

## COMMENTS

### Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest

The inadmissibility of hearsay<sup>1</sup> statements has long been a dominant principle of the law of evidence.<sup>2</sup> Because such statements are not made under oath before the factfinder and are not subject to cross-examination, they are viewed as unreliable.<sup>3</sup> Some hearsay statements, because of their content or the context in which they are made, are thought to be sufficiently reliable to be presented to the factfinder. The result has been the creation of exceptions to the rule excluding hearsay evidence.<sup>4</sup>

Federal Rule of Evidence 804(b)(3) codifies one such exception. This rule admits into evidence declarations against penal interest.<sup>5</sup> It is based on the common sense belief that people do not rashly or falsely make statements against their penal interest.<sup>6</sup> Despite its ostensible

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1. Hearsay is defined in FED. R. EVID. 801(c) 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."

2. See generally C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 244 (2d ed. 1972); W. RICHARDSON, *THE LAW OF EVIDENCE* § 239 (7th rev. ed. 1948); 5 J. WIGMORE, *EVIDENCE* § 1361 (3d ed. 1940).

3. The oath, the opportunity for the jury to examine the declarant's demeanor, and the opponent's cross-examination are all viewed as guarantors of reliability. C. MCCORMICK, *supra* note 2, at § 245. See also B. JONES, *THE LAW OF EVIDENCE* § 268 (5th rev. ed. 1958); 5 J. WIGMORE, *supra* note 2, at § 1363 (emphasizing the importance of the oath and cross-examination).

4. 5 J. WIGMORE, *supra* note 2, at § 1420. Wigmore notes that the presence of a "circumstantial probability of trustworthiness" and the factfinder's need for the statement have been the major factors which have allowed for the creation of hearsay exceptions.

5. Rule 804(b)(3) admits any "statement which . . . so far tended to subject [the declarant] to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." FED. R. EVID. 804(b)(3). The rule sets forth an additional requirement for statements against penal interest offered to *exculpate* the accused: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

6. The hearsay exception admitting statements against pecuniary or proprietary interest is well established. See generally Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1 (1944); Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451 (1952). Initially, however, statements against penal interest were not included within its scope. The *Sussex Peerage* case, 8 Eng. Rep. 1034 (1844). The absence of a principled basis for this development and the horrifying results it produced on occasion gave rise to vehement criticism

clarity, rule 804(b)(3) contains an important ambiguity. The rule does not refer to a troublesome type of declaration against penal interest: the inculpatory statement against the penal interest of the declarant which also implicates and is sought to be admitted against the defendant.<sup>7</sup> Given that a provision to exclude such inculpatory statements had been part of the rule as originally drafted—only to be excised, reinserted, and once more omitted in the drafting process—the present rule leaves unanswered a number of important questions. Are all inculpatory statements admissible under rule 804(b)(3)? Are only noncollateral<sup>8</sup> inculpatory statements admissible? If even collateral inculpatory statements are admissible, what are the requirements for admissibility?

This Comment attempts to answer these questions. In this effort, the labyrinthine drafting process which produced rule 804(b)(3) is examined to determine the intent of the groups involved in its drafting. Next, the treatment by federal courts of declarations against penal interest under rule 804(b)(3) is analyzed to determine how courts have decided these questions. Finally, this Comment proposes a method for dealing with inculpatory statements under rule 804(b)(3).

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by commentators. C. McCORMICK, *supra* note 2, at § 278; 5 J. WIGMORE, *supra* note 2, at §§ 1476, 1477. See also Justice Holmes' often-quoted dissent in *Donnelly v. United States*, 228 U.S. 243, 277-78 (1913). By the middle of this century, the hesitant, though unmistakable, trend was to include declarations against penal interest within the exception. C. McCORMICK, *supra* note 2, at § 278.

7. The confusing nature of the terminology used to describe declarations against interest has been intensified by the carelessness of some courts. Essential to an analysis of the issues involved is an understanding of the relevant classifications. An *inculpatory statement* is one which implicates both the declarant and the defendant in criminal activity and is admitted against the defendant. Such statements can be divided into *collateral* and *noncollateral* statements. In a *noncollateral* inculpatory statement, the facts inculcating the defendant are found in the portion of the statement directly against the declarant's interest. In his treatise, District Judge Jack Weinstein presents as an example of such a statement one in which the declarant states that he has stolen goods, with the statement admitted against a defendant charged with possession of the stolen goods. 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES* ¶ 804(b)(3)[03], at 804-96-97 (1977) [hereinafter cited as 4 J. WEINSTEIN]. Here, the fact that the declarant has stolen the items is dis-serving to the declarant and inculcates the defendant. Because such statements can arise only where a defendant is accused of certain less common crimes, they do not appear often in the cases.

The more common type of inculpatory statement is the *collateral* inculpatory declaration. Here, the inculpatory material is not found in the portion of the statement directly against the declarant's interest, but appears instead in another portion of the statement. An example of such a statement would be the declarant's assertion that "John and I robbed the bank" admitted in John's trial for bank robbery. In this example the relevant material is not contained in the dis-serving segment ("I robbed the bank."); instead, it is in the collateral portion ("John robbed the bank.").

*Exculpatory statements* are declarations against the declarant's interest which indicate that the defendant is not responsible for the crime charged. These also can be divided into the collateral and noncollateral classifications described above.

8. For a description of collateral and noncollateral statements, see note 7 *supra*.

## I

## THE DRAFTING OF RULE 804(b)(3)

The original Advisory Committee<sup>9</sup> draft of rule 804(b)(3) made clear that inculpatory statements were not to be admitted at trial. The final sentence of the draft rule provided: "This example does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused."<sup>10</sup> This final sentence was retained in the March 1971 Advisory Committee draft,<sup>11</sup> but it was omitted from an unpublished draft which the committee forwarded to the Supreme Court in November 1971.<sup>12</sup> The sentence was again absent when the Supreme Court promulgated the official Advisory Committee draft of the Federal Rules of Evidence in November 1972.<sup>13</sup> The rules were submitted for congressional amendment and approval in 1973.<sup>14</sup> The House reinserted the final sentence of rule 804(b)(3).<sup>15</sup> The Senate found this addition unacceptable and deleted it from its version of the rule.<sup>16</sup> The conference committee adopted the Senate position.<sup>17</sup> Therefore, as passed by Congress, rule 804(b)(3) contained no specific reference to inculpatory statements.

The ambiguity created by this legislative history is not easily resolved. One view is that the drafters believed that inculpatory statements are reliable and sought to admit them. The antithetical view is that the drafters thought inculpatory statements to be insufficiently trustworthy to warrant inclusion in the 804(b)(3) exception; the drafters, therefore, omitted the final sentence, believing that such an explicit statement was not needed because this result was already mandated by the rules.<sup>18</sup> As each of the drafting units' work is examined in the

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9. The Advisory Committee and a Reporter for the committee were appointed by Chief Justice Warren in March 1965 to draft rules of evidence for the federal courts. The committee met between June 1965 and December 1968, revising the draft prepared by the Reporter, Professor Edward L. Cleary. The first draft completed by the committee was published in 1969. *Proposed Amendments to the Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 37, 40-41 (1974) [hereinafter cited as *Senate Hearings*] (statement of Judge Albert B. Maris).

10. Proposed Fed. R. Evid. 804(b)(4) (1969 draft), 46 F.R.D. 161, 378 (1969). The rule was renumbered as 804(b)(3) before it emerged in its final form.

11. Proposed Fed. R. Evid. 8-04(b)(4) (1971 draft), 51 F.R.D. 315, 438-39 (1971).

12. *Senate Hearings*, *supra* note 9, at 40 (statement of Judge Albert B. Maris).

13. Fed. R. Evid. 804(b)(3) (1972 draft), 56 F.R.D. 183, 321 (1972).

14. *Senate Hearings*, *supra* note 9, at 6 (statement of William L. Hungate).

15. HOUSE COMM. ON THE JUDICIARY, REPORT ON FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 650, 93d Cong., 1st Sess. 16 (1973) [hereinafter cited as HOUSE REPORT].

16. SENATE COMM. ON THE JUDICIARY, REPORT ON FEDERAL RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 21-22 (1974) [hereinafter cited as SENATE REPORT].

17. COMM. OF CONFERENCE, REPORT ON FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 1597, 93d Cong., 2d Sess. 12 (1974) [hereinafter cited as CONFERENCE REPORT].

18. This is the position taken by District Judge Jack Weinstein and Professor Marilyn A.

search for "intent," it will be instructive to evaluate the extent to which the material encountered supports either of these opposing views.

### A. The Advisory Committee

The Advisory Committee's work on 804(b)(3) is in some ways the most illuminating. The committee's 1969 draft explicitly excluded inculpatory statements. In the Note accompanying this draft, the committee stated that statements against penal interest might include portions implicating an accused other than the declarant.<sup>19</sup> Such collateral portions would be admissible, acknowledged the committee, under existing doctrine applicable to statements against pecuniary and proprietary interest.<sup>20</sup> The committee then made the only statement to be found in any of the official comments to the rules which denigrated the reliability of inculpatory statements. Referring to the dissent by Justice White in *Bruton v. United States*,<sup>21</sup> the committee argued that statements by codefendants implicating each other were unreliable "because of the readily supposed advantages" of such statements, and concluded that therefore inculpatory statements should not be admitted.<sup>22</sup>

The Advisory Committee reversed its position on the reliability of inculpatory statements and omitted the final sentence of rule 804(b)(3) in its unpublished October 1971 draft and in its final draft promulgated by the Supreme Court in November 1972.<sup>23</sup> The revised Note accom-

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Berger in their treatise on the Federal Rules of Evidence. Noting that the first two drafts of rule 804(b)(3) contained the final sentence, Weinstein concludes:

Except in the most unusual situation, exclusion of the statement would have been the result obtained under the present rule. When Congress added the final sentence to Rule 804(b)(3) it made this point clear. But it was dropped by Congress on the grounds that it was not needed . . . . In context, this means that the Rule should be interpreted to include this language.

4 J. WEINSTEIN, *supra* note 7, ¶ 804(b)(3)[3] at 804-93. Despite this bald assertion, Weinstein does not attempt to explore what motivated efforts to include the final sentence, to determine how the various drafting bodies felt about inculpatory statements. In fact, a close examination of Weinstein's analysis indicates that his argument about the exclusion of inculpatory statements relies chiefly upon the confrontation clause, *id.* at 804-94 to -95, and rule 403, *id.* at 804-95 to -97, and fails to deal with the ambiguity of rule 804(b)(3).

