

The Rationale of Personal Admissions

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Under the personal admissions rule, a party's own statement is admissible in evidence when offered by the opponent.¹ The rule is categorical. Whatever the party has said or written is admissible against that party, so far as the hearsay rule is concerned, whether or not the statement is armed with guarantees of trustworthiness. Admissions are often reliable because they were against interest when made, but they are not required to have been against interest. Hence the admissions rule cannot be supported, in all of its applications, on the theory that a person does not make self-harming statements unless they are true.² The Advisory Committee to the Federal Rules of Evidence recognized this point, and after noting that "no guarantee of trustworthiness is required in the case of an admission," stated that "their admissibility in evidence is the result of the adversary system rather than satisfaction of the [reliability-based] conditions of the hearsay rule."³ Because admissions are not required to be trustworthy, the Committee reasoned, they should not be considered an exception to the hearsay rule, but should be placed in a special category of their own.⁴

Commentators have joined the Advisory Committee in treating the rule receiving personal admissions as *sui generis*, that is, as not being

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¹See, e.g., FED. R. EVID. 801(d)(2)(A).

²See FED. R. EVID. 801(d)(2); C. McCORMICK, MCCORMICK ON EVIDENCE § 262 (E. Cleary 3d. Ed. 1984) [hereinafter cited as MCCORMICK]. McCormick gives the following example: "If a person states that a note is forged, and then later acquires the note and sues upon it, the previous statement will come in against him as an admission, though he had no interest when he made the statement." *Id.*

³FED. R. EVID. 801(d)(2) advisory committee's note. The Advisory Committee, following Wigmore, drew a curious conclusion from this reasoning. It decided that admissions could not be classed as an exception to the hearsay rule because, unlike other exceptions, they do not require guarantees of trustworthiness. Therefore, they must be deemed not to be hearsay at all. Following this reasoning, the Advisory Committee created an ungainly category of out-of-court statements (including admissions) which are defined as not being hearsay, though they are offered to prove the truth of the matter asserted. The structure of the Federal Rules would have been simpler if the Committee had defined all out-of-court statements offered to prove the truth of the matter asserted as hearsay, and had placed admissions in the category of exceptions.

⁴*Id.*

based on considerations that normally support hearsay exceptions.⁵ One reaches this view by reasoning that: (1) exceptions to the hearsay rule are based upon a trustworthiness rationale; (2) admissions are not required to be trustworthy; (3) therefore, the admissions rule is not a true hearsay exception, and one must look for some rationale for receiving admissions that does not rely at all upon suppositions about their trustworthiness. This essay will argue that this chain of reasoning has two flaws: it assumes too limited a basis for the creation of hearsay exceptions, and it assumes that a rule that is not tailored to eliminate *all* unreliable statements cannot enlist reliability as one of its justifications. First, however, the article will examine the results of the search for a unique rationale for the admissions rule.

This search has attracted the attention of distinguished scholars of evidence and procedure. Their explanations of the rule's rationale give content to the Advisory Committee's brief reference to the "adversary system" as the basis for the admissions rule.

Zachariah Chafee saw the rule as resting "on a deep-rooted human instinct antedating common law rules of Evidence[.] 'Out of their own mouths —.'" ⁶ He also counseled that "[t]his attitude is easier to grasp when we remember that a trial is not an abstract search for truth, but an attempt to settle a controversy between two persons without physical conflict."⁷ The reception of admissions, therefore, need not be justified on grounds of trustworthiness; the significance of an admission is "*inter partes*, like estoppel or *res judicata*, which sometimes make truth irrelevant."⁸

Morgan believed that reception of admissions was a corollary of the adversary system⁹ and explained that "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath."¹⁰ McCormick endorsed this view,¹¹ remarking that "[t]his notion that it does not lie in the opponent's mouth to question the trustworthiness

⁵See authorities cited *infra* notes 6, 9, 10, 11.

⁶Chafee, Book Review, 37 HARV. L. REV. 513, 519 (1924) (reviewing J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (2d ed. 1923)).

⁷*Id.*

⁸*Id.*

⁹MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (1962).

¹⁰*Id.* Cf. J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1048 (Chadbourn rev. 1972).

