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Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception

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Perils of the Rulemaking Process:
The Development, Application, and
Unconstitutionality
of Rule 804(b)(3)’s Penal Interest Exception

PETER W. TAGUE*

As the culmination of a decade of rulemaking, in 1975 Congress enacted the Federal Rules of Evidence, which include in rule 804(b)(3) an exception to the hearsay rule that allows federal courts to admit statements against penal interest. Having reviewed previously unpublished memoranda and nonpublic tape recordings of the deliberations of the Advisory and Standing Committees to the Judicial Conference and the Special Subcommittee on Reform of Federal Criminal Laws of the House Judiciary Committee, Professor Tague explores the development of rule 804(b)(3), one of the more controversial rules that emerged from that rulemaking process. After analyzing rule 804(b)(3) and describing under what circumstances a penal interest statement is admissible, Professor Tague discusses why the penal interest exception of rule 804(b)(3) is unconstitutional. As a result of his study, Professor Tague concludes that the Supreme Court should revise the present rulemaking process to ensure that the process evolves as a professional, dispassionate, and unpolticized approach to effectuating needed changes in the law.

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I. INTRODUCTION

"You must not tell us what the soldier or any other man said, sir," interposed the judge; "it's not evidence."

Charged with murder, a defendant learns that another person, the declarant, confessed to the crime. In this example, one might expect the defendant to encounter no difficulty in introducing that statement during his trial to prove his innocence or to rebut the Government's evidence. Various impediments, however, may prevent the defendant from using the confession.

First, the evidentiary bar to the introduction of hearsay presents an obstacle. If the defendant subpoenas the declarant to testify and the declarant invokes the privilege against self-incrimination, thereby refusing to admit either that he committed the crime or that he confessed, the defendant cannot introduce the declarant's out-of-court statement because he offers it for its

1. The following abbreviated citations have been adopted for use throughout this article:


Supreme Court of the United States, Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1973) [hereinafter Supreme Court Draft].

Two Committees, an Advisory Committee to the Judicial Conference of the United States (the Advisory Committee) and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the Standing Committee), tape-recorded several of the meetings each held to consider the various drafts of the Federal Rules of Evidence. The tapes of these meetings, which are presently stored at the Judicial Conference, have not been catalogued or identified other than by date. Thus, the tape recordings are identified in this article only by committee and by date. E.g., Advisory Committee Meeting, Sept. 5, 1971. To preserve the confidentiality of the committee members, only Professor Edward W. Cleary, the Reporter to the Advisory and Standing Committees, is identified by name in this article. The editors of the Georgetown Law Journal have relied upon the author for verifying the accuracy of statements in these tape recordings.

The Subcommittee on the Reform of Criminal Justice of the House Committee on the Judiciary also tape-recorded the markup sessions in which it reviewed the Supreme Court Draft of the Federal Rules of Evidence. The author and an editor of the Georgetown Law Journal have listened to a copy of the tape recordings of these sessions provided by Herbert E. Hoffman, then staff counsel to the Subcommittee. Throughout this article, the tape recordings are cited by date only. E.g., Markup Session, June 5, 1973.

2. C. DICKENS, PICKWICK PAPERS 530 (Signet ed. 1964).

3. For a discussion of nine more complicated examples, see notes 43-50 infra and accompanying text.

4. For various definitions of hearsay, see MCCORMICK, EVIDENCE § 246, at 584 (2d ed. 1972) ("Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court assertion.") [hereinafter MCCORMICK]; 5 WIGMORE, EVIDENCE § 1362, at 3 (Chadbourn rev. ed. 1974) (hearsay rule rejects "assertions offered testimonially, which have not been in some way subjected to the test of cross-examination") [hereinafter WIGMORE]; FED. R. EVID. 801(c) ("Hearsay is 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").
truth. Second, the defendant may not comment to the jury about the declarant's assertion of the privilege against self-incrimination. As a result, the defendant probably cannot force the declarant to assert the privilege before the jury because the jury might draw the forbidden inference of guilt from the defendant's pregnant questions. Finally, the defendant cannot require the Government to immunize the declarant. Such immunization would force the declarant to testify about his complicity in the crime, and his confession.

Of these three impediments, the most important and most commonly encountered is the hearsay rule. Before Congress enacted the Federal Rules of Evidence in 1975 federal courts refused to recognize a hearsay exception for statements, known as statements against penal interest, that expose the declarant to prosecution, conviction, or punishment. Rule 804(b)(3), in which Congress recognized this exception to the hearsay rule, provides:


6. In fact, counsel may not ethically "call a witness who[m] [he] knows will claim a valid privilege not to testify for the purpose of impressing upon the jury the fact of the claim of privilege." ABA, Standards for Criminal Justice Standard 5.7(c), at 3.84 (2d ed. 1980) (prosecutor); id. Standard 7.6(c), at 4.90 (defense counsel).


9. See note 26 infra (citing examples of federal and state cases rejecting hearsay); 11 Moore's Federal Practice § 804.06(3)[2], at VIII-280 & n.9 (2d ed. 1976) (same) [hereinafter Moore].

A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. 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.1

Rule 804(b)(3), however, does not solve the defendant’s admissibility problem. The rule bristles with interpretative questions. For example, the tests of “so far tended” in the first sentence and of “exculpate” and “clearly indicate” in the second sentence are terms of art not used elsewhere in the Federal Rules of Evidence. Unfortunately, not much published legislative history explains what the rule means.12 Furthermore, the published material is both inconclusive and inconsistent.13 As a result, one federal court has complained about the dearth of “clues” about the rule’s meaning.14 Because, in the absence of a clear legislative directive, no federal common law provides interpretative guidelines, federal decisions are both tentative and conflicting.

As a primary goal, this article will explain under what circumstances a penal interest statement is admissible under rule 804(b)(3) and then will evaluate the constitutionality of the rule. As an ancillary goal, the article will illustrate one problem with the Supreme Court’s rulemaking process: Although the Judicial Conference, through its Advisory and Standing Committees, drafted the Federal Rules of Evidence that the Supreme Court promulgated, it published only the version of the rule and its accompanying
explanatory Note in the Preliminary, Revised, and Supreme Court Drafts.¹⁵ These goals require a lengthy discussion of the legislative history of the rule. Access to a trove of previously unpublished memoranda and nonpublic tape recordings of the work of the Judicial Conference and the House Subcommittee on Criminal Justice makes this discussion possible.¹⁶ Based on these materials, this article will examine the development and the application of rule 804(b)(3).

₁⁵ As is true with all of the rules of evidence, the Judicial Conference did not publish the alternatives that it considered, the reasons why it rejected those alternatives, the unresolved questions about the adopted version, or any comments by the public about the several versions of the penal interest exception. No witness who testified during the congressional hearings regarding the work of the Advisory and Standing Committees had access to the Advisory Committee's internal papers. See Hearings before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary on Proposed Rules of Evidence, 93d Cong., 1st Sess. 181 (1973) (statement of Charles R. Halpern & George T. Frampton) ("The Advisory Committee kept no notes or minutes or even a summary of its deliberations, that are open to the public") [hereinafter House Subcommittee Hearings]. In preparing their presentation to the House Subcommittee, Halpern and Frampton enjoyed the "unique opportunity" to review the public's comments about the work of the Advisory and Standing Committees. Id. at 159. Although Halpern and Frampton suggested that Congress investigate the role played by the Department of Justice and Senator McClellan in influencing the Advisory and Standing Committees, id. at 181, Congress apparently never made such an investigation.

₁⁶ Arguably, because the Federal Rules of Evidence were legislatively enacted, the work of Congress alone is relevant. Four reasons, however, justify considering the previously unpublished material. First, only the Standing and Advisory Committees considered certain interpretive questions pertaining to rule 804(b)(3). Because the House Subcommittee, for example, erroneously assumed that the Supreme Court Draft of the rule restated the common law approach except for that draft's treatment of the corroboration requirement in the second sentence, it only discussed this alteration. Markup Session, June 5, 1973. Thus, we must review the Advisory and Standing Committees' interpretation of the penal interest test of the rule's first sentence. Second, although Congress changed the corroboration requirement as proposed, a review of the purpose of the proposal will help in assessing the constitutionality of the rule as enacted. Cf. Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 526, 544 (1947) (courts may use external aids to interpret statutes). Third, the unpublished material may help to resolve the differences between the principal commentators' interpretations of rule 804(b)(3). Compare 11 MOORE, supra note 9, ¶ 804.06(3)[2], at VIII-282-83 (suggesting corroboration requirement may not be so high as to violate due process) with J. WEINSTEIN & M. BERGER, 4 WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES ¶ 804(b)(3)[03], at 804—103-09 (1979) (corroborating evidence must allow reasonable person to conclude statement true) [hereinafter WEINSTEIN]. Finally, the unpublished material highlights the need for changing the current rulemaking process. See notes 843-46 infra and accompanying text (discussing suggested revisions in the rulemaking process).

The materials include internal memoranda of the Advisory and Standing Committees, tape recordings of the discussion by those Committees about rule 804(b)(3), and tape recordings of the markup sessions of the Special Subcommittee on Reform of Federal Criminal Laws. Although the markup sessions were public, apparently no commentator on rule 804(b)(3) has previously had access to those tape recordings of those sessions. Unfortunately, certain legislative sources were unavailable. For example, the House Subcommittee's October 2, 1973 review of the public's comments concerning the Subcommittee's June 28, 1973 version of the penal interest exception is not included in the tape recording of that session. Of the members of the Subcommittee whom I contacted, none could recreate the missing discussion. Also, neither the Senate Judiciary Committee nor the conference committee tape-recorded the discussions each held in considering the rules.

Like other commentators, I share the concern about using unpublished papers and discussions. Disclosure may impede candid discussion by a committee of the Judicial Conference in the future. On balance, however, I think that discussing this unpublished information is justified because it will assist courts in interpreting the penal interest exception and Congress in considering whether to alter the Supreme Court's rulemaking procedures. Cf. W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY viii (1964) (use of private papers of Supreme Court justices justified despite possibility of negative publicity and impeding future discussion).
First, the article discusses the common law treatment of defense-offered penal interest statements. This section presents hypothetical situations in which a declarant makes a statement that is arguably against his penal interest, and then the section examines the questions raised by application of the exception.

Second, the article reviews the legislative treatment of penal interest statements offered by the defense and by the Government. The exception underwent significant change during this process. At each step the drafters ratcheted higher the burden that the defendant must meet to introduce a statement against penal interest. This section suggests that the rule is the product of unwise policy choices made through a questionable process.\textsuperscript{17} Commentators criticized not only the development of the\textit{Supreme Court Draft},\textsuperscript{18} but also the substance of many of the rules. That criticism in part prompted Congress, for the first time in the history of the Rules Enabling Act,\textsuperscript{19} to conduct hearings on procedural rules promulgated by the Supreme Court.\textsuperscript{20} Justifiably concerned about the way that the\textit{Supreme Court Draft} was developed, Congress enacted legislation stripping part of the Court's autonomy in drafting the rules of evidence.\textsuperscript{21}

\textsuperscript{17} The process of enacting the penal interest exception suggests that any state legislature considering whether to enact a code of evidence should not adopt rule 804(b)(3) without close inspection of that rule's tests. A close inspection also is warranted because the Constitution may require some form of penal interest hearsay exception. In two decisions,\textit{Green v. Georgia}, 442 U.S. 95 (1979) (per curiam), and\textit{Chambers v. Mississippi}, 410 U.S. 284 (1973), in which neither state recognized the exception, 442 U.S. at 96 n.1; 410 U.S. at 299, the Supreme Court decided that the due process clause required admitting the declarant's statement. 442 U.S. at 97; 410 U.S. at 302. Although\textit{Chambers} did not hold that some form of exception is constitutionally required, the Court suggested in dictum that it might so hold in the future. 410 U.S. at 300 ("[W]e need not decide in this case whether, under other circumstances, [having no such exception] might serve some valid state purpose by excluding untrustworthy testimony."). Nonetheless, Mississippi continues to reject the exception.\textit{See Lee v. State}, 338 So. 2d 399, 402 (Miss. 1976) ("\textit{Chambers} does not seek to impose a general rule on the States that all declarations against penal interest which tend to exonerate a defendant must be admitted").

\textsuperscript{18} One group critical of the drafting process of the Federal Rules of Evidence noted that significant changes were made in the proposed Federal Rules of Evidence from the time when the last previously published draft appeared for comments by the Bench and Bar and the date of the approval by the Supreme Court of a final and different draft of the proposed Rules. In most instances, the Advisory Committee did not see fit to explain the rationale for these changes, nor, indeed, did the Committee make even passing reference to the fact that the changes had been made. Such a breakdown in communications between the Advisory Committee which drafted the Rules on the one hand and the judges and lawyers who must practice under the rules on the other hand is regrettable.

\textit{House Subcommittee Hearings, supra} note 15, at 129 (statement of the Committee on Federal Courts of the Association of the Bar of the City of New York). Although this comment applied to all of the rules, it appropriately followed a discussion of rule 804(b)(3) because the struggle to enact that rule perhaps has remained the most hidden from public view.


\textsuperscript{20} Friedenthal,\textit{The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 STAN. L. REV.} 673, 675 n.18 (1975). The Advisory and Standing Committees' desire to avoid congressional review of the rules of evidence and to preclude increased congressional oversight of the Supreme Court's rulemaking authority significantly shaped the Committees' version of the penal interest exception. See notes 85-102 infra and accompanying text (describing Committees' political decisions in responding to Senator McClellan's challenge).

\textsuperscript{21} \textit{See} 28 U.S.C. § 2076 (1976) (changing Rules Enabling Act so that Supreme Court rule effective, absent congressional action by either branch, 180 days after Court's transmission of rule).
Third, the article examines the various versions of rule 804(b)(3) in light of the legislative history. During the development of the rule, the Advisory and Standing Committees raised the defendant's burden in an attempt to placate Senator McClellan, a critic the Committees accurately perceived as a formidable opponent of their work in general and of their version of the penal interest exception in particular. That appeasement, never publicly disclosed, led the House Subcommittee to misinterpret the Advisory and Standing Committees' version of the penal interest exception and to increase the defendant's admissibility burden further. In light of this process, the article suggests how courts should interpret rule 804(b)(3).

Fourth, the article discusses the constitutionality of the enacted version of the rule. The defendant bears a higher burden than the Government when seeking to use the exception to introduce a declarant's statement simultaneously implicating himself and the defendant. This burden may infringe upon the defendant's compulsory process right to introduce evidence under the sixth amendment. Furthermore, when contrasted with the Government's lower admissibility burden, the defendant's burden may be unconstitutional under the equal protection clause.

Finally, the article comments on the rulemaking process and suggests possible improvements. The Supreme Court, for example, should publish or at least make available to the public the background memoranda prepared by the reporter, the alternative proposals that the Advisory and Standing Committees considered, the rationale for any proposals they rejected, and whatever public comments that would assist courts and scholars in understanding how the Court intends that lower courts should interpret the proposed rule. Through these steps, the Supreme Court could enhance the credibility of the rulemaking process.

II. THE COMMON LAW AND SELECTED EXAMPLES

Two introductory inquiries will assist in the analysis of the legislative history of the rule 804(b)(3). The first inquiry, a brief review of the common law courts' skeptical treatment of the penal interest exception, explains congressional opposition to the changes proposed by the Advisory and Standing committees. The second inquiry, a discussion of statements that either the defendant or the Government may introduce under the penal interest exception, highlights the issues courts must resolve in order to admit statements under this exception.


23. This proposal is not as multi-faceted as the criticism of one commentator who objected that the Supreme Court's development of the Federal Rules of Evidence simultaneously involved inadequate participation by many interested groups and too much participation by the Department of Justice. Letter from Charles R. Halpern to William L. Hungate (July 31, 1973), reprinted in Supplement to Subcommittee Hearings, supra note 10, at 281.

24. See generally Friedenthal, supra note 20, at 677 (noting "current distrust of the Supreme Court's rulemaking authority" and encouraging Court to increase its supervision over work done by Judicial Conference's committees).
A. THE COMMON LAW APPROACH

The common law courts were skeptical of the penal interest exception, using it to admit hearsay in only a few, dramatic instances. This skepticism originated in the Sussex Peerage, an influential nineteenth-century English case whose dictum has overshadowed its stated rationale for excluding the particular penal interest statement offered. Without analyzing whether the exception should be recognized generally or whether the statement should be admitted in a particular case, American courts heedlessly have followed the dictum in the Sussex Peerage.

The case arose in 1843 following the death of the Duke of Sussex. Augustus Frederick D'Este, the Duke's son, claimed his father's "honours, dignities, and privileges." D'Este asserted that Mr. Gunn, a minister of the Church of England, married D'Este's father and mother in Rome, even though the Duke had not received the King's permission as required by the Royal Marriage Act. To prove that his father married in Rome, D'Este offered the undated statement by Mr. Gunn to his son that he married the Duke and his wife in Rome. Because it was a crime to marry a person who had not complied with the Royal Marriage Act, D'Este argued that Gunn's statement was against his penal interest and thus was trustworthy. Disagreeing with D'Este, the Committee for Privileges of the House of Lords refused to consider Gunn's statement for two reasons.

26. See Donnelly v. United States, 228 U.S. 243, 272-77 (1913) (since Sussex Peerage, near unanimity in state courts against admitting evidence of confessions of third parties made out of court and tending to exonerate accused). Although federal courts followed Donnelly, several questioned the decision, acknowledging that trial courts should admit penal interest statements in certain circumstances. See, e.g., Scolari v. United States, 406 F.2d 563, 563-64 (9th Cir.) (following Donnelly but questioning whether federal courts bound by Supreme Court decision interpreting rule of evidence), cert. denied, 395 U.S. 981 (1969); Jones v. United States, 400 F.2d 134, 136 (9th Cir. 1968) (following Donnelly but noting criticism of rule); United States v. Dovico, 380 F.2d 325, 327 & n.2 (2d Cir.) (same), cert. denied, 389 U.S. 944 (1967). State courts generally have followed the blanket exclusion of penal interest statements on the authority of the Sussex Peerage and Donnelly. See State v. English, 201 N.C. 295, 300, 159 S.E. 318, 320 (1931) (noting injustice of excluding hearsay, court nonetheless held that "if proffered testimony is technically and legislatively hearsay, then this technical interpretation must prevail."). See generally 5 WIGMORE, supra note 4, § 1476 at 352-57 n.9 (listing state cases in which penal interest statements excluded). In some state decisions, however, the courts admitted the hearsay statement when a third party admitted guilt and the defendant faced execution. See, e.g., Weber v. Chicago, R.I. & P. R.R., 175 Iowa 358, 393-94, 151 N.W.2d 852, 864 (1961) (Sussex Peerage circumvented by finding statement against proprietary, rather than penal, interest and thus admissible); Blocker v. State, 55 Tex. Crim. 30, 31, 114 S.W. 814, 815 (1908) (reversing conviction when evidence against defendant circumstantial and declarant admitted committing murder); Hines v. Commonwealth, 136 Va. 728, 735, 117 S.E 843, 850 (1923) (declarant's statement admitted because corroborated by circumstantial evidence).

28. Id. at 1037. The Committee for Privileges of the House of Lords, the body deciding the case, concluded that D'Este was not entitled to the "honours, dignities, and privileges" of his father because the Royal Marriage Act applied to the Duke, a descendant of King George II. Id. Even though the Act was applicable regardless of where the marriage occurred, the Committee discussed the penal interest exception to hearsay in terms of whether the marriage actually took place in Rome. Id.
29. Id. at 1042. Gunn had been called as a witness to testify about the Duke's marriage as part of an unrelated action in chancery involving an undisclosed controversy. Id. He refused to answer on the ground that any answer might incriminate him. That refusal, D'Este argued, justified the conclusion that Gunn had no reason to misrepresent the marriage when Gunn spoke to his son. Id.
30. Id.
First, the Committee expressed concern that D'Este's argument, if fully expanded, would permit the prosecution to introduce a deceased's penal interest statement to implicate the defendant. This concern obviously was irrelevant because D'Este offered the statement only to support his claim. Second, the Committee indicated that Gunn never was "liable to prosecution." Although this concern is relevant in assessing the trustworthiness of Gunn's statement, we cannot judge its force because the decision fails to disclose fully the circumstances in which Gunn made the statement.

Lord Brougham rejected D'Este's offer of Gunn's statement in far broader language than the two reasons would justify: "The rule, as understood now, is that the only declarations of deceased persons receivable in evidence, are those made against the proprietary or pecuniary interests of the party making them, when the subject-matter of such declarations is within the peculiar knowledge of the party so making them."

Wigmore and other American commentators railed at the barbarity of the "rule" of the Sussex Peerage. Nonetheless, the United States Supreme Court casually accepted the rule without scrutiny in Donnelly v. United States, a

31. Lord Brougham announced:

To say, if a man should confess a felony for which he would be liable to prosecution, that therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced.

Id. at 1045. The Lord Chancellor argued that Gunn's statement should not be admitted on behalf of D'Este because Gunn's statement could not be admitted against the Duke of Sussex, were he on trial. Id. at 1044. English reaction to the conviction of Sir Walter Raleigh may have influenced these statements. See Trial of Sir Walter Raleigh, 2 State Trials (1603) (Raleigh's conviction based upon statements attributed to Raleigh by individual not called at trial). Today, the Committee's concern is embodied in the Sixth Amendment's confrontation clause.

32. 8 Eng. Rep. at 1044. The Lord Chancellor believed that Gunn did not fear prosecution because Gunn made the statements to his son. Id.

33. The difficulty in determining the trustworthiness of a statement suggests a different reason why common law courts might have distinguished between statements against proprietary or pecuniary interest and those against penal interest. Because most statements against proprietary or pecuniary interest were written in books of account or diaries found among the papers of the declarant, they presented less chance of fabrication by the witness who would testify about them. See 5 WIGMORE, supra note 4, § 1477, at 358 (possibility of fabrication only logical rationale for excluding oral penal interest statements); cf. 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 150, at 234 (16th ed. 1899) (noting common law courts' more frequent admission of documentary evidence).

34. 8 Eng. Rep. at 1045. Without explanation, Lord Campbell spoke in even broader terms of the importance of rejecting any penal interest statement: "I think it would lead to most inconvenient consequences, both to individuals and to the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations [against penal interest] in evidence." Id.

35. In Wigmore's view, the Sussex Peerage, which had "not [been] strongly argued and not considered by the judges in the light of the precedents," represented "a backward step... and an arbitrary limit... upon the rule [establishing an exception for statements against interest]." 5 WIGMORE, supra note 4, § 1476, at 351. Wigmore thought the practical consequence of the Sussex Peerage was "shocking to the sense of justice," id. § 1477, at 359, permitting the conviction of an innocent defendant who had the means to prove that another person was guilty. He therefore urged "discard[ing] this barbarous doctrine." Id. § 1477, at 360. For a discussion by other commentators protesting the refusal to include penal interest statements in the against-interest exception, see MCCORMICK, supra note 4, § 278, at 674-75; Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 HARV. L. REV. 1, 39-43 (1944).

36. 228 U.S. 243, 272-77 (1913). For an extensive discussion of Donnelly, see notes 549-67 infra and accompanying text.
case that would play an important, if uncertain, role in congressional evaluation of rule 804(b)(3). Donnelly, charged with murdering an Indian named Chickasaw in the Klamath Indian reservation at the turn of this century, sought to introduce the statement of Joe Dick, who had died before the trial, that he killed Chickasaw. In affirming the trial court's exclusion of Dick's purported statement, the Supreme Court relied upon the Sussex Peerage and the "great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties made out of court and tending to exonerate the accused." In the Court's view, it was "[un]necessary to review the authorities, for we deem it settled by repeated decisions of this court, commencing at an early period, that declarations of this character are to be excluded as hearsay." Without examining the reasons for excluding such statements or the unfairness of excluding Dick's statement in Donnelly, the Court established a rule for federal courts that would last almost until enactment of rule 804(b)(3). Despite the almost unanimous judicial refusal to admit defense-offered penal interest statements, when the Advisory Committee published its Preliminary Draft of the Federal Rules of Evidence in 1969 a trend had emerged toward recognizing the penal interest exception. For example, two model codes of evidence included penal interest statements as a general hearsay exception for statements against interest. After the Judicial Con-

37. 228 U.S. at 252-53.
38. Id. at 273-74. Many of the state court decisions the Supreme Court cited, id. at 274 n.1, are in part understandable in terms of the exception itself because the declarant was near death when he exonerated the defendant. Id. at 274-76. Thus, the declarants arguably had no reasonable fear that the statement would imperil them. Those statements do not qualify as "dying declarations" under rule 804(b)(2) of the Federal Rules of Evidence because they did not "concern . . . the cause or circumstances of what [the declarant] believed to be his impending death." Fed. R. Evid. 804(b)(2).
39. 228 U.S. at 276.
40. See note 26 supra (discussing judicial exclusion of penal interest statements). The chilling result of excluding the statement did not persuade many courts to relax the hearsay bar. In State v. English, 201 N.C. 295, 159 S.E. 318 (1931), for example, the defendant, convicted of murdering his wife, failed in his attempt to introduce the detailed statement of another, given to three police officers after the murder, that he and not the defendant had committed the crime. Id. at 296, 159 S.E. at 318. Although the judge who authored the English opinion agreed with Justice Holmes, who in dissent in Donnelly had argued that penal interest statements should be admitted at times, 228 U.S. at 277, that judge nonetheless followed state precedent in excluding the statement. 201 N.C. at 299-300, 159 S.E. at 320. As "explanation," the judge quoted from an earlier decision which also had refused to admit a penal interest statement: "The great jurist who wrote the May case [the decision followed in English], confesses that the holding might seem absurd to a layman, 'but the law must proceed in general principles,' and hence if proffered testimony is technically and legalistically hearsay, then this technical interpretation must prevail." Id. at 300, 159 S.E. at 320. See also Note, Declarations Against Penal Interest: What Must be Corroborated Under the Newly Enacted Federal Rules of Evidence, Rule 804(b)(3), 9 Val. L. Rev. 421 (1975) [hereinafter Note, What Must be Corroborated].
41. Rule 509(1) of the Model Code of Evidence provides:

A declaration is against the interest of a declarant [and therefore admissible] if the judge finds that the fact asserted in the declaration . . . so far subjected [the declarant at the time of the statement] to . . . criminal liability . . . that a reasonable man in his position would not have made the declaration unless he believed it to be true.

MODEL CODE OF EVIDENCE rule 509(1) (1942). No state has adopted this code.
Rule 63(10) of the Uniform Rules of Evidence provided: "[A declaration is against the interest of a
ference published the Preliminary Draft but before Congress enacted the Rules, the Supreme Court loosened the stricture of Donnelly by admitting penal interest statements in four cases. In all but one of these cases the Government, rather than the defendant, benefited from the use of the statement.42

B. THE ISSUES PRESENTED BY THE PENAL INTEREST EXCEPTION

The penal interest exception rests on the assumption that no one would knowingly implicate himself falsely in criminal conduct. Testing the validity of that assumption in a particular case involves at least six evidentiary questions. This section identifies these questions and presents nine examples of a declarant’s statement that a defendant or the Government might attempt to offer at trial.

First, is a statement against a declarant’s penal interest because of the “plain” meaning of the words spoken, the litigation effect of the statement, or the declarant’s motivation to tell the truth?43 If a court concentrates on the words spoken, it probably will limit admissibility to confessions (“I am guilty of murdering Smith”) or to explicit factual assertions (“I shot Smith”). If, however, the court analyzes the litigation effect of the statement, it might permit the introduction of opinions (“The defendant is not guilty”), statements whose relevance depends upon an inference (“I was present when Smith was shot”), or comments about the defendant’s complicity related to the statement (“X and I, but not the defendant, committed the crime”).

declarant if] the judge finds ... [it] ... so far subjected him to ... criminal liability [at the time of the assertion] ... that a reasonable man in his position would not have made the statement unless he believed it to be true. . . . " UNIFORM RULE OF EVIDENCE 63(10) (superseded 1975). Kansas and New Jersey essentially adopted Uniform Rule 63(10). Cf. KAN. CIV. PRO. CODE ANN. § 60-460(j) (Vernon 1965); N.J. REv. STAT. § 2A:84A Rule 63(10) (1967). California also has enacted a penal interest exception, but it differs from Uniform Rule 63(10). Cf. CAL. EVID. CODE § 1230 (West 1980).


43. Commentators have bitterly divided in addressing this threshold issue. One has dismissed it as a profitless philosophical inquiry. Letter from Kenneth W. Graham, Jr., to Committee on Rules of Practice and Procedure (July 28, 1971), reprinted in House Subcommittee Hearings, supra note 15, at 197. Professor Morgan believed that common law courts largely ignored the declarant’s motivation. Morgan, Declarations Against Interest, 5 VAND. L. REV. 451, 454 (1952). Morgan argued that the focus should be on the facts stated and not on whether the statement creates a liability. Id. For him, the possibility that the statement might lead to the declarant’s prosecution or that it might be damaging if introduced at the declarant’s trial was irrelevant. Morgan’s view appears consistent with that of Wigmore. Yet as Morgan points out, id., Wigmore’s position was ambiguous because Wigmore also believed that when “the fact is against interest . . . the open and deliberate mention of it is likely to be true.” 5 WIGMORE, supra note 4, § 1462, at 337. Not surprisingly, since Morgan was the reporter of the Model Rules, Rule 509(1) adopts his approach. The confusion over this question is illustrated by Jefferson’s belief that rule 509(1) adopted the litigation effect of a statement as controlling. Jefferson, supra note 35, at 10. Jefferson also believed, without substantiation, that common law courts had adopted this position. Id. Congress did not consider this question in its review of rule 804(b)(3). Because the Advisory Committee implicitly adopted a very relaxed interpretation of “against interest,” the Committee’s oversight was of considerable importance. See notes 248-58 infra and accompanying text (discussing Advisory and Standing Committees’ failure to discuss historic definitional controversy over when statement against interest).
Second, must the statement have been "against interest" at the time the declarant made it? If a court admits only statements that are confessional in nature, it would focus on when the declarant made the statement. If, however, the court analyzes the litigation effect of the statement, its inquiry could encompass a greater time period.

Third, must the declarant have understood that his statement was "against interest"? Courts usually use a "reasonable man" inquiry because they condition admission on the declarant's unavailability to testify. If, however, at the moment he spoke or at some later point the declarant says that he understood the "against interest" nature of his statement, should a court reject the "reasonable man" test and focus instead on the declarant's apparent subjective understanding?

Fourth, must the statement substitute the declarant for the defendant as the culprit? If so, a court should exclude the statement if it is relevant only to the defendant's degree of culpability, not his innocence. A statement that exonerated the defendant of complicity in a crime committed by more than one person is similarly inadmissible because this kind of statement provides the Government with a reason to charge the declarant as well as the defendant.

Fifth, may the Government use the exception to introduce a statement that implicates both the declarant and the defendant? A Government-offered statement presents the same "collateral statement" problem as does the defense-offered statement in the fourth issue.

Sixth, must the proponent introduce other evidence to support the truthfulness of either the witness' report of the statement or the statement itself? Demanding corroborating evidence of either sort suggests uncertainty about the declarant's motivation or his sincerity.

Several of these issues are illustrated in the following examples of hearsay statements purportedly against penal interest. In the first seven examples,

44. Statements that were not against the declarant's penal interest might become against his interest at a later point, for example, if the Government or the defendant discovers other inculpatory information. This position would tend to equate the penal interest exception with the party admission rule. See notes 254-57 infra and accompanying text (comparing penal interest exception with party admission rule). Similarly, a statement might trigger the penal interest exception if a declarant invoked the fifth amendment after recognizing the disserving effect of his statement. See notes 469-72 infra and accompanying text (arguing that declarant's invocation of fifth amendment might justify admitting statement).

45. See FED. R. EVID. 804(a).

46. Common law courts admitted defense-offered penal interest statements only in this factual setting. See note 26 supra (discussing common law application of penal interest exception).

47. A party's attempt to introduce a declarant's statement poses a constitutional as well as an evidentiary issue. This article, however, does not focus on the constitutionality of admitting such a statement over a defendant's confrontation clause objection. For a discussion of the differences between the defendant's ability to exclude such a statement and his right to introduce a third-party statement, see notes 708-59 infra and accompanying text.

48. The defendant (D) need not always rely on the penal interest exception to introduce the statement of a declarant (T). For example, charged with rape, D claims that T committed the crime. Soon after the crime was committed, T registered under a false name at a hotel located near the crime scene. D wants to introduce that false registration—a crime—because T looks like D, T was detained by the police for investigation following the rape, and T tentatively was identified by the victim as her assailant before D positively was identified by her. Here, D need not resort to the penal interest exception because he is not offering the statement for the truth of what T asserted—that he was somebody else. Because the statement is not hearsay, its admissibility depends upon its relevancy.
assume the defendant (D), charged with murdering Smith at the intersection of Turk and Taylor streets in San Francisco’s Tenderloin district, offers the statement of an unavailable declarant (T). In the eighth and ninth examples, assume the defendant is charged with possession of marijuana found in his automobile; in the eighth, the defendant offers the statement of T, a passenger, about who put the marijuana in the automobile; in the ninth, the Government offers T’s statement against the defendant.

First, D offers T’s statement, “I killed Smith,” or “I committed the murder with which D is charged,” and the Government’s evidence indicates that only one person committed the crime. In making these factual assertions, T confesses to the crime. He appears to have personal knowledge of the crime, his personal involvement, and the charge against D. By offering T’s statement, D substitutes T for himself as the culprit.

Second, D offers T’s statement, “I was present when Smith was murdered.” This second example also involves a factual assertion. The relevance of T’s statement, however, depends upon an inference: T not only was present at the scene of the crime, but also is culpable. Although more evidence is needed to substitute T for the defendant as the culprit, T’s statement may assist D in shifting responsibility to T.

Third, D offers T’s statement, made several weeks after the crime, “I murdered a guy in the Tenderloin district several weeks ago.” T has admitted facts constituting a crime. The problem is one of relevance, but in a different form from the problem in the second example. Has T admitted committing the crime with which D is charged? Without more information, the relevance of the statement to the charge against D remains unclear. Nonetheless, D might argue that T’s admission, at least when coupled with other evidence, suggests that T, not D, is guilty.

Fourth, D offers T’s statement, “I murdered Smith by myself,” and D, a friend of T’s, is identified as being at the intersection when the crime was committed. The confession is an indirect comment on D’s lack of participation. By confessing, T indicates that he personally knows the facts; as a result, he also may know whether D participated in the crime. Because T is a friend of D, however, T may be claiming sole responsibility to shield D.

A separate problem arises because rule 801(a) indicates that conduct is not hearsay as long as the actor did not intend to assert a belief by acting. See Fed. R. Evid. 801(a) (nonverbal conduct not statement unless intended as assertion). If the Government charged a migrant worker with murder, for example, he might seek to introduce the departure of other migrant workers immediately after the murder as evidence of “flight” and thus of their “admission” of guilt. If the departing workers were held not to have asserted their involvement in the crime, the defendant could circumvent the hearsay bar (and thus the admissibility problems of rule 804(b)(3)). In contrast, if they intended to assert their involvement by their action the defendant would be required to satisfy either the tests of rule 804(b)(3) or those of another hearsay exception. See State v. Piernot, 167 Iowa 353, 359, 149 N.W. 446, 448 (1914) (departure of migrant worker to find another migrant worker excluded as irrelevant). Remarkably, because of the high admissibility burden imposed by rule 804(b)(3), the defendant might be in a better position if he contends that the migrant workers asserted nothing by their departure. The problem, of course, is whether their departure is relevant if it is neither circumstantial evidence of state of mind nor an indirect assertion of complicity. Cf. People v. Mendez, 193 Cal. 39, 52-53, 223 P. 65, 70-71 (1924) (departure of other workers excluded as irrelevant because no other evidence connected them to crime).

49. The defendant, for example, might introduce evidence to show either that T had a motive or that Smith was murdered in the same unusual way as T killed another person. See Fed. R. Evid. 404(b) (evidence of other crimes admissible for indications of motive, plan, or knowledge).
Fifth, D offers T's statement, "D is not guilty of murdering Smith." This example also presents an opinion by T about D's complicity. This statement, however, differs from T's opinion in the fourth example because it is less clear that T implicated himself in exonerating D: T might know that D is not guilty because T is guilty or T might simply know of information that led him to opine about D's innocence without thereby implying that he himself is guilty. It is also less clear when T obtained the information upon which he bases his opinion. Did T only learn of information after the crime had been committed? Moreover, is T saying that D was not involved or that D has a legal excuse or defense for a killing that D committed?

Sixth, D offers T's statement, "X and I killed Smith; D did not participate." In this example, T has exonerated D of complicity. T's admission of personal guilt is obviously against his self-interest. But is his exoneration of D, a statement related to his personal admission, similarly against his penal interest?

Seventh, D admits that he hit Smith in the stomach. D offers T's statement, "I hit Smith in the head with a baseball bat," when a blow to the head caused Smith's death. Or, D admits stabbing Smith and offers T's statement, "I gave the knife to D while he fought Smith," when D claims self-defense, provocation, or no premeditation. The first statement, "I hit Smith in the head with a baseball bat," is a factual admission to the crime. The second statement, "I gave the knife to D," may or may not be an admission to a crime, depending upon whether either possession of the knife was illegal or transferring the knife made T an accessory. Both statements, however, are relevant to D's conduct, to his state of mind, and thus to his culpability, punishment, and perhaps defense.

Eighth, D offers T's statement, "I put the marijuana in the spare tire." This example involves a stronger case for the prosecution than does the analogous fourth example. D might be prosecuted based on his ownership of and presence in the car. T, whose factual assertion is self-incriminating, has not commented explicitly about D's participation in the crime of possessing marijuana. D might have participated even if he had not put the marijuana in the spare tire. Nonetheless, D might use T's statement to support his claim that he knew nothing of the crime. The Government also might use that statement to charge T with possession.

Ninth, the Government offers T's statement, "D and I put the marijuana in the spare tire." This final example, like the sixth, involves a related statement. Here, however, the Government offers T's statement against D. Is T's accusation of another person against T's penal interest? If T's self-accusation is reliable, should a court conclude that he spoke the truth in condemning D? Or, is T damning D in hope of immunity or a favorable plea bargain?

Of these nine examples, all but the seventh are relevant to the defendant's guilt; the seventh is relevant to either the defendant's degree of guilt or his punishment. Were the declarant on trial, a court would admit his statement in every example. Were the defendant on trial prior to enactment of rule 804(b)(3), however, federal courts would have invoked Donnelly to exclude each statement without analyzing its penal-interest effect. All but the statement in the first example still might be inadmissible for the defendant
under rule 804(b)(3). A review of the legislative history of rule 804(b)(3) will suggest why the federal law of evidence with respect to a defendant's offer of a penal interest statement has not progressed significantly since Donnelly.

III. THE LEGISLATIVE HISTORY OF RULE 804(b)(3)

A. THE DEFENDANT OFFERS A DECLARANT'S STATEMENT

As first proposed by the Advisory Committee in the Preliminary Draft, rule 804(b)(3)\(^{51}\) provided:

Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or social disapproval, that a reasonable man in his position would not have made the statement unless he believed it to be true. 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.\(^{52}\)

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51. In the Preliminary Draft, the Advisory Committee numbered the rule as 8-04(b)(4). In the Revised Draft and the Revised Definitive Draft, the Committee changed the rule number to 804(b)(4). The House Subcommittee renumbered the rule as 804(b)(3), the identification of the rule as enacted. Throughout this article, I identify the rule as 804(b)(3), unless one of the prior numbers is more appropriate.

52. Preliminary Draft, supra note 1, at 378. When first discussed by the Advisory Committee during its March 7-9, 1968 meeting, the rule did not contain the last sentence. As then drafted, the Committee adopted the rule by a 12-2 vote. Unfortunately, the Committee recorded neither its discussion nor the reasons for the two negative votes. The Committee also rejected, by a 7-5 vote without recorded explanation, a motion to transfer the rule from the illustrations of rule 8-04 to those of rule 8-03. That transfer would have eliminated the declarant's unavailability as a condition of admissibility. At least one member thought that statements against interest "offer the strongest guarantee of trustworthiness to be had . . . ." Minutes of Advisory Committee Meeting 15, 16 (March 7-9, 1968) (on file at Judicial Conference). During its meetings on May 23-25, 1968, the Committee unanimously voted to adopt the rule as quoted in the text, but without the last sentence. Minutes of Advisory Committee Meeting 83 (May 23-25, 1968) (on file at Judicial Conference). Later that year the Supreme Court decided Bruton v. United States. 391 U.S. 123 (1968). This led Professor Cleary, the Reporter to the Advisory and Standing Committees, to add the final sentence (the "Bruton sentence") that appeared in the Preliminary Draft to comport with his reading of Bruton and Douglas v. Alabama, 380 U.S. 415 (1965). See Letter from Edward W. Cleary to Members of The Advisory Committee on Rules of Evidence 3 (Nov. 12, 1968) (on file at Judicial Conference). He apparently first believed that the addition was constitutionally required by Douglas and Bruton but probably not compelled by the logic of the penal-interest exception. He noted that although Douglas did "not preclude admitting a third-party confession against an accused when offered as such and nothing more . . . , [t]he weight to be given [such a statement] is another matter." Memorandum No. 19, article VIII, part 5, at 392-93 (Feb. 21, 1968) (on file at Judicial Conference) (background memorandum prepared by Professor Cleary for Advisory Committee to explain hearsay rule) (hereinafter Memorandum No. 19). That comment is ambiguous. He would later change his mind twice, next arguing that a statement implicating the accused was not against the declarant's penal interest, see note 191 infra, but then concluding that it might be. See text at note 199 infra.

The Committee conditioned the admissibility of a statement against interest upon the unavailability of the declarant. Preliminary Draft, supra note 1, at 377-78. Congress retained that prerequisite in the enacted
This version favored the criminal defendant in two significant ways. The final sentence, the so-called "Bruton sentence," precluded the Government from using the penal-interest exception to admit a declarant's statement simultaneously implicating the declarant and the defendant.53 Furthermore, this version of the penal interest exception marked a radical break from Donnelly v. United States.54 In its Note explaining the rule, the Advisory Committee sided with Justice Holmes who, dissenting in Donnelly, argued that distinguishing between statements against either pecuniary or proprietary interests and those against penal interests—admitting the former but excluding the latter—was logically indefensible.55 In siding with Justice Holmes, however,

rule. Fed. R. Evid. 804(a). Unavailability, a condition required by the common law, was not required by either rule 63(10) of the Uniform Rules of Evidence or rule 509(1) of the Model Code of Evidence. Only the Advisory Committee considered whether the condition was justified. Professor Cleary thought that "unavailability added nothing to the trustworthiness of the hearsay statement." Memorandum No. 19, supra, at 293. Nonetheless, he included the requirement because the exception would otherwise have had to be transferred to the illustrations of rule 8-03. In his opinion, the exception did not belong in the rule 8-03 illustrations because against-interest statements were "concededly inferior evidence" and the rule 8-03 illustrations, in contrast, "embraced . . . evidence as good as if given by declarant on the stand." Id. Although Professor Cleary thought that against-interest statements were as trustworthy as the rule 8-03 illustrations, he also thought that many were not as reliable. Id. He provided no examples, however, to illustrate his observation. Interestingly, the Advisory and Standing Committees later would claim that "a good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases." Letter from Roszel C. Thomsen to Senator James Eastland, reprinted in Proposed Amendments to the Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Committee on the Judiciary, 93d Cong., 2d Sess. 69 (1974) (sending Comments of the Judicial Conference on H.R. 5463) [hereinafter Senate Judiciary Hearings]. Those Committees, however, did not push their point. Apparently, neither the Senate Judiciary Committee nor the conference committee considered it. In light of Chambers v. Mississippi, 410 U.S. 284 (1973), in which the Supreme Court held that a defendant had a constitutional right to introduce hearsay admissions and confessions by a testifying declarant, id. at 302, the unavailability requirement may be unconstitutional in certain cases, if not on its face. For a discussion of the constitutional implications of Chambers, see notes 789-814 infra and accompanying text.

53. Although the Advisory Committee's rationale for including this sentence is unclear, the Committee did not intend to bar the Government from introducing such a statement through some other hearsay rule, such as rule 801(d)(2)(E), the coconspirator rule. See notes 206-07 infra and accompanying text (Committee hoped to retain coconspirator doctrine as means for Government to introduce third-party statements implicating defendant).

54. 228 U.S. 243 (1913). Rule 8-04(b)(4) also broke new ground, at least in the federal courts, by permitting a party to introduce statements that "so far tended . . . to make [the declarant] an object of hatred, ridicule, or social disapproval . . . ." Preliminary Draft, supra note 1, at 378. Although California had a similar provision, CAL. EVID. CODE § 1230 (West Supp. 1980), and Professor McCormick supported the idea, see McCormick, supra note 4, § 278, at 674-75, Congress deleted this extension of the against-interest exception because it thought that such statements usually were not against interest. HOUSE JUDICIARY REPORT, supra note 10, at 16, [1974] U.S. CODE CONG. & AD. NEWS at 7089. Congress may have objected because it was concerned that what one person would consider as social disapproval another person would view as praise. Because Professor Cleary agreed that the word "social" was vague, he deleted it and substituted "disgrace" in the Revised Draft. Revised Draft of Proposed Federal Rules of Evidence, (Public) Suggestions with Reporter's Comments, at 114d (undated) (prepared by Professor Cleary for Advisory Committee's Sept. 3-5, 1971 meeting) (on file at Judicial Conference) [hereinafter Reporter's Comments to Revised Draft]. Professor Cleary thought that the phrase "hatred, ridicule, or disgrace" was sufficiently clear that declarants and courts would understand it. Id. Thus, the Advisory Committee expansively viewed statements against interest offered by a criminal defendant or a civil litigant, "expanding to the full logical limit" the scope of the exception. Advisory Committee Note to Preliminary Draft, supra note 1, at 385.

55. Advisory Committee Note to Preliminary Draft, supra note 1, at 385. Although Justice Holmes did not condemn the distinction so explicitly, he cited Dean Wigmore, Donnelly v. United States, 228 U.S. 243, 278 (1913) (Holmes, J., with Lurton & Hughes, JJ., dissenting), who forcefully had condemned the
the Advisory Committee appeared to omit the limitations on admissibility implicit in his dissent. Justice Holmes appeared to demand some "circumstances pointing to [the statement's] truth," but he did not specify in his short, two-page dissent what test he would apply. By its public silence on the issue of corroboration, the Advisory Committee ostensibly rejected conditioning admissibility on the existence or introduction of other evidence supporting the trustworthiness of the statement. Furthermore, the Advisory Committee noted that "one senses in the decisions [denying admission] a distrust of evidence of confessions by third persons arising from suspicions of fabrication either of the fact of the making of the confession or in its contents." This statement implicitly rejected those fears as unfounded or as outweighed by the importance of the statement to the defendant and to the factfinder. Moreover, the Advisory Committee thought that those fears were impossible

distinction. See 5 Wigmorne, supra note 4, § 1477, at 358-62. In addition to Justice Holmes, commentators also have criticized the distinction between economic and penal interest statements. See McCormick, supra note 4, § 278, at 674 (acknowledgement of facts rendering declarant criminally liable as trustworthy as acknowledgement of debt); Jefferson, supra note 35, at 39 ("Penal interest is certainly as important to a person as pecuniary or proprietary interest ").

56. Professor Morgan, who urged recognition of the penal interest exception, also suggested adding a foundation requirement that "there be some other evidence tending to show the declarant's guilt." Morgan, supra note 43, at 475. Morgan may have suggested that test principally to silence the objections of those commentators who opposed admitting penal interest statements under any circumstances. By its comment that rule 8-04(b)(4) "expands [the against-interest exception] to the full logical limit," Advisory Committee Note to Preliminary Draft, supra note 1, at 385, and by its reference to other evidentiary codifications that did not condition admission on the declarant's unavailability, id. at 387, the Advisory Committee demonstrated its eagerness to admit penal interest statements.

57. Donnelly v. United States, 228 U.S. 243, 277 (1913) (Holmes, J., with Lurton & Hughes, JJ., dissenting).

58. Although Justice Holmes would have demanded proof that "the confession really was made, and that there was no ground for connecting [the defendant with the declarant]," id., he did not explain either what evidence he thought relevant to these questions or the amount of evidence that he would have required. Nonetheless, neither Justice Holmes nor Professor Morgan used the word "corroboration" to describe what each would have demanded. Unfortunately, the Advisory Committee added this confusing term in the Revised Definitive Draft and the House Subcommittee later embraced it. For a discussion of the legislative history of the corroboration requirement of rule 804(b)(3), see note 474-543 infra and accompanying text.

59. Advisory Committee Note to Preliminary Draft, supra note 1, at 385. Professor Cleary recognized that this fear was "enhanced . . . by the requirement that [the] declarant be unavailable," Memorandum No. 19, supra note 52, at 290, but nonetheless rejected this fear as a ground to exclude penal interest statements from the illustration.