19. Advisory Committee's Note to Proposed Fed. R. Evid. 8-04(b)(4) (1969 draft), 46 F.R.D. 161, 386 (1969).

20. "[The third-party confession] may include statements implicating [the accused] and under the general theory of declarations against interest they would be admissible as related statements." *Id.* See also note 109 *infra*.

21. 391 U.S. 123 (1968).

22. Advisory Committee's Note to Proposed Fed. R. Evid. 8-04(b)(4) (1969 draft), 46 F.R.D. 161, 386 (1969).

23. Following the publication of its first draft in 1969, the committee issued another draft in March 1971. The final sentence was retained in that draft. Proposed Fed. R. Evid. 804(b)(4) (1971 draft), 51 F.R.D. 315, 438-39 (1971). After publication of the March 1971 draft, criticism and suggestions once more were submitted to the committee. Responding to the comments, the committee met again in September 1971 and incorporated certain changes in a new draft approved by the Judicial Conference in October 1971. This draft was not published. Instead it was made available to about 600 people for further comment. Aside from changes in rules 510 and

panying the final draft of the rule explained:

Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right to confrontation.<sup>24</sup>

This Note makes clear that the Advisory Committee intended some inculpatory statements, collateral as well as noncollateral, to be admissible under 804(b)(3). In fact, the language used by the committee suggests that all statements truly against interest that contain neutral or disserving collateral portions were intended to be admissible. The reluctance in previous drafts to admit inculpatory statements was here explained as a fear that some inculpatory statements, though ostensibly admitting a crime, might be motivated by the declarant's desire to appease law enforcement officials. Such statements would not qualify under the rule because they would not be truly against interest. The misgivings previously expressed about the reliability of inculpatory statements were thus withdrawn as unwarranted.

The seemingly clear picture of the committee's intent on this issue which emerges from the revised Note is somewhat tarnished by allegations that political machinations influenced the committee's change of position. In a statement before the House Subcommittee on Criminal Justice, Charles R. Halpern and George T. Frampton, representing the Washington Council of Lawyers, argued that the committee's revision of 804(b)(3) was motivated not by a view that inculpatory statements were reliable but rather by political pressures.<sup>25</sup> Halpern and Frampton criticized various changes that were made after the completion of the March 1971 draft. They argued that the Justice Department and Senator McClellan, an influential member of the Senate Judiciary Committee, coerced the Advisory Committee into making certain changes, with McClellan threatening to obstruct the entire project if his recommendations were not accepted.<sup>26</sup> This political pressure allegedly was exerted after publication of the March 1971 draft<sup>27</sup> and bore

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609, this draft was issued by the Supreme Court as the completed work of the Advisory Committee and the Judicial Conference in November 1972. *Senate Hearings, supra* note 9, at 41-42 (statement of Judge Albert B. Maris).

24. Proposed Fed. R. Evid. 804(b)(4) (1972 draft), 56 F.R.D. 183, 328 (1972).

25. *Proposed Rules of Evidence: Hearings on H.R. 5463 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 179 (1973) [hereinafter cited as *House Hearings*] (statement of Charles R. Halpern and George T. Frampton).

26. *Id.* at 180. Halpern and Frampton insisted that the legislation requiring congressional approval for the rules was viewed as a signal that Senator McClellan was willing and able to exert pressure to effect changes in certain provisions.

27. Indeed, Senator McClellan did communicate to the Advisory Committee his displeasure

fruit in the substantial amendments appearing in the unpublished October 1971 draft and the final draft.<sup>28</sup> The omission of the last sentence of 804(b)(3) was one amendment to which Halpern and Frampton pointed.

The claims of Halpern and Frampton support an argument that the Advisory Committee's statement of intent is a suspect and inadequate base on which to build an interpretation of the silence of 804(b)(3). An awareness of their claims renders more important the effort to ascertain the intent of the other drafting bodies involved: the House, Senate, and conference committees.

### B. The Congressional Committees

Although there is some doubt about the Advisory Committee's conclusions regarding the reliability of inculpatory statements, the Advisory Committee at least focused on that key question. In contrast, the congressional committees paid little attention to the reliability issue. Their work concentrated on the confrontation clause of the United States Constitution.

The introduction of this issue was apparently due to a reference to *Bruton v. United States*<sup>29</sup> and *Douglas v. Alabama*<sup>30</sup> in the Note to the Advisory Committee's original version of rule 804(b)(3).<sup>31</sup> In both *Bruton* and *Douglas*,<sup>32</sup> the Supreme Court held that the confrontation

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with the final sentence. *Proposed Rules of Evidence: Supplement to Hearings on H.R. 5463 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 60 (1973) [hereinafter cited as *Supplement to House Hearings*] (letter of Senator John L. McClellan to Judge Albert B. Maris (Aug. 12, 1971)). Senator McClellan argued that the final sentence should be omitted. Apparently inferring from the awkward references to *Bruton* and *Douglas* in the March 1971 draft that the Advisory Committee's position was based upon its reading of the confrontation clause, Senator McClellan asserted that the confrontation clause simply did not mandate exclusion of all inculpatory statements. *Id.* at 60. Deputy Attorney General Kleindienst expressed similar sentiments. Letter from Deputy Attorney General Richard G. Kleindienst to Judge Albert G. Maris (Aug. 9, 1971), reprinted in 117 CONG. REC. 33648, 33657 (1971).

28. Among the evidence presented by Halpern and Frampton suggesting the effects of such pressure is a letter from Judge Albert B. Maris to Professor Charles A. Wright acknowledging this pressure and stating: "[I]t may well be that we have to make major concessions in the Evidence draft." *House Hearings*, *supra* note 25, at 180-81 (statement of Charles R. Halpern and George T. Frampton).

29. 391 U.S. 123 (1968).

30. 380 U.S. 415 (1965).

31. Advisory Committee's Note to Proposed Fed. R. Evid. 8-04(b)(4) (1969 draft), 46 F.R.D. 161, 386 (1969).

32. In *Bruton* the Court held that the admission in a joint trial of a codefendant's confession violated the defendant's confrontation clause rights despite the trial court's admonition to the jury that the confession was inadmissible against the defendant.

In *Douglas* the prosecutor called to testify the defendant's alleged accomplice who had been convicted in an earlier trial. Since the witness refused to answer questions the prosecutor cross-examined him as a hostile witness. During this cross-examination, the prosecutor read the accomplice's purported confession to the jury. The Court held that this conduct violated the confrontation clause in denying the defendant the right to cross-examine the declarant.

clause was violated by the admission into evidence of statements made by declarants who did not testify.<sup>33</sup> The only relevance of the cases to the Advisory Committee's treatment of inculpatory statements was that both involved inculpatory statements and that Justice White's dissent in *Bruton* had deprecated the reliability of codefendants' inculpatory statements. Because the Advisory Committee did not invoke the confrontation clause as a basis for excluding inculpatory statements, the reference to *Bruton* and *Douglas* was gratuitous.

When the final Advisory Committee draft was sent to the House of Representatives, the House subcommittee linked the confrontation clause to the final sentence of rule 804(b)(3).<sup>34</sup> In the tentative subcommittee draft of the rules completed on June 28, 1973,<sup>35</sup> the final sentence of rule 804(b)(3) was reinserted.<sup>36</sup> The justification advanced for this amendment was set out succinctly in the subcommittee Note: "The Subcommittee also determined to add to the Rule the final sentence from the 1971 draft, designed to codify the [confrontation clause] doctrine of *Bruton v. United States* . . . ."<sup>37</sup> The Senate Judiciary Committee, to which the House bill was sent, deleted the final sentence.<sup>38</sup> In

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33. In both cases, the statement did not fall within an exception to the hearsay rule as to the defendant against whom it was admitted.

34. This linkage had in fact emerged in the summer of 1971 in letters written by Senator McClellan and Deputy Attorney General Richard Kleindienst to the Advisory Committee. See note 27 *supra*.

35. The House subcommittee held hearings in 1973 on February 7, 8, 22, and 28, and March 7 and 15. After extensive deliberation, the subcommittee passed the proposed rules on to the Judiciary Committee for further consideration. After some additional markup sessions, the bill was reported to the House. On February 6, the bill was passed, 377-13. *House Hearings, supra* note 25, at 6 (statement of William L. Hungate).

36. Proposed Fed. R. Evid. 804(b)(3), Tentative Subcommittee draft of H.R. 5463 in *Supplement to House Hearings, supra* note 27, at 175.

37. *Id.* at 176. Once the focus of analysis was distorted in this manner, debate proceeded along this path. Those who responded to the treatment of inculpatory statements in the subcommittee's tentative draft addressed the confrontation clause issue and completely ignored the reliability question. The Attorney General of Kentucky praised the amendment as "[a] good addition . . . principally codifying the doctrine of *Bruton*," though he noted that the language might have been too inflexible to reflect subsequent cases which had "manicured [*Bruton's*] import." *Supplement to House Hearings, supra* note 27, at 216-17 (letter from Ed. W. Hancock, Attorney General of Kentucky, to Subcommittee on Criminal Justice, (July 20, 1973)). See also *id.* at 309-10 (letter from Committee on Federal Courts, The Association of the Bar of the City of New York, to William L. Hungate). Acting Deputy Attorney General William D. Ruckelshaus also asserted that the final sentence was an attempt to codify *Bruton*, but he took a different approach. *Id.* at 351-52 (letter from William D. Ruckelshaus, Acting Deputy Attorney General, to William L. Hungate, (September 13, 1973)). Ruckelshaus argued that the final sentence should be omitted because a question as "complicated and marked by nuance" as the interrelationship of hearsay statements, hearsay exceptions, and the confrontation clause was not an apt subject for a statute. *Id.* at 352. Professor Kenneth W. Graham, Jr. expressed similar sentiments, arguing that the final sentence was "an inadequate statement of *Bruton*" and inconsistent with the general approach of the rules to avoid dealing with confrontation clause problems. *Id.* at 205 (Letter from Professor Kenneth W. Graham, Jr. to William L. Hungate, (July 16, 1973)).

