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PARTIES' ADMISSIONS, AGENTS' ADMISSIONS: HEARSAY WOLVES IN SHEEP'S CLOTHING

*Freda F. Bein** **

PREFACE

Once upon a time a little boy named Daniel was sent by his mother to a neighbor's home on the next street. On the way, Daniel met a wolf. Since there were no witnesses to the encounter except Daniel and the wolf, we do not know whether any words were exchanged between the two. Daniel was only three years, ten months, and eight days old at the time, too young to be a reliable reporter of the event. The wolf was eleven months and twenty-eight days old, presumably old enough to have developed the powers of reason and speech displayed by her cousins in some European fairy tales,¹ but this wolf was an American, and real.² Nevertheless, the animal was sufficiently anthropomorphized to have acquired the name of Sophie. Sophie had also acquired a reputation of sorts among the

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1. See, e.g., J. GRIMM & W. GRIMM, *LITTLE RED RIDING HOOD* (P. Galdone trans. 1974); J. GRIMM & W. GRIMM, *The Wolf and the Fox*, in *MORE TALES FROM GRIMM* 9 (W. Gág trans. 1947); J. GRIMM & W. GRIMM, *The Wolf and the Seven Little Kids*, *supra*, at 241; J. GRIMM & W. GRIMM, *Little Red-cap*, in *HOUSEHOLD STORIES FROM THE COLLECTION OF THE BROTHERS GRIMM* 101 (L. Crane trans. 1945).

All fictional wolves, however, are not "big" and "bad." Some have been known to befriend humans and nurture them, in effect, becoming a surrogate parent. See, e.g., J. GEORGE, *JULIE OF THE WOLVES* (1972) (after an Eskimo girl runs away from an unhappy marriage, she is accepted into a wolf pack whose members protect her); T. LIVY, *THE EARLY HISTORY OF ROME* 22 (A. de Selincourt trans. 1960) (describing the birth of Romulus and Remus, who, according to legend, were nursed by a she-wolf).

2. *Mahlandt v. Wild Canid Survival & Research Center*, 588 F.2d 626 (8th Cir. 1978).

The author is indebted to Mr. Eugene K. Buckley, Esq., attorney for defendant, Wild Canid, and Mr. P. Terence Crebs, Esq., one of the attorneys for plaintiffs, for providing the author with much background detail.

humans with whom she'd had contact in her short life. Hand-reared at the St. Louis Zoo,³ Sophie was known as a "gentle wolf who had proved herself to be good natured and stable during her contacts with thousands of children"⁴ Indeed, so gentle was she, that Kenneth Poos, as Director of Education for Sophie's owner, the Wild Canid Survival and Research Center ("Wild Canid"),⁵ had been displaying Sophie in schools and other institutions.⁶ To facilitate Sophie's hectic schedule, Mr. Poos kept Sophie, along with two "moofs,"⁷ behind a fence in his backyard.⁸ But since Sophie had jumped the fence the day before to nip at a nagging beagle, she was leashed to the fence by a six foot chain.⁹

Sadly, it was in the Poos' backyard where little Daniel was

3. The general curator of the St. Louis Zoo testified that Sophie was born at the zoo and kept available for physical contact with school groups and the general public in the Children's Zoo until she was six months old. She was then given to Wild Canid. Transcript of Trial at 60-61, *Mahlandt v. Wild Canid Survival & Research Center*, No. 76-606 C (2) (E.D. Mo. Nov. 9-11, 1977), *rev'd and remanded*, 588 F.2d 626 (8th Cir. 1978) [hereinafter cited as Transcript]. Zoo policy, including considerations of safety to visitors, the curator testified, required that Sophie be transferred out of the Children's Zoo when she was approximately five months old. *Id.* at 60, 62. The appellate court reported that Sophie was transferred at six months of age. 588 F.2d 626, 628 (8th Cir. 1978).

4. 588 F.2d 626, 628 (8th Cir. 1978). While the general curator of the St. Louis Zoo testified that "Sophie was a very gentle wolf," Transcript, *supra* note 3, at 63, he was unwilling to offer an opinion on the likelihood that her gentleness would have continued beyond six months, saying that that depended on the individual wolf and the circumstances. *Id.* at 62-66. See *infra* note 33.

5. "[Wild Canid] is a not-for-profit corporation devoted to the preservation of wild canids, particularly wolves, through education, conservation and research." Brief for Appellee Wild Canid at 2, *Mahlandt v. Wild Canid Survival & Research Center*, 588 F.2d 626 (8th Cir. 1978) [hereinafter cited as Appellee's Brief]. See also Transcript, *supra* note 3, at 15, 157-58. "Canids are members of the dog family such as domestic dogs, wolves, coyotes, jackals and foxes." Transcript, *supra* note 3, at 15.

6. 588 F.2d 626, 628 (8th Cir. 1978).

7. Moofs are half Malemute-husky and half wolf. Transcript, *supra* note 3, at 162. The two moofs in Mr. Poos' backyard that day were owned by him personally and not by Wild Canid. *Id.* For further discussion of the moof's possible role in *Mahlandt v. Wild Canid Survival & Research Center*, 588 F.2d 626 (8th Cir. 1978), see *infra* note 25.

8. 588 F.2d 626, 628-29 (8th Cir. 1978). Mr. Poos' house was located in St. Charles, Missouri. The neighborhood is a typical suburban community located near Washington University. Telephone interview with Eugene K. Buckley, Esq., attorney for Wild Canid (Feb. 28, 1984) [hereinafter cited as Buckley interview]. Telephone interview with P. Terence Crebs, Esq., attorney for Mahlandt (July, 1983) [hereinafter cited as Crebs interview].

Sophie was being kept at the Poos' house while awaiting construction of a new home at the Tyson Research Center, Washington University. Transcript, *supra* note 3, at 178-79. Mr. Poos had received complaints from his neighbors about the animals' howling, especially at night. *Id.* at 7, 113-14. There is no indication in the trial record, however, that any of Mr. Poos' neighbors had objected to the presence of the wolf or moofs for reasons of safety.

9. 588 F.2d 626, 628 (8th Cir. 1978).

found bleeding and bruised.¹⁰ The child's screams attracted the attention of a neighbor who, from his window nearly fifty yards away,¹¹ saw Daniel lying on his back. Sophie was straddling Daniel, their faces close together.¹² By the time Clarke Poos, Mr. Poos' teenage son, rescued Daniel,¹³ Sophie was standing back from the child, wailing.¹⁴

Almost at once, Daniel's mother was called, a policeman arrived, neighbors rushed in to help, and Mr. Poos returned home from a business trip.¹⁵ After seeing Daniel safely to the ambulance, Mr. Poos spoke to everyone gathered at the house.¹⁶ He then went to the office of Mr. Owen Sexton, President of Wild Canid, and left the following note: "Owen . . . Sophie bit a child"¹⁷ Later that day, Mr. Poos orally repeated the same message, "Sophie had bit a child" to Mr. Sexton.¹⁸ At a Wild Canid Board of Directors meeting about two weeks later, the minutes of the meeting reflect, "there was a great deal of discussion . . . about the legal aspects of the incident of Sophie biting [Daniel]."¹⁹

Now, while some bedtime stories begin at the beginning and end before dark, in this one, as is customary in the United States, little Daniel and his parents sued Mr. Poos, Mrs. Poos, and Wild Canid. The case, *Mahlandt v. Wild Canid Survival & Research Center*,²⁰ wound-up in a federal district court shortly after adoption of the new Federal Rules of Evidence.²¹ As luck would have it, too, the trial court held both Mr. Poos' statements and those in the minutes inadmissible in evidence against defendants under rule

10. *Id.* at 628-29.

11. Transcript, *supra* note 3, at 5.

12. 588 F.2d 626, 628 (8th Cir. 1978). The neighbor who testified at trial was a local attorney who was ill and home that day. Transcript, *supra* note 3, at 3-4. He carefully explained that he was too far away to see what the wolf was doing with her jaws. *Id.* at 5.

13. *See* 588 F.2d 626, 628 (8th Cir. 1978); Transcript, *supra* note 3, at 231.

14. 588 F.2d 626, 628 (8th Cir. 1978).

15. *Id.* at 628-29; Transcript, *supra* note 3, at 6, 176.

16. 588 F.2d 626, 628-29 (8th Cir. 1978).

17. *Id.* at 629.

18. *Id.*

19. *Id.*; *see also* Transcript, *supra* note 3, at 24-26.

20. No. 76-606 C(2) (E.D. Mo. Nov. 9-11, 1977), *rev'd and remanded*, 588 F.2d 626 (8th Cir. 1978).

21. The Federal Rules of Evidence became effective on July 1, 1975. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, codified at 28 U.S.C. §§ 101-1103 (1982); *see* 588 F.2d at 629. The incident in this case occurred on March 23, 1973. 588 F.2d at 628. The trial was held on November 9-11, 1977. Transcript, *supra* note 3, at 1.

801(d)(2).²²

Without these statements, and with no eyewitness to the event, the case turned largely on circumstantial evidence.²³ Had little Daniel climbed over the five foot high fence to visit Sophie, thereby injuring himself on the barbs on top?²⁴ Or had Sophie dragged little

22. See 588 F.2d at 630-31.

Plaintiffs did not offer any of the three statements for purposes of impeachment. Rather, they urged admissibility substantively only. Both Mr. Poos' statements and the Board minutes were offered under FED. R. EVID. 801(d)(2) (admissions of parties and parties' employees). See Transcript, *supra* note 3, at 21, 23-26, 145-46, 198-99, 201-05, 207-08. Mr. Poos' written note to Mr. Sexton was also offered under the hearsay exceptions for present sense impressions, FED. R. EVID. 803(1), excited utterances, FED. R. EVID. 803(2), and business records, FED. R. EVID. 803(6). Transcript, *supra* note 3, at 202-03. The trial court quickly disposed of the latter three exceptions, *id.* at 203-05, and they were not urged on appeal. In ruling Mr. Poos' note inadmissible against the defendants under rule 801(d)(2) as well, the trial judge emphasized declarant's lack of personal knowledge. The court seemed concerned that in the absence of an eyewitness to the event, the jury might overvalue Mr. Poos' statement. *Id.*

The Eighth Circuit, in reversing, summarized the lower court's rulings as follows:

The trial judge's rationale for excluding the note, the statement, and the corporate minutes, was the same in each case. He reasoned that Mr. Poos did not have any personal knowledge of the facts, and accordingly, the first two admissions were based on hearsay; and the third admission contained in the minutes of the board meeting was subject to the same objection of hearsay, and unreliability because of lack of personal knowledge.

588 F.2d at 629.

23. After voir dire, Daniel was ruled incompetent to testify, both because of his age at the time of the event and because he had told several different versions of the event. Transcript, *supra* note 3 at 133-34, 143-44. The trial judge also pointed out that the version Daniel told on voir dire, see *infra* note 25, would have weakened plaintiffs' position at trial. Transcript, *supra* note 3, at 143-44. Plaintiff's counsel did not disagree with the judge's observations, and did not "object or except" to the ruling on Daniel's competency. *Id.* at 144.

There was a question raised whether, despite his denials, Clarke Poos had seen Sophie attack Daniel. In a deposition, Daniel's mother, Mrs. Curry, said that one of the two Poos' teenage children (Clarke or Dee Dee) had told her, the day of the event, that Sophie was "eating" Daniel when Daniel was found in the backyard. At the time of that deposition, however, Mrs. Curry could not remember which of the two Poos' children had made the statement. *Id.* at 297-99. At trial, only Clarke Poos was shown to have seen Daniel in the backyard. Mrs. Curry testified at trial that she had searched her memory since her deposition and now remembered that it was Clarke who had uttered the statement. *Id.* at 297, 303-04. See 588 F.2d at 628. She was, therefore, permitted to testify to the statement. In response to the cross-examiner's question whether her first failure to remember who had made the statement, or her trial testimony was true, Mrs. Curry said the first statement was true for the deposition, and the second was true for the trial. *Id.* at 307-09. Clarke Poos' deposition was offered in evidence since he was out of state at the time of trial. *Id.* at 210. In his deposition, Clarke denied making the statement to Daniel's mother, *id.* at 235, and said he had not seen what happened. *Id.* at 238.

24. Supplementary Transcript of Opening Statements and Closing Arguments at 39-40 (Defendants' Closing Argument), *Mahlandt v. Wild Canid Survival & Research Center*, No. 76-606 C(2) (E.D. Mo. Nov. 9-11, 1977), *rev'd and remanded*, 588 F.2d 626 (8th Cir. 1978) [hereinafter cited as Supplementary Transcript].

Daniel under the fence, thereby causing lacerations both from the barbs at the fence bottom and her teeth?²⁵

Dr. Michael Fox, an expert on wolf psychology and behavior and a director of Wild Canid,²⁶ testified, on the basis of personal experience, that Daniel's scars were inconsistent with wolf bites.²⁷ Mr. Mahlandt, Daniel's father, testified that some of the scars looked like marks from the fence.²⁸ Other scars, he said, especially a puncture mark on Daniel's leg looked more like bites.²⁹ Moreover,

25. *Id.* at 47 (Plaintiffs' Rebuttal); *see id.* at 27 (Plaintiffs' Closing Argument). The moofs' role in the events in question was not explored at trial because the plaintiffs' only theory was that Sophie, a wild animal, was alone responsible for Daniel's injuries. *See* Transcript, *supra* note 3, at 144. While not explained, the configuration of defendants' insurance may have dictated this choice.

It is interesting to note, however, that on voir dire, little Daniel, who was eight years old by the time of trial, *id.* at 46, told the judge that he was pulled under the Poos' fence by another animal, not Sophie: "I know it wasn't Sophie, so it was either Wolf-Wolf or Jethroe." *Id.* at 141. Mr. Poos testified that Jethroe was a wolf who sometimes visited his backyard, but was not there that day. *Id.* at 189. Wolf-Wolf was one of the moofs. *Id.* at 106. Since Daniel was ruled incompetent to testify, *supra* note 23, he did not relate this statement to the jury.

Clarke Poos, whose deposition was received in evidence at trial, *supra* note 22, testified that Daniel occasionally played near the fence surrounding the Poos' backyard, sometimes throwing things into the backyard and poking sticks through the fence for the animals to bite. *Id.* at 222-23. While Sophie would ignore Daniel, the moofs sometimes played with the sticks. *Id.* at 251.

Plaintiffs did not urge a theory of attractive nuisance, foreseeable trespass, or the like, and no instruction on such theories was given to the jury.

26. Dr. Fox testified that he was Research Director of the Institute for the Study of Animal Problems, a division of the Humane Society of the United States. At the time of trial, he held the following degrees: Doctor of Veterinary Medicine (D.V.M.), Doctor of Philosophy (Ph.D.) in psychology and biology, and Doctor of Science in Animal Behavior. He had studied the behavior of wolves and other canids for 15 years and taught courses in animal behavior at Washington University for nine years. In addition, he published a nationally syndicated newspaper column entitled "Ask Your Vet." *Id.* at 259-64.

27. Transcript, *supra* note 3, at 269-72. *See* 588 F.2d at 629. Dr. Fox testified that he was once bitten by a domesticated wolf. The wolf was "not socialized to [him, but only] to one man and had had very limited exposure to people." Transcript, *supra* note 3, at 267. Dr. Fox opined that the wolf bit him because he (Dr. Fox) was threatening the wolf's "sexual identity." *Id.* at 286. The wolf, Dr. Fox explained, was "very jealous of my presence because his female was in heat and she had visited me as wolves will do." *Id.* at 267. Dr. Fox distinguished that wolf's behavior from Sophie's likely behavior. The wolf that bit him, Dr. Fox opined, was "not a normal wolf," *Id.* at 286, and, unlike Sophie, was not socialized to people generally, *see infra* notes 24-25 and accompanying text, but only to one man. Dr. Fox testified that in addition to his own wounds, he had seen one other wolf bite. *Id.* At the trial, Mr. Poos was not qualified as an expert on wolves, nor was he shown to have any familiarity with wolf bites.

28. 588 F.2d at 629; Transcript, *supra* note 3, at 128-29.

29. Transcript, *supra* note 3, at 128-29.

Daniel's doctor believed that Daniel's wounds were caused solely by wolf bites. Her testimony regarding the cause of Daniel's injuries was ruled inadmissible by the court, however, because her opinion was apparently based solely on history given to her at the hospital by either Daniel, his mother, or the emergency room physician. *Id.* at 31-36.

when Daniel was rescued, one of the cowboy boots he had been wearing was off his foot, lying some distance away.³⁰ Daniel's mother who had unfortunately thrown away the boot, testified that it looked "ripped off pretty badly."³¹

Of course, there was Sophie's previous and subsequent behavior to consider. Dr. Fox opined that wolves are timid creatures.³² Hand-raised³³ and socialized to people, they behave in an affectionate manner toward children.³⁴ That Sophie was straddling Daniel and wailing afterward, he said was a friendly gesture, indicating either "come here, . . . or I want to give you attention and nurture you."³⁵ In light of Sophie's history of gentle behavior, her attack on the yapping beagle the day before meant nothing. "Wolves are fully aware of whom they are attacking . . ." Dr. Fox explained.³⁶

The jury found for defendants. Plaintiffs appealed.³⁷ The appellate court reversed, remanding for a new trial.³⁸ The lower court committed prejudicial error at the trial, said the court of appeals, by ruling inadmissible Mr. Poos' statements, "Sophie bit a child."³⁹

The parties settled.⁴⁰ Little Daniel fully recovered from his wounds, although some small scarring may remain.⁴¹ Sophie was sent to a wildlife preserve near Joliet, Illinois,⁴² where she was last

30. *See id.* at 104.

31. *Id.* at 104-05, 108. Daniel's mother also said that the boot was "torn open, it was torn almost completely apart." *Id.* at 104.

32. *Id.* at 263.

33. Dr. Fox explained that a hand-raised wolf "means taking a wolf cub, . . . before it's [sic] eyes open and bottle raising it." *Id.* He testified that the hand-raised wolf "naturally transfers it's [sic] whole allegiance and behavior and emotions towards the human foster parent in a way the human being becomes a surrogate wolf." *Id.* Dr. Fox stated that he had never seen an aggressive hand-raised wolf. *Id.* at 264. *But see supra* note 27.

34. Transcript, *supra* note 3, at 265.

35. *Id.* at 275, 276.

36. *Id.* at 276-77.

37. 588 F.2d 626.

38. *Id.*

39. *Id.*

40. Buckley interview, *supra* note 8; Crebs interview, *supra* note 8.

41. Buckley interview, *supra* note 8; Crebs interview, *supra* note 8. Both Mr. Crebs and Mr. Buckley said that while some of Daniel's facial scars were still visible at trial, they were "not disfiguring." Buckley interview, *supra* note 8; Crebs interview, *supra* note 8. Mr. Crebs believed that Daniel may have had some further plastic surgery a few years after the trial which reduced even the scarring visible at the time of the trial. Crebs interview, *supra* note 8. Daniel's doctor testified at trial that, other than the scars, there was no definite indication that Daniel suffered any physical disability from the incident. Transcript, *supra* note 3, at 50. Immediately after the incident, however, Daniel had appeared severely injured with possible facial nerve damage and lacerations requiring 200 or more stitches in his face alone. *Id.* at 40.

42. The trial transcript indicates that Sophie was sent to a genetic research center in

seen walking into the sunset.

But the moral of the story cannot yet be stated, and the prudent reader will try to stay awake. We will never know whether Sophie bit Daniel. However, the appellate court opinion in the case revealed hearsay wolves right in the middle of the Federal Rules of Evidence, dressed like admissible "not hearsay" sheep.

