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# Shifting From the Inquisitorial to the Adversarial Model in Criminal Cases: Is a Hearsay Rule Indispensable?

Miguel A. Méndez\*

## I. INTRODUCTION

In January 2008, my colleagues, Lucy Tacher and José Antonio Caballero, apprised me of the reform Mexico is undertaking in how criminal cases are tried. Among the jurisdictions that follow the civil law tradition, Mexico has hewed closely to the inquisitorial model. The movement to switch to an adversarial model began in some Mexican states but soon spread to the federal government. By the spring, the federal Congress had approved a constitutional amendment that incorporates many features of the adversarial system into Mexican criminal trial practice. After a majority of the state legislatures also approved the amendment, Congress's Permanent Committee on June 18, 2008 officially published the newly adopted amendment.<sup>1</sup> New Article 20 provides that "criminal proceedings shall be accusatory and oral. They shall be governed by the principles of open proceedings, confrontation, concentration, continuity, and immediacy."<sup>2</sup>

Comparativists use the concepts of orality, immediacy, and concentration to contrast the common law with the civil law system.<sup>3</sup> Orality refers to the preference for testimony as opposed to depositions, affidavits, and written declarations of witnesses.<sup>4</sup> Immediacy relates to the absence of

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I am indebted to Professor Manuel Gómez for his invaluable assistance in ensuring that this article can be understood by legal scholars and policy makers who are not trained in the common law adversarial trial system.

<sup>1</sup> See <http://natlaw.com/interam/mx/any/pr/prmxany00064.htm>. (last visited 2009).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 120-25 (1969).

<sup>4</sup> *Id.* at 123.

intermediaries between the evidentiary sources, especially witnesses, and the fact finders.<sup>5</sup> Concentration is associated with the preference for a single hearing to receive the evidence.<sup>6</sup>

In contrast to some civil law models, the American trial is a model of orality, immediacy, and concentration. Proof consists mainly of the testimony of witnesses. The parties, through their lawyers, and not the presiding judge, have the principal responsibility for interrogating witnesses in the presence of the fact finders. And although American trials can consume many days or weeks, they are nonetheless conceived as consisting of a single event as opposed to stages. Article 20's express reference to these concepts underscores the Mexican commitment to switch to the adversarial system, especially as that system is understood in the United States.

Ms. Tacher is the Executive Director of the Rule of Law Program in Mexico.<sup>7</sup> Among the program's goals are protecting the fundamental rights of Mexicans by creating an accusatory system of justice.<sup>8</sup> Professor Caballero is an associate at the Juridical Studies Division of the Economics and Teaching Research Center.<sup>9</sup> "The division seeks to promote a system of credible and efficacious legal rules by encouraging new methods for studying and teaching law in Mexico."<sup>10</sup>

Ms. Tacher and Professor Caballero contacted me because at Stanford Law School I specialize in evidence and trial advocacy. They provided me with the reform legislation approved by one of the Mexican states. An aspect that attracted my attention was the absence of a hearsay rule. Because in the United States the hearsay rule is inseparable from the right given a party to cross-examine the opposing party's witnesses, I thought that it might be useful to provide Mexican scholars and policy makers with an overview of the important role the hearsay rule plays in American evidence law and criminal trials.

Although as amended Article 20 generally requires evidence to be taken in open court subject to cross-examination, the reformed article does not explicitly bar the use of hearsay.<sup>11</sup> That omission, however, does not prevent the state legislatures or the federal Congress from enacting legislation

<sup>5</sup> See MAURO CAPPELLETTI, JOHN HENRY MERRYMAN & JOSEPH M. PERILLO, *THE ITALIAN LEGAL SYSTEM* § 4.15, at 137 (1967).

<sup>6</sup> *Id.*

<sup>7</sup> Directora General del Programa de Apoyo para el Estado de Derecho en México (PRODERECHO).

<sup>8</sup> See [http://www.proderecho.com/pagina.php?id\\_pagina=227](http://www.proderecho.com/pagina.php?id_pagina=227).

<sup>9</sup> Socio en la División de Estudios Jurídicos del Centro de Investigación y Docencia Económicas (CIDE).

<sup>10</sup> See [http://www.cide.mx/div\\_estudios\\_juridicos.htm](http://www.cide.mx/div_estudios_juridicos.htm). (last visited 2009).

<sup>11</sup> See Artículo 20 A I – VI en <http://natlaw.com/interam/mx/any/pr/prmxany00064.htm>.

barring the use of hearsay. A transitional article provides the federal Congress and the state legislatures a period of eight years to enact the legislation necessary to implement an accusatory system in criminal proceedings.<sup>12</sup>

## II. AMERICAN FEDERALISM AND PROCEDURAL RULES

In the United States, each state has the power under the Federal Constitution to enact its own rules of criminal procedure and evidence. Although the federal courts have their own rules of criminal procedure and evidence, nothing in the Federal Constitution obligates the states to adopt identical or even similar rules. The latitude afforded states, however, has not led to procedural systems that are widely at variance with each other. In the fields of criminal procedure and evidence, there is some uniformity. Much of it can be traced to the origins of American criminal law. Even today, many “modern” procedural rules are but derivatives of principles first laid down centuries ago by the English common law judges. The critical stages—arraignment and trial—were widely used by the English judges. The principal purpose of the arraignment is to put the accused on notice of the charges brought against him. In the event he pleads not guilty, the trial affords him an opportunity to be heard before being adjudged guilty.

The founders of the Federal Constitution used these basic principles to define the rights of the accused in federal criminal trials.<sup>13</sup> Beginning in the mid-1960s, the United States Supreme Court began to apply to state criminal proceedings some of the procedural safeguards which the Bill of Rights guarantees to the accused in federal criminal trials. Chief among these guarantees are the right to counsel,<sup>14</sup> to trial by jury in non-petty cases,<sup>15</sup> to confront the state’s witnesses,<sup>16</sup> to produce evidence refuting the charges,<sup>17</sup> to avoid self-incrimination,<sup>18</sup> and to an acquittal unless proven guilty beyond a reasonable doubt.<sup>19</sup>

Similarity in state and federal evidentiary rules can also be attributed to the English common law. Today’s evidence codes can be traced to evidentiary concepts first introduced by the English common law judges, and

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<sup>12</sup> *Id.*

<sup>13</sup> See U.S. CONST., amend. V-VI.

<sup>14</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to trial counsel); *Douglas v. California*, 372 U.S. 353 (1963) (right to appellate counsel).

<sup>15</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>16</sup> *Pointer v. Texas*, 380 U.S. 400 (1965).

<sup>17</sup> *Chambers v. Mississippi*, 410 U.S. 284 (1973).

<sup>18</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>19</sup> *In re Winship*, 397 U.S. 358 (1970).

then developed further by American judges.<sup>20</sup> One focus of this article – the hearsay rule – was first developed and applied by the English judges. In the United States, the most influential event in the development of the rules of evidence occurred when some states and then the federal government codified the rules that apply in their respective tribunals.<sup>21</sup> Codification is a relatively recent phenomenon. The California Legislature, for example, did not enact the Evidence Code until 1965 and Congress did not enact the Federal Rules of Evidence until 1975. Today, most states have modeled their rules on the Federal Rules of Evidence,<sup>22</sup> a factor which helps explain further the similarity among the various evidence codes that exist in the United States.

