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REFLECTIONS ON THE RULE AGAINST HEARSAY

Irving Younger*

The rule against hearsay has a peculiar shape. Four words long as Federal Evidence Rule 802 puts it, "hearsay is not admissible," it proceeds immediately to that fearsome prepositional phrase, "with exceptions . . ." And the exceptions, in the formulation of Federal Evidence Rules 803 and 804, run to some 2,500 words.¹ If the rule were stretched from where we sit to the football stadium, the exceptions would reach Miami.²

This parlous state of affairs is similar to astronomy's before Copernicus. Ptolemy set a motionless earth in the center and, calculating from there, accounted for the observed positions of the heavenly bodies, though by an elaboration of cycles, epicycles, deferents, and equants quite enough to drive a man mad. When Copernicus proclaimed the sun immobile with the planets revolving around it, he wrought an exquisite simplicity. Every thinker knows that as a proof, a proposition, a theory becomes complicated, the less the chance that it is true; and if "truth" be too chimerical a measure, then the less its elegance, the more muted the mental pleasure it furnishes.³

Imagine, if you please, that we display to a practitioner of one of the "exact" or "rigorous" branches of knowledge our cherished rule against hearsay with all its exceptions piled up

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1. Nor are the Federal Evidence Rules unique. Compare CAL. EVID. CODE §§ 1200-1205 (West 1966)(rule against hearsay and general provisions, 50 lines of type), *with id.* (exceptions to the rule against hearsay, 429 lines of type). See also E. FISCH, NEW YORK EVIDENCE (2d ed. 1977)(pages 446-56 dealing with the rule, pages 457-589 with the exceptions).

2. These words were intended to be spoken at the University of South Carolina School of Law Auditorium in Columbia, South Carolina.

3. This principle of parsimony, also known as "Ockham's razor," was frequently used in philosophical proofs at least as early as William of Ockham (1285-1349). See 8 THE ENCYCLOPEDIA OF PHILOSOPHY 307 (P. Edwards ed. 1967).

behind it and that we inquire of him, as a friendly but intelligent stranger to the law, what he makes of it.

“Redo your experiments,” he responds.

“Lawyers don’t do experiments,” quoth we.

“Then redo your theory,” he remarks, “and cease troubling me with the needless mystifications of a jejune discipline.”

Our friend’s impatience brings it home to us that the structure of hearsay theory has taken on a shape ungainly and ill-proportioned. This lack of comeliness suggests something amiss with the method by which we lawyers have elaborated our most famous rule of evidence. Since things ought not to be left so sadly out of joint, let me try to bemuse the leaden-footed minutes you have allotted me by attempting a more satisfactory expression of the rule against hearsay.

We were taught in law school that cross-examination is the central feature of a common-law trial. Deprive the adversary of cross-examination, and the evidence will not be received against him. The name we attach to this sort of evidence which is inadmissible for no other reason than the lack of opportunity to cross-examine, is hearsay; and the rule against hearsay is a way of giving effect to the judgment that, unless it can be cross-examined, evidence ought not to be admitted. The vice of hearsay, in a word, is the lack of opportunity to cross-examine. That is why we define hearsay in terms of cross-examination. Hearsay is evidence that depends for its probative value upon the credibility of someone who cannot be cross-examined.⁴ Or, in somewhat shorter form, hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement.⁵

I claim, however, that cross-examination or its absence is a ring around the target, not the bull’s-eye. I suggest that what the law gives the adversary is protection, not against uncross-examined evidence, but against unreliable evidence. Although the principal assurance of reliability is cross-examination, it is not the sole assurance. When we point to cross-examination as the basis of the rule against hearsay, therefore, we are a few degrees off center. It is to reliability we should look.

“Perhaps,” I hear you say, “but we’re not putting our money on a mere assertion. It’s demonstration we want.”

4. See 1 S. GREENLEAF, EVIDENCE 111-12 (1842).

5. See FED. R. EVID. 801(c).

I acknowledge your demand and report that, seeking to satisfy you, I turned to two sources. I went first to the library, and then to the computer. In the library, I found three lines of cases to support my idea that the rule against hearsay is really a rule against unreliable evidence. The first line of cases consists in battle-pieces, large canvases on which can be observed heroic judges seizing the monster hearsay by its scaly neck and hacking it to pieces.