Mr. Poos' and the Board of Directors' utterances were not based on their own observations, nor even the observations of any of the people Mr. Poos had spoken with after the event.⁴³ Since no one saw the incident, these utterances were, at best, pure speculation. At worst, they were reports of the speculation of others. Nevertheless, the appellate court held, correctly, they were fully admissible under rule 801(d)(2) to prove the fact asserted in them: Sophie bit Daniel.⁴⁴

Mr. Poos' statements were admissible under rule 801(d)(2)(A) because he was a party to the litigation.⁴⁵ Therefore, according to the rule, they became "not hearsay."⁴⁶ His statements were admissible against his employer, Wild Canid, because it employed him at the time of his utterance, and the statements concerned a matter within the scope of his employment.⁴⁷ According to rule 801(d)(2)(D), his statements thus became Wild Canid's own "not hearsay" statements.⁴⁸ That they were made *to* the employer was of no concern, as the legislative history of rule 801(d)(2)(C) showed.⁴⁹ The Board of Directors' minutes also became Wild Canid's "not

Kankakee, Illinois. Transcript, *supra* note 3, at 186. Both Mr. Crebs and Mr. Buckley said, however, that it was similar to a "game preserve." Buckley interview, *supra* note 8; Crebs interview, *supra* note 8. Mr. Buckley remembered hearing that the place was later closed and Sophie, as far as he knows, has not been seen since. Buckley interview, *supra* note 8.

43. At the trial, Mr. Poos was not qualified as an expert on wolves, nor was he shown to have any familiarity with wolf bites. Transcript, *supra* note 3.

44. 588 F.2d at 630-31.

45. *Id.* at 630.

46. FED. R. EVID. 801(d)(2)(A) provides that: "A statement is not hearsay if— The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity."

47. 588 F.2d at 631.

48. FED. R. EVID. 801(d)(2)(D) provides that: "A statement is not hearsay if— The statement is offered against a party and is . . . (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

49. 588 F.2d at 630 (citing FED. R. EVID. 801(d)(2)(C) advisory committee note). The court stated that the rationale utilized by the drafters applied equally to the subsection at issue. *Id.* at 630.

hearsay" statements and were admissible under rule 801(d)(2)(C),⁵⁰ since the Board had authority to recite its conclusions in the minutes.⁵¹

The appellate court did leave the district court some discretion.⁵² Under rule 403, the trial court could exclude these "not hearsay" utterances if their probative value was substantially outweighed by their prejudicial effect.⁵³ However, lack of personal knowledge alone, as in Mr. Poos' utterances, would not suffice.⁵⁴ The lower court, therefore, had abused its discretion by excluding them.⁵⁵ The Board's minutes, however, were repetitive and admissible solely against Wild Canid. Therefore, it was not an abuse of discretion to exclude them.⁵⁶

For those who prefer the tidy endings of bedtime stories, here are my conclusions:

Party admissions are properly classified as hearsay. Under the assertion-oriented definition of hearsay in Federal Rule of Evidence 801(c), all party assertions offered for their truth are hearsay. Under a declarant-oriented definition of hearsay, a few party admissions may be properly defined as "not hearsay," but that possibility neither justifies rule 801(d)(2)(A)'s definition of them all as "not hearsay" nor the wholesale admissibility commanded by that rule.

Party admissions should be reclassified as an exception to the hearsay rule in the Federal Rules of Evidence. Requirements of reliability need not be added so long as there is judicial discretion to apply the exception consistently with its true, and limited, rationale. This discretion should be made explicit in the rule. In accordance with the exception's rationale, Mr. Poos' admissions would be properly admissible against him as a party. The Board of Directors' ut-

50. 588 F.2d at 631. However, the court held that the minutes were not admissible against Mr. Poos because: "None of the conditions of 801(d)(2) cover the claim that minutes of a corporate board meeting can be used against a non-attending, non-participating employee of that corporation." *Id.*

FED. R. EVID. 801(d)(2)(C) provides that: "A statement is not hearsay if— . . . The statement is offered against a party and is . . . (C) a statement by a person authorized by him to make a statement concerning the subject."

51. 588 F.2d at 631.

52. *Id.* at 630-31.

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

54. 588 F.2d at 631.

55. *See id.*

56. *Id.*

terance would be properly admissible against Wild Canid. In other cases involving different substantive policies or issues, however, similarly unreliable party admissions, especially those not based on personal knowledge, would be excluded.

Agents' and employees' declarations, whether authorized or not, are hearsay. They are not properly treated as party admissions except in narrow circumstances. No substantive nor sound evidentiary policy commands the attribution of these statements to party-employers. Therefore, Federal Rule of Evidence 801(d)(2)(C) and (D) should be merged and reclassified as a separate exception to the hearsay rule. Requirements of personal knowledge and reliability should be added. Under this new exception, Mr. Poos' utterances would not be properly admissible against Wild Canid.

I. PARTY ADMISSIONS—ARE THEY PROPERLY CLASSIFIED AS HEARSAY OR NOT HEARSAY AND WHAT DIFFERENCE DOES THE ANSWER MAKE?

By dint of their status, "admissions of a party-opponent", Mr. Poos' utterances were only the latest example of a class of evidence that must be ranked among the least trustworthy of all proof admissible at trial.⁵⁷ Party statements are admissible even if the party lacked personal knowledge of the facts asserted,⁵⁸ was expressing his

57. Indeed, many party admissions are so unreliable that one commentator has called for complete abolition of the practice of admitting them solely on the basis of the declarant's status. See generally Hetland, *Admissions in the Uniform Rules: Are They Necessary?* 46 IOWA L. REV. 307 (1961). While this author does not go so far, it must be conceded that the reasons urged by Hetland for his conclusion are even more valid under the Federal Rules of Evidence than they were under the Uniform Rules of Evidence which body of rules formed the subject of his article. Hetland stated:

Admissions under the common law of evidence can be justified primarily by the great need for a hearsay exception that is capable of elasticity and expansion to liberalize the general hearsay ban. This same reasoning does not prevail under the Uniform Rules. The Rules contain sufficient liberalization of the hearsay exceptions so reliability of the hearsay admitted in evidence can assume a position of importance.

Id. at 330. (On the extent of liberalization in the Federal Rules, see *infra* note 149.) However, as explained more fully, see *infra* text accompanying notes 150-88, there is still an identifiable policy to be served by the use in evidence of otherwise unreliable party admissions in some cases. If judicial discretion is recognized and exercised wisely, the norm would ultimately accord with Hetland's purpose.

58. C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 263, at 632 (2d ed. 1972); 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1053, at 16 (J. Chadbourn rev. ed. 1972); see also Falknor, *Vicarious Admissions and the Uniform Rules*, 14 VAND. L. REV. 855, 860 (1961). The doctrine creates an anomaly: Parties' out-of-court uninforming utterances are admissible, but their in-court testimony not based on personal knowl-

own opinion or adopting that of another,⁵⁹ and even if the statement was self-serving when made.⁶⁰ Out-of-court assertions of parties who were asleep,⁶¹ hysterical,⁶² insane,⁶³ or otherwise testimonially incompetent⁶⁴ when they uttered their statements, have all been admit-

edge would not be admissible. *Id.*

59. See McCORMICK, *supra* note 58, at § 264; 4 J. WIGMORE, *supra* note 58, at § 1053, at 21.

Mahlandt v. Wild Canid Survival & Research Center, 588 F.2d 626 (8th Cir. 1978), is an example of how the uninformed opinions of *others* can be admitted into evidence through a party admission. It was unclear whether Mr. Poos was uttering his own speculation or the uninformed speculation of others when he penned his note, "Sophie bit a child." See *id.* at 629-30. The appellate court ruled that it was to be treated as Mr. Poos' own utterance when offered against him, both because it did not, in form, directly purport to express someone else's opinion and because he had adopted it as his own. *Id.* at 630. The only evidence that he adopted it as his own, however, was his repetition of it. Had he said, "I was told, . . ." the court suggested, there might have been some reason to inquire whether the original assertion was covered by a hearsay exception. The court cited *Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n*, 551 F.2d 1136 (8th Cir. 1977). For a discussion of the *Cedeck* case, see *infra* notes 246-55 and accompanying text. See also *Reed v. McCord*, 160 N.Y. 330, 341, 54 N.E. 737, 740 (1899).

60. 4 J. WIGMORE, *supra* note 58, § 1048, at 5-6. See, e.g., *Staniewicz v. Beecham, Inc.*, 687 F.2d 526, 530 (1st Cir. 1982) (statement need not be against the party's interest when made to be an admission under FED. R. EVID. 801(d)(2)); *Auto-Owners Ins. Co. v. Jensen*, 667 F.2d 714, 722 (8th Cir. 1981) (admission need not be against party's interest when made, but must be contrary to party's position at trial).

61. *State v. Morgan*, 35 W. Va. 260, 266, 13 S.E. 385, 386-87 (1891); see *Sutton v. State*, 237 Ga. 418, 419, 228 S.E.2d 815, 817 (1976) (statement admissible although made while defendant was allegedly asleep or in drunken stupor); cf. *State v. Posten*, 302 N.W. 2d 638, 641-42 (Minn. 1981) (statement uttered while complainant was asleep is admissible, but not sufficient to support conviction). But see *Brock v. United States*, 223 F.2d 681 (5th Cir. 1955); *People v. Robinson*, 19 Cal. 40 (1861) (words uttered while asleep are inadmissible; since they are not the product of conscious thought, they do not constitute evidence of guilt of a crime); *People v. Knatz*, 76 A.D.2d 889, 889, 428 N.Y.S.2d 709, 711 (1980).

62. *Friedman v. United Rys. Co. of St. Louis*, 293 Mo. 235, 244-45, 238 S.W. 1074, 1076 (1922).

63. See *Fountain v. McCallum*, 194 Ga. 269, 275, 21 S.E.2d 610, 614-15 (1942) (statement made by a party who was adjudged insane prior to the utterance); see also *United States v. Buttram*, 432 F. Supp. 1269, 1272 (W.D. Pa. 1977) (agent's insanity does not render his utterances inadmissible under federal rule that treats his utterances as that of party-employer), *aff'd mem.*, 568 F.2d 770 (3d Cir. 1978).

According to Professor Morgan, the admitter must, at least, "have been in such mental condition as to be able to understand what he was saying." E.M. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 243 (J. Weinstein 5th ed. 1976). This prerequisite may account for the conflicting opinions on statements made while asleep. *Id.* See cases cited *supra* note 61.

Courts also have admitted statements made by declarants under medication. *E.g.*, *Currier v. Grossman's of N.H.*, 107 N.H. 159, 162, 219 A.2d 273, 275 (1966) (writing made while under sedation is admissible as party admission).

64. For instance, admissions by minors have been held admissible. *E.g.*, *De Souza v. Barber*, 263 F.2d 470, 476-77 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959); *Atchison, T. & Santa Fe Ry. v. Potter*, 60 Kan. 808, 810-11, 58 P. 471, 471-72 (1899); *Smith v. Illinois Cent.*

ted into evidence. The only foundation required for party admissions is a showing that the party uttered the statement, (the testimony of the offering party will suffice), and an inconsistency between the statement and the party's position at trial.⁶⁵

In support of this mysterious method of finding truth, it has been observed that parties' extrajudicial statements were admitted in evidence against them even before the common law developed a hearsay rule.⁶⁶ History unsupported by enlightened reason, however, is no excuse. Commentators have therefore sought to explain the use of party admissions by modern methods of classification. One group holds that party admissions are admissible because they are analytically "not hearsay."⁶⁷ The other group concedes the hearsay nature of party admissions, but argues that they constitute a desirable exception to the hearsay rule.⁶⁸

While technically engaged in a more difficult chore, those who justify admissibility on "not hearsay" grounds gain a significant advantage over those who urge admissibility under an exception. Calling party admissions "not hearsay" requires no further explanation

R.R. Co., 214 Miss. 293, 307, 58 So. 2d 812, 817 (1952); *Rolfe v. Olson*, 87 N.J. Super. 242, 244-45, 208 A.2d 817, 818-19 (1965); *Berggren v. Reilly*, 95 Misc. 2d 486, 407 N.Y.S.2d 960 (Sup. Ct. 1978) (mem.). *But see* *Admundson v. Tinholt*, 228 Minn. 115, 36 N.W.2d 521 (1949) (statement not admissible since party lacked capacity to narrate what he observed).

65. McCORMICK, *supra* note 58, § 262, at 628-29, § 277, at 671 (unless there is an inconsistency between the admission and the party's position at trial, there is no relevance to the admission, and it would be excluded on that basis); *see* 4 J. WIGMORE, *supra* note 58, at § 1048 at 4-5; FED. R. EVID. 801(d)(2)(A).

66. E.M. MORGAN, *supra* note 63, at 241.

67. 4 J. WIGMORE, *supra* note 58, § 1048, at 4-5; Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 488, 564, 586 (1937). The Federal Rules of Evidence classify party admissions as "not hearsay." FED. R. EVID. 801(d)(2). In support of this classification, the Advisory Committee cites E.M. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 265 (1962), 4 J. WIGMORE, *supra* note 58, and Strahorn, *supra*. FED. R. EVID. 801(d)(2) advisory committee note. Morgan, however, argued that admissions were analytically hearsay, but an exception to the rule. *See* sources cited *infra* note 46. His reasoning is superficially quite close to Wigmore's, and the editor of Wigmore's treatise cites one of Morgan's earlier articles, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921), as instrumental in causing revision of Wigmore's own chapters on the subject. 4 J. WIGMORE, *supra* note 58, § 1048, at 2-3 n.1. For a further discussion of this first position, *see infra* notes 69-149 and accompanying text.

68. Lev, *The Law of Vicarious Admissions—An Estoppel*, 26 U. CIN. L. REV. 17, 32 (1957); E.M. MORGAN, *supra* note 63, at 241. Morgan has reiterated this position in several articles. *See generally* Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921) [hereinafter cited as Morgan, *Admissions as an Exception*]; Morgan, *Admissions*, 12 WASH. L. REV. 181 (1937); Morgan, *Some Suggestions for Defining and Classifying Hearsay*, 86 U. PA. L. REV. 258 (1938); Lev, *The Law of Vicarious Admissions—An Estoppel*, 26 U. CIN. L. REV. 17, 32 (1957).

for using them in evidence. By definition, the adversarial process provides sufficient opportunity for demonstrating to the trier of fact ("Trier") the true value of all "not hearsay" proof.

A. *The "Not Hearsay" Argument Under the Assertion-Oriented Definition of Hearsay Contained in the Federal Rules*

In rule 801(a)-(c), the Federal Rules of Evidence adopt what has been termed an assertion-oriented definition of hearsay.⁶⁹ This definition focuses on whether the statement will be used for the truth of the facts asserted in it.⁷⁰ It seems plain that any out-of-court party statement offered in evidence for its truth should, consistent with this definition, be classified as hearsay.

Thus, Mr. Poos' utterance in *Mahlandt v. Wild Canid Survival & Research Center*,⁷¹ "Sophie bit a child,"⁷² offered to prove the very fact asserted, is logically defined as hearsay under rule 801(c).⁷³ Instead, in the very next federal rule, 801(d), parties' statements are separately classified as "not hearsay."⁷⁴ In support of this anomaly, the Advisory Committee cited Wigmore, and an impressive but confusing article by Professor Strahorn.⁷⁵ Wigmore's conclusion was based on a declarant-oriented definition of hearsay⁷⁶ (one that fo-

69. FED. R. EVID. 801(c) defines "[h]earsay" [as] 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 asserted." See *id.* advisory committee note.

Professor Park coined the terms "assertion-oriented" and "declarant-oriented" in describing hearsay definitions. Park, McCormick on Evidence *and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers*, 65 MINN. L. REV. 423, 424 (1981).

70. Park, *supra* note 69, at 424.

71. 588 F.2d 626 (8th Cir. 1978).

72. *Id.* at 629.

73. FED. R. EVID. 801(c). See *supra* note 69.

74. FED. R. EVID. 801(d)(2)(A)-(D). Also anomalously classified as "not hearsay" in rule 801(d) are: witnesses' prior inconsistent statements, prior identifications, and co-conspirators' utterances. For a good blueprint of the definitional inconsistencies in the Federal Rules' hearsay section, see Blakey, *You Can Say That If You Want—The Redefinition of Hearsay in Rule 801 of the Proposed Federal Rules of Evidence*, 35 OHIO ST. L.J. 601 (1974) [hereinafter cited as Blakey, *The Redefinition of Hearsay*]. See also Blakey, *Moving Towards an Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina*, 13 N.C. CENT. L.J. 1 (1981); Blakey, *A Short Introduction to the Ohio Rules of Evidence*, 10 CAP. U.L. REV. 237 (1980); Blakey, *An Introduction to the Oklahoma Evidence Code: The Thirty-Fourth Hearsay Exception*, 16 TULSA L.J. 1 (1980).

75. FED. R. EVID. 801(d)(2)(C) advisory committee note. The Advisory Committee also cited E.M. MORGAN, *supra* note 67, at 265, but Morgan, as has already been stated, argued that party admissions were admissible as an exception to the hearsay rule. See *supra* notes 67-68. Since his work does not support the Rules' classification of these statements as "not hearsay," it is dealt with separately in this article. See *infra* notes 233-95 and accompanying text.

76. 4 J. WIGMORE, *supra* note 58, § 1048 at 4; see *infra* note 138.

cuses on the need for cross-examination of the declarant⁷⁷) and is considered more fully in the next section of this article.⁷⁸ Strahorn's conclusion,⁷⁹ based on an assertion-oriented definition similar, but not identical, to that incorporated in rule 801, is treated in this section.

Strahorn's observations about admissions are part of a larger work in which he attempted to define and categorize all extrajudicial statements as hearsay, not hearsay (hearsay rule inapplicable), and exceptions to the hearsay rule.⁸⁰ Since all true exceptions to the rule required need and reliability, Strahorn reasoned, admissions could not comfortably be classified as an exception.⁸¹ That observation, of course, does not automatically prove that admissions are properly classified as "not hearsay," although it appears to have strongly influenced the Advisory Committee's choice of classification.⁸² Though not subject to the usual conditions of hearsay exceptions, admissions might still be hearsay, but constitute an unusual exception or be hearsay and inadmissible.

Strahorn, therefore, went on to urge that admissions were "not hearsay" because they fit into a larger category of "not hearsay" utterances called "relevant circumstantial conduct."⁸³ Why Strahorn turned parties' words into conduct is something of a mystery, but not entirely inconsistent with his overall approach to the definition of hearsay. Indeed, Strahorn used a definition of hearsay that can only be called assertion-oriented with a vengeance.