¹¹C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 239 (1954). McCormick limited his acceptance of Morgan's theory to "express admission"—that is, out-of-court statements received as admissions. McCormick classified non-statements received as "admissions" as conduct that circumstantially undermines a party's claim. *Id.*

of his own declarations is an expression of feeling rather than logic but it is an emotion so universal that it may stand for a reason."¹²

This attitude of "you said it, and you're stuck with it" is most vividly displayed in Lev's article setting forth an estoppel theory of admissions.¹³ Lev wrote flatly that admissions were received against a party as judicial punishment for his inconsistency.¹⁴

These theories may help explain the genesis of the admissions rule. They do not, however, justify retaining the rule. The explanations of Morgan, McCormick and Lev suggest that the statement should be received because the party cannot fairly object. But why should the party be precluded from objecting? The usual prerequisites for the application of estoppel or waiver are not present. The party has not misled the other party into relying upon the statement to his or her detriment—reliance may have occurred, in some cases, but reliance is certainly not one of the requirements of receiving an admission. Nor has the party slept on his rights, engaged in dilatory conduct, or done anything else that impairs the smooth operation of the judicial system.¹⁵ If the rule rests solely upon the desire to punish inconsistency, then the punishment is disproportionate. What the party has done is to make a statement while not under oath, which the party now asks to have excluded on grounds that its inaccuracy may mislead the trier of fact. If we accept the view that admissions are unreliable and that the trier cannot accurately evaluate them, then the statement may cause the trier to reach an inaccurate result—for example, it may cause the trier to convict an innocent person. Yet because the party once made an inaccurate statement while not under oath, the party is prevented from objecting to whatever consequence may flow from the reception of the statement, including being convicted of a crime that the party did not commit.

Chafee's theory¹⁶ takes the focus away from crime and punishment, and places it on the acceptability of verdicts. Because others, including the parties, accept the admissions rule, the judicial system should

¹²*Id.*

¹³Lev, *The Law of Vicarious Admissions—An Estoppel*, 26 U. CIN. L. REV. 17 (1957).

¹⁴*Id.* at 29.

¹⁵Compare the usual waiver situation, in which a party seeks to resurrect an objection that should have been made earlier. Here it is sometimes appropriate to hold that a party has waived his rights, not because the party "can hardly object" in a moral sense, but because the judicial system must encourage timely objections for its own benefit. For example, judicial economy requires that objections to matters such as personal jurisdiction, venue, and improper service of process must be made before the merits of the case have been reached. See FED. R. CIV. P. 12(h)(1).

¹⁶See *supra* notes 6-8 and accompanying text.

accept it, whether or not it produces accurate verdicts, because it enhances popular acceptance of verdicts. Trials, in Chafee's view, are not searches for truth, but attempts to settle disputes without physical violence. Chafee's point assumes the model of the bipartite dispute in which settlement is more important than an accurate verdict. Yet many cases are not of that nature; rather, they involve the determination of issues that affect many persons who are not parties.¹⁷ Moreover, the moral judgment implied in Chafee's theory is not acceptable even in the classic bipartite case. Fault should not be assigned, much less punishment administered, on the basis of fact-finding believed to be inaccurate. Judicial pursuit of accuracy is the ultimate guarantor of public acceptability of verdicts. Sometimes the pursuit of complete accuracy must be sacrificed to other goals, such as the protection of confidences or the conservation of resources, but it should not be sacrificed to instinct and emotion.¹⁸

Suppose that one rejects these rationales. What position, then, should one have about the reception of party admissions? There are at least four possibilities: (1) one could maintain that the category of party admissions should no longer be recognized;¹⁹ (2) one could maintain that the category should be recognized, but redefined to reduce the possibility of unreliable verdicts; (3) one could continue to accept the admissions rule in its present form, on grounds that the entire hearsay rule is based on a mistaken theory and that any ex-

¹⁷See generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

¹⁸I have assumed that accurate fact-finding should be the primary goal of the rules of evidence and trial procedure, and that speed and economy are the most important secondary goals. For examples of other authors who appear to have made the same assumption, see 1 J. BENTHAM, *RATIONAL OF JUDICIAL EVIDENCE* 1, 5-6 (1827); Lengbein, *The German Advantage in Civil Procedure*, 52 CHI. L. REV. 822 (1985); Frankel, *The Search For Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). This essay is not the place for a critique of scholars who stress the importance of other goals, such as satisfaction of the parties, providing catharsis, or achieving verdicts that are acceptable to the public. See generally Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 COLO. L. REV. 1 (1987); Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978). Compare Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985), with Allen, *Rationality Mythology, and the "Acceptability of Verdicts" Thesis* 66 B.U.L. REV. 541 (1986). It is sufficient to note that, at least in this context, I align myself with those who would give accuracy of fact-finding a primary place.