38. SENATE REPORT, *supra* note 16, at 21-22. The Senate Judiciary Committee devoted less

its report, the Senate committee indicated its understanding that the House had viewed the final sentence as mandated by the confrontation clause.<sup>39</sup> The committee did not justify its deletion by arguing that inculpatory statements were sufficiently reliable to be admissible. Instead, it insisted that the House's attempt to incorporate constitutional doctrine was inconsistent with the drafters' reluctance to codify constitutional principles in the rules.<sup>40</sup> The committee also noted that the final sentence failed to account for exceptions to *Bruton* carved out by the Supreme Court in subsequent cases.<sup>41</sup>

The passage of the rules in the Senate with the final sentence excised from 804(b)(3) required that the issue be resolved by a conference committee. The conference committee adopted the Senate version, omitting the final sentence from the statute. The conferees justified this resolution with the reasoning of the Senate committee: the rules should not attempt to codify constitutional principles on this question.<sup>42</sup>

The congressional committees' preoccupation with the confrontation clause is disheartening in two respects. First, this concern reflected a sloppy reading of *Bruton* and other confrontation clause cases, and caused the committees to focus on an irrelevant issue. Second, it allowed the congressional committees to avoid addressing explicitly the important issue presented: the *reliability* of inculpatory statements.

At the time rule 804(b)(3) was being drafted, the relationship between hearsay exceptions and the confrontation clause had not been defined clearly.<sup>43</sup> Nonetheless, the Supreme Court's pronouncements up to that point indicated that the House subcommittee's fear that *Bruton* required the exclusion of inculpatory statements was without foundation. *Bruton* stated explicitly that its holding did not reach the case in which an exception to the hearsay rule was involved.<sup>44</sup> If inculpatory statements fell within a hearsay exception—the issue which the

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time to amending the rules than did the House subcommittee. The committee held two hearings in June 1974, reporting the bill in October. The bill passed 69-0 in November 1974.

39. *Id.*

40. *Id.*

41. *Id.* at 22.

42. CONFERENCE REPORT, *supra* note 17, at 12.

43. See generally *California v. Green*, 399 U.S. 149 (1970).

44. We emphasize that the hearsay statement inculcating petitioner was clearly not admissible against him under traditional rules of evidence . . . , the problem arising only because the statement was . . . admissible against the declarant Evans. . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatsoever that such exceptions necessarily raise questions under the Confrontation Clause.

*Bruton v. United States*, 391 U.S. 123, 128 n.3 (1968).

The same point was made in *Dutton v. Evans*, 400 U.S. 74, 86 (1970). It has been acknowledged by the federal courts of appeals. *E.g.*, *United States v. Kelley*, 526 F.2d 615, 620 (8th Cir. 1975), *cert. denied*, 424 U.S. 971 (1976) ("*Bruton* involved no recognized exception to the hearsay rule. Indeed it has become well settled that the *Bruton* rule is limited to circumstances where the out-of-court statements are inadmissible . . .").



committees had the power and responsibility to resolve—*Bruton* by its very terms would not apply. Moreover, the relationship between the confrontation clause and hearsay exceptions had been examined in *Dutton v. Evans*.<sup>45</sup> *Dutton* held that the admission of a coconspirator's statement pursuant to an exception to the hearsay rule, in a trial in which the coconspirator did not testify, did *not* violate the confrontation clause.<sup>46</sup> Though the opinion was far from clear, it listed a number of factors which would permit the admission of a statement by a declarant not available for cross-examination. In *Dutton*, and once more in a subsequent decision,<sup>47</sup> the Court emphasized that the presence of sufficient indicia of reliability would satisfy the requirements of the confrontation clause.<sup>48</sup>

This case law demonstrates that the congressional committees, in dealing with inculpatory statements, were concerned with what they should have recognized as a phantom issue. Had they decided that inculpatory statements were to be included within the 804(b)(3) excep-

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45. 400 U.S. 74 (1970).

46. *Id.* at 87-88.

47. *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972).

48. The *Dutton* plurality opinion is not a model of clarity. The opinion is an almost random recitation of the factors which the Court claimed insured that the defendant's confrontation clause rights were not violated. Many of the factors presented were apparently chosen simply because they were present in earlier cases finding violations and absent here. 400 U.S. at 87. Nonetheless the plurality did emphasize one factor whose source it was confident could be found in the principles underlying the confrontation clause: the presence of indicia of reliability. The opinion argued that "indicia of reliability were widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." *Id.* at 89. It continued: "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact has a satisfactory basis for evaluating the truth of the prior statement.'" *Id.* The plurality concluded that the integrity of the truth-determining process had not been undermined here because of the presence of indicia of reliability. *Id.*

In *Mancusi v. Stubbs*, 408 U.S. 204 (1972), this was the one strand of *Dutton* that was reiterated. The Court there defined its confrontation clause inquiry as follows: "The focus of the Court's concern has been to insure that there are 'indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant' . . ." *Id.* at 213.

The federal courts of appeals, though occasionally alluding to a few other *Dutton* factors, basically have adopted reliability as the benchmark. If the statement admitted is sufficiently marked by indicia of reliability as to insure the accuracy of the truth-finding process, the confrontation clause is not violated. *United States v. Martinez*, 573 F.2d 529 (8th Cir. 1978); *United States v. Weaver*, 565 F.2d 129, 135 n.7 (8th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); *United States v. Haynes*, 560 F.2d 913, 916 (8th Cir.), *cert. denied*, 434 U.S. 974 (1977); *United States v. Scholle*, 553 F.2d 1109, 1119-20 (8th Cir.), *cert. denied*, 434 U.S. 940 (1977); *United States v. King*, 552 F.2d 833, 845-46 (9th Cir. 1976); *United States v. Carlson*, 547 F.2d 1346, 1356 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *United States v. Kelley*, 526 F.2d 615, 620-21 (8th Cir. 1975), *cert. denied*, 424 U.S. 971 (1976); *United States v. Snow*, 521 F.2d 730, 734-36 (9th Cir. 1975). In many of these cases, the fact that the statement is against penal interest is cited as the main mark of reliability. See *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *United States v. Scholle*, 553 F.2d at 1120; *United States v. Kelley*, 526 F.2d at 621; *United States v. Snow*, 521 F.2d at 734-36.

tion, *Bruton* would not have been directly applicable, and *Dutton* suggested that the confrontation clause issue would be resolved by the courts on a case-by-case basis. Had they not placed inculpatory statements within the 804(b)(3) exception, such statements would have been inadmissible hearsay, and the confrontation clause issue would never be reached.

### C. Conclusion

Because of this misplaced emphasis on the confrontation clause, the congressional committees failed to address the issue of the reliability of inculpatory statements. Gaining a clear view of congressional intent on the inclusion of inculpatory statements within the 804(b)(3) exception is, therefore, difficult. Nonetheless, one can draw certain conclusions by combining observations about all of the drafting bodies. The more plausible view is that inculpatory statements are included in the 804(b)(3) exception. First, the rule in its final form does not limit the admission of statements against penal interest in a manner suggesting exclusion of inculpatory statements. Second, the Advisory Committee Note clearly specifies that statements truly against interest are admissible under 804(b)(3).<sup>49</sup> Finally, no congressional committee asserted that inculpatory statements were not sufficiently reliable to be admitted under a hearsay exception.<sup>50</sup> The more persuasive view, therefore, is that the drafters intended inculpatory statements to be admissible.

## II

### THE APPLICATION OF RULE 804(b)(3)

The admissibility of inculpatory statements under rule 804(b)(3) has not been clarified by the federal courts' application of the rule. Experiencing difficulty interpreting and applying the explicit 804(b)(3) language about *exculpatory* statements, the federal courts have been even more tentative in deciding how to deal with *inculpatory* statements. An examination of the ways in which the federal courts have treated inculpatory and exculpatory statements under 804(b)(3) will illustrate this confusion and make evident the need for a solution to the inculpatory statement dilemma.

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49. The Halpern-Frampton argument denigrating the committee's work as a legitimate source of an interpretation of rule 804(b)(3) is based on inadequate evidence. By itself, the argument is not sufficiently persuasive to raise significant doubts about the committee's position on the issue.

50. One may also wonder why both houses addressed the *Bruton* question if they intended to exclude inculpatory statements from the reach of the 804(b)(3) exception. If Congress had intended to place such statements outside the exception, the confrontation clause would have been irrelevant. Such statements would have been left as inadmissible hearsay.

*A. Federal Case Law on Inculpatory Statements*

Few federal appellate cases have considered the admissibility of inculpatory statements under rule 804(b)(3). The clearest pronouncements on admissibility have appeared in dicta; where the issue has been squarely raised, courts have been evasive or unclear. In *United States v. White*,<sup>51</sup> for example, the defendant was convicted of interstate transportation of two women for the purpose of prostitution. At trial two statements of one of the women were admitted.<sup>52</sup> The declarant was unable to testify because she had been killed before trial. The statements presented to the jury indicated that the declarant had been a prostitute and had accompanied the defendant across state lines—evidence highly damaging to the defendant. Addressing the inculpatory statements issue, a Second Circuit panel in dicta discussed the arguments for and against admitting this evidence.<sup>53</sup> But the court did not decide the case on these grounds. The court concluded that it did not need to decide whether the statements were admissible, arguing unpersuasively that the evidence did not have much impact on the factfinder.<sup>54</sup> The court thus avoided the thorny inculpatory statements issue by holding that the admission of the statements was “if error at all, harmless.”<sup>55</sup>

In *United States v. Rogers*,<sup>56</sup> the declarant admitted that he used defendant's identification to buy a gun and participated with the defendant in the robbery for which the defendant was convicted.<sup>57</sup> The trial court admitted the statement for the limited purpose of impeaching the declarant.<sup>58</sup> On appeal the defendant argued that the admission of the statement for even this limited purpose was erroneous. The government contended that rule 804(b)(3) allowed the admission of the statement not only to impeach the declarant but also as substantive evidence.<sup>59</sup> The Court of Appeals for the Eighth Circuit upheld the trial court's admission of the statement for impeachment,<sup>60</sup> and therefore did not have to address the government's 804(b)(3) argument. The

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51. 553 F.2d 310 (2d Cir.), *cert. denied*, 431 U.S. 972 (1977).