As recently described elsewhere, the term "assertion" or "statement" in a hearsay rule (describing those out-of-court utterances classified as hearsay) is capable of several meanings.⁸⁴ The choice of meaning affects the type and number of statements that will be clas-

77. See Park, *supra* note 69, at 424.

78. See *infra* notes 125-49 and accompanying text.

79. See generally Strahorn, *supra* note 67, at 484-509, 564-88.

80. Strahorn, *supra* note 67, at 484-509; 564-88.

81. See *id.* at 493, 570.

82. See FED. R. EVID. 801(d)(2) advisory committee note.

83. Strahorn, *supra* note 67, at 571.

84. Wellborn, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 71-74 (1982). Wellborn suggests three possible meanings: first, only direct, literal assertions of the facts the statement is offered to prove, *id.* at 71; second, all statements "intended" to assert the matter it is offered to prove (which include statements directly asserting that matter), *id.*; and third, all of the above plus all statements offered to prove an implied belief of the declarant, *i.e.* the doctrine of *Wright v. Tatham*, 7 A & E. 313, 112 Eng. Rep. 488 (Exch. ch. 1837), *aff'd*, 5 C. & F. 670, 7 Eng. Rep. 559 (H.L. 1838). Wellborn, *supra*, at 70-71.

sified as hearsay and thus admissible only if reliable within the meaning of exceptions to the rule. Strahorn's meaning of the term, which is not among those arguably intended by rule 801(c),⁸⁵ results in classifying as hearsay the fewest imaginable out-of-court utterances.⁸⁶

According to Strahorn, an utterance is hearsay only if it has what he calls "narrative content," i.e., "on its face it purports to narrate any then past and relevant event."⁸⁷ An assertion that does not "tell any story, or any story of possible relevance in the instant case" is "not hearsay" according to Strahorn's definition.⁸⁸

Strahorn's strained and strange definition of "assertion" is particularly hard to understand in light of the purpose he claims for the hearsay rule. In line with tradition, he observed, the hearsay rule rests on the probably valid assumption that all human testimony is untrustworthy because of the normal possibility of defects in the perception, recollection, and narrational processes of the individual witness.⁸⁹ To guarantee testimonial accuracy, he argued, the hearsay rule is designed to protect all trial devices toward that end: "oath, perjury penalty, sequestration, discovery, publicity, confrontation, and cross-examination."⁹⁰ But there was an already-crafted hearsay definition that more efficiently effected this purpose than Strahorn's own: the declarant-oriented definition.⁹¹ By defining as hearsay any

85. Rule 801(c) classifies as hearsay those out-of-court statements that are offered for the truth of the matter asserted. FED. R. EVID. 801(c). However, "verbal acts" are excluded from this definition. *Id.* advisory committee note.

86. See *infra* note 88 and accompanying text.

87. Strahorn, *supra* note 67, at 489.

88. *Id.* Strahorn's definition thus includes even fewer assertions than the least inclusive of the groups identified by Wellborn, viz., direct, literal assertions of the facts the statement is offered to prove. See *supra* note 84. Strahorn's story-telling definition would presumably exclude as "not hearsay" an exclamation such as "you are a murderer," offered to show that the target of the statement committed murder, since it does not purport to narrate a then *past* event. However, Wellborn's least-inclusive category would undoubtedly include such a statement since it is a direct assertion of the fact it is offered to prove. See Wellborn, *supra* note 84, at 64-65, 71-72.

89. Strahorn, *supra* note 67, at 485.

90. *Id.* at 484. Strahorn thus claimed an even greater purpose for the hearsay rule than any other commentator, see *infra* note 92, while more narrowly defining hearsay than any other.

91. See Park, *supra* note 69, at 424; *supra* notes 76-77 and accompanying text.

At the time Strahorn wrote his article, Professor Morgan was widely espousing a declarant-oriented definition of hearsay that Strahorn tacitly rejected in his own article, Strahorn, *supra* note 67, at 569-579. See, e.g., Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929) [hereinafter cited as Morgan, *Vicarious Admissions*]; Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 HARV. L. REV. 712 (1926); Mor-

declaration not fully cross-examinable, a declarant-oriented definition identifies many more of the statements in need of these trial-conditioning devices than does an assertion-oriented definition.⁹² In any event, there was certainly no need for Strahorn to invent an even narrower definition than those already in use.

Strahorn's initial assertion-oriented approach may have been dictated by his premise that testimonial accuracy, rather than the adversarial opportunity to expose inaccuracies, is the goal of the hearsay rule.⁹³ Still, it is hard to understand how the distinction he urges between narrative and non-narrative statements fosters that premise. Strahorn does not claim that testimonial trustworthiness is a feature of the non-narrative assertions he classifies as "not hearsay." Rather, he argues that such statements are capable of evidentiary use regardless of their truth or falsity.⁹⁴

Whatever his original motive, Strahorn's sorting of statements according to their narrative, or story-telling, qualities does not withstand analysis. Strahorn reasons that "no problem of trustworthiness arises"⁹⁵ if Trier is confined by instruction to using the non-narrative statements as "relevant circumstantial conduct."⁹⁶ A non-narrative

gan, *Admissions as an Exception*, *supra* note 68. Later, Morgan collected and expanded on his definitional theories in his famous article, Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948) [hereinafter cited as Morgan, *Hearsay Dangers*].

92. See generally Morgan, *Hearsay Dangers*, *supra* note 91, at 177-79; Park, *supra* note 69, at 424; Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974). However, no current definition of hearsay, and certainly not Strahorn's, protects against loss of sequestration, discovery, and publicity. The only conceivable definition that would accomplish these goals would include *all* out-of-court statements, whether offered for their truth or not.

93. This is the basic policy difference between all assertion-oriented and declarant-oriented commentators. The declarant-oriented approach, however, is logically connected to its policy root. See Morgan, *Hearsay Dangers*, *supra* note 91, at 183-85. The purpose of the rule is to protect cross-examination, see *supra* text accompanying notes 76-77, and the declarant-oriented definition simply attempts to identify as hearsay any limitation on the opportunity to cross-examine a witness. The assertion-oriented approach, however, seems based on a logical and empirical fallacy. The reasoning underlying the definition is, presumably: the goal of the trial is to find the "truth." The hearsay rule fosters that goal by assuring that only "true" statements are admitted in evidence. If a statement is not offered for the "truth" of its contents, there is no danger in relying on it, and hence, it is not hearsay. The first fallacious assumption is that there is a knowable, objective "truth" about human utterances. Clearly, we cannot know if a human utterance about the past is the "truth"—the most we can hope to know is whether it was *intended* to be as close to the truth as declarant could make it. The second fallacy—the notion that Trier cannot be misled by using an insincerely uttered statement unless it is offered for the objective "truth"—flows from the first.

94. Strahorn, *supra* note 67, at 492.

95. *Id.*; see *id.* at 489.

96. See *id.* at 571.

statement may be circumstantially relevant to the case, he argues, because of "the relation between the utterance and . . . the non-contemporaneous conduct of the speaker."⁹⁷ Assuming Trier attempted to follow the instruction to use such statements only as "circumstantial conduct," however, it is impossible to find an inferential process that does not involve reliance on declarant's testimonial capacities—the very capacities Strahorn earlier describes as the major ingredients of trustworthiness.⁹⁸

Strahorn's own examples illustrate the point. He claims that "[a] dog owner's warning to a neighbor to 'beware the dog,' circumstantially proves the owner's knowledge of the dog's vicious nature,"⁹⁹ and so is "not hearsay." Similarly, "[a] mother-in-law's advice to her son to return to his wife," Strahorn claims, provides circumstantial proof that "she lacked malice toward her daughter-in-law" or "did not alienate [her son's] affections."¹⁰⁰

Presumably, Strahorn reasons that the dog owner's statement might show his knowledge of the dog's nature even if he did not really want his neighbor to "beware."¹⁰¹ This reasoning, however, overlooks more crucial sincerity problems. The statement would not logically tend to prove the dog owner's knowledge if he uttered it as a joke or if he was intentionally lying about the dog's nature by innuendo. The statement also would not show the dog owner's knowledge if he had misspoken, intending to say instead "beware the hog." And if the statement were offered to show the dog's viciousness, it could not be logically probative of that fact if the dog owner had misperceived or misreclected. Thus, Trier cannot possibly use the utterance as circumstantially probative of the facts it is offered to prove without relying on the dog owner's testimonial capacities.

Strahorn's example of the mother-in-law's statement suggests an even more glaring error in analysis. The utterance only disproves the mother-in-law's alleged malice and attempts at alienation if she sincerely wanted her son to follow her command. If, despite her words, she hoped her son would act contrary to her advice to "return to his wife," her utterance would not tend to prove that she lacked malice toward her son's wife, nor to disprove any noncontemporane-

97. *Id.* at 492.

98. *See supra* text accompanying note 89. For a discussion of similar fallacies, see Park, *supra* note 69, at 428-35; Wellborn, *supra* note 84, at 55-64.

99. Strahorn, *supra* note 67, at 492.

100. *Id.*

101. *See id.*

ous behavior consistent with her real wish.

When Strahorn turns to admissions, he takes a strange ninety degree turn in his own hearsay definition. Although he places admissions in his "not hearsay," "relevant circumstantial conduct" category,¹⁰² he abandons entirely the distinction between narrative and non-narrative statements that he uses to justify creation of the category in the first place. According to Strahorn, *all* party assertions, in any form, may be viewed as circumstantial conduct and thus, "not hearsay."¹⁰³

All party admissions are circumstantially relevant despite their truth or falsity, Strahorn argues, because "[t]he fact of the utterance by the party and his opponent's desire to use it throw some light on the separate . . . conduct of the party speaker, viz., his conduct of the affair on which the instant case hinges."¹⁰⁴ Unfortunately, however, Strahorn does not explain how the latter party "conduct" is relevant to the factual issues to be decided by Trier. Had he paused to address that issue directly,¹⁰⁵ he might have avoided yet another hearsay error.

Instead, Strahorn draws an imperfect analogy to the formerly uniform use of prior inconsistent statements of the ordinary witness for impeachment purposes only.¹⁰⁶ Unlike the ordinary witness' inconsistent assertions, however, party admissions are admissible regardless of whether the party testifies or is even available to testify.¹⁰⁷ Strahorn is forced, therefore, to find the necessary inconsistency for his analogy in the party's pleadings: "[T]he unfavorable verbal conduct of a party litigant may be offered against him because of the circumstance of its inconsistency with the validity of his present contention by pleading."¹⁰⁸

Putting aside for the moment the ultimate relevance at trial of an inconsistency between the party's two extra-testimonial asser-

102. *Id.* at 571.

103. *Id.* at 573, 576.

104. *Id.* at 572.

105. This issue is addressed later in this article. See *infra* text accompanying notes 156-73.

106. Strahorn, *supra* note 67, at 571-73. Today, prior inconsistent statements are frequently accorded substantive value as well and some are even classified as "not hearsay." See, e.g., FED. R. EVID. 801(d)(1)(A); CAL. EVID. CODE § 1235 (West 1984). For a criticism of this practice, see Bein, *Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)*, 26 U.C.L.A. L. REV. 967 (1979).

107. See *supra* notes 58-65 and accompanying text.

108. Strahorn, *supra* note 67, at 573.

tions,¹⁰⁹ this arm of Strahorn's approach fails, too, because it does not avoid the pitfalls of his own definition of hearsay. Unlike the ordinary witness' in-court testimony, the party's pleading need not contain the party's personal knowledge of the facts, or ultimate facts, alleged. Instead, the only relevant requirement is that the pleading reflect the party's honest *belief*.¹¹⁰ Thus, in *Wild Canid*,¹¹¹ both defendants could deny in their answers that Sophie bit Daniel, even though no one had witnessed the event.

The difference between the functions of testimony and pleading permits the ordinary witness' prior inconsistent statement a logical status in the case independent of his extrajudicial testimonial capacities, but deprives party admissions of such status. Impeachment use of a witness' prior statement, regardless of the prior statement's truth, is logically possible because the role of the witness is to reproduce accurately events within his personal knowledge.¹¹² Thus, suppose Mr. Poos had testified at trial: "Sophie did *not* bite Daniel." To credit his testimony, Trier would rely on the accuracy of Mr. Poos' perception, recollection, sincerity, and narrational skill.¹¹³ Demonstration of a defect in any one capacity would be sufficient to discredit the whole of his testimony. Using Wigmore's approach, upon which Strahorn relied,¹¹⁴ if, instead, plaintiff shows that Mr. Poos once said, out of court, "Sophie bit a child," the very inconsistency proves that Mr. Poos, as a witness, is capable of error regardless of the particular defect involved.¹¹⁵ Since pinpointing a single defect would discredit Mr. Poos in his role as an ordinary witness,

109. The question is addressed later in this article. See *infra* notes 156-71 and accompanying text.

110. *E.g.*, FED. R. CIV. P. 11. It would obviously be counterproductive to require a party to have personal knowledge of the facts. As recently amended, rule 11 requires only that parties or their attorneys conduct a reasonable inquiry into the facts before filing a pleading. *Id.* "The signature of the attorney or party constitutes a certificate by him that he has read the pleading [and, in parts relevant here] to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . ." *Id.* The purpose of the change was to ensure that the person filing the document did so in good faith. *Id.* advisory committee note; see also GA. CODE ANN. § 9-11-11 (1982) (pleadings need not be verified).

111. 588 F.2d 626 (8th Cir. 1978).

112. See FED. R. EVID. 602; MCCORMICK, *supra* note 58 at § 10.

113. See MCCORMICK, *supra* note 58, § 245, at 581; 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 475-78 (3d ed. 1940); 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 876 (J. Chadbourn rev. ed. 1970) [hereinafter cited as J. WIGMORE 1970]; see also Morgan, *Hearsay Dangers*, *supra* note 91, at 177-79; Strahorn, *supra* note 67, at 484-88; Tribe, *supra* note 92, at 958.

114. Strahorn, *supra* note 67; see *supra* note 81 and accompanying text.

115. 3A J. WIGMORE 1970, *supra* note 112, § 1017, at 993.

showing an indefinite defect, which could be any one of the four testimonial capacities, is good enough.¹¹⁶ To use the prior statement for impeachment only, then, Trier need not accept it as a replacement for Mr. Poos' in-court testimony.¹¹⁷ While jurors may well have difficulty following an instruction to use a witness' prior statement solely for impeachment purposes and not for its truth,¹¹⁸ nevertheless, it is a plausible use that logically involves no hearsay dangers.

Since the function of pleading is different from the function of testimony, however, the logical process for discrediting the pleading is necessarily different. A pleading is not discredited by proof of an indefinite defect in the party's testimonial capacities because only one of those capacities, sincerity, is required for a pleading.¹¹⁹ Proof that Mr. Poos, as a party, is capable of errors in perception or memory would not logically weaken the force of his pleading. Arguably, too, his pleading is not discredited by showing errors in narration, for even a poorly narrated pleading, in which he honestly believed, would withstand a motion to dismiss for improper verification.¹²⁰

Instead, the inferential process logically necessary to discredit Mr. Poos' pleading on the basis of his inconsistent admission must narrow the reason for the inconsistency to his sincerity. Trier would have to eliminate the possibility that a testimonial defect other than insincerity produced the different assertions. Trier would also have to discard the possibility that the inconsistency was due to an honest change of heart before filing the pleading, since only a deliberate lie would undermine Mr. Poos' pleading. Finally, to infer a deliberate lie in the pleading from Mr. Poos' inconsistent admission, Trier would have to determine that the admission was based on his honest belief. Each of these steps in the inferential process is a hearsay step.

Proponents of Strahorn's "not hearsay" definition might be tempted to rejoin that Trier need not take the last step in the series of inferences set out above. If Mr. Poos' admission is offered only to prove that he lied in either the admission or the pleading, then the admission is not offered for its truth, but only to show him capable of a lie. However, if, as Strahorn urges, the relevance of a party's

116. *See id.*, § 1018, at 996.

117. *See id.*

118. *See* McCORMICK, *supra* note 58, § 251, at 604.

119. *See* Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966); FED. R. CIV. P. 11; *supra* note 110 and accompanying text.

120. The proper motion under the federal rules would be one for a more definite statement. FED. R. CIV. P. 12(e).

admission is in its relation to the party's pleading, the last hearsay step is unavoidable. Without it, the admission would not discredit the pleading, but only the party. No pleading rule requires verification only by a party who never told a lie about the case.¹²¹

Indeed, Strahorn may have recognized his own error. Despite his "not hearsay" argument for admissions, he would not require an instruction to Trier to ignore their narrative content.¹²² He would, however, require such a warning for all other statements in his "relevant circumstantial conduct" category.¹²³ For admissions, he ultimately concedes, "any possible narrative effect which might be attached to them is ipso facto the *same* as the circumstantial effect to be given them as conduct."¹²⁴

Strahorn's argument, then, does not logically support the result he reaches nor, therefore, the Federal Rule crafted in reliance on it. Under an assertion-oriented definition, no matter how narrowly the term "assertion" or "statement" is defined, party admissions offered to prove the truth of the facts asserted in them must be hearsay. Even describing their relevance in narrower terms does not change this conclusion, for, in any event, Trier must rely on the party's extrajudicial testimonial capacities if the admission is to have even limited relevance in the case.

B. *The "Not Hearsay" Argument under a Declarant-Oriented Definition*

Since the Federal Rules use an assertion-oriented definition of hearsay in rule 801(c),¹²⁵ one might simply dismiss as a mistake the Advisory Committee's partial reliance on Wigmore's declarant-ori-

121. For the sake of the few extremists who might rebut by urging that discrediting the party as a liar has a relevance independent of his pleading, the rejoinder is—relevant to what? Might a party who never testifies be shown to be impeached by a felony conviction? Unless the party testifies, which is not required by the admissions exception, there is no relevance to a party's lie except as it reflects on his belief about the facts of the instant case. While the party's belief may be relevant at trial, *see infra* notes 150-79 and accompanying text, his admission is, nonetheless, hearsay.

In a few cases it may be possible to reason that *both* the prior admission and the pleading are lies (where the admission and pleading are not diametrically opposed, for example). If the party insincerely uttered the admission, then he insincerely uttered the pleading, and the admission is not offered for its "truth." That reasoning is perilously close, however, to "once a liar, always a liar," and so may be fully rebutted by the first point made in this note.

122. Strahorn, *supra* note 67, at 576.

123. *Id.*

124. *Id.* (emphasis added).

125. FED. R. EVID. 801(c). *See supra* note 69.

ented approach to justify rule 801(d).¹²⁶ But, in a cryptic note, the Advisory Committee recognized that “[s]everal types of statements which would otherwise literally fall within the [801 (c)] definition [of hearsay] are expressly excluded from it [by 801(d)].”¹²⁷

It would be presumptuous to read this language as intending a radical leap from one hearsay definition to another in a single body of rules, although there is support in reason for such an interpretation.¹²⁸ More likely, since the line between the two definitions has been frequently obscured,¹²⁹ and only recently clarified,¹³⁰ the Advisory Committee was merely expressing uncertainty: the arguments defining these utterances as “not hearsay” seemed persuasive, but simply different from the also persuasive arguments supporting the language in rule 801(c).

On examination, however, the declarant-oriented approach, which, in the classic case, focuses on the need for cross-examination of the declarant,¹³¹ provides theoretical support for treating only a small number of admissions as “not hearsay.” The bulk of them are hearsay even under this definition.¹³² Moreover, the definition’s own rationale provides no strong theoretical need for, and many practical obstacles to, separating those party admissions that are hearsay from those that are not. It provides absolutely no support for admitting them all as “not hearsay.”¹³³

A declarant-oriented definition of hearsay protects the integrity of the fact-finding process by identifying as hearsay all extrajudicial

126. FED. R. EVID. 801(d) advisory committee note.

127. *Id.*

128. See generally Blakey, *The Redefinition of Hearsay*, *supra* note 79.

129. The exchanges between Morgan and Strahorn, and Strahorn and Wigmore, see sources cited *supra* note 67, are two examples of the confusion. Other examples are found in the debates over the proper definition of, and the desirability of distinguishing between, assertive and nonassertive conduct for the purposes of the hearsay definition. Compare Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682 (1962) and Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138 (1935) with McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930). On the labeling of state of mind utterances as circumstantial utterances, compare Hinton, *State of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394 (1934) with MCCORMICK, *supra* note 58, § 249, at 296.

