sup>225</sup>

Before beginning the evaluation, it is useful to remember what McCormick said about the definition of hearsay and apply it to our problem: “Too much should not be expected of a definition.”<sup>226</sup> This wisdom reminds us that it is unreasonable to expect any classification of admissions and prior statements to resolve all the theoretical and practical issues involved with these kinds of statements. If classified as “not hearsay” as in Rule 801(d), there is confusion over both the term’s meaning and the risk of inconsistent use. If classified as hearsay and an exception, there may be a reduced emphasis on the distinctiveness of admissions and prior statements, and since we are not writing on a blank slate, the costs of change after thirty-five years of usage.

On the other hand, neither should we expect too little of a

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224. *Id.* at Rule 802.1.

225. There is also a fifth category for hearsay exceptions, which is the residual exception currently represented by Rule 807. FED. R. EVID. 807. If the residual category represented by Rule 807 were included in the count, the recommendation would be for a “five categories” approach.

226. McCormick, *supra* note 180, at 459. He then went on to say that a definition “cannot furnish answers to all the complex problems of an extensive field (such as hearsay) in a sentence. The most it can accomplish is to furnish a helpful starting-point for discussion of the problems, and a memory-aid in recalling some of the solutions. But if the definition is to remain brief and understandable, it will necessarily distort some parts of the picture. Simplification is falsification.” *Id.*

classification. When used as part of a code of rules, we have every reason to demand that the classification satisfy the basic criteria of rule drafting: clarity and consistency. These are the standards of the *Guidelines for Drafting and Editing the Court Rules* and the leading works on drafting.<sup>227</sup> They are also consistent with the goals that the Reporter himself expressed at the beginning of the drafting process.<sup>228</sup> In addition to clarity and consistency, I would also add a third criterion, education: the ability of the classification to educate users as to the distinctiveness of admissions and prior statements and their differences from the out-of-court statements covered by the other hearsay exceptions.<sup>229</sup>

The six alternatives to evaluate under these criteria are:

- 1) The Federal Rule approach, with Rule 801(d) and the “not hearsay” terminology;
- 2) The First and Second Draft approach, excluding admissions and prior statements from the definition of hearsay, Rule 801(c);
- 3) The predecessor code approach, treating admissions and prior statements as one of a list of hearsay exceptions;
- 4) The “three categories” approach adopted by Connecticut and Pennsylvania;
- 5) The “four categories” approach that I recommend;<sup>230</sup> and

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227. See generally BRYAN A. GARNER, *GUIDELINES FOR DRAFTING AND EDITING THE COURT RULES* (5<sup>th</sup> ed. 2009); See also, e.g., REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* (2d ed. 1986), LAWRENCE E. FILSON AND SANDRA L. STROKOFF, *THE LEGISLATIVE DRAFTER'S DESK REFERENCE* (2d ed. 2008).

228. As noted in Section III, at the second meeting of the Advisory Committee in October, 1965, the Reporter told the members that “words should be used in their ordinary meaning whenever possible” and that he was drafting the rules “to be as usable and accessible as possible.” United States Courts, Minutes of Rules Committee Meetings, *supra* note 108, at 3.

229. These criteria for evaluating the various alternatives are different from and narrower than the goals of the initial codification effort; which also included uniformity, reform, and accessibility. The selection of one or another alternative approach to the treatment of admissions and prior statements will have no impact on reform—only a possible short-term impact on uniformity—and should help accessibility.

230. In addition to having four categories based on the status of the declarant, my preferred approach also follows the lead of California and Hawaii and includes past recollection recorded exception in the declarant-as-a-witness category (and moves it from its present placement in Rule 803(5)).

The reason for this proposed relocation is clear. A past recorded recollection *is* a prior statement of a witness. Under the terms of the exception, the declarant of the past recorded recollection must appear as a witness in court and testify as to the foundational requirements of the exception. California, Hawaii, and Maryland place past recorded recollections within the exception for prior statements. The Reporter’s reason for not placing it with the other prior statements and classifying it instead as a Rule 803 exception was weak. He did not place it with the prior statements provision because Rule 801(d)(1) “requires that declarant be ‘subject to cross-examination,’ as to which the impaired memory aspect of the exception raises doubts.” FED. R. EVID. 803(5) advisory committee’s note (interestingly, the quoted language was not in the original

6) A “four categories” approach where the categories for admissions and prior statements are labeled “exemptions” or “exclusions” rather than “exceptions.”