60. Professor Cleary thought that conditioning admissibility on the unavailability of the declarant was a better way of protecting against admitting untrustworthy statements than was interpreting "against interest" restrictively. See note 310 infra and accompanying text. When the Advisory Committee later added a corroboration requirement to the rule, it did so to mollify critics of the rule, not to reject Professor Cleary's view. See notes 96-109 infra and accompanying text (describing Committee's reaction to Senator McClellan's demand for corroboration requirement).
to eliminate with a rule\textsuperscript{61} and that juries were capable of assessing the possibility of fabrication.\textsuperscript{62}

The Department of Justice swiftly attacked proposed rule 8-04(b)(4). In the first of three letters objecting to the Committee's work, the Department "strongly urge[d]" deletion of the penal interest exception,\textsuperscript{63} not because it clung mulishly to the position of the Donnelly majority, but because it doubted the trustworthiness of the reporting witness and of the declarant. In its view, "[e]xperience shows that most instances of evidence of statements against penal interests proffered by an accused in a criminal case involve statements allegedly made to the accused or by one prison inmate to another—situations fraught with the possibility of contrivance or of unfounded braggadocio."\textsuperscript{64} However, because the Department begrudgingly admitted that certain sorts of penal interest statements might be admitted,\textsuperscript{65}

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\textsuperscript{61} Professor Cleary wrote: "The Maryland court has been especially sensitive to the difference between crackpot and fabricated third-party confessions and those bearing substantial earmarks of genuineness, but the distinction seems to be an impossible one to incorporate in a rule." Memorandum No. 19, supra note 52, at 291. The Maryland decisions referred to by Professor Cleary are discussed in Brady v. State, 226 Md. 422, 427-28, 174 A.2d 167, 170 (1961). Letter from Edward W. Cleary to Peter W. Tague (May 17, 1979) (on file with author) [hereinafter Cleary Letter]. The Maryland courts have suggested admitting a declarant's written confession when the declarant admits to having committed the crime charged against the defendant and when the defendant confesses to the same crime. Brady v. State, 226 Md. 422, 428, 174 A.2d 167, 170 (1961) (citing Thomas v. State, 186 Md. 446, 452, 47 A.2d 43, 46 (1946)). Both \textit{Brady} and \textit{Thomas} conditioned admissibility on the absence of collusion between the declarant and the defendant. Brady v. State, 226 Md. 422, 429, 174 A.2d 167, 171 (1961); Thomas v. State, 186 Md. 446, 452, 47 A.2d 43, 46 (1946). The \textit{Brady} court thought that the judge should decide the collusion issue. 226 Md. at 429, 174 A.2d at 171.

\textsuperscript{62} See Advisory Committee Note to \textit{Preliminary Draft}, supra note 1, at 386 ("Questions of possible fabrication are better trusted to the competence of juries than made the attempted subject of treatment by rule"). The Advisory and Standing Committees, which initially thought that the jury should assess the trustworthiness of the declarant's statement, eventually reversed positions on this issue, delegating that task to the judge. See notes \textit{infra} and accompanying text (describing change between \textit{Preliminary and Revised Drafts and Supreme Court Draft}).

\textsuperscript{63} Letter from Sol Lindenbaum, Executive Assistant to Attorney General, to Judge Albert B. Maris at 34 (Jan. 12, 1970) (sending Department's Report to the Attorney General Concerning Proposed Federal Rules of Evidence of the United States District Courts and Magistrates) (on file at Judicial Conference) [hereinafter Justice's First Letter]. Before writing this report, the Department of Justice had asked the United States Attorneys to comment on the \textit{Preliminary Draft}. Because those comments are no longer on file at the Department of Justice, we cannot determine what, if anything, the United States Attorneys said about the penal interest exception. As far as I can determine from a review of the public comments received by the Advisory Committee, only the Department of Justice objected to rule 8-04(b)(4) of the \textit{Preliminary Draft}.

\textsuperscript{64} Justice's First Letter, supra note 63, at 33 (footnote omitted). To support its position, the Department of Justice cited Scolari v. United States, 406 F.2d 563 (9th Cir.) (per curiam), \textit{cert. denied}, 395 U.S. 981 (1969). In \textit{Scolari} the lower court convicted the defendant for smuggling narcotics from Mexico into the United States in a spare tire. \textit{Id.} The court of appeals excluded Scolari's testimony that a passenger in his automobile admitted to him that she had hidden the narcotics in the tire without his knowledge. \textit{Id.} at 564. Because the court affirmed on the authority of \textit{Donnelly v. United States}, 228 U.S. 243 (1913), its decision lacks all of the information necessary to evaluate the Department of Justice's concern over the trustworthiness of a third-party's statement reported by the defendant: the passenger's identity, her whereabouts at the time of the trial, and the content and context of her declaration. I have been unable to contact the attorneys to obtain this information.

The Department of Justice sought the opinions of the United States Attorneys about the problems presented by the \textit{Preliminary Draft} for prosecution of criminal cases. See note 63 supra. Thus, it is remarkable that the Department of Justice could marshal only \textit{Scolari} as an example of the danger of the penal interest exception.

\textsuperscript{65} Because rule 8-04(b)(5) was simply "illustrative" of one type of hearsay that might be admitted, the
its reasons for demanding deletion of the penal interest language remain unclear. If the Advisory Committee retained the penal interest language, the Department of Justice urged it to condition admissibility on a defense offer of "other substantial evidence which tends to show clearly that the declarant, and not the defendant, is in fact the person guilty of the crime for which the defendant is on trial."

In his unpublished rejection of the Department of Justice's objections, Professor Cleary addressed all but the Department's concern over the defendant as a reporting witness. He wrote:

Department of Justice argued that "the deletion of express reference would not mean that all [penal interest] statements would have to be excluded." Justice's First Letter, supra note 63, at 34. To demonstrate the sorts of against-interest statements that it thought should be admissible, the Department of Justice cited two inconsistent cases, State v. Larsen, 91 Idaho 42, 415 P.2d 685 (1966), and State v. Sejuelas, 94 N.J. Super. 576, 229 A.2d 659 (Super. Ct. App. Div. 1967).

In Larsen, Butler, initially suspected by the police as the murderer, explained to three disinterested people soon after the crime how he had killed and buried the victim. 91 Idaho at 47, 415 P.2d at 690. At trial Larsen made an offer of proof that Butler's car was observed near the victim's grave, that grass and brush like that at the gravesite had been found on Butler's car, and that human blood had been found inside Butler's car. Id. Having excluded this evidence, the trial court convicted Larsen for murder. Id. at 47-48, 415 P.2d at 690-91. Because Larsen failed to offer any supporting evidence to substantiate his offer of proof at trial, the Idaho Supreme Court affirmed his conviction. Id. at 49, 415 P.2d at 692. The court held that "third-party confessions, made out of court, are admissible only when there is other substantial evidence which tends to show clearly that the declarant is in fact the person guilty of the crime in question." Id. This holding was arguably unfair because the trial court had prevented the defendant from introducing any supporting evidence, unless his offer of proof was inadequate for failing to identify the manner of proof.

In Sejuelas, a police officer testified that he saw the defendant drop some packets containing heroin. 94 N.J. Super at 578-79, 229 A.2d at 660. The trial court excluded the testimony of an eyewitness, Maldonado, that Camacho had said before the incident that Camacho intended to frame the defendant. Id. at 579-80, 229 A.2d at 661. The trial court, however, allowed Maldonado to testify that she saw Camacho drop the packets. Id. The New Jersey Superior Court reversed the defendant's conviction, stating that "[t]he totality of the evidence, if believed, directly substantiates the conversation which Mrs. Maldonado allegedly overheard." Id. at 582, 229 A.2d at 662. In the court's view, a statement against penal interest is admissible if direct evidence tends to substantiate it. Id. at 581, 229 A.2d at 662.

Sejuelas cannot be harmonized with Larsen. See Note, What Must Be Corroborated, supra note 40, at 483, criticizing Larsen as conditioning admissibility on "compelling evidence of declarant's guilt"). Incredibly, the Sejuelas court cited Larsen as support. State v. Sejuelas, 94 N.J. Super. 576, 581, 229 A.2d 659, 662 (Super. Ct. App. Div. 1967). The only difference between the cases is that an eyewitness observed the declarant's conduct in Sejuelas. That difference should be relevant only to the weight of the penal interest statement, not to its admissibility. Nonetheless, both cases support the Department of Justice's claim that a court should admit only against-interest statements that substitute the declarant for the defendant as the culprit.

The Department of Justice also suggested that a third-party confession made to a police officer before the defendant's arrest might be admissible. Justice's First Letter, supra note 63, at 34.

66. The Department of Justice apparently was worried that an explicit recognition of the penal interest exception might tempt defendants to fabricate third-party statements. In its view, "[t]he deletion of the reference to statements against penal and social interests simply serves to discourage attempts to introduce testimony concerning an absent third party's alleged statement exonerating a defendant." Justice's First Letter, supra note 63, at 34. The Department of Justice marshaled only Scolari as a case in which the defendant was the reporting witness. It cited no cases in which the declarant was a prison inmate. The Government always can cross-examine a testifying defendant about the statement and his relationship to the declarant. In attempting to block cross-examination with respect to his guilt, a defendant might testify only about the statement, without asserting his own innocence. The jury, however, undoubtedly would distrust such restricted testimony and would question the defendant's innocence. The Department of Justice also failed to discuss the more difficult aspect of Scolari: Should a court admit a statement in the form of an opinion about the defendant's involvement in a crime?

67. Justice's First Letter, supra note 63, at 34. The Department of Justice also objected to the "Bruton sentence" because it thought that the sentence was more restrictive than Bruton required. Id. at 34-35.
The problems of contrived or boastful statements are aspects that were carefully considered by the Advisory Committee, particularly against the background of the Maryland decisions. The decision was reached that they were problems of weight and not appropriate grounds for exclusion. Similar considerations call for rejection of the Department’s proposal that corroboration be required as a condition to admissibility.

What had been implicit in the Advisory Committee’s Note to the Preliminary Draft of rule 8-04(b)(4) was now explicit: A court should not condition the admission of a defense-offered statement on separate proof that the declarant had spoken and had spoken truthfully. The Advisory Committee had adopted a low threshold test to admit defense-offered statements against penal interest. Nonetheless, the Advisory Committee left two critical issues unresolved. First, should a court admit a statement only if the statement constituted a direct confession (“I did it”) or a direct factual assertion (“I shot the victim”), or also if the declarant’s guilt was inferable from the statement (“I was present when the victim was shot”)? Second, should a court, as the Department of Justice urged, admit the statement only if the statement substituted the declarant for the defendant as the culprit? On the other hand, should the court admit the statement if it might affect the defendant’s degree of culpability without exonerating him, or if it permitted the defendant to argue either that the Government failed to satisfy its burden of proof or that he had not participated with the declarant in a crime committed by more than one person?

Following a public comment period, the Advisory Committee published a Revised Draft on March 15, 1971. In this draft the Advisory Committee changed the framework of rule 8-04(a) by deleting as the admissibility test whether “strong assurances of accuracy” exist whenever the declarant is unavailable. The Committee also converted the rule 8-04(b) illustrations...
into the examples of the types of hearsay admissible under the rule. It did not change the language of the against-interest exception, but it did renumber the rule as rule 804(b)(4).

On August 9, 1971, the Department of Justice renewed its attack on the penal interest exception, objecting, without explanation, that the "standard is so vague as to be unworkable." The Department continued to concede that a court need not exclude all penal interest statements, but it deleted the examples, mentioned in its first letter, of statements a court might admit. Justice again objected to the Advisory Committee's standard that statements qualifying for the penal interest exception be so far against the declarant's interest that "a reasonable man in his position would not have made the statement unless it were true." The Department believed that a court should resort to the "reasonable man" standard only after the court's inquiry into the particular declarant's understanding of his hearsay statement had proven fruitless. Thus, the Department of Justice adhered to its argument that the Committee should delete the penal interest exception.

In his comments to the Advisory Committee, Professor Cleary again dismissed the Department of Justice's concerns. Although he gave no examples to illustrate his observation, Professor Cleary thought that a declarant was more likely to recognize the disserving effect of a statement against penal interest than that of a statement against civil interest. He also thought that the "reasonable man" test was necessary because the declarant by definition was unavailable to explain his understanding of his statement.

74. Id.
75. Letter from Deputy Attorney General Richard G. Kleindienst to Judge Albert B. Maris, Chairman, Committee on Rules of Practice and Procedure (Aug. 9, 1971), reprinted in 117 CONG. REC. 33,657, 92d Cong., 1st Sess. (Sept. 28, 1971) [hereinafter Justice's Second Letter]. According to Professor Cleary, this letter was "more temperate... and better done than the original one... [with the Department of Justice] chang[ing] [its] position on a number of things rather significantly..." Advisory Committee Meeting, Sept. 5, 1971. Although the Department of Justice's letter was more temperate, its objection to the penal interest exception was more extreme.
76. Justice's Second Letter, supra note 75, at 33,657. For examples of the sorts of statements that the Department of Justice suggested in its first letter might be admissible, see note 65 supra.
78. Justice's Second Letter, supra note 75, at 33,657. The Department of Justice explained this point more fully in its first letter, stating that the "reasonable man" standard "raises difficult questions as to whether the determination should be made on an objective or subjective basis... [T]he question should be left to the discretion of the court in the particular case and... the rule should not impose upon the court the 'reasonable man' test." Justice's First Letter, supra note 63, at 35.
79. The Department of Justice urged that rule 804(b)(4) should simply read: "A statement [is not excluded by the hearsay rule] which was at the time of its making contrary to the declarant's pecuniary or proprietary interest." Justice's Second Letter, supra note 75, at 33,657.
80. Professor Cleary wrote:

[The Department of Justice's] argument fails to convince [me] with respect to penal interest as it seems almost beyond dispute that awareness of the possible damaging impact of a statement is greater in the case of penal than pecuniary interest. It seems evident that less sophistication is demanded of the declarant in appraising his own utterance in the light of possible adverse effects in the area of penal interest than is the case with pecuniary interests. Correspondingly, the judge is certainly confronted with no greater problem in deciding.

81. Professor Cleary wrote:
At the same time that the Department of Justice was protesting, Senator John L. McClellan, Chairman of the Senate Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary, was criticizing certain proposed rules. On August 12, 1971, Senator McClellan wrote to Judge Albert B. Maris, the Chairman of the Standing Committee, objecting that the rules in the *Revised Draft* “would seriously impair the administration of justice in the United States . . .”82 He further noted that he would “deprecate any effort which would . . . radically alter present law and further debilitate an already weak Federal system of criminal justice.”83 His general objection to the *Revised Draft* seemed to focus directly on the penal interest exception. To emphasize this general concern, Senator McClellan had cosponsored a bill, introduced one week earlier on August 5, 1971, that would have modified Congress’ delegation of rulemaking power to the Supreme Court, enabling Congress to participate more actively in the formulation of the Federal Rules of Evidence.84

The Advisory and Standing Committees feared that Senator McClellan’s intervention might jeopardize congressional enactment of whatever code of evidence they proposed.85 To forestall the Senator’s bill, individual members were willing to compromise.86 Speaking to the Advisory Committee on

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The Department would simply sweep under the rug the question whether an objective or subjective standard should be applied to the declarant’s mental attitude toward the statement. Since he is required to be unavailable, his own testimony on the subject cannot be had, and it is unlikely that he would have made a declaration on the subject. Consequently, the only standard available in actuality is the objective one, which the rule adopts.

Professor Cleary’s choice of an objective standard is understandable. The defendant ordinarily will face an insurmountable barrier in proving what the declarant actually thought the effect of his statement would be. Many statements by declarants are terse and unelaborated. Although a reporting witness might describe the declarant’s physical condition, he rarely would know why the declarant made the statement. Professor Cleary’s observation does not preclude the defendant from introducing evidence of what the declarant thought. His failure to publish his comment, however, has led at least one court to misinterpret the relevance of a declarant’s comments about the effect of his allegedly against-interest statement. See United States v. Satterfield, 572 F.2d 687, 691 (9th Cir.) (because of inevitable uncertainty about success of appeal, no reasonable declarant would expect that exonerating codefendant would jeopardize declarant’s appeal), cert. denied, 439 U.S. 840 (1978). For a further discussion of Satterfield, see notes 403-09 infra and accompanying text.

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83. Id.
84. S. 2432, 92d Cong., 1st Sess., 117 CONG. REC. 29,893 (1971). Under Senator McClellan’s bill, no rule of evidence would take effect until the end of the session in which it was reported (in contrast to the then-applicable law that a federal rule of evidence automatically was enacted 90 days after being transmitted by the Supreme Court to the Congress); no rule would become effective if either the Senate or the House of Representatives objected; and either body could object to a rule. 117 CONG. REC. 29,894 (1971) (remarks of Sen. McClellan when introducing S. 2432). In placing his letter to Judge Maris in the Congressional Record and in urging the Senate Judiciary Committee to hold hearings both on his bill and on the Revised Draft, Senator McClellan reiterated his concern that “[w]e cannot afford to weaken the administration of criminal justice [by enacting the rules as proposed in the Revised Draft].” 117 CONG. REC. 33,642 (1971) (remarks of Sen. McClellan).
85. Because the Advisory Committee had been working on the rules since 1965, Congress’ refusal to enact the rules would have been a significant blow to the Committee.
86. On August 25, 1971, Judge Maris, for example, wrote to Professor Charles A. Wright, a member of the Standing Committee, that “it may well be that we will have to make major concessions in the evidence draft.” Letter from Judge Albert B. Maris to Professor Charles A. Wright (Aug. 25, 1971). Judge Maris
September 3, 1971, as it met to consider the objections of Senator McClellan and of the Department of Justice as expressed in its second letter, Chief Justice Burger emphasized the desirability of a compromise. Enlarging upon the damage the Senator's bill might work, the Chief Justice worried that the bill threatened the Supreme Court's historic rulemaking independence. He thought, however, that the Committees might placate Senator McClellan and the cosponsors of his bill by changing some of the proposed rules in the Revised Draft. After the Chief Justice left the meeting, one member reiterated this conciliatory tone: "We ought to accept the suggestions that they make, even to the point that we withdraw from some of the positions we take, even advanced positions... This is a practical situation."

On September 5, the Advisory Committee reviewed Senator McClellan's objections to rule 804(b)(4). Although he acknowledged that federal law should be changed to admit certain sorts of statements against penal interest, Senator McClellan thought that the proposed rule was too generous to defendants. Among his objections, first he argued that a court should only admit a statement that was "directly and immediately" against interest, not

explained:

S. 2432 is unquestionably a storm signal which we must take account of and meet. I am quite certain that it originates with and is inspired by Robert Blakey, the general counsel of Senator McClellan's Subcommittee on Criminal Law. Mr. Blakey's views are quite conservative and prosecution oriented, if one might so describe them, and I think that Senator McClellan will follow them.

Under date of August 12th the Senator sent me a 26 page letter of comments upon and criticism of individual evidence proposals, undoubtedly prepared by and representing the thinking of Mr. Blakey... Both the Advisory Committee and our [Standing Committee] must certainly give close attention to this letter.

Id. To Senator McClellan, Judge Maris wrote: "Our committees have never heretofore proposed, and do not now intend to propose in the uniform rules of evidence any provisions to which the Congress or its Judiciary Committees may have serious objection." Letter from Judge Albert B. Maris to Senator John L. McClellan (Aug. 25, 1971) (on file at Judicial Conference). That six of the seven members of the Senate Judiciary committee cosponsored Senator McClellan's bill surely prompted Judge Maris to adopt a conciliatory attitude. Letter from Professor Charles A. Wright to Judge Albert B. Maris (Aug. 13, 1971).
“merely indirectly or only remotely” against interest.\textsuperscript{91} Thus, he apparently rejected admission of statements in the form of opinions and of statements from which an inference of guilt could be drawn. Professor Cleary dismissed this objection as “pretty nebulous”;\textsuperscript{92} the Committee discussed it no further. Second, because Senator McClellan was worried about a court admitting statements against penal interest at “face value,” he demanded that courts admit only those statements that “would qualify to convict the declarant himself.”\textsuperscript{93} Professor Cleary thought that the Senator wanted a court to exclude any statement that would not substitute the declarant for the defendant in a one-person crime.\textsuperscript{94} Unfortunately, the Committee did not discuss this crucial interpretative limitation on the rule; no member, however, suggested changing the language of the rule or its Note to embrace the Senator’s point.\textsuperscript{95} Finally, Senator McClellan wanted the admissibility of defense-offered statements conditioned on “a rule of corroboration . . . as strong as the rule we now apply to confessions where introduced [by the Government] for the purpose of convici[ng]” the defendant.\textsuperscript{96} Several Committee members agreed that a corroboration requirement might have the advantage of excluding statements as “phony as a $3 bill.”\textsuperscript{97} Yet the members disagreed over the likelihood that a court would admit untrustworthy statements without such a requirement. One member argued that rule 804(b)(4) should not mention penal interest statements because courts would admit too many “$3 bill stories” otherwise and because the Committee could not draft language to exclude untrustworthy statements.\textsuperscript{98} Thus, he argued for a case-by-case determination of admissibility.\textsuperscript{99} Other members criticized his suggested change as a “horse-and-buggy” approach; they intended to mod-

\textsuperscript{91} McClellan Letter, supra note 82, at 33,647-48.
\textsuperscript{92} Advisory Committee Meeting, Sept. 5, 1971.
\textsuperscript{93} McClellan Letter, supra note 82, at 33,648.
\textsuperscript{94} Advisory Committee Meeting, Sept. 5, 1971.
\textsuperscript{95} Senator McClellan’s demand would have made inadmissible both statements exonerating the defendant in a two-culprit crime and statements exonerating the defendant by inference.
\textsuperscript{96} McClellan Letter, supra note 82, at 33,648. Senator McClellan based this demand on his belief that Justice Holmes, in his Donnelly dissent, similarly conditioned the admission of the declarant’s statement. \textit{Id.} The Senator’s explanation of what he meant by corroboring a defendant’s confession is confusing. In citing to Smith v. United States, 348 U.S. 147 (1954), he actually gave the citation for Opper v. United States, 348 U.S. 84 (1954). Both cases discuss the corroboration necessary to convict a defendant based in part on his admission or confession. See Smith v. United States, 348 U.S. 147, 156 (1954) (Government must establish all elements of crime by independent evidence or corroborated admissions; admission may be corroborated if independent evidence “bolsters” it); Opper v. United States, 348 U.S. 84, 93 (1954) (corroboration sufficient if it supports essential facts “sufficiently to justify a jury inference of the truth”). \textit{Smith} and \textit{Opper}, however, dealt with the quite different issue of the amount and sort of evidence, apart from the defendant’s statement, necessary to sustain a conviction. Neither case dealt with whether the defendant’s statement was admissible. For a discussion of the problem of using this analogy to explain the corroboration requirement of rule 804(b)(3), see notes 486-538 \textit{infra} and accompanying text.
\textsuperscript{97} Advisory Committee Meeting, Sept. 5, 1971. One member said that defendants offered phony statements in several recent cases, but he did not identify them. \textit{Id.}
\textsuperscript{98} \textit{Id.} Professor Cleary initially agreed that drafting language to prevent the introduction of untrustworthy statements was impossible. Because he thought that the restrictions the Maryland courts placed upon admissibility were not persuasive, see note 61 \textit{supra}, he thought that the choice was between either excluding or admitting all statements that appeared to be against penal interest, whether or not the evidence supported the truth of the statement. Advisory Committee Meeting, Sept. 5, 1971. Nonetheless, later in the meeting he suggested a corroboration test. See text accompanying note 105 \textit{infra} (Professor Cleary’s proposed versions of corroboration test).
\textsuperscript{99} Advisory Committee Meeting, Sept. 5, 1971.
ernize the federal law of evidence to include a penal interest exception even if the federal courts and most states had not recognized the exception. Moreover, another member thought that the Committee did not have to add a corroboration requirement because corroborating evidence would exist in almost every case.100 A third member, who questioned the empirical validity of the second member's assumption, feared that a corroboration requirement effectively would bar introduction of every defense-offered penal interest statement.101

Although the Committee eventually acceded to Senator McClellan, the members were not convinced by the Senator's claim that a corroboration requirement was necessary to prevent the introduction of fabricated statements. Instead, as one member put it, "[f]rom a practical standpoint, we could give on [the corroboration requirement] without hurt[ing] the rule much."102 The Committee apparently viewed the corroboration requirement as a bargaining chip that lacked substantive merit. Unfortunately, the Committee never resolved how the defendant could satisfy the corroboration requirement. One member expected that the defendant's testimony that he was innocent would satisfy the requirement.103 Other members thought the defendant would have to explain how he had learned of the declarant's statement, thereby exposing the relationship between the declarant and defendant to cross-examination.104

100. Id.
101. Id. Although he did not explain his comment, this third member probably believed that corroborating evidence would not exist when the defense offered a penal interest statement.
102. Id. Although this member did not explain how a corroboration test would change the application of the penal interest exception, other suggestions were aired during the Committee's meeting. One member suggested excluding all statements made in contemplation of pending or anticipated litigation. Id. This suggestion, which was never made in the form of a motion to amend the rule, was not discussed further. If adopted, this first suggestion would have excluded any statement made after the defendant was suspected or charged. This would have unfairly excluded any statement by a trustworthy declarant impelled to speak to protect an innocent defendant. The second suggestion was to make admissible any statement made after the defendant had been convicted. Id. This suggestion would have eliminated the Department of Justice's fear that a prison inmate would "confess" to provide his fellow inmate with a basis to bring a post-conviction attack on his fellow inmate's conviction. The Committee also did not discuss the merits of this suggestion. Such a restriction probably was unnecessary. On the one hand, such a statement might not be against penal interest if the declarant did not fear further prosecution. On the other hand, were such a statement admissible, the Government would have scant difficulty in countering its force through a skillful summation on retrial. Moreover, because of the defendant's high burden on postconviction attack, any statement other than a confession in a one-person crime would probably not justify reversal.
103. Advisory Committee Meeting, Sept. 5, 1971. The member interpreted the corroboration requirement in this way because he doubted that evidence supporting either the truth of the declarant's statement or his culpability would ever exist.

The Committee did not discuss the constitutional implications of requiring the defendant to testify. Imposing the burden of production on the defendant with respect to an affirmative defense might not infringe upon his fifth amendment privilege against self-incrimination. Cf. Patterson v. New York, 432 U.S. 197, 205 (1977) (New York statute burdening defendant with proving affirmative defense of extreme emotional disturbance not violative of due process). Nonetheless, requiring the defendant to testify as a condition of admitting the declarant's statement might be unconstitutional. See Brooks v. Tennessee, 406 U.S. 605, 609, 612 (1972) (Tennessee statute requiring defendant to testify first or not at all all violative of defendant's right against self-incrimination and right to counsel). Requiring the defendant to testify might be constitutional, however, if he could testify at a rule 104(a) hearing out of the presence of the jury and if the Government could not use his testimony except perhaps as impeachment when he testified during the trial. For a discussion of this issue, see notes 653-58 infra and accompanying text.
During the Committee's discussion, Professor Cleary drafted proposed language. He suggested these versions: "Statements tending to expose the declarant to criminal liability must, in addition, be corroborated in order to be admissible" and "Statements tending to expose the declarant to criminal liability and offered to exculpate the accused must, in addition, be corroborated in order to be admissible." One member feared that trial judges would wrongly interpret either suggestion as requiring the defendant to prove that the declarant made the statement. The other members agreed that the corroboration test should not require the defendant to prove either that the declarant made the statement or that the statement was true. Instead, they intended that the defendant could corroborate the statement by his own testimonial denial of guilt. With that understanding, the Committee voted unanimously to add Professor Cleary's second version as long as he explained the Committee's intent in the Note to the rule.

105. Id. He also suggested the language "tending to exculpate the accused." Id. Professor Cleary did not explain what he meant by "exculpate" and no other member discussed the meaning of that word. As ultimately approved by the Advisory Committee, the addition read: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated." Supreme Court Draft, supra note 1, at 321.

The adopted language, together with Professor Cleary's second version, included a hidden problem. It made sense for the Advisory Committee to refer to the defendant because at the time of this discussion, the Committee did not intend to permit the Government to introduce against the defendant a statement that simultaneously implicated the declarant and the defendant. When the Standing Committee later agreed with Senator McClellan that a declarant's accusation of the accused might be against the declarant's penal interest, see notes 188-200 infra and accompanying text, both Professor Cleary's second version and the sentence as adopted distinguished between the defendant's and the Government's burden: Unlike the Government, the defendant was required to corroborate the declarant's statement. Like Professor Cleary's first version, other members' suggestions—"This exception will not apply in criminal cases unless the statement is corroborated" or "Statements contrary to penal interest are not admissible in criminal cases unless corroborated"—would have avoided this troubling distinction. Although the Advisory Committee probably did not intend to create this distinction, it never explained its position.

106. In his view, "a cursory reading of the rule with [Professor Cleary's suggested language] . . . might lead at least one-half of the trial judges to believe that corroborating evidence would have to be of a nature that the declarant in fact made the statement." Advisory Committee Meeting, Sept. 5, 1971.

107. Id. Without explanation, the Committee rejected the suggestion that the requirement be phrased "unless the facts stated [by the declarant] are corroborated" as demanding too much from the defendant. Id.

108. Id.

109. Id. To implement the Committee's directive, Professor Cleary added these sentences to the second paragraph of the Note to the Revised Draft:

The requirement of corroboration is included as a safeguard against fabrication. Since the statement will be offered by an accused, the situation is not adapted to control by rulings in terms of the weight of the evidence. Cf. Rule 406(a). Also, it should be noted that corroboration may consist of testimony of innocence by the accused, thus presenting a situation quite different from the requirement that testimony of an accomplice or a confession be corroborated.

Advisory Committee Amendments to Revised Draft, Sept. 3-5, 1971, at 130 (presented to Standing Committee at its meeting of Sept. 30-Oct. 1, 1971) (unpublished) [hereinafter Advisory Committee Minutes]. Several issues were raised by Professor Cleary's change. First, because Professor Cleary apparently drafted the language after the meeting had adjourned, the Advisory Committee might not have specifically approved the change to the Note. Second, neither the Advisory Committee nor Professor Cleary discussed how the defendant would corroborate the declarant's statement if the defendant did not
On September 22, 1971, Senator McClellan met with representatives of the Advisory and Standing Committees to discuss his objections in light of the amendments adopted by the Advisory Committee at its September 3-5 meetings. Senator McClellan continued to oppose rule 804(b)(4) as amended. He objected both to the addition to the Note permitting the defendant to corroborate through his own testimony and to the way that the Committee had changed the "Bruton sentence." If the Committee would redraft the Note to emphasize that the corroboration requirement was designed to eliminate fabricated third-party statements and would delete the "Bruton sentence," he was prepared to drop his other demands for changes to the rule.

In an attempt to meet the Senator's objections, Professor Cleary deleted from both the rule and the Note most of the changes that the Advisory Committee had approved on September 5, 1971. Senator McClellan indicated, however, that he would continue to oppose the entire rule if the Committee refused to make those changes.

In an attempt to meet the Senator's objections, Professor Cleary deleted from both the rule and the Note most of the changes that the Advisory Committee had approved on September 5, 1971. He dropped the "Bruton sentence." Finally, the second sentence of the revised Note portentously implied that corroboration should be a condition precedent to admission, an approach later adopted by the Standing Committee. Because the Advisory Committee did not discuss this change during its meeting of September 3-5, 1971, Professor Cleary must have added it on his own. By permitting the defendant to testify during a rule 104(a) hearing out of the presence of the jury, this change probably would have eliminated the fifth amendment problem inherent in requiring the defendant to testify to corroborate the declarant's statement.


11. In response to Senator McClellan's letter, the Advisory Committee reconstructed the "Bruton sentence" during its September 5 meeting. To comply with the Senator's interpretation of Nelson v. O'Neill, 402 U.S. 622, 627 (1971) (no confrontation clause violation when declarant available at trial for "full and effective" cross-examination), the Committee amended the Note to permit the Government to introduce a declarant's statement implicating the defendant as long as the declarant testified at the defendant's trial. The Senator misinterpreted Nelson, however, because the Government did not introduce the codefendant's statement against the defendant. Nelson, like Bruton, involved the question whether the jury could follow an instruction ordering it not to consider the codefendant's statement against the defendant. Based on Senator McClellan's misinterpretation, the House Subcommittee later misinterpreted the purpose of the "Bruton sentence." See notes 201-10 infra and accompanying text (discussing Subcommittee's consideration of "Bruton sentence").

The Advisory Committee amended the rule to read: "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, is not a statement against interest within this paragraph." Advisory Committee Amendments, supra note 109, at 125.

12. Standing Committee Meeting, Sept. 30, 1971. In Professor Cleary's report to the Standing Committee about the meeting, he noted that "what constitutes corroboration is left open." Id. Senator McClellan, in objecting to the Advisory Committee's change to the "Bruton sentence," argued without explanation that the declarant, in implicating the defendant, would sometimes speak against his own penal interest. Professor Cleary agreed. Thus, he decided to delete the "Bruton sentence," leaving the Note to cover the matter. Cleary Memorandum to File Concerning Conference between Judge Maris and Messrs. Blakey, Cihlar, Jenner, and Cleary (Sept. 22, 1971) Concerning Objections to Evidence Rules in Senator McClellan's Letter of Aug. 12, 1971, at 7-8 (prepared Sept. 23, 1971) (on file at Judicial Conference) [hereinafter Cleary Memorandum].

13. Standing Committee Meeting, Sept. 30, 1971 (comment by Professor Cleary). The members of the Advisory Committee might not have been notified of the Senator's continuing objections to the rule as amended by that Committee on September 5, 1971.

14. I have been unable to determine how the representatives from the Advisory and Standing Committees who met with Senator McClellan decided to respond to his objections. They apparently instructed Professor Cleary to redraft the rule and its Note to reflect the Senator's objections. That the
sentence” from the rule and the explanation in the Note that the defendant could satisfy the corroboration requirement by testifying that he was not guilty.\footnote{113} He also rewrote the third paragraph of the Note to explain the announced purpose of the corroboration requirement. Under this version of the rule, satisfaction of the corroboration requirement was a condition of admissibility for the court to decide.\footnote{116}

The Standing Committee met on September 30, and October 1, 1971, to discuss the Revised Draft.\footnote{117} Mirroring the Advisory Committee’s discussion during its September 3 meeting, the Standing Committee’s discussion focused in part on the potential effect of Senator McClellan’s proposed legislation.\footnote{118} 


\footnote{115} One cannot ascertain whether the representatives, by deleting this explanation of the corroboration test, either agreed with Senator McClellan that the defendant’s testimony of his own innocence could not corroborate the declarant’s statement or simply chose to withdraw any explanation of how a court should interpret the test. The second interpretation is probably correct because the representatives apparently did not review the results of the conference with the other members of the Advisory Committee and did not discuss this question with the Standing Committee during its October 1 meeting.

\footnote{116} Professor Cleary added the following:

The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations [of the fear of fabrication and of the movement in the law to adopt a penal interest exception]. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.

Advisory Committee Note to Supreme Court Draft, supra note 1, at 327.

\footnote{117} Although it met to discuss all of the Advisory Committee’s changes to the rules in light of the public’s comments, the Standing Committee focused first on those “crucial” rules to which Senator McClellan had objected. Standing Committee Meeting, Sept. 30, 1971.

\footnote{118} One member remarked that

[It would be] unfortunate for this sort of legislation to be enacted. [It would be a] major setback to the rulemaking process. . . . Of course, [we have] never before engaged in any quite as controversial a project as this project. . . . All things considered, our major consideration should be to avoid any such legislation. If necessary, [we should] sacrifice a little bit of what may be from our standpoint perfectly appropriate steps forward in the field of evidence for the time being.

Standing Committee Meeting, Sept. 30, 1971. Because Congress never before had held hearings on any rule amendment approved by the Supreme Court, another member hoped that compromising with Senator McClellan would forestall any congressional committee from holding hearings on the proposed rules of evidence. Id. Two other members hoped that a compromise that did not sacrifice principle would avoid a “collision course with influential Senators.” Id. By compromising, another member expected that Senator McClellan’s proposed legislation would die in committee. Id. Although that bill died in the Senate, it was resurrected in a slightly different form by the House Subcommittee. Congress eventually added a section to the Rules Decision Act that, inter alia, extended the time for congressional review of evidentiary amendments promulgated by the Supreme Court from 90 to 180 days and empowered either house of Congress unilaterally to disapprove of a particular Supreme Court amendment to the Federal Rules of Evidence. See 28 U.S.C. § 2076 (1976) (amendments to Federal Rules of Evidence not to take effect until 180 days after reported to Congress; within that period, either house may disapprove of any rule by resolution).
The Standing Committee's heightened concern undoubtedly contributed to its decision to approve unanimously the amendments that Professor Cleary made to rule 804(b)(4) after the September 22 meeting with Senator McClellan.119

The Standing Committee did not identify publicly either the effect of Senator McClellan's intervention or the source of the corroboration requirement of rule 804(b)(4).120 Only a cryptic addition to the Note explained the change: “[T]he requirement of corroboration is included in the rule in order to effect an accomodation between [the] competing considerations [of the fear of fabrication and of an increasing judicial willingness to adopt a penal interest exception].”121 Also, the Committees, like Senator McClellan, failed to mention a single instance of prevarication by the declarant or of perjury by the reporting witness.122 Furthermore, the Committees, in the redrafted Note, did not explain what facts had to be corroborated or by what standard of proof. Those omissions appear to have been deliberate.123 By redrafting the

Ironically, the Advisory and Standing Committees' concessions to Senator McClellan, at least with respect to the penal interest exception, failed to deter Congress from enacting the rulemaking changes the Committees sought to deter. Moreover, the Committees' hoped-for compromise failed to forestall hearings on rule 804(b)(3) and the other proposed Federal Rules of Evidence. Both houses of Congress held extensive hearings on the Supreme Court Draft. The House Subcommittee, for example, received testimony from about 50 witnesses, developed a 600-page record, and conducted 17 markup sessions. Senate Judiciary Hearings, supra note 52, at 21 (statement of Rep. William L. Hungate).

119. Minutes of the September 30-October 1, 1971 Meeting of the Standing Committee on Rules of Practice and Procedure, at 10 (undated) (on file at Judicial Conference) [hereinafter Minutes of September 30-October 1, 1971 Meeting]. Like Senator McClellan, one member wondered whether the rule should be further amended to condition admissibility on proof that the declarant had personal knowledge. Standing Committee Meeting, Sept. 30, 1971. Although Senator McClellan apparently had not pressed this point at the September 22, 1971 meeting with members of the Committees, the Standing Committee added a personal knowledge requirement to all hearsay in the Note to rule 803: “In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. [Firsthand knowledge] may appear from his statement or be inferable from circumstances. See Rule 602.” Advisory Committee Note to Supreme Court Draft, supra note 1, at 303.

120. Professor Cleary later conceded that “[c]onsiderable impetus for the corroboration requirement came from Senator McClellan’s letter of August 12, 1971.” Cleary Letter, supra note 61.

121. Advisory Committee Note to Supreme Court Draft, supra note 1, at 327. During the House Subcommittee's hearings, however, Professor Cleary indicated that the Advisory and Standing Committees added the corroboration requirement “of third party confessions as a safeguard against fabrication.” House Subcommittee Hearings, supra note 15, at 98 (statement of Edward W. Cleary). Although his comment was literally true, he did not explain that Senator McClellan, not the Committees, was concerned about fabricated statements. He also did not indicate that the Committees added the “simple corroboration” requirement to placate Senator McClellan. Professor Cleary's explanation greatly influenced the House Subcommittee, which erroneously assumed that the Advisory and Standing Committees were worried about the easy introduction of fabricated defense-offered statements. Markup Session, June 5, 1973.

122. In its earlier response to the Department of Justice's objections to the Preliminary Draft, the Advisory Committee had debunked perjury by the reporting witness as a possible source of fabrication.

123. In discussing the corroboration requirement and the September 22, 1971 meeting between members of the Advisory and Standing Committees, Senator McClellan, and Professor Blakey, Professor Cleary noted that “what constitutes corroboration is left open.” Standing Committee Meeting, Sept. 30, 1971. Thus, the Standing Committee never discussed the suggestions made by members of the Advisory Committee on how the defendant might corroborate the statement. That failure would embolden the federal courts in the problem of interpreting the corroboration tests of the Supreme Court Draft and of the rule as enacted. See notes 473-624 infra and accompanying text (discussing development and various interpretations of corroboration requirement). Professor Cleary accurately forecast the confusion that would result from adding a corroboration requirement to the rule. Because he found the ground rules established by the
Note, the Committees clearly intended that admissibility was conditioned upon satisfaction of the revised rule's tests, however they were to be defined. As the Standing Committee wrote, "[w]hen the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a)." The Committees' decision marked a momentous change from the earlier versions of the rule. Under this redrafted version, the judge would decide not only whether the statement was against penal interest but also whether the defendant had sufficiently corroborated the statement. By conditioning admissibility upon satisfaction of both tests under the third draft of the rule, the Revised Definitive Draft, the Committees withdrew the role of assessing the credibility and weight of the statement they had given to the jury in the two earlier drafts. Neither Committee widely publicized either the addition of the so-called "simple corroboration" requirement or the change in the roles of the judge and the jury.

Maryland courts unpersuasive, he argued that purported penal interest statements should always be either excluded or admitted. The jury then could puzzle over the weight and the credit of any statement the court admitted. Advisory Committee Meeting, Sept. 5, 1971.

124. Advisory Committee Note to Supreme Court Draft, supra note 1, at 327. The Committee did not explain its reference to rule 406(a). Rule 406(a) provided:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Supreme Court Draft, supra note 1, rule 406(a). The Committee apparently intended to contrast the absence of a corroboration requirement when evidence of habit or routine practice was offered with the higher test that the revised penal interest exception would require. Standing Committee Meeting, Sept. 30, 1971 (comments by Professor Cleary). As enacted by Congress, rule 406(a) was renumbered as rule 406.

125. Thus, rule 104(a) would govern admissibility. That rule provides, in part, that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . ." FED. R. EVID. 104(a).

126. Thus, the Committees reversed the Advisory Committee's earlier decision that "[q]uestions of possible fabrication are better trusted to the competence of juries than made the subject of attempted treatment by rule." Advisory Committee Note to Preliminary Draft, supra note 1, at 386; Advisory Committee Note to Revised Draft, supra note 1, at 444. The Advisory Committee deleted this sentence from the Note in both the Revised Definitive and the Supreme Court Drafts.

127. The Revised Definitive Draft, submitted by the Standing Committee to the Supreme Court on October 29, 1971, was distributed to law professors and those individuals who had commented on the Preliminary or Revised Drafts. No reporter system published the Revised Definitive Draft. Professor Cleary estimated that about 600 photocopies were distributed on request. House Subcommittee Hearings, supra note 15, at 28 (testimony of Edward W. Cleary). In contrast, approximately 50,000 copies of the Preliminary Draft and 40,000 copies of the Revised Draft had been made available to the public. Senate Judiciary Hearings, supra note 118, at 205 (testimony of Albert E. Jenner, Jr.). Members of the Advisory Committee, however, discussed changes in the Revised Definitive Draft "at the judicial conferences and seminars before law school groups and . . . special committees of the American Bar Association." House Subcommittee Hearings, supra note 15, at 27 (testimony of Albert E. Jenner, Jr.). The Committees' failure to publicize widely the changes sparked a bitter attack during the House Subcommittee's hearings. See, e.g., id. at 114-15 (testimony of Alvin K. Hellerstein (significant changes made after Revised Draft should have been submitted to bar for comment); id. at 129 (statement of The Committee on Federal Courts, The Association of the Bar of the City of New York) (breakdown in communications between Advisory Committee and lawyers and judges regrettable); id. at 170 (statement of Charles R. Halpern & George T.
Senator McClellan appeared satisfied with rule 804(b)(4) as amended in the Revised Definitive Draft.128 The Department of Justice, however, remained dissatisfied. In an act termed "unprecedented,"129 the Department of Justice renewed its attack on certain rules in a then-unpublished letter to Chief Justice Burger.130 The Department attacked rule 804(b)(4) as a rule that would "raise significant practical problems in the fair and orderly presentation of evidence" and would "require the consideration [by the factfinder] of evidence which has little or no probative value."131 The Department continued to worry that it was "virtually impossible to determine whether an individual who makes a statement knows at the time of the declaration that the statement would subject him to . . . criminal liability."132 The Department also repeated its objection that the "abstract logic" of enacting a penal interest hearsay exception was "lost in the reality of the situation in which such statements most frequently occur. Unfounded boasting by inmates as to having committed successful or infamous crimes is an everyday facet of prison life."133 As in its two earlier letters to the Standing Committee, the Department again provided no examples to illustrate its belief that inmates were the principal source of penal interest statements and that they either lied or failed to recognize the penal interest effect of their statements.

The Department of Justice also expressed dissatisfaction with the "simple corroboration" requirement added to the Revised Definitive Draft.134 Because the Standing Committee had not explained what that requirement meant, the Department feared that a statement might be corroborated by the declarant's repetition of it or by the defendant's testimonial denial of guilt.135 The Department begrudgingly acknowledged without explanation, however, that

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128. See Letter of Senator John L. McClellan to Representative William L. Hungate, reprinted in House Subcommittee Hearings, supra note 15, at 313. Senator McClellan wrote:

Although each of my suggestions [to the Standing Committee] was not accepted in precisely the language I might have desired, or perhaps in some cases, at all, I am inclined, as of now, to say the Rules should be permitted to go into effect. I intend, however, to continue to study them and nothing that I say here is intended to pre-judge the merits of any individual proposal to change the result of any individual Rule.


131. Id.

132. Id. at 48.

133. Id. In contrast to its two earlier letters, the Department of Justice objected to the introduction of any defense-offered penal interest statement, arguing that "experience showed that such statements could not be determined to be trustworthy." Id.

134. Id.

135. Id. The Advisory Committee had explained that the defendant could satisfy the "simple corroboration" requirement by testifying that he was not guilty, see note 109 supra, but Professor Cleary then deleted that explanation when Senator McClellan objected. See note 115 supra and accompanying text (describing reaction to Senator McClellan's objection).
trustworthiness might be established if the "corroboration [requirement was] interpreted to require a showing at least as strong as the showing which is now required as a prerequisite to the admission of a confession when introduced for the purpose of conviction." Nonetheless, the Department urged the Supreme Court to delete the penal interest exception.

Chief Justice Burger considered the Department of Justice's objections to the Revised Definitive Draft so significant that he returned it on January 6, 1972 to the Standing Committee for reconsideration. The Standing Committee reviewed these objections on March 17-18, 1972. As it had before, the Standing Committee rejected the objection that a judge could not determine whether the declarant thought his statement was against his penal interest. In the Committee's view, a judge could determine the against-interest effect of a penal interest statement as easily, or at least with no more difficulty, as he could ascertain the against-interest effect of a pecuniary- or a proprietary-interest statement. The Standing Committee also rejected as too broad the Department of Justice's second objection that such statements are usually made by prison inmates. The Committee thought that the judge

136. Justice's Third Letter, supra note 130, at 48. Although the Department of Justice reluctantly agreed with Senator McClellan, who had offered this analogy, see note 96 supra and accompanying text, the Department doubted that the analogous burden was sufficient to ensure trustworthiness. The Department of Justice stated:

The inherent danger of fabricated testimony coming before the trier of fact under the provisions of subsection (b)(4), is especially acute in those instances where statements against penal interest of an unavailable declarant are offered to exculpate the defendant. That such statements be corroborated is an insufficient guarantee of trustworthiness. It is uncertain what would be sufficient corroboration of such a statement.

Justice's Third Letter, supra note 130, at 48.

137. Justice's Third Letter, supra note 130, at 47.

138. Letter from Honorable Albert B. Maris, Chairman of the Standing Committee, to Honorable Warren E. Burger (Mar. 22, 1972) (acknowledging receipt of Chief Justice Burger's recommittal of Revised Definitive Draft and including Standing Committee's comments about Department of Justice's objections) (on file at Judicial Conference) [hereinafter Maris Letter]. I could not determine whether Chief Justice Burger explained to the Standing Committee why he was returning the draft or what changes (if any) he thought appropriate in light of the Department of Justice's objections. The Chief Justice did not publicize his decision to recommit and apparently did not suggest that the Standing Committee either publicize the Department of Justice's objections or solicit comments by others interested in the important changes made in the Revised Definitive Draft. As far as I have been able to determine, of those who had received a copy of the Revised Definitive Draft, only the Department of Justice commented on the addition of the "simple corroboration" requirement to rule 804(b)(4).

139. Id. The Advisory Committee apparently did not review the Department of Justice's objections. Although agreeing to minor changes proposed by the Department of Justice to other rules, the Standing Committee concluded that "we do not think that the suggestions made [by the Department of Justice concerning the penal interest exception] considered from all angles, merit making any changes in the draft rules now before the Court." Id. Professor Cleary discussed the Department of Justice's objections point by point in a memorandum prepared for the Standing Committee. See Comments of Committee on Rules of Practice and Procedure on Letter of Deputy Attorney General Kleindienst to the Chief Justice (Dec. 22, 1971) [hereinafter Committee Response], reprinted in House Subcommittee Hearings, supra note 15, at 51. One cannot ascertain whether Professor Cleary's memorandum reflects either his personal views or the Standing Committee's reaction to Justice's objections because no record of the Standing Committee's March 17-18, 1972 meeting exists.