130. By labeling and distinguishing, in plain English, the differences between “declarant-oriented” and “assertion-oriented,” Professor Park helped clarify the definitional debates. Park, *supra* note 69; see also R. LEMPERT & S. SALTZBURG, *A Modern Approach to Evidence* 355-57 (2d. ed. 1982) (expressly recognizing inconsistencies in definitional approaches). Other substantial recent contributions may be found in Blakey, *The Redefinition of Hearsay*, *supra* note 74; Wellborn, *supra* note 84.

131. Park, *supra* note 69, at 425 & n.8.

132. See *infra* text accompanying notes 134-39.

133. See *infra* text accompanying notes 141-48.

assertions that cannot be fully cross-examined.¹³⁴ Through cross-examination at trial, adversary is usually afforded the opportunity to demonstrate the degree to which witness' testimony does not perfectly reflect the objective facts and events reported. By exposing defects in the witness' perception, recollection, sincerity, and narrational skills, adversarial cross-examination can provide Trier with information necessary to make a realistic assessment of the true value of the witness' testimony.¹³⁵ Any limitation on cross-examination of an out-of-court declarant, therefore, limits the opportunity to demonstrate the value of his declaration as reflective of the truth.¹³⁶

While by definition, party admissions are uttered out of court, the party to whom the statement is attributed is the adversary himself, who is usually available to testify. According to Wigmore, this status of the purported declarant was crucial in defining the utterance for hearsay purposes. The party, he argued,

does not need to cross examine himself.

The theory of the hearsay rule is that an extrajudicial assertion is excluded unless there has been sufficient opportunity to test the grounds of assertion and the credit of the witness, by cross-examination by the party against whom it is offered.¹³⁷

Since the party against whom the statement is offered is the very person who made the statement, Wigmore said, "the hearsay rule is satisfied."¹³⁸

134. See Park, *supra* note 69, at 424; see also Bein, *supra* note 106, at 983-89; Morgan, *Hearsay Dangers*, *supra* note 91, at 218-19; Tribe, *supra* note 92, at 958.

135. See Bein, *supra* note 106, at 983-89; Morgan, *Hearsay Dangers*, *supra* note 91, at 185-88; Tribe, *supra* note 92, at 961-63.

136. See sources cited *supra* note 135.

137. 4 J. WIGMORE, *supra* note 58, § 1048, at 4-5.

138. *Id.* at 5.

In fairness, Wigmore also argued that a party's request to cross-examine himself would be "absurd," *id.* at 4, "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." *Id.* at 5. However, it is difficult to fathom exactly what Wigmore believed to be the aim of the hearsay definition since he switched approaches so frequently. As Professor Park noted, in one volume of Wigmore's treatise, volume six, Wigmore used the assertion-oriented definition of hearsay. Park, *supra* note 69, at 424 n.4 (citing 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1766, at 50 (J. Chadbourn rev. ed. 1976)). In discussing admissions in volume four, however, Wigmore uses a mixture of definitions. First, he classifies a party's out-of-court statement offered for the party-declarant as hearsay. 4 J. WIGMORE, *supra* note 58, § 1048, at 5. Under a declarant-oriented definition, such a statement would not be hearsay, because, to the extent that the statement is consistent with the party's position at trial, the party is available for cross-examination. Thus, while Trier would rely on the party's credibility in assessing the statement, the opportunity to cross-examine the party about that credibility removes the statement from the hearsay ban

One may readily agree with Wigmore that a party does not need self-cross-examination without, however, necessarily concluding that party admissions are "not hearsay." At the trial, it is not the party against whom the statement is offered who needs to be shown its unreliability, but the Trier. Protection of the party's opportunity to convince Trier, not himself, is the purpose of the declarant-oriented definition. Consistent with this purpose, the crucial question must be whether the only adversarial means available to the party, as the purported declarant—explanation, denial or rebuttal¹³⁹—are adequate to demonstrate the degree to which the utterance varies from objective truth.

In some instances, it may be hypothesized, the party will be able to explain the testimonial faculties underlying the statement sufficiently to justify classifying the statement as "not hearsay."¹⁴⁰ Where, for example, the party remembers making the statement and the perception and thought processes that produced it, he is fully capable of explaining all errors in the underlying perception, memory, and narrational skills. He could get no more through immediate cross-examination of any witness produced against him, and his out-of-court statement ought technically to be classified as "not hearsay."

In most other instances, however, party admissions are properly classified as hearsay, although identification of their hearsay nature is difficult because of declarant's status. For example, suppose the party denies making the statement. He may, of course, be lying. If we were sure he was lying, we might conclude that he thereby waived his opportunity to expose any testimonial defects. On the

(although it might still be excluded as redundant and self-serving). See Morgan, *Hearsay Dangers*, *supra* note 91, at 192-96. Wigmore thus appears to be using an assertion-oriented definition (the out-of-court statement is offered for the truth of what it asserts) to conclude that, when offered for the party-declarant, the statement is hearsay. Under an assertion-oriented approach, Wigmore should then conclude that when offered *against* the party, the statement is *also* hearsay because it, too, is offered for its *truth*. However, in testing the out-of-court utterance offered *against* the party-declarant, Wigmore switches direction, emphasizing Trier's necessary reliance on the party's credibility, the party-declarant's opportunity to explain, the absurdity of self-cross-examination, and the party-declarant's lack of need to cross-examine himself. 4 J. WIGMORE, *supra* note 58, § 1048, at 4-5, 7.

139. 4 D.W. LOUISELL & C.B. MUELLER, FEDERAL EVIDENCE § 423, at 251 (1980). Professor Mueller argues that admissibility of the party's statement under the Federal Rules is justified for several reasons, including the opportunity to persuade Trier of the statement's unreliability. *Id.* at 250-51.

140. The hearsay analysis that follows, *see infra* text accompanying notes 109-13, is similar to that properly used to categorize *any* witnesses' prior inconsistent statements offered for their truth. See Bein, *supra* note 106, at 983-85.

other hand, he may be telling the truth: he did not utter the words reported. In the latter circumstance, he is in the same position as any party challenged with the out-of-court assertion of another, here unknown, declarant. The party cannot show, without cross-examination of the true declarant, that the statement is the product of misperception, faulty recollection, or any other error that might originate in the real declarant's peculiar mental process.¹⁴¹ The party's only opportunity to defeat the impact of the statement is by proof that its authorship is not as claimed—an opportunity available to any party faced with any hearsay declaration, but not sufficient to change the definition of the statement to "not hearsay."

Similarly, suppose the party honestly testifies to a lack of recollection. He cannot remember uttering the statement or, although he remembers the utterance, he cannot remember the underlying events; or, perhaps, he remembers neither the statement nor the event. The human act of forgetting obviously renders impossible any clarification of the thought processes and perceptions that once underlay the statement. Since Trier could not, without such information, make a realistic assessment of the value of the utterance as probative of the facts it recites, the statement is properly classified as hearsay. Again, however, there is the difficulty of knowing whether the party's memory failure is feigned.

In the unlikely event that the party both admits uttering the out-of-court statement and intentionally lying when he did, the statement is, again, hearsay, but the objection is properly held waived. It is hearsay because the party cannot in court expose errors in the perception and memory reported in the statement (beyond the claim that the utterance was not a product of his then sense impressions). If Trier, nevertheless, credits the party's statement (i.e., chooses to believe it was sincerely uttered), it would do so with no further information about the degree to which the statement accurately reflects the events reported in it. After all, Trier may be right: The party may have sincerely uttered the statement, but in some way mistaken the objective events he recited in it.¹⁴² The point is most technical here, however, for it is the party's fabrication of either the extrajudi-

141. There is scientific verification of the assumption contained in this declarant-oriented approach that each person perceives, recollects, and narrates in unique fashion, see E. LOFTUS, *EYEWITNESS TESTIMONY* (1979). Therefore, neither cross-examining another individual, nor hypothesizing about common errors, can be considered an adequate substitute for cross-examination of the actual declarant.

142. For a fuller explanation of this point, see Bein, *supra* note 106, at 1004-12.

cial utterance or his courtroom disavowal that makes fuller explanation of the statement impossible. Without choosing which statement is a lie, we might properly conclude that the hearsay objection was waived.

Finally, as in *Mahlandt v. Wild Canid Survival & Research Center*,¹⁴³ the party may honestly admit uttering the statement, but claim no personal knowledge of the events recited in it. Mr. Poos' utterance there may have been the product of his own speculation or based on the speculation of others. While lack of personal knowledge is usually considered a relevance¹⁴⁴—not a hearsay—problem, here the objections are the same. Mr. Poos was capable of explaining only what motivated his utterance. He was incapable of explaining the degree to which it reflected or varied from the objective facts.¹⁴⁵ Had he uttered the statement on the stand, it would have been stricken as irrelevant.¹⁴⁶ Since it was instead uttered out-of-court and offered to prove the facts recited in it,¹⁴⁷ it was for that purpose hearsay under a declarant-oriented definition. For the same reason, admissions uttered by incompetent and sleep-walking parties are properly defined as hearsay under the instant definition.

Thus, under a purely logical application of a declarant-oriented definition, many party admissions are hearsay, some are not, and others are hearsay but the objection is waived. The practical obstacles to sorting them, though, are enormous. Since a party may control the hearsay classification by his own explanation, keying admissibility to the correct definition could easily lead to fraudulent practices. Resources consumed in rooting out such party deception could not be easily justified by any resulting accuracy in either the sorting process or in the trial.

Since it is obviously desirable to treat all party admissions the same for purposes of rulemaking, the remaining question is whether the probable "not hearsay" nature of some justifies admitting all. If the "not hearsay" definition of some were the *sole* determinant for a decision to admit or exclude all party admissions, the system would probably be better served by wholesale exclusion. Under the instant

143. 588 F.2d 626 (8th Cir. 1978).

144. Lack of personal knowledge usually renders a witness incompetent because without personal knowledge the witness can offer no testimony of any relevance in the case. FED. R. EVID. 602 & advisory committee note. "[T]he rule is in fact a specialized application of [the rule relating to] conditional relevancy." *Id.*

145. See *supra* text accompanying notes 10-17.

146. FED. R. EVID. 602.

147. See *supra* notes 44-49 and accompanying text.

definition, the reason that some party admissions may be “not hearsay” is that they are capable of full examination or explanation by the party. Reliability is not a feature of this definition.¹⁴⁸

Even theoretically then, there is no predictable benefit, in terms of accuracy of trial results, in admitting those party admissions defined as “not hearsay.” On the other hand, in the same terms, a detriment from admitting all party admissions can be predicted with some certainty. Any party utterance that is both technically hearsay and not admissible under one of the numerous exceptions to the hearsay rule in the Federal Rules is likely to be grossly unreliable.¹⁴⁹ Thus, even if the drafters of rule 801(d) intended to apply a declarant-oriented definition to party admissions, the conceivable definition of a few of them as “not hearsay” would not justify the current classification and admissibility of all of them.

However, as explained in the next section, there is a policy served by admitting even grossly unreliable admissions that in some cases may outweigh the loss inherent in their use. Since it is a policy disconnected from the choice of hearsay definition and applies equally to the many party admissions which are hearsay as well as the few that are “not hearsay” under a declarant-oriented approach, it is logical to view the policy as one that informs an exception to the hearsay rule.

C. *Justifying Party Admissions as an Exception to the Hearsay Rule*

As we have seen, under the assertion-oriented definition of hearsay in rule 801(c), all party admissions are properly classified as hearsay.¹⁵⁰ Using a declarant-oriented approach, some party admissions may be not hearsay,¹⁵¹ but that possibility does not account for the practice of admitting them all. If all are properly treated alike

148. See sources cited *supra* note 134.

149. The Federal Rules of Evidence 803 and 804 contain 29 exceptions to the hearsay rule. Many of them widely expand on the original common law class exceptions from which they are borrowed, making admissible many more utterances than were formerly admitted. See FED. R. EVID. 803, 804 advisory committee notes. A few are almost wholly new class exceptions that seemingly allow into evidence large numbers of utterances not formerly admissible. See, e.g., FED. R. EVID. 803(1), (2). In addition, two of the exceptions, rules 803(24) and 804(5), are open-ended exceptions. They give trial courts broad power to admit any hearsay utterance that does not fall under the 27 class exceptions, so long as there are circumstantial guarantees of reliability equivalent to those enumerated in the other exceptions. FED. R. EVID. 803(24), 804(5).

150. See FED. R. EVID. 801(c); see *supra* notes 63-124 and accompanying text.

151. See *supra* notes 126-49 and accompanying text.

for purposes of admissibility, then it must be as an exception to the hearsay rule.

An exception for party admissions cannot be justified on grounds normally used to justify hearsay exceptions—reliability and need for the evidence.¹⁵² Rather, those commentators who urge admissibility as an exception usually rationalize the result by reference to the “adversarial theory of litigation” or even more simply, “the adversary system.”¹⁵³ This justification so immediately commends itself that, without further explanation, it cuts off the most heated law school debates on the subject. Even those who urge the “not hearsay” analysis echo the term,¹⁵⁴ although it seemingly adds nothing to the analysis; indeed, the Federal Rules’ Advisory Committee picked it up as a justification for excluding party admissions from the hearsay definition.¹⁵⁵

Taken at face value, though, the “adversary system” is a non-justification justification—the equivalent of urging “that’s the way the system operates.” A decision to admit any proof at trial is as readily explained, or not explained, as a product of the adversarial method of trying cases. Of course, here the purported authors of the hearsay proof are the adversaries themselves. But the connection between declarants’ status and the manner in which use of their declarations furthers the goals of the adversarial system is not self-evident.

Two oft-cited explanations of this “adversary system” rationale stress a sporting theory of litigation. Morgan argued 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 . . . oath.”¹⁵⁶ Since parties are free to disavow any admissions used against them,¹⁵⁷ presumably Morgan’s “can hardly object” language is intended to convey the party’s embarrassment when his inconsistent admission is revealed to Trier.¹⁵⁸ The inconsistency, even if ex-

152. C. McCORMICK, *supra* note 58, § 262, at 628.

153. *E.g., id.*; E.M. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 266 (1963); Morgan, *Hearsay Dangers*, *supra* note 91, at 184-85.

154. *See* 4 J. WIGMORE, *supra* note 58, at § 1048; Strahorn, *supra* note 67, at 564.

155. FED. R. EVID. 801(d)(2) advisory committee note.

156. E.M. MORGAN, *supra* note 153, at 266; *see also* Morgan, *Admissions as an Exception*, *supra* note 68, at 361.

157. 4 J. WIGMORE, *supra* note 58, § 1048, at 4-5.

158. *See* Blakey, *The Redefinition of Hearsay*, *supra* note 74, at 617 (“Thus the lack of any requirement of personal knowledge for an admission would not make sense if we were seeking assurances of trustworthiness, but it does make sense if it is enough that one’s adversary has somehow become responsible for a statement that is embarrassing to him.”).

plained as produced by lack of personal knowledge¹⁵⁹ or a sleepwalking state,¹⁶⁰ reveals the party as somewhat less than perfect ("unworthy of credence," in Morgan's terms¹⁶¹) at least when he uttered the statement. Balanced against the extraordinary unreliability of many party admissions, though, the benefits of fostering this game-like atmosphere at trial is hard to fathom today.

Lev's estoppel theory rests on a similar notion of the adversary system.¹⁶² According to Lev, the party's statement is admitted against him as a "judicial punishment for his inconsistency."¹⁶³ But why is it fair to punish the sleep-walker, or even the loose-tongued party, for his human frailty? Since use of even an unreliable admission may have a devastating effect on the party's case, the punishment is both disproportionate and unrelated to the crime.

Both Lev and Morgan presuppose an adversary system that prefers to award victory to the best (or, at least, the most consistent) person, rather than the person with the best cause. Whatever the merits or demerits of such a system in the past, it is unlikely to command a consensus today. In modern times, adversarial presentation is thought desirable because: (1) it facilitates the truth-finding function of the trial if proof is found and presented by those motivated by self-interest;¹⁶⁴ and (2) the moral acceptability of the ultimate judgment is enhanced by allowing participation by antagonists psychologically committed to opposing views.¹⁶⁵

If the explanation for admissibility of party admissions is still properly found in the adversary system, then it must be because their use facilitates one of these aims. As we have seen, the practice does not assist in directly achieving the first purpose of the system articulated above. While reliance on some party admissions might further the truth-finding function of the trial, by definition many or most will not. In the *Wild Canid*¹⁶⁶ case, for example, Mr. Poos' statement that Sophie bit the child,¹⁶⁷ fully admissible against him as a party to the case, could not assist the jury in finding out what really happened in the Poos' backyard any more than speculation by

159. See *supra* note 58 and accompanying text.

160. See *supra* note 61.

161. E.M. MORGAN, *supra* note 153, at 266.

162. Lev, *supra* note 68.

163. *Id.* at 29.

164. F. JAMES, CIVIL PROCEDURE § 1.2, at 5 (1965).

165. See *id.*

166. 588 F.2d 626 (8th Cir. 1978).

167. *Id.* at 629.

Poos' teenage children, his neighbors, spectators in the courtroom, astrologers, or soothsayers. The most the jury might rationally infer from Mr. Poos' utterance is that, in a moment filled with emotion, after hearing of an upsetting event and with no direct knowledge of it, Mr. Poos uttered a statement reflecting a then belief inconsistent with the position he now urges at trial.

While proof of Mr. Poos' early belief is not rationally probative of the facts recited in the statement, it is, however, directly related to the second aim of the adversary system: facilitating the moral force of judgments. If the belief reflected in the statement was Mr. Poos' then belief, and if it continued forward to trial, it would prove that despite Mr. Poos' present claim, he lacks any important psychological commitment to his cause. Of course, Mr. Poos' belief at trial would be no more based on personal knowledge of the event than was his earlier statement. If the *only* aim were to find the truth in the particular case, both Mr. Poos' present and past belief would be irrelevant.¹⁶⁸ But the second aim of the adversary system may be rationally promoted regardless of immediate truth-finding and sometimes may even be thwarted by strict insistence on accurate results.

A judgment favorable to Mr. Poos, which he did not believe he deserved, would have no moral force, for, regardless of accuracy, it would not be perceived as a fair one (at least by Mr. Poos). Even worse, such a decision would reward and encourage an abuse of the adversary system as defined by both its first and second aims. Whatever the objective truth in the instant case, awarding favorable decisions to those not emotionally committed to their causes could encourage unnecessary and frivolous litigation. Ultimately, that practice could have a negative impact on the accuracy of the system as a whole.

The adversary system places parties in a position to control whether and when judicial resources are to be used. It is at the

168. In justifying the "not hearsay" definition of admissions, Strahorn argued that the party's utterance might be rationally viewed as impeaching his pleading. Strahorn, *supra* note 67, at 586-89. Strahorn's position on relevance is similar to that argued here. There is, however, a major and a minor difference. First, as argued here, this possible relevance does not justify classification as "not hearsay." Strahorn claimed that the aim of the hearsay rule was to protect the truth-finding function of the trial. *Id.* at 484-87. By classifying admissions as "not hearsay," however, the real rationale for admissibility (which cannot be justified by reference to "truth" in the particular trial) is obscured, and the exercise of judicial discretion and intelligent discrimination made that much more difficult. *see infra* notes 173-80 and accompanying text. Second, since parties may change their minds between pleading and trial, it would seem just as relevant to the proper purpose of admitting their statements, to admit those which impeach the trial position, not just the pleading.

party-plaintiff's behest that the power and resources of the State are invoked to inquire into a private argument.¹⁶⁹ It is to accommodate both parties (who might otherwise settle privately) that proceedings continue into trial and judgment. A system of dispute settlement according to "truth" cannot long survive unless it demands that those empowered to trigger its use and control the conduct of its cases do so only for the purpose specified.¹⁷⁰ Where the party does not believe in his own cause, he is, by definition using the system for the wrong purpose. Were there a means of identifying him at the door, he could be rightly turned away.¹⁷¹ But we cannot afford to ignore proof of his deception simply because he is past the threshold.