52. One statement was a comment made to an FBI agent who testified at trial; the other was a written statement summarized by the same agent. *Id.* at 312.

53. The court referred to arguments against including inculpatory collateral statements (one was Weinstein's position), and also to the omission of the final sentence. *Id.* at 313-14. The court also asserted erroneously that the House of Representatives had deleted the final sentence. *Id.* at 313 n.8. This mistake is noteworthy because it is a minor, but pointed, example of the carelessness of some federal courts in dealing with rule 804(b)(3) and inculpatory statements.

54. *Id.* at 314.

55. *Id.*

56. 549 F.2d 490 (8th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977).

57. *Id.* at 494.

58. *Id.* at 497.

59. *Id.* at 498 n.8.

60. *Id.* at 498.

court nevertheless noted that the declarant's admission of an illegal purchase of a gun<sup>61</sup> might not have been against interest because the declarant might have viewed cooperation with law enforcement officials as in his interest.<sup>62</sup> The court concluded that the trial judge, in light of the suspect reliability of the statement, did not abuse the discretion granted by Federal Rule of Evidence 403 to exclude a statement when the statement's probative value is outweighed by its potential prejudicial effect.<sup>63</sup>

The court's treatment of this question is confusing and subject to conflicting interpretations. Its analysis can be read to indicate that inculpatory statements are admissible under 804(b)(3) but that in this case the possible unreliability of the statement justified exclusion based on rule 403. On the other hand, the court did not directly state that inculpatory statements were admissible. Its discussion could with equal plausibility be characterized as simply determining that the trial court's refusal to admit the inculpatory statement involved a proper exercise of discretion in the instant case. In this view the question of the admissibility of the inculpatory statement under 804(b)(3) was not reached. Addressing the inculpatory statement problem though the case did not require it, the court thus avoided taking a clear position and produced further confusion.

Only two federal opinions have made a clear statement about the admissibility of inculpatory statements under rule 804(b)(3). Each court determined that such statements were admissible,<sup>64</sup> although in each case the conclusion was dictum. In *United States v. Barrett*,<sup>65</sup> the court briefly described the background of rule 804(b)(3) and noted Congress' deletion of the final sentence. It concluded that the omission meant that "subject to sixth amendment and other constraints, a third party's out-of-court statements against penal interest may now be used

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61. The declarant's statement that he had participated in the robbery was not truly against interest because the declarant had already pleaded guilty to the robbery. His admission therefore did not subject him to additional criminal liability.

62. 549 F.2d at 498 n.8.

63. Professor Rothstein's description of the case misrepresents its holding, providing another example of the confusion this problem has caused. In P. ROTHSTEIN, PRACTICE COMMENTS: RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 386.1 (June 1977), Professor Rothstein describes the case as follows: "(co-criminal's statement identifying defendant as accomplice; no good; that part not against interest.)" Professor Rothstein's language suggests that the court viewed the collateral inculpatory portion as not admissible because it by itself was not against the declarant's interest. This is true of all collateral inculpatory statements, suggesting that *Rogers* excludes *all* collateral inculpatory statements on this ground. Quite to the contrary, the *Rogers* court expressed doubt about whether the *against interest* portion of the statement was sufficiently disserving. It did not argue that the collateral portion could not be against interest. For the present federal law on the point, see text accompanying notes 70-81 *infra*.

64. For a case in which a state supreme court reached the same conclusion, see *People v. Edwards*, 396 Mich. 551, 556 n.43, 242 N.W.2d 739, 746 n.43 (1976).

65. 539 F.2d 244 (1st Cir. 1976).

against, as well as in favor of, an accused.”<sup>66</sup> *United States v. Hyde*<sup>67</sup> involved a claim that a wiretap order had been issued without probable cause.<sup>68</sup> In finding that probable cause did exist, the court observed that one informant’s statement had been against penal interest. The court argued that “804(b)(3) . . . declares such statements admissible in spite of the hearsay rule (thus acknowledging their reliability).”<sup>69</sup>

The federal judiciary has made poor use of the opportunities presented to clarify the reach of 804(b)(3). The cases discussed above nevertheless suggest that inculpatory statements will be held to be admissible in some circumstances. However, these cases provide no indication of the guidelines that will govern the admissibility determination. It would seem that such guidelines might be apparent in federal cases involving *exculpatory* statements under 804(b)(3). In fact, those decisions provide little guidance because they are inconsistent and unclear. Examining these cases nevertheless illustrates this confusion and suggests the basis for its elimination in cases concerning inculpatory statements.

### B. Federal Case Law on Exculpatory Statements

The inconsistency of the federal courts in determining the admissibility of exculpatory statements is evident in their treatment of three important issues: the admissibility of collateral<sup>70</sup> statements; the extent to which a statement against penal interest must be disserving; and the degree of corroboration necessary before the exculpatory statement can be admitted.

#### 1. Collateral Statements

Cases arising before the promulgation of rule 804(b)(3) held that collateral exculpatory statements were not admissible as declarations against penal interest.<sup>71</sup> These cases held the collateral portion to be not against interest, and therefore inadmissible, regardless of the relationship between the disserving and collateral statements.<sup>72</sup> The cases appearing since the promulgation of the Federal Rules of Evidence

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66. *Id.* at 250.

67. 574 F.2d 856 (5th Cir. 1978).

68. *Id.* at 862.

69. *Id.* at 863.

70. For a description of collateral and noncollateral statements, see note 7 *supra*.

71. *Park v. Huff*, 493 F.2d 923, 932 n.17, *rev'd on rehearing en banc*, 506 F.2d 849 (5th Cir.), *cert. denied*, 423 U.S. 824 (1974); *United States v. Marquez*, 462 F.2d 893, 895 (2d Cir. 1972); *United States v. Seyfried*, 435 F.2d 696, 697-98 (7th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971).

72. In *United States v. Marquez*, 462 F.2d 893, 895 (2d Cir. 1972), the declarant had stated: "Cocaine mine. Other guys had nothing to do with it. Got cocaine yesterday. Don't know who I got it from." Despite the close relationship between the disserving and collateral exculpatory portions, the court characterized them as severable, with only the directly disserving portion ("cocaine mine") admissible.

have for the most part ignored the problem. The text of rule 804(b)(3) by itself provides little guidance and would accommodate comfortably either a doctrine excluding or one admitting collateral statements.<sup>73</sup> No federal court of appeals has refused to admit a declaration against penal interest under rule 804(b)(3) because a collateral statement was involved. However, declarations against penal interest have been admitted in a number of cases even though the relevant information was contained in a collateral statement.

*United States v. Benveniste*<sup>74</sup> provides an illustration. The Court of Appeals for the Ninth Circuit reversed a conviction because the trial court failed to admit an exculpatory collateral statement. The dis-serving portion of the declarant's statement was an admission that she was involved in a drug sale. The exculpatory portion of the statement contained assertions about the conduct of the defendant and an informant at the sale which aided the defendant.<sup>75</sup> These assertions were clearly collateral to, and severable from, the dis-serving portions. Nonetheless, the court ignored the collateral statements issue, implicitly determining that exculpatory collateral statements are admissible under 804(b)(3).

In *United States v. Barrett*,<sup>76</sup> the Court of Appeals for the First Circuit explicitly held collateral statements to be admissible subject to certain requirements. The court reviewed the debate about the reliability of collateral statements and concluded that exclusion was not warranted.<sup>77</sup> It appeared to the court that Congress did not intend to exclude collateral statements, though the court did not substantiate its claim with a discussion of the history of 804(b)(3).<sup>78</sup> Where the collateral portion is "sufficiently integral to the entire statement," the court concluded, both the collateral and noncollateral portions constitute a statement against interest under the rule.<sup>79</sup>

*Barrett* is the only decision appearing since the effective date of the rules to formulate explicitly a rule admitting collateral statements. It represents, along with one other decision relying on the rule while it was being drafted,<sup>80</sup> the beginning of a new line of authority. Because

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73. CAL. EVID. CODE § 1230 contains almost identical language about declarations against penal interest, and the California Supreme Court has held that collateral statements are not admissible under that provision. *People v. Leach*, 15 Cal. 3d 419, 441, 541 P.2d 296, 311, 124 Cal. Rptr. 752, 767 (1975).

74. 564 F.2d 335, 341-42 (9th Cir. 1977).

75. The declarant's statement suggested that the defendant was not an active party in the sale, bolstering the defendant's entrapment defense. *Id.* at 341. The statement also contradicted the informant's testimony, thereby damaging her credibility.

76. 539 F.2d 244 (1st Cir. 1976).

77. *Id.* at 252.

78. *Id.* at 253.

79. *Id.*

80. *United States v. Goodlow*, 500 F.2d 954 (8th Cir. 1974). The analysis in *Goodlow* is

the prerules cases hold to the contrary,<sup>81</sup> the issue has not yet been clearly resolved by the federal courts.

## 2. *The Extent to Which a Statement Against Penal Interest Must Be Disserving*

The federal courts also have failed to articulate a consistent standard in describing the extent to which a statement must be disserving in order to qualify as a declaration against penal interest. Two conflicting approaches are apparent in the cases.

A liberal approach was employed in *United States v. Barrett*.<sup>82</sup> The declarant had said that he and two others "were going to have some trouble from the people from California" with respect to the 'stamp theft or inatter.'<sup>83</sup> The statement was disserving because it demonstrated declarant's knowledge of the stamp theft and the identity of the participants, thereby suggesting that he may have been involved in the criminal venture.<sup>84</sup> The statement nevertheless was not a compelling link between the declarant and the crime. Realizing this, the court declared that the against penal interest exception did not demand a confession. Since the statement contained "important evidence" harmful to the declarant should he ever be prosecuted, the court concluded that it was sufficiently disserving to qualify under rule 804(b)(3).<sup>85</sup>

The *Barrett* approach has been adopted in other cases. In *United States v. Thomas*<sup>86</sup> the declarant had stated that the defendant "didn't have anything to do with [the crime]."<sup>87</sup> The court claimed the state-

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neither elaborate nor clear, but it does state the court's conclusion that the collateral statement involved there was admissible: "Such a statement, standing alone, is only exculpatory as to Goodlow and, as such, constitutes inadmissible hearsay. . . . However, since the statements allegedly were made at the same time and within the same context of [declarant's] admission of guilt, their overall exclusion or admission should be considered as one." 500 F.2d at 956.