Rule 801(d) scores poorly on clarity and consistency. Under Rule 801(d)(1), a prior inconsistent statement is called not hearsay if offered to impeach and “not hearsay” if offered substantively. An admission is both hearsay under Rule 801(c) and “not hearsay” under Rule 801(d)(2). It is unclear and confusing to have the same term, “not hearsay,” used in an inconsistent manner.

The First and Second Draft approach has the same problem. Excluding admissions and prior statements from the hearsay definition does not make them disappear from the courtroom. Lawyers still offer the statements at trials, opponents still object, and lawyers and judges continue to need a term to describe them. If they are not hearsay, what are they? The default term for evidence that is not hearsay is “not hearsay,” which creates inconsistency with the traditional meaning of not hearsay.

The final four alternatives score much better on clarity and consistency. They follow the traditional approach, using the term “not hearsay” only to describe statements not offered for their truth and reserving the term “hearsay exception” for statements offered for their truth, that we nevertheless wish to admit into evidence. This usage is clear and consistent.

With regards to the education criterion, Rule 801(d) educates somewhat, but in an indirect and opaque manner. Rather than highlighting what admissions and prior statements are (statements by the declarant as a party and as a witness), Rule 801(d) instead asserts that they are “not hearsay,” whereas they are hearsay under the definition of Rule 801(c).<sup>231</sup> As such, it is more confusing than enlightening. Second, by combining admissions and prior statements together in one rule, Rule 801(d) misses the opportunity to educate on how these two types of statements differ from each other and to remind judges and lawyers that the reasons for granting their admissibility are very different. Prior statements are very reliable, among the best of the admissible hearsay. Admissions are, doctrinally at least, notably unreliable. Grouping them together is artificial and

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ACN but was added in the third draft). While there may have been some doubt in 1967 about whether a witness with an impaired memory was subject to cross-examination, that doubt was removed by *United States v. Owens*, 484 U.S. 554 (1988), and the clear non-compliance with the terms of Rule 803 and Rule 804 trump any possible concerns over a possible fit with Rule 801(d)(1).

231. Which is why Professors Lilly, Saltzburg, and Capra correctly called the Rule 801(d) usage an “oxymoron.” LILLY ET. AL., *supra* note 2, at 160.

misleading. It did not make sense when Wigmore did it, first as "hearsay rule inapplicable" as self-contradiction and then as "hearsay rule satisfied," and it does not make sense in Rule 801(d).

The predecessor codes missed the opportunity to educate when they placed admissions and prior statements in an undifferentiated list of hearsay exceptions. The "three categories" approach educates as to the distinctiveness of prior statements but fails to do so for admissions. Only the fifth and sixth alternatives, with the "four categories" approach, perform the educational function optimally. By putting admissions and prior statements in separate categories, the four categories approach emphasizes their difference from each other and from the other hearsay exceptions. By labeling the new categories correctly as "Declarant is a Witness" and "Declarant is a Party-Opponent," it reinforces both the reason for their distinctiveness and the rationales for their admissibility.<sup>232</sup>

The sixth and final alternative is a variation on the "four categories" approach that labels the categories for declarant as a witness and declarant as a party as exemptions or exclusions instead of exceptions. The use of such a synonym would further emphasize the educational point that admissions and prior statements are different from the other exceptions; they are so different that we even use a different noun to describe them. However, this seems like overkill. Creating separate exceptions is sufficient to make the educational point. There is no need to introduce an additional term with the same meaning, and there is a cost (yet another term of art to remember) in doing so. In this instance, simpler is better.

The basic "four categories" approach is superior in terms of clarity, consistency, and education. What might an amendment embodying this approach look like? Does an amended rule make sense at this time? This article concludes by addressing these questions.