¹⁹See Hetland, *Admissions in the Uniform Rules: Are They Necessary?* 46 IOWA L. REV. 307, 322-330 (1961). Hetland argues that because the Uniform Rules liberally admit hearsay that is reliable, the admissions category is no longer necessary. He might reach a different conclusion under a system other than the Uniform Rules.

ception, however arbitrary, will promote justice by putting more facts before the trier; or (4) one could try to find a basis upon which the admissions rule can be justified as supporting accurate fact-finding within the constraints of the judicial system.

The fourth course is the best. The rule receiving personal admissions is a perfectly proper exception to the hearsay rule, justified by the same sorts of considerations that support the other exceptions. In supporting this view, the article will first describe reasons that support exclusion of hearsay, and then seek to show why those reasons do not require the exclusion of personal admissions.²⁰

The conventional explanation for the exclusion of hearsay centers on the danger of admitting evidence whose reliability has not been tested. Unlike courtroom witnesses, hearsay declarants have not testified under oath, in the presence of the trier and subject to cross-examination. These courtroom safeguards have the dual effect of encouraging witnesses to be accurate and of exposing defects in their credibility. Cross-examination is especially valuable because of the opportunity it provides to test credibility by exploring weaknesses in a declarant's memory, perception, narrative ability, and sincerity. Under this view, the fundamental flaw of hearsay evidence is that the adversary has not had the opportunity to reveal these weaknesses through cross-examination of the out-of-court declarant.²¹

While academic commentators have tended to focus upon the danger that the untested statement of the out-of-court declarant will be unreliable, lawyers and judges have often supported exclusion of hearsay on an additional basis: that the witness who reports the hearsay statement in court may testify inaccurately.²² Not only is there a danger of inaccurate reporting, but it is difficult to expose inaccuracy through cross-examination of the witness reporting the statement. As Chancellor

²⁰For a more comprehensive explanation of the reasons for excluding hearsay, see Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 55-88 (1987).

²¹See, e.g., G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 159-60 (1978); 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1362 at 7 (3d ed. 1940).

²²See, e.g., Report of Committee on Administration of Justice on Model Code of Evidence, 19 *Journal of the State Bar of California* 262, 274 (1944) (arguing that danger of misreport of statements is the main reason for excluding hearsay). See also *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 436 (1836) (Story, J.) (besides lacking oath and cross-examination, the fault of hearsay is "that it is peculiarly liable to be obtained by fraudulent contrivances"); *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 296 (1813) (Marshall, J.) (speaking of the "frauds which might be practiced" in the absence of the hearsay rule); *Englebretson v. Industrial Acc. Comm.*, 170 Cal. 793, 798 151 P. 421, 423 (1915) (Shaw, J.) (same); Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 56 (1987).

Kent wrote, "A person who relates a hearsay, is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author."²³ The danger of fabrication is increased by the fact that the in-court witness could, if hearsay were freely admissible, create a fictional declarant who made the crucial statement when no one else was present.

Another concern has frequently been advanced by bar groups that have opposed the liberal admission of hearsay. They have expressed the fear that if hearsay were freely admitted, trial preparation would become more difficult, and the danger of unfair surprise at trial would increase.²⁴ The attorney may be prepared to impeach or contradict the witness on the stand, but not to do so for declarants whose out-of-court statements come in unexpectedly through the mouth of the witness. Also, surprise can operate in the other direction: the attorney who expected his evidence to be admissible may be surprised by exclusion, and unprepared to offer substitute evidence. The unitary nature of the typical American trial makes surprise a greater danger than in other systems, where adjournments and continuances can mitigate its effect.

Bar groups have also raised the specter of misuse of judicial discretion. Proposals for hearsay reform have stimulated fear of discretion because most advocates of reform would not make hearsay admissible without limit, but would give trial judges discretion to admit or exclude in appropriate cases.²⁵ The fear of unbridled discretion

²³Coleman v. Southwick, 9 Johns 45, 50 (N.Y. 1812). See also R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 520 & n.38 (2d ed. 1982).