140. The Standing Committee indicated that "[p]enal interest seems, however, to raise less of a problem than cases of pecuniary or proprietary interests, since ordinarily the matter proceeds on a less sophisticated level." Committee Response, supra note 139, at 59.
could consider the declarant's position and could easily assess whether the statement was disservices or self-serving. With respect to Justice's third objection about the meaning of corroboration, the Committee thought that neither the repetition of the statement by the declarant nor the defendant's own testimony would normally suffice "unless under most unusual circumstances the court could say that the purpose of preventing fabrication was effectuated." Although it did not explain this vague comment, the Committee for the first time suggested "precedents" that might provide meaning for the "simple corroboration" test: the corroboration necessary to convict a defendant based in part on his own confession or to introduce an accomplice's testimony. The Committee thereby reversed its earlier rejection of the confession analogy.

The Standing Committee returned rule 804(b)(4) to the Supreme Court without changing the language of the rule in the Revised Definitive Draft. On November 20, 1972, the Supreme Court promulgated the Supreme Court Draft, with rule 804(b)(4) unchanged from the Revised Definitive Draft, and transmitted that draft to Congress on February 5, 1973. The Special Subcommittee on Reform of Federal Criminal Laws (later renamed the Subcommittee on Criminal Justice) of the House Committee on the Judiciary first reviewed the Supreme Court Draft.

During hearings before that Subcommittee, the Department of Justice finally gave up its attack on rule 804(b)(4). However, another important

141. Id. Two cases illustrate how easily a court can assess whether a statement that at least implicated rather than exculpated the defendant was against the declarant's penal interest. See United States v. Mackin, 561 F.2d 958, 962 (D.C. Cir.) (key Government witness' partial recantation of testimony not against interest because perhaps intended to "impress" her probation officer and because she was effectively immune from prosecution for perjury), cert. denied, 434 U.S. 959 (1977); United States v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977) (alleged coconspirator's grand jury testimony offered by Government at trial against defendant not against penal interest because declarant granted immunity and exposure to criminal prosecution arose only if declarant failed to testify before grand jury).

142. Committee Response, supra note 139, at 59. Thus, the Standing Committee virtually rejected the Advisory Committee's initial position on this point. See text accompanying note 108 supra (Advisory Committee indicating defendant could corroborate statement by denying guilt). The Standing Committee's retort was unnecessarily broad. The Department of Justice had worried that the defendant's denial of guilt might suffice to provide corroboration. The Committee, however, implicitly rejected as corroboration the defendant's testimony about facts that would link the declarant to the crime or that would support an inference that the declarant was trustworthy.

143. To explain the confession analogy the Committee cited Opper v. United States, 348 U.S. 84, 92-94 (1954) (as had Senator McClellan, see note 96 supra) and 7 WIGMORE, EVIDENCE § 2071. Committee Response, supra note 139, at 59. To explain the accomplice analogy, which it was the first to suggest, the Committee cited 7 WIGMORE, EVIDENCE § 2059. Committee Response, supra note 139, at 59. One senses that the Committee was purposefully vague in failing to explain the meaning of the corroboration test more fully because it added that requirement to placate Senator McClellan and not because it believed that such a requirement was necessary to justify admission. For a further discussion of these two analogies, see notes 486-538 infra and accompanying text.

144. See text accompanying notes 93-106 supra. The Standing Committee may have been politically astute in suggesting the confession analogy, hoping that it might thereby placate Senator McClellan and the Department of Justice, both of whom also had suggested the same way of interpreting the "simple corroboration" test. If the Committee had hoped to forestall further objection by the Senator and the Department to the penal interest exception, it succeeded. See text accompanying note 145 infra (Department of Justice finally dropped its opposition to rule 804(b)(4)).

145. House Subcommittee Hearings, supra note 15, at 290 (statement of Donald Santarelli). Although still concerned about the Standing Committee's failure to make all of the changes urged by the Department
of Justice in its letter to Chief Justice Burger, the "Department determined . . . [after reviewing the
Supreme Court Draft] that further efforts to seek modification of the Rules would not be productive." Id.
Despite Justice's public disclaimer, the Department's initial position still was "represented" throughout the
Subcommittee's discussions of rule 804(b)(3). The Subcommittee's chief counsel had once worked for the
Department of Justice and its associate counsel worked for the Department both before and after his
service with the Subcommittee. Associate counsel even appeared as a witness on behalf of the Department
of Justice during the Senate Judiciary Committee's hearings. See Senate Judiciary Hearings, supra
note 118, at 105. Indeed, Chairman Hungate candidly admitted:

There were occasions when it seemed that the Justice Department knew immediately when
the subcommittee had adopted a provision that was not in line with Justice Department
policy. Needless to say, the defense counsel of America were not so represented in the mark
ups, and while the views of Justice are certainly to be welcomed, this occasionally, in my
opinion made for a one sided debate.

Letter from Representative William L. Hungate to Professor Peter W. Tague (June 18, 1980) (on file with
author).

147. Id. at 265. Although Judge Friendly did not explain what he thought the "law" was, one can
assume that he intended to refer to Donnelly and thus to the nonadmissibility of defense-offered penal
interest statements. Because he thought that the rules of evidence should not be codified, perhaps he
thought the law should develop on a case-by-case basis.
148. Id.
149. Id. During the Subcommittee's hearings, Judge Friendly explained the context in which he
thought defense-offered statements usually arose: "[S]omeone who has been convicted of a crime gets
another fellow who is serving a long prison sentence before he dies . . . to say that he rather than the
accused was the one who did it." Id. at 252-53. Judge Friendly's failure to illustrate his observation with
specific cases was unfortunate because in an earlier decision he had thought that the federal courts should
recognize a penal interest exception. See United States v. Annunziato, 293 F.2d 373, 378 (2d Cir. 1961)
(dictum) (characterizing exclusion of penal interest statements as a "rather indefensible limitation"). Judge
Friendly conceded that he had once thought that the exception should be recognized. House Subcommittee
Hearings, supra note 15, at 253 (testimony of Judge Henry J. Friendly).

Judge Friendly, like the Department of Justice, see text accompanying note 64 supra, worried that a
false confession by a fellow inmate would free a convicted and jailed defendant. Nonetheless, Judge
Friendly, Senator McClellan, the Department of Justice, and the House Subcommittee's associate counsel
never substantiated the basis for this fear. Furthermore, no one explained how the defendant would
accomplish this scheme. Perhaps he could advance the declarant's confession as "newly discovered
evidence" in a motion for a new trial or as support for a writ of coram nobis. (A petition for habeas corpus
probably would not succeed unless the Government suspected the declarant's complicity before the
defendant was convicted.) Because the defendant's burden of proof in a postconviction attack is so high,
however, his likelihood of success is minimal. Moreover, Judge Friendly's concern underestimates a trial
judge's power to exclude such a statement as not against the penal interest of the declarant. See United
States v. Satterfield, 572 F.2d 687, 690 (9th Cir.) (while two jailed defendants waited decision on each
other's appeal, first defendant announced that second defendant was not first defendant's actual
accomplice; statement held not to have been against interest because first defendant should have recognized
unlikelihood of success on appeal and statement would not have jeopardized appeal), cert. denied, 439 U.S.
840 (1978).
tion” test to the Revised Definitive and Supreme Court Drafts to defuse his own fear of the fraudulent prisoner confession. He objected to the “simple corroboration” requirement, indicating that he had “no idea what [it] means.”

The House Subcommittee changed the “simple corroboration” test significantly, rewriting it to read: “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.” The Subcommittee’s explanation for its revision masked the disturbing process that led to this drafting change.

150. Judge Friendly testified that “[at] the last moment the committee apparently became aware that... [the defense offer of a prisoner's confession] was the common situation and [it] stuck in a provision so that such a declaration 'is not admissible unless corroborated.” House Subcommittee Hearings, supra note 15, at 253.

151. Id. at 265. Judge Friendly further testified: “I should suppose that any evidence of the defendant's innocence or verification of any significant aspect of the exculpatory statement would constitute ‘corroboration’ in the ordinary sense of that word.” Id. Judge Friendly, however, did not explain why either form of evidence would not suffice to corroborate the statement.

Several commentators objected to the “simple corroboration” requirement during the House Subcommittee's review of the Supreme Court Draft. John J. Cleary, Executive Director of Federal Defenders of San Diego, Inc., for example, objected that the “simple corroboration” test “will effectively preclude the use of this new exception in a criminal case by the defense. The possibility of fabrication, as suggested in the Revised Draft, should go to the weight rather than the admissibility of such statements introduced to exculpate the accused.” Id. at 237 (statement of John J. Cleary). Similarly, Stuart H. Johnson, who worried that the corroboration requirement might require the defendant to testify, id. at 493 (testimony of Stuart H. Johnson, Jr.), correctly interpreted what the Advisory Committee had originally intended. Johnson's fear was the reverse of that of Judge Friendly and the Department of Justice, both of whom worried that the defendant could corroborate by testifying. See also Supplement to Subcommittee Hearings, supra note 10, at 129 (statement of Committee on Federal Courts, Association of the Bar of the City of New York) (no explanation for “unwarranted” addition of “simple corroboration” requirement in Advisory Committee's opinion offered in Note accompanying Supreme Court Draft).


153. The House Judiciary Committee published this explanation for the Subcommittee's revision of the “simple corroboration” test:

As for statements against penal interest, the Committee shared the view of the Court that some such statements do possess adequate assurances of reliability and should be admissible. It believed, however, as did the Court, that statements of this type tending to exculpate the accused are more suspect [than statements against pecuniary or proprietary interest] and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of simple corroboration was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Committee settled upon the language “unless corroborating circumstances clearly indicate the trustworthiness of the statement” as affording a proper standard and degree of discretion. It was contemplated that the result in such cases as Donnelly v. United States, 228 U.S. 243 (1912) [sic] where the circumstances plainly indicated reliability, would be changed.

154. A separate problem from those discussed in the text concerns the way that the Subcommittee considered the information provided during its hearings. Its staff apparently did not summarize all of the testimony and written submissions of the witnesses and commentators concerning rule 804(b)(3). Instead, associate counsel focused on the opposition of Judge Friendly and the Department of Justice to the version of the penal interest exception in the Supreme Court Draft. This is perhaps understandable because of his relationship with the Department of Justice. See note 145 supra (associate counsel worked for Department...
The penal interest exception sparked extensive debate during four markup sessions held on June 5, 12, and 18, 1973, and October 2, 1973. During the first markup session, the rule “produced extensive discussions” but “no unanimity.” Other than Representative Elizabeth Holtzman, however, the members agreed that the rules should include a hearsay exception for penal interest statements, thereby implicitly suggesting that a court should or might admit a statement similar to the one allegedly made by the declarant in Donnelly v. United States.

For several reasons, the Subcommittee believed that some form of corroboration requirement was necessary to enable the judge to exclude a defense-offered statement that appeared on its face to be disserving. First, echoing the assertions of Senator McClellan, the Department of Justice, and Judge Friendly, associate counsel claimed that in “many, many instances” the declarant had been a friend, a relative, or a fellow prison inmate who had lied in claiming responsibility for a crime actually committed by the defendant. Second, the Subcommittee misinterpreted the purpose of the penal interest test set forth in the rule’s first sentence. Finally, the Subcommittee erroneously assumed that the Standing Committee both shared the Subcommittee’s concern over fabricated statements and added the “simple corroboration” test in a genuine attempt to solve the problem of collusive statements.

of Justice both prior to and after working for Subcommittee). As a result, the Subcommittee was not informed of those admittedly few comments critical of either the Standing Committee’s addition of the “simple corroboration” test or its deletion of the “Bruton sentence” from the Supreme Court Draft.

As one member remarked after staff counsel reviewed the Subcommittee’s treatment of the penal interest exception during the two prior markup sessions, “[b]oy, we worked this one over.” Markup Session, Oct. 2, 1973.

Unsigned, Undated Paper Attached to Staff Counsel Herbert E. Hoffman’s Handwritten Notes Concerning June 5, 1973 Markup Session (on file at National Archives) [hereinafter Staff Counsel’s Notes].

Representative Holtzman, who thought that a court should admit statements against pecuniary and proprietary interests, did not explain her objection to statements against civil and penal interests. Markup Session, June 5, 1973; Markup Session June 12, 1973. The other members, staff counsel wrote, were “of the opinion that statements against penal interests have sufficient guarantee of trustworthiness to be admissible but that the problem was to define the situations where such trustworthiness existed.” Staff Counsel’s Notes, supra note 156. Of these members, one indicated that he shared Representative Holtzman’s concern about admitting statements against civil interest. Markup Session, June 12, 1973.

For an extensive discussion of Donnelly v. United States, 228 U.S. 243 (1913), see notes 549-67 and accompanying text.

The Advisory Committee refused to add a corroboration requirement to the rule for the very reason raised by Professor Cleary’s misleading statement submitted to the Subcommittee on February 7, 1973. See note 121 supra (corroboration requirement added “as a safeguard against fabrication”).

The Subcommittee obviously was unaware of Senator McClellan’s role in pressuring the Advisory
Without explanation the Subcommittee rejected the “simple corroboration” test as too vague (thereby agreeing with Judge Friendly) and as inadequate to provide the needed protection.163 The Subcommittee failed to ask the Standing Committee to explain why it added the test or how it intended that a court should interpret the test.164 Moreover, the Subcommittee failed to apply either corroboration test to fact situations drawn from case law or posed as hypothetics, failed to explore how a court should interpret the two “precedents” offered by the Standing Committee to explain the “simple corroboration” test, and failed to discuss whether either “precedent” would provide adequate protection against the introduction of fabricated statements. Instead, during the June 5, 1973 markup session, the members toyed with different language in an attempt to draft a corroboration requirement that would capture their heightened concern.165 Unable to agree,166 the Subcommittee directed staff counsel to draft appropriate language.167

and Standing Committees to include the “simple corroboration” requirement. Although the Senator sent to the Subcommittee a copy of his letter to Judge Maris, see Supplement to Subcommittee Hearings, supra note 10, at 46-47, the Subcommittee may not even have known that the Senator objected to the version of the penal interest exception in the Revised Draft because the letter never discussed the Senator’s objections. Further confirmation that the Subcommittee did not comprehend the Senator’s influence on the Advisory and Standing Committees is found in the argument of Representative Hogan, a member of the Subcommittee. Representative Hogan argued that Congress should adopt the version of rule 609 in the Supreme Court Draft, which would have permitted greater use of prior convictions to impeach than did the Subcommittee’s version of that rule, because the Standing Committee apparently believed that a broad impeachment rule was wise. Senate Judiciary Hearings, supra note 118, at 17 (testimony of Rep. Lawrence J. Hogan). In fact, the Advisory and Standing Committees changed the Revised Draft to broaden the use of prior convictions solely as part of its pacification of Senator McClellan.

163. Markup Session, June 5, 1973; see Staff Counsel’s Notes, supra note 156 (“There was dissatisfaction with the final phrase in the [Supreme Court Draft’s] Rule requiring corroboration as not appropriate to accomplish the purpose of assuring trustworthiness”).

164. The Subcommittee’s failure to question the Standing Committee on these issues was surprising because the Subcommittee had not been reluctant on prior occasions to ask the Advisory and Standing Committees to explain particular rules in the Supreme Court Draft or to negotiate with them to find language that satisfied both the Committees and the Subcommittee. See Supplement to Subcommittee Hearings, supra note 10, at (V) (table of contents) (listing letters between Professor Cleary and Subcommittee). In fact, immediately before discussing the penal interest exception at its June 12, 1973 markup session, the Subcommittee reviewed a lengthy negotiation with the Advisory and Standing Committees over the language of rule 801(d)(1). Markup Session, June 12, 1973.

165. The Subcommittee’s skepticism over the effectiveness of the “simple corroboration” test is consistent with its general distrust of hearsay. Illustrative of its conservative approach, the Subcommittee deleted three hearsay exceptions from the Supreme Court Draft (rules 804(b)(2) (statement of recent perception) and 803(24) and 804(b)(6) (the “catch-all” exceptions)); limited the admissibility of so-called “dying declarations” in criminal cases to homicides (rule 804(b)(2) (as enacted)); and added requirements to the business records exception (rule 803(b)) and to the prior inconsistent statement doctrine (rule 801(d)(1)). Interestingly, except for its revision of the penal interest exception, the Subcommittee’s treatment of hearsay favored the criminal defendant.

166. The Subcommittee considered and rejected at least four versions of a corroboration requirement. First, a statement “is not admissible unless corroborated, and the circumstances are such as to lead the trial court to believe that a sufficient guarantee of trustworthiness exists.” Second, paraphrasing rule 804(b)(6) of the Supreme Court Draft, a statement is “not admissible unless having circumstantial guarantees of trustworthiness.” Third, paraphrasing rules 803(6)-(8) of the Supreme Court Draft, a statement is inadmissible “unless the sources of information or other circumstances indicate . . . trustworthiness.” This proposal deleted the words “lack of” as they appear in rules 803(6)-(8). Finally, a statement should be excluded unless it was made “under circumstances guaranteeing or tending to guarantee trustworthiness.” Markup Session, June 5, 1973.

167. Id.
At the next markup session, June 12, 1973, staff counsel proposed the language that the Congress eventually enacted.\(^{168}\) During this session, associate counsel noted that, although the Supreme Court in *Chambers v. Mississippi*\(^{169}\) held that the failure to admit a penal interest statement was a constitutional violation,\(^{170}\) he did not believe *Chambers* mandated the admission of every penal interest statement.\(^{171}\) Neither he nor the Subcommittee, however, discussed whether the proposed corroboration requirement was constitutional in light of *Chambers*, which the Court decided after transmitting the *Supreme Court Draft* to Congress. At the next markup session, June 18, 1973, the Subcommittee unanimously approved its version of the rule, renumbered as rule 804(b)(3), which included its redrafted version of the corroboration requirement and the "Bruton sentence."\(^{172}\)

On June 28, 1973, the House Subcommittee completed its revision of the *Supreme Court Draft* and invited comments by the public about its work.\(^{173}\) Several commentators expressed concern about the Subcommittee's changes to the penal interest exception.\(^{174}\) The Advisory and Standing Committees acquiesced in "the rephrasing in general of the corroboration requirement . . .," but urged that the word "clearly" be deleted.\(^{175}\) That word, they thought, would impose "a burden beyond those ordinarily

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168. Letter from Herbert E. Hoffman to Members of the Special Subcommittee on Reform of Federal Criminal Laws (June 14, 1973) (on file at National Archives). The language recommended by the staff included the "Bruton sentence." The Subcommittee's records at the National Archives include nothing that explains the choice of language. Furthermore, no participant I spoke with was able to offer an explanation. Neither the language the Congress adopted nor the alternatives the Subcommittee rejected focuses on the Subcommittee's true concern of excluding collusive statements by prison inmates or friends and relatives of the defendant; instead, the language applies to every defense-offered statement regardless of source or content.


170. Id. at 298.


173. The Subcommittee's print was published in the *Congressional Record* and by several publishers and was sent to state bar associations and to every organization or person who submitted material or testified. Memorandum of Staff of Senator Roman L. Hruska, Re: H.R. 5463, An Act to Establish the Federal Rules of Evidence, and for Other Purposes, at 2 (sent with letter from Senator Hruska to Senator James O. Eastland (Feb. 28, 1974)) (on file at National Archives) [hereinafter H.R. 5463 Agenda].

174. One commentator correctly thought the corroboration requirement presented a "methodological problem" because a hearsay exception was created only when that type of hearsay was assumed to be trustworthy enough to excuse live testimony. A corroboration requirement was inconsistent with that assumption and would therefore interfere with the factfinder's usual assessment of weight. Letter from Alvin K. Hellerstein to William L. Hungate (Aug. 2, 1973) (sending comments of the Committee on Federal Courts, the Association of the Bar of the City of New York), reprinted in *Supplement to Subcommittee Hearings*, supra note 10, at 309. Another commentator thought that the Subcommittee's corroboration requirement was unclear. See Letter from Representative William S. Cohen to Representative William L. Hungate (July 31, 1973), reprinted in *Supplement to Subcommittee Hearings*, supra note 10, at 273 (no reason for change because no practical difference from rule in *Supreme Court Draft*). In contrast, Judge Friendly was "gratified" by the Subcommittee's changes to the penal interest exception. See Letter from Judge Henry J. Friendly to Representative William L. Hungate (July 12, 1973), reprinted in *Supplement to Subcommittee Hearings*, supra note 10, at 199 (expressing approval of new material in rule 804(b)(3)).

175. Letter from Judge Albert B. Maris to Representative William L. Hungate (July 31, 1973) (sending the Advisory and Standing Committee's Comments on the Subcommittee's June 28, 1973 Print), reprinted in *Supplement to Subcommittee Hearings*, supra note 10, at 298 [hereinafter Committee's Comments to Subcommittee Print]. It is not clear whether either the Advisory Committee or the Standing Committee met formally to consider the changes proposed by the House Subcommittee.
attending the admissibility of evidence, particularly statements offered by defendants in criminal cases, and [would become a] prolific source of disputes and appeals." The Department of Justice cautioned that the Subcommittee's test was unclear and might pose a constitutional problem when read against Chambers. Thus, the Department of Justice recommended adding "a note to indicate that the subsection [on penal interest statements] is to be applied in conformity with the Chambers decision." On October 2, 1973, the House Subcommittee reconsidered the rule in light of public comments. Neither the Subcommittee at that meeting nor the

176. Id. The Committees did not explain to the House Subcommittee how the penal interest exception as reworded by the Subcommittee differed from other evidentiary rules either in general or as applied to the offer of evidence by criminal defendants. The Committees' public objection to the Subcommittee's corroboration test unfortunately downplayed the full force of Professor Cleary's criticism of the Subcommittee's change. In an internal memorandum prepared for the Advisory and Standing Committees, Professor Cleary wrote:

The [Subcommittee's] amendment [to the penal interest exception] also purports to strengthen the corroboration requirement with respect to third party confessions. A principal declared purpose is to preclude resort to the accused's own testimony for corroboration. This result may be too sweeping: while one would certainly entertain grave doubts whether mere denials of guilt by the accused would satisfy a corroboration requirement, a contrary view would seem appropriate when his testimony recounted independently supporting the truth of the confession. Of course, the likelihood of his being able to perform the latter feat without establishing some measure of complicity on his own part is slight. The amendment seems to inject the judge unduly into the area reserved to juries. The same may be said with respect to establishing the standard of proof as "clearly," a burden beyond that ordinarily attending the admissibility of evidence by any party and particularly going beyond burdens that have been thought properly to be imposed upon defendants in criminal cases.


178. Id. As the House Subcommittee began its discussion of the penal interest exception on June 5, 1973, one member remarked that he had received "notice of a constitutional problem" presented by Chambers. Markup Session, June 5, 1973. Nonetheless, the Subcommittee failed to consider the effect of Chambers on its version of the rule during the June 5, 12, and 18 markup sessions and apparently during its October 2, 1973 session.

179. Ruckleshaus Letter, supra note 177, at 352. To define the corroboration test, the Department of Justice suggested that the Subcommittee refer to the language in Chambers. Id. In Chambers the Supreme Court indicated that due process requires the admission of a penal interest statement if "considerable assurance of [its] reliability [exists]." 410 U.S. 284, 302 (1973). The Department of Justice's suggestion is ironic: although it opposed the Subcommittee's reinsertion of the "Bruton sentence" because it feared that such an addition would codify the constitutional principle of Bruton, the Department understandably feared that the Subcommittee's corroboration requirement might be unconstitutional unless courts read it to impose a test no higher than that of Chambers.

180. Regrettably, the tape recording of that meeting does not include the Subcommittee's discussion of
House Judiciary Committee changed the rule or included anything in their respective reports either to reflect the criticism of the Advisory and Standing Committees or to incorporate the concern of the Department of Justice. As a result, we do not know whether the Subcommittee and the Judiciary Committee disagreed with those comments or instead believed that the federal courts would interpret the rule as the Department of Justice had urged.

The rule as proposed by the Subcommittee passed the House without discussion on the floor.\footnote{H.R. 5463, 93d Cong., 2d Sess., 120 CONG. REC. 2393 (1974).} During two days of hearings before the Senate Committee on the Judiciary, the penal interest exception received little attention.\footnote{One substantive comment about the penal interest exception appeared in an article hidden in the Senate Judiciary Committee's record. See Rothstein, \textit{The Proposed Amendments to the Federal Rules of Evidence}, 62 GEO. L.J. 125, 152-55 (1973), reprinted in \textit{Senate Judiciary Hearings, supra} note 118, at 232-34 (urging deletion of corroboration requirement). The sparse record of the Senate Judiciary Committee's work includes the record of its public hearings, the report that accompanied the Committee's print, and a few scattered documents kept by the National Archives. The Senate Judiciary Committee decided to focus only on those few proposals of the House that were of especial concern to the Senators. \textit{See Letter from Senator Quentin N. Burdick to Senator James O. Eastland, Chairman of the Senate Committee on the Judiciary (Feb. 20, 1974) (on file at National Archives)}. Senator Burdick stated:

\begin{quote}
Although each of us may have our own views as to how we would write a particular rule . . . . I believe the hearings in the Senate should \textit{not} involve a general review of the proposed rules, but should be limited to only the specific matters that are of concern . . . . [The rules should receive expeditious consideration by the Committee and I believe this might be facilitated by having the staff members of the various interested Senators . . . . compile a list of those rules which would appear to warrant further review.}
\end{quote}

\textit{Id.} (emphasis in original).

The only part of the penal interest exception that apparently drew the Committee's attention was the \textit{"Bruton sentence."} See note 215 \textit{infra} (setting forth unpublished agenda of Senate Judiciary Committee's September 18, 1974 meeting). Because no record of the executive sessions of the Senate Judiciary Committee exists and because none of the correspondence addressed to the Committee on file with the National Archives discussed the penal interest exception, we can assume that the Committee did not discuss any part of the rule other than the \textit{"Bruton sentence."} \footnote{H.R. 5463, 93rd Cong., 2d Sess., 120 CONG. REC. 37,084 (1974).}
Senate’s position on _Bruton_ prevailed in conference.\(^{185}\) Congress enacted the rule without the “_Bruton sentence._”\(^{186}\)

**B. THE GOVERNMENT OFFERS A DECLARANT’S STATEMENT**

Determining whether the Government may use the penal interest exception to introduce a declarant’s statement in which he implicates both himself and the defendant is an important inquiry. Significantly, that determination also helps answer two questions about a defense use of the exception. In a one- or a multi-person crime, may the defendant introduce that part of the declarant’s statement that directly or inferentially exonerates the defendant? Is the corroboration requirement imposed on the defendant constitutional? Unfortunately, we cannot answer either question with certainty because Congress confused the relationship between the evidentiary and the constitutional doctrines\(^ {187}\) and misunderstood the Advisory and Standing Committees’ position with respect to the Government’s use of the exception.

In the _Preliminary Draft_ version of rule 804(b)(3), the Advisory Committee wrote: “[The penal interest] 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.”\(^ {188}\) The Advisory Committee’s publicized explanation of this “_Bruton sentence_” in its Note to the rule is somewhat ambiguous. On the one hand, the Advisory Committee suggested that the declarant’s implication of the accused could be admissible as a collateral statement,\(^ {189}\) apparently on the assumption that if the declarant truthfully implicated himself, he also truthfully implicated the accused. On the other hand, after citing Justice White’s dissent in _Bruton_ in which he argued that the declarant would advance, rather than jeopardize, his interests by serving up others as possible defendants,\(^ {190}\) the Advisory Committee concluded that such a statement would never be against the declarant’s penal interest.\(^ {191}\) Thus, the Advisory Committee did not include the “_Bruton sentence_.”

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185. I could find no record of the conference meeting apart from the Conference Report and comments by Representatives on the House floor, none of which addressed the penal interest exception. See 120 CONG. REC. 40,890-96 (1974).

186. H.R. 5453, 93rd Cong., 2d Sess., 120 CONG. REC. 40,070 (1974) (Senate); id. at 40,896 (House of Representatives).

187. No evidence indicates that anyone discussed the relationship between the penal interest exception and the treatment of a coconspirator’s statements under rule 801(d)(2)(E). For example, the statement to a police officer, “The defendant and I killed the victim yesterday,” probably would be inadmissible under rule 801(d)(2)(E) as not “in furtherance of the conspiracy.” _Fed. R. Evid._ 801(d)(2)(E). Nonetheless, that sort of statement might be admissible against the defendant because both parts arguably are against the declarant’s penal interest.

188. _Preliminary Draft, supra_ note 1, at 378. Professor Cleary added this “_Bruton sentence_,” see note 52 _supra_, after the Supreme Court decided _Bruton v. United States_, 391 U.S. 123 (1968).

189. _See Preliminary Draft, supra_ note 1, at 386 (“Ordinarily the third-party confession is thought of in terms of exculpating the accused, but . . . it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements”).

190. Dissenting in _Bruton_, Justice White argued that “[d]ue to his strong motivation to implicate the defendant and to exonerate himself, a codefendant’s statements about what the defendant said or did are less credible than ordinary hearsay evidence.” _Bruton v. United States_, 391 U.S. 123, 141 (1968) (White, J., dissenting).

191. Advisory Committee Note to _Preliminary Draft, supra_ note 1, at 386. In the Advisory Committee’s
sentence" on the supposition that Bruton constitutionally mandated exclusion. Nonetheless, the citation to Bruton in the Committee's Note led to misinterpretations that it never publicly corrected.192

The Committee changed neither the rule nor the Note until the Revised Definitive and Supreme Court Drafts. Senator McClellan objected to the "Bruton sentence" because he misinterpreted the Note to the Preliminary Draft. He argued that the sentence misstated constitutional doctrine in light of Nelson v. O'Neil,193 a case decided by the Supreme Court after publication of the Preliminary and the Revised Drafts.194 In Nelson the Court held that the Government did not violate the confrontation clause by introducing against only the codefendant his oral admission implicating both himself and the defendant.195 Citing Nelson, Senator McClellan argued that the "Bruton sentence" should be deleted because the Advisory Committee had eschewed "writ[ing] the Rules in terms of their constitutional implications."196

During its September 5, 1971 meeting, the Advisory Committee rejected Senator McClellan's broad attack on the "Bruton sentence." As Professor Cleary correctly noted, the "Bruton sentence" does not exclude a statement when, as in Nelson, the declarant testifies because he is not then unavailable as required by rule 8-04(a). To clarify its position, the Advisory Committee directed Professor Cleary to accommodate Senator McClellan's concerns by explaining in the Note to the rule that the "Bruton sentence" does not apply to the Nelson facts.197

view,

[The unacceptability of a confession of this kind as a declaration against interest is emphasized in the dissenting opinion of Mr. Justice White: statements of codefendants have traditionally been regarded with suspicion because of the readily supposed advantages of implicating another. This view is reflected in the concluding sentence of the example.

Id.

After the Department of Justice argued in its first letter that the "Bruton sentence" did not reflect constitutional doctrine, see Justice's First Letter, supra note 63, at 34-35, Professor Cleary responded that the Department of Justice's objection assumed

that the sentence attempts to codify the confrontation phrase of Bruton, when in fact Bruton is relied upon only to repel any supposition that a statement of this kind is truly against interest.

In other words, the sentence does not say that a Bruton confession violates the right of confrontation; it does say that a Bruton confession is not against interest.


192. Commentators, as well as Senator McClellan and the House Subcommittee, erroneously thought that the Preliminary and Revised Drafts included the "Bruton sentence" to codify the constitutional principle of Bruton. The Committee on Federal Courts of the New York City Bar Association, for example, noted that although the Revised Draft "attempted to accommodate the rationale of Bruton v. United States . . ., the [Supreme Court Draft] of the Rule does not purport to deal with the Bruton question." House Subcommittee Hearings, supra note 15, at 129 (statement of the Committee on Federal Courts, the Association of the Bar of the City of New York).


194. McClellan Letter, supra note 82, at 33,648.

195. 402 U.S. at 626. The codefendant testified that he had not made the statement and that its contents were false. Id. at 624. Both defendants testified to the same defense. Because O'Neil had the opportunity to cross-examine the declarant-codefendant and because the jury had been instructed not to consider the statement against O'Neil, the Supreme Court found no confrontation clause violation. Id. at 626.

196. McClellan Letter, supra note 82, at 33,648.

197. Professor Cleary added this sentence to the Note: "This situation [when the declarant is
Senator McClellan shifted his objection to the "Bruton sentence" during his meeting with representatives of the Advisory and Standing Committees on September 22, 1971. The Senator argued that the "Bruton sentence" was overbroad because not every statement made by a declarant implicating the accused is an attempt "to curry favor with the authorities . . . ." Agreeing with Senator McClellan, Professor Cleary and the representatives of the Committees decided to delete the "Bruton sentence" from the rule and to change the Note to state that a court should determine the penal interest effect of such a statement in each case. Interestingly, the Standing Committee did not detect the disparity it created by imposing the "simple corroboration" requirement on the defendant but not on the Government.

The House Subcommittee decided to reinsert the "Bruton sentence" in a slightly reworded form: "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, is not admissible." The reason for the Subcommittee's reinsertion of the "Bruton sentence" is not altogether clear. During the June 12, 1973 markup session, one representative expressed the Advisory Committee's once-held concern that the declarant would not speak unavailable] is not to be confused with those where the confessing defendant is present and testifies at the trial." Advisory Committee Amendments, supra note 109, at 130. However, this addition did not respond to the Senator's broader objection to the "Bruton sentence," namely whether its purpose was to codify Bruton or to hold, on evidentiary grounds, that such a statement was not against penal interest.

199. Although the Committees capitulated to Senator McClellan by adding the "simple corroboration" requirement, they did not delete the "Bruton sentence" for the same reason, as they have been accused of having done. See generally Comment, Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest, 66 CALIF. L. REV. 1189, 1193-94 (1978) [hereinafter Comment, Inculpatory Statements].

During its September 30, 1971 meeting, the Standing Committee agreed with Professor Cleary's suggested change to the Note. In the Revised Definitive and Supreme Court Drafts, the Note reads:

These decisions [Bruton and Douglas v. Alabama, 380 U.S. 415 (1965) (reversal on constitutional ground when trial court admitted codefendant's confession implicating accused]) . . . by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. 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 . . . . 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 of confrontation.

Advisory Committee Note to Supreme Court Draft, supra note 1, at 328.
200. Several of the alternative ways of phrasing the "simple corroboration" requirement would not have created this difference. See note 105 supra and accompanying text (setting forth different versions of corroboration requirement). During the June 12, 1973 markup session, Representative Holtzman asked why the Government had not been burdened with the corroboration requirement. Markup Session, June 12, 1973. See also Letter from Melvin B. Lewis to William L. Hungate (July 18, 1973), reprinted in Supplement to Subcommittee Hearings, supra note 10, at 210 (noting disparity). Associate counsel responded that he saw no need to impose such a burden because Bruton constitutionally prevented the Government from introducing a nontestifying declarant's statement implicating the defendant. Markup Session, June 5, 1973. Although he misinterpreted Bruton's reach, see note 204 infra, his answer satisfied the Subcommittee, which did not discuss the imbalance further. For a discussion of the constitutionality of imposing the corroboration burden on the defendant but not on the Government, see notes 708-59 infra.
201. JUNE 28, 1973 PRINT, supra note 10, at 175.
against his penal interest by implicating the defendant. In arguing that the declarant, for example, might "clear up twenty burglaries" in hope of either a favorable plea bargain or incarceration in a federal prison, this representative implicitly assumed that the declarant in each instance would damn the defendant to help himself. This evidentiary concern, however, did not motivate the Subcommittee to reinsert the "Bruton sentence." Rather, associate counsel, who argued that Bruton constitutionally excluded any statement by a nontestifying declarant, thought that the rule should include a "Bruton sentence" to codify his understanding of that decision. Although he misinterpreted Bruton, associate counsel persuaded the Subcommittee to adopt his position.

In an intriguing response, the Advisory and Standing Committees indicated that they would "express no disagreement with the proposed final sentence to be added to [the rule]. The wording may, however, invite confusion, and it is suggested that 'not admissible' be replaced by 'not within this exception.'" The result is consistent with the Subcommittee Note. By suggesting this change in language, the Committees apparently hoped to salvage the coconspirator doctrine and other hearsay exceptions as possible avenues for the Government to introduce third-party statements implicating the defendant. However, their failure to oppose the Subcommittee's decision to remove the availability of the penal interest exception conflicted both with Professor Cleary's evaluation of the reinserted "Bruton sentence" and with the Standing Committee's earlier decision that a declarant's implication of the defendant might be against the declarant's penal interest. Is it possible that

203. Id.
204. Associate counsel erroneously assumed that Bruton held that the confrontation clause barred the introduction of any hearsay statement against the defendant when the declarant did not testify. Because the trial court did not admit the codefendant's statement against the defendant, the Supreme Court left unresolved the constitutionality of introducing a nontestifying declarant's statement through a hearsay exception that justified its substantive use against the defendant. Bruton v. United States, 391 U.S. 123, 128 n.3 (1968).

Associate counsel's misinterpretation, however, explains why the Subcommittee wrote that a declarant's implication of the defendant "is not admissible." The Subcommittee assumed that neither rule 804(b)(3) nor any other hearsay exception provided a way of surmounting Bruton's constitutional bar.

205. In its report, the Subcommittee explained that it "also determined to add to the Rule the final sentence from the 1971 draft, designed to codify the doctrine of Bruton v. United States." JUNE 28, 1973 PRINT, supra note 10, at 176.
206. Committees' Comments to Subcommittee Print, supra note 175, at 298.
207. In an unpublished comment, Professor Cleary wrote:

With regard to the final sentence of the amendment, which is taken from the Revised Draft of 1971, the Advisory Committee, after inserting it, concluded that its principle, extracted from Bruton, could not safely be put in the form of a rule, but that room should be left for an ad hoc determination in each case whether an implicating confession by a codefendant was against his interest. True, a generalization may safely be made that such confessions by a person in custody are tainted by self-interest, but the same broad conclusion cannot be reached concerning statements made under other circumstances. Moreover, the formulation seemed to invite confusion with respect to confessions by a codefendant who is prepared to testify, even though strictly speaking he is not unavailable and his statement therefore not literally within the scope of the provision. The Reporter believes that the Advisory Committee's decision to omit the sentence was a wise one.

Reporter's Comments to House Subcommittee Print, supra note 176, at 38-39.
Senator McClellan's argument that such a statement could be against penal interest no longer persuaded the Committees? Or, did they not object because they were secretly pleased by the indirect slap that the Subcommittee had administered to Senator McClellan, whose pressure they could not withstand? Unfortunately, neither question is answerable because neither Committee recorded its discussion of the House Subcommittee's "Bruton sentence."

The Subcommittee discussed the public's comments to its "Bruton sentence" on October 2, 1973. The Subcommittee discussed and quickly dismissed the Department of Justice's objection that the Subcommittee's "Bruton sentence" did not express constitutional doctrine. Nonetheless, the Advisory and Standing Committees' response engendered much discussion and confusion. Since both Committees had proposed similar language in the Revised Draft, several Subcommittee members did not understand why the Committees suggested changing the language of the reinserted "Bruton sentence." Although the Subcommittee ultimately decided to retain the "Bruton sentence," it also decided both to change the last clause to conform with the Advisory and Standing Committees' recommendation and to point out the policy issue for the House Judiciary Committee to consider.

The House Judiciary Committee retained the amended sentence. Because the Committee did not record its discussions, we cannot determine whether it was motivated by constitutional or evidentiary considerations. By republishing the Subcommittee's explanation of the "Bruton sentence," the full Committee apparently agreed that Bruton mandated that courts exclude Government-offered penal interest statements. Thus, both the Subcommittee and the full Committee misunderstood why the Advisory and Standing Committees included the "Bruton sentence" in the Revised Draft but then deleted it from the Supreme Court Draft. The House Committees also apparently never addressed the threshold evidentiary question whether a declarant's implication of the defendant could be against his penal interest. As a result, the Committees did not make the policy decision to exclude such a statement whether or not it was against interest.

The Senate Judiciary Committee voted to delete the "Bruton sentence" because it thought the "[c]odification of a constitutional principle is unnecessary and, where the principle is under development, often unwise." Moreover, the Committee thought that the House's version excluded certain

208. Markup Session, Oct. 2, 1973. The Department of Justice had argued that the "Bruton sentence" should not be included because the Bruton issue was "complicated and marked by nuance." Ruckelshaus Letter, supra note 177, at 352.

209. Markup Session, Oct. 2, 1973. Staff counsel, after reviewing the competing considerations underlying the Subcommittee's earlier decision to include the sentence, suggested that constitutional doctrine probably did not require that the rule forbid the introduction of every third party statement implicating the accused. Nonetheless, he argued that Congress could decide as a matter of policy to provide more protection for the defendant than the Constitution required. Id. Staff counsel, however, did not identify what policy considerations might justify greater protection for the defendant. He also mistakenly thought that the Standing Committee deleted the "Bruton sentence" from the Supreme Court Draft because it decided not to codify Bruton. Id.


211. Also, neither the Subcommittee's Note to its October 10, 1973 Print nor the tape recording of the Subcommittee's October 2, 1973 discussion provide an explanation for this change.


types of statements that were constitutionally admissible. Because the Senate Judiciary Committee kept no record of its discussion, we cannot determine if it considered the evidentiary question whether the declarant’s implication of the defendant could ever be against his penal interest. Since Senator McClellan was chairman of the Subcommittee on Criminal Laws and Procedures, however, we reasonably can assume that he convinced the Committee that a declarant’s implication of the defendant might be against the declarant’s penal interest. The Senate Committee’s position prevailed at the conference. Therefore, rule 804(b)(3) as enacted does not include the “Bruton sentence” and does not specifically mention whether a court may admit statements implicating the accused as against the declarant’s penal interest.

C. REVIEW

Before turning to specific questions concerning the interpretation and the application of rule 804(b)(3), we should review the path of the rule from its proposal by the Advisory Committee to its enactment by Congress. First, the discussion at each stage proceeded in a factual vacuum, with no review of the case law to determine either the typical relationship between the declarant and the defendant or the type of statement that parties typically offered and courts usually admitted. This failure led the House Subcommittee to suggest that the statement in Donnelly was representative of most admissible declarations, a remarkable suggestion given the facts of that case.

214. The Senate Report cited two cases, United States v. Zelker, 452 F.2d 1009 (2d Cir. 1971), and United States v. Mancusi, 404 F.2d 296 (2d Cir. 1968), cert. denied, 397 U.S. 942 (1970), in which no confrontation clause violation occurred. Senate Judiciary Report, supra note 10, [1974] U.S. Code Cong. & Ad. News at 7068. The Senate Committee cited Zelker to establish that the confrontation clause is not violated when other evidence places the defendant at the scene of the crime. Id. Although such evidence was offered in Zelker, the court based its decision on the “interlocking confession” doctrine. See United States v. Zelker, 452 F.2d 1009, 1010 (2d Cir. 1971) (when defendant’s confession interlocks with and supports confession of codefendant, no violation of Bruton rule). Zelker and Mancusi presaged the Supreme Court’s decision in Parker v. Randolph, 442 U.S. 62 (1979) (plurality opinion), in which a plurality reached the same result. See id. at 72 (joint trial admission of defendant’s interlocking confessions did not infringe either defendant’s confrontation right).

215. The only evidence that the Senate Judiciary Committee discussed this evidentiary issue conflicts with this assumption. In a background memorandum, apparently intended to guide the Committee’s discussion, a staff member on the Committee wrote:

Background [to rule 804(b)(3)]: As passed by the House, the last sentence of this section precludes the use of a statement of a person implicating the defendant, whether the declarant is a codefendant in the trial or merely a witness. It goes beyond the rule in Bruton which precludes the use of such a statement on sixth amendment grounds when the declarant is a codefendant. Issue: Whether the rule should go beyond the Bruton principle.

H.R. 5463 Agenda, supra note 173.

216. During the Senate Judiciary Committee’s hearings, the Senators and staff aides, in off-the-record discussions, feared that defense counsel would search death row for a condemned prisoner who, in exchange for a promise to care for his family, would “confess” to the crime charged against the defendant. Conversation with Professor Paul Rothstein (May 7, 1979). Distrust of defense-offered statements had reached a new high.

217. See notes 549-67 infra and accompanying text (discussing Donnelly and Subcommittee’s view of it).
Second, the House Subcommittee misunderstood the Advisory and Standing Committees’ purpose in adding the corroboration requirement. Because the House Subcommittee refused to follow the advice that it review only the rules on privileges in the *Supreme Court Draft* and instead chose to examine that draft rule by rule, the Subcommittee should have determined why the Advisory and Standing Committees added the “simple corroboration” test. Such an inquiry would have revealed that the Subcommittee misconceived the Advisory and Standing Committees’ purpose in adding that requirement. Those Committees had not added the requirement, as the Subcommittee assumed, because they believed the version of the rule in the *Preliminary and Revised Drafts* would have required admitting a dying prisoner’s fabricated confession. Instead, the Committees surrendered to Senator McClellan’s demand that the rule contain a corroboration requirement to prevent the introduction of fabricated statements. Those Committees, perhaps understandably, did not publicize the source of their “simple corroboration” test, a failure that led to misinterpretation by the House Subcommittee and others as to their purpose in adding that requirement. Also, the Subcommittee’s announced reason for strengthening the corroboration requirement—to prevent the defendant from satisfying the *Supreme Court Draft*’s “simple corroboration” test through his own testimony—was unwarranted. The Standing Committee had rejected this interpretation of the test after Senator McClellan objected to it. The Subcommittee thus overdrafted the corroboration requirement to remove a problem that the Standing Committee already had eliminated. If the defendant had other evidence implicating the declarant, he would not have to testify and consequently there was no need for the Subcommittee to increase the corroboration hurdle.

Third, the Subcommittee made no attempt to explain how courts should interpret its corroboration requirement. It also overdrafted the corroboration requirement; it could have allayed its concern that untrustworthy statements by friends, relatives, or prison inmates would prompt juries to acquit guilty defendants in various other ways. The Subcommittee, for example, could have instructed courts to evaluate closely the penal interest effect of statements by those sorts of declarants.

218. See *House Subcommittee Hearings*, supra note 15, at 427 (testimony of Alan B. Morrison) (“I do not believe that either this committee . . . or the Congress as a whole should become so enmeshed in the rules of evidence, with the exception of the article on privileges, to take the time to try to draft the rules”).

219. The Committees probably decided not to publicize the influence of Senator McClellan to forestall him from objecting to the *Supreme Court Draft*. They also may have feared that other members of Congress might have urged striking the “simple corroboration” test if its addition were perceived as an unprincipled compromise. Had other members of Congress objected to the compromise, the Committees might reasonably have feared that Senator McClellan would then press for his proposed amendment to the rulemaking process.

220. Two commentators told the House Subcommittee that pressure from Senator McClellan and the Department of Justice apparently caused the Advisory and Standing Committees to change the *Revised Draft*. See *House Subcommittee Hearings*, supra note 10, at 180 (statement of Charles R. Halpern & George T. Frampton) (McClellan and Department of Justice responsible for “puzzling shifts” in *Revised Draft*). Halpern and Frampton, however, did not have access to the internal documents of the Advisory and Standing Committees to identify precisely their reaction to the pressure exerted by the Senator and the Department of Justice. The Subcommittee did not respond to Halpern and Frampton’s call for an investigation. See id. (“We do not know at this point what transpired, but this is something this Subcommittee certainly has an obligation to find out”).

221. For other alternatives, see notes 702-07 infra and accompanying text.
Fourth, except for the Department of Justice, which belatedly expressed concern about the effect of *Chambers v. Mississippi*, each group that considered the rule either was unaware of or blithely ignored the constitutional implications of the various versions. This failure is surprising because statements against penal interest are vitally important to the defense. Furthermore, in *Chambers* and *Washington v. Texas*, a case decided before publication of the Preliminary Draft, the Supreme Court announced constitutional doctrine of obvious relevance to the rule.

Finally, another constitutional problem crept into the rule when Congress, by imposing a corroboration requirement only on the defendant, created a difference between the Government's ability and the defendant's right to introduce a penal interest statement. As enacted, the rule also may create a constitutional problem if it allows the Government to introduce a related statement against the defendant but allows the defendant to introduce only a third-party statement that substitutes the declarant for the defendant in a one-person crime.

**IV. ANALYSIS OF RULE 804(b)(3)**

**A. WHEN IS A STATEMENT AGAINST INTEREST?**

1. Did the declarant make the "statement"?225

Before a court determines whether a declarant's statement is against his penal interest, the court must be satisfied that the declarant made the statement attributed to him.226 Alternatively, the court must trust that the

223. In a letter to Chief Justice Burger in defense of the Preliminary Draft, the Advisory Committee wrote:

[W]e may appreciate the fact that despite the efforts of the Committee to forestall them, constitutional issues may lurk in the Proposed Rules, but . . . this is no less so than as may be true of the other federal rules . . . . The Advisory Committee, greatly assisted by the scholars, has sought diligently to expose and to frustrate those possibilities. It is of the unanimous opinion that its proposals have constitutional integrity.