### III. CONFRONTATION AND CROSS-EXAMINATION

The right of American criminal defendants to cross examine the witnesses called by the state can be traced to the Bill of Rights. The Sixth Amendment provides that in “all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”<sup>23</sup> Initially, this right applied only in federal criminal trials, as the intent of the framers was to garner public support for the Constitution by adopting a number of amendments (the Bill of Rights) designed to limit federal power.<sup>24</sup> Although most state constitutions or criminal procedure codes guarantee a similar confrontation right to state criminal defendants, until 1965 states were free to dispense with this right. That latitude, however, ended that year when the United States Supreme Court held in *Pointer v. Texas*<sup>25</sup> that the Sixth Amendment’s right of confrontation applies to state criminal trials as well.<sup>26</sup> The Due Process Clause of the Fourteenth Amendment provides that no state may “deprive any person of life, liberty or property, without due process of law . . . .”<sup>27</sup> Because in the Court’s view, the right to

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<sup>20</sup> See CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 244 (3d ed. West 1984) (discussing especially the English origin of the hearsay rule).

<sup>21</sup> See MIGUEL MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES—A PROBLEM APPROACH (4th ed. Thomson-West 2008).

<sup>22</sup> “As of January 2007, forty-two states and Puerto Rico had adopted the Federal Rules of Evidence in various forms.” JACK B. WEINSTEIN, JOHN H. MANSFIELD, NORMAN. ABRAMS & MARGARET A. BERGER, EVIDENCE: 2007 RULES, STATUTE AND CASE SUPPLEMENT iii (Foundation Press 2007).

<sup>23</sup> U.S. CONST. amend. VI.

<sup>24</sup> It was not until the mid-1960s that the United States Supreme Court took up the question whether the procedural rights the Fourth and Fifth Amendments guarantee to federal criminal defendants also apply to state criminal defendants by virtue of the Due Process Clause of the Fourteenth Amendment. See the cases cited in notes 14 – 19 *supra*.

<sup>25</sup> *Pointer*, 380 U.S. 400 (1965).

<sup>26</sup> *Id.* at 403.

<sup>27</sup> U.S. CONST. amend. XIV.

confront witnesses is essential to a fair trial, the Court relied on the Due Process Clause to hold that state criminal defendants are also entitled to confront the state's witnesses.<sup>28</sup>

In the United States, understanding the importance of the Confrontation Clause in criminal trials requires appreciating the role of the jurors. Their role is to reconstruct a historical event from the evidence presented by the parties. Jurors are called upon to participate in the trial because the parties disagree about what happened. The purpose of the trial is to afford each side an opportunity to persuade the jurors to accept its version of what occurred. The jurors' reconstruction of what happened will determine whether the accused will be held accountable or exonerated.<sup>29</sup>

Three aspects about American jury trials are especially pertinent in understanding the role of the jurors. First, how a trial unfolds depends on the initiative of the parties. It is the parties who will decide which witnesses to call, the order in which to call them, the questions which the witnesses will be asked to answer, and which non-testimonial evidence will be offered.<sup>30</sup> The second aspect is related to the adversarial nature of jury trials. Because how trials unfold depends on the initiative of the parties, each side can be depended upon to produce the most helpful information available to reconstruct its version of the past event.<sup>31</sup>

Finally, the rules of evidence play a crucial part in shaping what parties can and cannot do. The rules place limits or an outright ban on the information the parties may seek to place before the jurors. The rules, for example, ban irrelevant evidence, exclude some relevant evidence in order to promote other policies (e.g., protect privileged information), ban evidence the legislature deems unduly prejudicial (e.g., character evidence), and place limits on what parties can do to support the credibility of their witnesses and to attack the credibility of their opponents' witnesses. The rules also restrict the use of evidence the legislature considers unreliable. Hearsay is the classic example.

While the rules do seek to exclude unreliable evidence, they cannot guarantee that all evidence presented to the jurors will be reliable. Witnesses sometimes lie; at other times, they may be mistaken. What the rules can and should do is give the parties an opportunity to present the jurors with reasons why they should reject the other side's evidence. In the case

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<sup>28</sup> Pointer, 380 U.S. at 403.

<sup>29</sup> See MÉNDEZ, *supra* note 21, at § 15.01.

<sup>30</sup> See *id.* at §§ 1.01-1.02.

<sup>31</sup> *Id.*

of testimony, the parties are given a powerful tool: the right to cross-examine adverse witnesses under oath in the presence of the jurors.<sup>32</sup>

An American jury trial, then, is predicated on the assumption that jurors are most likely to reconstruct a past event accurately if the parties are given an opportunity to demonstrate why they should give little or no weight to the evidence presented by the opposing party. Since cross-examination of witnesses is essential in exposing flaws in the testimony given on direct examination, confidence in the accuracy of a jury verdict is necessarily undermined whenever a party is deprived of the opportunity to cross examine the adversary's witnesses under oath in the presence of the jurors. This goal, however, cannot be achieved if hearsay is freely admissible under the rules of evidence.

#### IV. CROSS-EXAMINATION AND THE HEARSAY RULE

Assume that a defendant is prosecuted for reckless driving on the theory that he injured the victim, another driver, when he ran a red light and struck her car. The victim testifies that, as she entered the intersection, the traffic light facing her was green and that moments later the defendant's car struck her on the driver's side. In its case-in-chief, the State calls a motorist who testifies that he and his spouse were parked at the intersection and that after the collision, his spouse said to him that the light facing the defendant was red.

Under American procedural rules, the victim's testimony alone would make out a prima facie case and allow the state to get to the jury on the issue of whether the defendant committed the offense. With the motorist's testimony, the State's chances of persuading the jury to return a guilty verdict are enhanced significantly. But if the defendant contradicts the victim's testimony (e.g. "I had the green light") and precludes the motorist from testifying, the outcome is cast into doubt. Indeed, if under these circumstances the jurors cannot decide whether to believe the victim or the defendant, they would have to acquit the defendant since the State has the burden of proving each element of the offense beyond a reasonable doubt.<sup>33</sup> To the defendant, then, preventing the motorist from testifying is crucial.

Over a hearsay objection, should the motorist be allowed to testify that his spouse told him that the light facing the defendant was red? In the United States, the answer is "no" if the state is offering the motorist's testimony to establish the color of the light facing the defendant. In the words

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<sup>32</sup> See, e.g., CAL. EVID. CODE § 711 (West 1995).

<sup>33</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

of the Federal Rules of Evidence, the motorist's testimony would be hearsay because it consists of:

[A] statement, other than made by the declarant while testifying at the trial or hearing [what the spouse told the motorist about the color of the light], offered in evidence to prove the truth of the matter asserted [that the color of the light facing the defendant was red at the time of the collision].<sup>34</sup>

Why should the hearsay rule disfavor the use of the spouse's statement? One reason is that receiving hearsay through a witness other than the declarant deprives the party opposing the hearsay from cross examining the declarant. Cross examiners generally have one of two goals: (1) to persuade a witness to recant the testimony given on direct examination and, instead, affirm the cross examiner's theory of the case or (2) failing that, to discredit the witness's account on direct examination by impeaching the witness's credibility.

An example of the former would be a concession by the spouse on cross-examination that, indeed, the color of the light facing the defendant was really green. That does not happen often. More likely, she might concede that, although she thinks the light was red, she cannot be absolutely sure because the sun was in her eyes. But regardless of which goal the cross examiner pursues, one matter is clear: the cross examiner cannot pursue either goal unless the motorist's spouse is produced for cross-examination under oath in the presence of the jurors. What matters to the cross-examiner is her ability to perceive and recall the color of the light accurately, as well as her willingness to tell the truth about what she saw. The motorist's abilities in these respects are much less important, since he did not see the light. Put another way, even if the motorist correctly heard what his spouse said about the color of the light and even if he recalls her statement correctly and relates it accurately to the jury, none of that would matter if his spouse either lied or was mistaken about the color of the light. The hearsay rule thus forces parties to focus on evidence about what people saw and heard, and not about what they heard others *say* they saw or heard.<sup>35</sup>

Some American authorities link the hearsay rule to goals that go beyond the concessions that might be obtained on cross-examination. In

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<sup>34</sup> FED. R. EVID. 801(c).