For example, in *Dallas County v. Commercial Union Assurance Co.*,⁶ the tower of the Dallas County Courthouse in Selma, Alabama, collapsed. Since the insurance covered loss due to lightning, that is what the county claimed to have caused the catastrophe, adducing some charred timbers for proof. The defendants sought to avoid coverage by disputing the cause: the charred timbers, they asserted, were remnants of a fire that had occurred in 1901. To support their contention, the defendants offered a copy of the Selma Morning Times for June 9, 1901, describing the fire. The county's objection was overruled, and the court of appeals affirmed a jury verdict in defendants' favor as follows:

There is no procedural canon against the exercise of common sense in deciding the admissibility of hearsay evidence. In 1901 Selma, Alabama, was a small town. Taking a common sense view of this case, it is inconceivable to us that a newspaper reporter in a small town would report there was a fire in the dome of the new courthouse—if there had been no fire. He is without motive to falsify, and a false report would have subjected the newspaper and him to embarrassment in the community. The usual dangers inherent in hearsay evidence, such as lack of memory, faulty narration, intent to influence the court proceedings, and plain lack of truthfulness are not present here. To our minds, the article published in the Selma Morning Times on the day of the fire is more reliable, more trustworthy, more competent evidence than the testimony of a witness called to the stand fifty-eight years later.

. . . We do not characterize this newspaper as a "business record," nor as an "ancient document," nor as any other readily identifiable and happily tagged species of hearsay exception. It is admissible because it is necessary and trustworthy,

6. 286 F.2d 388 (5th Cir. 1961).

relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearing within reasonable bounds.⁷

In *State v. Gause*,⁸ the defendant appealed his conviction for murdering his wife. The trial judge had admitted the victim's will, which contained expressions of fear that her husband would kill her, as well as evidence of oral statements to the same effect. After reviewing the precedents characterizing such declarations as non-hearsay so long as the victim's state of mind is in issue⁹ but as hearsay when it is not, the court said:

We fail to apprehend some of the nice distinctions with which the courts play in applying the hearsay rule.

. . . .

We note that in the cases on this and related points the courts often resort to strained logic to attain the desired result. In determining the identity of the person committing a murder, the fact that the victim had reason to fear the defendant has some probative value. The indicia of reliability of the hearsay statements are as certainly present on the question of identity as they are on the issue of accident or suicide. We fail also to grasp the attempted distinction regarding when the state of mind of the victim is or is not in issue. We are not impressed with pious instructions to the jury which tell them to consider the statements of the victim only for the purpose of determining the victim's state of mind.

Courts have tended to permit hearsay to be introduced in evidence when, for some reason or other, such evidence has a special reliability. . . . In examining the evidence objected to here, we find that although it does not completely fit into any of the well recognized categories of exceptions to the hearsay rule, it does have a special reliability.

. . . .

Let us meet the problem head-on, brush aside the sophistry, and say that when expressions of fear by a murder victim, though they may be hearsay, are relevant, have probative value on the issue of identity, and when in human experience they have sufficient reliability, they should be admitted in

7. *Id.* at 397-98.

8. 107 Ariz. 491, 489 P.2d 830 (1971).

9. The victim's state of mind would have been in issue had the defendant raised a claim of suicide or self-defense, which he did not.

evidence.¹⁰

These are not the only examples,¹¹ but they suffice to exhibit the victory of “reliability” over “hearsay.” The second kind of case is a domestic interior wherein a competent and efficient judge goes about the homely business of deciding an apparently everyday hearsay point, but with just enough decolletage to permit us to make out the real basis of the receipt or exclusion of hearsay, and, lo, it is reliability.

In *Vincent v. Thompson*,¹² the question was whether Dr. Thompson had administered a certain drug to plaintiffs’ daughter. When plaintiffs testified that Dr. Thompson admitted it, the drug manufacturer objected on the ground of hearsay. The court quoted from an earlier case as follows:

“The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation. Exceptions to the hearsay rules are being broadened and created where necessary. . . . Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts in civil cases.”¹³

Applying these considerations to *Vincent*, the court held the hearsay to be admissible: “Under the circumstances, the only way the hearsay evidence could be deemed inadmissible against Parke, Davis would be by a rigid and slavish adherence to a black-letter rule. We should not thus elevate form over substance in disregard of the requirements of justice.”¹⁴

Having come this far, let me give voice to an objection many of you doubtless might raise were you inclined to be uncivil.