Letter from Albert E. Jenner, Jr., Chairman, Advisory Committee, to Chief Justice Burger, at 16 (Jan. 11, 1971) (on file at Judicial Conference). At the time Jenner wrote, the version of the penal interest exception in the Preliminary Draft was constitutional. The constitutional integrity of the rule became suspect only later, with the addition of a corroboration burden. Surprisingly, the Advisory and Standing Committees did not consider the constitutionality of adding the "simple corroboration" test and did not urge Congress to consider the constitutionality of the Subcommittee's higher corroboration requirement.

224. 388 U.S. 14 (1967). In *Washington* the Supreme Court held that a defendant was denied his due process and sixth amendment compulsory process rights when he was prevented from calling an accomplice to testify as a witness. *Id.* at 19.

225. A related problem is whether a third party made a "statement" in evidentiary terms so that his conduct or oral statement is hearsay within rule 801(a). See note 48 *supra* (discussing People v. Mendez, 193 Cal. 39, 223 P.2d 65 (1924)).

226. One aspect of this problem concerns the proponent's burden of proof. See notes 632-38 *infra* and accompanying text. A second aspect concerns whether a third party's failure to respond to an accusation
witness who testified about the statement truthfully reported both the existence of the declarant and the substance of his statement.227 This problem of proof is not serious if defense counsel either spoke to the declarant or participated in obtaining his statement.228 The relationship between the

constitutes a declaration. The defendant, for example, confronts the third party and says, "You did it, not me," and the third party does not respond. The legislative discussion of rule 804(b)(3) does not indicate whether the third party's silence constitutes an implied statement that he agrees with the defendant's comment. In considering the related problem of a party's failure to respond to such a comment, the Advisory Committee noted that inferring an admission from a failure to deny is "fairly weak" and raises "troublesome" questions. See Advisory Committee Note to Supreme Court Draft, supra note 1, at 279-98 (Note to rule 801(d)(2)(B); discussing admission by adoption or acquiescence in statement by another). The Advisory Committee concluded, however, that recent Supreme Court decisions relating to custodial interrogation and the right to counsel justified admitting into evidence a criminal prosecution a party's failure to respond to an accusation when one would have expected him to respond. Id. at 298.

This question has a constitutional dimension when a suspect who has received a Miranda warning fails to answer a police officer's accusation. Cf. Doyle v. Ohio, 426 U.S. 610, 619-20 (1976) (Government may not use defendant's silence at time of arrest to impeach subsequent exculpatory explanations). The constitutional problem, however, does not exist when the defendant offers the third party's silence. The third party is not on trial and the person speaking to the third party will rarely give him a Miranda warning. To introduce the third party's silence, then, the defendant must show that the accusation was made in the third party's presence, the third party heard and understood the accusation, the third party was physically and psychologically able to respond, and the accusation and surrounding circumstances naturally called for a reply. See Note, Tacit Criminal Admissions, 112 U. Pa. L. Rev. 210, 213-14 (1963) (listing conditions courts impose when defendant attempts to introduce evidence that admission occurred).

227. The Advisory Committee did not examine the separate problem that arises either when a witness (X) claims the declarant never made the statement that X is reported to have said the declarant made or when X invokes the privilege against self-incrimination and refuses to testify about the declarant's alleged statement. In each example, a second witness (Y) must then testify about what X purportedly said to Y. This situation involves double hearsay because it involves the truth of what the declarant allegedly told X and the truth of what X allegedly told Y. It is unlikely that X's alleged statement would be against his penal interest unless his statement included a damaging personal admission or it implied that X was a coconspirator or an accessory after the fact. Impeaching X's denial through Y's statement would not justify admitting X's statement for substantive purposes. Thus, a court would exclude it and the declarant's statement as well on evidentiary grounds. Cf. In re Weber, 11 Cal. 3d 703, 721-22, 523 P.2d 229, 240-42, 114 Cal. Rptr. 429, 441-42 (1974) (in bank) (witness' report of declarant's statement against penal interest even though against witness' social interest to report it because the witness would be "snitch"). But cf. People v. Marcus, 36 Cal. App. 3d 676, 679, 111 Cal. Rptr. 772, 774 (Cl. App. 1974) (police officer permitted to repeat statement by two witnesses that defendant confessed to them even though both denied having made statement). In contrast, if the declarant testifies that he did not speak as the witness reported, a court would allow the declarant to use the declarant's out-of-court statement to impeach the declarant, thereby bypassing the penal interest exception. Because the defendant carries no burden to disprove his guilt, he is less concerned than the Government with admitting the declarant's statement for substantive purposes. He simply wants the jury to learn of the declarant's statement. Nonetheless, the force of the exculpatory statement may be reduced if the declarant called by the Government as a witness, denied making the statement.

228. Defense counsel should record the declarant's statement whenever possible. Recording the statement eliminates questions about the accuracy of the witness' repetition and increases the likelihood that the declarant understands the significance of his statement. This strategy, however, might backfire if counsel becomes a witness to material evidence as a result of participating in obtaining the declarant's statement. See People v. Smith, 13 Cal. App. 3d 897, 905-08, 91 Cal. Rptr. 783, 791-94 (Cl. App. 1970) (proper to preclude defense counsel from testifying about declarant's statements when court told defendant before trial that counsel could not both testify and represent defendant); ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (mandating withdrawal as counsel when lawyer becomes witness with respect to substantive and contested matters). Because of this problem, counsel might ask his client to obtain the
witness and the defendant, however, sometimes gives the witness an incentive to misconstrue, overstate, or even fabricate the declarant's statement. Additionally, the declarant's statement may be made under unusual circumstances, may be terse, or may be reported by an inattentive witness. In these circumstances the Government may have difficulty using cross-examination to determine what the declarant intended by his statement or what he understood to be the effect of his statement.

Although the Department of Justice apparently was concerned with this problem, the Advisory Committee was not. The Committee thought that witness reliability problems are no more troublesome with penal interest statements than with other forms of hearsay. Because the witness is available for cross-examination, the Government may test his veracity, his relationship to the defendant, and his accuracy in reporting the statement.

The Advisory Committee's position did not satisfy all members of the House Subcommittee, several of whom worried that a witness who is a friend or a relative of the defendant might lie. The defendant, his friends, or his relatives clearly are not disinterested parties. Nonetheless, the self-interest of these sorts of witnesses should be obvious to the jury and subject to exploitation by the Government on cross-examination, particularly when the defendant, as a witness, limits his testimony to reporting the declarant's statement without denying his own culpability. By so restricting his statement. In United States v. Oropeza, 564 F.2d 316 (9th Cir. 1977), for example, counsel suggested that his client attempt to obtain a statement from the declarant. Conversation with counsel (May 8, 1979). If the defendant then must testify about the statement, however, counsel has eliminated the option of keeping the defendant off the stand. Counsel might attempt to block the Government’s cross-examination of the defendant by limiting direct examination to the substance of the declarant's statement. See Fed. R. Evid. 611 (cross-examination restricted to scope of direct examination). The jury, however, might wonder why the defendant failed to testify about his involvement. Additionally, the defendant might not know the proper questions to ask the declarant unless the defendant understands the intricacies of rule 804(b)(3).

229. See United States v. Guillette, 547 F.2d 743, 754-55 (2d Cir. 1976) (declarant made inculpatory statement while drinking with informant, whom he had just met, four months after crime; statement excluded because unreliable under circumstances), cert. denied, 434 U.S. 839 (1977).

230. See Reporter's Comments to Revised Draft, supra note 54, at 114a, 114e (Department of Justice objecting both to vagueness of penal interest exception and to objective test for determining whether declarant understood effect of statement). Professor Cleary believed that the Department of Justice's “real objection” to the penal exception was “directed to the quality of the witnesses who would testify to the making of such statements . . . .” Id. at 114d. Professor Cleary dismissed the Department of Justice's concern as “scarcely an acceptable ground” for deleting the penal interest exception. Id. The Department of Justice apparently feared that witnesses would fabricate statements, not that they would honestly err in reporting them. See id. at 114a (Department of Justice citing lack of safeguards for ensuring veracity of hearsay statements). The Department of Justice should have been more concerned about witnesses making honest errors in reporting statements. See J. Marshall, LAW AND PSYCHIATRY IN CONFLICT 8-40 (1968) (discussing problems of witness perception, recall, and articulation). This concern, however, does not warrant excluding the statement.

231. But cf. United States v. Hughes, 529 F.2d 838, 840-41 (5th Cir. 1976) (when defendant’s brother offered as witness to declarant's statement, testimony excluded because of sibling relationship and because defendant did not establish circumstances in which declarant supposedly made statement to brother).


233. Several members of the Advisory Committee expected that the defendant would need to testify about his noninvolvement to satisfy the “simple corroboration” test. See notes 103-09 supra and accompanying text (Advisory Committee concluded defendant's testimony with respect to innocence sufficient to corroborate declarant's statement). The Committee did not discuss whether the defendant
testimony, the defendant might preclude the Government from cross-examining him about his culpability. The jury should recognize that omission and react suspiciously despite the Government's inability to comment about the defendant's failure to announce his innocence.

A different problem arises if the witness is unable to describe or to identify a declarant whom he had never seen before and has not seen since the statement was made. Here, the defendant's problem in convincing a skeptical jury that the witness truthfully and accurately reported the existence of and statement by the declarant is as great as the Government's problem in cross-examining the witness. As long as defense counsel establishes the unavailability of the declarant through unsuccessful efforts to locate him, the court should not exclude the statement. Thus, both the existence of the declarant and the substance of his alleged statement should be issues of weight for the jury to assess rather than issues of admissibility for the court to decide. By failing to change the rule to require proof of the credibility of the witness as a condition of admissibility, Congress implicitly acquiesced in this conclusion.

Although Congress apparently rejected the requirement that a defendant establish the credibility of a witness who reports having heard a declarant make a statement against penal interest, at least one court of appeals has affirmed a trial court that excluded such a statement out of fear that the reporting witness had fabricated it. In United States v. Bagley the United States Court of Appeals for the Fifth Circuit held that in determining the trustworthiness of a statement against penal interest a trial court may consider evidence that indicates the declarant did not make the statement.

could corroborate the declarant's statement through testimony other than a denial of personal guilt. Also, the Committee did not determine how the defendant could corroborate the statement without testifying. In Professor Cleary's view, to require the defendant to testify would be dangerous because many defendants thereby would reveal their own complicity. Advisory Committee Meeting, Sept. 5, 1971. Thus, a defendant might have to choose between the evidentiary value of the statement and his right not to testify. Cf. United States v. Dovico, 261 F. Supp. 862 (S.D.N.Y. 1966) (defendant chose not to testify).

In Steadman v. United States, 358 A.2d 329 (D.C. 1976), for example, three witnesses heard a person admit to a shooting minutes after it occurred. Id. at 331. Although none of them had seen the declarant before or knew who he was, all three gave a similar description of him. The defense was unable to locate the declarant. Defense counsel thought the witnesses were truthful because, although two were friends of the defendant, the one who was not a friend of the defendant did not know the other two. Conversation with counsel (May 7, 1979). The District of Columbia Court of Appeals affirmed the trial court's exclusion of the statements. 358 A.2d at 332.

The defendant's problem is exacerbated when the declarant becomes "unavailable" by invoking the fifth amendment. See United States v. Thomas, 571 F.2d 285, 288 (5th Cir. 1978) (constructing unavailability requirement of rule 804(a)(1) to include assertion of fifth amendment privilege). The defendant may be unable to convince the jury that the declarant exists unless the defendant forces the declarant to invoke the fifth amendment before the jury, the court advises the jury that the declarant in fact exists but is unable to testify, or the defendant's corroborating information is admissible.

537 F.2d 162 (5th Cir. 1976), cert. denied, 429 U.S. 1075 (1977).
The court ruled that such evidence may include the character of the witness to the alleged statement, the relationship between the witness and the parties involved, and the witness’ demeanor while testifying. In reaching this conclusion, however, the court rendered a questionable interpretation of the legislative history of rule 804(b)(3). Moreover, the court ignored the constitutional problem implicated when a trial court passes on the credibility of a witness, an issue normally resolved by the jury.

164-65. Because Schropshire died prior to trial, Bagley sought to introduce the statements Schropshire made to Duke and the other inmates. Id. The trial court excluded the statement made to Duke and the statements made to the inmates about delivering valium because in the court’s view circumstances did not clearly reveal the trustworthiness of the statements. Id. at 165. The court of appeals decided that implicit in the trial court’s ruling was the finding that the inmates fabricated the statements allegedly made by Schropshire. Id. at 167. Under its reading of the legislative history of rule 804(b)(3) the court of appeals concluded that a court may pass on the credibility of a witness to a statement against penal interest and may exclude the statement when it believes the witness is lying about the statement ever having been made. Id. at 167-68. But see United States v. Atkins, 558 F.2d 133, 135-36 (3d Cir. 1977) (credibility of witness to statement against penal interest irrelevant), cert. denied, 434 U.S. 1071 (1978).

239. The court noted, for example, that “each of the critical defense witnesses was a prison inmate who had been convicted of a crime.” 537 F.2d at 167.

240. The court indicated that although Duke, one of the witnesses, was a friend of the declarant’s, he waited until after the declarant’s death to report the incriminating statement. In the court’s view, this delay detracted from the trustworthiness of the statement because Duke could testify without any danger of implicating his deceased cellmate, the declarant. Id. at 167.

241. Id. at 167-68. Thus, the court ruled that witness credibility is an important factor in determining whether the proffered statement is trustworthy. Id.

242. Although the court relied upon language in the Senate Report to the effect that statements tending to exculpate a defendant should have their admissibility conditioned upon further provisions ensuring trustworthiness, id. at 167, it ignored the conclusion of the House Committee Report that the rule should result in the admission of statements like the one that was excluded in Donnelly v. United States. HOUSE JUDICIARY REPORT, supra note 10, at 16, [1974] U.S. CODE CONG. & AD. NEWS at 7089-90. As will be demonstrated below, see notes 549-67 infra, one cannot make much of the Subcommittee’s rationale for indicating that the trial court should have admitted the statement in Donnelly. The only substantive support the Bagley court could muster was a comment by the Advisory Committee saying that the corroboration requirement of rule 804(b)(3) should be construed so as to achieve the purpose of circumventing fabrication. 537 F.2d at 167 (citing Advisory Committee Note to Supreme Court Draft, supra note 1, at 327). In a preceding discussion, however, the Advisory Committee noted that “an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake” to counterbalance suspicions of fabrication. Advisory Committee Note to Supreme Court Draft, supra note 1, at 327.

243. At least one other court has indicated that without a strong mandate from Congress a court may not pass on the credibility of a witness to a penal interest statement. See United States v. Satterfield, 572 F.2d 687, 691-92 (9th Cir.) (by passing judgement on credibility of witness, trial court may usurp traditional role of jury), cert. denied, 439 U.S. 840 (1978). In Satterfield at least two inmates were prepared to testify that during the course of an argument in prison another inmate, Merriweather, made statements exonerating his codefendant, Satterfield. Id. at 690. Because Merriweather refused to testify at Satterfield’s retrial, Satterfield sought to introduce the statements made to the two other inmates. In opposing the introduction of the testimony by these two witnesses, the Government introduced prison records indicating that the alleged argument never occurred and that the two witnesses had been segregated from Merriweather and Satterfield at the time of the alleged argument. Id. The trial court excluded the testimony by the witnesses. Id.

The United States Court of Appeals for the Ninth Circuit clearly was troubled with allowing the trial court to pass on the credibility of the witnesses and thus to usurp the power of the jury. Id. at 691-92. Additionally, the court noted that Washington v. Texas, 338 U.S. 14, 22-23 (1967), forbids a trial court from excluding the testimony of an accomplice on the ground that he may be likely to perjure himself. 572 F.2d at 692. The court concluded that the same may be true when the defendant seeks to introduce an out of court statement made by an accomplice who is unavailable at trial. Id. The court, however, did not
2. Was the statement "against penal interest"?

The Department of Justice vigorously objected that the penal interest "standard is so vague as to be unworkable" and claimed that it is "virtually impossible to determine whether an individual who makes a statement knows at the time of the declaration that the statement would subject him to . . . criminal liability." The Advisory Committee dismissed Justice's objection, saying "[i]t seems evident that less sophistication is demanded of the declarant in appraising his own utterance in the light of possible adverse [penal interest] effects . . . than is the case with pecuniary interests.

Although the Department of Justice's fears were exaggerated, the Advisory Committee did not anticipate the problems involved in determining when a statement is against penal interest. Part of the difficulty arises from the Advisory and Standing Committees' failure to explain the exception's relation to other legal doctrines, such as the "party admission rule" or the Government's constitutional obligation to disclose evidence.

recognize that by admitting the testimony it could satisfy constitutional requirements and ensure the Government an opportunity to test the credibility of the witness to the declaration. Cf. Dutton v. Evans, 400 U.S. 74, 87-89 (1970) (confrontation clause not violated when admission of witness to coconspirator's statement inculpating defendant conditioned on ability of defendant to cross-examine witness).

The Satterfield court noted that Bagley provides some support for allowing a court to assess the credibility of witnesses, and then stated rule 804(b)(3) might be read to "put the trustworthiness of the witness as well as the declarant in issue." 572 F.2d at 692. The court also found support in the Advisory Committee's comment that "[o]nly two instances in the decisions a distrust of evidence by third persons . . . arising from suspicions of fabrication either of the fact of the making of the confession or in its contents . . ." 572 F.2d at 692 (citing Advisory Committee Note to Supreme Court Draft, supra note 1, at 327) (emphasis in opinion). The court, however, misread the intent of the Committee, which offered the argument in order to reject it. See note 230 supra (discussing Committee's rejection of this concern).

Ultimately deciding that it did not have to resolve the constitutional issue, the Satterfield court ruled that even if Merriweather had made the statement, circumstances did not "clearly" corroborate the truth of the statement. 572 F.2d at 692. Thus, the court held that excluding the statement was not an abuse of the trial court's discretion. The effect of the court's ruling, however, is to allow the trial court to exclude testimony on the basis of possible fabrication, as long as the court is careful to cloak its objection in the language of rule 804(b)(3).

The House Subcommittee's change to rule 801(d)(1)(A) provides the slimmest circumstantial support for the court of appeals' belief in Satterfield that Congress was concerned with whether the declarant had spoken as reported. Rule 801(d)(1)(A) involves the substantive admissibility of a witness' out of court statements that are inconsistent with his testimony. The Supreme Court Draft provided that a witness' prior statement that was inconsistent with his trial testimony was admissible as substantive evidence rather than only as impeachment. Supreme Court Draft, supra note 1, at 293. The House Subcommittee changed the rule to admit as substantive evidence only those prior inconsistent statements that were made "under oath subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury," JUNE 28, 1973 PRINT, supra note 10, at 170. In its explanatory report, the Subcommittee explained: [U]nlike in other situations, there can be no dispute as to whether the prior statement was made [in the enumerated situations]." Id. at 171. During the Senate Judiciary Committee's hearings, the Advisory and Standing Committees objected that the House Subcommittee's explanation "appears to be based on the underlying assumption that in the case of prior inconsistent statements some factor is present that requires an extraordinary degree of assurance that the statement was in fact made." Senate Judiciary Hearings, supra note 52, at 66. If that "underlying assumption" did prompt the House Subcommittee to change rule 801(d)(1)(A), it may have also underlain the Subcommittee's decision to increase the corroboration requirement of the penal interest exception.

244. Justice's Second Letter, supra note 75, at 33,657.
245. Justice's Third Letter, supra note 130, at 48. The only example the Department of Justice cited was "unfounded boasting by [prison] inmates as to having committed successful or infamous crimes." Id.
246. Reporter's Comments to Revised Draft, supra note 54, at 114d.
247. See notes 373, 383 & 399 infra (discussing exception's relation to other legal doctrines).
More importantly, however, the Committees did not discuss the historic definitional controversy over when a statement is reliable enough to warrant its admission. In the absence of empirical information explaining why a declarant would damn himself, the common law commentators disagreed over whether a court should examine either the facts allegedly stated by the declarant or the statement itself and the context in which it was made. The first approach, supported by Dean Wigmore and Professor Morgan, would limit admissibility to statements whose facts are so compellingly against interest that no one would have uttered them unless they were true. This conclusion assumes that the declarant would neither deny that he had spoken nor dispute the accuracy of his statement. Thus, the evidentiary significance of the statement plays no part in analyzing its admissibility because the declarant would not demand a trial to determine his guilt. The second approach, supported by Professor Jefferson, focuses on the declarant’s understanding of the litigation significance of the statement: the probability that the statement would be disclosed; the likelihood of a resulting arrest and criminal prosecution; the number of criminal charges that would result from disclosure; and the certainty of conviction and severity of punishment were the declarant prosecuted. Implicit in this second approach is a greater willingness to admit a statement that the factfinder needs to reach an accurate

248. Compare 5 Wigmore, supra note 4, § 1462, at 337 (question whether statement of fact against interest beside mark; fact stated must be against interest) and Morgan, supra note 43, at 476 (common sense dictates that declarant’s knowledge that fact stated against interest controlling rather than knowledge that statement may be used as evidence against declarant) with Jefferson, supra note 35, at 8-17 (statement of fact must be against interest). In other words, the commentators disagreed over whether the court should focus solely on what the declarant said or whether it also should consider the circumstances surrounding the making of the statement.

Both tests are premised on the unverified psychological and empirical assumptions that a guilty person usually will remain silent to protect himself, even if his silence results in damage to an innocent person, and that if the declarant speaks, he must be speaking the truth. As one commentator has recognized, “it is easy to feel, to intuit with strange certainty, that most people ordinarily would not speak against themselves if the truth were favorable.” Jaffee, The Constitution and Proof by Dead or Unconfrontable Declarants, 33 Ark. L. Rev. 227, 362 (1979) (concluding that admission of penal interest statements may be less problematic than admission of dying declarations or certain other forms of hearsay). It is not clear, however, why Wigmore and Morgan limited admissibility to obviously self-damning accusations. Perhaps they thought that limiting the exception was a politically expedient way of driving an opening wedge into the common law courts’ uniform refusal to admit any type of penal interest statement. A declarant’s unequivocal confession of guilt represents the strongest example of the unfairness of excluding all penal interest statements. But instead, perhaps they distrusted the accuracy of the assumption underlying the argument in favor of recognizing a penal interest exception. The trustworthiness of even a clear self-condemnation occasionally is open to doubt. The declarant, for example, might be motivated to lie to protect another person or he might erroneously admit guilt for an unconscious reason. Cf. Hutchins and Slesinger, Some Observations on the Law of Evidence—Consciousness of Guilt, 77 U. Pa. L. Rev. 725, 736-40 (1929) (discussing difficulties with inferring consciousness of guilt from conduct). See generally J. Marshall, supra note 230, at 38. In the absence of psychological data explaining the motivation behind a statement against penal interest, courts generally should view an act of self-condemnation as sufficiently trustworthy to warrant its admission. Of course, this conclusion does not settle the dispute between Wigmore and Morgan on the one hand and Jefferson on the other because a declarant might lie or misperceive his own complicity either in writing a confession in his diary or by creating evidence that could be used against him.

249. See Morgan, supra note 43, at 457 (concluding declarant probably would not make statement with intent to deny it later). Morgan’s analysis led him to conclude that “[t]he disavowing quality of the fact must be so apparent and important that a reasonable man in the position of the declarant would not have made the declaration unless he believed it to be true.” Id. at 476.
and fair result even if the statement is not as trustworthy as the first approach would require.\textsuperscript{250}

The two approaches clearly would lead to different results in certain cases. Assume, for example, that a declarant writes in his diary that he killed the victim with whose murder the defendant is charged. Although secreted in a locked chest, the diary is discovered inadvertently by a thief. Under the more objective first approach, the statement would be against the declarant's penal interest because a court could infer that no one would write such a comment unless he believed it to be true. An examination of the declarant's state of mind would focus solely on his statement.\textsuperscript{251} That the declarant had no expectation that his diary would be discovered and that he might be prosecuted for having penned the note is irrelevant.\textsuperscript{252} Under the more subjective second approach, however, the statement might not be against the declarant's interest because the declarant had no reasonable expectation that someone would discover his diary. He did not intend to communicate his guilt to another person and in fact tried to prevent discovery. Because he had no reason to fear that his statement would expose him to arrest, prosecution, and conviction, a court would not consider his statement to be against his penal interest.\textsuperscript{253}

\textsuperscript{250} This second approach reflects an important shift away from the common law tradition of zealously guarding against the admission of hearsay and toward a balancing of need against trustworthiness. Compare State v. English, 201 N.C. 295, 299-300, 159 S.E. 318, 319-20 (1931) (need for law to proceed on general principles justifies apparent absurdity of excluding statement against penal interest) with Weinstein, Probative Force of Hearsay, 46 IOWA L. REV. 331, 338 (1961) (recommending rejection of class exceptions to hearsay rule and adoption of test that weighs probative force against possibility of prejudice).

\textsuperscript{251} A problem with this second approach is the judicial willingness to be inventive. Jefferson warns that by "devising ingenious theories of interest, courts have admitted statements which the declarants could not conceivably have believed against their interests." Jefferson, supra note 35, at 18. Jefferson's concern may hold true in civil litigation; in criminal cases, in contrast, courts consistently have excluded a defense-offered statement, concluding that it is not against penal interest \textit{ipse dixit}.

\textsuperscript{252} See Commonwealth v. Colon, 461 Pa. 577, 585, 337 A.2d 554, 558 (1975). In Colon the Pennsylvania Supreme Court ruled that the declarant's confession that he alone killed the victim was a statement against penal interest. \textit{Id.} The court affirmed the trial court's exclusion of the statement, however, because the fact stated—the defendant was not an accomplice—was not against the declarant's interest. \textit{Id.}

\textsuperscript{253} The source of this example is rule 509 of the Model Code of Evidence:

\begin{quote}
The theory is that a declarant would not concede even to himself the existence of a matter contrary to his interest unless he believed it to be true. Hence, such a statement, found in a secret diary which the writer believed would never be seen by another, is quite as admissible in evidence as one made to a multitude.
\end{quote}

\textsuperscript{254} For a second example of how these approaches would lead to different results, consider a declarant sending a signed confession of murder to the police immediately before he commits suicide. If the court focuses on the facts stated in the note, the court would admit the statement. If the court, however, focuses on the litigation significance of the statement, it would not admit the statement because the declarant did not expect that it would be used against him. Compare State v. Gold, 27 CRIM. L. RPRTR. 2261, 2262 (Conn., May 15, 1980) (admitting confession of declarant who subsequently committed suicide) and Brennan v. State, 151 Md. 265, 270-73, 134 A. 148, 150-51 (1926) (same) with Jefferson, supra note 35, at 41-42 (criticizing Brennan result because declarant intending suicide would not expect statement to lead to prosecution, conviction, and sentence). Moreover, the result under the second approach would not differ if the declarant survived his suicide attempt.

As a third example, consider the effect of a defendant attempting to introduce a privileged
A comparison of the admissibility of a party admission with the admissibility of a nonparty statement against penal interest makes the difference between the two approaches clearer. As Wigmore recognized, the two hearsay exceptions are different. A party's statement can qualify as an admission even if not disserving when made. In fact, the party may have intended or expected that his statement would be self-serving, or he may recognize the disserving effect of the statement only later upon learning of other information. The trustworthiness of a statement against interest, however, is premised upon the declarant's recognizing the disserving nature of his statement at the time he made it. Moreover, a hearsay statement is inadmissible primarily because no opportunity existed to cross-examine the declarant at the time he made the statement. The party declarant can explain his out-of-court statement by testifying. In contrast, the declarant of a penal interest statement must be unavailable to testify at trial as a condition of the exception; no opportunity therefore exists to cross-examine him.

Despite the differences between the party admission doctrine and the penal interest exception, the two exceptions are not mutually exclusive. Indeed, the second approach assumes that they overlap. By evaluating whether a statement might result in arrest, prosecution, and conviction, the second approach equates the two doctrines as long as the penal interest statement constituted an admission at the time the declarant spoke. This equation might prove enormously valuable to the defendant, who then could introduce either a statement in the form of an opinion whose disserving effect became clear to others only later or a seemingly neutral statement whose disserving effect became clear when understood in context. Both statements can qualify as party admissions.

In one sense, the distinction between these two approaches to "against interest" may be more apparent than real. Did the advocates of the second communication between the declarant and his attorney. Under the first approach, a confession would qualify as a statement against penal interest even if the declarant did not anticipate that his attorney would report his confession. Under the second approach, however, the statement would not be against interest as long as the declarant reasonably believed either that the lawyer would not report the statement or that the declarant could block its use against him if it were reported. See generally Bloom, The Law Office Search: An Emerging Problem and Some Suggested Solutions, 69 Geo. L.J. 1, 20-24 (1980). This result is questionable, however, if the particular privilege involved is not one that the declarant generally would recognize.

As a fourth example, assume a declarant said, "I had a .38 calibre revolver." A court might admit the statement under the second, but not the first, approach. If the declarant knew that the police found a .38 calibre revolver at the scene of the murder, he might reasonably fear that they would dust the revolver in hope of discovering his fingerprints. The police would not otherwise make a fingerprint comparison in the absence of information linking the declarant to the crime. On the other hand, the fact contained in the statement standing alone is not so clearly against the declarant's penal interest that a court would admit it under the first approach.

254. 5 WIGMORE, supra note 4, § 1475, at 348-49. Wigmore distinguished the two doctrines, possibly out of a fear that equating the two would lead to a further restriction of the admissibility of party admissions by adding the penal interest exception's requirement that the declarant be unavailable. See id. at 348 (statement by party opponent not deemed trustworthy for same reason as fact against interest; otherwise, party opponent would have to be unavailable before statement could be admitted).

255. This distinction explains why the Federal Rules of Evidence treat party admissions as nonhearsay rather than as an exception to the hearsay rule. See FED. R. EVID. 801(d)(2)(A) (admission by party opponent not hearsay). It also explains why a statement is admissible even if the party spoke without firsthand knowledge, normally a requirement for a hearsay exception to apply. See Advisory Committee Note to Supreme Court Draft, supra note 1, at 303 (stating that first-hand knowledge required when declarant testifies).
approach, for example, intend to reject the first approach or did they intend to supplement the first approach with the second approach instead?256 If they intended that the second approach should supplement the first approach, a court should admit a statement when the facts stated are confessional or, when taken in context, the statement’s effect would imperil the declarant.257

The Advisory and Standing Committees did not discuss the merits of either of the two historic approaches to analyzing statements against interest.258 This failure would not be regrettable had either Committee analyzed the admissibility of the sorts of statements that a defendant might offer. Unfortunately, neither the Committees nor the other major participants in the formulation of rule 804(b)(3) discussed the admissibility of such statements, whether in the form of an opinion (“The defendant is not guilty”), a related or collateral statement (such as the second clause in “I did it; the defendant did not”), or admissions whose relevance depends upon an inference (“I owned a .38 caliber revolver at the time the victim was murdered”).

The penal interest test also is difficult to interpret because the Advisory and Standing Committees failed to define certain words in the rule that are

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256. Jefferson criticizes the introduction of a confession by a dying declarant on the ground that the declarant would not anticipate that the statement could be used against him. Jefferson, supra note 35, at 56. Thus, Jefferson may not have intended that the second approach supplement the first approach. Under Wigmore’s analysis, however, such a statement probably would be admissible. In a related context, Professor McCormick simply concludes that a statement is admissible if it “state[s] facts which are against the pecuniary or proprietary interest of the declarant, or [if it] making... create[s] evidence which would endanger his pocketbook if the statement were not true.” McCormick, supra note 4, § 276, at 670 (footnote omitted). His explanation overlooks the historical disagreement between Wigmore and Morgan on the one hand and Jefferson on the other.

On occasion, courts apparently have required that the statement satisfy both approaches—that the statement both consist of “facts” and that it have evidentiary significance. See Demeter v. The Queen, 75 D.L.R.3d 251, 255-56 (Can. 1977) (ruling that fact stated must be against interest and declarant must apprehend vulnerability to penal consequences as result); cf. In re Weber, 11 Cal. 3d 703, 720-22, 523 P.2d 229, 240-42, 114 Cal. Rptr. 429, 440-42 (1974) (in bank) (ruling that for statement to be against declarant’s social interest both content of statement and fact statement made must be against interest). See generally Ziff, Statements Against Penal Interest: A New Exception to the Hearsay Rule in Canada, 11 OTTAWA L. REV. 163 (1979) (discussing Demeter and subsequent cases).

257. One commentator described those state cases in which a penal interest statement was admitted as lying along a continuum between the demand for special circumstances establishing the trustworthiness of the statement, on the one hand, and the demand for special circumstances justifying the importance of admitting the statement on the other. Note, What Must Be Corroborated, supra note 40, at 429. In terms of the Federal Rules of Evidence, these two considerations would equate the penal interest exception test with the test for admission of hearsay statements under the “catch-all” provisions of rules 803(24) and 804(b)(5). See FED. R. EVID. 803(24) (allowing for introduction of hearsay having circumstantial guarantees of trustworthiness equivalent to listed class exceptions upon, inter alia, showing of inability to procure equally probative evidence through reasonable efforts); FED. R. EVID. 804(b)(5) (same). Under rule 804(b)(3), however, the defendant is not required to establish his need to introduce the statement, even though in every case he could argue convincingly that the statement was important to his defense, his degree of culpability, or his sanction. See United States v. Thomas, 571 F.2d 285, 289-90 (9th Cir. 1978) (admitting statement that if true would exonerate defendant). See also notes 815-18 infra and accompanying text.

258. The Advisory Committee’s occasional citation to Dean Wigmore’s treatise should not be viewed as an indication of agreement with the objective approach that Wigmore advanced. A comment by Professor Cleary in a memorandum to the Advisory Committee may be the only point when the Committee discussed this question. Professor Cleary wrote: “Another manifestation of breaking away from the narrowness of the common law rule is the recognition that exposure to criminal liability is sufficiently against interest to satisfy the requirements of the exception.” Memorandum No. 19, supra note 52, at 290. The word “exposure” suggests that Cleary advocated the second approach.
susceptible to different or mutually inconsistent interpretations. For example, does the word "subject" in the rule’s first sentence mean something different from the word "expose" in the rule’s second sentence? What, for that matter, does “tended to” mean in the rule’s first sentence? Also, does the word "exculpate" in the rule’s second sentence restrict the "so far tended to subject" language of the first sentence or does it simply indicate that the corroboration requirement applies only when the criminal defendant offers the statement?

The Advisory and Standing Committees’ failure to provide interpretive guidelines underscores one commentator’s conclusion that any analysis of a penal interest statement is “difficult and subtle at best.” The legislative history of the rule provides no explanation of when a statement is against penal interest. The House Subcommittee (and, presumably, the Congress) seems to have assumed that the first sentence of the rule tracked the common law treatment of penal interest statements and that the sentence posed no questions for the Subcommittee to consider. Had the Subcommittee perceived that the first sentence apparently defines penal interest more generously to the defendant than any common law court probably had done, it would have recognized the fallacy of its assumption. Although the internal memoranda and discussions of the Advisory and Standing Committees provide clues for interpreting rule 804(b)(3), no clear answer emerges from that evidence. As a result, the federal courts of appeals have split over the proper analysis of penal interest.

The Judicial Divergence. United States v. Oropeza260 and United States v. Barrett261 represent different approaches to the admissibility of a statement that exonerates the accused without explicitly implicating the declarant. In Oropeza, the Government charged Oropeza, Minton, and Heinze with conspiring to distribute heroin, and Minton with possession of a firearm. While in jail, defendant Heinze wrote a statement exonerating Minton of both participating in the drug sale and possessing the gun.263 The United States

259. J. SCHMERTZ, FEDERAL EVIDENCE NEWS 79-84 (1979). In commenting about the common law treatment of declarations against interest, Morgan stated the point more bluntly:

[R]arely in the application of a rule of law can be found such a conglomerate of inconsistencies, such flat contradictions in the facts of the very basis of the rule declared to be applied. It is utterly useless to attempt to harmonize the decisions or even to understand the intellectual processes of the writers of many of the opinions.

Morgan, supra note 43, at 476.

260. 564 F.2d 316 (9th Cir.), cert. denied, 434 U.S. 1080 (1977).
261. 539 F.2d 244 (1st Cir. 1976).
262. 564 F.2d at 320. Defendants Minton and Heinze were in Heinze’s van when the police arrested both of them. The police found the gun under a blanket near the spot where Minton was lying at the time of the arrest. Id.
263. Id. at 325. Heinze wrote in part:

I wish to make it clear that [Minton] had no idea of the transaction that took place . . . . I wish to make it clear that the gun was owned by me, George Heinze. It was never in Mr. Minton’s possession . . . . Also like to make it clear the charge of conspiracy Mr. Minton again is innocent [sic].

Id. at 325 n.9. Minton’s defense attorney believes that he gave the defendant the stationery on which Heinze wrote the statement. Conversation with counsel (May 22, 1979).
Court of Appeals for the Ninth Circuit affirmed the trial court's refusal to allow Minton to introduce the statement, holding that "Heinze's statement was merely a general assertion of Minton's innocence rather than an assertion of his own culpability. There was nothing in the statement that would necessarily subject Heinze to criminal liability."264 The court of appeals did not grapple with the meaning of the "tended to subject . . . tending to expose" language in the rule, but rather adopted Senator McClellan's position that a statement is admissible under rule 804(b)(3) only when it substitutes the declarant for the defendant. The court also did not discuss whether the evidentiary consequences of Heinze's statement were significant in analyzing rule 804(b)(3).265 Furthermore, in deciding whether the statement appeared trustworthy, the court did not consider that Heinze wrote the statement in the presence of four people,266 pleaded guilty to thirteen criminal counts after writing the statement but before Minton had been tried, did not appeal his conviction, and never contested the truthfulness of the statement.267

In contrast to the Ninth Circuit in Oropeza, the United States Court of Appeals for the First Circuit rendered a generous interpretation of the penal interest test in United States v. Barrett.268 Of eight defendants charged with conspiracy and the transportation and disposal of stolen postage stamps, Barrett alone went to trial.269 In defense, Barrett sought to introduce the testimony of a witness to a conversation with Ben Tilley, an alleged participant in the crime who had died by the date of Barrett's trial.270 Tilley reportedly stated to the witness that he was having trouble with the "stamp theft or matter" and that Barrett was not involved.271 The court of appeals disagreed with the district court's belief that an exculpatory statement is admissible only when the defendant's innocence is "prejudicial" to the declarant.272 In the court of appeals' view, Tilley's statement about the stamp

264. 564 F.2d at 325. With respect to the gun charge, the court of appeals explained that Heinze admitted ownership but not possession of the gun and that nothing in the record indicated that ownership of the gun was a crime. Id. at 325 n.10. Even if valid, this distinction assumes a sophistication most criminals lack. In addition to ruling against Minton on the ground that Heinze's statement was not against his penal interest, the court also stated that corroborating circumstances did not exist and that Heinze's "unavailability was questionable." Id. at 325.

265. If the court of appeals had used the second approach for determining when a statement is against interest, it would have discussed whether the statement would have been admissible against Heinze. If the statement had evidentiary value, the court should have admitted the statement.


267. 564 F.2d at 319. The United States Court of Appeals for the Ninth Circuit similarly adhered to a strict interpretation of "against interest" in United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978). In Hoyos the police charged the appellant and Castro with selling narcotics. Id. at 1113. Before pleading guilty, Castro told his wife that Hoyos had nothing to do with the crime. Id. Hoyos sought to introduce the testimony of Castro's wife. Id. The court of appeals upheld the trial court's exclusion of the wife's testimony in part because Castro's statement consisted "largely of matter that is exculpatory of Hoyos but not significantly inculpatory of the defendant Castro." Id. at 1115. Hoyos also failed in attempting to introduce the wife's testimony under the residual hearsay exception of rule 804(b)(5). Id. at 1115-16.

268. 539 F.2d at 244 (1st Cir. 1976).

269. Id. at 245. Two of Barrett's codefendants pleaded guilty and testified against him. The prosecutor dropped charges against the other five defendants. Id. at 245 n.2.

270. Id. at 246, 249.

271. Id. at 249. Tilley allegedly said that he and "Buzzy" were going to have trouble because of the "stamp theft or matter." The witness, Melvin, inquired whether Tilley meant Bucky Barrett or Buzzy Adams, to which Tilley replied, "No, Bucky [Barrett] wasn't involved. It was Buzzy." Id. (brackets in original).

272. Id. at 250. The district court excluded the testimony because it was not offered to "prove anything
theft was against his penal interest because it suggested that he had participated in the crime. Moreover, the against-interest nature of the statement about the theft gave sufficient credence to the collateral statement exonerating Barrett that it constituted an integral part of the entire statement and satisfied the penal interest requirement of rule 804(b)(3).

In United States v. Pena and United States v. Toney two courts of appeals split over the correct approach for determining the admissibility of a statement whose relevance depends upon an inference. In Pena the United States Court of Appeals for the Fifth Circuit affirmed the district court's exclusion of an informant's statement that, under one plausible interpretation, was against his penal interest. Convicted of arranging a drug sale to a Government agent, Pena admitted that he had received money from the agent and had given it to Rubio, an informant. Pena, however, claimed that at that time he did not know he was participating in a drug sale. Rather, he thought that he was merely passing on reward money from the agent to Rubio. Pena argued that Rubio had framed him. To support his somewhat strained theory, Pena called a witness to testify that Rubio admitted receiving the money from Pena. Pena claimed the admission was against Rubio's penal interest because it suggested that Rubio had embezzled the money from the Government. Although troubled by Pena's argument, the court of appeals concluded that other equally plausible explanations of Rubio's action indicated that Rubio's statement was not against penal

prejudicial to the alleged maker of the statement but to prove that [Buzzy] rather than [Bucky] did it." Id. Under the district court's approach a court may admit a statement only if it substitutes the declarant for the defendant. Id. at 252. The court of appeals, however, did not "understand the hearsay exception [for penal interest statements] to be limited to direct confessions." Id. at 251.

273. Id. The court felt that Tilley's statement about having trouble with the "stamp theft or matter" would have been "important evidence against Tilley were he himself on trial for the stamp crimes." Id. Moreover, Tilley's having made the statement to acquaintances during a card game did not justify inferring that he did not recognize the disserving effect of his statement. Id. at 251-52.

274. Id. at 252-53. Although Tilley's exoneration of Barrett was not by itself against Tilley's interest, the court of appeals thought the collateral statement was admissible because it "fortified the [against-interest] statement's disserving aspects" and strengthened the impression that Tilley had an insider's knowledge of the crime. Id. at 252. Nonetheless, the court did not conclude that Tilley's statement was admissible. The district court had not determined whether the corroboration requirement of rule 804(b)(3) had been satisfied because of its ruling on the against interest test. The court of appeals reversed on a separate ground and instructed the district court to consider the corroboration issue on retrial. Id. at 253.

275. 527 F.2d 1356 (5th Cir.), cert. denied, 426 U.S. 949 (1976).
276. 599 F.2d 787 (6th Cir. 1979).
277. 527 F.2d at 1361-62. The court of appeals indicated that other possible interpretations of the declarant's statement were inconsistent with the declarant's culpability. Id. at 1361.
278. Id. at 1359-60.
279. Id. at 1359. The Government agent testified that in exchange for the money Pena tendered two packages containing heroin. Pena testified that he merely received money from the agent. Id.
280. Id. Pena claimed that Rubio was motivated by the mistaken belief that Pena had killed Rubio's brother. Id.
281. Id. at 1360. The witness testified that Rubio admitted both setting Pena up for revenge and receiving the money from Pena. Id.
282. Id. at 1361.
interest. In the court of appeals' view, Rubio's statement was "neither a confession nor a clear inculpatory remark." In United States v. Toney the United States Court of Appeals for the Sixth Circuit reversed a conviction because the trial court excluded a statement that inferentially exonerated the defendant. At Toney's trial for bank robbery, the prosecutor established that Toney possessed seventy dollars of "bait money." Toney admitted to the police that he planned the robbery but claimed that he withdrew from the crime and that King took his place. Toney claimed he obtained the bait money during the course of a dice game in which King participated. In an out of court statement, King confirmed that he gambled with Toney, that both had large sums of money at stake, and that both won substantial amounts. At Toney's trial the court excluded King's hearsay statement. The Sixth Circuit reversed Toney's conviction, finding that King's statement was against his penal interest because he admitted both participating in an illegal dice game and possessing a large sum of money immediately after the robbery.

The Oropeza and Barrett courts divided over the issue whether a declarant's statement exonerating the defendant in a multi-person crime is against the declarant's penal interest. Oropeza seems to require that the statement substitute the declarant for the defendant before a court may admit the statement. Barrett, on the other hand, indicates that a statement that indirectly implicates the declarant while exonerating the defendant satisfies the penal interest test. In both Pena and Toney the declarant did not explicitly exonerate the defendant, but instead provided support for the defense. Although the effect of the declarant's statement was sufficient for the Toney

283. The court of appeals suggested that "to complete his job as informant-participant Rubio may have delivered the payment to the ultimate supplier of the heroin or he may have returned it to [the Government agent]." Id. at 1361-62. The court also thought that Rubio's admitting to a desire to set Pena up was not against Rubio's penal interest as long as he was discharging his proper role as informant. Id. at 1361.

284. Id. at 1362. The defense did not develop an adequate record of either Rubio's statement or its penal interest effect. See id. at 1361 (Pena's interpretation of Rubio's statement not justified by "scanty tender shown by the record"). Pena stands as a lesson to defense counsel to make the most complete offer of proof possible.

285. 599 F.2d 787 (6th Cir. 1979).

286. Id. at 790.

287. Id. at 788. None of the eyewitnesses to the robbery could identify the three robbers allegedly involved, but the witnesses agreed that Toney matched the physical build of one of the robbers. Id.

288. Id. King, arrested several days after Toney, also matched the description of one of the robbers. Id. at 788-89.

289. Id. at 789.

290. Id. Exercising his fifth amendment privilege, King refused to testify at Toney's trial. Id.

291. Id. at 790. Although King's participation in the dice game by itself did not link King to the robbery, his possession of a large sum of money suggested that King's initial stake in the dice game came out of the stolen money. King's gambling admission, however, added weight to Toney's claim that King committed the crime. Similarly, in People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970), the defendant claimed that he shot the victim in self-defense because the victim had a gun. Id. at 90, 257 N.E.2d at 1, 308 N.Y.S.2d at 826. The Government's evidence, however, indicated the victim was unarmed. A declarant later confessed that he picked up the victim's gun immediately after the defendant shot the victim. Id. at 90, 257 N.E.2d at 17, 308 N.Y.S.2d at 826. Apparently, the declarant later used this gun to commit an unrelated robbery. Id. at 93, 257 N.E.2d at 18, 308 N.Y.S.2d at 828. The New York Court of Appeals thought the declarant's statement was against his penal interest and that the trial court should have admitted it because it supported the defendant's case. Id. at 94, 257 N.E.2d at 19, 308 N.Y.S.2d at 829.
court, it did not satisfy the Pena court. Thus, the approach of the courts of appeals in Oropeza and Pena is much more restrictive than that of the courts of appeals in Barrett and Toney.\footnote{292}

The Advisory and Standing Committees’ Position. Under rule 804 of the Preliminary Draft, a court would admit the hearsay statement of an unavailable declarant as long as the “nature and the special circumstances under which it was made offer strong assurances of accuracy . . . .”\footnote{293} That version of the rule simply focused on the reliability of the statement without directing the court to analyze reliability in any particular way. However, when the illustrations to rule 804 became the exceptions to that rule in the Revised Draft, the precise language of rule 804(b)(3) became important.