81. See cases cited in note 71 *supra*.

82. 539 F.2d 244, 249 (1st Cir. 1976).

83. *Id.*

84. *Id.*

85. See *id.* at 251, where the court stated: "Though by no means conclusive, the statement would be important evidence against [the declarant] were he himself on trial for the stamp crimes. We cannot say, therefore, that it did not pose the sort of threat to [declarant's] interest that the hearsay exception contemplates."

For another case taking the same approach, see *United States v. Benveniste*, 564 F.2d 335 (9th Cir. 1977). The declarant there stated that she had introduced the key government witness to two drug dealers at her apartment, apparently aware that all parties were contemplating a drug sale. The court argued: "Out of context, however, the specific statements she made to defendant's investigator which contradict the informant would not alone be against her penal interest. We do not believe, however, that rule 804(b)(3) was intended to apply only to statements which amount to direct confessions of criminal responsibility. Otherwise Congress would not have used the broadly worded phrase 'tended to subject.'" *Id.* at 341.

86. 571 F.2d 285 (5th Cir. 1978).

87. *Id.* at 288.

ment was disserving because it "implied that the declarant had knowledge of the crime," and concluded that statements "that would have probative value in a trial against the declarant"<sup>88</sup> are sufficiently disserving to be admitted under rule 804(b)(3).<sup>89</sup>

The court in *United States v. Pena*<sup>90</sup> applied a much more demanding standard. The declarant was an informant who allegedly bore a grudge against the defendant.<sup>91</sup> In his statement, he admitted "setting up" the defendant as a party to a heroin sale and keeping the money provided by the government to facilitate the sale.<sup>92</sup> The defendant argued that the statement was admissible since the declarant's admission that he kept the funds supplied by the government left him vulnerable to an embezzlement charge.<sup>93</sup> The court rejected this argument. Noting that "there are possible explanations of [the declarant's] receipt of money which are inconsistent with culpability on his part,"<sup>94</sup> the court found that the statement was not against interest. Emphasizing that the statement alone and out of context could not support declarant's conviction, the court held the statement inadmissible.<sup>95</sup>

Under the *Barrett-Thomas* line of authority, the statement of the declarant in *Pena* would have been admissible as against penal interest. The statement did contain "evidence of probative value in a trial against the declarant." The *Pena* court's argument that the statement was not disserving because there were possible explanations which were inconsistent with the declarant's culpability contrasts sharply with the *Barrett-Thomas* approach. There surely were "other possible" explanations for the declarants' knowledge of the crimes in *Barrett* and *Thomas* which would not have implicated them in criminal activity. The statements were nonetheless admitted. Thus federal courts have failed to articulate a consistent standard.

### 3. Corroboration Requirement

The federal courts' treatment of the corroboration requirement of rule 804(b)(3) for exculpatory statements<sup>96</sup> also has been unsatisfactory. The provision requiring corroboration was added to the rule in the

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88. *Id.* at 288-89.

89. *Id.* at 289. *United States v. Satterfield*, 572 F.2d 687 (9th Cir. 1978), similarly rejected a "restrictive approach" because Congress required only that the statement "tended to subject" the declarant to criminal liability. *Id.* at 691 (emphasis in original).

90. 527 F.2d 1356 (5th Cir. 1976).

91. Though the case was tried before the passage of the rules, the court assumed *arguendo* that it could choose to follow rule 804(b)(3).

92. 527 F.2d at 1359-60.

93. *Id.* at 1361.

94. *Id.*

95. *Id.* at 1361-62. See also *United States v. Hoyos*, 573 F.2d 1111 (9th Cir. 1978) (to be admissible, a statement must subject declarant to penal liability in a "real and tangible way").

96. FED. R. EVID. 804(b)(3) provides: "A statement tending to expose the declarant to crimi-



October 1971 Advisory Committee draft and strengthened by the House subcommittee.<sup>97</sup> The addition of the corroboration requirement reflected the lingering distrust of declarations against penal interest, the feeling that some additional mark of reliability was needed before such evidence could be confidently admitted.<sup>98</sup> The federal courts have failed to agree on what quantum of corroboration is required.<sup>99</sup>

One approach to the corroboration requirement was used in *Lowery v. Maryland*.<sup>100</sup> The declarant stated in an affidavit that he had perjured himself in important testimony against the defendant. The defendant sought to have the affidavit admitted in support of his petition for habeas corpus. The court conceded that the declarant's perjury admission was against his penal interest. It acknowledged that corroborating circumstances suggesting reliability were present.<sup>101</sup> The court nevertheless argued that other facts in the case undermined the credibility of the statement<sup>102</sup> and refused to admit it. Instead of setting forth a corroboration standard requiring a prima facie showing of reliability and leaving the ultimate determination of credibility to a jury, the court employed a balancing test, admitting only statements

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nal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

97. Along with advocating the omission of the final sentence, Senator McClellan also proposed a corroboration requirement. See *Supplement to House Hearings, supra* note 27, at 60 (letter from Senator John McClellan to Judge Albert B. Maris, (Aug. 12, 1971)). A corroboration requirement was added in the October 1971 draft and appeared in the final Advisory Committee draft. See Proposed Fed. R. Evid. 804(b)(4) (1972 draft), 56 F.R.D. 183, 321 (1972). The present language, strengthening the standard by requiring a clear indication of trustworthiness, was added by the House subcommittee. Proposed Fed. R. Evid. 804(b)(3), Tentative Subcommittee Draft of H.R. 5463 in *Supplement to House Hearings, supra* note 27, at 175.

98. HOUSE REPORT, *supra* note 15, at 15; Advisory Committee's Note to Proposed Fed. R. Evid. 804(b)(4) (1972 draft), 56 F.R.D. 183, 327 (1972).

99. In fact, as with other aspects of 804(b)(3), some courts have misconceived completely the focus of the requirement because of a misunderstanding of the theory behind the rule. In *United States v. Atkins*, 558 F.2d 133 (3d Cir. 1977), *cert. denied*, 434 U.S. 1071 (1978) and *United States v. Bagley*, 537 F.2d 162 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977), statements were excluded because the *making* of the statement, rather than its *content*, was not corroborated. This reasoning is specious because the witness testifying about the making of the statement is before the court, under oath, and subject to cross-examination. As to the making of the statement, the witness' testimony is not hearsay, and corroboration should not be required. In *United States v. Atkins*, the court of appeals chided the trial court for requiring corroboration of the witness' testimony describing the making of the declaration. However, in reversing because of the exclusion of what it apparently viewed as a reliable statement, the court listed evidence which only corroborated the contention that the statement had been made, not that its content was true. 558 F.2d at 135-36. The same error is made in *United States v. Bagley*, 537 F.2d at 167.

100. 401 F. Supp. 604 (D. Md. 1975), *aff'd mem.*, 532 F.2d 750 (4th Cir.), *cert. denied*, 429 U.S. 919 (1976).

101. *Id.* at 608. The factors were: the declaration was a sworn statement; the declarant was a person who had been at the scene of the crime and had knowledge of the occurrence; and the defendant had testified that the declarant's testimony at trial had been coerced.

102. *Id.* These were: the declarant had been in prison with the defendant; the statement was made three and one-half years after the trial and was not "spontaneous"; and the police officers claimed that declarant's testimony at trial had not been coerced.

found credible by the court after evaluating all of the surrounding circumstances.<sup>103</sup>

A more liberal approach was used in *United States v. Barrett*.<sup>104</sup> The court conceded that it had little guidance from existing law in defining the scope of the corroboration requirement. Though aware that the drafters viewed the requirement as "not an insignificant hurdle," it refused to define the requirement as "so strict as to be utterly unrealistic."<sup>105</sup> Judge Jack Weinstein's position may suggest what the court had in mind. Weinstein has argued that evidence indicating the declarant's physical proximity and willingness to commit the crime should suffice if such evidence would persuade a "reasonable man . . . that the statement might have been made in good faith and that it could be true."<sup>106</sup> In contrast to *Lowery*, this approach does not require that the court balance those facts corroborating the declarant's statement with those undermining its reliability.<sup>107</sup> Rather, it allows for admission once a threshold of corroboration has been passed. The jury is left to make the balance.

#### 4. Conclusion

Because the federal cases dealing with the admissibility of exculpatory statements have taken varied approaches and reached divergent conclusions, these cases do not aid significantly the effort to determine how inculpatory statements should be treated. Thus, neither the drafting history of rule 804(b)(3) nor the federal case law on statements against penal interest is very helpful to one attempting to develop a

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103. For other cases employing a similarly restrictive corroboration test, see *United States v. Satterfield*, 572 F.2d 687, 693 (9th Cir. 1978); *United States v. Oropeza*, 564 F.2d 316 (9th Cir.), cert. denied, 434 U.S. 1080 (1977); *United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977). *Oropeza* and *Guillette* unsuccessfully attempt to graft the reliability considerations listed in *Chambers v. Mississippi*, 410 U.S. 284 (1973), onto the corroboration requirement. *Chambers* held that the exclusion of a hearsay statement which was against the declarant's interest, circumstantially trustworthy, and important to the defendant's defense violated the due process clause. *Id.* at 302-03. In the process, the Court listed considerations indicating the trustworthiness of the statement. *Guillette* summarized the considerations as follows: (1) when and to whom was the statement made; (2) was there corroborating evidence; (3) is the declaration really against the declarant's interest; and (4) is the declarant available. 547 F.2d at 754. The incorporation of these considerations into the corroboration requirement is redundant. Considerations two through four are explicitly covered in 804(b)(3), and consideration one is irrelevant because the witness will be subject to cross-examination. This incorporation simply leads to evasion and confusion. The use of this approach often will obscure the basis upon which a decision rests, with a court stating that there is insufficient corroboration when what is really meant is that the statement is not dis-serving.

104. 539 F.2d 244 (1st Cir. 1976).

105. *Id.* at 253. The discretion of the trial judge in applying the requirement was also emphasized by the court.

106. 4 J. WEINSTEIN, *supra* note 7, ¶ 804(b)(3)[03] at 804-90.

107. In fact the court in *Lowery* expressly rejected Weinstein's view. 401 F. Supp. 604, 607 (D. Md. 1975), *aff'd mem.*, 532 F.2d 750 (4th Cir. 1976), cert. denied, 429 U.S. 919 (1977).

coherent approach to inculpatory statements under the rule. Alternative approaches must be examined, and a prescription for dealing with inculpatory statements under 804(b)(3) must be advanced. It is to this task that we next turn.