<sup>35</sup> One, of course, can acquire information through senses other than sight or sound. One can also perceive by touching, smelling, and tasting. The California Evidence Code, for example, recognizes that all five senses are involved in the acquisition of knowledge. *See* CAL. EVID. CODE § 170 (West 1995).



their view, the use of hearsay violates the ideal conditions under which testimony should be received: witnesses should testify under oath in the fact finder's presence and subject to cross-examination.<sup>36</sup> The oath is believed to impress witnesses with the importance of testifying truthfully.<sup>37</sup> Having witnesses testify before the fact finders (whether judges or jurors) enables them to take the witnesses' demeanor into account in assessing their credibility.<sup>38</sup> And subjecting witnesses to a searching cross-examination helps the opposing party expose inadvertent as well as conscious inaccuracies in perception, recollection, and narration (including lack of sincerity).<sup>39</sup>

Sometimes hearsay is described as inherently untrustworthy. What is meant is that hearsay should not be relied upon in reaching factual decisions in the absence of the kind of cross-examination that has been described. The hearsay rule, however, does not proceed on the assumption that the hearsay declaration (in our example, what the spouse told the motorist) should be received in evidence so long as the opposing party is given a chance to call and cross-examine the hearsay declarant (the spouse); on the contrary, the rule makes the declaration inadmissible. If the State wants to establish the color of the light facing the motorist's spouse at the time of the collision, then, in the absence of hearsay exceptions, the State must do so by offering the spouse as a witness on that point and not by offering the spouse's statement to her husband or to anyone else.

This insight has serious implications in American criminal trials. From an instrumental perspective, it means that the accused should always be accorded an opportunity to cross examine his or her accusers under oath in the presence of the jurors. That, however, may not always be possible. For example, the person accusing the defendant might be dead, and unless his statement identifying the accused as his killer is admitted at the trial, the accused might go free. Framers of the rules of evidence, whether legislators or judges, have struggled with this and similar problems, and arrived at different compromises reflected in the various exceptions to the hearsay rule. But until 1965, state legislators and judges, in whose courts most criminal trials take place, were free to consider the question of exceptions without taking into account federal constitutional constraints.

That freedom ended with the United States Supreme Court's *Pointer* decision. Since that time, the Court has tried to define the circumstances when out of court statements can be offered by the prosecution against the accused without having to accord the accused an opportunity to cross ex-

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<sup>36</sup> See FED. R. EVID. ART. VIII advisory committee's note.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

amine the declarant. Initially, the Court evolved a two part test: (1) if the statement offered against the defendant fell within a “firmly rooted” exception to the hearsay rule, cross-examination could be done away with;<sup>40</sup> (2) but if the statement did not fall into such an exception, then cross-examination could be dispensed with only if the prosecution convinced the judge that the circumstances attending the making of the statement indicated that it was reliable.<sup>41</sup>

In *Crawford v. Washington*,<sup>42</sup> the Court abandoned the two part test when the statement offered against the defendant qualified as a “testimonial” hearsay.<sup>43</sup> When it does, then the prosecution must produce the declarant for cross-examination at the trial unless one of two exceptions apply: (1) either the accused was given an opportunity prior to the trial to cross examine the declarant<sup>44</sup> or (2) the accused has forfeited his right to object on Sixth Amendment grounds by engaging in wrongdoing that prevented the declarant from testifying.<sup>45</sup>

Testimony from a preliminary hearing can illustrate how the *Crawford* requirements can be satisfied. In many American states, a defendant may not be tried for committing a serious criminal offense (usually one punishable in state prison by more than a year), unless at a hearing prior to the trial (a preliminary hearing) the State convinces the judge on the basis of the evidence presented that there is probable cause to believe that a serious crime was committed and that the defendant is the person who committed the offense.<sup>46</sup> Assume a case in which the defendant is charged with assault. At the preliminary hearing, the State calls the victim who testifies under oath that the defendant attacked her without justification. The defendant is then given an opportunity to cross-examine the victim. After evaluating all of the evidence, the judge determines that the defendant should be tried on the charge of assault. If for some reason the victim is unavailable to testify at the trial, under the rules of evidence of all states, the prosecution may read to the jurors the testimony the victim gave at the preliminary hearing on direct examination.<sup>47</sup> The testimony (“the defendant attacked me without provocation”) is unquestionably hearsay; the State is offering it to prove as true the propositions the victim asserted in her statement (that she was

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<sup>40</sup> See *Roberts v. Ohio*, 448 U.S. 56, 66 (1980).

<sup>41</sup> See *Idaho v. Wright*, 110 U.S. 3139, 3147 (1990).

<sup>42</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>43</sup> *Id.* at 40.

<sup>44</sup> *Id.*

<sup>45</sup> See *Giles v. California*, 128 S.Ct. 2678, 2688 (2008).

<sup>46</sup> See *e.g.*, CAL. PENAL CODE §§ 871 and 872(a) (West 2008).

<sup>47</sup> The defendant would be entitled to read to the jury the testimony which the victim gave on the defendant’s cross-examination.

attacked without justification and that the defendant was the one who attacked her). Nonetheless, the judge would have to overrule the defendant's hearsay exception. All states have enacted an exception for "prior testimony." Federal Rule of Evidence 804(b)(1) is illustrative. It creates an exception for testimony,

given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.<sup>48</sup>

Our example meets the requirements of the exception: the accused was given an opportunity at the preliminary hearing to cross-examine the witness with an interest and motive similar to the ones he would have at the trial.

The defendant, of course, is still free to object to the introduction of the victim's testimony on Sixth Amendment grounds. Although the United States Supreme Court has yet to provide a comprehensive definition of "testimonial hearsay," the Court has held that the term includes testimony given at a prior trial, before a grand jury, or at a preliminary hearing.<sup>49</sup> Since in our hypothetical the defendant was given an opportunity to cross-examine the victim under oath at the preliminary hearing, the judge would have to overrule the defendant's Sixth Amendment objection.

Most hearsay exceptions do not require proof that the opponent was given an opportunity to cross examine the declarant at a prior hearing. An example is California's exception for statements by declarants describing the infliction or threat of physical injury upon the declarant.<sup>50</sup> In *People v. Giles*,<sup>51</sup> the defendant was prosecuted for murder. To prove that the defendant was the murderer, the prosecution offered a declaration by the victim in which she told a police officer that the defendant had threatened to kill her. Although the victim's statement was hearsay, the trial judge overruled the defendant's hearsay objection because the statement fell within the California exception for statements relating to the threat of infliction of physical injury upon the declarant. The defendant also objected on Sixth Amendment grounds. Although the California Supreme Court agreed that the statement constituted "testimonial" hearsay under *Crawford*, the court

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<sup>48</sup> FED. R. EVID. 804(b)(1).

<sup>49</sup> *Crawford v. Washington*, 541 U.S. 36, 56 (2004).

<sup>50</sup> See CAL. EVID. CODE § 1370 (West 1995).