Several clues suggest the Advisory Committee intended a court to admit a statement if the declarant’s words clearly were dissembling or if the statement might jeopardize the declarant, thereby adopting both historical approaches for defining “against interest.” These clues involve differences between the language of rule 804(b)(3) and that of rule 509(1) of the Model Code of Evidence\footnote{294} and rule 63(10) of the Uniform Rules of Evidence.\footnote{295}

The first clue is the use of the word “statement” in the first sentence of rule 804(b)(3). Rule 509(1) of the Model Code permits the introduction of a “declaration” if the “fact asserted in the declaration” is against the declarant’s penal interest.\footnote{296} The phrase “fact asserted” is a short-hand way of expressing the first approach to analyzing penal interest statements. Professor Morgan, the reporter for the Model Code of Evidence, argued for the first approach and undoubtedly chose the phrase “fact asserted” so that courts would focus on the words spoken by the declarant rather than on the litigation effect of the statement.\footnote{297} In contrast, the word “statement” indicates courts should focus on the litigation effect of the declarant’s statement.\footnote{298} Professor Cleary must have been aware of the historical debate between Morgan and Wigmore on the one hand and Jefferson on the other. Moreover, Professor Cleary stated that Uniform Rule 63(10),\footnote{299} which also uses the word “statement” rather than the phrase “fact asserted,” was the model for rule 804(b)(3).\footnote{300} The Advisory Committee’s adoption of the word

\footnote{292. The Supreme Court’s use of the penal interest exception also contrasts sharply with that of Oropeza and Pena. See notes 418-41 infra and accompanying text (discussing the Supreme Court’s decisions in Matlock, Harris, and Dutton).
\footnote{293. Advisory Committee Note to Preliminary Draft, supra note 1, at 377.
\footnote{294. MODEL CODE OF EVIDENCE rule 509 (1) (1942).
\footnote{295. UNIFORM RULE OF EVIDENCE 63(10) (superseded 1975), and MODEL CODE OF EVIDENCE rule 509(1) (1942) were earlier codifications of the penal interest exception to hearsay.
\footnote{296. MODEL CODE OF EVIDENCE rule 509(1) (1942).
\footnote{297. The comment to rule 509 makes this point clear: “The theory of the Rule . . . is not that the declarant is making evidence against himself. . . . [I]t is the matter declared which must have [an against-interest] quality.” Id. rule 509, Comment c. See also Morgan, supra note 43, at 476 (exception rests on theory that person will not concede existence of fact that will cause him substantial harm unless he believes fact exists). Wigmore similarly argued that a court should focus on the fact stated, not the statement. 5 WIGMORE, supra note 4, § 1462, at 337.
\footnote{298. See Jefferson, supra note 35, at 13 (“statement” focuses on litigation effect of declarations against interest).
\footnote{299. UNIFORM RULE OF EVIDENCE 63(10) (superseded 1975).
\footnote{300. Memorandum No. 19, supra note 52, at 289.}
“statement” rather than the phrase “fact asserted” by itself does not justify the conclusion that rule 804(b)(3) is more liberal than rule 509(1).301

A second clue more clearly distinguishes rule 804(b)(3) from rules 509(1) and 63(10). Rule 804(b)(3) provides that a “statement” is admissible if it “so far tended to subject the declarant to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.”302 Rule 509(1), however, substitutes the phrase “so far subjected” for the “tended to subject” language of rule 804(b)(3).303 Thus, rule 804(b)(3) creates a lesser burden for the defendant to overcome than does rule 509(1).304

The Advisory Committee was willing to lower the against interest standard because the Committee addressed the fundamental question of declarant availability differently than had the drafters of rules 509(1) and 63(10). Neither of those rules conditioned the admissibility of the declarant’s statement on his inability to testify.305 Apparently, the drafters of rule 509(1)

adopts the test . . . that the facts of the statement be against interest, rather than that the making of the statement be against interest. This means that the declarant need not have a conscious understanding that he is creating adverse evidence by making the statement because of the likelihood that a third person will see or overhear the declaration. Instead, veracity is guaranteed by the fact that a declarant would not admit the existence of such fact privately unless it were true.

301. The reason is the use of the word “statement” in rule 63(10), a word that is unfortunately not explained in the comment to that rule. See UNIFORM RULE OF EVIDENCE 63(10), Comment (superseded 1975). The comment, which is singularly unhelpful in resolving any of the difficult interpretive issues concerning the penal interest exception, indicates that the drafters made “[n]o attempt . . . to lay down a

guide, as does the Model Code, for the determination of what portions of a statement containing declarations against interest, are admissible.” Id. Nonetheless, one commentator has argued that the drafters intended “statement” to express the same focus as did the phrase “fact asserted” in rule 509(1). See Hetland, Admissions in the Uniform Rules: Are They Necessary? 46 IOWA L. REV. 307, 322 (1961). Hetland contends that Model Rule 63(10)

Id. (footnote omitted). If Hetland is correct, the Advisory Committee’s adoption of the language used in rule 63(10) is not significant.

302. FED. R. EVID. 804(b)(3) (emphasis added).

303. MODEL CODE OF EVIDENCE rule 509(1) (1942) (emphasis added).

304. Both Rule 401 and the Judicial Conference’s general approach to hearsay provide further support for the conclusion that the Advisory Committee set a lower “penal interest” test than had the Model Code and the Uniform Rules of Evidence. Rule 401 defines relevant evidence as that evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. Thus, evidence is relevant if its introduction changes in any way the probabilities of the fact to be proven. The “so far tended
to” language of rule 804(b)(3) demands an unspecified but greater shift in the probability that the defendant is or is not guilty. Although the language of rule 804(b)(3) is vague, the use of the word “tend” in both rule 804(b)(3) and rule 401 suggests the Advisory Committee would allow a lesser showing of against penal interest than would the drafters of the Model Code and the Uniform Rules.

Moreover, the Advisory and Standing Committees were less worried about the introduction of hearsay than was the House Subcommittee. See Senate Judiciary Hearings, supra note 118, at 212 (testimony of Albert E. Jenner, Jr., Chairman of the Advisory Committee) (arguing that although juries probably unable to determine when statement is hearsay, juries can adequately evaluate credit and weight of hearsay evidence).

305. See MODEL CODE OF EVIDENCE rule 509, Comment c (1942) (unavailability of declarant not required); UNIFORM RULE OF EVIDENCE 63(10), Comment (superseded 1975) (statement admissible even though declarant available as witness). But cf. State v. Sease, 138 N.J. Super. 80, 83, 350 A.2d 262, 264 (Super. Ct. App. Div. 1975) (per curiam) (affirming exclusion of statement under rule 63(10) and stating defendant could have called declarant to stand).
thought the requirement that the statement consist of expressly disserving facts as well as the application of an objective test ensured that a statement would possess "as much trustworthiness as one made by the declarant on the witness stand..." In the view of these drafters, this conclusion obviated the need for an unavailability requirement.

The Advisory Committee relaxed the penal interest test because rule 804(b)(3) conditioned admissibility on the declarant's unavailability. Professor Cleary explained: "The Reporter is of the view that a greater amount of needed evidence would be admitted by a combination of unavailability plus relaxation of against-interest concepts than by no unavailability requirement but a strict approach to what is against interest." This explanation appears paradoxical: If against-interest statements are not as trustworthy as the other sorts of hearsay admissible under rule 803's exceptions, the declarant's unavailability to testify might exacerbate the problem of reliability. If, on the other hand, against-interest statements are important to both the proponent and the factfinder, Professor Cleary's explanation is defensible. By requiring the proponent to call the declarant as a witness whenever possible the Advisory Committee chose a different way of restricting admissibility than had the drafters of rules 509(1) and 63(10).


307. Id. rule 509, Comment c (rule requires test of belief of reasonable man in position of declarant).

308. Id. Thus, the statement would have to be as trustworthy as the declarant's testimony would be if elicited by direct examination and subjected to cross-examination. This explains why rule 509(1) demanded the statement consist of express disserving facts.

309. The comment to rule 63(10) does not indicate why the drafters decided to eliminate the unavailability requirement. Moreover, rule 63(10), unlike rule 509(1), does not require that a statement have "testimonial qualifications." Hetland, supra note 301, at 321. The term "testimonial qualifications" refers to the Model Code's distinction between a hearsay statement and a hearsay declaration. The Code defines a hearsay declaration as a "hearsay statement which would be admissible were the declarant present and making it as a part of his testimony and which does not involve other hearsay..." Model Code of Evidence rule 501, Comment a (1942) (emphasis added). By categorizing against-interest statements as "declarations against interest," Model Code of Evidence rule 509(1) (1942), the drafters apparently intended that courts should strictly scrutinize such statements to ensure they possess testimonial qualifications and that they should exclude a purported penal interest expression in the form of an opinion or whose disserving nature turned on an inference. This strict approach explains why rule 509(1) focuses on the "facts asserted" by the declarant rather than on the litigation effect of his statement.

310. Memorandum No. 19, supra note 52, at 293. Professor Cleary further explained:

It is true that unavailability adds nothing to the trustworthiness of the hearsay statement. Nevertheless, if unavailability is not continued as a requirement, declarations against interest would have to be moved out of the category of the present rule, i.e., concededly inferior evidence admitted in preference to no evidence, and transposed into the category embraced in proposed Rule [803], i.e. evidence as good as if given by [the] declarant on the stand. This might be completely justifiable in some situations, but in many the against-interest motivation would seem scarcely to be that compelling.

311. Professor Cleary's analysis is similar to Justice Harlan's original explanation of the protection the confrontation clause affords a defendant. That clause, Justice Harlan explained, is "confined to an availability rule, one that requires production of a witness when he is available to testify." California v. Green, 399 U.S. 149, 182 (1969) (Harlan, J., concurring). Although Justice Harlan repudiated that explanation in Dutton v. Evans, 400 U.S. 74, 94-95, 96-97 (1970) (Harlan, J., concurring), at least one commentator has advanced his earlier position as the proper approach. See Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185, 1187 (1979) (future of confrontation analysis lies in direction of Harlan's Green concurrence) [hereinafter Westen, Future of Confrontation].
Although the Advisory Committee adopted a more liberal interpretation of "against penal interest," it failed to explain this interpretation publicly. Moreover, the Committee did not publicize its rebuff of Senator McClellan, the only critic of the rule who apparently sensed the implication of the "so far tended to subject" language. Senator McClellan urged that the Committee redraft the rule to provide "some requirement of directness and immediateness. . . . [The rule's] rationale is supportable to the degree that [the] statement is directly and immediately against interest, and conversely, unsupportable to the degree that the statement is merely indirectly or only remotely against a declarant's interest." Although Senator McClellan neither explained his objections nor illustrated them with examples, he undoubtedly wanted admissibility limited to "explicit and unequivocal confessions." During the Advisory Committee's meeting on September 5, 1971, however, Professor Cleary dismissed the Senator's request as "pretty nebulous."

Apparently, only Senator McClellan noticed the important change hidden in the Advisory Committee's choice of language. Although critical of the rule, the Department of Justice overlooked the phrase "tended to subject." The House Subcommittee assumed that the first sentence of the rule simply restated the common law and that the "simple corroboration" test in the second sentence of the Supreme Court Draft was the only controversial aspect of the proposed penal interest exception. As a result, the Subcommittee all but ignored the first sentence during its markup sessions on the rule.

To conclude that the Advisory and Standing Committees intended a liberal interpretation of penal interest does not explain how they intended a court
to apply the test in a particular case. Unfortunately, neither the Committees' internal memoranda nor the discussion of the rule at the meetings of September 5 and September 30, 1971, provide a definite answer. In its Note to the Supreme Court Draft, the Standing Committee added this sentence: "Whether a statement is in fact against interest must be determined from the circumstances of each case."\(^{319}\) Although contextually this sentence applies to the Government's offer of a declarant's statement simultaneously implicating the declarant and the defendant,\(^{320}\) it also represents the Committee's approach to all against-interest statements. Under this approach, courts should not determine trustworthiness solely by analyzing the words spoken by the declarant. Rather, the court should assess each statement according to the context in which the declarant made it. This ad hoc approach requires a court to consider what the declarant knew of the incident in question, why the declarant spoke, and what degree of criminal liability the declarant reasonably expected to result from his statement.\(^{321}\) Additionally, this approach

\(^{319}\) Advisory Committee Note to Supreme Court Draft, supra note 1, at 328.

\(^{320}\) See id. (referring to statements admitting guilt and implicating another person). The Standing Committee added the sentence as an implicit explanation of its reversal in position in response to Senator McClellan's objections. See notes 194-200 supra and accompanying text (discussing Committee's reaction to McClellan's criticism of "Bruton sentence").

\(^{321}\) In examining the declarant's reasonable expectation of prosecution, conviction, and punishment, the courts could refer to the analogous situation in which a witness invokes the privilege against self-incrimination. In People v. Traylor, 23 Cal. App. 3d 323, 100 Cal. Rptr. 116 (Ct. App. 1972), for example, a declarant refused to answer questions in court relating to statements he allegedly made exonerating the defendant. Id. at 328-29, 100 Cal. Rptr. at 119. After the trial court upheld the declarant's assertion of the fifth amendment, defense counsel argued that the declarant's refusal to testify on the grounds that he would incriminate himself proved the against-interest nature of the out of court statement. Id. at 329-30, 100 Cal. Rptr. at 121. Nonetheless, the trial court excluded the statement. Id. at 331, 100 Cal. Rptr. at 121. In affirming the trial court, the California Court of Appeals reasoned that although the privileged testimony might have provided a "link in the chain of evidence leading to the declarant's criminal liability" this link did not prove that the declarant realized "the statement he made... was 'distinctly' against his own penal interest." Id. The California penal interest exception, however, uses the phrase "so far subjected" in speaking of the degree of criminal liability to which the statement exposes the declarant. CAL. EVIDENCE CODE § 1230 (West 1966). As indicated earlier, the "tended to subject" language of rule 804(b)(3) imposes a lesser burden on the defendant. See notes 302-10 supra and accompanying text (distinguishing phrase "tended to subject" from "so far subjected" language of rule 509(1) of Model Code of Evidence). To the degree that the declarant's refusal to testify in Traylor indicated his out of court statement shifted the responsibility for the crime from the defendant to the declarant and a third person, it "tended to subject" the declarant to criminal liability. See also United States v. Benveniste, 564 F.2d 335, 341 (9th Cir. 1977) (declarant's assertion of fifth amendment at trial lends strong support to conclusion that out of court statement against declarant's penal interest). Thus, federal courts might use the fifth amendment's "link in the chain" doctrine to determine whether the declarant's statement tended to subject the declarant to criminal liability within the meaning of rule 804(b)(3).
requires the courts to err on the side of admitting rather than excluding such statements. The precise words spoken, of course, remain important. When a statement constitutes an opinion of guilt ("I am guilty of the crime charged against the defendant") or an express factual concession ("I shot the victim"), the statement clearly is against interest. Courts can assume that a declarant would not make such a statement unless it were true, regardless of his expectation that it would not be discovered or would not result in his prosecution.

Courts should go further than just examining the words spoken. The Standing Committee's focus on the circumstances of each case allows the courts to admit statements other than confessions. A declarant reasonably might believe that the statement, "I had the gun," is just as damaging as an explicit confession of murdering the victim, even when that statement only inferentially exonerates the defendant. Similarly, when a declarant's statement exonerates the accused ("The defendant is not guilty"; "I did it, the defendant did not"); "The defendant did not participate"), the declarant's knowledge of the defendant's innocence either explicitly or implicitly indicates that the declarant participated in the crime. The Government clearly could introduce such a statement against the declarant were he on trial. Viewed in context, then, an admission, a related statement, or an opinion might seem trustworthy. Certain language in the Note to the Supreme Court Draft, however, indicates the Advisory and Standing Committees may have intended otherwise. Consequently, we must probe more deeply into the intent of the Advisory and Standing Committees.

In discussing the trustworthiness of admissions, the Advisory and Standing Committees considered the relationship between the penal interest exception and the party admission doctrine. Equating the two as they apply to criminal defendants has superficial appeal. This equation, once almost unanimously

Additionally, the courts might analyze the degree of liability to which a statement might subject the declarant by determining whether the statement provides the basis for a finding of probable cause to arrest the declarant. See Ryan v. State, 95 Wis. 2d 83, 97, 289 N.W.2d 349, 355 (Ct. App. 1980) (statement did not tend to subject declarant to criminal liability because declarant's statement would not withstand probable cause test for charging declarant with crime).

322. See text accompanying note 310 supra (Professor Cleary stating approach of rule 804(b)(3) should result in admission of greater amount of necessary evidence).

323. The declarant might want to help the defendant without eliminating all hope of either plea bargaining or defending himself successfully in the event he was prosecuted. For example, a defendant might say, "Sure, I had something to do with Smith's murder," when the evidence indicates that only one person killed Smith. On at least one occasion, the Supreme Court has upheld a trial court's admission of a more ambiguous statement than this one. In Dutton v. Evans, 400 U.S. 74, (1970), the Court ruled that the statement, "If it hadn't been for [the defendant] we wouldn't be in this now," was against the declarant's penal interest and thus was admissible under Georgia's coconspirator exception to the hearsay rule. Id. at 89-90. But cf. United States v. Pena, 527 F.2d 1356, 1361-62 (5th Cir.) (excluding statement which was against interest under only one of several plausible interpretations), cert. denied, 426 U.S. 949 (1976).

324. The disserving effect of a party admission is, after all, the source of trustworthiness that justifies the doctrine's status as a hearsay exception. Moreover, if a statement would defeat a defendant party's alibi, that statement also should "tend . . . to subject . . . or to expose" the declarant to criminal liability in the language of rule 804(b)(3).
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rejection,\(^3\) has resurfaced to a limited degree in several recent decisions.\(^3\) Although the Advisory and Standing Committees did not take the radical step of equating the doctrines,\(^3\) they probably did not intend that an admission could never qualify as a statement against interest. They signaled the overlap between the doctrines by noting the differences: To be admissible, a statement against interest, unlike an admission, must satisfy the lay opinion and personal knowledge requirements of rules 701 and 602.\(^3\) With respect to firsthand knowledge, for example, the Advisory Committee, by cross-referencing in the Note to rule 804 to its Note to rule 803,\(^3\) conditioned admissibility of statements against interest upon proof of the declarant’s personal knowledge, established by the statement itself or inferable from its context.\(^3\) Similarly, in its Note to rule 803 the Advisory Committee implicitly conditioned admissibility under the same exception on satisfaction

\(^3\)See, e.g., Home Ins. Co. v. Allied Tel. Co., 246 Ark. 1095, 1100-01, 442 S.W.2d 211, 214-15 (1969) (admission by out of court nonparty declarant admissible as statement against interest, but not as party admission because declarant lacked authority to make statement); McCORMICK, supra note 4, § 276, at 671 (rejecting equation because party admission doctrine, unlike statement against interest exception, requires neither that declarant be unavailable nor that admission actually be against interest when made); S Wigmore, supra note 4, § 1475, at 348-49 (same).

\(^3\)See, e.g., United States v. Garris, 616 F.2d 626, 630 (2d Cir. 1980) (statement by out of court declarant implicating brother in bank robbery satisfied rule 804(b)(3)'s requirement that it "tended" to subject declarant to criminal liability because it would be probative in trial against declarant as accessory); United States v. Thomas, 571 F.2d 285, 288-89 (5th Cir. 1978) (rule 804(b)(3) not limited to direct confessions of guilt; rule encompasses disserving statement by declarant "[t]hey ought to let [defendant] go, he didn't have anything to do with it" because statement would have probative value in trial against declarant); United States v. Barrett, 539 F.2d 244, 251 (1st Cir. 1976) (declarant's statement that exposed his inside knowledge about stamp theft and its participants satisfies penal interest exception because it would be important evidence against declarant were he on trial). In two other recent decisions, courts admitted out of court statements that constituted admissions as statements against penal interest. In neither case, however, did the court discuss the relationship between the party admission doctrine and the statement against interest exception. See United States v. Toney, 599 F.2d 787, 789-90 (6th Cir. 1979) (statement constituting admission admissible under penal interest exception because it revealed declarant's involvement in illicit gambling and because it disclosed that declarant gambled with large sum of money shortly after bank robbery for which he had been arrested); People v. Brown, 26 N.Y.2d 88, 90, 257 N.E.2d 16, 17, 308 N.Y.S.2d 825, 826 (1970) (statement constituting admission admissible under penal interest exception because declarant indicted for robbery admitted picking up gun near scene of crime).

327. Standing Committee Meeting, Sept. 30, 1971 (comment by Professor Cleary distinguishing doctrines).

328. See Fed. R. Evid. 701 (lay opinion admissible only if rationally based upon witness' perception and helpful to clear understanding of statement or determination of disputed fact); Fed. R. Evid. 602 (personal knowledge admissible only if witness introduces sufficient evidence to establish his knowledge about matter). The Advisory Committee did not mention a third evidentiary hurdle, one that would require proof of the declarant's competency. See Note, Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule, 56 B.U. L. Rev. 148, 171-72 (1975) (arguing that court should exclude statement, inter alia, mentally deficient or obviously drunken declarant) [hereinafter Note, Declarations Against Penal Interest]. Because rule 601 eliminates most common law witness competency requirements, I would not erect this hurdle, anticipating that the prosecutor could successfully establish the declarant's condition by examining the witness who reported the statement.

329. Advisory Committee Note to Supreme Court Draft, supra note 1, at 322 ("As to firsthand knowledge on the part of hearsay declarants, see the introductory portion of the Advisory Committee's Note to Rule 803."). Although Professor Cleary thought firsthand knowledge was implicitly required by rule 804(b)(3), see Memorandum No. 19, supra note 52, at 294, he decided to state the obvious because Senator McClellan had thought the Revised Draft had implicitly eliminated the requirement. See McClellan Letter, supra note 82, at 33,648 (criticizing Revised Draft for lack of personal knowledge requirement).

330. Advisory Committee Note to Supreme Court Draft, supra note 1, at 303.
of the lay opinion rule. In the committee’s view, “[t]he exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel an implication that other possible grounds for exclusion are eliminated from consideration.”

The Committee’s position on the application of the lay opinion and firsthand knowledge rules to the penal interest exception was more clearly stated in an internal memorandum prepared by Professor Cleary. In this memorandum he cross-referred the treatment of opinions and firsthand knowledge under rule 804(b)(3) to “dying declarations” under rule 804(b)(2). The Note to rule 804(b)(2) states: “Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of firsthand knowledge is assured by Rule 602.” Because rule 701 does not bar lay testimony in the form of an opinion if it is “rationally based on the perception of the witness and . . . [is] helpful to a clear understanding of his testimony or determination of the fact in issue,” the Advisory Committee apparently intended that a statement whose diserving effect required an inference could qualify as a statement against interest as long as the declarant spoke with firsthand knowledge. Consequently, a court might admit the statement, “The defendant is not guilty,” as the sort of lay opinion that might assist the factfinder under rule 701, subject to proof that the declarant thereby implicated himself.

This analysis, however, presents a problem. The Advisory Committee in its Note twice used the word “confession” in discussing the penal interest exception. Professor Cleary also used that word in his criticism of the House Subcommittee’s revision of the “simple corroboration” test. Did the Advisory Committee thereby intend to limit admissibility to statements that constitute a full “confession”? Or, did it instead use that term as a...
shorthand description for all types of penal interest statements, including one whose dissenting character requires an inference, because most would consist of confessions? The second interpretation probably is correct because, in the context of the Note to rule 804(b)(3), the word "confession" refers to third-party statements offered by the Government against the defendants in _Bruton v. United States_ and _Douglas v. Alabama_. In those cases the Government offered a statement in which the declarant simultaneously admitted his own guilt and accused the defendant of complicity. The declarant's implication of the defendant is not itself a "confession," even if it is part of his own confession. Thus, the Committee must have meant the word "confession" to describe all statements against penal interest, not just those amounting to full confessions.

In addition to analyzing the admissibility of admissions, the Advisory Committee considered the admissibility of statements related to or collateral to an explicitly dissenting statement. Examples include the second clause in the statements, "I did it, the defendant did not" or "I did it; X and Y but not the defendant helped me." Common law courts usually excluded both examples because, as is apparent from the _Sussex Peerage_, they worried that the second clause was self-serving. In fact, neither example presents this

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with the position that the statement must substitute the declarant for the defendant in a one-person crime. Another reason for limiting admissibility to confessions is that any reasonable person easily understands that a confession can gravely imperil his interests. Thus, we could postulate that few declarants would confess to a crime that they did not commit. This postulate ameliorates three hearsay fears by assuming that the declarant is not lying, mistaken, or joking. Furthermore, limiting admissibility to "confessions" is not inconsistent with the "so far tended to subject" language of the first sentence of rule (804)(b)(3): Not even a confession would subject the declarant to criminal sanctions if the Government had no interest in prosecuting him or if he either was near death or beyond the jurisdiction of the authorities. Nonetheless, we should not make too much of the Court's discussion in _Chambers_ because the declarant's statements were confessions.


341. In _Bruton_ the Government offered against the declarant in a joint trial for armed postal robbery his statement that he and the defendant committed the robbery. _Bruton v. United States_, 391 U.S. 123, 124 (1968). The trial court instructed the jury not to consider the declarant's statement in determining his codefendant's culpability because the statement was inadmissible hearsay for this purpose. _Id._ The Supreme Court held that the trial court's admission of the statement violated the defendant's right to cross-examination because the confrontation clause of the sixth amendment because of the substantial risk that the jury ignored the instructions and considered the statement in finding the defendant guilty.

In _Douglas_ the Government offered against the defendant a statement by the declarant, his accomplice, describing in detail the involvement of both in the crime. _Douglas v. Alabama_, 380 U.S. 415, 416 (1965). The trial court admitted the declarant's statement. _Id._ The Supreme Court held that the trial court's admission of the statement violated the defendant's right to cross-examination because, although the declarant was present at the defendant's trial, the declarant exercised his fifth amendment right to remain silent. _Id._ at 420.

342. The Advisory Committee's rejection of Senator McClellan's demand that admissibility be limited to statements that were confessions reinforces the correctness of the second interpretation.
343. Rule 804(b)(3) takes no explicit position on the admissibility of these sorts of statements.
344. See notes 26-34 supra and accompanying text (discussing _Sussex Peerage_).
345. At least one common law court, however, admitted the second clause of a related statement over the Government's argument that the statement was untrustworthy. In _People v. Gullett_, 245 Cal. App. 2d 685, 54 Cal. Rptr. 308 (Cal. App. 1966), the defendant and the declarant were convicted of second degree robbery. _Id._ at 686, 54 Cal. Rptr. at 309. At trial the defendant sought to introduce a note he found in his automobile, the alleged escape vehicle, that said: "Frank, I took your car. I didn't think it would get you into trouble, but I pulled that job with Jim. Sorry, Rick." _Id._ at 687, 54 Cal. Rptr. at 310. The trial court
concern. The second clause can only help the declarant if we infer that his relationship with the defendant offers him something to gain by speaking (helping a friend escape the declarant's plight) or something to lose by not speaking (retaliation if he refuses to exonerate the defendant). Common law courts also refused to admit either example because the second clause was not thought to be against the declarant’s interest and the first clause was considered irrelevant to the defendant's guilt.  

The Advisory Committee apparently rejected the niggardly approach of the common law. This rejection is implicit in the Committee's agreeing with rule 509(1) of the Model Code, which states that “such additional parts [of a purported statement against penal interest should be admitted] as the judge finds to be so closely connected . . . as to be equally trustworthy.” Professor Cleary, however, refused to announce this rejection publicly. He thought

excluded the note because it was hearsay evidence, refusing to admit it under the penal interest exception. Id. at 688, 54 Cal. Rptr. at 310. In that court's view, the note was not against the declarant's penal interest because at the time the note was offered at trial the declarant already had been indicted and thus the note did not subject him to further criminal liability. Id. The California Court of Appeals reversed, ruling that the statement was reliable under the penal interest exception. Id. In the court's view, the statement was against the declarant's interest at the time he made it because the declarant had not yet been indicted for the crime. Id.  


347. Common law courts believed that the assurance of trustworthiness was absent in the second clause because the declarant neither admits having committed additional crimes nor subjects himself to other charges or to more severe punishment.  

348. See, e.g., United States v. Marquez, 462 F.2d 893, 895 (2d Cir. 1972) (codefendant's statement, "Cocaine mine. Other guys had nothing to do with it," inadmissible under penal interest exception; untrustworthy because it did not subject him to more severe penalty; first clause separately inadmissible because irrelevant to defendant's culpability); United States v. Seyfried, 435 F.2d 696, 697-98 (7th Cir. 1970) (convicted bank robber's statement at end of full confession, "No other person had knowledge of or participated with me," untrustworthy because it did not subject him to more severe penalty; first part of confession separately inadmissible because irrelevant to defendant's culpability), cert. denied, 402 U.S. 912 (1971); Commonwealth v. Colon, 461 Pa. 577, 585, 337 A.2d 554, 558 (1975) (convicted murderer's statement at end of full confession, "I acted alone," untrustworthy because it did not subject him to more severe penalty; first clause separately inadmissible because irrelevant to defendant's culpability), cert. denied, 423 U.S. 1056 (1976); cf. State v. Allen, 139 N.J. Super. 285, 287-88, 353 A.2d 546, 548 (Super. Ct. App. Div. 1976) (per curiam) (interpreting New Jersey evidence rule 63(10); finding statement inadmissible under common law approach).  

The common law approach resulted in at least one unsupportable judicial decision. In Baker v. State, 336 So. 2d 364 (Fla. 1976), after the Government convicted Baker and another person for robbery, the declarant's wife reported that the declarant had told her Baker was innocent. Id. at 366. At the same time, the declarant's mother-in-law reported that he had told her he was guilty, but Baker was innocent. Id. In affirming the grant of a motion for a new trial, the Florida Supreme Court distinguished these statements. First, the court held that the statement to the wife was inadmissible because it was not against the declarant's penal interest. Id. at 367. Unfortunately, in determining the declarant's intent the court did not analyze the context in which the declarant spoke but rather limited its analysis solely to the words of his statement. Second, the court found that because the statement to the mother-in-law was against the declarant's penal interest, it was admissible. Id. at 370. Simply noting that the authorities were divided on the admissibility of such a statement, the court failed to explain why the statement was against the declarant's penal interest. The court also failed to explain whether the declarant's statement to his mother-in-law served to substitute him for Baker in the multi-person crime or whether it was possible that he committed the crime with Baker.  

349. See Reporter's Comments to Preliminary Draft, supra note 68, at 192 (stating that Preliminary Draft rule and Model Code rule have same effect regarding related statements).  

350. MODEL CODE OF EVIDENCE rule 509(2) (1942).  

351. During the public comment period after publication of the Preliminary Draft, the Chicago Bar
that rule 804(b)(3), "by simply remaining silent," would reach the same result.\footnote{352} In addition to thinking that adding specific language to the rule to cover the problem of related statements would be unnecessary, Professor Cleary thought doing so would be unwise. "If one goes beyond [the language of the Preliminary Draft] in blanketing in [sic] . . . related statements," he wrote, "the rationale [of the rule] is probably stretched beyond a breaking point."\footnote{353} One could read this ambiguous comment as meaning that Professor Cleary thought a court should not admit related statements. Judging from the context of the statement, he probably thought the problem of drafting helpful language outweighed the ambiguity created by the failure to draft such language. Accordingly, by concluding later in the paragraph that it was better "to leave the matter for construction in the individual situation,"\footnote{354} he probably meant to indicate that a court should test the admissibility of collateral parts of statements against penal interests by their trustworthiness.

Three reasons support the conclusion that Professor Cleary probably intended the second interpretation. First, this interpretation is consistent with his focus on whether the declarant spoke with firsthand knowledge and whether the opinion would help the factfinder as required by rules 602 and 701.\footnote{355} Second, rule 509(1) of the Model Code focused on the trustworthiness of the related statement in context rather than on whether the related statement, standing alone, was against penal interest.\footnote{356} Finally, having been

Committee asked why neither the rule nor its Note discussed the admissibility of related statements. Letter from Kenneth Hanson, on behalf of Chicago Bar Association Federal Civil Procedure Committee, to William Foley at 80 (Jan. 23, 1970) (on file with Judicial Conference). Professor Cleary's refusal to publicize the Advisory Committee's position has resulted in confusion. See 11 Moore, supra note 9, § 804.06(3)[3], at VIII-286 (law on admissibility of related statements unsettled in federal courts; rule 804(b)(3) gives no guidance). Compare United States v. Barrett, 539 F.2d 244, 252 (1st Cir. 1976) (interpreting rule 804(b)(3) as restricting admissible collateral statements to those "actually tending to fortify statements' disavowing aspects" or "integral to the entire statement") with United States v. Goodlow, 500 F.2d 954, 956-57 (6th Cir. 1974) (dictum) (interpreting forthcoming rule 804(b)(3); treating compound statement with disavowing and collateral parts as one for purposes of "overall exclusion or admission").

352. Reporter's Comments to Preliminary Draft, supra note 68, at 192. Professor Cleary thought both rule 509(1) of the Model Code and rule 63(10) of the Uniform Rules authorized the introduction of related statements. \textit{Id.} At least one court has disagreed with this interpretation. \textit{See} State v. Allen, 139 N.J. Super. 285, 288, 353 A.2d 546, 548 (Super. Ct. App. Div. 1975) (by implication) (excluding declarant's identification of three other persons, none of whom was defendant, as coparticipants in crime; state penal interest exception modeled after 63(10) of Uniform Rules).

Professor Cleary's interpretation suffers from another problem. Under rule 509 of the Model Code the single illustration of a penal interest statement suggests that the only sort of related statement a court may admit is one confirming the declarant's guilt of the crime charged against the defendant. \textit{See} Model Code of Evidence rule 509, Illustration 4 (1942) ("At a trial of D for the murder of X, W offers to testify for D that M confessed that he, M, alone did the killing without the knowledge or assistance of any other person. Admissible.").

353. Reporter's Comments to Preliminary Draft, supra note 68, at 192.

354. \textit{Id.} Additionally, judging from the historical context in which Professor Cleary indicated that going beyond the language of the Preliminary Draft would stretch the rule "beyond a breaking point," he probably preferred this second interpretation. Advisory Committee Note to Preliminary Draft, supra note 1, at 385. The Preliminary Draft treated the penal interest exception as an "illustration" of one sort of admissible hearsay rather than as an "exception" to the hearsay rule. Professor Cleary's failure to discuss the problem of admissibility of related statements became a problem when the "illustrations" became the "exceptions" in the Revised Draft.

355. For a discussion of the lay opinion and the personal knowledge requirements, see notes 328-35 \textit{supra} and accompanying text.

356. See text accompanying note 350 \textit{supra} (quoting rule 509(1) of Model Code).
persuaded by Senator McClellan, Professor Cleary and the representatives of the Advisory and Standing Committees reversed their earlier position that a statement implicating the defendant could never be against the declarant’s penal interest. Although no one on either Committee explained why a declarant’s implication of the defendant might be against the declarant’s interest, two explanations are possible. If the statement exonerating the defendant is part of a confession, the declarant’s trustworthy frame of mind, inferable from his self-condemnation, might be assumed to continue when he damns the defendant. Alternatively, we might assume that the declarant would recognize that by implicating the defendant he would implicitly implicate himself. By parallel reasoning, both explanations support the conclusion that a court should admit the declarant’s exoneration of the defendant whenever it is linked with a self-implicating statement.

This third explanation is not inconsistent with the Standing Committee’s enigmatic cite, in its Note to rule 804(b)(3), to Professor McCormick’s discussion of collateral statements. In discussing the common law treatment of statements that contain disserving and self-serving parts, Professor McCormick preferred the approach that admitted the disserving part but excluded the self-serving part. Although the Standing Committee did not expressly accept Professor McCormick’s choice, it probably meant to agree

357. For a discussion of the Committees’ change of heart, see notes 198-99 supra and accompanying text.

358. 5 WIGMORE, supra note 4, § 1465, at 339.

359. Were he on trial, the declarant would have made a statement that was admissible against him. Implicating the defendant also might be against the declarant’s interest in the following manner: By naming X and Y as coparticipants, for example, the declarant might speed his own conviction because X or Y eventually might testify against him or because the police might uncover evidence against him in a search directed against X or Y. Furthermore, the jury might convict the declarant when presented with only scant evidence against him because strong evidence existed against X or Y. Similarly, the declarant’s exoneration of the defendant might be against his self-interest. For example, naming X and Y but exonerating the defendant might be against the declarant’s social interest. As a “snitch,” the declarant would expose himself to retribution either from X or Y or from others who disapprove of informants. Cf. State v. Sanders, 27 Utah 2d 350, 359, 496 P.2d 270, 273 (1972) (being informer sufficiently socially disgraceful to satisfy against-interest requirement of statements against-interest exception; declarant’s naming coparticipants and excluding defendant nevertheless excluded because exception should be “applied with caution” and because court should defer to trial court’s possible suspicion of untrustworthiness). Arguably, because Congress refused to enact the against-social-interest exception in rule 804(b)(3), resort to this argument is barred.

360. See United States v. Goodlow, 500 F.2d 954, 956-57 (8th Cir. 1974) (declarant said he was “good for crime” and defendant not “good for it”; latter statement not against penal interest, but admissible because coupled with former statement).

361. See Advisory Committee Note to Supreme Court Draft, supra note 1, at 328 (citing MCCORMICK, supra note 4, § 279(d), at 677). Although the Advisory Committee is designated as the author of the Note, the Standing Committee added this reference to Professor McCormick.

362. MCCORMICK, supra note 4, § 279(d), at 675. Professor McCormick suggested two other approaches. A court either could admit the entire statement or it could either admit or exclude the entire statement depending on whether the disserving or self-serving part predominated. Id. When severance is impossible, Professor McCormick does not indicate which option he prefers. Id. He does argue, however, that when a single statement has both disserving and self-serving aspects, a court should balance the disserving and collateral parts to decide whether the declarant was more likely to have lied to help himself. Id.

363. The Committee simply cited Professor McCormick without indicating whether it agreed with his choice or with either of the other approaches. Advisory Committee Note to Supreme Court Draft, supra note 1, at 328.
that the self-serving part should be redacted whether the statement was offered by the defendant or by the Government.\textsuperscript{364} Presumably, the Committee would not have made the effort to exclude the self-serving part if it did not also intend that a court should admit the collateral, non-self-serving part.\textsuperscript{365}

It follows from the preceding discussion that the admissibility of related statements under rule 804(b)(3) initially should involve the fact question of whether the declarant's implication or exoneration of the defendant is self-serving.\textsuperscript{366} That inquiry will force a court to examine the motivation of the declarant in the context in which he made the statement. Thus, if a related statement is not self-serving and is linked to a disserving statement, a court should admit it as long as it meets the other requirements of rule 804(b)(3).

In discussing rule 804(b)(3), neither Committee addressed the admissibility of opinions. If they are "helpful to the factfinder" under rule 701, opinions might be admissible under the penal interest exception of rule 804(b)(3). A court might admit the declarant's compound statement, "I am guilty, the defendant is innocent," by attributing to the second clause the trustworthiness of the first, disserving clause. Defendants, however, may have a more difficult time convincing a court to admit naked opinions such as, "The defendant did not commit the crime," "The defendant is innocent," or "The defendant did not participate in the crime." First, because a declarant's inferential statement

\textsuperscript{364} The Standing Committee discussed Professor McCormick's position while discussing the admissibility of third-party statements offered by the Government. Standing Committee Meeting, Sept. 30, 1971. Nonetheless, the Standing Committee probably intended that the reference also should apply to statements offered by the defendant because its citation to Professor McCormick appears in a separate paragraph of the Note to rule 804. Advisory Committee Note to Supreme Court Draft, supra note 1, at 328.

\textsuperscript{365} A fourth rationale constituting a more extreme position on this question would admit a related statement if the part in which the defendant is especially interested in "tend[s] to explain the declaration against interest or pertain[s] to the same subject." B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK, § 6.2, at 107 (1972). This rationale is patterned after the California Evidence Code, id., § 21.2, at 200, which permits a party to introduce other relevant portions of a statement of which the opponent has introduced only part when a court needs these other sections to understand the introduced evidence in its proper context. CAL. EVID. CODE. § 356 (West 1966); accord, FED. R. EVID. 106 (permitting adverse party to "introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it"). See also FED. R. EVID. 611(a)(1) (requiring court to exercise reasonable control over interrogation of witnesses and presentation of evidence to promote ascertainment of truth). This theory assumes that if the declarant speaks the truth in implicating himself, he also speaks the truth in exculpating the declarant. Wigmore accepts this position, writing:

\begin{quote}
Since the principle is that the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy..., it is obvious that the situation indicates the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also as to every fact contained in the same statement.
\end{quote}

5 WIGMORE, supra note 4, § 1465, at 339 (footnote omitted) (emphasis in original); accord, United States v. Barrett, 539 F.2d 244, 252 (1st Cir. 1976) (after citing Wigmore, admitting declarant's collateral statement because simultaneous with disserving part). Wigmore might even more liberally admit collateral statements because his comment suggests that he would admit collateral statements spoken simultaneously with, but not pertaining to, the disserving statement. This fourth rationale extends rule 106, however, because that rule permits the opponent to introduce other parts of the statement; the defendant, not the Government, would seek to introduce the exonerating words related to the declarant's self-condemnation.

\textsuperscript{366} See 5 WIGMORE, supra note 4, § 1465, at 341 (if statement against interest, "any reference to collateral records which amounts to a repetition or an incorporation of them would make them a part of the admissible statement").
indicating his guilt is less certainly against his interest than is a direct admission, a court may not be able to conclude as easily or as safely that the declarant was in a trustworthy state of mind when he spoke. Indeed, the only way a naked exculpatory opinion can be disserving to the declarant is if a court assumes that the reason for the declarant's knowledge of the defendant's innocence is the declarant's own complicity in the crime.367 Second, if the declarant states a naked opinion, a court will have more difficulty inferring that the declarant spoke with firsthand knowledge, as required by rule 602.368 Nonetheless, if the defendant links the declarant to the crime369 and establishes that he spoke with personal knowledge, rule 804(b)(3) probably does not exclude these sorts of statements.

Since the Advisory and Standing Committees failed to discuss these problems, the House Subcommittee, which may have thought these sorts of statements should be admissible, was the sole commentator on these issues. With respect to a statement offered by the Government in which the declarant implicated the defendant, the Subcommittee apparently believed the declarant must have simultaneously and expressly implicated himself before a court should admit such a statement.370 In its view, the opinion statement, "The defendant is guilty," as well as all similar statements would be inadmissible when offered by the Government because the statement only implicitly


368. See Advisory Committee Note to Supreme Court Draft, supra note 1, at 303 ("In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge ").

369. Requiring defendants who seek to introduce exculpatory naked opinions to link the declarant to the crime is necessary to bar the introduction of a statement by a declarant who simply opined about the defendant's guilt based on information he had learned of personally but independent of his own complicity. In State v. Gaines, 147 N.J. Super. 84, 370 A.2d 856 (Super. Ct. App. Div. 1975), aff'd sub nom. State v. Powers, 72 N.J. 346, 370 A.2d 854 (1977) (per curiam), three defendants were charged with possession of guns found in a car, but the third defendant's case was severed. Id. at 87, 370 A.2d at 856. The trial court excluded the third defendant's statement that the second defendant knew nothing about the guns because the statement did not implicate the declarant. Id. at 90, 370 A.2d at 858. The New Jersey Court of Appeals reversed, ruling that the declarant's "initial statement, that [the second defendant] knew nothing about the guns, implied, in the circumstances, that he himself knew something about the guns, of their origin or their existence, which tends toward proving the charge of possession against him." Id. at 97, 370 A.2d at 863-64. Noting that the guns were hidden under a towel on the floor behind the front seat and that the second defendant was lying on the rear seat, the court found that the declarant's statement that the second defendant knew nothing about the guns confirmed the declarant's complicity in the crime. Id. at 97-98, 370 A.2d at 863-64; cf. State v. Davis, 50 N.J. 16, 28-29, 231 A.2d 793, 799 (1967) (defendant, convicted of murder, who stated that driver of automobile in which police arrested him had nothing to do with murder, inferentially indicated defendant's own involvement; linkage of defendant to crime not based on circumstances but solely on inference from statement). The Gaines analysis might become important in jurisdictions that have adopted a presumption of possession rule that is based upon the defendant's proximity to an item that is illegal to possess. See County Court v. Allen, 442 U.S. 140, 167 (1979) (holding constitutional New York statute permitting presumption that occupants of vehicle illegally possess firearms found within vehicle). This presumption will make it easier for a party seeking admission of an opinion statement to link the declarant/defendant to the crime.

370. Associate counsel said that a statement implicating both the declarant and the defendant was not against the declarant's penal interest in so far as it implicated the defendant. Markup Session, June 5, 1973. The Subcommittee members agreed that the declarant had to implicate himself for his statement to be against his penal interest. Id.
implicated the declarant. By parallel reasoning, this position suggests that the Subcommittee also would not permit the introduction of a naked opinion offered by the defendant.\textsuperscript{371}

Before concluding that the Advisory and Standing Committees believed admissions, related statements, and perhaps naked opinions might qualify as statements against penal interest, we must examine the meaning of the word “exculpate” in “offered to exculpate the accused,” which the Advisory Committee included in the rule’s second sentence. With this word, did the Advisory Committee intend to apply the “simple corroboration” test only when the criminal defendant, in contrast to the Government in a criminal case or any party in a civil proceeding, offers a penal interest statement? Or, did the committee intend to restrict the sorts of statements that the defendant may introduce?\textsuperscript{372} With respect to the latter possibility, if the Committee

\textsuperscript{371} The Subcommittee, however, never discussed this possibility. Even though the House Judiciary Committee cited Gichner v. Antonio Troiano Tile and Marble Co., 410 F.2d 238 (D.C. Cir. 1969), in its report, \textit{House Judiciary Report}, supra note 10, at 16, [1974] U.S. CODE CONG. & AD. NEWS at 7089, a court should not conclude that the Committee intended to preclude the introduction of naked opinions. In \textit{Gichner} the plaintiff sued the lessee of his warehouse for fire damage allegedly caused by the negligent cigarette smoking of the lessee’s employees. 410 F.2d at 240. The plaintiff sought to introduce two statements by one of the lessee’s employees, the first an admission that he had been smoking and the second that he had been negligent. Conversation with appellee’s counsel (May 25, 1979). The trial court excluded the statements. 410 F.2d at 240. The United States Court of Appeals for the District of Columbia Circuit remanded for a determination whether the employee was unavailable; if he was, the court ordered reversal on the ground that the trial court should have admitted the first statement as a statement against pecuniary interest. \textit{Id.} at 243. The court of appeals thought the second statement was inadmissible, however, because it was simply an opinion about negligence. \textit{Id.} at 243 n.5; accord, Carpenter v. Davis, 435 S.W.2d 382, 384-85 (Mo. 1968) (en banc) (statement by plaintiff’s deceased wife to defendant’s employee truck driver after accident, “Yes, I know, its not your fault,” inadmissible because opinion about fault in negligence case).

Although \textit{Gichner} stands for the proposition that a naked opinion cannot be admitted under rule 804(b)(3), the House Judiciary Committee did not cite the case for that proposition. Instead, the Committee cited \textit{Gichner} to support its decision not to include a “civil interest” exception to the rule because it thought pecuniary and proprietary interests were sufficiently broad to include statements against civil interest. \textit{House Judiciary Report}, supra note 10, at 16, [1974] U.S. CODE CONG. & AD. NEWS at 7089.

One might contest the House Subcommittee’s arguable denial of admissibility of opinions under the penal interest exception by drawing a distinction between opinions about civil liability and criminal guilt. A declarant might be unaware of the legal defenses commonly available in civil litigation, such as contributory negligence or last clear chance. In contrast, a declarant’s statement about his or the defendant’s criminal guilt does not require the same sophistication. See Reporter’s Comments to Preliminary Draft, supra note 68, at 114(d) (declarant should more easily recognize that statement against penal interest than that another statement against either pecuniary or proprietary interest). Thus, opinions about criminal guilt are less likely to be mistaken than are opinions about civil liability, supporting the conclusion that if civil liability statements are admissible so should be penal interest statements a fortiori.

\textsuperscript{372} Judge Weinstein interprets the purpose of the last sentence of rule 804(b)(3), and thus the word “exculpate,” quite differently. He argues that Congress intended to restrict the admissibility of all penal interest statements in criminal suits to those offered by defendants. 4 \textit{Weinsteins}, supra note 16, \S 804(b)(3)[03], at 804—110. He argues that the House Subcommittee deleted the “\textit{Bruton sentence}” from the rule on the ground that the rule achieved that limitation without the sentence. \textit{See id.} (“in context, this means that the Rule should be interpreted to include [the ‘\textit{Bruton sentence}’] because this interpretation ‘would have been the result obtained under the present rule’”). The last sentence of the enacted rule also implies this limitation because it speaks only about the defendant. \textit{See FED. R. EVID.} 804(b)(3) (statement tending to expose declarant to criminal liability and offered to exculpate “accused” admissible only if corroborating circumstances clearly indicate trustworthiness of statement). Judge Weinstein’s interpretation of “exculpate” is wrong. Senator McClellan convinced the Standing Committee that a statement implicating the defendant could be against the declarant’s penal interest. \textit{See notes} 198-99 supra and
intended “exculpate” to limit admissibility to statements that by themselves exonerate the defendant by eliminating his complicity, that word would exclude statements relevant to the defendant’s degree of guilt or to his punishment and statements offered to support a defense argument that the Government failed to meet its burden of proof. In other words, the rule would admit only those statements that establish the defendant’s factual innocence. Considerable evidence suggests that those parties who discussed

accompanying text (Professor Cleary redrafted rule and Note to meet Senator McClellan’s objection). The House Subcommittee reinserted the “Bruton sentence” because it sought to codify Bruton, not because it disagreed with either Senator McClellan or the Standing Committee with respect to the evidentiary question. See notes 201-05 supra and accompanying text (associate counsel convinced Subcommittee that “Bruton sentence” necessary to codify Bruton decision). Neither the Senate nor the conference disagreed with either Senator McClellan or the Standing Committee. Instead, the Senate and the conference deleted the “Bruton sentence” to avoid codifying constitutional doctrine. See Senate Judiciary Report, Supra note 10, at 20-21, [1974] U.S. Code Cong. & Ad. News at 7068 (“Bruton sentence” deleted because codification of constitutional principle unnecessary and often unwise).