²⁴See *Proposed Rules of Evidence: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, Ser. No. 2 (Supp.), 93d Cong., 1st Sess. 74 (1973) [hereinafter cited as *Proposed Rules of Evidence: House Hearings* (Supp.)] (statement of American College of Trial Lawyers) (asserting that broad admissibility of hearsay will "make it impossible for a trial counsel adequately to prepare the case for trial since he will not and cannot know what evidence he will have to meet until it faces him in the courtroom"); *id.* at 290 (statement of District of Columbia Bar Association) (unfairness may result from surprise and a "novel offer" of hearsay evidence); H.R. Rep. No. 650, 93d Cong., 1st Sess., 5 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7079 (explaining Committee's deletion of residual exceptions on grounds that they would have the effect of "injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial.") The final version of the residual exceptions sought to meet the surprise objection by putting in a requirement that notice be given before trial of intent to offer evidence under the exceptions. See FED. R. EVID. 803(24); 804(b)(5).

²⁵See, e.g., Younger, *Reflections on the Rule Against Hearsay*, 32 S.C.L. REV.

has been one of the bar's primary reasons for opposing these proposals for broader admission of hearsay.²⁶

In criminal cases, the exclusion of hearsay partly rests upon concerns about abuse of governmental power. This concern is reflected in the history of the confrontation clause²⁷ and, more recently, in the congressional consideration of the question whether prior inconsistent statements should be admissible without limit.²⁸ In part, the concern reflects a fear that free admission of hearsay would give statement-takers too much power, and encourage coercion and trickery in station-house interrogation.²⁹

281 (1980); Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961); Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 803(a) (1969), reprinted in 2 J. BAILEY, III & O. TRELLES, II, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS Doc. 5, 178-79 (1980) [hereinafter BAILEY & TRELLES].

²⁶See, e.g., C. WRIGHT & K. GRAHAM, 21 FEDERAL PRACTICE AND PROCEDURE § 5005, at 88 (1977) ("[I]t is now part of the lore that the [Model] Code failed because lawyers objected to the power left in the trial judge. While scholars and appellate court judges may be comfortable with the idea, most practicing lawyers are not 'Big Pots' who can count on the trial judge to be benign in his exercise of discretion."); *Proposed Rules of Evidence: House Hearings* (Supp.), supra note 23 (statement of American College of Trial Lawyers opposing broad admissibility of hearsay and condemning increased judicial discretion); *id.* at 91 (statement of Washington State Bar Association opposing proposed residual exceptions on grounds of increased judicial discretion); *id.* at 356 (statement of Colorado Bar Association opposing residual exceptions on grounds that they inject too much uncertainty and discretion into the law of evidence).

²⁷See generally Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 208-15 (1984). Cf. *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ("From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses.").

²⁸The legislative history of Rule 801(d)(1)(A) indicates that concern about fabrication by investigators and systemic criminal justice concerns played as much a role in limiting the use of prior inconsistent statements as did the orthodox concern about the absence of immediate cross-examination of the declarant. See Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 78-80 (1987).

²⁹These concerns were expressed by opponents of the proposed rule, described in the preceding footnote, that would have allowed substantive use of all prior inconsistent statements. See *Proposed Rules of Evidence: House Hearings* (Supp.), supra note 23, at 92-93 (statement of Frederick D. McDonald). See also *Federal Rules of Evidence: Hearings before the Committee on the Judiciary* 92d Cong., 2d Sess. 302 [hereinafter *Senate Hearings*] (statement of Herbert Semmel (Washington Council of Lawyers)); *Rules of Evidence: Hearings Before the Special Subcom. on Reform of Federal Criminal Laws of the House Comm. of the Judiciary* 93 Cong., 1st Sess. 252 (oral testimony of Henry J. Friendly). Cf. statement of Senator Ervin, *Senate Hearings* at 36 (4 BAILEY & TRELLES, supra note 24, Doc. 13).

These concerns about unreliability, surprise, discretion, and misuse of governmental power help justify both the exclusion of hearsay and the reception of personal admissions. It is not necessary to base the reception of personal admissions upon other grounds, such as the theory that the party is estopped from objecting or that he or she is being punished for misconduct. Several features of the ordinary personal admission make its reception acceptable.