#### A. *What might the "Four Categories" approach look like?*

There are several ways to amend the Federal Rules of Evidence to

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232. As another example of the "there is no perfect solution" maxim, a "four categories" amendment that would provide clarity, consistency, and educational value for admissions and prior statements would at the same time render certain applications of Rule 806 either redundant or puzzling. If prior statements becomes a hearsay exception, Rule 806's authorization of the impeachment of the declarant-witness will be redundant, since a witness is already impeachable *qua* witness. If admissions become a hearsay exception, Rule 806 would authorize a party-opponent to impeach his or her own statement. As Wigmore and Morgan noted long ago, this is unnecessary, since the party obviously can take the stand if he or she wishes to do so. While such authorization makes sense (as the language of Rule 806 makes clear) in the context of vicarious admissions, it does not with personal admissions.

incorporate the “four categories” approach. While those with greater familiarity with the rules drafting and amending process will surely have additional insights, I can begin the discussion by suggesting several types of amendments, three that are minimalist and two that are more thoroughgoing.<sup>233</sup>

One minimalist approach would retain the framework and specific rule language of Rule 801(d) but would change the titles of the main rule and the two sub-rules. Thus, the title of Rule 801(d) would change from “Statements Which are not Hearsay” to “Hearsay Exceptions.” The title of Rule 801(d)(1) would become “Declarant is a Witness” and Rule 801(d)(2) would become “Declarant is a Party-Opponent.” Additionally, Rule 803(5) would move and become a new Rule 801(d)(1)(4). This approach has the important advantage of being minimally disruptive to the other rules. While it continues to group admissions and prior statements together and thus loses the opportunity to educate as to their distinctiveness, it could provide a different kind of future educational benefit. It might remind readers twenty years from now—when they inquire as to why these two exceptions are placed in Rule 801(d) and grouped together—of how confusing the classification issue once was.

A second minimalist approach would follow the one used by several states. Hawaii, Maryland, and Pennsylvania created a new category for statements by witnesses and then simply shoehorned in the new category as a new sub-section of an existing category: Rule 802.1 in Hawaii and Maryland, and Rule 803.1 in Pennsylvania.<sup>234</sup> While each of these states then placed admissions into an exception within their Rule 803 category, the amenders could simply create another new sub-section for admissions, such as Rule 802.2 or 803.2. This approach is awkward and forced, and is not recommended. A third minimalist approach—and the one that I prefer—would delete Rule 801(d) and then create two new exceptions as

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233. My thinking on possible amendments has benefited greatly from correspondence with Professor Dan Capra, who has flagged a number of important issues and has made numerous helpful suggestions. Any amendment to Rule 801(d) will require other conforming amendments. Certain language of Rule 806—“a statement defined in Rule 801(d)(2)(C), (D), or (E)” —should be deleted. FED. R. EVID. 806. To the extent that the amendments would renumber Rule 803, other rules that refer to certain hearsay exceptions by number (such as Rules 901(11) and (12)), would need to be changed. It is also important to note that any renumbering will complicate future electronic searches, although some renumbering provisions will be affected more than others. Professor Capra discusses these issues in greater detail in his September 16, 2010, memorandum to the Advisory Committee. *See* Memorandum to Advisory Committee from Daniel Capra, *supra* note 14 (Sept. 16, 2010).

234. HAW. REV. STAT. § 626-1 (1980); MD. R. EVID. 5-802.1; PA. R.EVID.. 803.1.

Rules 808 and 809.<sup>235</sup> The deletion of Rule 801(d) would strengthen and clarify Rule 801 by making it a rule focused exclusively on the definition of hearsay. Creating new exceptions as Rules 808 and 809 would take advantage of the fact that the highest numbered rule in Article VIII of the Federal Rules of Evidence is currently Rule 807. The new Rule 808 would be titled "Declarant is a Witness," and would be identical to the current Rule 801(d)(1). Rule 809 would be titled "Declarant as a Party-Opponent" and would be identical to the current Rule 801(D)(2). This approach creates separate exceptions for prior statements and admissions, and does so without disrupting the numbering scheme for the other hearsay exceptions. It thus follows the approach used by the Advisory Committee in its treatment of the residual exception, with the deletion of two prior exceptions (Rules 803(24) and 804(b)(5)) and the transfer of the text into a residual exception located in a new Rule 807.<sup>236</sup> The location of the Rule 807, like that of the proposed Rules 808 and 809, has the disadvantage of not being sequential with the other hearsay exceptions (which are located in Rules 803 and 804). However, the Advisory Committee wanted a separate category for the residual exception and presumably thought that the lack of sequential ordering was less of a problem than the alternative, which would have been to place the new residual exception as Rule 805 and the renumber the current Rules 805 and 806 as Rules 806 and 807. Renumbering other rules in order to make room for a new rule is a serious disadvantage, as we will see in the discussion of the more thorough approach to amending Rule 801(d). It also "cleans up" Rule 801, leaving it as an exclusively definitional rule.