373. Two recent Supreme Court decisions suggest that the constitutional dimensions of a restrictive interpretation of “exculpate” is uncertain. In Green v. Virginia, 442 U.S. 95 (1979) (per curiam), the Court reversed for resentencing because the trial court during the sentencing phase excluded a coparticipant’s statement that he, not the defendant, killed the victim. Id. at 96, 97. In reversing, the Court grounded its decision upon a due process analysis rather than upon an interpretation of “exculpate.” Nevertheless, Green suggests that interpreting “exculpate” to exclude statements relevant only to punishment or degree of guilt arguably is unconstitutional.

In United States v. Agurs, 427 U.S. 97 (1976), a Brady-type case, the defense did not request and the prosecution did not disclose the murder victim’s criminal record for assault. Id. at 101. This record would have supported the defendant’s claim that the victim was the aggressor. Id. at 100. The Court repeatedly used the word “exculpatory” in describing the sort of evidence to which the Brady doctrine applies. Id. at 105, 106, 107, 111, 112 n.20. The Court defined “exculpatory” as stating that “if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.” Id. at 112. Although this holding does not indicate whether “exculpate” has an exclusionary nature, language in the court’s immediately following sentences including “reasonable doubt about guilt” and “if the verdict is of questionable validity,” id., respectively, suggests that the Court defines “exculpate” broadly to include any guilt-related statements. As a result, the declarant’s equivocal statement, “I was present at the murder scene,” when analyzed with other evidence, might suggest reasonable doubt and thus a court should admit it. On the other hand, the examples cited by the Court suggest that it viewed Brady as applicable only to undisclosed evidence supporting the defendant’s factual innocence rather than as applicable to evidence challenging the Government’s proof. See id. at 110 n.18 (fingerprint evidence indicating defendant did not shoot victim); id. at 112 n.21 (one of two eyewitnesses says defendant not culprit). Thus, the Court’s discussion of “exculpate” is unclear over whether the Brady doctrine renders unconstitutional a narrow interpretation of “exculpate.”

374. Accord, State v. Smith, 415 A.2d 553, 560-61 (Me. 1980) (codefendant's exculpation of defendant not sufficiently corroborated because her self-implication not “inherently inconsistent with accused's guilt”; defendant could have planned or participated in murder); Thompson v. State, 480 S.W.2d 624, 628-29 (Tex. Crim. App. 1972) (penal interest statement exonerating defendant of robbery admissible only when defendant’s guilt inconsistent with declarant’s guilt); Kan. Civ. Pro. Code Ann. § 60-460(j), Author’s Comments (Vernon 1965) (“[A] statement against declarant’s interest should be admissible if it exculpates a defendant on trial and for the same policy reason which prevents it from being used against him, namely, to protect an innocent person.”). If the Advisory Committee intended to limit admissibility to statements establishing the defendant’s innocence, it probably would have tracked the Supreme Court’s frequent restriction of habeas corpus relief to constitutional violations that prevent the defendant from establishing his innocence. See generally Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 Colum. L. Rev. 436, 437 (1980) (noting that Burger Court has focused attention of criminal courts narrowly on questions of guilt or innocence); Tague, Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do, 31 Stan. L. Rev. 1, 5, 6, 29 (1978) (criticizing Supreme Court’s “actual prejudice” requirement for unnecessarily restricting federal habeas review of constitutional claims of state defendants forfeited in state courts due to state procedural rules).
the penal interest exception expected that the defendant could use the rule to admit only a statement whose effect would substitute the declarant for the defendant in a one-person crime. In its first criticism of the rule, for example, the Department of Justice argued that the penal interest exception, if adopted, should be limited to statements that substitute the declarant for the defendant as the single culprit.375 Also, rule 509(1) of the Model Code of Evidence, which permits the introduction of a “related statement,” appears to define a related statement as one that confirms the substitution of the declarant for the defendant.376 Furthermore, Professor Cleary, in his initial memorandum to the Advisory Committee explaining the rule, expressly approved of the Maryland decisions that admitted written confessions substituting the declarant for the defendant as well as contradictory confessions by the declarant and defendant when each claimed sole responsibility for the crime.377

Although the Advisory and Standing Committees did not specifically discuss the meaning of “exculpate,” they probably did not intend to limit admissibility to statements that substitute the declarant for the defendant. During its September 5, 1971 meeting, the Advisory Committee added the word “exculpate” to the rule by including it in the sentence proposing the “simple corroboration” requirement.378 By including “exculpate” in this sentence, the Committee intended only to appease Senator McClellan, not to adopt the Senator’s interpretation of the sorts of statements admissible under the rule. In the clearest public demand that only confessions substituting the declarant for the defendant should “exculpate” the defendant, Senator McClellan wrote: “An accused seeks, in effect, to convict [the declarant] by such a confession in order that [the defendant] may go free.”379 During that meeting, however, the Advisory Committee did not discuss Senator McClellan’s intended limitation on the meaning of exculpation.380 Indeed, after the September 22, 1971 meeting with Senator McClellan, Professor Cleary indicated that he added the language, “offered to exculpate the accused,” to the Note to identify the sorts of cases in which the commentators and the common law courts feared fabrication.381 Thus, the Advisory and Standing

375. Justice’s First Letter, supra note 63, at 34.
376. See note 352 supra (quoting only penal interest illustration accompanying rule 509, which involved statement exonerating defendant of guilt).
377. Memorandum No. 19, supra note 52, at 291. For a discussion of the Maryland decisions, see note 61 supra.
378. The word “exculpate” first appeared in the Committee’s explanation of the Bruton problem. See Advisory Committee Note to Preliminary Draft, supra note 1, at 386 (“Ordinarily, the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him . . . .”).
379. McClellan Letter, supra note 82, at 33,648.
380. The Advisory Committee adopted “offered to exculpate” rather than Senator McClellan’s language. See Supreme Court Draft, supra note 1, 321 (“A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.”). In response to Senator McClellan’s objection to the rule changes made by the Advisory Committee on September 5, 1971, the Standing Committee inserted the clause, “offered to exculpate the accused,” in the Note to the Supreme Court Draft. Advisory Committee Note to Supreme Court Draft, supra note 1, at 327. In doing so, however, the Committee did not agree by implication with the Senator’s narrow reading of the rule. A careful review of the Advisory Committee’s September 5, 1971 discussion of alternative ways of expressing the “simple corroboration” requirement suggests, for example, that no member was trying to limit the admissibility of particular types of statements against penal interest. See note 105 supra and accompanying text (setting forth Professor Cleary’s suggested formulations for “simple corroboration” requirement).
Committees probably only inserted that clause to identify the circumstance in which the “simple corroboration” requirement applies: when the defendant offers the statement.

The Standing Committee’s use of the accomplice analogy to explain the “simple corroboration” requirement it added to the Supreme Court Draft further supports this conclusion. Because an admission and a confession by a coparticipant are equally admissible under the accomplice doctrine, a declarant’s admission that implicates himself and eliminates the defendant as a participant in a multiparticipant crime should be equally admissible. Also, Professor Cleary approved of Brady v. State, one of the Maryland state court decisions admitting a declarant’s statement that did not absolve him of guilt in a multiperson crime. Professor Cleary’s reference to Brady suggests that the Advisory Committee did not intend that “exculpate” should exclude from the penal interest exception statements relevant only to certain issues, including the Government’s burden of proof, the defendant’s degree of guilt, and his punishment, or statements that do not substitute the declarant for the defendant.

The House Subcommittee’s discussion about the meaning of “exculpate” only adds to the confusion. During the markup sessions, various Subcommittee members used the word “exculpate” without explaining what they understood it to mean. Nonetheless, the Subcommittee’s desire to change the result in a case like Donnelly, which was the only case and the only factual setting discussed during the markup sessions, suggests that the Subcommittee expected the statement to replace the declarant for the defendant as the sole culprit in a single-person crime. Whether the Subcommittee intended that only statements offered for that purpose would be admissible, however, is problematic because of its discussion of the “Bruton sentence.” Unlike the Advisory Committee, which in the Preliminary and Revised Drafts chose to exclude purported penal interest statements offered by the Government.

382. Memorandum No. 19, supra note 52, at 291.
383. Brady v. State, 174 A.2d 167, 172 (Md. 1961), aff’d sub nom. Brady v. Maryland, 373 U.S. 83 (1963). In Brady the defendant, charged with a murder committed in the course of a robbery, admitted at trial that he participated in the robbery, but claimed that his companion, Boblit, actually killed the victim. Brady v. Maryland, 373 U.S. 83, 84 (1963). Before trial, Brady moved to discover any statement made by Boblit. Id. Despite Brady’s request, the prosecution did not disclose a statement in which Boblit admitted having killed the victim. Id. The Maryland Court of Appeals held that the prosecution’s failure to disclose the statement violated due process, and remanded for reconsideration of Brady’s punishment, but not his guilt. Id. at 85. In affirming, the United States Supreme Court ruled that the prosecutor’s suppression of evidence requested by the defendant violated due process on the issue of punishment because prosecutors must disclose all evidence that “tend[s] to exculpate [the defendant] or reduce the penalty.” Id. at 87, 88. On the issue of guilt, the Court rejected Brady’s request for a new trial. Agreeing with the Maryland court, the Supreme Court indicated that Boblit’s statement would have been inadmissible on the issue of guilt at Brady’s trial because “nothing in it could have reduced the appellant Brady’s offense below murder in the first degree.” Id. at 88. In dictum, however, the Court indicated that if the requested evidence had been “favorable” to the defense on the issue of guilt, the prosecutor’s failure to disclose it would have violated due process. Id. at 87. The Court did not explain how Boblit’s statement might have been “favorable” to Brady. Nonetheless, by using this term as shorthand for the language “nothing in it could have reduced the appellant Brady’s offense below murder in the first degree,” the Court may have indicated that it wanted prosecutors to disclose evidence relevant to lesser guilt-related issues such as burden of proof, guilt of lesser included offenses, or degree of guilt. Thus because it also equated the disclosure test of “tends to exculpate the defendant” with the test “favorable on the issue of guilt,” the Court may have implied that “exculpate” should include lesser guilt-related issues. But cf. note 373 supra (discussing United States v. Agurs, 427 U.S. 97 (1976)).
against the accused because they were not against interest, the Subcommittee decided to exclude such statements because it felt Bruton constitutionally mandated this result. In Bruton a coparticipant's statement implicated the defendant in a crime. Such a statement could not have been a confession that substituted the declarant for the defendant because it merely added a second culprit to the crime. Thus, if the Subcommittee truly had intended to limit admissibility of defense-offered statements to those that substitute the declarant for the defendant in a one-person crime, it would have had no reason to include the "Bruton sentence" in the rule because Bruton-type statements already would have been excludable under a narrow interpretation of "exculpate." No explicit evidence, however, supports the inference that the Subcommittee did not intend such a narrow interpretation of "exculpate."

B. THE "REASONABLE MAN" TEST

Rule 804(b)(3) provides that a statement is against interest if "a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true." The "reasonable man" test was adopted only after a spirited exchange between the Department of Justice and the Advisory Committee. In its first letter to the Advisory Committee, the Department of Justice argued that a court should be free to evaluate the understanding of either the specific declarant or the "reasonable man" with respect to a statement's disserving possibilities. It repeated this argument in its objections to the Revised Draft. The Advisory Committee rejected the Department of Justice's objection, defending the "reasonable man" approach as being the only viable test courts could employ. The Advisory Committee's position prevailed when the Department did not press its objection during the congressional hearings and when neither the House of Representatives nor the Senate discussed the propriety of the "reasonable man" approach. The Department of Justice never explained why it thought the subjective analysis of the declarant's understanding would lead to a different result than an objective inquiry. More importantly, the Advisory Committee did not explain either whether a court could consider the declarant's subjective understanding of the penal interest significance of his statement or how courts should interpret the Committee's ambiguous order to determine the understanding of a "reasonable man in [the declarant's] position."

Courts might interpret the "reasonable man" test in three ways. First, a court might ignore the declarant's subjective understanding and ask only

385. FED. R. EVID. 804(b)(3).
386. Justice's First Letter, supra note 63, at 35.
387. Justice's Second Letter, supra note 75, at 33,657. The Department of Justice shifted its attack in commenting on the Revised Definitive Draft, arguing that penal interest statements should be deleted from the rule because "It is virtually impossible to determine whether an individual who makes a statement knows at the time of the declaration that the statement would subject him to ... criminal liability." Justice's Third Letter, supra note 130, at 48.
388. Professor Cleary wrote: "Since [the declarant] is required to be unavailable, his own testimony on the subject cannot be had, and it is unlikely that he would have made a declaration on the subject. Consequently, the only standard in actuality is the objective one, which the rule adopts." Reporter's Comments Concerning Revised Draft, supra note 54, at 114d.
389. FED. R. EVID. 804(b)(3).
whether an ordinary person would recognize the disserving effect of his statement.\textsuperscript{390} Second, the court might explore what the declarant actually thought, but ignore his understanding if it is unreasonable.\textsuperscript{391} Finally, the court may admit the statement if the declarant thought the statement was against his interest, regardless of whether either the statement was in fact disserving or a normal person would have so thought.\textsuperscript{392} Under the third

\textsuperscript{390} Professor Morgan adopts this approach. As evidence of this approach, Morgan even would exclude a statement the declarant thought was disserving when it was in fact self-serving. Morgan, supra note 43, at 477. Although he acknowledged that such a statement theoretically should be admissible, he thought that Model Code rule 509 would exclude it. He accepted the rule only because “practical considerations seem to furnish a sufficient justification for this result.” Id.

Courts that admit only statements unquestionably or distinctly against interest implicitly have chosen the first interpretation of the “reasonable man” test. In United States v. Brandenfels, 522 F.2d 1259 (9th Cir.), cert. denied, 423 U.S. 1033 (1975), for example, the declarant moved to Brazil to evade arrest for embezzlement. Id. at 1262. While there, he exonerated the defendant of complicity in the crime. The United States Court of Appeals for the Ninth Circuit held that the declarant’s statement was inadmissible because it was insufficiently against the declarant’s penal interest in that the statement only inferentially inculpated the declarant. Id. at 1263. The court also held that the statement was inadmissible under the against-pecuniary interest exception because it was only the “natural accompaniment” of a criminal act. Id. In People v. Chapman, 50 Cal. App. 3d 872, 123 Cal. Rptr. 862 (Ct. App. 1975), the defendant, charged with murder, sought to introduce the declarant’s admission that he had shot someone and that the defendant had tried to break up the fight between the declarant and the victim. Id. at 877, 123 Cal. Rptr. at 865. The court of appeals affirmed the exclusion of this exculpatory statement, inter alia, because it was not “distinctly” against the declarant’s penal interest. Id. at 880, 123 Cal. Rptr. at 867. A “reasonable man” would not have thought it against penal interest. Id. at 878, 123 Cal. Rptr. at 866. Not surprisingly, under the first interpretation of the “reasonable man” test as adopted by these courts, a court probably would exclude any statement other than a confession.

\textsuperscript{391} This approach parallels the two-step analysis of whether the fourth amendment protects an individual in a particular situation. To determine whether the fourth amendment provides protection to the individual, the Supreme Court asks whether the party who moves to suppress evidence had a subjective expectation of privacy in the area searched and whether that expectation is objectively justifiable. See United States v. White, 401 U.S. 745, 751-52 (1971) (Government’s introduction against defendant of his implicating statement made to government informant who had concealed transmitter not violative of fourth amendment; defendant had subjective expectation of privacy, but expectation unreasonable because “one contemplating illegal activities must realize and risk that companions may be reporting to police”); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (Government’s introduction against defendant of his statement implicating him in illegal transmission of wagering information by phone violates fourth amendment; defendant had subjective expectation of privacy, which Government unreasonably intruded upon by attaching electronic recording and listening device to telephone booth). Assuming that the first step is satisfied, the second step gives a court considerable discretion to grant or to deny fourth amendment protection. This discretion to ignore the defendant’s subjective expectation is perhaps justifiable under the fourth amendment because the rationale for the exclusionary rule, police deterrence, is a consideration independent of an individual’s subjective expectation. Similarly, the second interpretation of the “reasonable man” test would authorize a judge to exercise broad discretion under rule 804(b)(3), but for the different rationale of avoiding the introduction of ostensibly unreliable evidence. Courts should reject the second interpretation of the “reasonable man” test and its broad grant of discretion. As long as the Government has an adequate opportunity to demonstrate a statement’s unreliability to the jury, the court should admit the statement. Thus, in United States v. Satterfield, 572 F.2d 687 (9th Cir.), cert. denied, 439 U.S. 840 (1978), the trial court should have admitted the declarant’s statement because the Government might have convinced the jury that either the declarant never spoke or he fabricated the statement’s details. Id. at 693. For a discussion of Satterfield, see notes 403-09 infra and accompanying text.

\textsuperscript{392} One might analogize this interpretation to the method by which several courts have decided whether to invoke the rule excluding statements made during plea negotiations under former rule 410 of the Federal Rules of Evidence or rule 11(o)(6) of the Federal Rules of Criminal Procedure. These courts
approach, a court would exclude the statement if the declarant had not actually recognized its disserving effect, even if a normal person would have recognized it. Under this approach, the court would ask what the normal person would have thought only if it could not determine the declarant's actual understanding.393

Choosing among these three approaches is complicated by other considerations. First, a necessary interplay exists between the definition of "against interest" and the meaning of the "reasonable man" test. If courts define "against interest" strictly, as do Wigmore, Morgan, and rule 509(1) of the Model Code, the "reasonable man" test would be of little concern because a declarant's statement would have to be so clearly against interest that no person could overlook its disserving quality.394 If, however, in defining "against interest," courts follow Jefferson and consider the litigation significance of the statement, a question of fact arises. These courts then must ascertain how a "reasonable man" would assess the likelihood that witnesses would report his statement and that he then would be prosecuted, convicted, and punished.395 In answering this question, a court also must decide whether

have held that the only relevant issue in this area is not a Government official's actual authority, but the defendant's perception of the Government official's authority to bargain. See United States v. Herman, 544 F.2d 791, 799 (5th Cir. 1977) (defendant, charged with robbery of post office and murder of post-office employee, made incriminating statements in connection with attempt to plea bargain with postal inspectors; statements inadmissible under rule 11(e)(6) because defendant incorrectly assumed inspectors had authority to plea bargain); cf. United States v. Stirling, 571 F.2d 708, 731 (2d Cir. 1978) (by implication) (defendant, charged with securities and mail fraud, accepted plea bargain with prosecutor and made incriminating remarks before grand jury on following day; statements admissible because defendant conceded he was not engaged in "discussion" to persuade prosecution not to indict; had intent existed, statement might be inadmissible under Herman), cert. denied, 439 U.S. 824 (1980); United States v. Brooks, 536 F.2d 1137, 1139 (6th Cir. 1976) (defendant, charged with theft and possession of check from mails, called postal inspector and offered to plead guilty if given maximum of two-year sentence; without addressing apparent authority issue, court held statement inadmissible because attempts to open plea-bargaining fall within exclusionary rule for plea-bargain connected statements).

Under both amended rule 410 of the Federal Rules of Evidence and amended rule 11(e)(6) of the Federal Rules of Criminal Procedure, a court should admit only those plea-bargain statements made during discussions with a government attorney. Fed. R. Evid 410; Fed. R. Crim. P. 11(e)(6). Thus, these rules now implicitly reject the view that the defendant's perception of a government official's authority to bargain is the only significant issue raised in these types of cases.

393. Jefferson thought "[s]trict logic" required the third approach. Jefferson, supra note 35, at 22. Like Professor Cleary, however, he doubted that evidence of what the declarant had thought would exist very often. Id. Thus, he accepted the objective reasonable man approach for practical reasons, subject perhaps to proof by the opponent that the declarant in fact had not thought his statement disserving. Id. at 23. Professor Moore agrees "to the extent that there is evidence to indicate the subjective state of the declarant's mind, that evidence should be given great weight." 11 Moore, supra note 9, ¶ 804.06(3)[3], at VIII-284. Professor Moore's examples, however, concerned instances in which the declarant did not believe his statement was disserving rather than when he did think so. Id.

394. Indeed, Wigmore never mentioned the "reasonable man" issue in discussing the penal interest exception.

395. When coupled with a subjective interpretation of the "reasonable man" test, the view of "against interest" that admits statements if they have litigation significance may exclude more statements than would the other, usually more restrictive interpretation of against interest. Professor Morgan apparently rejected this approach, implicitly fearful that courts might exclude even the most frank confessions because many declarants probably are insufficiently sophisticated to understand the litigation significance of their allegedly disserving statements. Morgan, supra note 43, at 456. Morgan thought a subjective view of the "reasonable man" test was more compatible with a strict "against interest" interpretation. In his view, even though a declarant might not recognize the evidentiary significance of his statement, he surely would
it should examine the sophistication of the declarant. A police officer, an attorney, or even an experienced criminal, for example, is more likely than a normal person to recognize the potentially disserving effect of certain sorts of statements. Similarly, a sophisticated declarant, unlike the average person, might better recognize that certain sorts of statements probably are not disserving.

Second, the relevance of a witness’ evaluation of a statement’s significance complicates the choice between the three “reasonable man” tests. The person who heard the declarant speak, for example, might report the statement because he thought it either would implicate the declarant or would assist the defendant. In another setting, the Government might think that it was constitutionally obliged to disclose such a statement to the defendant. On the other side, the declarant, if he realized the seriousness of his statement, and because of this realization, a court should find his statement trustworthy. Id. If a court, like Morgan, wanted to avoid the problem posed above, it also could combine the “litigation significance” approach to penal interest with the objective “reasonable man” test.

396. For example, only an experienced defendant might understand the disserving effects of a statement in a jurisdiction that has a “presumption of possession from the opportunity to control” doctrine. If the police, for example, found narcotics under the front seat of an automobile and the unsophisticated defendant stated, “I was in the front seat and [my codefendant] was in the back seat,” he probably would not understand the criminal implications of his statement. Cf. County Court v. Allen, 442 U.S. 140, 163 (1979) (upholding state statute providing that presence of firearm in vehicle presumptive evidence of illegal possession by all persons in vehicle).

397. Privileged statements provide the best examples. A declarant, for example, might know of the spousal immunity or husband-wife communication privileges or of other privileges, such as the reporter’s shield for confidential sources, that are not recognized in all jurisdictions. Nonetheless, courts have been quick to find privileged statements not against interest. In United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978), for example, the United States Court of Appeals for the Ninth Circuit held that a declarant’s statement to his spouse was not against interest. Id. at 1115. Even though the declarant probably was unaware of the spousal immunity privilege, the statement “could have been suppressed at a subsequent criminal prosecution under a claim of the confidential marital communications privilege.” Id. Even if the spouse cannot testify against the declarant, a privileged communication may expose the declarant to prosecution. If the spouse reports the statement to the defense, as the wife did in Hoyos, for example, the defense may search for other evidence to implicate the declarant.

In contrast, if the listener tells the declarant the communication is privileged, the declarant probably will not anticipate that the statement might be used against him. Nonetheless, in this setting the declarant may speak more freely and honestly. Cf. United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.) (affidavit privileged; affiant assumed it could not be used against him), cert. denied, 439 U.S. 1005 (1978).

398. Cf. United States v. Atkins, 558 F.2d 133, 135 (3d Cir. 1977) (after overhearing declarant admit to having killed bank guard during robbery, witness reported statement to family of deceased, which then accompanied witness when he reported statement to police), cert. denied, 434 U.S. 1071 (1978). The proponent under other circumstances might argue that if a witness who recognized the penal interest effect of the statement had communicated that understanding to the declarant and if the declarant did not then retract or qualify the statement, he arguably acknowledged that he understood the significance of his statement.

399. Evaluating whether the statement was against interest in terms of the prosecutor’s constitutional duty to disclose it, however, probably is too narrow an interpretation of the “reasonable man” test. Under this interpretation, the prosecutor might take the improperly narrow position that only confessions that substitute the declarant for the defendant create a reasonable doubt and trigger the constitutional duty to disclose. See United States v. Agurs, 427 U.S. 97, 112 (1976) (using word “exculpate,” which implies issue of guilt or innocence, to describe subject of reasonable doubt; test for disclosure is whether admitted evidence creates reasonable doubt that it did not otherwise exist). On the other hand, prosecutors might object that their willingness to provide information to the defense should not be the test because they often disclose evidence when they believe disclosure is not constitutionally advised. Cf. id. at 108 (suggesting that because disclosure standard inevitably imprecise, “prudent prosecutor will resolve doubtful questions” about importance of evidence “in favor of disclosure”). For a further discussion of Agurs, see note 373 supra. See also note 383 supra (discussing Brady).
the other hand, the Government might argue that a statement is not against the declarant’s interest because it would never prosecute the declarant, no matter what he had said. The Government may make this claim when the declarant is a valuable informant, if he is serving a long prison term on a different charge, if he is too difficult to arrest, or if his statement is privileged. If third persons make these sorts of assessments, would the “reasonable man” similarly understand the effect of the declarant’s statement?

The Advisory Committee did not discuss either complicating factor or select one of the three approaches as the proper way to interpret the “reasonable man” test. The third approach—investigating the declarant’s actual belief—is more consistent than the other two approaches with the Committee’s relaxation of the “against-interest” test and its desire to admit more penal interest statements than had common law courts. The Advisory Committee apparently chose the “reasonable man” test over a purely subjective test because it thought that the declarant’s unavailability to testify at trial almost always would foreclose judicial determination of his state of mind at the time he made the statement. Rules 509(1) and 63(10) adopted the “reasonable man” approach for the same pragmatic reason. In light of this analysis, rule 804(b)(3) does not forbid a court from investigating the declarant’s subjective understanding of his statement. Thus, a court should consider what the declarant thought when evidence of his understanding exists. A court, however, should not require a proponent to prove the declarant’s subjective understanding if no evidence of it exists or if the evidence is inconclusive.

The Advisory and Standing Committees’ unfortunate failure to explain the relevance of either the declarant’s subjective understanding or his sophistication has resulted in several questionable judicial decisions, including United

400. However, the language of the rule, apparently directing the court to place itself in the declarant’s position but then to ask what a “reasonable man” would have thought, suggests that the second approach is the correct one. But the error of the second approach is suggested by comparison with the Model Penal Code’s provocation test for assessing the blame of a murderer. See Model Penal Code: Proposed Official Draft § 210.3 (1962) (“(1) Criminal homicide constitutes manslaughter when: . . . (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be”). The purpose of the two tests is different. The Model Penal Code’s test is designed to distinguish one type of murderer from another; the “reasonable man” would not always kill in the circumstances which prompted the murderer to kill. In contrast, the Advisory Committee did not intend rule 804(b)(3)’s “reasonable man” test to perform the same type of sorting function. It apparently chose the “reasonable man” test to excuse the defendant from proving what the declarant thought if no evidence of the declarant’s understanding existed. The second approach improperly permits a skeptical court to dismiss evidence of the declarant’s understanding as unreasonable.

401. The comment to rule 509 provides: “To avoid the difficulty which would be caused by an inquiry into the declarant’s actual state of mind, the rule prescribes the test of the belief of the reasonable man in the position of the declarant.” Model Code of Evidence rule 509, Comment a (1942). Similarly, a commentator to rule 63(10) notes: “If the subjective motive of the declarant at the time of making the statement must be determined, the familiar reasonable man test is the best way to determine it. Seldom, if ever, will evidence of the actual state of mind of the declarant be available.” Hetland, supra note 301, at 332. See also Kan. Civ. Proc. Code Ann. § 60-40j, Author’s Comments (Vernon 1965) (“reasonable man” test “practicable approach” to problem).

402. Ignoring what the declarant thought and asking instead what the “reasonable man” would have thought occasionally might help the defendant. In United States v. Bagley, 537 F.2d 162 (5th Cir. 1976),
States v. Satterfield and United States v. Brandenfels. In Satterfield the declarant, Merriweather, refused to repeat his exoneration of his codefendant, Satterfield, probably because of his previously expressed fear that he would thereby jeopardize his appeal. In affirming the trial court's exclusion of Merriweather's statements, the United States Court of Appeals for the Ninth Circuit noted the difficulty in determining whether a "reasonable man" would expect that his appeal would succeed and that the statement might therefore harm him. In the court's view, no "reasonable layperson would have been confident of the success of the appeal" in this case because of the "inevitable uncertainty" of any appeal and because Merriweather had not alleged "blatant" error in his appellate brief. The court thought Merriweather's expressed fear of jeopardizing his appeal was irrelevant because rule 804(b)(3) requires a court to analyze what a "reasonable man" in Merriweather's position would have thought and not what Merriweather himself thought. The court of appeals' analysis is doubly wrong. The average person would have expected, as Merriweather did, that exonerating a codefendant might jeopardize his appeal. Only a sophisticated declarant would recognize that an appellate court will not consider extra-record information. Moreover, Merriweather thought he had spoken against his penal interest, as demonstrated by his refusal to testify at Satterfield's retrial. In United States v. Brandenfels, a similarly questionable decision by the United States Court of Appeals for the Ninth Circuit, the Government charged Brandenfels and Grove with multiple counts of fraud, embezzlement, and counterfeiting in a complicated business fraud. Grove fled to Brazil after the Government began investigating the crime. Before Brandenfels was indicted, he and his attorney interviewed Grove in Sao Paolo. During cert. denied, 429 U.S. 1075 (1977), for example, the defendant testified that he agreed to deliver for the declarant a package containing valium to another prison inmate. Id. at 164. In fact, the package contained heroin. Id. The declarant's cellmate was prepared to testify that the declarant had said that he erroneously gave the defendant heroin rather than valium. Id. The trial court excluded this statement, intimating that the declarant would not have expected his cellmate to repeat the statement. Id. at 165. The court of appeals disagreed, stating that no reasonable person would "falsely admit the commission of a serious crime to his cellmate, knowing that there was a chance, even if slight, that this admission could be used to convict him." Id. The court, however, did not recognize that a prison inmate might reasonably assume that no fellow inmate would risk becoming a "snitch" by reporting such a statement either to the prison authorities or to the defense. Nonetheless, the court of appeals affirmed the exclusion of the statement because the defense had not satisfied the rule 804(b)(3) corroboration requirement. Id. at 168. 403. 572 F.2d 687 (9th Cir.), cert. denied, 439 U.S. 840 (1978). 404. 522 F.2d 1259 (9th Cir.), cert. denied, 423 U.S. 1033 (1975). 405. 572 F.2d at 690. Merriweather refused to testify at Satterfield's trial even though the Government offered him immunity. Id. 406. Id. at 691. 407. Id. But cf. Witham v. Mabry, 596 F.2d 293, 297-98 (8th Cir. 1979) (rejecting argument that statement by convicted declarant could never be against penal interest; statement excluded, however, because defendant failed to establish that declarant was seeking post-conviction relief on ground of factual innocence when he spoke). 408. 572 F.2d at 691 n.1. Although the court did not explain why, it thought that Merriweather's belief might be relevant to the question of corroboration. Id. 409. An admission like Merriweather's nonetheless might influence an appellate court, sub silentio, in considering questions of plain or harmless error. 410. 522 F.2d 1259 (9th Cir.), cert. denied, 423 U.S. 1033 (1975). 411. Id. at 1260. 412. Id. at 1261-62. 413. Id. at 1262.
this interview, Grove gave a tape-recorded statement exonerating Brandenfels of misconduct while Grove was president of the company. The court approved the trial court's exclusion of Grove's statement, reasoning that it was not "in a very real sense self-incriminatory and unquestionably against interest." The court explained that the statement was not against interest because either Grove did not expect to be extradited or else he believed the evidence against him was so overwhelming that his exonerating Brandenfels could not further jeopardize his position.

In contrast to the Ninth Circuit, which narrowly interpreted the "reasonable man" test in Satterfield and Brandenfels, the Supreme Court has been quick to find statements against interest when they are offered by the Government to justify a search challenged on fourth amendment grounds. In United States v. Matlock the issue was whether Mrs. Graff had authority

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414. Id. at 1263 n.20. During this taped conversation, Grove said:

None of those people that are currently being interrogated by various federal agencies were in any way involved in any of those questionable transactions and I refer specifically to Martin Brandenfels... [who] was a mortgage loan customer... As far as any of these people having any knowledge about how money was originated, who, in some cases the lenders were... the only person that has knowledge of those facts is me. . . .

Id. at 1263 n.10. Although the court of appeals thought this statement was "only marginally" and "indirectly" against Grove's interest, the statement surely implicated Grove and would have been admissible if offered against him were he on trial. The Government did not extradite Grove until after Brandenfels had been convicted. I have been unable to determine whether Grove was tried and, if so, whether his statement was introduced against him.

415. Id. at 1264. The court also focused on the lack of corroborating circumstances required under rule 804(b)(3) to support an exculpating penal interest statement. Specifically, the court pointed out that Grove's statement was "less than spontaneous," having been made four to six weeks after Grove fled to Brazil and spoken directly to one of the men sought to be exculpated. Id. The court also noted the conspicuous lack of corroboration for Grove's statement and Brandenfels' explanation by a third coindictee, Gnapp, who had never heard about the "promissory notes, deeds of trust, and mortgages" that Brandenfels allegedly signed to secure what he claimed to be a loan. Id.

416. Id. The court failed to recognize that if the statement had been admitted and Brandenfels had been acquitted, the statement might have increased the probability that the Government would have proceeded against Grove. The court also ignored the possibility that an implicated declarant reasonably would expect that whatever he said might damage his position, especially if he did not know what evidence the Government had or could gather against him.

417. The Supreme Court has not been alone in stretching the penal interest analysis to override a fourth amendment objection. In United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973) (en banc), a panel of the United States Court of Appeals for the Seventh Circuit suppressed evidence found by the police at the time of the defendants' arrest because it thought the complaint supporting issuance of the arrest warrant was defective. Id. at 985. Reversing, an en banc court held that a second hearsay statement by an unidentified informant in the complaint was sufficiently against interest to establish his reliability. Id. at 986-87. In that complaint, a federal officer reported that "[t]he confidential informant told your complainant that he has seen these checks in the possession of one of the defendants and that the defendant who had possession told him that the checks would be given by Robert E. Carmichael to John Doe and then to T.W. Allen..." Id. at 984 (footnote omitted). The en banc court inferred that the informant's statement was reliable because it was against penal interest. Id. at 986. The court, however, did not explain why the statement was against the informant's penal interest. It may have assumed, without basis in the record, that the informant was a coconspirator. Cf United States v. Gavic, 520 F.2d 1346, 1350, 1351 n.8 (8th Cir. 1975) (unidentified informant's reliability inferable from admission to affiant that he had seen illegal drugs in house that he occupied with defendant; statement against penal interest because "it at least implicated him in the crime of constructive possession of the contraband"). In fact, the informant might have instead learned of information about the crime without being criminally involved.

to consent to a warrantless search of a room she claimed to share with the defendant. Because Mrs. Graff and the defendant were illegally living together under Wisconsin law, the Supreme Court reasoned that her statement was against her penal interest and that she had authority to give consent. In addition to the questionable logic of inferring authority to consent from a statement against interest, the Court based its conclusion on an expansive analysis of what is against interest. The Court did not argue that Mrs. Graff knew that cohabitation was a crime, that the officer informed her of the possible against-interest effect of her statement, or that the state had ever prosecuted anyone for cohabitation. Furthermore, the Court failed to relate the against-interest effect of her statement to the crime about which the police were questioning her, a nexus that is found in Satterfield, Brandenfels, and almost every case involving a penal interest statement arising under rule 804(b)(3).

In United States v. Harris the Supreme Court found that an unidentified informant's statement, included in an affidavit as support for a search warrant, was against the informant's penal interest on a showing arguably less convincing than that in Matlock. According to the affiant in Harris, the informant admitted both purchasing illegal whiskey from the defendant on several occasions within a two-year period preceding his tip to a federal agent and seeing others drink illegal liquor on the defendant's premises. The Court concluded that the informant was reliable because of the penal interest effect of his statements. In the Court's view, "[c]ommon sense... would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions." Although the Court's

419. Id. at 167. The district court found that the searching officers reasonably could have assumed before the search that facts existed which would render the consent binding on Matlock, the defendant. Id. Nonetheless, the district court ruled that the Government failed to satisfy a second requirement of showing Mrs. Graff's actual authority to consent for Matlock because the only proof of her authority was her inadmissible hearsay statements. Id. at 167-68.

420. Id. at 177.

421. A Wisconsin statute made it illegal to "[o]penly cohabit... with a person he knows is not his spouse under circumstances that imply sexual intercourse." Id. at 176 n.13. Mrs. Graff admitted that she had lived with the defendant in Florida for several months. Id. at 176. The record, however, does not indicate that cohabitation was a crime in Florida, a fact that might have increased the likelihood that Mrs. Graff knew her statement might expose her to criminal liability. Florida in fact does have such a statute, but it apparently outlaws cohabitation only if it is coupled with sexual intercourse. See Fla. Stat. Ann. § 798-02 (West 1976) (prohibiting only lewd and lascivious cohabitating by unmarried couples). The Court boldly concluded that "[c]ohabitation out of wedlock would not seem to be a relationship that one would falsely confess." 415 U.S. at 176. That Mrs. Graff invoked the fifth amendment at the motion to suppress hearing, id. appendix at 22, however, supports the Court's conclusion that her statement was against interest. Predictably, the Court did not mention this fact in its opinion.

422. For a discussion of two cases in which a court did not find such a nexus, see notes 275 & 291 supra and accompanying text.


424. Id. at 583. Associate counsel for the House Subcommittee mentioned that the Supreme Court's decisions dealing with the existence of probable cause in search warrants based on statements against the maker's penal interest confirmed the Supreme Court's willingness to recognize the penal interest exception. Markup Session, June 5, 1973. He read these decisions as representing "a movement to cut back on the old Donnelly case." Id.

425. 403 U.S. at 575.

426. Id. at 583.

427. Id. The Court noted: "Admissions of crime, like admissions against proprietary interest, carry
observation is generally correct, its accuracy was not demonstrated in the Harris record. The Court implicitly acknowledged this when it said that even if the informant had been paid for his information or "promised a 'break'," these interests "would not eliminate the residual risk and opprobrium of having admitted criminal conduct." The record does not reveal where, when, or why the informant spoke or whether the informant feared that his statement would result in prosecution. The record also does not indicate the informant was aware that he had "confessed" to the crime of either possessing or purchasing unstamped liquor. The Government's failure to raise the against-penal interest argument in support of the informant's reliability also underscores the Court's eagerness to find the informant's statement against penal interest. The Government might have feared that an expansive interpretation of penal interest by the Supreme Court might rebound against the Government if lower courts then could admit similar statements on such a weak foundation when offered by defendants.

In interpreting rule 804(b)(3) courts should not disregard Matlock and Harris merely because the Government offered the statements in those cases to establish probable cause rather than the defendant's guilt or innocence. First, in both cases the Court suggested the statements would be admissible under the then-pending version of rule 804(b)(3). Second, the defendant's practical "burden" of dispelling guilt at trial surely is no greater than the Government's burden in establishing probable cause in the fourth amendment.

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428. Had the Ninth Circuit made the same observation in Satterfield and Brandenfels, it would have reached different results in both cases.

429. 403 U.S. at 583.

430. Id. at 584.

431. In all likelihood the Harris informant thought that he could protect himself only by implicating the defendant, a danger quite different from that which the Department of Justice thought inheres in statements made by prison inmates or by the defendant's friends. In the Department of Justice's view, such parties risk nothing by confessing in an attempt to help the defendant. See Justice's First Letter, supra note 63, at 33 (claiming these situations "fraught with the possibility of contrivance or of unfounded braggadocio"). Indeed, the affiant in Harris might have fabricated the existence of either the informant or the conversation. In the fourth amendment area, a defendant might learn less information about the informant by cross-examining the affiant during a suppression hearing than the Government might learn about the unavailable declarant by cross-examining the reporting witness during the defendant's trial. The Government probably will learn more because at the suppression hearing it can object to defense questions designed to identify either the informant or the context in which he spoke. Cf PROPER. FED. R. EVID. 510, reprinted in Supreme Court Draft, supra note 1, at 255-56 (detailing when Government must disclose informant's identity).

432. 403 U.S. at 594 (Harlan, J., dissenting).

433. In Matlock and in Harris, however, the Court acknowledged that Donnelly might prevent the Government from introducing penal interest statements at the defendant's trial. United States v. Matlock, 415 U.S. 164, 177 (1974); United States v. Harris, 403 U.S. 573, 584 (1971).

434. See United States v. Matlock, 415 U.S. 164, 177 (1974) (statement likely inadmissible at trial under proposed rule 804(b)(3) of Supreme Court Draft only because declarant probably available to testify); United States v. Harris, 403 U.S. 573, 584 (1971) (Donnelly's implication that statements against penal interest without value and per se inadmissible partially rejected in proposed rule 804(b)(3) of Revised Draft). Although the House had approved the Subcommittee's change to rule 804(b)(3) by the date of the Matlock decision, the Court's opinion referred to the rule as rule 804(b)(4), 415 U.S. at 177, which was its number in the Supreme Court Draft. It is thus fair to conclude that the Court referred to the Supreme Court Draft's version of the rule. In any event, only the corroboration requirement, not the definition of penal interest, changed from the Supreme Court Draft to the version adopted by Congress. The Matlock Court did not discuss either corroboration requirement.
context. Finally, the Supreme Court's willingness to find a statement against interest in circumstances that would have troubled the courts of appeals in *Satterfield* and *Brandenfels* is convincingly demonstrated by its decision in *Dutton v. Evans*.435

In *Dutton* the Government charged Evans, Williams, and Truett with murdering three police officers.436 At Evans' separate trial the Government introduced Williams' comment, reportedly made while Williams was in jail awaiting his own trial, that "[i]f it hadn't been for . . . Alex Evans, we wouldn't be in this now."437 In his habeas petition, Evans argued that the court, by admitting Williams' statement, violated his sixth amendment right of confrontation.438 Justice Stewart, writing for a plurality of the Court,439 rejected that argument on two grounds. Not only had Evans had the opportunity to test the witness' report of Williams' statement,440 but also Williams' statement was trustworthy because it was against his penal interest.441 Williams' statement, however, is ambiguous: Did he mean that Evans murdered the victims or, instead, that Evans' earlier conduct, separate from his involvement in the crime charged, precipitated the prosecution? In either case, a statement that included a description neither of the crime nor of Williams' involvement required an imaginative inference to find its disserving effect. The Court, nonetheless, characterized Williams' statement as against his penal interest, thereby demonstrating that it interprets the penal interest and the "reasonable man" tests less restrictively when the Government offers

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436. Id. at 76.
437. Id. at 77. Shaw, a fellow prisoner, testified that Williams made this comment in response to Shaw's question, "How did you make out in court?" Id.
438. Id. at 76. The prosecution did not show that Williams was unavailable to testify at trial. Id. at 102 (Marshall, J., with Black, Douglas & Brennan, JJ., dissenting). Defense counsel did not subpoena Williams, apparently believing that Williams would invoke the fifth amendment. Id. at 102 n.4. If Williams was available, the statement could not have been admitted under rule 804(b)(3). The Court, however, discussed the admissibility of Williams' statement in constitutional rather than in evidentiary terms. Id. at 83 (opinion of Court).
440. 400 U.S. at 88. The plurality concluded that the opportunity to cross-examine Shaw, the reporting witness, satisfied any confrontation clause requirement with respect to Shaw's testimony. Id. This conclusion confirms the error of excluding a penal interest statement on the ground that the reporting witness is lying, as the Ninth Circuit essentially did in *Satterfield*. See notes 237-43 supra and accompanying text (discussing *Satterfield*). Both Justice Marshall, 400 U.S. at 103 & n.5 (Marshall, J., with Black, Douglas & Brennan, JJ., dissenting), and the court of appeals, *Dutton v. Evans*, 400 F.2d 826, 828 n.4 (5th Cir. 1968), rev'd, 400 U.S. 74 (1970), doubted that Williams had made the statement attributed to him. The court of appeals described the setting:

[Shaw] testified that Williams was talking to him in a normal voice through a ten-by-ten plate-glass window in a prison hospital door, while Williams was lying on a bed in the room and Shaw was standing in the hall. Shaw had stated in the Williams trial that the window was covered only by wire mesh. The fact that it was covered by a pane of plate glass was brought out in Evans' trial. Moreover, evidence was submitted but rejected by the trial court which tended to show that Shaw's testimony may have been compensation for a respite from the dull routine of prison life.

441. 400 U.S. at 89.
the statement than do many courts of appeals when the defendant offers the statement.

How, then, should a court determine what "a reasonable man in the [declarant's] position" would have thought? A court should admit the statement if the declarant said that he thought his statement was against his interest, even if he was mistaken on an objective assessment. In the absence of such a statement by the declarant, a court must consider the available circumstantial evidence of the declarant's state of mind. Thus, the court must evaluate the facts stated, the declarant's sophistication, the information available to him concerning his criminal exposure, his relationship to the defendant, and the context in which he made the statement.

If the declarant's statement approaches a confession or if it is recorded, sworn to, or written in the presence of others or in response to a request, the declarant should recognize the gravity of his actions and the likelihood that his statement will be reported to the police or to the defense. Similarly, when the declarant speaks to a police officer, to defense counsel or the defendant, or to a friend or a relative of the defendant, he should be

442. Understandably, a court might suspect that a defendant's friends or relatives might claim responsibility when the defendant faces a harsher punishment (a multiple-offender sentence, for example) than they would face (probation or an opportunity for diversion, for example). Cf. Vaughn v. United States, 367 A.2d 1291, 1293 (D.C. 1977) (even though defendant's girlfriend testified against advice of counsel that she placed foil packets in defendant's sock without his knowledge and she informed police to obtain revenge, defendant aware drugs in his possession).


444. See Chambers v. Mississippi, 410 U.S. 284, 297 (1973) (to extent declarant's sworn confession tended to incriminate him, it tended to exculpate defendant). But see United States v. Metz, 608 F.2d 147, 157 (5th Cir. 1979) (sworn statement given to defense counsel excluded; corroboration test of rule not met when statement made in nonadversarial setting), cert. denied, 101 S. Ct. 80 (1980).

Far-sighted defense counsel might seek permission to depose a declarant whom counsel fears may later become unavailable through flight or assertion of the fifth amendment privilege. See FED. R. CRIM. P. 15 (in "exceptional circumstances" court may order deposition upon motion and notice to parties). Deposing a declarant serves two purposes. First, the formality of the proceeding increases the likelihood the declarant understands what he risks by speaking. Second, rule 804(a)(5) of the Federal Rules of Evidence provides that the proponent of a statement of an absent declarant establishes the declarant's "unavailability" by attempting to obtain his "attendance or testimony . . . by process or other reasonable means." FED. R. EVID. 804(a)(5). If the defendant's fifth amendment protections does not forgive his failure to obtain the declarant's "testimony," defense counsel should try to depose a declarant who is willing to speak.


446. The Department of Justice has conceded that a court may admit a confession given to a police officer before the defendant's arrest. See Justice's First Letter, supra note 62, at 34.

447. Cf. United States v. Benveniste, 564 F.2d 335, 341 (9th Cir. 1977) (statement made to private investigator should have been admitted). But cf. United States v. Metz, 608 F.2d 147, 157 (5th Cir. 1979) (sworn statement to defense counsel excluded), cert. denied, 101 S. Ct. 80 (1980); United States v. Oropeza, 564 F.2d 316, 325 (9th Cir. 1977) (statement written by declarant while in jail cell excluded), cert. denied, 434 U.S. 1080 (1978); United States v. Brandenfels, 522 F.2d 1259, 1263 (9th Cir.) (statement made to defense counsel and defendant excluded), cert. denied, 423 U.S. 1033 (1975).

448. Cf. United States v. Goodlow, 500 F.2d 954, 958 (8th Cir. 1974) (trial court should not necessarily
cognizant of his statement's possibly disserving effect. A declarant should be wary of speaking to a police officer who is interested in solving the crime or to defense counsel and the defendant's friends or relatives, all of whom are interested in finding any information that might help the defendant, especially when that person searches out the declarant to obtain his statement. In either case, the declarant should recognize that the listener wants to learn what the declarant knows of the incident.

In contrast, when the declarant speaks either to a friend or relative or to someone unassociated with the Government or the defendant, he has less reason to fear that his statement will be reported. Although he may doubt that his statement will be reported, the declarant nonetheless might recognize the potentially disserving effect of the statement. Moreover, because he feels secure in speaking to such a person, he might be more likely to speak

exclude statement when witnesses who would testify to statement included defendant, defendant's wife, and defendant's close friend). But cf. United States v. Hughes, 529 F.2d 838, 841 (5th Cir. 1976) (statement made to defendant's brother excluded).

449. The declarant should be especially cognizant of the possibly disserving effect of his statement if someone warns him about the possible significance of his statement.