10. 107 Ariz. at 494-95, 489 P.2d at 833-34 (citation omitted).

11. Others are *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975); *United States v. Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968); *Hew v. Aruda*, 51 Hawaii 451, 462 P.2d 476 (1969); *Woll v. Dugas*, 104 N.J. Super. 586, 250 A.2d 775 (1969). In Massachusetts, “a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.” MASS. GEN. LAWS ANN. ch. 233, § 65 (West 1959).

12. 50 A.D.2d 211, 377 N.Y.S.2d 118 (1975).

13. *Id.* at 225, 377 N.Y.S.2d at 131 (quoting *Fleury v. Edwards*, 14 N.Y.2d 334, 341, 200 N.E.2d 550, 554, 251 N.Y.S.2d 647, 653 (1964)).

14. *Id.* at 225, 377 N.Y.S.2d at 131 (citations omitted).

Granted, you would say, reliability figures significantly in these cases, perhaps even to the supersession of cross-examination. But what difference does it make? Suppose courts continued to use the old categories, making sidelong references to reliability from time to time. Would we be any the poorer? My answer: I do not know whether we would be poorer. I do know that a forthright recognition of the bases of decision, in plain English, calling things by their right name, would contribute something, perhaps much, to the coherence of the law and its maturation as a genuinely intellectual calling.

To illustrate my point, I remind you of *Palmer v. Hoffman*.¹⁵ There, supporting its defense to a claim of negligence, the railroad offered its engineer's report. Hearsay, argued the railroad, but admissible as a business record. The Supreme Court affirmed the trial court's refusal to admit the report because, it said, the report was "not a record made for the systematic conduct of the business as a business."¹⁶

Now pair with *Palmer v. Hoffman* a decision of the Appellate Division in New York, *Matter of Ronald B.*¹⁷ The subject of the appeal was an adjudication of juvenile delinquency on account of the juvenile's possession of an operable handgun. After arresting the juvenile and finding the gun, the police had sent it to the ballistics laboratory for testing. The laboratory report was offered as a business record; the juvenile objected on the authority of *Palmer v. Hoffman*; and the court held the report admissible because it "does further the business of the police department."¹⁸

Instead of balderdash about an accident report not part of the railroad's business while a ballistics report is part of the police department's business, would it not be more satisfactory to face up to the obvious? The report in *Palmer v. Hoffman* was inadmissible because the court did not trust it. The report in *Matter of Ronald B.* was admissible because the court did trust it. Railroad engineers involved in accidents may lie. Ballistics

15. 318 U.S. 109 (1943).

16. *Id.* at 113.

17. 61 A.D.2d 204, 401 N.Y.S.2d 544 (1978).

18. *Id.* at 208, 401 N.Y.S.2d at 547. The court referred to reliability, but in connection with the general acceptance that suffices to excuse what would otherwise be the requirement of expert testimony about the scientific basis of a technical device. This has nothing to do with the point at issue in *Ronald B.*

tests do not. This is the reading of *Palmer v. Hoffman* we are given in Federal Evidence Rule 803(6).¹⁹ It is heard as a kind of echo in *Matter of Ronald B.* But were the echo sounded *forte* and in C major, were the court in a case like *Palmer v. Hoffman* or *Matter of Ronald B.* to say the record is admissible because it is reliable and for no other reason, the tears of pride would run down my cheeks, and I suspect yours too.