In the abstract then, the moral-force-of-judgments rationale justifies a rule that treats both reliable and unreliable party admissions identically, since both are equally probative of the party's present commitment to his cause. It also provides a means of reconciling the inconsistency between the foundations required to admit ordinary declarants' hearsay declarations and those of parties.¹⁷² To support the stability and credibility of an adversary system that seeks "truth," we rightly refuse to admit any ordinary hearsay declaration that will not assist in a rational investigation of truth in the particular case in which it is offered.¹⁷³ Use of a party's own declaration against him, however, assists in maintenance of the "truth-finding"

169. F. JAMES, *supra* note 164, § 102 at 3.

The principle of party-presentation represents in part a judgment that private parties should be masters of their rights under what is generally thought of as private law, that it is up to them to press or to waive claims or defenses, and that the social interest in securing general observance of the rules of private law is sufficiently served by leaving their enforcement to the self-interest of the parties more or less directly affected.

Id. at 4 (footnote omitted).

170. The 1980 and 1983 amendments to FED. R. CIV. P. 11, 26, and 37, requiring a new type of certification by parties and attorneys of pleadings, motions, and discovery requests, and stiffening sanctions for improper certifications, reflect a judicial conclusion, based on some experience, that the system can easily become bogged down through such abuses. FED. R. CIV. P. 11, 26, 37 & advisory committee notes.

171. The revisions to the Federal Rules of Civil Procedure, especially to rule 11, are an attempt to identify such parties at the door. However, it is unlikely that they will stop all abuse since finding good faith is an amorphous process, probably better left to Trier. Although the rule may assist courts in weeding out suits not preceded by a reasonable inquiry into the facts, where such an inquiry has been shown, a finding of bad faith would be most difficult to justify in terms of accuracy and would surely be a controversial decision. *See infra* note 174.

172. *See generally* C. McCORMICK, *supra* note 58, at §§ 245, 247, 262, 263; *see also supra* notes 57-65 and accompanying text.

173. *See* C. McCORMICK, *supra* note 58, at §§ 244-48; Morgan, *Hearsay Dangers*, *supra* note 91, at 184-85.

system even when it cannot facilitate objective truth-finding in the instant case.¹⁷⁴

Of course, a simple out-of-court statement, uttered in an emotional moment, may not be highly probative of the party's present belief about his cause.¹⁷⁵ To accept it as such requires two debatable inferences: (1) that the party uttered it sincerely (for that reason it is also properly regarded as hearsay),¹⁷⁶ and (2) that the party's then state of mind continued forward to the trial.¹⁷⁷ However, in typical

174. It may be logical to conclude, where "party commitment" is the only probative value of a particular admission, that jurors should be confined by instruction to using the admission for that purpose and not as proof of any "facts." However, there are two reasons why such an instruction would not be desirable, and would actually be counterproductive:

(1) To make the instruction sensible, jurors would have to be told what to do if they conclude that the party does not believe in his own cause—e.g., a separate finding, presumably followed by nonsuit or dismissal. Where there is no proof of the party's psyche other than his admission (as in most cases), it is preferable for jurors to weigh the admission against other facts directly relevant to the facts in dispute. For example, an admission may be some proof that plaintiff does not believe in his own cause. Yet, from the facts shown, there also may be proof that plaintiff was actually damaged by defendant's particularly egregious conduct. On balance, a rational policy-maker might conclude that despite plaintiff's disbelief, a verdict for him is warranted to punish or deter defendant. *Cf. Suowitz v. Hilton Hotels*, 383 U.S. 363 (1966) (reversing a lower court's dismissal of plaintiff's claim alleging fraud in connection with securities despite the fact that plaintiff did not understand why she was suing defendant). Jurors, even when concentrating solely on finding the "truth," will intuitively weigh the proof before them in light of these sorts of policies. An instruction to make a separate finding on the party commitment issue, followed by a dismissal, might actually deprive jurors, the best reflectors of community standards we have, of this function. An alternative instruction for jurors to play policy-maker separately from truth-finder would be confusing, unnecessary, and spark too many law review articles on the differences between findings of "law" and findings of "fact."

(2) If there is more proof of party disbelief than the party's admission, the proper route to dismissal is through a motion to dismiss for improper certification. *See supra* notes 170-71. The reader should remember that factually frivolous and unfounded claims or defenses are usually weeded out well before the trial on motions to dismiss the complaint and motions for summary judgment.

175. However, some emotional utterances, based on *personal knowledge*, might be probative of the facts asserted in them despite their emotional nature. *See* FED. R. EVID. 803(2) ("Excited Utterance. A Statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). For a discussion of this exception, see C. McCORMICK, *supra* note 58, at § 297.

176. *See supra* text accompanying notes 58-106. Where the party is available to testify about his sincerity at the time (as Mr. Poos was), under a declarant-oriented definition, it might be argued, the utterance is not hearsay if offered solely to prove the party's later commitment to his cause. However, without an instruction confining use of the utterance to this purpose, *see supra* note 174, the utterance is hearsay even under a declarant-oriented definition, except in very unusual circumstances, *see supra* notes 132-46 and accompanying text.

177. The analysis is identical to that used for statements of a declarant's "then existing state of mind," admissible as an exception to the hearsay rule when probative of facts or state of mind at issue in the trial. FED. R. EVID. 803(3); *see id.* advisory committee note; *see also* *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892).

hearsay exception parlance, there is a strong need for these statements that outweighs their unreliability as proof of the party's present belief.¹⁷⁸ Like ordinary declarations of "state of mind," there is probably no better proof of the fact, short of an in-court confession, and arguably the importance of protecting the system requires that we consider *any* proof of its abuse.¹⁷⁹

However, finding a rationale that justifies treating all party admissions alike at the rule-writing stage cannot end the inquiry. As *Wild Canid* demonstrates, it is, perhaps, even more important to outline the role of judicial discretion consistent with that rationale. Surely, the rationale suggested here is not always of such overriding importance that it automatically justifies admissibility in *every* case in which a party utterance is offered. As with all hearsay exceptions, judges must have inherent discretion to exclude from evidence any declaration whose use would thwart substantive policies. Judges must also retain discretion to vary the degree of reliability demanded with the concerns of substantive law.¹⁸⁰

A catalog of all cases in which unreliable admissions may be fairly admitted or excluded is beyond the scope of this article, but a few generalizations may help. Consistent with the rationale for the admissions exception suggested, where truth-finding in the instant case and protection of the adversarial process as a whole are the only interests affected by a decision to admit party declarations, there may be some gain in sacrificing the former to the latter. Surely, *Wild Canid* was such a case.¹⁸¹ While the trial judge there should rightly have had greater discretion than the appellate court held, the arguments for admissibility were so much stronger than those for exclusion, the decision to exclude was probably an abuse. The dispute in *Wild Canid* was essentially private in nature. The loss was already certain, and the ultimate factual determination was of little or no concern to anyone other than the immediate parties. Moreover, the defense, through expert testimony, urged the cogency of the inference that Sophie acted consistently with her previously-demonstrated gentle nature.¹⁸² Mr. Poos was the sole salaried employee and one of the founders of Wild Canid, an organization devoted to

178. See C. McCORMICK, *supra* note 45, § 294, at 694-95.

179. See sources cited *supra* notes 177-78.

180. See Bein, *Substantive Influences on the Use of Exceptions to the Hearsay Rule*, 23 B.C.L. REV. 855 (1982).

181. 588 F.2d 626 (8th Cir. 1978) *see supra* notes 1-58 and accompanying text.

182. 588 F.2d at 628-29; *see supra* notes 1-58 and accompanying text.

teaching about the gentle nature of wolves. As a party, he urged the jury to find facts consistent with those teachings. In that context, his own earlier willingness to draw the opposite inference, even briefly, was highly probative of the strength of his commitment to his cause at trial. On balance then (and of course in hindsight), admissibility seems commanded by the rationale for the exception.¹⁸³

In other cases, however, equally unreliable admissions would be properly excluded. Where the outcome of a case is intended to, or will likely affect the behavior or burdens of persons not before the court, use of party admissions that do not facilitate accurate fact-finding in the immediate case is contraindicated. For instance, imagine a private antitrust suit where defendant denies an allegedly "unreasonable" impact on competition from his challenged activity. Use of defendant's admission, not based on personal knowledge, to prove facts related to competitive injury would not be productive of accuracy, although it might, as in *Wild Canid*, be highly probative of defendant's commitment to his cause. However, an erroneous factual determination of the competitive impact of a business practice could (as perceived precedent) influence the business practices of persons not before the court in a manner inconsistent with policies fostered by the antitrust laws.¹⁸⁴ Similarly, immediate truth-finding may be more imperative than any other goal where, on the basis of adjudicated facts, injunctive or structural relief is sought that will affect large classes of persons not present in court. In such cases, then, judges should be free to exclude party admissions if they are not founded on personal knowledge, or are otherwise unreliable.

In current practice, there is rarely any recognition of the relationship between any larger interests in truth-finding and the relia-

183. The trial judge in the case seemingly believed that in the absence of eyewitness testimony, the jury might overvalue Mr. Poos' utterances. *See supra* note 22. Focusing solely on the jury's truth-finding function, even in retrospect that reasoning is unexceptionable. The point here, however, is that there is another, equally crucial policy function being performed by the jury, (protecting the system as a whole) simultaneously with its inquiry into the facts. The *Wild Canid* case strikes this author as an example of a case where finding a universally acceptable "truth" was impossible anyway, and the jury's policy function was, accordingly, more important than its truth-finding function. However, in all cases, so long as the ingredients of the decision are clear and considered, it is usually better to defer to the trial judge's decision.

184. Many courts instinctively apply a stricter standard of reliability to use of hearsay in antitrust cases than in other types of cases. *See Bein, supra* note 180, at 892-911. *Compare Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980) (for a discussion of this case see *infra* notes 231-46 and accompanying text) and *Northern Oil Co., v. Socony Mobil Oil Co.*, 347 F.2d 81 (2d Cir. 1965) with *Wild Canid*, 588 F.2d 626 (8th Cir. 1978).

bility of party admissions offered in evidence. When there is, the solution is to admit the party statement, but assign it "little weight."¹⁸⁵ Nevertheless, in criminal cases, requirements of corroboration for all confessions,¹⁸⁶ and a variety of corroboration requirements in other areas of the law,¹⁸⁷ suggest a judicial awareness that free use of party statements may produce unacceptably inaccurate results in discrete instances. Corroboration and "weighing," however, are probably inadequate to avoid the danger of untoward results, at least where the fact-finder is a jury, rather than a judge. Ultimately, of course, the problem may be righted on a judgment notwithstanding the verdict or a reversal for insufficiency of the evidence. But it is cheaper and more certain simply to exclude any party statement that is not sufficiently reliable for use in such cases.

In sum, it is suggested here that party admissions in the Federal Rules of Evidence be reclassified as an exception to the hearsay rule, and that the role of judicial discretion be made explicit. While it is this author's belief that judges have inherent discretion under all hearsay exceptions, the history of party admissions in the courts

185. See, e.g., *Vitek Systems, Inc. v. Abbott Laboratories*, 675 F.2d 190 (8th Cir. 1982). In this trademark infringement case, the issue was whether the Abbott Laboratories ("Abbott") logo was confusingly similar to the Vitek Systems Inc. logo. In the application for trademark registration, Abbott's vice president described Abbott's trademark as a "block A." When this statement was offered against Abbott as a party admission, the court held: "The manner in which Abbott describes its logo for registration purposes carries little weight in determining whether the marks are confusingly similar to the public." *Id.* at 192.

186. C. McCORMICK, *supra* note 58, at § 158; S. SALTZBURG, *AMERICAN CRIMINAL PROCEDURE CASES AND COMMENTARY* 511-12 (1984); C. WHITEBREAD, *CRIMINAL PROCEDURE* § 15.06, at 313 (1980); 7 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 2070-74 (Chadbourn rev. ed. 1978); see also *Wong Sun v. United States*, 371 U.S. 471, 488-89 (1963) ("conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused"); *Smith v. United States*, 348 U.S. 147, 152-54 (1954) (corroboration necessary for admission of a confession); *United States v. Lehmann*, 613 F.2d 130, 133 (5th Cir. 1980) (corroboration necessary to safeguard against a conviction based on an untrue confession); *Lemons v. State*, 49 Md. App. 467, 468-69, 433 A.2d 1179, 1181 (1981) (an uncorroborated confession is insufficient to support a conviction); *Commonwealth v. Herman*, 288 Pa. Super. 219, 230, 431 A.2d 1016, 1022 (1981) (confession must be corroborated); *State v. Hamrick*, 19 Wash. App. 417, 419, 576 P.2d 912, 913 (1978) (corroboration of a confession is required to prevent conviction by a false confession of guilt).

187. 7 J. WIGMORE, *supra* note 186, at §§ 2067-69. See, e.g., *St. Lawrence County Dep't of Social Servs. ex rel. Cathy B.B. v. Gerome C.C.*, 75 A.D.2d 952, 953, 428 N.Y.S. 2d 76, 77 (1980) (corroborated testimony of mother is sufficient to support a finding of paternity); *In re Cheryl B. v. Alfred W.D.*, 99 Misc. 2d 1085, 1088, 418 N.Y.S.2d 271, 273 (Fam. Ct. 1979) (an admission of paternity must be corroborated by additional evidence); *Farrar v. Farrar*, 553 S.W.2d 741, 744 (Tenn. Sup. Ct. 1977) (the uncorroborated admission or confession of a guilty party will not support a divorce decree based on a charge of adultery). For other areas requiring corroboration, see 4 J. WIGMORE, *supra* note 58, at §§ 1054-55.

shows that many do not believe they have it. Moreover, the very uncertainty about why these utterances are admissible at all seems to have led to an assumption that unthinking admissibility is commanded.

Indeed, McCormick was probably right when he observed that current practice is driven more by emotion than by reason.¹⁸⁸ This emotion is undoubtedly fueled by leftover impulses to "punish" imperfections and bring sport to the courtroom. It is a mistake, however, to let the emotion "stand for a reason,"¹⁸⁹ no matter how awkward articulation of a reason may be. As the system incorporates values that are sometimes irreconcilable, there are presumably many instances in which choices must be made. Reliance on emotion rather than reason to support a rule of admissibility means that the occasion for choice is probably not even recognized. Indeed, published reports of cases excluding an offered party admission as too unreliable are rare indeed. Yet, there are presumably many instances in which the only rational policy inherent in the admissions exception was, through irrational impulse, unfairly, or unwisely exalted over the truth-finding function of the trial.

Reclassifying admissions as an exception, allowing wider judicial discretion, and frank recognition of the limited rationale for admissibility, could bring some refreshing changes.

II. AGENTS' AND EMPLOYEES' STATEMENTS: ARE THEY THE SAME AS A PARTY'S STATEMENT AND WHAT DIFFERENCE DOES IT MAKE?

In *Mahlandt v. Wild Canid Survival & Research Center*,¹⁹⁰ Mr. Poos' utterances were held admissible not only against him, but also against his employer, Wild Canid, under rule 801(d)(2)(D).¹⁹¹ Identical utterances by a member or members of Wild Canid's Board of Directors were held technically admissible under rule 801(d)(2)(C),¹⁹² but correctly excluded on other grounds,¹⁹³ which will be discussed shortly.

Insofar as these declarations were offered against Wild Canid, none of the declarants were actually the party-opponent. Mr. Poos

188. C. McCORMICK, *McCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE* § 239, at 503 (1954).

189. *Id.*

190. 588 F.2d 626 (8th Cir. 1978).

191. *Id.* at 630.

192. *Id.* at 631.

193. *Id.*; FED. R. EVID. 403.

was merely an employee of the party-opponent, Wild Canid, a not-for-profit corporation.¹⁹⁴ The Board of Directors, while not easily characterized as merely an agent of Wild Canid, was, nevertheless, *not* the corporate party itself.¹⁹⁵ There was thus no reason logically consistent with any hearsay definition to call any of the utterances "not hearsay."

In addition, the utterances were wholly unreliable due to declarants' lack of personal knowledge.¹⁹⁶ They were, therefore, inadmissible under any or all of the many hearsay exceptions in rules 803 and 804.¹⁹⁷ As we have seen, too, the limited rationale that justifies treating both reliable and unreliable party admissions identically for purposes of admissibility¹⁹⁸ does not logically extend to statements made by nonparty declarants.¹⁹⁹

Nevertheless, as the appellate court in *Wild Canid* held, a party's employees' statements are admissible in evidence under rule 801(d)(2) regardless of the personal knowledge of the employee and without any showing of reliability or need.²⁰⁰ Avoidance of these normal requisites for exceptions to the hearsay rule is accomplished by giving employees' statements the status of the party's own statements.

Two categories of employee statements are attributed to the

194. Mr. Poos was a founder of Wild Canid but at the time of the litigation, was not a member of the Board of Directors. Transcript, *supra* note 3, at 15, 157.

195. Typically, management authority rests in corporations' Boards of Directors, since shareholders have no control over the Board's decisions. Although they may remove directors, the Board is not, technically, an "agent" of the shareholders, and, of course, no individual member of the Board "binds" the corporation. See J.J. SLAIN, C.A. THOMPSON, & F.F. BEIN, *AGENCY, PARTNERSHIP AND EMPLOYMENT* § 1, at 1-50 (1980). As one commentator succinctly said: "[I]n a rather true sense the directors are more nearly principals than agents." N. LATTIN, *LATTIN ON CORPORATIONS* § 69, at 239 (2d ed. 1971). Wild Canid was a not-for-profit corporation. Appellee's Brief, *supra* note 5, at 2. In such corporations, directors may be more nearly principals than in the usual model because the directors of nonprofit corporations are often the same people as the members of the corporation. Ellman, *Another Theory of Non-profit Corporations*, 80 MICH. L. REV. 999, 1007-08 (1982); See *infra* note 287.

196. 588 F.2d at 629-30.

197. FED. R. EVID. 803, 804 advisory committee notes.

198. See *supra* notes 152-71 and accompanying text.

199. See *supra* notes 150-97 and accompanying text.

200. 588 F.2d at 630-31 (Rule 801(d)(2)(D) does not require personal knowledge); *Baughman v. Cooper-Jarrett, Inc.*, 391 F. Supp. 671 (W.D. Pa. 1975) (personal knowledge not necessary under rule 801(d)(2)(D)), *vacated in part and remanded*, 530 F.2d 529 (3d Cir. 1976), *cert. denied* 429 U.S. 825, *on remand sub nom.*; *Baughman v. Wilson Freight Forwarding Co.*, 79 F.R.D. 520 (W.D. Pa. 1977), *rev'd on other grounds*, 583 F.2d 1208 (3d Cir. 1978); see also FED. R. EVID. 801(d)(2) advisory committee note; 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* 801(d)(2)(C) [01], at 801-126, 801-131, 801-132 801(d)(2)(D) [01], at 801-139 (Supp. 1977).

party by rule 801(d)(2), and are accordingly classified as "not hearsay": (1) a statement by someone authorized by the party to make statements concerning the subject (including statements made to the party himself);²⁰¹ and (2) a statement concerning a matter within the scope of declarant's "agency or employment" made during the existence of the employment relationship.²⁰²

Thus, the appellate court was right. But why are employee utterances treated as if uttered by the party himself? Among the leading commentators who rationalize admissibility of party admissions, only one attributes both classes of employee utterances to the party by a theory consistent with his own rationale for use of party admissions.²⁰³ Morgan refused to extend his own "can hardly object" theory²⁰⁴ to employees not authorized to speak for the party, (the second category set forth above), arguing that those statements ought not to be admitted unless reliable.²⁰⁵ Nonetheless, Wigmore imported Morgan's theory to achieve just that result.²⁰⁶ Confining his own "not hearsay" rationale to utterances of the party himself, Wigmore reasoned that even unauthorized employees' statements should be admissible because "[a] person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish."²⁰⁷ He then chided Morgan for refusing to go along.²⁰⁸ Strahorn supported the admissibility of both the party's own statements and unauthorized employee statements as "not hearsay"²⁰⁹ but could not fit unauthorized employee utterances

201. FED. R. EVID. 801(d)(2)(C).

202. FED. R. EVID. 801(d)(2)(D).

203. See *Lev, supra* note 68, at 34, 44, 57.

204. See *supra* notes 156-57 and accompanying text.

205. Morgan, *Vicarious Admissions, supra* note 91, at 463-64, 70.

206. 4 J. WIGMORE, *supra* note 58, § 1077, at 160.