450. An exception might be a crime, like statutory rape, to which the defense of "consent" does not apply. Because this defense is one that the normal person might expect a court will apply, an unwilling declarant might not realize that he has committed a crime. The House Subcommittee discussed only this penal interest question. See note 112 supra (one Subcommittee member worried that prosecutor easily might obtain admission about sexual contact from declarant unaware that admission would satisfy one element of statutory rape crime).

451. This example has divided the courts. Compare United States v. Hoyos, 573 F.2d 1111, 1115 (9th Cir. 1978) (because statement to close friend, declarant had no reason to fear friend would report it; friend reported statement only after declarant's death) and Sussex Peerage, 8 Eng. Rep. 1034, 1044 (1844) (because statement made to son, declarant had little reason to fear son would repeat it) with Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam) (even though statement to friends, trial court should have admitted it) and Chambers v. Mississippi, 410 U.S. 284, 300-02 (1973) (even though statement to friends, trial court should have admitted it). See also MODEL CODE OF EVIDENCE rule 509, Comment c (1942) (that statement made to acquaintance irrelevant); Cleary Memorandum, supra note 112, at 7-8 (declarant's statement to acquaintance admitting guilt and implicating defendant is less likely to be against interest when made in custody than when declarant has nothing to gain by exonerating defendant).

452. Examples include an informant, a bartender, an eavesdropper, or a cellmate. These persons nonetheless might report the statement. Cf. United States v. Atkins, 558 F.2d 133, 135-36 (3rd Cir. 1977) (declarant's statement to X that he killed victim overheard by bystander who reported statement to victim's family and police; conviction reversed because statement against interest), cert. denied, 434 U.S. 1071 (1978); United States v. Bagley, 537 F.2d 162, 165 (5th Cir. 1976) (reasonable man would not falsely admit committing serious crime to cellmate if even remote chance that admission would be used against him), cert. denied, 429 U.S. 1075 (1977).

453. A court might exclude a statement when the declarant has confessed one crime in an attempt to avoid greater punishment for a separate crime. Compare People v. Moscatello, 114 Ill. App. 2d 16, 32, 34, 251 N.E.2d 932, 939, 940 (Ct. App. 1969) (declarant's confession to robbery excluded because he was motivated to avoid extradition to be tried for murder) with Osborne v. Purdome, 250 S.W.2d 159, 163 (Mo. 1952) (declarant's implication of self and defendant admitted against defendant, despite declarant's statement that he confessed in hope of obtaining leniency because declarant realized he would receive some sort of punishment). In Moscatello the court hypothesized that the defendant spoke out of self-interest. People v. Moscatello, 114 Ill. App. 2d 16, 34, 251 N.E.2d 532, 534 (Ct. App. 1969). In Osborne the court ignored the declarant's admission of self-serving interest. Both courts employed a flawed approach. See Note, Declarations Against Penal Interest, supra note 328, at 169-70 (hypothetical motive to falsify statement unsubstantiated by evidence not sufficient reason to exclude statement; courts should balance relative importance of self-serving and disserving interests to determine trustworthiness).

454. Trustworthiness is premised here in a manner consistent with the first interpretation of "against interest" discussed in this article. See notes 248-57 supra and accompanying text (discussing two historical approaches for defining "against interest").
truthfully. The more difficult instance occurs when the declarant might enhance his self-importance by claiming responsibility for the crime, as when he speaks in prison or in front of "street" acquaintances or a potential victim. A similar problem arises when the declarant implicates the defendant while speaking with a police officer. In this setting, the declarant might have attempted "to curry favor with the authorities." Because juries are more likely to believe that the defendant has pressured the declarant to speak than that the Government has done so, courts should interpret the "reasonable man" test more rigorously when the Government offers such a statement.

The setting in which the declarant speaks also is important. When speaking in court, in defense counsel's office, or at a police station, the declarant should recognize the potentially disserving effect of his statement. In these situations, the declarant should be on notice that because a crime has been committed, an investigation is underway, and another person has been accused or is suspected, his statement may be disserving.

Even if a statement is privileged, a reasonable person might still think it is against his penal interest. Of course, when the declarant believes that the listener cannot repeat the statement or when the listener tells the declarant that he will not repeat it, the "reasonable man" test is not met. In other settings, however, such as when the privilege is one not commonly recognized or when the declarant fears that the listener might report the conversation—a report that might trigger a police investigation of the declarant notwithstanding the listener's inability to testify against the declarant—the privileged nature of the communication should not bar its admission.

Irrespective of the conditions under which the declarant made a statement, rule 804(b)(3) suggests that he (or the "reasonable man") must recognize at

455. Advisory Committee Note to Supreme Court Draft, supra note 1, at 328; see United States v. Love, 592 F.2d 1022, 1025 (8th Cir. 1979) (declarant's statement accusing defendant of transporting her across state lines to commit act of prostitution excluded because of probability that statement made in attempt to gain leniency); United States v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977) (declarant's grand jury testimony excluded because, once immunized, declarant could have been prosecuted only if he failed to implicate defendant).

456. See Rothstein, supra note 183, at 154 n.151 (jury more sophisticated about possibilities of private coercion to obtain exculpatory statements than about analogous Governmental pressures to obtain incriminating statements). Because the Government need not corroborate the declarant's incriminating statement as a condition of admissibility, a court should exclude the statement if the declarant could protect himself only by implicating the defendant. One court excluded a defense-offered statement when the declarant said that he exonerated the defendant solely to avoid physical harm. United States v. Miller, 277 F. Supp. 200, 209-10 (D. Conn. 1967); accord, G. Lilly, AN INTRODUCTION TO THE LAW OF EVIDENCE 265 (1978) (arguing that rule 403 authorizes judge to exclude such statements). A court should not exclude the statement on this ground, however, as long as the defendant satisfies the corroboration requirement and the Government had the opportunity to inform the jury of the reliability problem. See notes 704-07 infra and accompanying text (advance notification provides Government opportunity to challenge credibility of declarant).


459. Cf. Regina v. O'Brien, 76 D.L.R.3d 513, 519-21 (1977) (10 months after counsel's client convicted, declarant confessed to counsel on understanding that statement would not be used against him that he, not defendant, committed crime; statement properly excluded as not against interest). See generally Ziff, supra note 256, at 168-71 (discussing O'Brien).
the moment he spoke that his statement was against his penal interest. The language of the rule is ambiguous, providing that a statement is against interest if "at the time of its making" it "so far tended to subject" the declarant to criminal liability that a reasonable person would not have spoken unless he thought he was telling the truth. Standing alone, the language "at the time of its making" suggests that, although the statement must be against interest when spoken, the declarant might recognize its disserving aspect at some later point. However, the last clause of the rule's first sentence—"a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true"—appears to modify the language "at the time of its making" and to exclude a statement that the declarant recognizes as against his interest only later. Although the Advisory and Standing Committees did not discuss this issue, this interpretation is consistent with their desire to distinguish statements against penal interest from party admissions.

Arguably, this interpretation is too restrictive. Can we not infer that the statement was trustworthy if the declarant repeats his statement on a later occasion; if he acknowledges later that he recognized the disserving effect of what he said; or if he invokes the fifth amendment to defense questions about his statements, his culpability, or his knowledge of the defendant's culpability? Although it did not explain why, the Department of Justice feared that repetition of the statement would justify its admission. Yet repetition does not necessarily establish reliability: The declarant may never recognize the significance of his statement. An inference of reliability does arise, however, when the declarant explicitly admits complicity, repeats facts rather than opinions, repeats precisely his earlier statement, threatens or implores the reporting witness not to reveal his earlier statement, demands immunity in testifying about his statement before a grand jury, or claims his earlier statement was true.

Nonetheless, the United States Court of Appeals for the Ninth Circuit in United States v. Satterfield refused to consider the declarant's later statements about what he understood to have been the effect of his earlier statement because the court thought that the proper inquiry is what a


461. The declarant might recognize when he speaks again, however, that his second statement is against his penal interest. This recognition would justify admitting the second statement, but not necessarily the first one. The defendant, of course, would want to introduce both statements so that each would reinforce the other. The first statement should not be excluded as cumulative.


466. 572 F.2d 687 (9th Cir.), cert. denied, 439 U.S. 840 (1978).
“reasonable man,” not the actual declarant, would have thought.\textsuperscript{467} The
Satterfield approach represents an overly literal interpretation of the rule's
language. This approach also illustrates the error of asking only what the
“reasonable man” would have thought. The rule's direction to consider the
“reasonable man” assumes that the court has no evidence to infer what the
declarant understood to be the effect of his statement. As indicated in the
preceding section, the better approach evaluates the trustworthiness of
whatever the declarant says he understood.\textsuperscript{468}

Similarly, a declarant's assertion of his privilege against self-incrimination
also should justify admitting his statement.\textsuperscript{469} Of course, such an assertion
does not necessarily establish that the declarant understood the disserving
nature of his statement when he spoke. He may have recognized the effect of
his statement only upon later reflection or when alerted by the judge, the
prosecutor, or his attorney. Although the privilege blocks the court from
determining precisely what the declarant thought, the judge might be able to
infer what the declarant understood to be the effect of his statement by
questioning the declarant closely to ascertain his reason for asserting the
privilege. By invoking the privilege, however, the declarant acknowledges
that he believes that his earlier statement was in some sense against his
interest. Arguably, that acknowledgement confirms the reliability of his
statement and perhaps supports an inference that he understood the penal
interest effect of his statement when he spoke.\textsuperscript{470} Moreover, a court should
admit the statement regardless of the restrictions of rule 804(b)(3) when the
declarant fails to testify because either the court or the prosecutor warned him
about the potentially disserving effect of testifying about his earlier state-

\textsuperscript{467} Id. at 691 n.1 (“test under Rule 804(b)(3) involves the perception of a reasonable person in
[declarant's] position, not of [declarant] himself").

\textsuperscript{468} A declarant's later explanation of what he understood to be the effect of an earlier statement is
hearsay. Under rule 104(a), however, the court may consider any nonprivileged information, including
hearsay, in determining whether to admit the earlier statement. Also, if the declarant recognizes his earlier
statement was then against his penal interest, his present state of mind is admissible, see Fed. R. Evid. 803(3)
(state of mind hearsay exception), if relevant to determining his understanding when he made the
offered statement.

\textsuperscript{469} The declarant can invoke the privilege in response to incriminating questions. See People v.
Chapman, 50 Cal. App. 3d 872, 877, 123 Cal. Rptr. 862, 865 (Ct. App. 1975) (declarant, who allegedly
inculcated self and exculpated defendant, permitted to invoke fifth amendment).

\textsuperscript{470} Compare United States v. Benveniste, 564 F.2d 335, 341 (9th Cir. 1977) (although witness' out of
court statement standing alone not against penal interest, witness' assertion of privilege at trial "lends
strong support to conclusion that her testimony would tend to subject her to criminal liability") with Ryan
v. State, 95 Wis.2d 83, 95 n.4, 289 N.W.2d 349, 354 n.4 (1980) (witness' assertion of privilege cannot be
used to bootstrap statement into evidence without further corroboration) and People v. Traylor, 23 Cal.
App. 3d 323, 330-31, 100 Cal. Rptr. 116, 120 (Ct. App. 1972) (witness' assertion of privilege does not mean
that he realized that earlier statement to defense counsel against penal interest). Cf. United States v.
Matlock, 415 U.S. 164 (1974) (app. at 22)(co-occupant's assertion of privilege might provide basis to infer
that she spoke against penal interest). When a witness' reasons for asserting the privilege are unknown, a
court has no basis for inferring guilt. The witness, for example, might be uncertain why the interrogator has
asked a question. See E. Griswold, THE FIFTH AMENDMENT TODAY 15-16 (1955) (arguing that
witnesses interrogated by congressional investigative committee might invoke fifth amendment privilege to
shield conduct that might be in chain of proof of criminal charge against them). This concern,
however, does not exist when defense counsel questions the declarant during the defendant's trial because
the declarant knows that his statement, his complicity, and the defendant's involvement are at issue. Thus,
Benveniste seems to be correct.
ment or because the prosecutor refused to immunize the declarant, thereby forcing him to assert the privilege.

C. CORROBORATION

The Advisory and Standing Committees, which initially refused to include a corroboration requirement when the Department of Justice demanded one, added a "simple corroboration" test to the Revised Definitive and Supreme Court Drafts to appease Senator McClellan. During the hearings before the House Subcommittee, Judge Friendly and the Subcommittee members misunderstood the Advisory and Standing Committees' reason for adding the "simple corroboration" test. The Subcommittee mistakenly thought that the test was too vague, and they feared that the defendant could satisfy it by testifying to his own innocence, a way originally adopted by the Advisory Committee but later rejected by the Standing Committee.

This development of the rule's corroboration requirement differs significantly from Judge Weinstein's version. By tracing the evolution of that requirement in a neutral way, Judge Weinstein finds room to advance a revisionist interpretation of the burden that the rule imposes on the defendant. According to Judge Weinstein, the Standing Committee added the "simple corroboration" test to the Supreme Court Draft at the "suggestion" of Senator McClellan and then Congress merely "elaborated upon" the test. He rejects interpreting the rule's test in terms of the Government's burden to corroborate the defendant's confession, an analogy that the Department of

471. See State v. Jamison, 64 N.J. 363, 376-78, 316 A.2d 439, 446-47 (1974) (trial court should not have appointed counsel for declarant who was prepared to exonerate defendant before speaking to counsel because such act encouraged declarant to invoke fifth amendment privilege).

472. See note 7 supra and accompanying text (discussing effect of Governmental grants of immunity on fact-finding process). For a discussion of the constitutional dimension of this issue, see note 835 infra.

473. Professor Moore made the same mistake. See 11 MOORE, supra note 16, § 804.06(3)[2], at VIII-281 ("In recognition of the supposed untrustworthiness of third-party confessions offered to exculpate an accused, the Supreme Court's version required that such a statement be corroborated."). Although impossible to trace with certainty, the demand for a corroboration requirement probably stemmed from a misinterpretation of Justice Holmes' dissent in Donnelly and of early decisions that admitted penal interest statements. Because of the force of the Sussex Peerage and Donnelly, those courts that were willing to admit a particular statement usually detailed the circumstantial evidence that justified deviation from the common law's refusal to recognize the penal interest exception, as in Hines v. Commonwealth, 136 Va. 728, 735-43, 117 S.E. 843, 844-49 (1923). This judicial attempt to avoid an unfair result in a particular case, without rejecting precedent by recognizing a general penal interest exception, was probably misinterpreted to require corroboration in every instance, even after the courts and the legislatures became more willing to admit penal interest statements. See Note, Declarations Against Penal Interest, supra note 328, at 173 n.134.

474. Although the Subcommittee advanced this reason in its report, see note 153 supra, it never discussed this particular issue during its markup sessions. Instead, the Subcommittee feared that most declarants were either friends or relatives of the defendant or prison inmates and thus were not trustworthy. Markup Session, June 5, 1973; Markup Session, June 12, 1973.

475. 4 WEINSTEIN, supra note 16, ¶ 804(b)(3)[03], at 804—103.

476. Id. Professor Moore, in contrast, correctly states that "Congress expanded upon the [corroboration] requirement by adding stronger language . . . ." 11 MOORE, supra note 9, ¶ 804.06(3)[2], at VIII-281. Nonetheless, he fails to explain what the "stronger language" means other than that the standard for corroboration "must not be too high." Id. at VIII-283.

477. 4 WEINSTEIN, supra note 16, ¶ 804(b)(3)[03], at 804—104.
Justice and Senator McClellan first proposed, the Advisory Committee initially rejected, and the Standing Committee ultimately advanced. Instead, Judge Weinstein restates the requirement of the rule to read: “The court should only ask for sufficient corroboration to ‘clearly’ permit a reasonable man to believe that the statement might have been made in good faith and that it could be true.”

In paraphrasing the rule, he implies that the rule demands less proof than would the confession analogy. Because Judge Weinstein was a member of the Advisory Committee, his decision to ignore congressional concern and reassert the original position of the Advisory Committee is perhaps understandable. Nonetheless, his historical explanation of the rule's corroboration requirement and his interpretation of what that requirement demands are plainly wrong.

In rejecting Judge Weinstein’s interpretation, one has not explained how a court should interpret the rule's corroboration requirement. Throughout the development of the requirement, the Advisory and Standing Committees made little effort to explain what was to be corroborated and by what quantum of evidence. In its Note to the Supreme Court Draft, for example, the Standing Committee said only that the “simple corroboration” test “should be construed in such a manner as to effectuate its purpose of circumventing fabrication.”

The vagueness of this explanation confirms both the Standing Committee’s reluctance to add the requirement and its apparent hope that the requirement would be meaningless.

478. Id.

479. Judge Weinstein, for example, rejects the relevancy of Opper v. United States, 348 U.S. 84 (1954), in which the Supreme Court, id. at 90-92, explained the corroboration burden in introducing a defendant's statement. 4 WEINSTEIN, supra note 16, ¶ 804(b)(3)[03], at 804—104 n.11. The Standing Committee, nonetheless, cited Opper to explain the “simple corroboration” test. See Committee Response, supra note 139, at 59. For a discussion of Opper, see notes 497-501 infra and accompanying text.

Wigmore also rejected the need for corroboration, never mentioning the word in his discussion of the penal interest exception. He characterized the analogous demand for corroboration of an accomplice's statement as a condition of admissibility as “mere useless chaff,” 7 WIGMORE, EVIDENCE § 2059, at 440 (Chadbourn rev. ed. 1978), a comment that Weinstein quotes for support. 4 WEINSTEIN, supra note 16, ¶ 804(b)(3)[03], at 804—104. Wigmore only referred to independent evidence when he noted the need for it in determining whether the statement was truly against interest. 5 WIGMORE, supra note 4, ¶ 1468, at 346.

480. Judge Weinstein concludes that “[i]n effect, the test of Rule 403 is applicable.” 4 WEINSTEIN, supra note 16, ¶ 804(b)(3)[03], at 804—105. Rule 403 authorizes the exclusion of relevant evidence whose “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .” Fed. R. Evid. 403. Using rule 403 as a guide would result in shifting the burden from the defendant in establishing the trustworthiness of the statement to the Government in establishing its untrustworthiness. Although this is the better judicial approach to rule 804(b)(3), Congress clearly did not intend that result. See Lowery v. Maryland, 401 F. Supp. 604, 607 (D. Md. 1975) (Judge Weinstein's position incorrectly interprets congressional intent), aff'd without opinion, 532 F.2d 750 (4th Cir.), cert. denied, 429 U.S. 919 (1977). The Subcommittee never discussed the relationship between rules 804(b)(3) and 403 during its markup sessions. The rule's corroboration requirement, in fact, probably requires the reverse of rule 403: The defendant must establish, at the very least, that the probative value of the statement substantially outweighs the dangers listed in rule 403.

Judge Weinstein provides two examples to explain how a rule 403 test would work. If the proof were “undisputed” that the declarant “could not have been at the scene of the crime because he was in prison,” the court should exclude his statement. 4 WEINSTEIN, supra note 16, ¶ 804(b)(3) [03], at 804—104-05. In contrast, “if there is evidence that he was near the scene and had some motive or background connecting him with the crime,” the court should admit his statement. Id. at 804—105.

481. Standing Committee Note to Supreme Court Draft, supra note 1, at 327.

482. Several possible reasons might underlie the vagueness of this explanation. First, neither the
During the Subcommittee's hearings, the Standing Committee, in response to the Department of Justice's objection to Chief Justice Burger that the "simple corroboration" test was unworkably vague, analogized the test to the Government's burden in convicting a defendant by means of his or an accomplice's statement. Earlier the Advisory Committee had rejected the Department of Justice's analogy to convicting a person through his own statement. Prior to this time, however, no one had offered the analogy of convicting a defendant through his accomplice's statement. Because no internal memoranda exist that explain the Standing Committee's reason for offering both analogies, one cannot ascertain whether the Committee no longer agreed with the Advisory Committee's earlier rejection of the confession analogy, whether it was trying once again to mollify its critics, or whether it was trying cleverly to silence its critics by adopting their interpretative analogy. The second or third explanation appears to make more sense because neither analogy would have been easy to apply and because each might provide different answers to the several questions discussed below. During these hearings, the House Subcommittee never discussed how courts should interpret its version of the corroboration requirement, except indirectly by concluding that the trial court in Donnelly should have admitted the declarant's statement.

What, then, does the rule's corroboration requirement demand? The only certain conclusion is that the defendant cannot satisfy that requirement by testifying that he is innocent. Beyond that, interpretation is difficult. The "clearly indicate" language is not used elsewhere in the Federal Rules of Evidence. Congress implicitly rejected the confusing analogies offered by the Standing Committee as interpretative guides when Congress increased the defendant's corroboration burden. Moreover, the Subcommittee's position on Donnelly appears to be inconsistent with its intent to increase the defendant's

Advisory Committee nor the Standing Committee thought the "simple corroboration" requirement was necessary. Thus, they added it out of fear rather than conviction. Second, Senator McClellan opposed the Advisory Committee's only attempt to describe what it thought "simple corroboration" should require—the defendant's testimonial denial of guilt. Senator McClellan, however, would have accepted the nonspecific explanation quoted in the text as long as the Committee added the corroboration requirement. Third, because Senator McClellan objected to the Advisory Committee's attempt to explain "simple corroboration" at the September 22, 1971 meeting and the Standing Committee voted to add the "simple corroboration" requirement on September 30, 1971, the Standing Committee had no time to develop an alternate way of explaining "simple corroboration" and did not discuss any alternatives during its meeting. Finally, Professor Cleary consciously chose to leave the "simple corroboration" test as vague as possible. As he said, "what constitutes corroboration is left open." Standing Committee Meeting, Sept. 30, 1971. Other evidence, however, suggests that the Standing Committee intended the "simple corroboration" test to impose a high burden. See notes 486-50 infra and accompanying text (Standing Committee probably intended to analogize "simple corroboration" burden to Government's corpus delicti burden).

483. The Advisory Committee, however, did use the word "clearly" once in a separate context. In the Revised Draft, the Advisory Committee indicated that specific instances of conduct could be used under rule 608(b) to question a witness' character for truthfulness "if clearly probative of truthfulness . . . ." Revised Draft, supra note 1, at 389. That test replaced the requirement of the Preliminary Draft that specific instances could be used "if relevant to truthfulness . . . ." Preliminary Draft, supra note 1, at 293. In the Supreme Court Draft, however, the Advisory and Standing Committees deleted "clearly," simply indicating that specific instances could be used "if probative of truthfulness . . . ." Supreme Court Draft, supra note 1, at 267. Neither Committee explained why "clearly" was added to the Revised Draft or deleted from the Supreme Court Draft. No evidence exists to infer that the House Subcommittee was aware of the Advisory Committee's use of the word in the Revised Draft and that the Subcommittee therefore thought that the penal interest exception warranted such a test.
burden. Donnelly would provide an opponent of the penal interest exception with perhaps the best example of a case in which the trial court should not have admitted the statement. In Donnelly not only was there no evidence to check the veracity of the witness who would have testified about the declarant’s purported statement, but also the evidence linking the declarant to the crime was of questionable value. Because of this confusion and uncertainty, we must examine the meaning of each attempt to explain the corroboration test.

1. The Confession and Coconspirator Analogies

**What Must Be Corroborated?** In applying the Standing Committee’s confession and coconspirator analogies, a court must determine what the defendant must corroborate. Is it the truth of what the declarant said or the personal trustworthiness of the declarant that permits a court to infer the truth of his statement? Neither alternative defines the Government’s burden in corroborating the defendant’s or the coconspirator’s statement. To introduce a coconspirator’s statement under rule 801(d)(2)(E), the Government must establish the existence of a conspiracy and the defendant’s participation in it. To convict a defendant based in part on his admission or confession, the Government must introduce other evidence to establish both the voluntariness of his statement (if he moves to suppress) and the corpus delicti of the crime. Most courts apply the corroboration requirement to the corpus delicti doctrine. The defendant’s fifth amendment protection against coerced confessions, entitlement to a Miranda warning, and sixth amendment

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484. For a discussion of Donnelly, see notes 549-67 infra and accompanying text.

485. The historical roots of rule 804(b)(3)’s corroboration requirement may be the demand for more than two witnesses in a treason charge or for evidence corroborating an accomplice’s testimony. See 7 Wigmore, supra note 4, §§ 2036 & 2056. Wigmore’s justification for the two-witness rule in treason cases—“the relative proportion, in experience, of . . . the likelihood of false accusations, as compared with the harm of a guilty person’s escape,” id. § 2037—is similar to the apparent concern of the House Subcommittee with respect to defense-offered penal interest statements. Wigmore thought that “there will be [an] ample array of witnesses to prove [the defendant’s] acts” if he did commit treason. Id. § 2037. Similarly, the House Subcommittee may have believed that evidence corroborating the declarant’s self-implication would exist if he told the truth. In the absence of such evidence, the Subcommittee may have thought the declarant was lying or the defendant had fabricated his existence.

Wigmore’s explanation of the corroboration rule for accomplice testimony is also instructive. He argues that at early common law the “rule” was not a rule but an admonition to the judge to caution the jury about the credibility of the accomplice’s testimony. Id. § 2056. When American courts later rejected judicial comment on the evidence as a way of assisting the jury, they converted the cautionary instruction into a corroboration requirement. Id. Although no evidence suggests that the Advisory and Standing Committees or the House Subcommittee were aware of these historical analogues, this history indicates that one better way of treating defense-offered penal interest statements is to admit the statement freely and to encourage the judge to comment about the credibility and relevancy of the declarant’s purported statement. See note 704 infra and accompanying text (court should be more willing to admit hearsay if judge can identify credibility and weight issues for jury).

486. Fed. R. Evid. 801(d)(2)(E). Two other requirements of that rule—that the coconspirator spoke during and in furtherance of the conspiracy—are inapplicable to rule 804(b)(3). Supreme Court Draft, supra note 1, at 293.

487. See McCormick, supra note 4, at 346 (confession requires corroboration tending both to establish reliability of confession and to prove commission of crime); Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1072 (1966) (same) [hereinafter Developments in Confessions].

488. McCormick, supra note 4, § 158, at 347; Developments in Confessions, supra note 487, at 1072.
right to counsel might provide sufficient safeguards against the introduction of unreliable confessions to relieve the Government of the burden of proving that the defendant's statement was reliable as a further admissibility condition. Thus, the Standing Committee probably intended to analogize the “simple corroboration” test to the Government's *corpus delicti* burden.

That analogy, however, does not work well. At a minimum, the *corpus delicti* doctrine obliges the Government to establish a particular injury. Most courts also require the Government to show that a criminal agent caused the injury. A very few courts demand that the Government introduce evidence that the defendant committed the crime. The purpose of the first two showings is to prevent the conviction of a defendant for a nonexistent crime. The purpose behind the third approach is to prevent the conviction of an innocent defendant who, to protect another or to commit legal suicide, has chosen to confess to a crime he did not commit. The first two approaches are inapplicable to defense-offered statements. Through its proof against the defendant, the Government will establish the commission of a crime. If the Government fails to do that, the admissibility of the declarant's statement will never become an issue because the court must grant the defendant's motion for judgment of acquittal at the close of the Government's case-in-chief.

To have any meaning, the “simple corroboration” test should require some form of corroboration of the declarant's statement. By imposing a burden on the defendant that the Government does not shoulder in introducing either the defendant's or the coconspirator's statement, was the Standing Committee demanding corroboration of the truth of what the declarant said, of the trustworthiness of the declarant, or of both? Although the Standing Committee's citation to Opper v. United States, 348 U.S. 84, 92-94 (1954), in which the Supreme Court discussed the meaning of the Government's *corpus delicti* burden, id. at 92-94, suggests the Committee's intent, the Committee's simultaneous citation to Dean Wigmore, who mentioned both aspects of the Government's burden, renders this conclusion less than certain. See Committee Response, supra note 139, at 59 (citing 7 Wigmore, Evidence § 2071 (3d ed. 1940)).

489. In State v. Edwards, 49 Ohio St. 2d 31, 358 N.E.2d 1051 (1976), the Ohio Supreme Court indicated that because of “the revolution in criminal law of the 1960's and the vast number of procedural safeguards protecting the due-process rights of criminal defendants, the *corpus delicti* rule is supported by few practical or social-policy considerations. This court sees little reason to apply the rule with a dogmatic vengeance.” Id. at 35-36, 358 N.E.2d at 1056. The United States Supreme Court, however, earlier had held that the doctrine was important because the defendant may be “unable to establish the involuntary nature of his statements” and because even a voluntary statement might be unreliable. Smith v. United States, 348 U.S. 147, 153 (1954).

490. Although the Standing Committee's citation to Opper v. United States, 348 U.S. 84, 92-94 (1954), in which the Supreme Court discussed the meaning of the Government's *corpus delicti* burden, id. at 92-94, suggests the Committee's intent, the Committee's simultaneous citation to Dean Wigmore, who mentioned both aspects of the Government's burden, renders this conclusion less than certain. See Committee Response, supra note 139, at 59 (citing 7 Wigmore, Evidence § 2071 (3d ed. 1940)).


492. Inbau, supra note 491, at 466; Note, Corpus Delicti, supra note 491, at 214 & n.5.

493. Inbau, supra note 491, at 466; Note, Corpus Delicti, supra note 491, at 214 & n.6.

494. See Note, Corpus Delicti, supra note 491, at 214 & n.2 (citing cases in which defendants convicted of nonexistent crimes).

495. Id. at 215; see Developments in Confessions, supra note 487, at 1073 & n.9 (policy view of confession as strong evidence changed as result of unjust capital convictions based on false confessions).

496. A separate analogy might help explain this issue. Consider the nature of the corroborating information necessary to credit an unidentified informant's information a court should demand before issuing a search warrant. In Aguilar v. Texas, 378 U.S. 108 (1964), the Supreme Court divided the inquiry
Committee did not explicitly answer this question, its citation of *Opper v. United States*, 497 provides an apparent answer. In *Opper* the Government convicted the defendant for paying a federal employee to recommend that the Government accept goods furnished by the defendant. The defendant's statement to the FBI included certain admissions crucial to the Government's case. In holding that the Government had to satisfy the *corpus delicti* doctrine, the Supreme Court interpreted that doctrine in a novel way. It concluded that the Government need not adduce evidence of *corpus delicti* independent of the defendant's statement as long as it introduced "substantial independent evidence which would tend to establish the trustworthiness of the statement." By "trustworthiness of the statement," the Court must have intended that the Government establish the truth of the statement rather than the trustworthiness of the declarant.

In *Opper*, however, the Court did not say whether the Government must establish the trustworthiness of the statement even when it can establish injury and criminal agency (the usual *corpus delicti* burden) apart from the statement. In *Smith v. United States*, 502 decided the same term as *Opper*, the Court settled that question. In *Smith* the Government convicted the defendant for income tax evasion. Although the defendant made a statement to federal investigators asserting his net worth, the Government's information indicated a higher figure. The Court held that the Government could meet its *corpus delicti* burden in two ways: Either, as in *Opper*, by introducing evidence that substantiated the truth of the defendant's admissions or by introducing evidence independent from the defendant's statement that estab-
lished the crime. In Smith the Court excused the Government from the burden of proving the trustworthiness of the defendant's admission. By citing Opper, not Smith, the Standing Committee must have intended that a court require the defendant to establish the truth of the declarant's statement by evidence independent of the statement. Under Smith, if the Government introduced evidence in its case against the defendant that a crime had been committed, the Government would excuse the defendant from proving the truth of the declarant's statement. The Standing Committee, by relying on Opper, created a difference between the Government's burden in introducing the defendant's statement and the defendant's burden in introducing the declarant's statement.

Proving the truth of a declarant's statement is not always difficult. At least when the declarant's statement operates to substitute the declarant for the defendant in a one-person crime, the defendant could establish the truth of the declarant's admission or confession by proving that the declarant had a motive or an opportunity to commit the crime. However, when the declarant's statement exonerates the defendant in a two-person crime ("My accomplice was X rather than the defendant") or is a naked opinion ("The defendant is not guilty"), what must the defendant corroborate? In the first example, proof that the declarant participated appears irrelevant to the truth of the second clause, unless the court infers the truth of the exonerating statement from evidence supporting the declarant's self-incrimination. Or, must the defendant also establish the truth of the second clause? Could the defendant do this by pointing to some defect in the Government's evidence against him? Or, must he introduce evidence to establish his innocence? Requiring the defendant to testify creates a conflict between his evidentiary burden and his fifth amendment protection. Moreover, requiring the defendant to prove that the Government failed to prove him guilty as a condition of admitting the statement resurrects the conceptual dilemma courts faced before enactment of the Federal Rules of Evidence with respect to the introduction of a coconspirator's statement.

505. Id. at 158. The Court held that the Government could corroborate the truth of the declarant's statement, rather than injury and criminal agency, because a net worth tax prosecution does not have a tangible injury. Id. at 154, 156.

506. Cf. 7 WIGMORE, EVIDENCE § 2059, at 424 (Chadbourn rev. ed. 1978) (when court credits declarant's self-condemnation, it should credit his implication of defendant). The same argument would apply to penal interest statements: If we do not fear that the accomplice will vindictively damn the defendant as he damn himself, we should not fear that the declarant will damn himself to save the defendant.

507. Only two cases have examined the strength of the Government's evidence in deciding whether to admit a penal interest statement. See United States v. Thomas, 571 F.2d 285, 290 (5th Cir. 1978) (Government's case did not cast doubt on trustworthiness of statement); United States v. Benveniste, 564 F.2d 335, 341 (9th Cir. 1977) (Government's actions in investigation provided corroboration for statements; reversible error to exclude statement). But cf. United States v. Metz, 608 F.2d 147, 157 (5th Cir. 1979) (although Government's evidence provided some corroboration for statement, it did not meet requirements of rule 804(b)(3)), cert. denied, 101 S. Ct. 80 (1980).

508. This does not necessarily follow, however, provided that the defendant can testify at a rule 104(a) hearing out of the presence of the jury and provided that the Government may not use his testimony from that hearing except to impeach his testimony at trial.

509. See Carbo v. United States, 314 F.2d 718, 736 (9th Cir. 1963) (if, before relying on statement jury had to be satisfied that declarant and accused were engaged in conspiracy charged, declaration would serve merely to confirm what jury already decided; therefore, court rather than jury must decide admissibility of coconspirator's statement).
is the declarant's statement? These interpretational problems pose difficult issues for a court. One way to eliminate these problems is for a court to assume that the Advisory and Standing Committees intended to limit admissibility only to those statements that substituted the declarant for the defendant in a one-person crime.

Proving the personal trustworthiness of the declarant is much more difficult than proving the trustworthiness of his statement. If neither the defendant nor the witness who reported the statement knew the identity of the declarant, the defendant's effort would fail. If the declarant had a criminal record or if he was a friend or relative of the defendant, his trustworthiness obviously would be suspect. Moreover, the defendant probably could not show that the declarant gave credible information on other occasions, a method by which the Government can establish the credibility of an informant whose information provides the justification to search under the fourth amendment. The court, however, might infer the declarant's trustworthiness if the defendant and the declarant did not know each other and thus no collusive relationship existed between them.

What is the Defendant's Burden of Proof? The second issue in interpreting the "simple corroboration" test in terms of the Standing Committee's two analogies is determining the quantum of proof that the defendant must introduce. This second issue presents even more difficult interpretational problems than does the first issue. For example, no one explained the relationship between the "simple corroboration" requirement and the rule 104(a) burden carried by the proponent of any other type of evidence whose admissibility depends on satisfaction of certain foundation conditions. Moreover, neither analogy provides much help because the Government's burdens in corroborating a defendant's and coconspirator's statements are not only undefined but appear to require different amounts of supporting evidence.

Rule 104(a) directs the judge to decide whether to admit any evidence whose introduction depends upon the satisfaction of conditions like the penal interest and "simple corroboration" tests. The lack of cross-reference between the "simple corroboration" test with the test of rule 104(a) is perhaps understandable because rule 104(a) does not explain the burden the proponent bears in establishing any admissibility foundation. Nonetheless, the court should apply a preponderance of evidence standard under rule 104(a).

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512. See Fed. R. Evid. 104(a) (court shall determine preliminary questions with respect to admissibility of evidence).

513. See D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 35, at 264-65 (1977) (preponderance of evidence standard should govern because not unduly difficult for claimant who usually has access to information necessary to sustain burden). But cf. Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 STAN. L. REV. 271, 301-02 (1974) (standard no higher than "reasonable possibility" should be imposed on defendant). In Lego v. Twomey, 404 U.S. 477 (1972), the Supreme Court held that the Government need satisfy only a preponderance standard to overcome the criminal defendant's objection
Although interpreting the “simple corroboration” test to impose a preponderance standard is inconsistent with the Standing Committee’s citation to Opper, it may be consistent with its coconspirator analogy. In Opper the Supreme Court required the Government to prove the reliability of the defendant’s statement by “substantial independent evidence,” a burden that it left undefined. In Smith, however, the Court indirectly set a ceiling on that burden when it said the Government need not corrobore the defendant’s statement beyond a reasonable doubt or by a preponderance of the evidence. As in Opper, the Court failed to define “substantial” specifically. In an earlier case, however, the Court defined substantial as “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Apart from the Supreme Court’s inconclusive attempts to explain the “substantial evidence” test, other
courts have defined the Government's *corpus delicti* burden in various ways, from "not beyond a reasonable doubt" to "clear and convincing" evidence and from "a prima facie showing" to "some evidence" or to "a light showing." Compound the problem of selecting among these variations is the position of a few courts that the quantum of proof demanded may vary with the circumstances of the case. Given these variations, the federal courts might well have interpreted the "simple corroboration" test in diverse, if not arbitrary, ways.

Although the Government's burden for satisfying the foundational tests of the coconspirator doctrine is more certain now, it was not well established when the Standing Committee offered the analogy in 1973. The Supreme Court has used in dictum the same "substantial evidence" standard it used in *Opper* and *Smith*. Before enactment of the Federal Rules of Evidence, lower courts used the "slight evidence" or "substantial prima facie proof" standards. Since enactment of the Federal Rules of Evidence, federal courts have not felt bound by the Supreme Court's dictum because most have interpreted the coconspirator doctrine, rule 801(d)(2)(E), as requiring a court to determine admissibility under rule 104(a). As a result, several courts of appeals have applied a "preponderance of evidence" standard, while commentators have argued for the higher standards of "clear and convinc-
ing” evidence;\textsuperscript{526} “clear, unequivocal, and convincing” evidence;\textsuperscript{527} or proof “beyond a reasonable doubt.”\textsuperscript{528}

The Standing Committee may not have intended courts to interpret the “simple corroboration” test in the way courts have construed the coconspirator doctrine.\textsuperscript{529} If this were the Committee’s intent, two points follow. Interpreting the “simple corroboration” test in terms of the preponderance of evidence burden would have imposed on the defendant a foundation requirement higher than even that demanded by Senator McClellan and the Department of Justice, both of whom argued for the corpus delicti burden as an analogy.\textsuperscript{530} Furthermore, the defendant would have had to corroborate the declarant’s statement to a degree higher than that required of the Government in introducing the defendant’s confession.\textsuperscript{531} Put another way, the

\textsuperscript{526} See United States v. Fatico, 458 F. Supp. 388, 405 (E.D.N.Y. 1978) (“Quantified, the probabilities might be in the order of above 70% under a clear and convincing evidence burden”); Sessions & Hall, supra note 516, at 105-06 (same).

\textsuperscript{527} See Sessions & Hall, supra note 516, at 106 (quantifying clear, unequivocal, and convincing test at above 80% certainty). For slightly different quantifications, see Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 YALE L.J. 1299, 1311 (1977).

\textsuperscript{528} See 4 WEINSTEIN, supra note 16, ¶ 104(05), at 104-42-43 (noting, however, that no federal court has accepted his position). Judge Weinstein’s remarkable suggestion, irrespective of its propriety when applied to coconspirator statements, overlooks the Standing Committee’s reliance on the coconspirator analogy to explain the “simple corroboration” test. This oversight is especially apparent in light of Judge Weinstein’s argument that the corroboration requirement of rule 804(b)(3) should be no higher than that of rule 403. See note 480 supra (discussing Judge Weinstein’s advocacy of test of rule 403 as proper standard of corroboration under rule 804(b)(3)).

\textsuperscript{529} Interpreting the Standing Committee’s intent is impossible. On the one hand, several clues suggest that a party would not have to produce much evidence to satisfy the “simple corroboration” test. First, neither the Standing Committee nor the Advisory Committee believed that the requirement was necessary. Second, to explain the coconspirator analogy, the Standing Committee referred to Wigmore, who caustically dismissed court opinions on the sufficiency of evidence needed to corroborate a coconspirator’s statement as “mere useless chaff”; the Committee did not cite rule 801(d)(2)(E). 7 WIGMORE, EVIDENCE § 2059, at 440 (Chadbourn rev. ed. 1978). Committee Response, supra note 139, at 59. Third, although the Committees assigned the corroboration inquiry to the judge under rule 104(a), see notes 625-31 infra and accompanying text, they never explained what the standard of proof would be under rule 104(a). If they intended courts to apply the prerules standards applicable to each type of evidence, see S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 39 (2d ed. 1977) (“One can only surmise that the draftsmen . . . intended to leave existing law as it is”), one might expect that they would have relied on the “substantial evidence” or prima face evidence tests of Opper and the coconspirator cases decided before the enactment of the Federal Rules of Evidence.

On the other hand, the Advisory Committee explained in its Note to rule 104(b) that a court should admit conditionally relevant evidence when “the foundation evidence is sufficient to support a finding of fulfillment of the condition.” Advisory Committee Note to Supreme Court Draft, supra, note 1, at 198. That explanation paraphrases the prima facie evidence standard. Because the Advisory Committee probably intended the standard under rule 104(a) to be higher than under rule 104(b) (because of the supposed dangers of evidence that requires the judge alone to evaluate whether it satisfies the evidentiary standards) and because the Advisory and Standing Committees surely should have anticipated that federal courts would interpret rules 104(a) and 801(d)(2)(E) to impose a higher burden than prima facie evidence, we can infer that the Committees intended that “simple corroboration” also should require a greater amount of corroborating evidence.

\textsuperscript{530} The Department of Justice, however, implicitly demanded that a higher burden be placed on the defendant: “Only if the requirement of corroboration were interpreted to require a showing at least as strong as the showing which is now required as a prerequisite to the admission of a confession when introduced for the purpose of conviction, would trustworthiness be guaranteed to an acceptable degree.” Justice’s Third Letter, supra note 130, at 48 (emphasis added).

\textsuperscript{531} The confession-coconspirator analogies also would have imposed a higher burden on the defendant
defendant would have had to satisfy a higher proof burden than he must meet in convincing the factfinder that the Government has failed to prove him guilty. Of course, these points assume that the Standing Committee intended, or at least anticipated, that the coconspirator doctrine would involve no less than the preponderance of evidence test. In any event, if a court interprets the corpus delicti doctrine in terms of the Opper and Smith "substantial evidence" burden, the two analogies as judicially interpreted demand different amounts of corroborating evidence.

The confession and coconspirator analogies do not work well as explanations of the "simple corroboration" test for yet another reason: The defendant might then be able to admit the statement provisionally, subject to a motion to strike, if he failed to corroborate it. The corpus delicti doctrine is part of the Government's burden of proof; it is not a condition to the admissibility of the defendant's statement. Thus, it does not structure the Government's presentation of its case. Instead, the Government suffers a judgment of acquittal if it fails to establish the corpus delicti. Although the Government also did not need to corroborate the coconspirator's statement as a condition of admissibility at the time when the Standing Committee offered its analogies, the doctrine did apply to the admissibility of such a statement rather than to the Government's burden of proof. Courts permitted the Government to introduce the statement provisionally, subject to either a motion to strike or the grant of a mistrial if the Government failed to corroborate the statement.

If the "simple corroboration" test functioned in the same way, the defendant might have been able to introduce the declarant's statement, subject to its exclusion if he failed to corroborate. Such a result not only would have been inconsistent with the Advisory and Standing Committees'
transfer from the jury to the judge of the corroboration determination for two reasons. A judicial instruction to ignore the declarant's statement upon the defendant's failure to corroborate would have had no better success than similar curative instructions in other contexts. Moreover, although courts sometimes admit a coconspirator's statements provisionally, the defendant is protected from abuse by the sanction of a mistrial. The Government probably lacks similar protection; in fact, were a mistrial granted, the defendant might enjoy double jeopardy protection.

2. The Rule's Corroboration Requirement

Dissatisfied with the "simple corroboration" requirement added by the Standing Committee, the House Subcommittee rewrote the final sentence of the rule to read: "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." It is difficult to know why the Subcommittee decided to strengthen the corroboration requirement. Having criticized the Standing Committee's corroboration test as vague, the Subcommittee failed to clarify

536. See notes 625-31 infra (between Preliminary Draft and Supreme Court Draft role of deciding trustworthiness of declarant's statement shifted from jury to judge).

537. Although simply striking the coconspirator's statement and warning the jury not to consider it may be equally unfair to the defendant, it does not follow that a court should provide the defendant with the same potential for influencing the jury under rule 804(b)(3) that the Government sometimes receives under rule 801(d)(2)(E).

538. A final reason why the corpus delicti analogy does not work well is that its purpose is different from that of rule 804(b)(3). The purpose of the corpus delicti doctrine is to protect the defendant against his misjudgment or frailty in confessing to a nonexistent crime or to a crime he did not commit and to further the policy that the Government should investigate the crime rather than concentrate on obtaining confessions from suspects. Developments in Confessions, supra note 487, at 1073. Neither reason applies, however, when the defendant offers the declarant's statement. Rather, the reverse is true: To protect the defendant from erroneous conviction, a court should permit him to introduce any relevant evidence.

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

540. The Subcommittee's markup sessions and the full Committee's report confirm that the Subcommittee intended to impose a higher requirement than the simple corroboration test. The Subcommittee believed that penal interest statements are "more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of simple corroboration was . . . deemed ineffective to accomplish this purpose . . . ." HOUSE JUDICIARY REPORT, supra note 10, at 16, [1974] U.S. CODE CONG. & AD. NEWS at 7089. The Subcommittee, however, may have objected to the "simple corroboration" requirement as being too vague rather than as setting too low a burden. This interpretation is justified somewhat by the tenor of the Subcommittee's discussion of the corroboration requirement during the June 5, 1973 markup session and is more consistent with its willingness to admit the declarant's statements in Donnelly, in which only circumstantial evidence supported the defendant's culpability. Although the rule's corroboration requirement could be understood in terms of the coconspirator and corpus delicti analogies, the House Judiciary's explanation of the rule's test, which the Subcommittee wrote, appears to impose a higher burden than the Standing Committee's analogies.

Professor Graham savaged the Subcommittee's work. See Supplement to Subcommittee Hearings, supra note 10, at 205-06 (reprinting letter from Professor Kenneth W. Graham, Jr., to Representative William L. Hungate (July 16, 1973)) (episode created bitterness among scholars hopeful that legislative process would produce reform; law reviews will soon publish "I told-you-so" articles extolling virtues of rulemaking by experts, not politicians). Nonetheless, the Advisory and Standing Committees must share responsibility for leaving the penal interest exception as ambiguous and as unfair as it is to the defendant.
its requirement, despite an entreaty from the Department of Justice to do so.\footnote{After the Subcommittee published its print on June 28, 1973, the Department of Justice urged it to explain the corroboration requirement. See Ruckelshaus Letter, supra note 177, at 352. The Department of Justice noted that [i]t is not clear exactly what corroborating circumstances are required under this provision [of rule 804(b)(3)]. In light of the Supreme Court's recent decision in Chambers v. Mississippi... that such inculpatory hearsay statements must be admitted if there exists 'considerable assurance of their reliability,' we recommend a Subcommittee note to indicate that the subsection is to be applied in conformity with the Chambers decision.}

Furthermore, during its markup sessions, the Subcommittee did not discuss either the analogies offered by the Standing Committee or the relationship of its test to the burdens imposed by rules 104(a) or 403. More importantly, the Subcommittee never explained what it meant by the phrase "clearly indicate." That language, proposed by the Subcommittee's staff without consulting with the Advisory or Standing Committees,\footnote{See McCormick, supra note 4, § 340, at 798. Professor McCormick's paraphrase of the "clear and convincing" burden as highly probative, \textit{id.}, captures the Subcommittee's intent. The Subcommittee viewed penal interest statements offered by the defendant as presenting a particular danger of deception.} is not used elsewhere in the rules or in the law of evidence. As a result, the Subcommittee's derivation of the language remains a mystery.\footnote{Furthermore, during its markup sessions, the Subcommittee did not discuss either the analogies offered by the Standing Committee or the relationship of its test to the burdens imposed by rules 104(a) or 403. More importantly, the Subcommittee never explained what it meant by the phrase "clearly indicate." That language, proposed by the Subcommittee's staff without consulting with the Advisory or Standing Committees,\footnote{The Standing and Advisory Committees, however, must share responsibility because in their only public comment to the Subcommittee's corroboration test, they objected only to the word "clearly," an objection they did not explain. See Committee's Response to Subcommittee Print, supra note 175, at 298 (urging deletion of word "clearly").} is not used elsewhere in the rules or in the law of evidence. As a result, the Subcommittee's derivation of the language remains a mystery.\footnote{Understandably, federal courts have struggled with the test, rephrasing it as demanding "circumstances solidly indicating trustworthiness," that go beyond "minimal corroboration,"\footnote{Numerically, the "clear and convincing evidence" standard demands approximately 70% probability. Sessions & Hall, supra note 516, at 105-06.} but not as imposing a "standard so strict as to be utterly unrealis\textsuperscript{ic}." Because those restatements set the boundaries of the test so far apart, they too are unhelpful. Perhaps the "clear and convincing evidence" test is the most sensible restatement of "clearly indicate." Federal courts have used the "clear and convincing" standard to describe the Government's burden in introducing evidence of "other crimes, wrongs, or acts" under rule 404(b).\footnote{546. E.g., United States v. Cobb, 588 F.2d 607, 612 (8th Cir. 1978), cert. denied, 440 U.S. 947 (1979); United States v. Trevino, 565 F.2d 1317, 1319 (5th Cir.), cert. denied, 435 U.S. 971 (1978); United States v. Maestas, 554 F.2d 834, 837 (8th Cir.), cert. denied, 431 U.S. 972 (1977); See also Sessions & Hall, supra note 517, at 105 & n.151 (citing cases and discussing application of burden to rule 801(d)(2)(E)).} Courts also frequently use that standard with evidence that might present a particular danger of deception.\footnote{547. See also United States v. Satterfield, 572 F.2d 687, 693 (9th Cir.) ("corroborating circumstances must do more than tend to indicate the trustworthiness of the statement; they must clearly indicate it") (emphasis in original), cert. denied, 439 U.S. 840 (1978).} Moreover, that standard is the next ratchet up from the "preponderance of evidence" standard that Congress might have imposed on a defendant if Congress had used the coconspirator doctrine to define the House Subcommittee's "simple corroboration" test.\footnote{Id.}}

541. After the Subcommittee published its print on June 28, 1973, the Department of Justice urged it to explain the corroboration requirement. See Ruckelshaus Letter, supra note 177, at 352. The Department of Justice noted that [i]t is not clear exactly what corroborating circumstances are required under this provision [of rule 804(b)(3)]. In light of the Supreme Court's recent decision in Chambers v. Mississippi... that such inculpatory hearsay statements must be admitted if there exists 'considerable assurance of their reliability,' we recommend a Subcommittee note to indicate that the subsection is to be applied in conformity with the Chambers decision.