The more thoroughgoing approach would be to create the two new categories in renumbered sections of Article VIII. One version of this approach might have Rule 801(d)(1) become the new Rule 803 and Rule 801(d)(2) the new Rule 804. The hearsay exceptions would then be:

- 803 Declarant is a Witness – Prior Statements<sup>237</sup>
- 804 Declarant is a Party-Opponent – Statements of Party-Opponents<sup>238</sup>
- 805 Availability of Declarant Immaterial<sup>239</sup>

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235. Professor Capra suggested this alternative for consideration. He developed it after he submitted his September 16, 2010 memorandum, and thus it was not included in the alternatives discussed in that memorandum. *See* Capra, *supra* note 14.

236. *See* FED. R. EVID. 807 advisory committee's note.

237. This would include the language from the current Rule 801(d)(1) as well as the current Rule 803(5), which would be a new Rule 803(4).

238. This would include the language from the current Rule 801(d)(2).

## 806 Declarant Unavailable

In addition to creating separate exceptions for prior statements and admissions, this approach has the advantage of keeping the hearsay exceptions together in a sequentially numbered group. However, the extensive renumbering would require significant retraining and would also seriously complicate future electronic searches. My sense is that the costs of renumbering the rules exceed the benefits of sequential numbering.

Another version might create the new category only for declarant as a witness, and for admissions, following Hawaii and Maryland by placing it in a new Rule 803(a) category and moving the current Rule 803 exceptions to a newly-created Rule 803(b) category. This version has the advantage of emphasizing the similarity that admissions have with the other Rule 803 exceptions (the availability of the declarant is indeed immaterial), but it runs the risk of underemphasizing the differences.

*B. Amending the Federal Rules of Evidence*

Any proposed amendment (whether minimalist or thoroughgoing) must satisfy the standards governing the amendment process. The amendment of the Federal Rules of Evidence follows the same well-defined Rules Enabling Act process as the other federal court rules.<sup>240</sup> The statutory authority for the amendment process is vested with the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, commonly known as the “Standing Committee,” which has delegated the initial rule-amending authority to one of five advisory committees—in the case of evidence, the Advisory Committee on Evidence Rules.<sup>241</sup>

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239. Rule 803(5) would be deleted and its language transferred to the new Rule 803(4).

240. James C. Duff, *The Rulemaking Process: A Summary for the Bench and Bar* (October 2010), available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx>; see also 28 U.S.C. §2073(b). This process governs amendments to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, and the Federal Bankruptcy Rules, as well as the Federal Rules of Evidence. Of course, Congress can also unilaterally amend the federal rules, as it did with Rule 412 and Rules 413-415.

241. Duff, *supra* note 240. The Advisory Committee begins the amending process by studying an issue, then drafting an amendment and submitting it for public review and comment. The Advisory Committee then presents its proposed amendment to the Standing Committee, which reviews it, and if approved, presents the proposed amendment to the Judicial Conference. If approved, the Judicial Conference then transmits the proposed amendment to the Supreme Court. The Supreme Court then reviews and, if approved, promulgates the amendment by forwarding it to Congress by May 1 of any given year. The amendment takes effect on December

After being unceremoniously abolished soon after the enactment of the Federal Rules of Evidence in 1975, the Advisory Committee on Evidence Rules was reestablished in 1993.<sup>242</sup> The Advisory Committee soon thereafter announced its general philosophy for assessing proposed amendments, a conservative approach that I discuss below.<sup>243</sup> In addition to dealing with its general amendments, the Advisory Committee has also participated in the ongoing effort of the Judicial Conference to “restyle” the federal rules. This restyling project, started in the early 1990s with the Federal Rules of Appellate Procedure<sup>244</sup> and now reaching the Federal Rules of Evidence, is designed “to simplify, clarify and make more uniform all of the federal rules of practice, procedure and evidence.”<sup>245</sup> The Advisory Committee will thus entertain two types of amendments: general amendments or restyling amendments.