### III

#### ALTERNATIVE APPROACHES

Although the issue was barely considered in the drafting of rule 804(b)(3),<sup>108</sup> much of the debate about inculpatory statements in the literature and state decisions has centered on the reliability of collateral statements.<sup>109</sup> Only those believing collateral statements to be marked by reliability sufficient to overcome the doubts embodied in the hearsay rule have favored admission. Because very few noncollateral inculpatory statements appear in the cases,<sup>110</sup> the exclusion of collateral statements would cause the exclusion of almost all inculpatory statements. Therefore, a conclusion about the reliability of collateral statements is the underpinning of any rule determining the admissibility of inculpatory statements.

Professor John H. Wigmore<sup>111</sup> and Bernard S. Jefferson<sup>112</sup> (now a California appellate court justice) have advanced the conflicting views concerning the admissibility of collateral statements which have gained the most support. Professor Wigmore argued that a statement against interest indicates that the declarant is in a trustworthy state of mind, and that all additional statements made while the declarant remains in this state are reliable and should be admitted into evidence.<sup>113</sup> The Model Code of Evidence adopts this basic approach. The relevant provision admits "a declaration against interest and such additional parts thereof, including matter incorporated by reference, as the judge finds so closely connected with the declaration against interest as to be equally trustworthy."<sup>114</sup>

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108. The alternating inclusion and exclusion of the final sentence of 804(b)(3) was effected with little reference to whether the relevant material of the statement introduced was contained in the disserving or the collateral portion. The final sentence would have explicitly excluded collateral and noncollateral inculpatory statements. See notes 9-49 and accompanying text *supra*.

109. The hearsay exception for statements against pecuniary or proprietary interest has been available for much longer than that for statements against penal interest. As a result, the treatment of collateral statements in the context of pecuniary and proprietary statements is much more extensive. The general rule has been one of admissibility of neutral and even, on occasion, of self-serving collateral statements. See RICHARDSON, *supra* note 2, at § 299; 5 J. WIGMORE, *supra* note 2, at § 1465; Jefferson, *supra* note 6, at 56-60.

110. See note 7 *supra*.

111. 5 J. WIGMORE, *supra* note 2.

112. Jefferson, *supra* note 6.

113. See 5 J. WIGMORE, *supra* note 2. See also Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 480-82 (1929).

114. MODEL CODE OF EVIDENCE Rule 509(2) (1942).

Though no state statutes have adopted the language, a number of state courts have admitted collateral statements in criminal cases. Admission has been achieved in various ways. In *State v. Parrish*<sup>115</sup> the Supreme Court of Kansas held that an inculpatory collateral statement was admissible. The court simply asserted that the statement was against interest and that "testimony of the preliminaries and circumstances leading up to and surrounding the making of the assertion" were admissible.<sup>116</sup> No analysis of the issue was attempted.<sup>117</sup>

A more sophisticated treatment of the collateral statement question reaching the same result appears in *State v. Abrams*.<sup>118</sup> The New Jersey Supreme Court there affirmed and adopted the reasoning of a lower appellate court which admitted into evidence a collateral exculpatory statement.<sup>119</sup> The lower court argued that as long as the entire statement was against penal interest, exclusion should not result merely because a portion of that statement by itself did not subject the declarant to penal liability.<sup>120</sup> The relevant facts were here contained in the collateral portion. Three judges on the seven-judge New Jersey Supreme Court concurred and dissented in separate opinions addressing the collateral statement question more directly. In essence, the

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115. 205 Kan. 178, 468 P.2d 143 (1970).

116. *Id.* at 183, 468 P.2d at 148. The testimony consisted of statements by the declarant that the defendant had offered to pay him to burn down a hotel. *Id.* at 179-82, 468 P.2d at 145-47. The court held that the statements indicating the declarant's involvement in the arson plan were against his interest. However, the fact that it was the defendant who made the offer was not against the declarant's interest. It was this collateral portion that was relevant in the trial of the defendant and that had been admitted by the trial court.

117. In an opinion which also did not discuss the collateral statement issue raised by the declaration admitted, three concurring judges of the seven-judge New York Court of Appeals argued that an inculpatory collateral statement should be admitted. *People v. Harding*, 37 N.Y.2d 130, 135-37, 332 N.E.2d 354, 357-59, 371 N.Y.S.2d 493, 497-99 (1975) (concurring opinion). The statement consisted of an admission that the declarant was a numbers runner and had been picked up by the defendant, a policeman. It related that the declarant had contacted her "banker," who had arranged for her release by bribing the policeman. The defendant policeman continued to extort money from the declarant's boss, leading to his arrest and conviction for that conduct. *Id.* at 136-37, 332 N.E.2d at 358, 371 N.Y.S.2d at 497-98. Here, the admission by the declarant of her "numbers" sale was the dis-serving portion of the statement. The assertion that the declarant witnessed the defendant accepting a bribe from her "banker" was collateral. The majority did not reach the issue because it held the admission of the statement harmless error, if error at all. *Id.* at 134, 332 N.E.2d at 357, 371 N.Y.S.2d at 496.

118. 140 N.J. Super. 232, 356 A.2d 26 (1976), *aff'd*, 72 N.J. 342, 370 A.2d 852 (1977).

119. The majority affirmed "substantially for the reasons expressed" in the lower court opinion. 72 N.J. at 342, 370 A.2d at 852. The statement involved was a declaration that "'I . . . sold [the detective] a bag of cocaine, but I didn't and never got nothing from [the defendant].'" 140 N.J. Super. at 235, 356 A.2d at 27. The collateral portion exculpating the defendant was the relevant segment.

120. The lower court stated: "The rule does not require that each discrete part of the statement imply involvement in a crime . . ." 140 N.J. Super. at 235-36, 356 A.2d at 28. It later added: "The appropriate test for admissibility is whether, in the context of the whole statement, the particular remark was plausibly against the declarant's penal interest, even though it might be neutral or even self-serving if considered alone." *Id.*

three judges argued that the collateral portion should be admitted if it were integrally related to the dis-serving portion.<sup>121</sup> The three dissented because they believed that the determination of the degree of interrelationship between the collateral and dis-serving portions should be made by the trial court, not the appellate court.<sup>122</sup>

Wigmore's position has an undeniable appeal. His approach provides useful flexibility because it allows a judge some discretion in determining whether the trustworthiness evidenced by the dis-serving fact underlies closely related assertions. This flexibility seems desirable when one begins to examine statements in the cases which appear to be the products of minds so immersed in confession as to be immune from the sway of dissembling forces.<sup>123</sup> However, several considerations indicate that the wholesale adoption of Wigmore's approach by the federal courts is neither likely nor desirable.

An important obstacle preventing ready admission of inculpatory statements is the questionable psychological premise upon which such a standard would be built. It is said to be a common sense conclusion that people generally do not concede facts against their interest unless such facts are true.<sup>124</sup> But it is becoming increasingly obvious that there are numerous exceptions to this observation. In recent years, a number of individuals have confessed to crimes they did not commit.<sup>125</sup> These individuals have ranged from psychotics to pranksters, from publicity seekers to drug ingesters.<sup>126</sup> Many actually believed that they

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121. One concurring and dissenting justice, citing Wigmore and the Model Code of Evidence stated: "That next step calls for inquiry into whether the exculpatory part of the statement (or separate exculpatory declaration) should be permitted to 'tag along' with the inculpatory part under the doctrine of continuing trustworthiness." 72 N.J. at 343, 370 A.2d at 852. This opinion was joined by one other justice. The other concurring and dissenting opinion made the same point: "If [the declaration] . . . was essentially a single, integral statement such that the trustworthiness of the portion admitting liability rubbed off on the portion absolving [the defendant] of connection with the criminal transaction, it should be admissible." *Id.*

122. *Id.* at 343, 370 A.2d at 853-54.

123. In the following cases, the image presented by the facts is of an individual speaking of things harmful and painful, emotionally upset, defenses down, baring all. The presence of such statements and accompanying circumstances in the cases suggests that there is some validity in Wigmore's argument. In *United States v. White*, 553 F.2d 310 (2d Cir. 1977), *cert. denied*, 431 U.S. 972 (1977), the court depicted the declarant's statements as those of a frightened, vulnerable person, exposing herself to criminal liability in conversations in which she did not have the self-possession or the desire to lie. In *People v. Ireland*, 38 Ill. App. 3d 616, 348 N.E.2d 277 (1976) the declarant was similarly shaken when she stated to the defendant's parents (her in-laws) that she, and not the defendant, had obtained and owned the marijuana, for the possession of which the defendant had been arrested. *Id.* at 618, 348 N.E.2d at 279. Note that the declarant's exculpation of the defendant was collateral to her admission of her own guilt, since both she and the defendant could have been guilty of procuring and possessing the marijuana.

124. See Note, *Declarations Against Interest—Rules of Admissibility*, 62 Nw. U.L. REV. 934, 941 n.34 (1968).

125. Timnick, *False Murder Confessions: Reasons Why*, L.A. Times, Mar. 12, 1978, at 1, col. 1. See generally T. REIK, *THE COMPULSION TO CONFESS* (1959).

126. *Id.*

had committed the crime and, consequently, stated their guilt in a persuasive manner. These individuals are the irrational, those not encompassed in our common sense conclusions based on observations of reasonable people.<sup>127</sup> They are too numerous, and the potential effect of their testimony is too potent, to be ignored.<sup>128</sup>

The reliability of declarations against penal interest is further attenuated in inculpatory statements made in police custody. Ostensibly damaging confessions are frequently self-serving in that environment.<sup>129</sup> Accusing others is readily perceived as a way to gain favor with law enforcement officials. A conspiracy gone awry can easily generate enough enmity to induce the captured unfortunate to exaggerate the role of those only peripherally involved.<sup>130</sup> The potential for false accusations is evident.

Even when inculpatory statements are not made in police custody, the presence of certain factors may diminish their reliability. Committing a crime constitutes an achievement of great magnitude to some people. The temptation to falsify a claim of criminal success to impress colleagues cannot be ignored.<sup>131</sup> Other psychological motives may also produce unreliability. Persons admitting to a crime they have in fact committed may subconsciously feel that their culpability is diminished if they implicate others. In this instance, an ostensibly dis-serving statement actually would be self-serving.