<sup>51</sup> *People v. Giles*, 152 P.3d 433 (Cal. 2007).

nonetheless upheld the trial judge's admission of the statement. As the court explained, under another United States Supreme Court decision, *Davis v. Washington*, the defendant had forfeited his right to object on Sixth Amendment grounds.<sup>52</sup> By killing the victim, the defendant had engaged in wrongdoing that prevented her from testifying at the trial.<sup>53</sup>

The two examples illustrate important aspects about a criminal defendant's right to cross examine his accusers in American trials. First, although the hearsay rule favors the defendant by excluding statements by witnesses who cannot be cross examined, the reach of the rule is limited by exceptions to the rule. Second, not all hearsay offered by the prosecution under the exceptions results in a confrontation violation. Only hearsay that qualifies as "testimonial" can result in a violation. Third, even the prosecution's use of testimonial hearsay will not result in a Sixth Amendment violation if the defendant has been accorded an opportunity prior to the trial to cross examine the hearsay declarant. Finally, even if the defendant was not accorded such an opportunity, no Sixth Amendment violation will occur if the defendant has forfeited his right to object on confrontation grounds.

All four qualifications have resulted in still unresolved complications in Sixth Amendment jurisprudence. The United States Supreme Court's refusal to define "testimonial" hearsay comprehensively has created grave uncertainties about what constitutes "testimonial" hearsay. Until recently, for example, state and lower federal courts, for example, were divided on whether *Crawford* applies to statements in reports prepared by government chemists in which they identify as controlled substances (e.g., heroin) the substance taken from the defendant.<sup>54</sup> The Court, moreover, has not defined what counts as a prior opportunity to cross examine the hearsay declarant. Presumably, the defendant must have been accorded an opportunity to cross examine the declarant with an interest and motive similar to those the defendant has at the trial. In addition, the Court has not specified all of the elements of the forfeiture doctrine. Although the Court requires the State to prove that the defendant engaged in wrongdoing for the purpose of preventing the declarant from testifying,<sup>55</sup> the Court had not yet ruled on the standard of persuasion which the State must meet or whether in making out a

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<sup>52</sup> *Davis v. Washington*, 557 U.S. 813, 827 (2006).

<sup>53</sup> *People v. Giles*, 152 P.3d at 447. This aspect was reversed by the United States Supreme Court in *Giles v. California*, 128 S.Ct. 2678 (2008), where the Court held that forfeiture requires the prosecution to prove that the defendant engaged in wrongdoing designed to prevent the declarant from testifying. *Id.* at 2688.

<sup>54</sup> See MÉNDEZ, *supra* note 21, § 607. In June 2009, the United States Supreme Court ended the controversy by holding that in most instances the prosecution's use of such reports constitutes testimonial hearsay. See *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532 (2009).

<sup>55</sup> See *Giles v. California*, 128 S.Ct. 2678 (2008).

forfeiture case the State may rely on the hearsay statement at issue. Of greater interest to readers unfamiliar with American rules of proof is the question of hearsay exceptions. If hearsay should be excluded because it is inherently unreliable, then how can American jurisdictions justify the numerous exceptions found in their codes?

#### V. EXCEPTIONS TO THE HEARSAY RULE

When I was a law student in the late 1960s, I recall studying less than fifteen exceptions to the hearsay rule. Today, the Federal Rules of Evidence contain almost forty exceptions and “exemptions.”<sup>56</sup> Given the explosion in exceptions, one cannot help but wonder whether the hearsay rule retains much bite. In theory, all of the exceptions are available to the prosecution. In practice, however, prosecutors usually resort to a smaller number of exceptions. California, which tries more criminal cases than any other American jurisdictions, is an example.

Occasionally, California prosecutors find it indispensable as well as useful to offer the statements of declarants who for some reason are unable to testify at the trial. Since these statements are often offered for the truth of the matter stated, California’s hearsay rule would bar their use in the absence of an exception.<sup>57</sup> Fortunately for prosecutors, the Evidence Code contains numerous useful exceptions. Among these are the exceptions for excited utterances,<sup>58</sup> dying declarations,<sup>59</sup> declarations against interest,<sup>60</sup> co-conspirators’ declarations,<sup>61</sup> statements of prior identification,<sup>62</sup> declarations regarding states of mind,<sup>63</sup> entries in business or official records,<sup>64</sup> prior testimony,<sup>65</sup> statements regarding gang related crimes,<sup>66</sup> statements relating to the infliction or threat of physical injury,<sup>67</sup> statements by the elderly or dependent adults offered in prosecutions for the crime of elderly or dependent adult abuse,<sup>68</sup> statements by children describing acts of child abuse,<sup>69</sup>

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<sup>56</sup> See FED. R. EVID. §§ 801-804.

<sup>57</sup> See CAL. EVID. CODE § 1200 (West 1995).

<sup>58</sup> See *id.* § 1240.

<sup>59</sup> See *id.* § 1242.

<sup>60</sup> See *id.* § 1230.

<sup>61</sup> See *id.* § 1223.

<sup>62</sup> See *id.* § 1238.

<sup>63</sup> See *id.* §§ 1250-1253.

<sup>64</sup> See *id.* §§ 1270-1284.

<sup>65</sup> See *id.* §§ 1290-1294.

<sup>66</sup> See *id.* § 1231.

<sup>67</sup> See *id.* § 1370.

<sup>68</sup> See *id.* § 1380.

<sup>69</sup> See *id.* § 1360.

and statements by declarants who are prevented from testifying in trials charging a serious felony.<sup>70</sup>

With the exception of excited utterances, co-conspirators' declarations, entries in business or official records, mental state declarations, and dying declarations, the remaining exceptions require prosecutors to prove the declarant's unavailability to testify at the trial. If the declarant is available to testify, no justification is believed to exist for depriving defendants of their right to cross examine the declarant under oath in the presence of the fact finder.

All of the exceptions contain other restrictions. Some limit the exception to certain kinds of prosecutions, for example, prosecutions charging a serious felony,<sup>71</sup> elderly or dependent adult abuse,<sup>72</sup> or gang activities.<sup>73</sup> Some require the statement to be memorialized in a writing or recorded electronically.<sup>74</sup> Others require the prosecution to give the defendant notice of its intention to offer the statement.<sup>75</sup> Still others provide the judge with guidelines for determining the admissibility of the statement.<sup>76</sup> Some require the statement to be supported by corroborative evidence.<sup>77</sup> Others merely require the judge to consider the presence or absence of supporting evidence in determining the admissibility of the statement.<sup>78</sup> The exception for statements offered in cases charging a serious felony is specifically designed to make admissible statements by declarants who have been prevented from testifying.<sup>79</sup>

Little would be gained by explaining the requirements of each of these exceptions in detail. This information is readily available in a treatise.<sup>80</sup> More useful to readers unfamiliar with American evidence law is how the exceptions developed and the grounds advanced for their justification.

As has been noted, the codification of the rules of evidence in the United States is a recent phenomenon. Most codes were enacted in the last third of the Twentieth Century. Prior to that time, the hearsay rule and its exceptions were the creations of appellate judges using their common law power to fashion legal rules. Because the rules were created for a specific

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<sup>70</sup> See *id.* § 1350.

<sup>71</sup> See *id.* § 1350(a).

<sup>72</sup> See *id.* § 1380(a).

<sup>73</sup> See *id.* § 1231(a).

<sup>74</sup> See, e.g., CAL. EVID. CODE §§ 1350(a)(3), 1370(a)(5), 1380(a)(3), 1231(b) (West 1995).

<sup>75</sup> See, e.g., *id.* §§ 1231.1, 1350(b), 1360(b), 1370(c), and 1380(b).

<sup>76</sup> See, e.g., *id.* §§ 1231(f), 1370(b).