207. *Id.* While the section in which this quote appears is titled, "Privies in obligation: joint promisor; principal and surety, etc.," Wigmore intended the reasoning of this section to apply to all utterances covered by the chapter headed, "*Statements of Another Person Having Identity of Interest with the Now Opponent.*" *Id.* at 152. That chapter includes employee utterances. In the next section, § 1078, which discusses agents, the argument continues, "He who sets another person to do an act in his stead as *agent* is chargeable in substantive law by such acts . . . so, too, properly enough, admissions made by the agent . . . have the same testimonial value to discredit the party's present claim as if stated by the party himself." *Id.* § 1078, at 162 (emphasis in original).

208. *Id.*, § 1080a, at 195-201. The Wigmore-Morgan debate concerns the proper characterization and admissibility of all vicarious admissions. Wigmore's rejoinder, found in a section headed "Privies in title (continued)," applies to employee utterances as well as to other vicarious admissions. *Id.* § 1081, at 201-09.

209. Strahorn, *supra* note 67, at 583-84.

into the same category he used for the party's own.²¹⁰ Acknowledging that attribution to the party was impossible, he reached the "not hearsay" classification anyway by reasoning that employee statements were "parts of relevant conduct,"²¹¹ a category even more fraught with hearsay dangers than the one he reserved for party statements.²¹²

Only Lev's party-punishment theory²¹³ consistently extends to all employee utterances. By exacting retribution not only for the party's own inconsistencies, but also for inconsistencies between the party's in-court position and the utterance of any person with whom the party willingly associated in his business ventures, Lev was able to consistently rationalize use of both party's and party's employees' utterances.²¹⁴ Like the rationale of "emotion," however, this consistency is obtained only by avoiding reason. The connection between

210. *Id.* at 582.

211. *Id.*

212. Strahorn argues that:

Whenever the contemporaneous non-verbal conduct of one who is speaking, . . . is relevant in the case, and is in need of interpretation in order for the utmost meaning concerning it too be required by the fact finder, the fact of the spoken . . . utterances may be considered by the fact finder for that purpose.

Id. at 491. Thus, "utterances which would have no status as being relevant conduct [and so 'not hearsay' under another category] in their own right may acquire standing in the case because they form a part of non-verbal conduct which does have such a status." *Id.*

The problem with this category, similar to Strahorn's "relevant conduct" category, discussed earlier in text, *see supra* text accompanying notes 80-102, is that it blatantly violates Strahorn's own rationale for the rule. According to Strahorn, an utterance is hearsay if it is used "narratively," i.e., it "purport[s] to tell any story, . . . of possible relevance in the instant case . . ." Strahorn, *supra* note 67, at 489. In his section entitled "utterances as parts of relevant conduct," *id.* at 4980, however, Strahorn classifies exactly such utterances as not hearsay. *Id.* at 990-91. Thus, an employee's utterance, as he drives an automobile for his employer, "I am driving negligently," would, when the employer is sued for the employee's negligent driving on that occasion, be part of relevant conduct, according to Strahorn, because it is explanatory of a relevant act. It is not, however, the narration of a past event, and, thus, "not hearsay" under Strahorn's approach. *See supra* note 87. But to use the utterance as probative of the act, Trier would necessarily rely on the employee's perception, sincerity, and narrational skills—the very danger, Strahorn argues, that his hearsay definition is designed to avoid. *See Strahorn, supra* note 67, at 486.

For a fuller discussion of the same problem as incorporated into McCormick's hearsay definition, *see Park, supra* note 69, at 441-49.

213. Lev, *supra* note 68, at 49.

214. *Id.* at 49-50. Even Lev's estoppel-punishment theory had some limit, however. Lev stated that there was "little justice" in using it to rationalize admissibility of utterances made by predecessors in interest, long admissible by common law as party admissions. *Id.* at 50-51. The drafters of the Federal Rules of Evidence presumably agreed with Lev, and similar criticisms by Morgan in his article, *The Rationale of Vicarious Admissions, supra* note 91. *See Hetland, supra* note 57, at 309-11. By ignoring the common law rule, the federal rule seems to have abandoned it. *See Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979).

the party's act of hiring, or voluntary business association, and the punishment meted out is not capable of rationale explanation, and so Lev offered none.²¹⁵

Where the purpose of assigning the same label to two things is to have them treated identically, surely the label ought not to be assigned if there is no good reason for identical treatment. The immediate result of assigning the label "party admission" to an employee's utterance is to make it admissible regardless of reliability or need. Yet, admissibility of employee utterances is desirable, we are frequently told, because of the high degree of reliability and need attending so many of them.²¹⁶ Since only authorized utterances or those within the scope of employment are admissible, the employee-declarant frequently will have had personal knowledge of the matter asserted, and the utterance may even reflect an account of his own conduct on the relevant occasion. Moreover, employee utterances are often against not only employer's, but employee's interests as well, reporting facts which, if true, would subject employee to loss of employment, or civil or criminal liability.²¹⁷ Finally, we are told, there is a great need for employee utterances in cases where employer's substantive liability turns on employee-declarant's conduct. By the time of trial, employee's heightened awareness of employer's and his own interests may make his trial testimony even more suspect than his out-of-court utterances.²¹⁸ And, of course, in some cases, employee may disappear, die, or be otherwise unavailable by the time of trial.²¹⁹

215. Lev, *supra* note 68, at 49-51.

216. 4 D.W. LOUISELL & C.B. MUELLER, *supra* note 139, § 426, at 311-30; *see also* C. McCORMICK, *supra* note 58, § 267, at 639-43; 4 J. WEINSTEIN & M. BERGER, *supra* note 200, ¶ 801(d)(2)(C) [01], at 801-126 to 801-133 Falknor, *supra* note 58, at 857 ("By . . . finding trustworthiness in the mere circumstance that the declarant is speaking of authorized conduct, we come pretty close . . . to accepting a principle which . . . would all but annihilate the hearsay rule.").

217. Oft-cited examples of highly reliable employee utterances are found in *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775, 784 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1961); *Martin v. Savage Truck Line*, 121 F. Supp. 417 (D.D.C. 1954).

218. 4 D.W. LOUISELL & C.B. MUELLER, *supra* note 139, § 426, at 317-18; C. McCORMICK, *supra* note 58, § 267, at 641 ("The rejection of such post-accident statements coupled with the admission of the employee's testimony on the stand is to prefer the weaker to the stronger evidence.").

219. Moreover, as Judge Weinstein and Professor Berger point out, "Often, . . . particularly in tort cases, the agent was the only one who knew what had happened." 4 J. WEINSTEIN & M. BERGER, *supra* note 160, ¶ 801(d)(2)(D) [01], at 801-135; *see also* *Gichner v. Antonio Troiano Tile & Marble Co.*, 410 F.2d 239 (D.C. Cir. 1969).

The reliability of, and need for, many employee assertions seems strong reason to include them in evidence under an exception to the hearsay rule. However, it is *no* reason to give them the status of parties' admissions. Indeed, the only benefit of assigning that label to employees' utterances is *avoidance* of normal reliability and need requirements, making admissible against employers utterances like those in *Wild Canid*.²²⁰ But unreliable party assertions, as we have seen, may be admitted in evidence because they are rationally probative of the party's psychological commitment to his cause, and thus useful in averting abuses of the adversary system generally.²²¹ Clearly unreliable employee assertions that cannot assist in that goal should not be made admissible by a rule so justified.²²²

There are, however, a few arguments that appear, at first glance, to be logically consistent with the result reached by the Federal Rules. Basically, they fall under two main headings: substantive and evidentiary. Thus, attribution of authorized employee utterances to the party-employer is said to flow either from: (1) substantive law; or (2) an actual advance adoption of the assertion by the employer. Similarly, attribution of unauthorized employee utterances is sometimes said to flow from: (1) policies whose origins are vague, but appear more substantive than procedural; and (2) an implied advance adoption by the employer similar to the supposed actual adoption of authorized utterances. The theories supporting attribution of unauthorized utterances to the employer are, at least partially, derived from arguments supporting attribution of authorized utterances and so, except where noted, are discussed simultaneously below.

A. *Substantive Attribution?*

The employee utterances admissible as the employer's own under rule 801(d)(2), are not those for which the employer is sub-

220. 588 F.2d 626 (8th Cir. 1978).

221. See *supra* text accompanying notes 150-74.

222. For a strong argument that only reliable employee utterances should be admitted under the federal rule, see 4 J. WEINSTEIN & M. BERGER, *supra* note 200, ¶ 801(d)(2)(C) [01], at 801-132 to 801-133. After pointing out in detail the dangers of admitting any utterance just because an employee makes it, Weinstein and Berger urge that under the federal rule as presently drafted, judges retain discretion to use rules 403 and 805 to exclude those that are not reliable. They urge that at least a showing of employee's personal knowledge ought to be required. See *id.* at 801-132. Unfortunately, in too many cases, including *Wild Canid*, 588 F.2d 626 it is clear that many judges do not believe that the rule gives the breadth of discretion urged. For the reasons articulated herein, see *infra* notes 284-323 and accompanying text, this author concludes that, therefore, the rule should be redrafted.

stantively responsible. No substantive law consequences attended either Mr. Poos' or the Board of Directors' utterances in *Wild Canid*,²²³ for example. Employees' authorized verbal acts, such as the operative words of a contract, a material misrepresentation, or a defamation, are automatically admissible under rule 801(c).²²⁴ If relevant, they are "not hearsay" by traditional interpretation of the hearsay definition found in that section.²²⁵ Rule 801(d)(2)(C) and (D), however, make admissible utterances that by themselves carry no substantive consequences for employers, but are offered merely as proof of disputed factual issues at trial.²²⁶

Nevertheless, it is frequently argued that the doctrine of respondeat superior dictates attribution to party-employers of at least some *authorized* utterances, other than verbal acts, covered by rule 801(d)(2)(C): those that employer authorizes employee to make to outsiders.²²⁷ Support for this argument is found in section 286 of the Second Restatement of Agency.²²⁸ The Second Restatement does not extend to authorized employee utterances made solely to the employer himself.²²⁹ Thus, Mr. Poos' utterances to Wild Canid's presi-

223. 588 F.2d 626.

224. FED. R. EVID. 801(c) advisory committee note.

225. See FED. R. EVID. 801(c); Morgan, *Hearsay Dangers*, *supra* note 91, at 205-14.

226. 4 D.W. LOUISELL & C.B. MUELLER, *supra* note 139, § 425, at 296-97.

227. *Id.*, § 425, at 296-99; Morgan, *Vicarious Admissions*, *supra* note 91, at 463 ("It would be captious to refuse to apply to narrative utterances the ordinary principles of representation of the law of agency."); 4 J. WEINSTEIN & M. BERGER, *supra* note 200, ¶ 801(d)(2)(C) [01], at 801-126 to 801-133. The advisory committee note accompanying rule 801(d)(2)(C) states only that "[n]o authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party." FED. R. EVID. 801(d)(2)(C) advisory committee note.

228. Section 286 of the Second Restatement of Agency provides as follows:

In an action between the principal and a third person, statements of an agent to a third person are admissible in evidence against the principal to prove the truth of facts asserted in them as though made by the principal, if the agent was authorized to make the statement or was authorized to make, on the principal's behalf, any statements concerning the subject matter.

RESTATEMENT (SECOND) OF AGENCY § 286 (1958).

229. Section 287 of the Second Restatement of Agency provides as follows: "Statements by an agent to the principal or to another agent of the principal are not admissible against the principal as admissions; such statements may be admissible in evidence under other rules of evidence." *Id.* § 287.

In an oft-quoted passage, Morgan explains:

The doctrine of *respondeat superior* does not apply *inter sese* between principal and agent or between master and servant. It is only where the principal or master brings himself in contact with the outside world through his agent or servant that he becomes responsible for the latter's acts. If the agent or servant in gathering the data violates some right of a third party, the principal or master will have to answer for it. But where he merely transmits information to his superior, it is specious to say

dent were not, even if authorized, covered by section 286. Nevertheless, proponents of this result of the Federal Evidence rule argue that there is no reason to draw the line at statements to outsiders.²³⁰

Both arguments, however, miss the point. Section 286 of the Second Restatement is *not* founded on substantive principles. Just as employers' substantive law responsibility for employees' nonverbal acts is limited to those that cause or contribute to a substantively cognizable injury, the employer's substantive law responsibility for employee's verbal acts is similarly limited.²³¹ As the Reporter's Note in the Second Restatement makes clear, section 286 was not informed by any reasons of commercial convenience, fair dealing, risk distribution, nor any other policy underlying employers' substantive responsibilities for employees' verbal and nonverbal acts.²³² Where these policies are affected by an employee's utterance to an outsider,

that it is as if the superior were speaking to himself. It is not so in fact; it is not so in substantive law; to hold it so for evidential purposes is to treat a limited generalization as a universal, and to apply a formula without discriminating examination of its basis. If such statements are to be received, their reception must be justified not on any ground of representation but because of the existence of some independent guaranty of trustworthiness.

Morgan, *supra* note 205, at 463 (footnotes omitted); *see also* Falknor, *supra* note 58, at 860-61.

230. McCormick indicated that instead of drawing the line between admissible and inadmissible utterances by analogy to substantive law, the line should be drawn by analogy to the evidence doctrine that permits use against the party of any utterance, even if made while talking to himself. C. McCORMICK, *supra* note 188, § 78, at 160; *see* FED. R. EVID. 801(d)(2)(C) advisory committee note. That argument, however, begs the very issue to be determined: Why should these utterances be attributed to the party in the first place? Professor Mueller argues that the "notion of party responsibility which underlies the admissions doctrine . . . suggests no reason to draw the line" at statements made to outsiders. 4 D.W. LOISELL & C.B. MUELLER, *supra* note 139, § 425, at 302. In context, the argument may be referring to responsibility for authorized utterances derived from substantive law. *Id.* at 296-310. *See infra* notes 231-37 and accompanying text.

The Advisory Committee to the Federal Rules also reasoned that utterances to the employer should be admissible because "a party's books or records are usable against him, without regard to any intent to disclose to third persons." FED. R. EVID. 801(d)(2)(C) advisory committee note. As argued forcefully elsewhere, that analogy does *not* support attribution of an employee's *unreliable* oral utterances to the party as the party's own assertion. Comment, *Evidence: The Admissibility of Intra-Corporate Documents as Admissions of a Party-Opponent*, 28 OKLA. L. REV. 151, 158 (1975). The business records exception requires a showing of reliability and need before the party's books may be admitted. *See* C. McCORMICK, *supra* note 58, at §§ 307, 310. Moreover, rule 803(6) expressly requires a showing that the information in the record offered was transmitted by an employee with personal knowledge of the event reflected. FED. R. EVID. 803(6).

231. *See* RESTATEMENT (SECOND) OF AGENCY § 284, §§ 284-89, at 495-512 app., reporter's note.

232. *Id.* at 487-88.

the Restaters said, the doctrine of verbal acts is sufficient to effectuate them.²³³ Rather, the Restaters offered section 286 as a compromise between what they considered the substantively desirable rule (one that limited employers' responsibility to verbal acts, and accepted admissibility under evidence law of any trustworthy declarations to prove them),²³⁴ and the seeming direction of evidence law toward wholesale attribution of employees' utterances to employers.²³⁵ The observation that the line drawn in section 286 is an arbitrary one, then, is apt only if it is meant to suggest that the line's placement is not supported by any known substantive policy.²³⁶ Indeed, the desirability of attributing to party-employers *all* of the employee utterances covered by rule 801(d)(2)(C)—those made to outsiders as well as to insiders—must be measured solely by the soundness of the *evidence* policy that gained the ambivalent concession in the Second Restatement.²³⁷

No current commentators claim that substantive law mandates the evidentiary attribution to party-employers of *unauthorized* employee statements about matters within the scope of employment found in rule 801(d)(2)(D). In much of the evidence literature supporting the rule, however, there is a subtle, and sometimes not so subtle, argument that unauthorized employee assertions should be attributed to employers to achieve symmetry with substantive rules relating to respondeat superior.²³⁸ Since employers are responsible in

233. See *supra* notes 231-32.

234. RESTATEMENT (SECOND) OF AGENCY, §§ 284-89, at 496-511, app., reporter's note.

235. *Id.* at 497-98.

236. Thus, the enigma observed by at least one commentator is more apparent than real. See Comment, *supra* note 230, at 158. Proponents of extending party admissions to include utterances of employees made solely to employers are not ignoring the substantive law that justifies attributing to the party-employer utterances made by employees to outsiders. Since there is no substantive policy behind either attribution, the seeming inconsistency may be best characterized as revealing an absence of good reason for both attributions.

237. The evidentiary policies are discussed later in this article. See *infra* notes 238-86 and accompanying text.

238. Use of the terms "agent or servant" in FED. R. EVID. 801(d)(2)(D) seems calculated to achieve this result, since those are the terms used in substantive law to describe persons for whose physical conduct the employer is responsible. For a discussion of whether the rule should be extended to cover others, see 4 D.W. LOUISELL & C.B. MUELLER, *supra* note 139, § 426, at 322-30. It is frequently argued that if unauthorized employee utterances are not admitted, employers will be "immunized" from all utterances by employees about matters within the scope of their employment. See, e.g., REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE 165-167 (1963) [hereinafter cited as N.J. REPORT]; D.W. LOUISELL & C.B. MUELLER, *supra* note 139, § 426, at 312. One court has taken the symmetry argument seriously. Process Control Corp. v. Tullahoma Hot Mix Paving Co., 79 F.R.D. 223, 225-26 (E.D. Tenn. 1977) (only utterances admissible under FED. R. EVID. 801(d)(2)(D) are

substantive law for employees' nonverbal acts within the scope of employment, the argument appears to run, they ought to be responsible for employees' utterances about those acts.²³⁹ Even Wigmore argued that a person "chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish."²⁴⁰

Taken as an argument that evidence law ought not to unreasonably impede proof of employee's acts for which substantive law makes employers responsible, it is unobjectionable. Where there is reliability and need for such employee utterances, they should be as admissible as any others. However, taken as an argument that employee utterances should be treated as employers' own because there is a need for employers to bear an evidentiary risk coterminus with their substantive risks, the argument is specious. Morgan's careful and cogent criticism long ago demonstrated that such symmetry supported neither evidence nor substantive policies.²⁴¹ Nevertheless, it lingers on as support for the Federal Rules' classification of employee utterances, and has even formed the basis of some recent commentaries.²⁴² Without repeating Morgan's points, a few more are ventured here.