Before leaving this second kind of case, there is a last point to be made, requiring recitation of yet another example. In *Potter v. Baker*,²⁰ the plaintiff claimed to have been struck at an intersection by defendant's car. On the issue of defendant's negligence, plaintiff offered to testify that, when she came to, some moments after the impact, she heard a pedestrian exclaim to another, "God, he [defendant] rushed the light." The trial judge sustained defendant's objection on the ground the hearsay was unreliable. The intermediate appellate court reversed on the ground the hearsay was admissible as an excited utterance, and the supreme court reversed again, affirming the trial judge's ruling. In such matters, the appellate court must not substitute its judgment for the trial court's. If the latter's ruling is reasonable, it will be affirmed.²¹

Observe what *Potter* adds to the discussion. It places on the judge the responsibility to determine, at the threshold and as a matter of sound discretion, whether the evidence is reliable enough to be admitted. If the judge decides that it is unreliable as he did in *Potter*, he excludes the evidence. If he decides otherwise, he admits it. What follows from this? You shall see, ladies and gentlemen, you shall see.

19. Under Federal Evidence Rule 803(6), the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. RULE EVID. 803(6).

20. 162 Ohio St. 488, 124 N.E.2d 140 (1955).

21. *Id.* at 500, 124 N.E.2d at 146-47.

My third line of cases is the line, chiefly in the United States Supreme Court, construing the sixth amendment right of confrontation. There is an enormous number of things to say about these cases. Here, my purpose is simply to sketch out a preliminary view of the way in which they are affecting the law of hearsay.

The sixth amendment right of confrontation is a guarantee that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."²² In 1965, the Supreme Court set out to develop a definition of confrontation, devoting roughly one case per term for five years to various aspects of the problem.²³ But a review of those cases is not to the point.²⁴ What is, rather, is that today the right of confrontation is separated into two branches. In one, the right of confrontation assures that the defendant's cross-examination of persons who take the stand against him will have the broadest possible scope.²⁵ The other branch tries to answer the question when the right of confrontation permits or forbids hearsay to be received against the defendant. *California v. Green*²⁶ held that, so long as the defendant can cross-examine the hearsay declarant, either at the time of utterance or at trial, the right of confrontation does not bar receipt of the hearsay. In *Dutton v. Evans*,²⁷ however, it seems that the Court changed its mind. *Dutton* teaches that the test of confrontation is reliability. Putting it less opaquely, when hearsay is offered against the defendant in a criminal case, an objection under the confrontation clause will be overruled if the hearsay is reliable.²⁸

22. U.S. CONST. amend. VI.

23. See *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970); *Barber v. Page*, 390 U.S. 719 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965).

24. Such a review may be found in Younger, *Hearsay and Confrontation*, 2 NAT. J. CRIM. DEF. 65 (1976).

25. See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974); *Salazar v. State*, 559 P.2d 66 (Alaska 1976); *People v. Simmons*, 36 N.Y.2d 126, 325 N.E.2d 139, 365 N.Y.S.2d 812 (1975); *State v. Jalo*, 27 Oreg. App. 845, 557 P.2d 1359 (1976). This branch of the right of confrontation does not bear upon the subject of this lecture.

26. 399 U.S. 149 (1970).

27. 400 U.S. 74 (1970). In *Dutton*, no single opinion had the support of a majority of the Justices. The comments that follow in the text are addressed to Justice Stewart's plurality opinion.

28. *Id.* at 89-90. After summarizing the relevant circumstances surrounding the hearsay, Justice Stewart stated:

Whether one follows *California v. Green* or *Dutton v. Evans*, the method of analysis remains the same. When the prosecutor tenders hearsay, there are two objections to be considered. First, the hearsay objection, resolved by application of the jurisdiction's law of hearsay. If the objection is sustained, the prosecutor goes to something else. If the objection is overruled, defense counsel proceeds to the second objection, violation of the right of confrontation. That objection is determined by reference to the Supreme Court's attempts to say what confrontation is.²⁹ The two objections must be treated separately because they rest upon wholly different doctrinal foundations, as both Justice White for the majority in *Green*³⁰ and Justice Stewart for the plurality in *Evans*³¹ were at pains to say.

Now, as I read the recent cases on this second branch of the right of confrontation, a subtle pattern has begun to emerge. The courts are tending no longer to apply the two-step approach of *Green* and *Evans*. Instead, judges are inclining to reduce the two steps to one, something along these lines: Is the hearsay reliable enough to be admissible under the confrontation clause? If it is, ipso facto, it is admissible despite the rule against hearsay. In a metaphor, the confrontation clause has become a door. When the door is open, hearsay is admitted. When the door is closed, hearsay is excluded. The door is open when the hearsay is reliable. The test of the admissibility of hearsay therefore, is its reliability.