The reluctance to admit exculpatory statements has long been justified by the fear that declarants intending to flee a state might falsely implicate themselves in order to free an accused comrade or thwart the criminal justice system.<sup>132</sup> This fear is equally applicable to inculpatory statements—a revenge seeker might reveal imagined joint crimes before departing a state. In addition, the veracity of a significant source of testimony presenting inculpatory statements may be suspect. Informants and undercover agents, who often have an interest in securing a conviction, may fabricate or distort facts in their testimony.<sup>133</sup>

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127. Two courts have expressed the same fear. *See Ward v. Pitt*, [1913] 2 K.B. 130, 138; *People v. Leach*, 15 Cal. 3d 419, 441, 541 P.2d 296, 311, 124 Cal. Rptr. 752, 767 (1975).

128. Recall that rule 804(b)(3) can be invoked only when the declarant is unavailable. Hence an individual might admit involvement in a crime, then depart from the jurisdiction and remain unavailable for examination about his mental state.

129. *Bruton v. United States*, 391 U.S. 123, 141-42 (1968) (White, J., dissenting).

130. The commentators have been very sensitive to this phenomenon. *See Levie, Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1173 (1954); Comment, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 755-56 (1955).

131. *United States v. Atkins*, 558 F.2d 133 (3d Cir. 1977), *cert. denied*, 434 U.S. 1071 (1978), provides an example of a statement against penal interest that was probably a boast.

132. C. McCORMICK, *supra* note 2, at § 278; 5 J. WIGMORE, *supra* note 2, at § 1477.

133. *People v. Edwards*, 396 Mich. 551, 566 n.43, 242 N.W.2d 739, 746 n.43 (1976). The court stated:

Undercover agents and informers are professional dissemblers. Their assignment is to

The declarant is not present to contradict such testimony. Though cross-examination is available to expose untrustworthy testimony, the familiarity of undercover agents with the trial process can reduce the effectiveness of the cross-examination.

Wigmore's position has not gained the unanimous approval of the legal community. Jefferson's contrary approach<sup>134</sup> has commanded significant support. Jefferson found untenable Wigmore's justification for the majority rule. He insisted that the reliability of the statement against interest stems from the dis-serving fact stated. Jefferson rejected the notion that a dis-serving statement reflects a trustworthy state of mind extending beyond the confines of the dis-serving portion of the statement.<sup>135</sup> Because only the statement of the dis-serving fact bears the requisite indicia of reliability, Jefferson insisted, only that portion should be admitted.

Jefferson's arguments have persuaded some legislatures<sup>136</sup> and courts.<sup>137</sup> The California Supreme Court relied on Jefferson's reasoning in holding that collateral statements are not admissible.<sup>138</sup> In *State*

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take on a false identity and so convincingly act a lie that they gain the confidence of alleged drug dealers, fences and murderers. Frequently their very lives depend upon their ability to play a particular role. These same persons, skilled in the art of dissembling, then come into court and repeat statements allegedly made to them which inculcate defendants. Often they are cooperating with the authorities in an effort to win concessions regarding charges pending against them; many are paid; others "cooperate" with the police because they are morally outraged by the conduct defendant is alleged to have engaged in. Leniency, pay, and vindication of moral convictions could well be related to success in the particular assignment; there is a motive for the agent or informant to make the case he or she knows the authorities want.

134. Jefferson, *supra* note 6.

135. *Id.* at 57-63.

136. See, e.g., ME. REV. STAT. tit. 14, § 804(b)(3) (Supp. 1978); N.J. STAT. ANN. § 63(10) (West Supp. 1978); N.D. CENT. CODE § 804(b)(3) (Supp. 1977).

137. For a prerules federal case adopting Jefferson's approach, see *United States v. Seyfried*, 435 F.2d 696, 698 (7th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971): "Where a statement is clearly separable, part of which is against one's interest and part is not, only that part which is against one's interest and, therefore, has some inherent trustworthiness should be admitted." See also *Park v. Huff*, 493 F.2d 923, 932 n.17, *rev'd on rehearing en banc*, 506 F.2d 849 (5th Cir.), *cert. denied*, 423 U.S. 824 (1974).

138. *People v. Leach*, 15 Cal. 3d 419, 441, 541 P.2d 296, 311, 124 Cal. Rptr. 752, 767 (1975). This position was advanced in the face of statutory silence similar to that of rule 804(b)(3). The court concluded:

In the absence of any legislative declaration to the contrary, we construe the exception to the hearsay rule relating to evidence of declarations against interest set forth in section 1230 of the Evidence Code to be inapplicable to evidence of any statement or portion of a statement not itself specifically dis-serving to the interests of the declarant.

*Id.* at 441, 541 P.2d at 311, 124 Cal. Rptr. at 767. Much of the reasoning justifying the court's holding is presented in the form of long quotations from Jefferson's piece. *Id.* at 439 n.15, 541 P.2d at 309 n.15, 124 Cal. Rptr. at 765 n.15. The court's effort to buttress Jefferson's position with additional arguments was not successful. Noting that the purpose of the hearsay rule is to exclude statements of unreasonable people, Chief Justice Wright suggested that admitting the instant statement involved crediting the reliability of an unreasonable person. *Id.* at 441-42, 541 P.2d at 311-12, 124 Cal. Rptr. at 767-68. The flaw in this reasoning is that it had little to do with the issue addressed by the court, the reliability of collateral statements. The only conclusion Chief Justice

*v. Self*<sup>139</sup> the New Mexico Supreme Court also held collateral statement inadmissible. Though the court did not rely expressly on Jefferson's article, its reasoning provides a clear example of his approach. The court severed the collateral part of the statement because only the dis-serving portion was reliable and admissible. The court's aversion to collateral statements was shown by its narrow, though proper, identification of the dis-serving portion. The declarant admitted obtaining a gun from the defendant, who was accused of stealing that gun.<sup>140</sup> The statement subjected the declarant to criminal liability in two ways: the declarant's status as a felon made his possession of a gun illegal; his admission also constituted evidence of the crime of knowingly receiving stolen property. The court insisted that both of these dis-serving aspects stemmed solely from the declarant's possession of the gun. The identity of the thief supplying the weapon, which was the only fact relevant to the defendant's trial, did not affect the declarant's potential penal liability. The statement was therefore not against interest, not reliable, and not admissible.<sup>141</sup>

Jefferson's proposal to exclude all collateral statements has the virtue of being easily applicable. Moreover, Jefferson's reasoning—that only the portion of the statement containing dis-serving facts is reliable—seems cogent because it is the dis-serving character of the facts that inspires trust. However, Jefferson's approach, like that of Wigmore, is not a satisfactory resolution of the 804(b)(3) problem. First, the drafting history of the rule suggests that Jefferson's approach was probably not that intended by the drafters.<sup>142</sup> Second, no federal appellate case dealing with the issue under the rules has reached Jefferson's conclusion.<sup>143</sup> Finally, blanket exclusion of collateral statements would deprive the against penal interest exception of much of its force. Because a large number of exculpatory statements are collateral,<sup>144</sup> Jefferson's approach would limit significantly the utility of rule 804(b)(3). It is

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Wright's argument supported is that *all* declarations against penal interest, since made by unreasonable people (*i.e.*, criminals), are untrustworthy and should be excluded. This surely is not what the court intended to say.

139. 88 N.M. 37, 536 P.2d 1093 (1975).

140. *Id.* at 40, 536 P.2d at 1096.

141. *Id.* at 41-42, 536 P.2d at 1097-98. Contrast this careful severance of the dis-serving from the collateral portion with the lax treatment of the question by a court more hospitable to exculpatory collateral statements. The declarant in *Commonwealth v. Carr*, 1977 Mass. Adv. Sheets 2312, 369 N.E.2d 970, stated he had been involved in a drug sale but the defendant had not. The state's evidence showed that both were involved. The court treated the entire statement as dis-serving and did not perceive that the portion exculpating the defendant was collateral to the dis-serving portion.

142. See section IC *supra*.

143. See notes 80-81 and accompanying text *supra*.

144. See, *e.g.*, statements in cases discussed in text accompanying notes 71, 72, 80, 115-17, 119, and 123 *supra*, and in notes 74-75, 82-84, 140-41 *supra*.



unlikely that the federal courts would be willing to so eviscerate the against penal interest exception.

Though neither Wigmore's nor Jefferson's approach could, in its absolute form, serve as the governing standard under rule 804(b)(3), the viewpoints of both scholars provide a basis for building an appropriate guideline under the rule. The standard advanced in the following section represents a circumspect acceptance of the proposition that inculpatory statements should be admissible. It reflects a fusion of two views: first, that inculpatory statements are sufficiently reliable as a general proposition to warrant admission; second, that the failure to be sensitive to the potential unreliability of specific inculpatory statements may result in the deprivation of an individual's liberty. The proposed standard embodies a reconciliation and synthesis of two central legal precepts. One is Wigmore's notion that it is the *probability* of trustworthiness found in statements excepted from the hearsay rule which satisfies us that such statements should be submitted to the jury for their determination of credibility.<sup>145</sup> The other is the traditional American deference to the criminal defendant. Based upon a wary acceptance of the view that inculpatory statements generally are sufficiently reliable for admission, the standard contains stringent safeguards to eliminate the risk of convicting a defendant by admitting an untrustworthy inculpatory statement.

#### IV

##### STRICT SCRUTINY WITH CORROBORATION

Inculpatory statements should be admitted under rule 804(b)(3) if they can pass a "strict scrutiny with corroboration" test. Under this test, the disserving portion would be rigorously examined to make certain that the statement is truly against interest. In addition, the proponent of the statement would have to show that the collateral portion is so closely related in time and context to the disserving portion that it is equally trustworthy. Finally, the corroboration requirement applied to exculpatory statements under 804(b)(3) would be extended to inculpatory statements.

The careful examination and corroboration requirements would impress upon judges that a significant degree of confidence in the reliability of a statement is necessary before the statement should be admitted. With the reasoning behind the approach made clear, judges would be forced to deal with inculpatory statements in a consistent, sound manner. This approach would ensure that the jury would not be denied exposure to probative evidence, while adequately safeguarding the criminal defendant's rights.