One oft-cited reason for the rule attributing to party-employers unauthorized employee utterances about all matters within the scope of employment is:

[M]any of the litigations in which this Rule would play a significant role are brought by individuals against companies, most of which are insured. If a rule of evidence tends to disadvantage one group of litigants as against another, and we are uncertain where the greater burden of reliability of such evidence lies, is it unreasonable to suggest that one group of litigants may be in far better condition to accept the risks than the other?²⁴³

Thus, a rule admitting unreliable proof in all cases is supposedly

those about matters for which the employee was authorized to act for the employer).

239. See 4 D.W. LOUISELL & C.B. MUELLER, *supra* note 139, at § 426; 4 J. WIGMORE, *supra* note 58, § 1077, at 158-61; Rogers, *The Doctrine of Vicarious Admissions* 33 CONN. B.J. 461, 472 (1959).

240. 4 J. WIGMORE, *supra* note 58, § 1077, at 160.

241. Morgan, *Vicarious Admissions*, *supra* note 91.

242. See Harvey, *Evidence Code Section 1224—Are an Employee's Admissions Admissible Against His Employer?* 8 SANTA CLARA LAW. 59, 61 (1967). One answer to the Harvey article is found in Note, *Elimination of the Agency Fiction in the Vicarious Admissions Exception*, 54 WASH. L. REV. 97, 100-06 (1978).

243. N.J. REPORT, *supra* note 238, at 166-67.

justified by the desirability of placing a burden of unreliability on insured companies. That burden is not justified by the usual evidence policy facilitating integrity of the fact-finding process, for, by hypothesis, "we are uncertain where the greater burden of reliability of such evidence lies."²⁴⁴ Rather, it is justified by analogy to what is seemingly perceived as a policy of tort law.²⁴⁵

The mistakes in the quoted passage are only the usual pitfalls of an attempt to effectuate a single substantive policy through a uniform rule governing admissibility of proof. First, it is necessarily so oversimplified, as to be a probable misstatement of substantive policy.²⁴⁶ Second, assuming its accuracy, and even confining it to accident cases involving insured companies, the rule of proof it justifies does not serve the stated purpose.²⁴⁷ Without knowing the content of those employee utterances the rule makes admissible, how can we know that they will assist in identifying risks appropriately borne by the insured? And if, as seems suggested, the goal is to assign to insureds all losses claimed against them, why do we need this rule of proof? Finally, as the rule is intended for *all* cases, there is no recognizable relationship between the only certain identification made by the rule—a loose-tongued employee—and the distribution of responsibility, risks, or losses commanded by any substantive law.

The danger of keying admissibility of hearsay to attempted substantive symmetry rather than reliability is well demonstrated by *Astra Pharmaceutical Products, Inc. v. Occupational Safety and Health Review Commission*.²⁴⁸ In that case, the result of rule 801(d)(2)(D) was to admit, as the employer's own, the employees' unauthorized statements *accusing the employer* of violating Occupational Safety and Health Administration ("OSHA") standards.²⁴⁹ The employees' observations and utterances, as the rule required, concerned a matter within the scope of their employment.²⁵⁰ Applied

244. *Id.*

245. *See infra* note 246.

246. The statement by the reporter for the New Jersey Supreme Court's Committee on Evidence, *see supra* text accompanying note 243, is an oversimplification, but is, nevertheless, a recognizable version of a policy sometimes urged in partial explanation of, and other times urged as a policy that should partly inform, tort law in accident cases. *Compare* 2 F.W. HARPER & E. JAMES, *THE LAW OF TORTS* §§ 11.5, 12.1, 13.1, 13.2 (1956) and Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961) with *N.J. REPORT*, *supra* note 238, at 166-67.

247. *See supra* note 246 and accompanying text.

248. 681 F.2d 69 (1st Cir. 1982).

249. *Id.* at 73 n.8.

250. *Id.* In *Astra Pharmaceutical*, statements made by employees to an OSHA inspec-

in a case brought to protect employees, however, the rule resulted in assigning an evidentiary risk to the employer exactly opposite to the risk defined by the substantive law from which the standard was imported. If the employees' utterances also happened to be reliable proof of the facts asserted in them, there would be no harm.²⁵¹ But since such a showing was not required by the rule, none was demanded. The resulting decision, that the employer violated statutory duties,²⁵² thus turned on the possibly unreliable opinions of those to whom the duties were owed.²⁵³ No recognizable substantive policy is served by a rule that facilitates such a result.

B. *Advance Adoption?*

In the absence of an acceptable theory of mind control, the assertion of another person is no proof of a party's psyche. The universal assumption is that each person's belief, perception, and recollection is unique.²⁵⁴ For this reason, when the statement of another is offered as a party's admission, the usual practice is to exclude it unless there is some proof that the party adopted the statement as his own.²⁵⁵ The rule is as logically applicable to statements uttered by the party's employees as it is to the declarations of strangers to the party, his mother, brother, or Siamese twin. While each declarant's

tor after an accident relating to protective equipment that the employer required its employees to wear was held admissible under FED. R. EVID. 801(d)(2)(D). Primarily on the basis of these statements, the employer was found in violation of the OSHA regulation. *Id.* at 73.

251. Although both employees had personal knowledge, the utterances appeared to have limited probative value as proof of the employer's policies. *See id.* Moreover, the context in which the statements were made—an investigation into the cause of a fellow employee's accident—, *see id.* at 71, suggests unreliability. There were two statements. One concerned the extent of contact between a toxic chemical and the injured employee. Declarant said his co-worker was "covered . . . from head to toe" with the chemical. *Id.* Presumably, had the injured employee been wearing protective clothing, the contact would not have been as extensive. It is conceivable that declarant had a motive to misrepresent the extent of injury: assistance of his co-worker in any ultimate claim against their employer. The other statement concerned the employer's policy regarding the wearing of protective gear. The second declarant claimed that the employer required only chemical goggles, a respirator, and gloves to be worn. *Id.* at 72. Again, it is possible that declarant was motivated to cover-up for the injured employee, by minimizing any suspected violations by the employee of the employer's instructions.

252. *Id.* at 73.

253. *See supra* note 251.

254. *See generally* Stewart, *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1; E. LOFTUS, *supra* note 141.

255. *See, e.g.*, FED. R. EVID. 801(d)(2)(B). For a general discussion of this rule, see 4 D.W. LOUISELL & C.B. MUELLER, *supra* note 139, at § 424; 4 J. WEINSTEIN & M. BERGER, *supra* note 200. ¶ 801(d)(2)(B) [01], at 801-119 to 801-126.

extrajudicial assertion may provide debatable proof of his own belief, there is no palatable reason to project that belief onto another person just because he happens to be a party to the case.

Of course, it is possible for one person to adopt another's statement. If, in response to hearing another's utterance, party says "I agree," party's own utterance may be rationally viewed as an adoption of the other's.²⁵⁶ If the person who uttered the initial statement had personal knowledge of the facts asserted, party's subsequent agreement might be translated into evidence terms as follows: party expressed agreement with the perception and recollection underlying the statement. If the person who uttered the initial statement did not have personal knowledge of the facts asserted, the party's adoption might be better translated as: party then expressed agreement with the belief expressed in the other person's utterance. In either event, due to party's subsequent adoption, Trier is rationally invited to rely solely on party's testimonial capacities in crediting the utterance. Since the utterance is thus a true party admission, neither the original asserter's nor party's personal knowledge of the facts asserted in the adopted statement is relevant to admissibility.

In attributing a subsequently adopted utterance to party, then, the only issue is whether party's later conduct or words evidenced an intention to adopt the other's utterance. Most courts, therefore, demand a showing of the circumstances surrounding, or conduct constituting, the alleged adoption from which it may be reasonably inferred that party had actual knowledge of the assertion and intended to adopt it as his own.²⁵⁷ For example, in *Wild Canid*²⁵⁸ an utterance almost identical to Mr. Poos' utterance, ("Sophie bit a child"), was found in the Board of Directors' minutes.²⁵⁹ While the connection was not made expressly, had the minutes been shown at trial to reflect a subsequent adoption of Mr. Poos' utterance,²⁶⁰ Mr. Poos' own

256. 4 D.W. LOUISELL & C.B. MUELLER, *supra* note 139 § 424, at 263; 4 J. WEINSTEIN & M. BERGER, *supra* note 200, ¶ 801(d)(2)[B] [01], at 801-120.

257. See, e.g., *Pillsbury Co. v. Cleaver-Brooks Div. of Aqua-Chem, Inc.*, 646 F.2d 1216, 1218 (8th Cir. 1981); *United States v. Shulman*, 624 F.2d 384, 390-91 (2d Cir. 1980); *United States v. Costanzo*, 581 F.2d 28, 34 (2d Cir. 1978), *cert. denied*, 439 U.S. 1067 (1979); *United States v. Weaver*, 565 F.2d 129, 135 (8th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); see also *In re Japanese Electronic Products*, 723 F.2d 238 (2d Cir. 1983) (cross reference to documents made by the party in response to interrogatory requests constitutes subsequent adoption of the material contained in the documents under 801(d)(2)(B)).

258. 588 F.2d 626 (8th Cir. 1978).

259. *Id.* at 629.

260. The appellate court found that the Board of Directors had acted upon Mr. Poos' statements, see *id.* at 629, but the information the conclusion was based upon is not clear from

utterance would have been admissible against his employer on that ground under rule 801(d)(2)(B).²⁶¹

By definition, however, no such showing is required for the supposed *advance* adoption in rule 801(d)(2)(C)²⁶² that justifies attributing to party statements that the party, as employer, authorized his employee to utter.²⁶³ While lack of this requirement is sometimes justified by analogizing the employee's later statement to a stenographic reproduction of the party's own statement,²⁶⁴ it is usually recognized that an employer's authorization of an employee to speak is rarely particularized, and may occur well in advance of the actual utterance.²⁶⁵ Under the Federal Rule, the authorization need only encompass the general subject of the statement ultimately uttered.²⁶⁶ Thus, far from an immediate command to utter certain words, the authorization is usually as vague and remote from the utterance as the day the employee was hired to a position that apparently required verbal contact with others.²⁶⁷

Nevertheless, it is reasoned that by this authorization employer adopts in advance any later employee statement that happens to be offered in evidence against employer.²⁶⁸ By analogy, it is argued, even where the job does not require verbal contact, employer impliedly authorizes employee to speak about job-related matters to

either the opinion or the transcript of the trial.

261. FED. R. EVID. 801(d)(2)(B) provides that: "A statement is not hearsay if—. . . . The statement is offered against a party and is . . . (B) a statement of which he has manifested his adoption or belief in its truth."

262. FED. R. EVID. 801(d)(2)(C) provides that: "A statement is not hearsay if—. . . . The statement is offered against a party and is . . . (C) a statement by a person authorized by him to make a statement concerning the subject."

263. R. LEMPert & S. SALTzBURg, *supra* note 98, at 389-91. For a general discussion of advance adoption, see 4 J. WEINSTEIN & M. BERGER, *supra* note 200, ¶ 801(d)(2)(B) [01] at 801-119 to 801-126; C. McCORMICK, *supra* note 188, § 296, at 527. Wigmore explained advance adoption as follows: "[I]f a party . . . names another person as one whose expected utterances he approves beforehand, this amounts to an anticipatory adoption of that person's statement; and it becomes, when made, the party's own." 4 J. WIGMORE, *supra* note 58, § 1070, at 100.

264. Strahorn, *supra* note 67, at 580 ("[w]hether the party chooses to use voice, pen, pencil, typewriter, printing, or the voice or hand of another as the vehicle of *his* utterance is immaterial, for it will come in equally in all events as his utterance") (emphasis in original).

265. 4 J. WIGMORE, *supra* note 58, § 1078, at 162.

266. See FED. R. EVID. 801(d)(2)(C).

267. Even where no express authority is shown, an implied or apparent authority will do. See, e.g., *Kingsley v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir. 1977); *Helbling v. Unclaimed Salvage & Freight Co.*, 489 F. Supp. 956, 959 (E.D. Pa. 1980) (admitting employee's out-of-court statement to plaintiff on basis of rule 801(d)(2)(D)).

268. 4 J. WIGMORE, *supra* note 58, § 1070, at 100-02.

outsiders and himself.²⁶⁹ In hearsay terms, this translates into an advance adoption of the testimonial capacities or beliefs underlying every statement subsequently uttered by the employee. This advance adoption supposedly justifies treating party-employer as the declarant, and the employee's statement identically to any statement party himself utters.

In most, if not all cases, this evidentiary translation of the act of hiring into an advance adoption of employee's utterances is a complete fiction. For example, employer hires employee as a receptionist. Part of receptionists's duties are to monitor and report to all who inquire as to the whereabouts of numerous employees. Is it conceivable that employer assumes that receptionist, a human being, will never make a mistake, that employer will never disagree with receptionist's report, or that receptionist's perception, memory, narrational skills, or belief will always be in accord with employer's? When the whereabouts of one employee on a particular occasion becomes relevant in a lawsuit, it would be absurd to reason that receptionist's belief about the matter, if contrary to employer's position at trial, is logically probative of employer's lack of commitment to his own cause. Where employee is authorized not to speak but to act for the employer (as the appellate court mysteriously found to be Mr. Poos' situation in *Wild Canid*²⁷⁰) whether he is also impliedly authorized to speak about his job to outsiders or insiders is thus beside the point. Employers no more assume that employees will always perform their verbal duties correctly than their nonverbal ones.

Of course, in *Wild Canid*, Mr. Poos was not any employee; he

269. For example, in *Martin v. Savage Truck Line, Inc.*, 121 F. Supp. 417 (D.D.C. 1954), the court explained:

To say, in these circumstances, that the owner of a motor truck may constitute a person his agent for the purpose of the operation of such truck over public streets and highways, and to say at the same time that such operator is no longer the agent of such owner when an accident occurs, for the purpose of truthfully relating the facts concerning the occurrence to an investigating police officer on the scene shortly thereafter, seems to me to erect an untenable fiction, neither contemplated by the parties nor sanctioned by public policy To exclude the statement of the driver of the truck as to the speed of the truck at the time of the collision . . . would be to deny an agency which I believe inherently exists regardless of whether the statement is made at the moment of impact, or some minutes later to an investigating officer, or other authorized person.

Id. at 419. See also *Zenith Radio Corp. v. Matsushita Elec. Indus.*, 505 F. Supp. 1190, 1245-46 (E.D. Pa. 1980), *aff'd in part, rev'd on other grounds and remanded in part sub nom. In re Japanese Elec. Prods.*, 723 F.2d 238 (3rd Cir. 1983); 4 D.W. LOUISELL & C.B. MUELLER, *supra* note 139, at § 425.

270. 588 F.2d at 630.

was the sole salaried employee, a founder of *Wild Canid*, and had the title "Director of Education."²⁷¹ Although he was not a member of the Board of Directors, he was clearly authorized to do a lot of talking about Sophie, at least in schools and other institutions.²⁷² But the fictional nature of employer's supposed advance adoption does not become any the less a fiction as the employee (authorized to speak or not) rises in the hierarchy of employer's organization. While upper echelon employees may be more trusted by employer to carry out their duties correctly, and may even more frequently express opinions identical to employer's, at the moment of hiring or authorization, employer could not realistically assume that employee's performance of every task and every utterance about it will be perfectly satisfactory.²⁷³

Even if we posit employers with unrealistic expectations, however, and then characterize their hiring of employees as an expression of this faith, the federal rule's evidentiary attribution to the employer of the employee's subsequent utterances does not automatically follow. Indeed, by focusing on the original authorization to speak, the theory of advance adoption overlooks a hearsay step not accounted for by its hypothesis. Even in the simplest case of authority speaking, for example, where Employer *A* instructs Employee *B* to convey immediately, verbatim, *A*'s own utterance to *C*, *C*'s in-court recitation of the message actually conveyed by *B* rests for its value on both *A*'s and *B*'s credibility. Under an assertion-oriented definition of hearsay,²⁷⁴ *C*'s in-court recitation is double hearsay since *B*'s message is offered as a true reproduction of *A*'s utterance. Trier would have to determine first that Employee *B* correctly heard, remembered, and recited Employer *A*'s words to *C*. Only then could Trier use the utterance as probative of *A*'s actual belief. In declarant-oriented terms, *A* is deprived of the opportunity to cross-examine *B* about his hearing, memory, and narration of *A*'s utterance.²⁷⁵

This double hearsay problem is not avoided, but only made more difficult, when the original authorization is general, rather than specific. To treat Party *A* as declarant, Trier must first determine that Employee *B* correctly apprehended Party-Employer *A*'s presumably unarticulated belief about the particular matter asserted, and

271. Transcript, *supra* note 3, at 15, 157.

272. *Id.*, see *supra* notes 1-58 and accompanying text.

273. See generally J.J. SLAIN, C.A. THOMPSON & F.F. BEIN, *supra* note 195.

274. See *supra* notes 71-124 and accompanying text.

275. See *supra* notes 125-49 and accompanying text.

then accurately reproduced *A*'s unspoken belief in the message to *C*. Trier could not logically value the utterance as a reflection of *A*'s testimonial belief without this "trip" through *B*'s head.²⁷⁶ In *Wild Canid*, since Mr. Poos' utterance was made to his employer,²⁷⁷ the hearsay analysis would be as follows: To treat *Wild Canid* (its Board of Directors or its President)²⁷⁸ as the declarant, Trier would first have to determine that Mr. Poos correctly apprehended the Board members' beliefs about a matter of which they had not yet heard. Then, Trier would have to find that Mr. Poos correctly recited that belief to the very person whose belief he had supposedly apprehended.

The very difficulty and artificiality of determining whether employee correctly apprehended employer's unarticulated belief must, at the least, tempt Trier not to attempt it. If, on its face, employee's statement recites a matter for which he was also responsible as an employee, it is both simpler and more realistic to treat him as the sole declarant than to attribute the utterance to his employer. As in *Wild Canid*, it is likely anyway that at the moment employee made the statement, employer had no knowledge of the matter asserted, let alone time to form a belief observable by employee.

It is thus plain that if employees' utterances should be admitted, it cannot be because they are adopted by employers. Indeed, there is simply no logical reason to treat most employees' utterances as anybody's but their own.

It is sometimes suggested, however, that unless we attribute employee utterances to employers, party-employers would attain an evidentiary advantage and their adversaries suffer a disadvantage, by the party's use of an employee to do his bidding on the relevant occasion.²⁷⁹ The argument takes on special force, it is urged, where party-employer is a corporation capable of acting only through its employees.²⁸⁰ Construed as an argument that evidence law should not impose conditions that unfairly disadvantage substantively actionable claims against employers and corporations, it is unexcep-

276. See Tribe, *supra* note 92, at 958.

277. 588 F.2d at 629-30.

278. See *infra* notes 283-88 and accompanying text.

279. See 4 D.W. LOUISELL & C.B. MUELLER, *supra* note 139, § 426, at 312; 4 J. WEINSTEIN & M. BERGER, *supra* note 200, ¶ 801(d)(2)(D) [01], at 801-136; see also *KLM Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1961); *Martin v. Savage Truck Line*, 121 F. Supp. 417, 419 (D.D.C. 1954).

280. R. LEMPert & S. SALTzBURg, *supra* note 130, at 389-90 (the authors set forth a strong argument about the need for utterances by corporate employees).

tionable. Other than party-admissions, however, all exceptions to the hearsay rule require a showing of reliability and need before extrajudicial utterances are admissible under them.²⁸¹ And since, as we have seen, there is no reason to assume that employees' unreliable utterances are probative of employers' psyches,²⁸² admitting them against employers may be equally construed as unfairly disadvantaging those who use employees, not the other way around.