<sup>77</sup> See, e.g., *id.* §§ 1350(a)(6), 1380(a)(5).

<sup>78</sup> See, e.g., *id.* §§ 1231(f)(3), 1370(b)(3).

<sup>79</sup> See *id.* § 1350(a)(1).

<sup>80</sup> See, e.g., MÉNDEZ, *supra* note 21, chs. 7-13.

case on appeal, the judges did not have the occasion to consider the broad question of what circumstances justified exceptions generally. Instead, the judges were confronted with the narrow question of whether the circumstances attending the making of a particular declaration offered at the trial justified an exception. Not surprisingly, it is hard in retrospect to discern all the concerns that prompted the judges to create the exceptions. At least two, however, appear to have motivated the judges. One was the need for the hearsay. The other was the belief that the circumstances attending the statement suggested that it was so reliable as to dispense with the need for the adverse party to cross examine the hearsay declarant.

Three early exceptions illustrate this approach – the exceptions for dying declarations, declarations against interest, and excited utterances. All American jurisdictions recognize the exception for dying declarations. These consist of statements made by a declarant, while believing that his or her death is imminent, concerning the cause or circumstances of what the declarant believes to be impending death.<sup>81</sup> An example would be the statement, “Help me! I am dying. Joe Blow just stabbed me.” Without the exception, the statement would be inadmissible under the hearsay rule to prove that Joe Blow stabbed the victim. If the victim in fact dies, a prosecutor would not be inclined to prosecute Joe Blow if the statement is the key evidence linking Joe Blow with the homicide. Thus the need for this kind of evidence probably accounts in part for the exception. In addition, most exceptions include requirements designed to assure the reliability of the declaration. In the case of dying declarations, the common law judges insisted on proof that the declarant believed himself about to die. They were willing to accept the cultural assumption that people about to die will not lie, as they do not want to meet their Creator with a falsehood on their lips.<sup>82</sup> If the declarant was not religious, then they were disposed to accept the assumption that individuals facing the prospect of immediate death have no motive to lie.<sup>83</sup>

American jurisdictions also recognize an exception for declarations against interest. In any trial in which liability is contested, nothing helps defendants more than the testimony of a witness who admits responsibility for the wrong at issue. If the witness cannot be called because he is unavailable, the next best thing is for defendants to offer an out of court statement in which the witness admits responsibility. The California Evidence Code, for example, creates a hearsay exception for such statements.<sup>84</sup>

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<sup>81</sup> See, e.g., FED. R. EVID. 804(b)(2).

<sup>82</sup> See MÉNDEZ, *supra* note 21, at § 9.03.

<sup>83</sup> *Id.*

<sup>84</sup> See CAL. EVID. CODE § 1230 (West 1995).



To be admissible, the proponent must persuade the judge that the declarant is unavailable to testify and that it was against the declarant's interest to have made the declaration.<sup>85</sup> As in the case of dying declarations, need justifies the exception. A party may not invoke the exception if the declarant is available to testify. Declarations against interest are considered reliable. The rules of evidence assume that people do not say things disserving of their interests unless they believe their statements to be true. However, this commonplace assumption has not been tested empirically.

In contrast, the justification for excited utterances does not rest on need, only on reliability. American jurisdictions provide a hearsay exception for a "statement relating a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."<sup>86</sup> Under this exception, the prosecution would be entitled to offer a declaration by a witness who was overheard saying, "Look, Joe Blow is stabbing the victim," as proof that the defendant, Joe Blow, stabbed the victim. Because the exception does not require the prosecution to prove the witness's unavailability to testify, the declaration may be offered by the witness as well as by anyone who heard the witness make the statement. Why are excited utterances considered so reliable as to dispense with the need to cross-examine the declarant? Because of the belief that the spontaneity associated with such statements deprives the declarant of an opportunity for reflection and deliberate fabrication.<sup>87</sup>

The Federal Rules of Evidence classify the hearsay exceptions into two categories. One requires the proponent of the hearsay to prove the unavailability of the hearsay declarant to testify as a condition of admissibility. The other lists those hearsay exceptions where the unavailability of the hearsay declarant to testify is immaterial to admissibility. Twenty-three exceptions are listed under this category<sup>88</sup> while only five are listed under the former.<sup>89</sup> These results are surprising. Given the important role of cross-examination in exposing flaws in testimony, one would have expected the opposite results.

Imagine a convention of scholars convening for the first time to consider the creation of a hearsay rule. Given the crucial role of cross-examination, the scholars contemplating exceptions to the hearsay rule might begin their discussion by noting that hearsay should not be admissible unless the proponent first establishes the declarant's unavailability to

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<sup>85</sup> *Id.*

<sup>86</sup> *See, e.g.*, FED. R. EVID. 803(2).

<sup>87</sup> *See* CAL. EVID. CODE § 1240 cmt. (West 1995).

<sup>88</sup> *See* FED. R. EVID. 803.

<sup>89</sup> *See* FED. R. EVID. 804.



testify. If the declarant is available to testify, there is no need to strip the opponent of the right to cross examine the declarant. The convention might then formulate a forfeiture doctrine. Parties, for example, might forfeit their right to object on hearsay grounds when the offering party can persuade the judge that the objecting party engaged in wrongdoing that was designed to prevent or dissuade the declarant from testifying.<sup>90</sup> Parties who seek to undermine the judicial process by procuring or coercing silence from witnesses should not be allowed to profit from their wrongdoing.<sup>91</sup> Then the convention could get down to the difficult business of determining when the circumstances attending the making of some out of court statements render the statements so reliable *as a class* to justify dispensing with the need to cross examine the declarant. These questions confronted American scholars when the United States Supreme Court convened a committee to draft the Federal Rules of Evidence.

## VI. CHOICES FACING POLICY MAKERS

One of the most recent American studies of hearsay was conducted by the Advisory Committee appointed by the United States Supreme Court in 1965 to draft rules of evidence for the federal courts. In its study, the Advisory Committee acknowledged the central role the hearsay rule plays in preserving a party's right to cross examine the witnesses called by the adverse party.<sup>92</sup> The surest way to preserve this right is simply by excluding all hearsay. But as the Advisory Committee conceded:

No one advocates this position. Common sense tells that much evidence which is not given under the three [ideal] conditions [that is, under oath and subject to cross-examination in the presence of the fact finder] may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.<sup>93</sup>

If the choice is between excluding all hearsay or admitting some evidence "which is less than best," a rule favoring some evidence rather than

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<sup>90</sup> See, e.g., FED. R. EVID. 804(b)(6) (forfeiture by wrongdoing).

<sup>91</sup> See *Davis v. Washington*, 547 U.S. 813, 833 (2006) (quoting from *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

<sup>92</sup> See FED. R. EVID. art. VIII advisory committee's note (Introductory Note: The Hearsay Problem).

<sup>93</sup> *Id.*

none would call for the abolition of the hearsay rule. But as the Advisory Committee noted, abolishing the rule would not necessarily result in placing before the fact finders testimony that has not been subjected to cross-examination.<sup>94</sup>

If the declarant were available [to testify], compliance with the ideal conditions would be optional with either party. Thus the proponent could call the declarant as a witness as a form of presentation more impressive than his hearsay statement. Or the opponent could call the declarant to be cross-examined upon his statement.<sup>95</sup>

The Advisory Committee rejected this option.<sup>96</sup> Abolition of the hearsay rule could also result in the admission of hearsay by declarants who are unavailable to testify. Their out of court statements would be admitted without giving the fact finders the benefits that might accrue from cross-examination. The Advisory Committee thus rejected the position at each end of the spectrum: a rule excluding all hearsay and a rule admitting all hearsay. Instead, the Committee opted for a rule favoring the use of reliable hearsay.