One might think that an amendment to Rule 801(d) would work well as a restyling amendment. The goal of the amendment is more stylistic than substantive. It seeks to change only how we describe admissions and prior statements (calling them hearsay exceptions instead of “not hearsay”), not to change the amount and type of evidence admitted or excluded. However, the Advisory Committee has established criteria for restyling amendments, and the proposed amendment to Rule 801(d) does not meet those criteria.<sup>246</sup>

Restyling amendments can affect only style, not substance, and the Advisory Committee has stated that a proposed change is substantive if:

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I of that year unless Congress takes action.

242. SUBCOMMITTEE ON LONG RANGE PLANNING, *Self-Study of Federal Judicial Rulemaking: Report to the Committee on Rules of Practice, Procedure, and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 686 (1995).

243. *Proposed Amendments to Federal Rules*, 156 F.R.D. 339, 484 (1994).

244. The Rules of Appellate Procedure were amended with an effective date of December 1, 1998. FED. R. APP. P. 1 advisory committee’s note. The Rules of Criminal Procedure were amended with an effective date of December 1, 2002. FED. R. CRIM. P. advisory committee’s note. The Rules of Civil Procedure were amended with an effective date of December 1, 2008. FED. R. CIV. P. 1 advisory committee’s note. See COMMITTEE ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF EVIDENCE 2 (2009) (released for public comment on Aug. 11, 2009).

245. See COMMITTEE ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF EVIDENCE 2 (2009) (released for public comment on Aug. 11, 2009).

246. This discussion of the restyling criteria is primarily heuristic, not for practical effect during the current restyling, which is nearly finalized. The restyling project began in 2007 Draft amendments were published for public comment in August 2009, and the Advisory Committee approved those amendments in April 2010 and sent them to the Standing Committee. Memorandum from Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules to the Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. 1-6 (May 10, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2010.pdf>.

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility; or
2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or
3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or
4. It changes what Professor Kimble has referred to as a “sacred phrase”—“phrases that have become so familiar as to be fixed in cement.”<sup>247</sup>

The proposed amendment is clearly stylistic, not substantive, on criteria one and two, because it would not change either the result or procedure on an admissibility issue. It also seems stylistic on criterion four. While the term “not hearsay” to describe the impeachment (or other not hearsay) use of an out-of-court statement is likely a sacred phrase,<sup>248</sup> Rule 801(d)’s oxymoronic use is an usurpation of that traditional phrase that should be undone, not retained.

However, because it would change the “structure of a rule and method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule,” a proposed amendment of Rule 801(d) is substantive under criterion three. The purpose—indeed the virtue—of the proposed amendment is to change, for the better, the way that courts and litigants think and talk about admissions and prior statements. Rather than having to think and talk in a convoluted way, all participants will be able to converse clearly. Evidence would be not hearsay if it is not offered for its truth; it would be hearsay but admissible under an exception if it meets the exception’s requirements, or hearsay with no exception if it does not. Evidence law would take a welcome step backwards, returning to a hearsay world with two questions (Is it hearsay? If not, is there an applicable exception?) and three categories. This change would be a simplification, a clarification, and a welcome improvement—but is regarded as a substantive change under criterion three. Thus, the amendment does not meet the restyling standards.

It is an open question whether an amendment to Rule 801(d) meets the Advisory Committee’s standards for general amendments. As noted, the Advisory Committee outlined a conservative approach to amendments in its 1994 statement:

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247. *Id.* at 3-4.

248. *Id.* at 4. The Advisory Committee determined that “truth of the matter asserted” was a sacred phrase and did not change it in the proposed restyling.