Non-natural individuals, however, are definitionally incapable of holding beliefs and forming psychological commitments separate from their employees. Just as corporate employees are the eyes and ears of the corporation when acting for it, it may be argued, their unauthorized assertions of their beliefs about that business should be considered corporate belief.²⁸³ But to state the hypothesis this way is not convincing. In light of the artificiality and collectivity of the corporate entity, it is just as logical to observe the impossibility of any *single* corporate belief,²⁸⁴ and so make all corporate employees' unreliable assertions inadmissible.

In two situations, however, it is obviously necessary and desirable to attribute some belief to a corporate party. First, where substantive law turns on the intention or motivation behind certain conduct, that law sometimes attributes to the corporation, as to *any* employer, the motivation or intention of the employees responsible for decision about, or conduct of, the matter involved.²⁸⁵ When such laws are involved, and the relevant employees' utterances asserting their own past intentions or beliefs about the matter are offered in

281. *Id.* at 355; *see supra* notes 57, 152 and accompanying text.

282. *See supra* notes 254-81 and accompanying text.

283. *Balfour v. Fresno Canal & Irrigation Co.*, 123 Cal. 395, 397-98, 55 P. 1062, 1063 (1889) (explaining why it is essential, for substantive purposes, to sometimes attribute to the corporation the internal beliefs, knowledge, etc. of its employees).

284. For an interesting discussion of the various personnel permutations possible for forming even a corporate "policy," and a strong argument that these policy formations vary from corporation to corporation, *see generally* M. EISENBERG, *THE STRUCTURE OF THE CORPORATION* (1976).

285. *See Balfour Fresno Canal & Irrigation Co.*, 123 Cal. 395, 397-98, 55 P. 1062, 1063 (1889). Examples of substantive imputation of employees' states of mind to corporations and other employers include *United States v. T.I.M.E.-D.C. Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974) (holding that a corporate defendant knowingly and willingly committed a crime, by imputing to it the collective knowledge of its employees); *Blackburn v. Witter*, 201 Cal. App. 2d 518, 19 Cal. Rptr. 842, 843-45 (1962) (through the doctrine of apparent authority, an employer becomes vicariously liable for an employee's intentional fraud). *See generally* H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS* § 184, at 429-83 (3d ed. 1983); J.J. SLAIN, C.A. THOMPSON & F.F. BEIN, *supra* note 195, § 1[E], at 1-105 to 1-132 and § 6 at 4-120 to 4-125.

evidence, the utterances *must* be treated as would any party admission (or the state of mind exception amended) to avoid impeding substantive law.²⁸⁶

Second, to effectuate the policy of the admissions exception, attribution to the employer of some officers' and directors' beliefs about a few matters for which they are *not* directly responsible is desirable. If the directors or officers responsible for litigating in the corporate name or formulating a litigation posture for the corporation²⁸⁷ do not believe in a cause they choose to pursue, a judgment in favor of the corporation would be as productive of mischief as one that unfairly favored a natural person. For purposes of the admissions exception, then, at least those persons' beliefs about the matter are logically viewed as the corporate-party's belief.

Thus, in the *Wild Canid* case, the Board of Directors' utterance, as reflected in the minutes of its meeting, should have been admitted against the corporate party for the same reason that Mr. Poos' utterances were admissible against him. The Board of Directors of this not-for-profit corporation was responsible for the management of the corporation and collectively entitled to determine its litigation posture.²⁸⁸ Surely, the Board's utterances had as much probative value as a reflection of Wild Canid's commitment to its cause as any individual party's utterance in relation to his cause. The court of appeals' holding that the Board's minutes were "repetitive" was, thus, nonsense. Mr. Poos' utterances were rightly of no consequence in determining Wild Canid's commitment. The Board's utterances, however, were the "whole ballpark."

286. Assertions by such employees expressing their then existing state of mind, or their future intentions, would be admissible in any event under the state of mind exception to the hearsay rule. See FED. R. EVID. 803(3). Only expressions of past beliefs would not be admissible under rule 803(3). *Id.* Either the state of mind exception should be amended to admit them for the same reasons that testators' statements of past state of mind are admissible under that exception, see *id.* advisory committee note, or the admissions exception should be held to include them.

287. The status of the persons who actually formulate a litigation posture varies from corporation to corporation, dependent more on actual power distribution than on the niceties of the charter or the by-laws. See generally M. EISENBERG, *supra* note 227a, (describing the many possible personnel permutations that influence the decision-making process). There are, of course, gross differences in the distribution of decision-making authority between close, public, and nonprofit corporations. J.J. SLAIN, C.A. THOMPSON & F.F. BEIN, *supra* note 195, § 1, at 1-33, 1-51.

288. Buckley interview, *supra* note 8. Mr. Poos was not a member of the Board of Directors and did not participate in Wild Canid's decision to litigate the matter. See *supra* notes 4-58 and accompanying text.

III. RULE 801(d)(2)(C) AND (D) SHOULD BE REDRAFTED

Except in the two instances discussed previously,²⁸⁹ unreliable employee utterances now made admissible as the party's own should not be admitted. It has been urged that without redrafting rule 801, this goal, assuring use of only reliable employee utterances, can be accomplished through the exercise of judicial discretion under rule 403.²⁹⁰ As the cases demonstrate, however, many federal judges do not believe they have discretion to exclude employee utterances solely because they are unreliable, even where the utterances are not based on personal knowledge.²⁹¹ The history of party admissions in the courts and the wording of rule 801(d)(2) strongly support their conclusion.²⁹² Other courts, desirous of excluding unreliable employee statements, are nevertheless hampered by the inconsistency between good sense and the rationale for the rule.

For example, the party admission label and the advance adoption theory makes the extra hearsay step discussed above supposedly irrelevant to decision making.²⁹³ When an employee utterance is offered that directly reports the state of mind, motivation or opinion of employer, (or in a corporate setting, that of another employee re-

289. See *supra* text accompanying notes 285-88.

290. 4 J. WEINSTEIN ' M. BERGER, *supra* note 200, at ¶ 801(d)(2)(D) [01], at 801-133.

291. See, e.g., *Russell v. United Parcel Serv.*, 666 F.2d 1188, 1190 (8th Cir. 1981); *Helbing v. Unclaimed Salvage*, 489 F. Supp. 956, 959 (E.D. Pa. 1980) (no inquiry into personal knowledge where court finds implied authority to convey reason for termination); *Mahlandt v. Wild Canid Survival & Research Center*, 588 F.2d 626 (8th Cir. 1978); *Baughman v. Cooper-Jarrett, Inc.*, 391 F. Supp. 671, 675 (W.D. Pa. 1975) (no inquiry into personal knowledge once authority to speak is shown), *aff'd in part and vacated and remanded in part*, 530 F.2d 529 (3d Cir.), *cert. denied* 429 U.S. 825 (1976), *on remand sub. nom. Baughman v. Wilson Freight Forwarding Co.*, 79 F.R.D. 520 (W.D. Pa. 1977), *rev'd on other grounds*, 583 F.2d 1208 (3d Cir. 1978). The assumption that there is no discretion to exclude employee utterances for lack of personal knowledge may account for the narrow interpretation of rule 801(d)(2)(D) in *Process Control v. Tullahoma Hot Mix Paving Co.*, 79 F.R.D. 223, 225-26 (E.D. Tenn. 1978) (holding that the rule admitted utterances only of employees authorized to act for the employer about the matter asserted) (emphasis added). Cf. *In re Japanese Elec. Prods.*, 723 F.2d 238, 301 (3d Cir. 1983). The Third Circuit in *Japanese Elec.*, upheld the trial court's ruling that employees' diary entries were inadmissible under rule 801(d)(2)(D) because their meaning was so unclear that they could not be easily characterized as "assertions" within the meaning of the rule and, alternatively, held that their probative value was outweighed by prejudice. However, since the diary entries might be admissible under rule 801(d)(2)(B) because the entries were referred to by the employer in answers to interrogatory requests, the appellate court remanded the case to the trial court for consideration of that issue. *Id.* at 301.

292. See FED. R. EVID. 801(d)(2); *supra* note 291 and *infra* notes 294-323 and accompanying text.

293. See *infra* notes 273-78 and accompanying text.

sponsible for decision making) the double hearsay problem is so starkly presented that courts cannot help noticing. But, how can they rule the utterance inadmissible without confronting the rule's rationale?

In a recent antitrust case in the Second Circuit, *Oreck Corp. v. Whirlpool Corp.*,²⁹⁴ Oreck Corporation ("Oreck") alleged a conspiracy between Whirlpool Corporation ("Whirlpool") and Sears Roebuck & Co. ("Sears") to exclude Oreck from the vacuum cleaner market.²⁹⁵ To prove the conspiracy, Oreck offered the extrajudicial statements of the Whirlpool salesman in charge of Oreck's account.²⁹⁶ The Whirlpool salesman allegedly told Oreck that Oreck's selling tactics were antagonizing Sears, and thus jeopardizing Oreck's continued relationship with Whirlpool.²⁹⁷ Upholding a directed verdict in both defendants' favor,²⁹⁸ the court first reasoned that the utterances were improperly admitted against Sears because there was insufficient independent evidence to connect Sears to a conspiracy.²⁹⁹

Whether the utterances were admissible and sufficient against Whirlpool, however, was not so easily disposed of. Apparently unwilling to answer the question directly, the court first concluded that the issue of admissibility against Whirlpool need not be reached because of the lack of independent evidence against Sears (a logically questionable result), but then observed that even if properly admitted, they should have been assigned little weight.³⁰⁰

The Second Circuit's quandry is understandable. The salesman's utterances were completely unreliable indicators of the facts asserted in them. There was little likelihood that the salesman would have had any personal knowledge of the alleged anticompetitive condition of sale reported in the statement, for as defendants pointed out, the salesman lacked authority to formulate sales policy.³⁰¹ But, their argument was beside the point. The rule requires only that the employee be authorized to utter "statement[s] concerning the sub-

294. 639 F.2d 75 (2d Cir. 1980).

295. *Id.* at 78.

296. *Id.* at 80.

297. *Id.*

298. *Id.* at 78.

299. *Id.* at 80-81.

300. *Id.* at 80 n.3, 81.

301. *Id.* at 80 n.3. Compare *Oreck Corp.*, 639 F.2d 75 (2d Cir. 1980) with *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1143 (7th Cir. 1983) (statements of upper-echelon management concerning anticompetitive tactics admitted).

ject,"³⁰² or that the statement relate "to a matter within the scope of his . . . employment."³⁰³ Surely, the salesman's responsibilities and authority included apprehending Whirlpool's terms and conditions of sale and relaying those terms to his accounts. What he was actually likely to know about the reasons for any policy is not important under the rule. Had the court ruled on admissibility, it presumably would have been forced to uphold admissibility.

The remedy suggested by the court, however, upholding admissibility of the statement but assigning it little weight,³⁰⁴ can be justified neither by the rule as written, nor the policy that supports it.³⁰⁵ The supposed reason for giving employees' utterances the status of party-employers' is that they are as probative of the employer's belief as any made by the employer himself.³⁰⁶ In *Oreck Corp.*, any utterance of an anticompetitive motive by the employer himself, (or an employee likely to have formed the employer's policy on the matter) would have been highly probative of the employer's belief. That belief, in turn, would have been cogent proof not only of the employer's commitment to its cause, but also of a central issue in the case.³⁰⁷ Refusal to give the salesman's utterances the same probative value, while empirically realistic, collides with the logic of the rule of admissibility. In this case then, had the court followed the rule and applied it consistently with its own rationale it would have been forced to order a trial of "fact" based on wholly unreliable proof.³⁰⁸ But admitting these employee utterances and assigning them little weight, is tantamount to ignoring the rule in the first place.

Another device for avoiding the mandate of the rule is found in an Eighth Circuit case, *Cedeck v. Hamiltonian Federal Savings & Loan Association*,³⁰⁹ involving alleged sex discrimination in employment. In *Cedeck*, a bank branch manager's statement to plaintiff about why plaintiff had been denied a promotion was held inadmissible.³¹⁰ The bank manager had authority to convey plaintiff's request

302. FED. R. EVID. 801(d)(2)(C).

303. FED. R. EVID. 801(d)(2)(D).

304. 639 F.2d at 80 n.3, 81.

305. See C. McCORMICK, *supra* note 58, § 267, at 639-47.

306. See *supra* text accompanying notes 256-69.

307. The probative value of a party's own utterances is the same as that which justifies the use of declarant's then-existing state of mind utterances to prove a later state of mind or act. See FED. R. EVID. 803(3); *supra* text accompanying notes 175-79.

308. The salesman's utterances were nearly the only proof offered of an anticompetitive motive for the refusal to deal. 639 F.2d at 80-81.

309. 551 F.2d 1136 (8th Cir. 1977).

310. *Id.* at 1138.

for a promotion to "those in charge,"³¹¹ and he seemingly had authority to tell plaintiff of the denial of her request and the reason therefore.³¹² In light of the language of the Federal Rules, the utterance seemed squarely admissible under rule 801(d)(2)(C)³¹³ or (D).³¹⁴ In excluding the utterance, however, the court emphasized its form. Had the manager merely stated that plaintiff was qualified except for her sex, or had he stated a company policy to that effect, it would have been admissible.³¹⁵ Instead, he allegedly prefaced his statement with "I was told that,"³¹⁶ and so the court held it excludable under rule 805.³¹⁷ "That part of [the] statement which contains a reiteration of what someone told him is not admissible as an admission by party-opponent since the author of the statement is unknown,"³¹⁸ the court held.

While the court's bold recognition of a problem obscured by the advance adoption theory is commendable, the solution suggested is untenable. Clearly, the danger of the extra hearsay step in the branch manager's utterance could not have been obviated by a rephrasing of the statement. It was double hearsay, with or without the words "I was told . . ." And even with those words, nothing in the rule justified the court's result since the bank manager had been told of the reason for the denial by another employee who was presumably covered by the same rule. So long as each utterance is defined as the employer's, its double hearsay nature is of no consequence.³¹⁹

Indeed, four years later, in *Russell v. United Parcel Service*,³²⁰ involving claimed discrimination for exercise of rights pursuant to a worker's compensation scheme, two employees' utterances reiterating their superior's motivation for the allegedly discriminatory acts were held admissible by the same circuit.³²¹ In *Russell*, the Eighth Circuit

311. *Id.*

312. *Id.*

313. FED. R. EVID. 801(d)(2)(C) ("a statement by a person authorized by him to make a statement concerning the subject").

314. FED. R. EVID. 801(d)(2)(D) ("a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship").

315. *See* 551 F.2d at 1138.

316. *Id.*

317. *Id.* FED. R. EVID. 805 provides that: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

318. 551 F.2d at 1138.

319. *See* FED. R. EVID. 805.

320. 666 F.2d 1188 (8th Cir. 1981).

321. *Id.* at 1190.

answered defendant's double hearsay and lay opinion objections with the standard observation that admissions need not incorporate personal knowledge.³²² In an aside, the court, nevertheless, emphasized that these employee utterances were reliable: "In this case the two [employees] were clearly in a position to discern the attitude of [their superior] toward the plaintiff."³²³

If it were possible to mix, match, and discard some of the reasoning in these three opinions, we would have the beginning of a rational system for choosing which employee hearsay utterances ought to be admitted in evidence and which ought not. Since the employer's own knowledge is of no concern, the only issue (as the Eighth Circuit suggested in *Russell*) is whether the employee was in a position to reliably discern and report the matters uttered in his statement. So long as employee utterances are confined to their present category in the Federal Rules, however, such a system cannot be reconciled with the reason for rule 801(d)(2)(C) and (D) and choices must necessarily appear arbitrary and unsupported.

IV. CONCLUSION

A. Parties' Admissions

Federal Rule 801(d)(2)(A) should be reclassified as an exception to the hearsay rule rather than, as presently classified, "not hearsay." The new exception for party admissions should be re-drafted as follows:

A statement by a party, in either his individual or representative capacity, or by one responsible for formulating the party's litigation posture, offered against the party in evidence, unless admissibility would defeat the purposes of these rules or the interests of justice.

Reclassification of party admissions as an exception to the hearsay rule is desirable to achieve consistency with the Federal Rules' definition of hearsay. The sole reason for treating alike both reliable and unreliable party statements is to avoid abuses of the adversary system by those not committed to the truth of their causes.³²⁴ That policy cannot support use of unreliable party admissions in evidence in cases where their use may conflict with more important substantive policies necessitating accurate fact-finding in the particular case.

322. *Id.* at 1190.

323. *Id.*

324. *See supra* notes 150-79 and accompanying text.

Judges must have discretion to exclude unreliable party admissions in such cases. By making the role of judicial discretion explicit, a new rule may help avoid untoward results. Because the rationale of the rule commands it, the utterances of parties' attorneys and of persons responsible for formulating a corporate party's litigation posture would be admissible as the party's own.

B. *Employees' Utterances*

Most employee utterances contained in rule 801(d)(2)(C) and (D) are not rationally attributable to employers.³²⁵ Substantive law does not command the attribution, and the evidentiary theory of "advance adoption" is neither empirically nor theoretically sound.³²⁶ Thus, there is no reason to treat employee utterances as employer admissions. By labeling them party admissions, the current rules make these statements admissible regardless of personal knowledge or reliability, despite lack of reason to do so.

Many employee utterances, however, are reliable. They are also needed in evidence to prove matters not susceptible of proof in any other way. As presently drafted, rule 801(d)(2)(C) and (D) does not appear to many courts to permit discrimination between those that are reliable and those that are not.³²⁷ Therefore, it is suggested that the two rules be merged, redrafted, and incorporated as an exception to the hearsay rule, as follows:

On any issue involving the rights or obligations of a principal or employer, unless circumstances indicate lack of trustworthiness, a statement by the principal's agent or employee if the statement was: (1) based on declarant's personal knowledge; and (2) made pursuant to an employment duty to observe or report the matter stated; and (3) was so far contrary to declarant's interests or those of his principal or employer that a reasonable person in declarant's position would not have made the statement if he did not believe it to be true.

As redrafted, this exception, like all others (except party-admissions), requires a showing of need and indicia of reliability. The need for these utterances is: (1) to facilitate proof in all cases where substantive law makes employers substantively responsible for the conduct of their employees; and (2) to facilitate proof of any matter

325. See *supra* notes 190-251 and accompanying text.

326. See *supra* notes 252-88 and accompanying text.

327. See *supra* notes 289-323 and accompanying text.

involving employers' rights or obligations, since frequently the only persons who will have personal knowledge of the relevant fact or event are his employees. By the time of trial, employees' heightened awareness of their own interests and those of their employers may impede forthright testimony.³²⁸

All employee statements admissible under this exception would be based on personal knowledge and would be against either the employee's or the employer's interest when made. Some employee utterances may be unreliable even though they technically fit under the exception, for instance: employee statements which cast blame on others, (including employers and fellow employees) and those made in haste. Their reliability depends on the extent of employees' personal knowledge and other facts and circumstances surrounding the making of the statement, including employees' own interests. Therefore, courts should be given discretion under such an exception to exclude any statements that appear untrustworthy. Since the crucial issue is the employee's interest at the time of the utterance, employers could offer their own employees' statements into evidence. Again, the need for such statements is to prove matters about which employees, and not employers, are likely to have personal knowledge.

328. See *supra* notes 248-52 and accompanying text.