In *United States v. Medico*,³² the first of three illustrations of this pattern I propose to lay before you, the defendant was convicted of bank robbery. He owned a car with a certain license number. A bank teller was permitted to testify that that very

These circumstances go beyond a showing that Williams [the hearsay declarant] had no apparent reason to lie to Shaw [the prosecution witness]. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

Id. at 89 (plurality opinion) (Stewart, J.).

29. That is, the trial judge must decide whether the law is *California v. Green*, *Dutton v. Evans*, or something else. See, e.g., *United States v. Puco*, 476 F.2d 1099, 1102-05 (2d Cir. 1973); *State v. Lunn*, 82 N.M. 526, 484 P.2d 368, 369-72 (1971).

30. 399 U.S. at 155-56.

31. 400 U.S. at 86-87.

32. 557 F.2d 309 (2d Cir. 1977).

license number was given the teller by a customer who received it from a passerby as the license number of the get-away vehicle. Affirming, the court remarked in text that “several factors contribute to the reliability of [the teller’s] testimony,”³³ and in a footnote stated: “The Sixth Amendment guarantee of confrontation, therefore, should not blind us to the reality that the question of the admission of the hearsay statements, whether in a criminal or civil case, turns on due process considerations of fairness, reliability and trustworthiness.”³⁴

In *United States v. West*,³⁵ the grand-jury testimony of one Brown had been admitted against the defendant after Brown’s murder. Affirming the conviction, the court said:

Whether the circumstantial guarantees of trustworthiness of Brown’s grand jury testimony are equivalent to those which arise from cross or direct examination . . . we need not determine. In this unusual case, those guarantees were probably greater.

....

It should not be surprising that the same circumstances suffice to meet the requirements of [Rule] 804(b)(5) [of the Federal Evidence Rules] and of the Confrontation Clause.³⁶

Finally, in *United States v. Oates*,³⁷ we have a case in which the confrontation door was closed. At trial, the judge overruled defendant’s objection to the receipt of two documents purporting to be the official report and worksheet of the chemist who analyzed as heroin the substance seized from the defendant. On appeal, the government argued that the report was admissible under Federal Evidence Rules 803(6) (“records of regularly conducted activity”), 803(8) (“public records and reports”), and 803(24) (“other exceptions”). Other evidence casts considerable doubt upon the reliability of the report. The court of appeals reversed:

We thus consider it clear that Congress has expressed a firm intention that, if there are plausible doubts that evidence fitting within the literal terms of a hearsay exception could sur-

33. *Id.* at 315.

34. *Id.* at 314, n.4.

35. 574 F.2d 1131 (4th Cir. 1978).

36. *Id.* at 1136, 1138.

37. 560 F.2d 45 (2d Cir. 1977).

vive confrontation analysis, the hearsay exception should be construed with considerable flexibility so that the court can, if possible, avoid deciding the constitutional question.³⁸

Which is as much as to say that receipt or exclusion of hearsay under the rule against hearsay will be determined by deciding whether it is admissible or inadmissible under the confrontation clause, which in turn is as much as to say that the receipt of hearsay depends upon its reliability.

There is my account of what I found in the library. Come with me now to the computer room and gaze upon the console. You must understand that were I to lay a finger upon that console, I would instantly short out the computer, the university, and probably the Strategic Air Command. Consequently, I did not lay a finger upon the console. I prevailed upon Daniel Cohn, of the Massachusetts Bar, then a third-year law student at Cornell, to devise and run a LEXIS program to suit my purpose.

The program had a presupposition, and I had better reveal it. I believe that lawyers and judges usually sense the inadequacies of legal theory and, though they may be unable or unwilling to put it into words, act upon their impression by ignoring the theory. I believe too that when lawyers and judges ignore the theory, it is too bad for the theory, not for the lawyers and judges. It is time then to change the theory.