In the Committee's view, such a rule could take one of two forms. The trial judge could be given the task of excluding unreliable hearsay whenever, in the judge's discretion, its probative value would be outweighed by the possibility of prejudice, waste of time, or the availability of more satisfactory evidence.<sup>97</sup> Or the judge could be charged with excluding hearsay upon objection, unless the proponent convinces the judge that the hearsay falls within an a statutory exception that is believed to exclude unreliable hearsay.<sup>98</sup> The Committee rejected the first form as "involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases."<sup>99</sup>

Of all the reasons the Advisory Committee advanced, enhancing the difficulties of preparation for trial is the most persuasive. Because in the United States the lawyers – not the trial judge – play the key role in determining how a trial unfolds, in planning their trials the lawyers need to know whether the judge will admit or exclude evidence. A rule that commits the

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

admissibility of hearsay to the trial judge's discretion ignores this reality and cannot work in the American style adversarial system.

If asked, most American first year law students will respond that the judge is the most important person in a trial. The judge, after all, is dressed differently from all others – whether lawyers, parties, jurors, or spectators – attending the trial. Judges are the only ones dressed in a black robe. Moreover, they sit at a special place (the bench) which is usually elevated. Whenever a judge enters the court room, an armed guard (the bailiff) orders all others to stand. No one can sit until after the judge sits. No one can speak until after the judge formally opens the proceedings, usually by announcing the case to be heard that day.

The reality is otherwise, however. In American jury trials, it is the lawyers who are the most important persons. In criminal trials, for example, it is the prosecutor and defense counsel who are responsible for the manner in which the trial unfolds. It is the lawyers who decide which witnesses to call and the order in which they will testify. It is the lawyers who decide whether non-testimonial evidence will be offered and when it will be offered. It is the lawyers who decide what the witnesses will say, since witnesses are expected to respond only to the questions put to them. It is the lawyers who formulate these questions and who put them to the witnesses. Even though the presiding judge is free to ask questions of witnesses, most judges leave this task almost exclusively to the lawyers.<sup>100</sup>

Other than ministerial duties such as opening trials and informing the jurors of the law that applies to the case, an American judge's principal role in a jury trial is to rule on objections to the introduction of evidence offered by a party. But even this role is circumscribed. The rules of evidence operate in an adversarial environment. As in the case of procedural rules, whether a particular rule of evidence will be applied will depend initially on whether its application is invoked by a party. If a party fails to object to evidence offered by the opponent, as a rule the party loses the right to complain on appeal about the introduction of inadmissible evidence. The California Evidence Code is illustrative. It provides that a "verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or motion to exclude or strike the

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<sup>100</sup> The degree to which the lawyers control the interrogation of witnesses is evidenced by the virtual disuse of a procedure available in California and some other states. Jurors, under certain circumstances, can ask questions of witnesses. See MÉNDEZ, *supra* note 21, at § 17.11. It is the rare case where jurors exercise this right, mainly because they are not apprised of their right to ask questions.

evidence that was timely made and so stated as to make clear the specific ground of objection or motion. . . .”<sup>101</sup>

In the end, the Advisory Committee opted to retain the common law approach to hearsay: a general rule of exclusion with exceptions.<sup>102</sup> In coming up with the exceptions enumerated in the Federal Rules, the Advisory Committee introduced two innovations. First, as has been noted, it classified the exceptions by whether or not the proponent has to establish the hearsay declarant’s unavailability to testify at the trial. Five exceptions impose this obligation on the proponent.<sup>103</sup> The remaining thirty-one do not.<sup>104</sup> Second, the Committee empowered the trial judge to create an exception in the case being tried if the hearsay offered does not fall within the enumerated exceptions but has comparable circumstantial guarantees of trustworthiness.<sup>105</sup> As the Committee explained, the exceptions listed in the Federal Rules “are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have catalogued and to pass the hearsay rule to oncoming generations as a closed system.”<sup>106</sup>

Not passing “a closed system” to future generations of lawyers and judges may be commendable. But to jurisdictions contemplating whether to enact a hearsay rule, the wisdom of adopting the common law approach is contestable. Enacting a general rule of exclusion necessarily invites the question of exceptions. The approach taken by the Advisory Committee is revealing. In identifying the exceptions that should be included in the Federal Rules, the Committee did not undertake research that draws on the social sciences. The Committee did not ask, for example, whether empirical research justifies the legal assumption that most exceptions allow the use of only reliable evidence. Recall the hearsay exception for declarations against interest. Intuitively, it may be true that most people do not say things that are against their interest unless they believe the things they are saying are true. But in the absence of solid social science research, we simply do not know as a scientific matter whether this proposition is accurate. Consider also the exception for excited utterances. Their reliability is said to derive from the spontaneity (and consequent lack of reflection) in-

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<sup>101</sup> CAL. EVID. CODE § 353 (West 1995).

<sup>102</sup> See FED. R. EVID. art. VIII advisory committee’s note (Introductory Note: The Hearsay Problem).

<sup>103</sup> See FED. R. EVID. 804(b).

<sup>104</sup> See FED. R. EVID. 801(d), 803.

<sup>105</sup> See FED. R. EVID. 807.

<sup>106</sup> See FED. R. EVID. art. VIII advisory committee’s note (Introductory Note: The Hearsay Problem).

duced by the stress associated with the startling event giving rise to the declaration.<sup>107</sup> Some social science studies, however, suggest that stress can distort perception.<sup>108</sup> Jurisdictions contemplating a shift from the inquisitorial to the adversarial system of litigation should pause before adopting wholesale the common law approach to hearsay and its exceptions.

## VII. BENCH TRIALS AND THE RULES OF EVIDENCE

The American rules of evidence do not distinguish between cases tried to a jury and cases tried to a judge. They apply to both types of cases. Whether a party is entitled to a trial by jury depends both on state law and federal law. As a matter of federal constitutional law, criminal defendants are entitled to a jury trial whenever they are charged with committing an offense that is punishable by more than six months in jail.<sup>109</sup> In some jurisdictions, however, as a matter of state law, criminal defendants are entitled to a trial by jury whenever the offense is punishable by any term in jail.<sup>110</sup> Even in these jurisdictions, however, a criminal defendant may waive his or her right to trial by jury and have the judge sit as both judge and jury. In the United States, cases tried to a judge are called “bench” trials because the elevated desk at which the judge sits is called a bench.

When hearsay is offered at a jury trial, the judge has discretion to order a hearing outside the presence of the jury to determine the admissibility of the hearsay. If the judge sustains the opponent’s hearsay objection, the jury will never learn about the hearsay, and it cannot contaminate the jury’s deliberations. But if the case is tried to the judge, the judge will learn about the hearsay in ruling on its admissibility. Even if the opponent succeeds in convincing the judge to sustain his or her objection, the opponent must worry about whether the judge will be able to disregard the hearsay in reaching the verdict. An advantage, then, of an American jury trial is that it increases the likelihood that the fact finder will not be contaminated by inadmissible evidence. That prophylactic benefit cannot be attained in Mexico, unless the legislation implementing the constitutional amendment calls for a panel of professionally trained jurors who play no role in presiding over the trial.<sup>111</sup>

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<sup>107</sup> See, e.g., CAL. EVID. CODE § 1240 cmt. (West 1995).

<sup>108</sup> See MCCORMICK, *supra* note 20, at § 272 (4th ed. 1992).