(1) Party admissions are often made under circumstances that provide a guarantee of trustworthiness. Statements that turn out to be useful to opposing parties in litigation are usually against interest when made.³⁰ The fact that they are not *always* against interest does not require that they be excluded or that the rule be tailored to apply only to statements that are actually against interest. Requiring a determination that admission was actually against interest when made would add an unnecessary complication.³¹ As this article will argue later, a flat rule receiving all personal admissions works no real unfairness, and is justified by consideration of convenience.

(2) It is fair to receive an admission because ordinarily the party who made the admission will have the opportunity to put himself or herself on the stand to explain the statement or to deny having made it.³² The party thus has an adequate substitute for cross-examination of the out-of-court declarant and an adequate opportunity to expose fabrication by the in-court witness. The admissions rule does not *require* that the party be available, but ordinarily he or she will be. In criminal cases, trials *in absentia* are rare, and are limited to situations in which the party is absent because of the party's own misconduct.³³ In civil

³⁰The author knows of no one who has attempted to prove this assertion empirically, but it seems highly likely that most statements that are offered by opponents (and hence are against the declarant's interest at the litigation stage) were against the declarant's interest when made. Cf. McCORMICK, *supra* note 2, at 777 ("Of course, most admissions are actually against interest when made, but there is no such requirement"); FIELD, KAPLAN & CLERMONT, CIVIL PROCEDURE 122-23 (5th ed. 1984) ("usually against interest when made, but they need not have been so").

³¹The issue of whether a statement was so far against interest as to provide a guarantee of trustworthiness can be a complicated one. See C. McCORMICK, *supra* note 2, § 279 (describing problems related to determining context and motive and to admission of statements that contain both deserving and self-serving aspects). For a fuller discussion of problems raised by statements containing deserving and self-serving aspects, C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 257 (1954).

³²See 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1048, at 5 (Chadbourn rev. 1972) ("he now as opponent has the full opportunity to put himself on the stand and explain his former assertion.")

³³See, e.g., FED. R. CRIM. P. 43 (trial cannot take place in defendant's absence unless the defendant has voluntarily absented himself after the trial has commenced, or unless the defendant is removed for disruption after having been warned).

cases, under majority doctrine, the personal admissions rule does not apply when the declarant is unavailable by reason of death.³⁴ When the declarant is unavailable for some other reason such as absence from the jurisdiction, making a showing of unavailability a prerequisite to reception would unduly complicate the rule. The party often has some control over his or her own availability, so the question of whether unavailability is genuine could become a topic of collateral litigation. Moreover, the party who is unavailable for reasons other than death frequently can protect his or her right to present testimony, either by giving testimony at a deposition,³⁵ or by obtaining a continuance until he or she becomes available.

(3) Ordinarily, the party will not be surprised by the admission, because the party will have been present when the admission was made. By questioning the client, the lawyer should be able to learn of the admission and prepare to rebut or explain it. Even the totally fabricated admission should not be a surprise to a diligent lawyer; the lawyer will routinely be entitled to know about purported admissions of the client through discovery, even in a criminal case.³⁶

(4) The rule receiving personal admissions raises no problems of judicial discretion. It is clear and categorical.

(5) The concern in criminal cases that reception of out-of-court statements may lead to abuse of governmental power has been met, in the case of admissions, with doctrines other than the hearsay rule. The fifth amendment regulates the conduct of official statement-takers and protects against the reception of evidence created by government coercion.³⁷ The "universal" notion described by

³⁴Under the Federal Rules of Evidence, the admissions rule does not authorize the reception of a deceased declarant's statement against his successors. See C. McCORMICK, *supra* note 2, § 268. A majority of states appear to have acceded in this feature of the rule. See Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315, 1343-44 (1985) and authorities cited therein.

³⁵See FED. R. CIV. P. 32(a)(3) (deposition of unavailable witness, including a party, is admissible unless the absence of the witness was procured by the party); *Richmond v. Brooks*, 227 F.2d 490, 493 (2d Cir. 1955) (construing FED. R. CIV. P. 26(d) which is now FED. R. CIV. P. 32(a)) (party who lives in state other than state of trial may introduce her own deposition at trial; she had not "procured" her absence within the meaning of the rule); 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2147 (1970).