Its philosophy has been that an amendment to a Rule should not be undertaken absent a showing either that it is not working well in practice or that it embodies a policy decision believed by the Committee to be erroneous. Any amendment will create uncertainties as to interpretation and sometimes unexpected problems in practical application. The trial bar and bench are familiar with the Rules as they presently exist and extensive changes might affect trials adversely for some time to come. Finally, amendments that seek to provide guidance for every conceivable situation that may arise would entail complexities that might make the rules difficult to apply in practice.<sup>249</sup>

This has been described as an “if it ain’t broke, don’t fix it” approach to amendment,<sup>250</sup> and the Advisory Committee has clearly been cautious in applying its cost-benefit calculus to proposed amendments. As the current Reporter has written:

Amending or abrogating rules of evidence only makes sense where the benefits of an amendment clearly outweigh the costs. . . . If the courts are surviving with a rule as they appear to be, however unhappily, the benefits of a rule change are unlikely to outweigh the costs. This is not to speak of the costs of upsetting settled expectations that come with any rule change.<sup>251</sup>

An amendment to Rule 801(d) clearly fails the first two factors identified in the 1994 statement. It cannot be said that Rule 801(d) is “not working well in practice.”<sup>252</sup> Although the language of Rule 801(d) is awkward, judges and lawyers have adapted well. Further, it likely does not “embod[y]” a policy decision believed by the Committee to be erroneous.<sup>253</sup> Indeed, because the issue is classification, not admissibility, the dispute over Rule 801(d) does not involve what one typically thinks of as a policy decision.<sup>254</sup>

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249. *Proposed Amendments to Federal Rules*, 156 F.R.D. 339, 484 (1994).

250. Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?* 53 HASTINGS L.J. 817, 823 (2002).

251. Daniel J. Capra, *A Recipe for Confusion: Congress and the Federal Rules of Evidence*, 55 U. MIAMI L. REV. 691, 702 (2001).

252. See Section IV, *supra*.

253. See *Self Study of Federal Judicial Rule Making*, *supra* note 242, at 484.

254. Under the general understanding of that term, “policy decisions” involve questions of admissibility, such as the scope of the attorney-client privilege in the corporate context, the standards for determining the expertise of an expert witness, or whether to apply Rule 407 to products liability cases.

On the other hand, and counting in its favor, this amendment is unlikely to “create uncertainties as to interpretation and sometimes unexpected problems in practical application,” or to disorient the bench and bar or adversely affect future trials.<sup>255</sup> In fact, the amendment is likely to be welcomed by the bench and bar, will improve clarity and communication, and will lead to fewer uncertainties of interpretation and problems in practice. Also counting as a positive is the fact that Rule 801(d) was not included in the “list of rules that the Advisory Committee has tentatively decided not to amend . . . .”<sup>256</sup>

In its initial consideration of the issue at its October 2010 meeting, the Advisory Committee decided not to take any action. While the members “agreed in principle with [my] proposal,” they felt that the rule “was not a source of ambiguity or confusion and was being applied properly in the courts. Moreover, the members felt that the time and expense of making and incorporating a rule amendment outweighed the need for changing the rule at this time.”<sup>257</sup>

In principle, then, there is agreement that admissions and prior statements are better classified as hearsay exceptions than as “not hearsay.” In this respect, it is clear that, if the Federal Rules of Evidence were being drafted today (and especially if the drafters were using the Guidelines for Drafting and Editing the Federal Rules), Rule 801(d)’s “not hearsay” language would not be used. However, the Advisory Committee does not write on a clean slate; it must take into account the behavior and expectations developed through thirty-five years of usage, even the usage of an oxymoronic term. The Advisory Committee does not want to incur the costs of disrupting learned behavior and settled expectations unless the benefits exceed the costs.

The benefits of an amendment to Rule 801(d) are logic, clarity, and consistency. There is a significant value in having a consistent meaning for important terms like “hearsay” and “not hearsay.” It is helpful to have frequently used types of evidence, like admissions and prior statements, properly classified as hearsay exceptions. Hearsay is confusing enough

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255. *Self Study of Federal Judicial Rule Making*, *supra* note 242.

256. *Id.* at 485. It is unlikely that Rule 801(d) and the “not hearsay” language has any supporters. While many writers have made harsh comments, *see supra* notes 12-14. I have found only two people who have had anything good to say: Professor Thomas Green in 1970, *supra* note 100, and Dean Mason Ladd in 1973. Mason Ladd, *Some Highlights of the New Federal Rules of Evidence*, 1 FLA. ST. U. L. REV. 191, 197 (1973) (“Surely one of the highlights of the new evidence rules is 801(d), entitled statements which are ‘not hearsay.’”).