<sup>109</sup> See *Baldwin v. New York*, 399 U.S. 66, 72 (1970).

<sup>110</sup> See, e.g., CAL. CONST. art. I, § 16.

<sup>111</sup> Some continental systems used a mixed panel made up of the presiding judge and lay jurors. See Mirjan Damaska, *Evidentiary Barriers To Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 536-46 (1973).

In the United States, our appellate rules are more protective of judges than jurors when judges preside over bench trials and they erroneously admit inadmissible evidence. In reviewing rulings erroneously admitting evidence in jury trials, appellate judges will reverse the verdict and order a new trial if they conclude that in the absence of the error the jury might have reached a different verdict.<sup>112</sup> But when appellate judges review rulings erroneously admitting evidence in bench trials, they will assume that their trial brethren were capable of ignoring inadmissible evidence.<sup>113</sup> Consequently, it is much more difficult to convince an appellate court to reverse a verdict reached by a judge than one rendered by a jury. Yet, there is nothing in the training and work of American judges that confers upon them a special immunity to the deleterious effects of inadmissible evidence, including hearsay.

Why are the American appellate courts more solicitous of trial judges when they sit as a jury of one? Because of the belief held by some legal scholars that the common law developed the exclusionary rules of evidence principally to protect jurors from unreliable evidence. Professor James Bradley Thayer, one of the most prominent American evidence scholars of the Nineteenth Century, maintains that the development of rules of evidence has been the “product of the jury system . . . where ordinary untrained citizens are acting as the judges of fact.”<sup>114</sup> In particular, he views the hearsay rule as “the child of the jury [system],”<sup>115</sup> If Thayer is right, the hearsay rule might not have developed if jurors had never been employed to resolve factual controversies in Anglo-American trials.<sup>116</sup> Had that been the case, hearsay might be freely admissible with judges reserving the right to assign whatever weight they thought the hearsay deserved. Parties would call hearsay declarants only if they thought that their testimony would be more impressive than their out-of-court statements. If a party failed to do so, the opponent would be free to call the hearsay declarant if he believed that he could discredit the declarant’s account on cross-examination. The hearsay rule might not have developed or might have been frozen in its early stages, when hearsay was admissible only to corroborate other evidence and could not by itself support a judicial finding.<sup>117</sup>

If Thayer is right, the implications for civil law jurisdictions contemplating moving from an inquisitorial to an adversarial system of litigation

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<sup>112</sup> See, e.g., CAL. EVID. CODE § 353 (West 1995).; FED. R. EVID. 103(a).

<sup>113</sup> See MCCORMICK, *supra* note 20, at § 60.

<sup>114</sup> JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 509 (1898).

<sup>115</sup> *Id.* at 47.

<sup>116</sup> *Id.* at 107.

<sup>117</sup> See MCCORMICK, *supra* note 20, at § 244.

are worth pondering if judges trained in the law, not ordinary citizens, are to serve as the jurors. These jurisdictions might be better served by rules that (1) prohibit the use of hearsay, unless the proponent first convinces the judge of its inability to produce the hearsay declarant under the procedures provided by the forum; (2) allow the opponent to call and cross-examine the hearsay declarant (if available to testify) when the proponent fails to do so; (3) permit the opponent to impeach the hearsay declarant by any means that would be available if the declarant had testified at the hearing; and (4) excuse the proponent from having to establish the hearsay declarant's unavailability to testify whenever the proponent convinces the judge that the opponent engaged in wrongdoing that was intended to and did procure the declarant's unavailability.

Such an approach would confer other benefits. It would allow these jurisdictions to avoid complex questions that have haunted the common law regarding the definition of hearsay and the adequacy of the justifications of exceptions. The Federal Rules of Evidence defining hearsay and its exceptions and the comments of the Advisory Committee comprise 68 pages.<sup>118</sup> The comparable California Evidence Code sections and comments take up 44 pages.<sup>119</sup> The chapters in my treatise explaining hearsay and its exceptions take up 243 pages, even though I designed my book as a concise one-volume treatise.<sup>120</sup> Multi-volume treatises on evidence abound in the United States.<sup>121</sup> Although in the United States extended discussion is necessary given the current intricacies of American evidence law, other jurisdictions should seek to avoid needless complexity when considering switching to an adversarial model of litigation.

#### VIII. THE RIGHT TO CONFRONT WITNESSES V. THE RIGHT TO TRIAL BY JURY

In the United States, an important distinction is drawn between the right to cross-examine adverse witnesses and the right to trial by jury. As noted, American parties have the right to cross-examine adverse witnesses, irrespective of whether the case being tried is criminal or civil. As has also been explained, the hearsay rule gives teeth to the cross-examination right by generally forcing the proponent to call the hearsay declarant as a witness, unless an exception applies or, as in criminal cases, the accused has

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<sup>118</sup> See FED. R. EVID.

<sup>119</sup> *Id.*

<sup>120</sup> See MÈNDEZ, *supra* note 21, at §§ 5.01-12.03.

<sup>121</sup> See, e.g., JACK B. WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS (Bender 2d ed. 1997).



forfeited his Sixth Amendment right to confront the declarant.<sup>122</sup> As a statutory matter, the right to cross-examine adverse witnesses is independent of whether the parties trying the case are entitled to trial by jury.<sup>123</sup>

In the United States, the right to trial by jury in criminal cases is not considered “a mere procedural formality” but “a fundamental reservation of power” in the American constitutional structure.<sup>124</sup> “Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”<sup>125</sup> Accordingly, in the United States appellate courts have developed rules to insulate jury verdicts from judicial interference. First, where the jury renders a not guilty verdict, principles relating to double jeopardy generally forbid the state from appealing the verdict to the appellate courts. A not guilty verdict rendered by the accused’s peers is final because it is generally unreviewable and hence irreversible.<sup>126</sup> Second, where the appealing party claims that the evidence is insufficient to support the jury verdict, the appellate judges may not reverse the judgment and order a new trial unless the appealing party persuades them that the evidence admitted is inadequate to support the verdict under a sufficiency standard.<sup>127</sup> In a criminal case, this means that the appellate judges may not reverse a guilty verdict on grounds of the insufficiency of the evidence, unless they find that no reasonable juror could have found the defendant guilty even if the prosecution’s evidence was believed.<sup>128</sup> In determining whether the evidence admitted at the trial supports the conviction, the appellate judges are required to “view the record in a light most favorable to conviction, resolving all conflicts in the evidence and drawing all reasonable inferences in support of conviction.”<sup>129</sup>

The latter American appellate rule contrasts sharply with the appellate rules of some civil law jurisdictions. In some countries, the right of appeal includes a reconsideration of factual as well as legal questions and may even include the right to introduce new evidence at the appellate level.<sup>130</sup> The adversarial trial contemplated by Article 20 of the Mexican Constitution includes the right of the accused and the prosecution to try the case

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<sup>122</sup> Although “forfeiture” is generally associated with the Sixth Amendment right of confrontation, American jurisdictions are entitled to apply similar concepts to prosecutors and to parties in civil cases. For example, under the Federal Rules of Evidence, the forfeiture doctrine applies to any party in any case, civil or criminal. *See* FED. R. EVID. 804(6).

<sup>123</sup> *See, e.g.*, FED. R. EVID. 614, CAL. EVID. CODE § 711 (West 1995).

<sup>124</sup> *Washington v. Blakely*, 542 U.S. 296, 306 (2004).

<sup>125</sup> *Id.*

<sup>126</sup> *United States v. Dougherty*, 473 F.2d 1113, 1132 (D.C. Cir. 1972).