³⁶FED. R. CRIM. P. 16(a)(1)(A) gives the defendant the right, on discovery, to a copy of any written or recorded statement made by the defendant, and to "the substance of any oral statement [by the defendant] which the government intends to offer in evidence." In civil cases, statements by a party are freely discoverable by the party who made them, without any showing of special need. See FED. R. CIV. P. 26(b)(3).

³⁷See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (accused must be warned

McCormick³⁸—the notion that “it does not lie in the opponents’ mouth to question the trustworthiness of his own declarations”—is not so universal as to apply unconditionally to criminal cases.

(6) Concerns about the reliability of admissions are reduced by recognizing that an admission has some probative value even if one assumes that it was untrue when made. The trier ought to know that the party had taken different positions at different times, even if there is no special guarantee that the original position was accurate. Of course, when a party testifies, he or she should be impeachable with inconsistent statements like any other witness.³⁹ Even if the party does not testify, the fact he or she has taken inconsistent positions at different times (one in the prior statement, and another in litigation) has some impeachment value.⁴⁰ It throws suspicion upon the way in which the testimony of witnesses was developed and the way in which the party’s case was shaped to meet the requirements of a legal claim or defense. Its value for this purpose, even if not enough to justify receiving the evidence when considered alone, should at least be weighed in the balance.

The article has described why admissions are, in the usual case, acceptable as evidence without the necessity for resorting to any ex-

of right to counsel and to refuse to answer questions); *Jackson v. Denno*, 378 U.S. 368 (1966) (reception of involuntary confessions is violation of due process). In applying these constitutional safeguards, the courts have not distinguished between admissions that are confessions (statements directly conceding that the defendant committed the crime) and other admissions offered by the prosecution. See 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 413 (1982).

³⁸See *supra* note 12 and accompanying text.

³⁹Even without the benefit of a rule receiving party admissions, the party-witness’s prior inconsistent statement would be admissible under FED. R. EVID. 801(d)(1)(A) if made under oath at a proceeding. If made under other circumstances, the prior inconsistent statement would still be admissible on the theory that it is not being offered for the truth of the matter asserted; hence, it falls outside the definition of hearsay set forth in FED. R. EVID. 801(c). In the latter case, the opponent would be entitled to a limiting instruction informing the jury that the statement was only admitted for its bearing on credibility and not for the truth of the matter asserted. See J. WEINSTEIN & M. BERGER, 1 WEINSTEIN’S EVIDENCE para. 105 [03] (1984); MCCORMICK, *supra* note 2, § 251.

⁴⁰See 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1048 (Chadbourn rev. 1972). In discussing the probative value of admissions, Wigmore said that in addition to the ordinary value of any utterance, admissions had the additional value of showing self-contradiction because the party-opponent, “whether he himself takes the stand or not, speaks always through his pleadings and through the testimony of witnesses put forward to support his pleadings.” *Id.* at 4. Cf. Strahorn, *A Reconsideration of the Hearsay Rule and Admission: Part II*, 85 U. PA. L. REV. 564, 569-79 (1937) (Admissions are nonhearsay “circumstantial conduct” that are admissible, not for their narrative value, but to show conduct inconsistent with the party’s present claim).

planation based upon notions of estoppel or punishment. It would be possible to refine the admissions rule in an attempt to exclude particular statements whose reception is not supported by all of the reasons given. For example, one could provide that an admission should be excluded if the trial judge finds it to be unreliable and if the party, without fault, is not available to demonstrate its unreliability through testimony. But this doctrinal refinement would not be worth a candle. The rule receiving personal admissions, in its present form, is supremely easy to learn and to apply. *Anything* that a party says may be used against him by the opposing party. Making exceptions for the rare case in which receiving an admission might cause unfairness is simply not worth the confusion and additional litigation that would accompany attempts at doctrinal refinement. Perhaps a case can be made for excluding admissions not based upon personal knowledge.⁴¹ In other situations, however, no great unfairness is caused by blanket reception of admissions. Situations in which an admission is both unreliable and un rebuttable because the party is unavailable will rarely arise. In criminal cases, the unavailability of the defendant will prevent the trial from being held at all, unless the defendant has voluntarily decided to be absent.⁴² In civil cases tried without a jury, there would be little point to a rule requiring that admissions be screened for reliability. The judge who is capable of weighing reliability for purposes of ruling on admissibility will also be capable of deciding whether to believe testimony that is admissible.⁴³ In civil jury cases, the jury assesses the