If I am right that the rule against hearsay is not a rule against uncross-examined evidence but rather is a rule against unreliable evidence, it would comport with the beliefs I have just stated to you to conclude that lawyers and judges act accordingly: that is, hearsay is received when it is reliable, without regard to doctrinal niceties. And since trial lawyers are rational men and women, able for themselves to determine what is reliable and reluctant to offer evidence only to see it excluded, does it not follow that reliable hearsay will be offered most of the time and that most of the time hearsay will in fact be admitted? That is what I used the computer to try to find out. In how many cases is hearsay admitted, without regard to the nature of the analysis undergirding the decision?

Here are the results:³⁹

38. *Id.* at 79.

39. Mr. Cohn's description of his method is as follows:

	Sampling of federal cases (Courts of Appeals and District Courts) since July 1976		Arizona Supreme Court 1976-77		Sampling of New York cases (all courts) 1973-77	
	number of cases	%	number of cases	%	number of cases	%
Hearsay admitted	77	82%	40	81%	41	56%
Harmless error to admit hearsay	21		6		6	
Hearsay excluded	22	18%	11	19%	37	44%
	Sampling of Georgia Supreme Court 1973-77		Sampling of Illinois Supreme Court 1960-77		Sampling of Missouri Supreme Court 1973-77	
	number of cases	%	number of cases	%	number of cases	%
Hearsay admitted	50	78%	27	67%	26	76%
Harmless error to admit hearsay	9		5		9	
Hearsay excluded	17	22%	16	33%	11	24%

I first tried a program that summoned all cases containing the word "hearsay." Most of the cases thus summoned, however, dealt with sufficiency of evidence and were thus irrelevant. I then asked LEXIS for all cases containing the word "hearsay" and, within forty words of it, a word containing the letters ADMI, INADMI, ALLOW, EXCLU, PERMI, or IMPERMI. LEXIS told me how many cases fit that description. If the number was manageable (as in the case of Arizona), I looked at all of them. In the other instances, I sampled the cases at random. Between one-fourth and one-half of the cases summoned turned out to concern problems other than the admissibility of hearsay at trial. They were rejected, as were cases involving parole hearings or other administrative proceedings. Even in the instance of Arizona, this research probably did not disclose all cases that considered hearsay problems. But that is unimportant. The crucial thing is that everything I did was neutral as between admitting or excluding the hearsay evidence. The program was calculated to search no harder for cases excluding the evidence than admitting it, and, when I chose sample cases from among those summoned by the program I did so at random. Thus I believe that the proportion of cases admitting the hearsay to those excluding it fairly represents the practice in each of the jurisdictions I surveyed.

This first, tentative, incomplete, and flawed attempt to find out by computer what actually happens in court when hearsay is offered in evidence tends to confirm my hypothesis. There is no rule against hearsay. Hearsay is usually admitted.⁴⁰ The basis of receiving it is its reliability. Thus, there is only a rule against unreliable evidence. If and when everyone agrees, we will rewrite our statutes or reformulate the common law something like this:

“Hearsay is admissible”

But since, when I talked about *Potter v. Baker* some while ago⁴¹ I promised that you would see what follows from it, let me continue my draft in this manner:

“ . . . unless the court decides as a preliminary question that the hearsay could not reasonably be accepted by the finder of fact as trustworthy. The finder of fact remains free to disbelieve admitted hearsay.”

Having given the world this proposed new rule, I know three things to a certainty. First, I know that it will be attacked as novel. But surely it is not for that reason wrong. Second, I know that it will be attacked on the ground that under it, rulings on hearsay will be unpredictable. But no less predictable, I should think, than under the present hodgepodge. Third, I know that it will be attacked on the ground that it is unrealistic to think that lawyers and judges can be as straightforward as adoption of the new rule would require. There, alas, I have no defense.⁴²

Letter from Mr. Cohn to *South Carolina Law Review* (August, 1980), on file with *South Carolina Law Review*.

40. Even in New York, where the percentage of cases excluding hearsay is highest, hearsay is admitted more than half the time.

41. See text following note 20 *supra*.

42. But then again, perhaps I do. The Bench and Bar of England have accepted reform of the rule against hearsay similar to the one proposed here. See The Civil Evidence Act, 16 & 17 Eliz. 2, c. 64 (1968); LAW REFORM COMMITTEE, THIRTEENTH REPORT, CMD No. 2964, at 9-10 (1966); CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, CMD No. 4991, at 137-39 (1972).