<sup>127</sup> *See* MÉNDEZ, *supra* note 21, at § 1711.

<sup>128</sup> *See, e.g.*, *People v. Nguyen*, 26 Cal. Rptr. 2d 323, 329 (Cal. Ct. App. 1993).

<sup>129</sup> *Id.*

<sup>130</sup> *See* MERRYMAN, *supra* note 3, at 127.



before an impartial tribunal whose members have not participated in pretrial investigations or pretrial hearings.<sup>131</sup> Article 20 also includes the right of the parties to have the fact finder determine the verdict on the basis of the evidence admitted at the trial.<sup>132</sup> Combined, these two provisions establish the right to have the case decided by an impartial fact finder. If the implementing legislation enacted by the states and the federal Congress calls for a panel of judges to serve as the jurors, then legislators will have to consider the finality that should be accorded to their not guilty verdicts as well as the need for appellate review rules that respect guilty verdicts when criminal defendants challenge them on insufficiency grounds.

### IX. PANELS V. SINGLE JUDGES

The new Mexican constitutional amendment does not require criminal cases to be tried to a jury. Nor does it require the case to be tried to a single judge. It simply requires the case to be tried before an impartial judge and an impartial fact finder.<sup>133</sup> One state, Chihuahua, that switched from the inquisitorial to the adversarial model shortly before the adoption of the new amendment, does provide for an impartial jury made up of a panel of three judges.<sup>134</sup> If the Mexican reform takes the form of a presiding judge and a separate panel of judges to serve as the jurors, an important question will be the optimal size of the panel. This question arose in the United States in *Ballew v. Georgia*, where a defendant who was convicted by a state jury consisting of only five jurors appealed his conviction to the United States Supreme Court.<sup>135</sup> The Court reversed the conviction, holding that under the Federal Constitution, the accused was entitled to be tried by a state jury consisting of no less than six persons.<sup>136</sup>

In an earlier case, *Williams v. Florida*,<sup>137</sup> the Court ruled that the Federal Constitution does not require states to provide juries consisting of twelve persons, the number traditionally associated with common law juries.<sup>138</sup> In *Williams* the Court sustained a guilty verdict returned by a jury of

<sup>131</sup> Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 20, at ¶ IV, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>132</sup> *Id.* at art. 20, ¶ III.

<sup>133</sup> Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 20, at ¶ III-IV, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>134</sup> See Código de Procedimientos Penales del Estado de Chihuahua [C.P.P.C.] [Chihuahua Criminal Procedure Code], *as amended*, ch. I, at art. 5, Periódico Oficial del Estado de Chihuahua [P.O.], 8 de Agosto de 2009 (Mex.).

<sup>135</sup> 435 U.S. 223, 228 (1978).

<sup>136</sup> *Id.* at 239.

<sup>137</sup> 399 U.S. 78, 86 (1970).

<sup>138</sup> *Id.* at 103.

six persons.<sup>139</sup> The question posed by *Ballew* was whether the Federal Constitution barred states from using juries of less than six persons. In ruling in the defendant's favor, the Court was moved by a number of studies of jury behavior.<sup>140</sup> Most were published between the *Williams* (1970) and the *Ballew* (1978) decisions.<sup>141</sup>

First, these studies suggest "that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts."<sup>142</sup>

Second, the studies "raise doubts about the accuracy of the results achieved by smaller and smaller panels. Statistical studies suggest that the risk of convicting an innocent person (Type I error) rises as the size of the jury diminishes."<sup>143</sup>

Third, the studies indicate that progressively smaller juries are more likely than progressively larger juries to reach inconsistent verdicts on the same evidence.<sup>144</sup> The inconsistency was demonstrated by having mock juries of different sizes listen to and view the same evidence.<sup>145</sup> The greater the risk that juries of a given size will reach inconsistent verdicts, the greater the risk they will reach incorrect verdicts.

Fourth, the studies suggest that progressively smaller juries are less likely to include diverse points of view, especially those offered by members of minority groups.<sup>146</sup> Because the United States is a multicultural society, the legitimacy of jury verdicts requires that care be taken not to exclude potential jurors on account of their race or ethnicity.

In deciding that a jury of five failed to comport with the constitutional minimum, the Court acknowledged the difficulty of specifying the minimum number.

We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that

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<sup>139</sup> *Id.*

<sup>140</sup> *Ballew*, 435 U.S. at 233.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 234 (footnotes omitted).

<sup>144</sup> *Id.* at 235.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 236.

causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.<sup>147</sup>

A year later, the same reliability and representational concerns moved the Court to hold that if a state jury consists only of six persons, then its verdict must be unanimous.<sup>148</sup>

Civil law jurisdictions considering switching to the adversarial model of trials should ponder whether the number of jurors, whether professional or lay, they specify will be sufficiently large to diminish the risk of mistaken verdicts. The studies cited by the Court indicate that in this country a panel consisting of less than six lay jurors would be unable as a rule to return reliable verdicts.<sup>149</sup> Whether a panel made up of less than six judges poses a lower risk is an empirical question. The studies cited by the Court also indicate that in this country voting rules matter. The smaller the jury, the greater the need for unanimity if American jurors are to return reliable verdicts. Civil law jurisdictions contemplating reform need to consider the interplay between voting rules and the size of the jury panel.

#### X. SOME CONCLUDING THOUGHTS

Even if it were constitutionally possible for American jurisdictions to adopt a criminal trial model in which a panel of judges would replace the citizen jurors, defense lawyers would still insist on the application of the hearsay rule. They would resist a model abolishing the rule and allowing the professional jurors to determine the weight to be given to the hearsay. Defense lawyers would likely advance two major reasons for opposing the abolition of the hearsay rule. First, no social science research has been undertaken to test Thayer's observation that judges, unlike citizen jurors, can accurately gauge the probative value of hearsay. Outside the courtroom, all of us frequently rely on hearsay in reaching decisions. Although American law school graduates do learn about the dangers of hearsay in the course of their legal training, they are not trained in evaluating the probative value of hearsay. And even if law school graduates knew how to discount the value of hearsay, it is unclear whether they would apply that skill when serving as jurors.

Second, experienced criminal defense lawyers know of the indispensable role that cross-examination can play in exposing flaws in a witness's powers of perception, recollection, and narration, including sincerity. They

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<sup>147</sup> *Id.* at 239.

<sup>148</sup> *See Burch v. Louisiana*, 441 U.S. 130, 138 (1979).

<sup>149</sup> *See Ballew*, 435 U.S. at 233.

understand that unless defense counsel are given an opportunity to confront the state's witnesses, a substantial risk exists that jurors might reach a guilty verdict on the basis of untested evidence. Because American criminal defense lawyers value the role of cross-examination so highly, it is inconceivable that they would readily agree to abolish the hearsay rule simply because a panel of judges would replace the panel of citizen jurors.

Defense lawyers, however, are not the only ones who appreciate the hearsay rule and the role of cross-examination. American prosecutors also value the opportunity to discredit defense witnesses on cross-examination. In the United States, the hearsay rule applies in both civil and criminal trials and can be invoked by all parties; it is not limited to criminal defendants. To American trial lawyers and judges, the reason is obvious: the rule seeks to promote reliable verdicts by withdrawing from the jury's consideration evidence that has not been tested through cross-examination.

Such an important function militates in favor of enacting a hearsay rule in jurisdictions considering changing from an inquisitorial to an adversarial model of litigation. The challenge for these jurisdictions will be to find a way to do so without inadvertently incorporating all of the complexities that attend the American hearsay rule and its exceptions.