⁴¹Admissions have traditionally been considered to be exempt from the requirement of personal knowledge. See, e.g., McCORMICK, *supra* note 2, § 263; FED. R. EVID. 801(d)(2) advisory committees note. For examples of instances in which this feature of the rule may have worked unfairness, see *Mahlandt v. Wild Canid Survival & Research Center*, 588 F.2d 626 (8th Cir. 1978), *Reed v. McCord*, 160 N.Y. 330, 54 N.E. 737 (1899). However, even when the party spoke without personal knowledge, his or her belief that events could have occurred in the fashion described in the admission may be useful to the trier because of the party's general knowledge. In *Reed*, for example, the statement illustrated at least that the declarant, who apparently was familiar with the machine that caused the injury, did not think it improbable that the machine's "dog" had slipped; in *Mahlandt*, the statement indicated that the custodian of an allegedly tame wolf was willing to accept as true the proposition, later denied, that the wolf had bitten a child. See generally Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing*, 12 HOFSTRA L. REV. 393 (1984).

⁴²See *supra* note 32 and accompanying text.

⁴³Of course, appellate review would to some extent correct miscalculations by trial judges. Rarely, however, does appellate review result in reversal on evidence points in nonjury cases. In a nonjury case, the judge who erroneously admits hearsay will be upheld if there is other evidence supporting the verdict. See McCORMICK, *supra* note 2, § 60, at 153.

type of evidence that it regularly uses to make important decisions in everyday life. In assessing the reliability of the out-of-court statement, it will have the aid of arguments of counsel and, in many jurisdictions, of the comments of the trial judge. As a last resort, the trial judge can grant a new trial if the jury's undue reliance upon an admission has caused it to return a verdict that is against the weight of the evidence.

In short, doubts about the utility of the hearsay rule in civil cases generally should make one more willing to tolerate an exception which, if it conceivably covers some instances that it should not, at least has the benefit of clarity and ease of administration. If the rule is too broad, it does no great harm.

The rule receiving personal admissions can be justified, without resort to emotion, "instinct," or ideas of punishment, on grounds that admissions are usually reliable, that a substitute for cross-examination is usually present, that dangers of surprise and discretion are reduced, and that concerns about abuse of governmental power have been met by other rules. To say that the admissions rule must be justified on other grounds because these features are not always present is fallacious. If they are usually present, then the need for simplicity, and the absence of any great sacrifice in achieving it, justify giving the rule its present scope.⁴⁴

This essay concludes with two simple points. The first is that it is not necessary to justify a rule of law by reference to a single goal. No one would deny this proposition in the abstract, yet hearsay writers sometimes deny it in practice, discarding a justification completely because it is inadequate standing alone.⁴⁵ The admissions rule is justified by a combination of features, which together are stronger than any one standing alone. The second is that it is perfectly proper to give a rule of law square corners, even if by doing so some territory is included which, in a perfect world, should be elsewhere. Rules that

⁴⁴The subject of this essay applies to personal admissions, not to admissions of an agent offered against the principal. However, many of the same explanations apply to agents' admissions. The party is likely to be aware of them; they are usually, to some degree, against interest; the agent will often be available as a friendly witness to explain or deny them. In any event, it is clear that agency admissions are even less susceptible to explanation by theories of estoppel or punishment than are personal admissions. The notions that a party cannot object to not being able to cross-examine himself or that he should be punished for inconsistency have little or no application to a party who objects to the admission of the statement of an agent.

⁴⁵Even the greatest evidence scholars are susceptible to this temptation. See, for example, Wigmore's attempt to find a single reason for the hearsay rule, 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1362, at 7 (3d ed. 1940), and his disparagement of jurists who offered additional explanations. *Id.* § 1363.

must be applied instantaneously in the courtroom should be simple and rigid. If they cannot be made so without causing unfairness, then we should tolerate discretion instead of seeking doctrinal refinement. Because the personal admissions rule is simple, rigid and fair, neither discretion nor refinement is needed.