257. Letter from Peter G. McCabe, Secretary to the Committee on Rules and Practice of the Judicial Conference of the United States, to author (November 1, 2010).

even without the addition of oxymoronic terms, and an amendment would help everyone journey more safely and confidently through what has been aptly described as “the [hearsay] thicket.”<sup>258</sup>

The costs of an amendment are, as described by the Reporter, the “disruption of settled expectations, necessary adjustment, possible inadvertent changes, etc,”<sup>259</sup> with arguably the most significant cost in this instance being the disruption of electronic searches. The more extensive the changes (new separate exceptions for both admissions and prior statements, and the reassignment of Past Recollection Recorded to the prior statements grouping), the greater the benefit in terms of clarity and education, but also the greater the cost.<sup>260</sup>

As an example, consider the thoroughgoing alternative that lists all the hearsay exceptions in a sequential fashion:

- Rule 803 Exceptions – Prior Statements of a Witness
- Rule 804 Exceptions – Statements of Party-Opponents
- Rule 805 Exceptions – Availability of Declarant Immaterial
- Rule 806 Exception – Declarant Unavailable

This structure is clear, orderly, and logical. If writing on a clean slate, rules drafters would almost surely adopt such a sequential listing. However, if imposed now as an amendment, such an approach would be massively disruptive. While designed to address the Rule 801(d) problem, it would renumber *every* hearsay exception. It would require lawyers and judges to learn and use new numbers whenever referring to any hearsay exception and, much more critically, would make electronic research much more difficult. The costs of such an extensive change would exceed the benefits.

In contrast, the preferred minimalist alternative would create new, separate categories for admissions and prior statements without affecting the other hearsay exceptions in any way. It retains Rules 803 and 804 and then places prior statements and admissions in new Rules 808 and 809. It would impose two costs—initial adjustment and relearning, and an impact on electronic searches—both of which would be modest. Lawyers and judges would have to learn that the rules for prior statements and

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258. John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741 (1960).

259. Capra memorandum, *supra* note 14, at 3.

260. *See id.* at 3 (“Generally speaking, the less drastic the approach, the less cost of disruption, but also the less benefit provided.”).

admissions have moved, but that is not a difficult task.<sup>261</sup> In electronic searches, researchers will base their post-amendment searches for pre-amendment cases on the prior rule number without any difficulty, as cases citing Rule 801(d) will still be accessible. There are no overlapping rules or numbers to complicate the search or distort the search results. In the case of the preferred minimalist alternative, then, the benefits of clarity and consistency exceed the costs associated with the amendment.

## VII. CONCLUSION

Rule 801(d)'s "non-hearsay" term is an oxymoron that contradicts the traditional meaning of non-hearsay and misrepresents the hearsay nature of admissions and prior statements. The rule should not have been enacted originally and should be amended at the earliest opportunity.

The backstory of the rule is interesting in several different ways. It is invigorating to be reminded of the nature and intensity of the debates over the classifications that we now too readily take for granted. It is instructive to learn again that the resolution of an issue at one time—as when the three predecessor codes resolved the status of admissions and prior statements as hearsay exceptions—is no guarantee that some future decision-maker will reach the same result at a later date. And in light of the great achievement that the Federal Rules of Evidence represent, it is disheartening to see, in this one narrow area, both how poorly the Reporter performed in presenting these classification issues to the Advisory Committee and how uncritically the Advisory Committee, Congress, and the adopting states followed the Reporter's lead.

An amendment will be difficult to achieve. The Advisory Committee is commendably cautious and conservative in its approach to amending the Federal Rules of Evidence. Stability in the law is a virtue. However, so are adaptability and the ability to correct an original mistake. Perhaps as Rule 801(d)'s backstory becomes better known, a growing discomfort with the rule might begin to dissolve the comfortable familiarity that has developed over the past thirty five years. And if that discomfort leads to thinking about change, the profession generally and then the Advisory Committee may come to the conclusion that the benefits of clarity and consistency outweigh the modest costs associated with a change.

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261. This adjustment would be similar to that experienced with the renumbering of the residual exception with the Rule 807 amendment. Admissions and prior statements are used much more frequently than the residual exception, but it is unclear whether this greater frequency would make the adjustment more difficult or easier.