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145. 5 J. WIGMORE, *supra* note 2, at § 1422.

*A. Strict Scrutiny*

This standard demands that judges examine closely a claim that an inculpatory statement is sufficiently against interest to be trustworthy. The proponent would have to show that the statement *directly* and *clearly* implicates the declarant in a crime. A statement containing a single piece of circumstantial evidence suggesting culpability would not suffice. *People v. Taylor*<sup>146</sup> illustrates how this standard would be applied. The court there upheld the exclusion of an exculpatory statement in which a declarant admitted he was present in a car in which heroin was found. The court held that the fact admitted had to be "distinctly" against interest, not simply a link in a probative chain.<sup>147</sup> Since admitting his presence at the scene of the crime did not *directly implicate* the declarant as the owner of the heroin, the statement was excluded.<sup>148</sup>

The strict scrutiny standard also demands that the reasonable person language of rule 804(b)(3) be applied with sufficient flexibility to enhance the likelihood of reliability. Rule 804(b)(3) requires that the declaration be sufficiently against interest that a reasonable person in the position of the declarant would not have made the statement unless it were true.<sup>149</sup> Under strict scrutiny, the court would evaluate the specific context in which the statement was made in determining whether the statement was actually against interest. This examination would result in the exclusion of statements which are ostensibly against interest, but which, because of the circumstances in which they are made, are either neutral or self-serving. Thus, by considering the environment in which the statement was made, the judge would be able to

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146. 23 Cal. App. 3d 323, 100 Cal. Rptr. 116 (2d Dist. 1972).

147. *Id.* at 331, 100 Cal. Rptr. at 120. For a discussion of the contrasting federal approaches to this question with exculpatory statements, see text accompanying notes 82-95 *supra*. The "significant evidence" test of *Barrett* is, obviously, inconsistent with the "direct implication" guideline advanced here.

148. The statement in *Dutton v. Evans*, 400 U.S. 74 (1970), provides another example of how the strict scrutiny standard would operate. To avoid the mistake of the Advisory Committee and the congressional committees, it should be noted that though the case was a confrontation clause case, the focus here is solely on the statement, and not on the confrontation clause principles announced by the Court. The declarant in *Dutton* said: "If it hadn't been for [the defendant], we wouldn't be in this now." *Id.* at 77. The statement had been admitted under a Georgia coconspirator's exception to the hearsay rule. In its analysis, the plurality opinion stated that the statement was against the declarant's penal interest. *Id.* at 89. The dissent, noting that the defendant had earlier antagonized the local police, argued that the statement was ambiguous. It might simply have reflected the declarant's belief that he and the defendant were being harassed because the police disliked the defendant. Under the strict scrutiny standard, the proponent in this case would not have been able to show that the statement directly and clearly implicated the declarant. Therefore, the statement would not have been admissible.

At the other end of the continuum is the statement in *United States v. Marquez*, 462 F.2d 893, 895 (2d Cir. 1972): "Cocaine mine." This clearly indicated guilt.

149. FED. R. EVID. 804(b)(3).

detect and exclude statements which were 'jokes or boasts'.<sup>150</sup> To the extent that courts have been willing to exclude statements to police admitting crimes because they suspect the declarant is attempting to secure better treatment, this approach is already being applied.<sup>151</sup>

Strict scrutiny also would permit an examination of the traits of the particular declarant to verify that the statement is likely to be reliable. First, the opponent of the evidence would be allowed to show that the declarant was not aware that the statement was disserving. Second, the opponent would be allowed to show that this declarant was not the "reasonable person" contemplated by rule 804(b)(3). If the opponent could show that the declarant was, for example, intoxicated or deranged, the disserving nature of the statement would provide no assurance of reliability, and the statement would not be admitted.<sup>152</sup> By requiring that the opponent of admission prove the presence of these "subjective" elements, strict scrutiny would not obstruct the proponent's effort to introduce evidence,<sup>153</sup> but would insure that the statement was marked by indicia of trustworthiness.

Finally, strict scrutiny would require careful examination of the interrelationship between the disserving and collateral portions of the declaration. The trial judge and appellate court would have to examine carefully the circumstances surrounding the making of the statement to make certain that the entire declaration was a single reliable pronouncement.<sup>154</sup>

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150. See, e.g., *United States v. Atkins*, 558 F.2d 133 (3d Cir. 1977), *cert. denied*, 434 U.S. 1071 (1978). *Atkins* involved an exculpatory statement. The declarant, a minor, stated to a group of young people on a street corner outside a bar that he had been involved in a robbery which had just occurred and had killed a guard. The trial judge excluded the statement. The justification for the exclusion was not stated clearly, and the judge was reversed by the court of appeals for focusing solely upon the credibility of the witness testifying about the content of the declarant's statement. *Id.* at 135-36. What the court of appeals overlooked was that the district judge had in fact concluded that the statement was not disserving. Reviewing the context in which the statement was made, the judge apparently had determined that the statement was likely a boast and hence self-serving: "[T]hose kind [sic] of statements made by minors in the presence of other minors sometimes are in the interest of minors to make." *Id.* at 135. Strict scrutiny would require a judge to examine the surrounding circumstances to detect and exclude such statements.

151. See *Bruton v. United States*, 391 U.S. 123, 141-42 (1968) (White, J., dissenting).

152. Strict scrutiny also would permit a related examination of the declarant's motive to lie. Wigmore and Jefferson disagree about how to handle this factor. Wigmore treats it as a part of the against interest determination. 5 J. WIGMORE, *supra* note 2, at § 1464. Jefferson treats it as a separate consideration. Jefferson, *supra* note 6, at 53-55. Under strict scrutiny, if the opponent could show that the declarant had a motive to lie sufficient to negate the presumption of trustworthiness, the statement would not be admitted.

153. The desire to avoid imposing on the proponent the burden of showing that the declarant was aware that the statement was disserving played a role in the fashioning of the qualified reasonable man standard of rule 804(b)(3). See *House Hearings*, *supra* note 25, at 59 (statement of Albert Jeimer).

154. For an example of the kinds of circumstances which would satisfy this requirement, see note 123 *supra*.

### B. Corroboration

The second major component of this standard is the requirement of corroboration. Under rule 804(b)(3), *exculpatory* statements must be corroborated.<sup>155</sup> Identical treatment of exculpatory and inculpatory statements is proper here<sup>156</sup> because neither type of statement is more reliable than the other.<sup>157</sup> The degree of corroboration required for exculpatory statements under rule 804(b)(3) is unclear.<sup>158</sup> This proposal adopts the stringent balancing test employed in *Lowery v. Maryland*<sup>159</sup> rather than the more liberal standard advocated by Judge Weinstein.<sup>160</sup> Caution about the reliability of declarations against penal interest justifies use of the balancing test. Allowing judges to find corroborating evidence inadequate because its credibility is undermined by other evidence would ensure that the fair trial rights of the defendant were protected with minimal harm to the factfinding process.

### CONCLUSION

Determining how inculpatory statements should be treated under rule 804(b)(3) emerges as a frustrating endeavor. An examination of the drafting of the rule reveals that an inadequate understanding of the issue pervaded the drafting process. The confusion spawned by the drafters is reflected in the tentative and inconsistent way the federal courts have applied the rule. Ultimately, the effort to construct a workable standard under the rule still leaves a feeling of frustration, a sense that one has addressed a problem on terms inhospitable to a cogent and just solution. The Advisory Committee's indication that inculpatory statements should be admitted<sup>161</sup> shifts the focus of discourse to an arena in which it is almost impossible to achieve a satisfactory resolution. Liberal admission of inculpatory statements is unacceptable because the doubts about the consistent trustworthiness of inculpatory

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155. FED. R. EVID. 804(b)(3).

156. The absence of a reference to corroboration for inculpatory statements in the rule can be attributed to the confused treatment of the inculpatory statement issue by the drafters. The proposal for a corroboration requirement for exculpatory statements was advanced when the Advisory Committee draft excluded inculpatory statements. *Supplement to House Hearings, supra* note 27, at 60 (letter from Senator John L. McClellan to Judge Albert B. Maris). It is quite likely that with the simultaneous addition of a corroboration requirement and omission of the final sentence, the logical expansion of the requirement to inculpatory statements was simply overlooked.

157. *See Washington v. Texas*, 388 U.S. 14, 22-23 (1967). The court stated: "To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large."

158. *See* notes 96-107 and accompanying text *supra*.

159. 401 F. Supp. 604 (D. Md. 1975), *aff'd mem.*, 532 F.2d 750 (4th Cir. 1976), *cert. denied*, 429 U.S. 919 (1977). *See* notes 100-03 and accompanying text *supra*. *See also* *United States v. Satterfield*, 572 F.2d 687, 693-94 (9th Cir. 1978).

160. 4 J. WEINSTEIN, *supra* note 7. *See* notes 106-07 and accompanying text *supra*.

161. *See* notes 19-24 and accompanying text *supra*.

statements are sound. The effort here has been to suggest a standard addressed to those doubts, one designed to eliminate the more common sources of unreliability. The strict scrutiny with corroboration standard does have drawbacks. Time will be consumed in the process of weeding out unreliable statements. However, this effort is necessary to protect the defendants' fair trial rights, given that the Advisory Committee Note and the federal case law suggest that liberal admissibility is the only alternative. If the drafting history indicated that another option were present, the response might be different.

Ultimately, this examination of inculpatory statements and rule 804(b)(3) may contain a lesson relevant beyond the immediate problem. The hearsay exception for declarations against penal interest, like other hearsay exceptions, is based on an untested, common sense assumption about human psychology.<sup>162</sup> The simplicity of this assumption has led to its ready acceptance. The major works dealing with the exception rarely dissect the rationale behind the rule, and increasing knowledge of the human psyche has created significant doubt about that assumption.<sup>163</sup> Yet those who drafted the rule seem not to have evaluated fully the conceptual basis for the exception. The intent here has been to address a concrete problem and present a practical solution. The broader hope is that an awareness of the specific dilemma will inspire others to reexamine the against penal interest exception and put it on rational footing.

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162. For a classic piece attacking a similar basis for the spontaneous utterance exception, see Hutchins & Slesinger, *Some Observations on the Laws of Evidence*, 28 COLUM. L. REV. 432 (1928).

163. See notes 125-26 and accompanying text *supra*.

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