\textit{Id.}

542. The Standing and Advisory Committees, however, must share responsibility because in their only public comment to the Subcommittee's corroboration test, they objected only to the word "clearly," an objection they did not explain. See Committee's Response to Subcommittee Print, supra note 175, at 298 (urging deletion of word "clearly").

544. United States v. Barrett, 539 F.2d 244, 253 (1st Cir. 1976); see United States v. Hoyos, 573 F.2d 1111, 1115 (9th Cir. 1978) (quoting Barrett). See also United States v. Satterfield, 572 F.2d 687, 693 (9th Cir.) ("corroborating circumstances must do more than tend to indicate the trustworthiness of the statement; they must clearly indicate it") (emphasis in original), cert. denied, 439 U.S. 840 (1978).

546. E.g., United States v. Cobb, 588 F.2d 607, 612 (8th Cir. 1978), cert. denied, 440 U.S. 947 (1979); United States v. Trevino, 565 F.2d 1317, 1319 (5th Cir.), cert. denied, 435 U.S. 971 (1978); United States v. Maestas, 554 F.2d 834, 837 (8th Cir.), cert. denied, 431 U.S. 972 (1977); See also Sessions & Hall, supra note 517, at 105 & n.151 (citing cases and discussing application of burden to rule 801(d)(2)(E)).
Because the Subcommittee believed that the trial court should have admitted the declarant’s statement in *Donnelly v. United States*, this interstitial interpretation of “clearly indicate” may not capture the Subcommittee’s intent, even if it makes sense logically. We can approach *Donnelly* either by focusing on its facts as described by the Court’s opinion and as reviewed by the Subcommittee’s associate counsel or by focusing on the facts as set forth in the record and appellate briefs.

In *Donnelly* the Government charged Donnelly with killing an Indian named Chickasaw. Donnelly called William Norris to testify that another Indian named Joe Dick, who was dead at the time of the trial, had admitted killing Chickasaw. Refusing to recognize a penal interest exception, the Supreme Court affirmed the trial court’s exclusion of Norris’ testimony.

The Subcommittee’s associate counsel reviewed *Donnelly* during the June 5 and 12, 1973 markup sessions. He told the Subcommittee that only one

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549. See *House Judiciary Report, supra* note 10, at 16, [1974] U.S. CODE CONG. & AD. NEWS at 7090 (result in *Donnelly*, in which circumstances “plainly indicated reliability,” would be changed by rule 804(b)(3)).

550. *The Senate Judiciary Committee’s reinsertion of the “catch-all” provisions of rules 803(24) and 804(b)(5) further supports converting the “clearly corroborated” language into a “clear and convincing evidence” test. The House had deleted the broad “catch-all” provisions of the Supreme Court Draft (authorizing the admission of any “statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness,” *Supreme Court Draft, supra* note 1, at 303, “as injecting too much uncertainty into the law of evidence.” *Subcommittee Note to June 28, 1973 Subcommittee Print, reprinted in Supplement to Subcommittee Hearings, supra* note 15, at 174. The Senate Judiciary Committee, however, agreed with the Advisory Committee that some provision for admitting hearsay not covered by a specific exception was important both to permit the development of the hearsay rules and to achieve justice in particular cases. The Senate Judiciary Committee demanded more than did the Advisory Committee before a court could admit hearsay under the reinstated “catch-all” provisions. Although its key demand, that the offered hearsay have “circumstantial guarantees of trustworthiness” “equivalent” to the other hearsay exceptions, *Senate Judiciary Report, supra* note 10, at 19, [1974] U.S. CODE CONG. & AD. NEWS at 7066, did not indicate that the test a court should apply, the Senate Judiciary Committee indicated that the “residual hearsay exceptions will be used very rarely, and only in exceptional circumstances.” *Id.* Professor Paul Rothstein, the originator of the Senate’s language, however, suggested that a court should admit “catch-all” hearsay only if it found by clear and convincing evidence that introduction of the hearsay was both necessary and as trustworthy as hearsay satisfying a specific exception. *Senate Judiciary Hearings, supra* note 118, at 272 (testimony of Professor Paul Rothstein) (before admitting “catch-all” hearsay, court must determine that hearsay necessary and comparably trustworthy). Although the Senate Judiciary Committee did not specifically endorse Professor Rothstein’s test, it probably thought that such a test was appropriate. Thus, converting the “clearly corroborated” language of the penal interest exception into the “clear and convincing evidence” test seems appropriate, even if the House Subcommittee had not received advice like that of Professor Rothstein’s when it drafted its higher corroboratable requirement.

Furthermore, “words [in statutes] acquire scope and function from the history of the events which they summarize.” *Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186 (1941).* The congressional concern for crime that prompted Congress to enact the 1968 Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520 (1976), probably affected Congress when it reviewed the *Supreme Court Draft.* Senator McClellan’s intervention certainly makes sense in light of this congressional concern about crime. See *McClellan Letter, supra* note 82, at 33,642 (proposed Federal Rules of Evidence must not radically alter present law and debilitate already-weak criminal justice system). To the extent the House Subcommittee thought it was liberalizing federal common law practice by recognizing penal interest statements, it may have balked at defining that exception as generously to the defendant as had the *Preliminary and Revised Drafts.*

551. 228 U.S. 243, 252 (1913).

552. *Id.* at 272.

553. *Id.* at 277.
person committed the crime and that the declarant, Joe Dick, had the opportunity to kill Chickasaw.\textsuperscript{554} In his view, no connection existed between Dick and Donnelly to suggest that Dick had fraudulently exculpated Donnelly.\textsuperscript{555} Associate counsel agreed with Justice Holmes who argued in dissent that the trial court should have admitted Dick's confession "on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick."\textsuperscript{556} To fully grasp this remarkable case, one must review the record and the appellate briefs. James Masten, a neighbor of Joe Dick and Chickasaw, found Chickasaw's body lying on the bank of the Klamath River in Northern California between 7:00 A.M. and 8:00 A.M. on October 1, 1901 or 1902.\textsuperscript{557} Although no one witnessed the murder, the Government assumed that Chickasaw had been murdered because Masten did not find a gun near Chickasaw's body.\textsuperscript{558} The Government theorized that Donnelly killed

\begin{footnotes}
\item[556] 228 U.S. 243, 277 (1913) (Holmes, J., with Lurton & Hughes, J., dissenting).
\item[557] Brief of Plaintiff in Error on Appeal to United States Supreme Court at 3, United States v. Donnelly, 228 U.S. 243 (1913) [hereinafter Plaintiff's Brief]. No one recalled whether Chickasaw died in 1901 or 1902. The principal issue on appeal was whether the Government had jurisdiction to try Donnelly, which depended upon whether the site of the murder was part of the Klamath Indian tribe's territory and upon whether Donnelly was an Indian. 228 U.S. at 252.
\item[558] A grand jury indicted Donnelly for Chickasaw's murder in 1909 and a jury convicted him in 1910. Transcript of Record on Appeal at 2, 9, Donnelly v. United States, 228 U.S. 243 (1913) [hereinafter Transcript of Record]. The delay between the crime and the indictment may have resulted because the Indians believed that the killing was a problem for them to settle among themselves. Donnelly's counsel, for example, represented that he received no help in defending his client because the Indians refused to help white men and did not want the federal Government to interfere in their affairs. Id. at 54-55 (reprinting Defense Council's Affidavit in Support of Defendant's Motion for New Trial (Feb. 28, 1910)).
\end{footnotes}
Chickasaw around 7:00 A.M., ran down stream, traversed several miles of wild terrain in circling back to his home, and then returned around 10:00 A.M. or 11:00 A.M. with his wife to the small town near the location at which Masten found Chickasaw's body.\textsuperscript{559} The Government offered no motive, and, apart from one witness' testimony, no evidence that Donnelly had a gun.\textsuperscript{560} Claiming to have been at home on the morning of the murder, Donnelly denied killing Chickasaw.\textsuperscript{561}

Donnelly made an offer of proof that William Norris would testify that Joe Dick confessed at some earlier, unstated date to having killed Chickasaw.\textsuperscript{562} Evidence of questionable persuasiveness connected Dick to the crime.\textsuperscript{563} No evidence, however, indicated that Dick owned a gun or had a motive for killing Chickasaw, and no witness saw Dick at his house, his acorn camp, or the murder scene either before or after the murder.\textsuperscript{564}
On this record, the Subcommittee's willingness to admit a statement like Dick's as a valid statement against penal interest is surprising. Donnelly, perhaps more than any other case, presents troubling questions concerning the occurrence of the declarant's alleged confession, the reliability of that confession, and the existence of evidence linking the declarant to the crime. The facts of Donnelly suggest that a defendant can satisfy the rule's corroboration requirement merely by showing that he did not collude with the declarant and by linking the declarant to the crime by scant, inconclusive circumstantial evidence. The Subcommittee, however, probably intended to increase, rather than decrease, the defendant's burden if we assume, perhaps charitably, that the Subcommittee understood what it was doing and how courts might interpret its corroboration test. Although the Subcommittee never specifically discussed during the markup sessions what its test would demand, it did indicate in the Committee Report that the test inadequately protected against the danger of defendants introducing fabricated statements. Furthermore, the Subcommittee did not change its test when the Advisory and Standing Committees warned that the Subcommittee's corroboration requirement imposed a burden higher than that usually imposed on defendants.

As a result, we probably cannot make too much of the Subcommittee's approval of Justice Holmes' dissent in Donnelly. Because the Subcommittee members did not read either the Donnelly opinion or the record on appeal, we should limit our interpretation of that case to the skeletal description provided by the Subcommittee's associate counsel: One person committed the crime and the declarant confessed, had the opportunity to commit the crime, and had no reason to help the defendant at his own expense. But here we must stop, because associate counsel, who apparently never compared the record to the opinion for the Subcommittee, failed to discuss both the persuasiveness and the trustworthiness of the corroborating information mentioned in the Court's opinion and Justice Holmes' caveat about trustworthiness.

Shleghorn Jim followed along the river. Shleghorn Jim never described either the type or the size of the shoe that made these impressions. Furthermore, he never explained why he chose to follow the tracks, where he first noticed them, why he stopped following them, or when he first reported his findings. A healthy person might have made these tracks as well as the impression under the willow tree. That person might have made the impression during a stop not brought on by fatigue. The Court never addressed any of these possible explanations that would dissociate both Dick and Donnelly from the crime.


566. Interestingly, the Government has conceded that the circumstantial evidence linking Dick to the crime, as set forth in the Donnelly opinion, 228 U.S. at 272, would satisfy rule 804(b)(3). See Government's Brief on Appeal at 104, United States v. Atkins, 558 F.2d 133 (3d Cir. 1977), cert. denied, 434 U.S. 1071 (1978). In its Brief, the Government essentially paraphrased the Donnelly opinion, stating:

[Dick] lived in the vicinity [of the crime]; the tracks found on the sand bar at the scene of the crime led in the direction of the camp where declarant was stopping at the time, rather than in the direction of defendant's home; the tracks indicated at one point an impression of a person sitting down, indicating a stop caused by shortness of breath, which was natural for declarant who suffered from consumption.

Id.

567. See United States v. Donnelly, 228 U.S. 243, 277 (1913) (Holmes, J., with Lurton & Hughes, JJ.,
3. *Chambers v. Mississippi* as a Guide

Because the House Subcommittee failed to explain its corroboration test in meaningful terms, several courts have used *Chambers v. Mississippi* as a guide. In that case the Government charged Chambers with murdering Aaron Liberty, a police officer who had unsuccessfully attempted to arrest another person in a bar. One police officer testified that Chambers shot Liberty. The officer further testified that Liberty, after having been shot, took careful aim, as if to shoot his attacker, and fired his riot gun, hitting Chambers in the back of the neck and head. Other evidence, however, pointed to Gable McDonald as the killer. Several months after the murder, McDonald confessed to a Reverend Stokes that he had killed Liberty, a confession that he repeated in a sworn statement given to Chambers’ attorneys two days later. As a result, the police arrested McDonald. The local justice of the peace discharged McDonald at a preliminary hearing, when McDonald testified that he had an alibi and had confessed to Stokes and to Chambers’ attorneys in order to share in a lawsuit Chambers would bring against the Government for false arrest.

At trial Chambers called McDonald as a witness and succeeded in introducing McDonald’s sworn confession during direct examination. When McDonald repudiated his confession during cross-examination, Chambers sought to examine McDonald as an adverse witness. The trial court refused to allow the cross-examination under Mississippi’s voucher rule, which denies a party the right to impeach his own witness. Chambers also sought to introduce the testimony of three of McDonald’s friends to whom McDonald had confessed. The first witness testified that while he was driving McDonald home hours after the shooting, McDonald stated that he had shot Liberty. The court excluded as hearsay this testimony, which the witness gave in the presence of the jury. The two other witnesses testified out of the presence of the

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568. See Lowery v. Maryland, 401 F. Supp. 604, 607 (D. Md. 1975) (“except to indicate that simple corroboration is not enough, no clues are given as to what constitutes corroborating circumstances”), *aff'd without opinion*, 532 F.2d 750 (4th Cir.), *cert. denied*, 429 U.S. 919 (1976).


572. *Id.* at 286.

573. *Id.*

574. *Id.* at 287-88.

575. *Id.* at 293.

576. *Id.* Unfortunately, the court never explained why, given its position on the voucher rule, it permitted Chambers to introduce McDonald’s confession during McDonald’s direct examination.

577. *Id.*

578. *Id.* The court also excluded the witness’ statement that McDonald admitted disposing of the murder weapon and that he accompanied McDonald when McDonald purchased a new gun three weeks later. *Id.*
the jury that McDonald also had admitted the shooting to each of them individually. The court excluded as hearsay the testimony of these two witnesses as well.579

The Supreme Court reversed for two reasons. First, the trial court's application of the voucher rule on the specific facts impermissibly interfered with Chambers' right to defend himself.580 Second, McDonald's several confessions were sufficiently reliable to warrant their admission on due process grounds when Mississippi did not have a hearsay exception for penal interest statements.581 With respect to the second basis for reversal, the Court believed that the confessions offered as impeachment were reliable for several reasons. McDonald had confessed "spontaneously to . . . close acquaintance[s] shortly after the murder had occurred."582 Moreover, other evidence corroborated McDonald's own sworn statement, including the testimony of an eyewitness to the shooting, the testimony of a witness who saw McDonald with a gun after the shooting, and the proof of McDonald's ownership of a .22-calibre revolver, the type of gun used to kill Liberty.583 Additionally, each confession was "in a very real sense self-incriminating and unquestionably against interest."584 Finally, McDonald was available at trial either to repudiate the excluded confessions or to explain why he had made them.585

The corroborating circumstances in Chambers surely satisfy a "clear and convincing" evidence standard, if our rephrasing of the corroboration requirement of rule 804(b)(3) in that way is correct.586 Chambers, however, has limitations as a guide. First, the relationship between Chambers and the rule's corroboration requirement is uncertain. The Court characterized the corroborating evidence as "well within the basic rationale of the exception for declarations against interest."587 When the Court announced Chambers, the Supreme Court Draft version of rule 804(b)(3) with its "simple corroboration" test was pending before Congress. The House Subcommittee increased the rule's corroboration test after the Supreme Court's decision in Chambers without explaining the relationship between the two.588 Thus, one could conclude that the corroborating evidence in Chambers was no longer "well within the basic rationale" but instead dropped to the least amount of

579. Id. at 292-93.
580. Id. at 298.
581. Id. at 300.
582. Id.
583. Id.
584. Id. at 300-01. McDonald also had urged one of his friends not to report the confession. This suggests that McDonald was aware that disclosure would lead to criminal prosecution. Id. at 301.
585. Id. at 301.
586. The Supreme Court's assertion that McDonald's confessions "bore persuasive assurances of trustworthiness . . . ," id. at 302, may be another way of expressing the "clear and convincing evidence" standard.
587. Id.
588. During the House Subcommittee markup session, associate counsel mentioned Chambers but argued that it did not require a court to introduce every penal interest statement. Markup Session, June 12, 1973. Neither he nor the Subcommittee members discussed Chambers further, even though the Department of Justice requested that the Subcommittee clarify the relationship between Chambers and the corroboration requirement of rule 804(b)(3). See Ruckelshaus Letter, supra note 177, at 352 (in light of Chambers, not clear what corroborating circumstances required by rule 804(b)(3); Subcommittee should indicate rule to be applied in conformity with Chambers).
corroborating evidence necessary to satisfy rule 804(b)(3). If this conclusion is correct, the rule's corroboration test is constitutionally suspect.

Second, by using *Chambers* as a guide, several courts have wrongly demanded that the corroborating evidence match the facts in *Chambers*. Although the Supreme Court intended that lower courts interpret its decision narrowly, it did so because it was reversing on constitutional rather than on evidentiary grounds. Furthermore, by demanding that the corroborating evidence approximate that in *Chambers*, a court not only might adopt the Court's questionable analysis of hearsay exceptions, but also might misread the *Chambers* record. By focusing on the specific facts of *Chambers*, a court may too easily err by requiring equivalent corroborating circumstances. The Supreme Court in *Chambers* neither weighed the factors it mentioned nor indicated whether any lesser amount of corroborating information would have required the trial court to admit a penal interest statement on constitutional grounds.

Third, the Court's stress on McDonald's availability to testify limits *Chambers* as a guide. The Government had cross-examined McDonald and

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589. See, e.g., United States v. Pena, 527 F.2d 1356, 1361 (5th Cir.) (witness' statement inadmissible because statement not confession and witness not present in court), cert. denied, 426 U.S. 949 (1976); Lowery v. Maryland, 401 F. Supp. 604, 608 (D. Md. 1975) (witness' sworn statement inadmissible when made three and one-half years after crime because insufficiently spontaneous), aff'd without opinion, 532 F.2d 750 (4th Cir.), cert. denied, 429 U.S. 919 (1976); Ryan v. State, 95 Wis. 2d 83, 97, 289 N.W.2d 349, 355 (1980) (confession inadmissible because declarants' statements made months after crime, declarants not close friends of defendant, no significant corroborating evidence, and declarants' statements not sufficiently against penal interest).

590. See 410 U.S. at 303 ("[W]e hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial").

591. For example, at least two courts have excluded a statement in part because the declarant had not spoken to close friends, as McDonald had on three occasions. See United States v. Guillette, 547 F.2d 743, 754 (2d Cir. 1976) (declarant confided in police informant after meeting him for first time over cocktails), cert. denied, 434 U.S. 839 (1977); Ryan v. State, 95 Wis. 2d 83, 97, 289 N.W.2d 349, 355 (1980) (declarants first met defendant in prison after crime). McDonald, however, also confessed to Reverend Stokes and to Chambers' defense counsel. Certainly, McDonald had no reason to confide in Chambers' defense counsel, whom he should have expected would use his confession against him.

Courts also have excluded statements when the declarant spoke months after the crime rather than soon after the crime, as McDonald allegedly did. See United States v. Guillette, 547 F.2d 743, 754 (2d Cir. 1976) (statement made four months after crime), cert. denied, 434 U.S. 839 (1977); United States v. Pena, 527 F.2d 1356, 1362 (5th Cir.) (even though statement made to trusted friend, made months after transaction in question), cert. denied, 426 U.S. 949 (1976); Lowery v. Maryland, 401 F. Supp. 604, 608 (D. Md. 1975) (confession made three and one-half years after crime), aff'd without opinion, 532 F.2d 750 (4th Cir.), cert. denied, 429 U.S. 919 (1976). In *Donnelly* however, the declarant spoke years after the crime, if at all. In *Chambers* as well, McDonald spoke to Reverend Stokes and to Chambers' defense counsel months after the murder. Furthermore, the spontaneity of McDonald's statements to his three friends is questionable. None probably would have been admissible under the "excited utterance" exception of rule 803(2) because when McDonald spoke he was not "under the stress of excitement caused by the event or condition." *Fed. R. Evid.* 803(2). McDonald may have admitted his culpability during a normal conversation, perhaps even in a boastful manner. The Supreme Court in *Chambers* probably referred to spontaneous as part of its search for other hearsay exceptions that McDonald's statement came close to satisfying because neither Mississippi nor the federal courts had adopted a penal interest exception. To demand spontaneity is ridiculous when the declarant has carefully drafted an affidavit detailing his complicity in a crime, a process that would impress upon him the significance of his remarks.

One court has excluded a statement because no independent evidence placed the declarant at the crime scene as in *Chambers*. Ryan v. State, 95 Wis. 2d 83, 97, 289 N.W.2d 349, 355 (1980). The court's decision, however, clashes with the Subcommittee's desire to admit a statement like Dick's in *Donnelly*, in which only scant, inconclusive, circumstantial evidence tied Dick to the murder.
could have recalled him to contest the testimony of his three friends. Under rule 804(b)(3), however, the declarant must be unavailable. Thus, when the declarant is necessarily unavailable, courts might interpret the rule to require even more corroboration than existed in Chambers.592

Finally, courts might use Chambers to interpret the penal interest test too narrowly. McDonald's confessions substituted him for Chambers in a one-person crime. The Court considered this important because it supported Chambers' claim that he was factually innocent.593 Yet, as we have seen, the Advisory Committee probably did not intend to restrict admissibility to statements that constituted confessions or that substituted the declarant for the defendant as the sole culprit.594

4. Judicial Interpretation of Corroboration

Illustrating the differences between cases litigated in the absence of a corroboration requirement, under the "simple corroboration" requirement, or in conformance with the House Subcommittee's corroboration requirement is difficult. Although each case is tied to its facts, three cases suggest certain differences.595

In People v. Edwards596 the Michigan Supreme Court suggested the approach a court might employ had Congress not enacted a corroboration test. In Edwards the defendant offered to find a prostitute for Stevens and Napora. When Stevens and Napora did not agree on a price with King, the prostitute Edwards had introduced to them, Edwards allegedly shot Stevens while attempting to rob Stevens and Napora. Edwards admitted to the police that he had a gun, but claimed that he fired it accidentally during a fight with Stevens.597 At trial, Edwards recanted his admissions, claiming that he thought he could avoid a murder charge by speaking as he had.598 Edwards then accused Blake of killing Stevens. Edwards testified that he purchased a .22-calibre pistol (the same calibre gun as the murder weapon) from Blake hours after the murder.599 Edwards called as a witness Longuemire, a person with whom Edwards discussed Stevens' murder while Edwards was awaiting trial.600 At some point Longuemire allegedly spoke with Blake, who, according to Longuemire, confessed to having murdered Stevens. Longuemire,

593. See Chambers v. Mississippi, 410 U.S. 284, 287 (1973) (Chambers "has asserted his innocence throughout").
594. One court, however, apparently has read Chambers as requiring the statement to be a confession. See United States v. Brandenburg, 522 F.2d 1259, 1263 (9th Cir.) (refusing to admit declarant's exoneration of defendant's complicity as only "marginally" against declarant's interest), cert. denied, 423 U.S. 1033 (1975).
595. Because the Standing Committee offered the corpus delicti and coconspirator analogies shortly before the House Subcommittee approved a higher corroboration requirement, none of the courts in the three cases that will be discussed in the text probably understood that each was supposed to interpret the "simple corroboration" test in terms of those two analogies.
597. Id. at 554 n.4, 242 N.W.2d at 740 n.4.
598. Id.
599. Id. at 554, 242 N.W.2d at 740.
600. Id. at 555 & n.8, 242 N.W.2d at 748 & n.8.
however, never reported Blake’s confession to the police and only reported it to Edwards after Blake’s death.601

Although the trial court excluded Blake’s confession because Michigan did not recognize a penal interest exception at that time, a divided Michigan Supreme Court reversed.602 In reversing, the majority did not condition admissibility on corroboration. Nonetheless, the majority believed that Blake’s statement had been corroborated through King’s trial testimony that she saw Blake at the scene of the murder with a gun.603 At trial, King explained that she lied to the police not only because Blake threatened to kill her if she spoke the truth but also because he paid her to remain silent.604 The trustworthiness of Blake’s confession hardly met the present corroboration requirement of rule 804(b)(3).605 Nonetheless, a jury surely could have fairly evaluated the credibility issue had the trial court given the jury that opportunity.606

United States v. Goodlow607 might illustrate the “simple corroboration” test. In Goodlow a witness observed two men break the seals on three interstate trailer trucks and then described the men, their car, and its license plate number to the police. The next day, the police arrested Goodlow, Bogan, and Glass in a car, owned by Bogan’s sister, that matched the eyewitness’ description. Because the eyewitness identified only Goodlow and Glass, the police released Bogan.608 At trial, Goodlow challenged the eyewitness’ identification of him, claiming that Bogan committed the crimes with Glass. To support his claim of misidentification, Goodlow unsuccessfully tried to admit several statements by Bogan that he was “good for the crime” and that Goodlow was “not good for it.”609 Bogan, who disappeared before the trial, allegedly made these statements to Goodlow, Goodlow’s wife, and a personal friend of Goodlow shortly after the witness identified Goodlow and Glass.610

In a split decision, the United States Court of Appeals for the Eighth Circuit reversed, recognizing, as the trial court had not, a hearsay exception for statements against penal interest.611 By the date of the decision, the House of Representatives had passed the version of rule 804(b)(3) ultimately

601. Id. at 570, 242 N.W.2d at 748 (Coleman, J., with Fitzgerald, J., dissenting).
602. Id. at 566, 242 N.W.2d at 746 (opinion of court). Two judges dissented, arguing that Blake’s statement “was not of trustworthy calibre and therefore was properly excluded.” Id. at 568, 242 N.W.2d at 747 (Coleman, J., with Fitzgerald, J., dissenting).
603. Id. at 567, 242 N.W.2d at 746 (opinion of court). King, however, earlier had told the police that she saw Edwards shoot the victim. She also selected Edwards’ photograph in identifying the alleged murderer. Id. at 568-69, 242 N.W.2d at 747 (Coleman, J., with Fitzgerald, J., dissenting). At trial, King said she chose Edwards’ photograph because the police badgered her into picking it. Id. at 569, 242 N.W.2d at 747.
604. Id. at 554-55 n.6, 242 N.W.2d at 740 n.6 (opinion of court).
606. As the Michigan Supreme Court recognized, “the circumstances surrounding the making of a third-party statement, whether ‘assuring reliability,’ ‘indicating trustworthiness,’ or ‘rendering totally incredible,’ go to the weight to be given testimony, not its admissibility.” People v. Edwards, 396 Mich. 551, 565; 242 N.W.2d 739, 745 (1976).
607. 500 F.2d 954 (8th Cir. 1974).
608. Id. at 955.
609. Id. at 956.
610. Id.
611. Id at 958.
enacted. The court of appeals, however, did not apply the higher corroboration test adopted by the House. Instead, it asked whether there were “corroborative circumstances giving an aura of trustworthiness to the statements.”

That question probably represents the court of appeals’ attempt to interpret the “simple corroboration” test. Based on three facts, the court found such an “aura of trustworthiness.” First, the car involved in the crime belonged to Bogan’s sister. Second, a police officer testified that Bogan was a “known interstate carrier thief.” Finally, several inconsistencies in the eyewitness’ description of the defendant made it “at least plausible” that Bogan, not Goodlow, was the thief. Because the Government never retried Goodlow, we cannot determine whether a second trial court would have thought that the factors considered corroborative by the court of appeals satisfied the higher corroboration requirement of the rule as enacted.

In State v. Higginbotham the Minnesota Supreme Court applied the higher corroboration requirement of the rule as enacted to exclude a declarant’s statement on facts that probably would have convinced the court of appeals in Goodlow to admit the statement. Charged with murder,
Higginbotham claimed at trial that his friend, O'Neal, killed the victim. Five days after the murder, O'Neal voluntarily appeared at a police station, waived his Miranda rights, and admitted in a signed confession that he killed the victim. He then collapsed, saying that he had been on LSD all day. The Minnesota Supreme Court affirmed the exclusion of O'Neal's confession, accepting the trial court's characterization of it as a "fraud on the public." The Government had charged O'Neal with murder following his confession, but O'Neal invoked the fifth amendment when Higginbotham called O'Neal as a witness. Moreover, when O'Neal spoke to the police soon after the murder, he was wearing a vest identified as having been worn by the murderer. Nonetheless, the Minnesota Supreme Court was not convinced that O'Neal's confession had been sufficiently corroborated.

The difference between Edwards and Higginbotham is striking. The Edwards court was willing to permit the jury to assess the credit and weight of the declarant's purported confession despite the possibility that the reporting witness had fabricated it. The Higginbotham court, in contrast, was unwilling to permit the jury to evaluate the statement, despite the absence of any convincing evidence explaining why the declarant might have lied in implicating himself. The corroboration requirement biased the Higginbotham court against admitting the statement.

The three cases also suggest that a court might interpret the corroboration requirement in light of the Government's evidence. If, as in Edwards, the Government's evidence is weak or, as in Goodlow, the statement undercuts the reliability of the Government's eyewitness, the court might be more willing to admit the statement. In contrast, if, as in Higginbotham, the statement simply provides an alternative explanation for the crime, the court might exclude the statement. The Higginbotham court used the corroboration requirement as a substitute for a harmless error analysis. But such an interpretation of the requirement, especially if used by the trial court ex ante, is unfair to the defendant. Admissibility should not turn on the strength of the Government's evidence. The defendant should be permitted to introduce a statement which would force the jury to choose between two explanations of the crime, even when the defendant's explanation is implausible.

position of the government agent). This evidence, thought the district court, did not satisfy the corroboration requirement of rule 804(b)(3), a ruling that the court of appeals thought was not "clear error." Id. at 3, 212 N.W.2d at 882.

621. Id.

622. Id.

623. 298 Minn. at 3, 212 N.W.2d at 883. Although neither the trial court nor the supreme court explained the nature of the "fraud," the supreme court did note that "O'Neal, who lived with defendant's family and was often referred to as defendant's brother, [had] fabricated a false confession out of a desire to free his close friend." Id. at 5, 212 N.W.2d at 883. Those courts may have thought that Higginbotham and O'Neal colluded to have O'Neal confess and then invoke the fifth amendment so that his confession would be admitted to free Higginbotham. That possibility seems unlikely, however, because O'Neal still could have been tried for the murder once Higginbotham was acquitted.

624. Id. at 5-6, 212 N.W.2d at 882. The court also refused to reverse because it credited the eyewitness' identification of Higginbotham as the murderer. Id. at 6, 212 N.W.2d at 883. Although this ground would have justified the conclusion that excluding Bushey's confession was harmless error, the court thought that excluding his statement was not error.

When the Government's case depends upon eyewitness identification, one would think that a court should admit any third party statement because eyewitness testimony is notoriously unreliable. See generally Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 STAN. L. REV. 969 (1977) [hereinafter Note, Expert Psychological Testimony].
D. THE MECHANICS OF RULE 804(b)(3)

Five mechanical questions arise when the defendant offers a penal interest statement. First, should the judge or the jury decide if the statement satisfies the “against interest” tests of the rule's first sentence and the corroboration test of the rule's second sentence? Second, may the judge consider the trustworthiness of the reporting witness in deciding whether to admit the statement? Third, what is the defendant's burden of proof under the separate tests of the rule's first and second sentences? Fourth, what evidence may the judge consider in deciding whether to admit the statement? Finally, what evidence may the jury consider in deciding how to evaluate the declarant's statement?

1. The Roles of the Judge and the Jury

The Advisory Committee believed that courts should decide under rule 104(a) whether a statement was against the declarant's penal interest. Nonetheless, the roles of the judge and the jury in assessing the trustworthiness of the declarant's purported statement changed during the legislative process. The Preliminary and Revised Drafts of the rule provided that the jury would decide the trustworthiness issue. The Note to the rule in those drafts explained that “questions of possible fabrication are better trusted to the competence of juries than made the subject of attempted treatment by rule.” The addition of the “simple corroboration” test in the Supreme Court Draft, however, transferred the jury's role to the judge. In that draft's Note to the rule, the Standing Committee deleted the sentence that assigned the trustworthiness question to the jury. In its place, the Committee wrote that “when the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a).” Thus, the court also must find that, as a second admissibility condition, the defendant has corroborated the statement. That determination presents a mixed question of law and fact, with the judge assessing both the credibility of the declarant and the credibility and the probativity of his statement.

625. Advisory Committee Note to Supreme Court Draft, supra note 1, at 197. The Committee noted that “[o]ften... rulings on evidence call for an evaluation in terms of a legally set standard. Thus, when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.” Id.; accord, United States v. Bagley, 537 F.2d 162, 165-66 (5th Cir. 1976) (whether hearsay statement against interest question of law), cert. denied, 429 U.S. 1075 (1977).

626. Advisory Committee Note to Revised Draft, supra note 1, at 444; Advisory Committee Note to Preliminary Draft, supra note 1, at 386.

627. Advisory Committee Note to Supreme Court Draft, supra note 1, at 327. The Standing Committee mentioned rule 406(a) to contrast the treatment of habit evidence with that of defense-offered penal interest statements. Under rule 406, the proponent need not corroborate habit or routine practices as a condition of admissibility because corroboration “relates to the sufficiency of the evidence rather than [to] admissibility.” Advisory Committee Note to Supreme Court Draft, supra note 1, at 224-25.

628. The trial judge should make findings of fact. If he has not done so, however, the appellate court may stretch to find some reason to justify excluding the statement. See United States v. Bagley, 537 F.2d 162, 166 (5th Cir. 1976) (trial court could have found declarant's statement unreliable because proof insufficient that declarant made statement), cert. denied, 429 U.S. 1975 (1977).
This shift in the role of the judge and the jury warrants several comments. First, the shift is consistent with an inference that the Standing Committee, through its confession and coconspirator analogies, intended to define "simple corroboration" in terms of the preponderance of evidence standard. Second, conditioning admissibility upon a judicial determination of trustworthiness makes the penal interest exception unique among the so-called "class" exceptions to the hearsay rule. Third, the three reasons usually advanced to explain why the judge must determine the admissibility of certain sorts of evidence do not justify transferring the jury's normal role to the judge. Finally, this transfer creates a difference between the Government's

629. See note 670 infra (describing difference between rule 804(b)(3) and other exceptions to hearsay rule). With every other exception, the judge assesses the credit and the weight of the hearsay and of the witness who reports it. If the judge refuses to admit a statement, however, the jury cannot assess the credit and the weight of the statement or the witness who reports it. Rule 63(4)(e) of the Uniform Rules of Evidence gave such a power to the judge, an authorization one commentator considered "atypical" and "extraordinary." Chadbourn, Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(e) of the Uniform Rules of Evidence, 75 Harv. L. Rev. 932, 947 (1962). California also gives this power to the judge. See People v. Chapman, 50 Cal. App. 3d 872, 879, 123 Cal. Rptr. 862, 866 (Cal. App. 1975) (California evidence code requires judge to make preliminary determination whether hearsay declaration admissible).

Only three other "class" exceptions, those for business and for public records and for the absence of information, specifically authorize the judge to exclude evidence for lack of trustworthiness. See Fed. R. Evid. 803(6) (admissible unless source of information or circumstances of preparation indicate lack of trustworthiness); Fed. R. Evid. 803(7) (same); Fed. R. Evid. 803(8) (same). The court will consider the trustworthiness of such evidence, however, only when the opponent presents evidence challenging the credibility of the record. Yet under rule 804(b)(3) the defendant must prove the trustworthiness of his evidence as a threshold matter, even in the absence of the Government asserting that the statement was fabricated. Thus, in drafting rule 804(b)(3), the Standing Committee gave greater protection to the Government than a jury instruction would have provided, as Senator McClellan requested.

Rule 804(b)(3) arguably demands even greater corroboration than do rules 803(24) and 804(b)(5), the "catch-all" hearsay exceptions. Because they condition admissibility on a showing of trustworthiness equivalent to other hearsay exceptions, they will admit much evidence unless rule 804(b)(3)'s high corroboration test sets the standard for trustworthiness.

630. When the evidence presents highly technical evidentiary questions, presents information that a jury might be unable to evaluate fairly, or presents issues that implicate a privilege, commentators long have argued that judges, not juries, should resolve the preliminary question of fact. Saltzburg, supra note 513, at 271 n.2. Neither the Advisory and Standing Committees nor the Congress advanced any of these three reasons to justify a trial court deciding the trustworthiness of a declarant. During its September 30, 1971 meeting, the Standing Committee approved without discussion Professor Cleary's suggestion to alter the roles of the judge and jury following the September 22, 1971 meeting between Senator McClellan and representatives of the Advisory and Standing Committees. Although the Advisory Committee had not directed Professor Cleary to make this change as part of its revision of the penal interest exception during its September 5, 1971 meeting and Senator McClellan had not spoken of it as part of his objection to the exception, Professor Cleary probably thought that the change was necessary so that courts would understand that the trial judge should decide the corroboration issue.

Of the three, only the second rationale is relevant to rule 804(b)(3). Although some courts argue that penal interest statements are inherently unreliable, see United States v. Atkins, 558 F.2d 133, 136 (3d Cir. 1977) (reversing trial court that excluded declarant's statement after remarking, "This is bizarre . . . oh, this is ridiculous"), cert. denied, 434 U.S. 1071 (1978); United States v. Guillette, 547 F.2d 743, 754 (2d Cir. 1976) ("inherent danger that third party confessions tending to exculpate a defendant are the result of fabrication"), cert. denied, 434 U.S. 839 (1977), this concern is not persuasive. The defense undoubtedly will search for and adduce any evidence that shows the defendant's innocence. When the search proves fruitless, see Steadman v. United States, 358 A.2d 329, 331-32 (D.C. 1976) (defense unable to show defendant innocent and declarant involved because proffered witness statements untrustworthy), however, the jury surely will question the evidentiary significance of the statement. Moreover, the prosecution
and the defendant's ability to introduce evidence, a distinction that raises constitutional problems.631

2. The Trustworthiness of the Witness

The courts of appeals have divided over whether the judge may assess the credibility of the witness as well as the credibility of the declarant.622 In United States v. Satterfield633 the United States Court of Appeals for the Ninth Circuit cautiously refused to answer the question, but leaned toward permitting the inquiry because it thought that it detected congressional authorization to assess the witness' credibility. Because the rule refers to the trustworthiness of the statement rather than solely to that of the declarant, the court thought that the rule was written broadly enough to justify examining the witness' credibility.634 Moreover, the court believed that the Advisory Committee may have indirectly approved of such an inquiry when it mentioned in its Note that courts at common law excluded penal interest

adequately can challenge the worth and the reliability of the declarant's statement by cross-examining the reporting witness, investigating the declarant, or delivering a scorching summation deriding both the declarant and the reporting witness. By taking such actions, the prosecutor provides the jury with information for assessing the credibility of the declarant's statement. Thus, the jury probably will not overvalue hearsay evidence that one might consider unreliable.

631. The rule's corroboration requirement burdens the defendant but not the Government. In fact, the Government need not establish the credibility of other sorts of questionable evidence, such as a defendant's confession, a coconspirator's implication of the defendant, or an eyewitness' identification, as a condition of admissibility. Additionally, the power of the judge to rule on trustworthiness also prevents the defendant from benefiting from the jury's refusal to follow the trial court's instruction to ignore a statement that is excluded after provisionally being admitted. Unlike the defendant, the Government may have this benefit because several courts of appeals permit the Government to introduce a coconspirator's statement subject to a motion to strike. See, e.g., United States v. James, 590 F.2d 575, 582-83 (5th Cir.) (en banc) (Government may introduce coconspirator's statement subject to later motion either to strike or to declare mistrial), cert. denied, 442 U.S. 917 (1979); United States v. Macklin, 573 F.2d 1046, 1049 n.3 (8th Cir.) (Government may introduce coconspirator's statement on condition that it later show sufficient independent evidence of conspiracy), cert. denied, 439 U.S. 852 (1978); United States v. Stanchich, 550 F.2d 1294, 1297-98 (2d Cir. 1977) (judge may permit admission of coconspirator's statement subject to proof of coconspirator's participation in conspiracy; if proof insufficient judge must instruct jury to disregard, or if necessary, grant defendant's motion for mistrial). See generally Marcus, supra note 516, at 302-03. Thus, the rule's corroboration requirement burdens the defendant in a way that the Government is not constrained. For a discussion of the constitutional issues raised by this distinction, see notes 708-59 infra and accompanying text.

At least one court has refused to impose a corroboration requirement as a condition of admitting penal interest statements because to do so would create too great a disparity between the Government's and the defendant's respective burdens. See People v. Edwards, 396 Mich. 551, 566, 242 N.W.2d 739, 746 (1976) (double standard, which assumes defendant more likely to use perjured testimony, unacceptable). For a discussion of Edwards, see notes 596-606 supra and accompanying text. No state, however, that has enacted a code of evidence patterned after the Federal Rules of Evidence has omitted a corroboration requirement. E.g., Me. Cr. R. MRE 804(b)(3) (West 1980) (test same as Federal Rule 804(b)(3) but adds Bruton sentence); Mich. Cr. R. Ann. MRE 804(b)(3) (West 1979) (test identical to Federal Rule 804(b)(3)); N. Mex. R. Evid. 804(b)(4) (Michie 1978) (same). None of these three states published legislative history to explain why it chose the version of the penal interest test it enacted, a failure common to the states.


634. Id. at 692.
statements because of possible fabrication "either of the fact of the making of the confession or in its contents." Neither source, however, supports the court's interpretation. Although it failed to say so in its Note to the rule, the Advisory Committee specifically refused to demand proof of a witness' credibility as a condition of admissibility. Furthermore, the Advisory Committee mentioned the common law courts' fear about fabrication only to reject it.

Apart from congressional intent, two important reasons suggest why a court should not evaluate the witness' credibility. Although courts exclude hearsay because the Government cannot cross-examine the declarant, the Government can cross-examine the witness who reports the declarant's statement. As a result, the jury can evaluate the witness' demeanor and credibility. Furthermore, a constitutional problem under the compulsory process and due process clauses is implicated when the judge believes that the defense has not established the witness' credibility and therefore bars the jury from hearing the witness.

3. The Defendant's Burden of Proof

A defendant who offers a statement that is against the declarant's penal interest must satisfy the "against interest" and corroboration admissibility conditions. Although rule 104(a) does not define the proponent's burden in satisfying an admissibility condition, courts usually consider the burden to be one of evidentiary preponderance. Therefore, the judge must employ a more-likely-than-not standard when assessing whether the defense-offered statement is against the penal interest of the declarant. If the model of the corroboration requirement presented in this article is correct, however, the judge must employ the more demanding standard of clear and convincing evidence in assessing trustworthiness. Thus, the judge must use two standards of proof. In this respect, the penal interest exception for defense-offered statements also is unique among the hearsay exceptions.

4. The Evidence the Judge May Consider

The judge must determine whether the defendant has satisfied his foundation burdens. In making this assessment, may he consider otherwise inad-
missible information? This problem may arise in several different ways. For example, the defendant may call a witness who reports that the "street" knows that the declarant committed the crime. Similarly, the defendant may call a police officer who reports that an informant, whom the officer will not or cannot identify, told the officer that the declarant had or the defendant had not committed the crime. Also, the defendant may call a police officer who, based on personal knowledge or in response to a hypothetical question, would testify that the crime was committed in a way that resembles the work of the declarant. The first two examples involve otherwise inadmissible hearsay. The officer's opinion in the third example is arguably inadmissible either because he is not an expert witness or because the evidence of the "other crime" he thinks the declarant committed does not satisfy rule 404(b)'s test. Nevertheless, the court should consider these three types of evidence because, apart from privileged communication, rules of evidence do not bind a court in deciding a question of admissibility under rule 104(a).

May the court consider the testimony of the defendant? The House Subcommittee strengthened the "simple corroboration" test in part because it feared that "the accused's own testimony might suffice" to satisfy that test, even though this testimony would "not necessarily increas[e] the reliability of the hearsay statement." The Subcommittee's fear, however, does not justify ignoring the defendant's testimony in all instances. The Subcommittee feared that by denying his guilt the defendant could satisfy the "simple corroboration" test. A court should consider any information the defendant can provide that implicates the declarant. If the defendant can establish the

641. But cf. United States v. Sedgwick, 345 A.2d 465, 473-74 (D.C. 1975) (no error when Government failed to disclose statement by unidentified person to police officer that declarant had admitted committing crime charged against defendant because declarant's statement would not have been admissible at trial).

642. See United States v. Goodlow, 500 F.2d 954, 958 (8th Cir. 1974) (trustworthiness of declarant's statement established, in part, by police officer's testimony that declarant was "a known interstate carrier thief"); cf. United States v. Harris, 403 U.S. 573, 583 (1971) (defendant's reputation may be considered in evaluating sufficiency of search warrant affidavit).

643. See Fed. R. Evid. 702 (witness qualified as expert may testify or give opinion about matters on which he is expert).

644. See Fed. R. Evid. 404(b) (evidence of other crime inadmissible to prove character of person to show he acted in conformity with those crimes).

645. Determining whether the statement is privileged is a difficult threshold question. In United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978), the declarant admitted to his wife that he, not the defendant, was guilty. Id. at 1113, 1115. The United States Court of Appeals for the Ninth Circuit affirmed the trial court's exclusion of the statement, indicating, "inter alia", that under the husband-wife privilege the trial court would not have admitted the statement were the declarant on trial. Id. at 1115. The court of appeals did not explain its reasoning. If it thought that the litigation significance of the statement, were the declarant on trial, determined admissibility of the statement at the defendant's trial, it reasoned erroneously. If it thought that the statement was not against interest because the declarant thought his comment was protected by the husband-wife privilege, however, it would have been on firmer ground. Even this second interpretation, which the court of appeals did not advance, is probably an incorrect assessment of against interest. If the declarant's wife reported his statement to the police, an investigation of his involvement might have followed, thus providing an against-interest effect of his statement even if his wife could not have testified against him.


647. Id. The Advisory Committee originally thought that the defendant's testimonial denial would be the only way that he could satisfy the "simple corroboration" test, a view that the Standing Committee later rejected. See notes 142-44 supra and accompanying text (describing Standing Committee's decision).
trustworthiness of the declarant or the truth of his statement or can shift guilt to him, surely the court should not ignore the defendant’s testimony. If the court considers the defendant’s testimony, may the Government introduce the defendant’s testimony in its case-in-chief if he implicates himself in some way during the rule 104(a) hearing? Neither rule 804(b)(3) nor rule 104(d) provides an answer. The Revised Draft answered this question by limiting the Government’s use of the defendant’s testimony for “impeachment if clearly contradictory of testimony given by him at the trial.” When Senator McClellan objected to this limitation, the Standing Committee responded by deleting any reference in rule 104 to the Government’s ability to use the defendant’s testimony. Nonetheless, to be consistent with other decisions, a court should allow the Government only to use the defendant’s rule 104(a) testimony either to impeach him should he testify at trial or to charge him separately with perjury.

5. The Evidence from the Rule 104(a) Hearing

If the court concludes that the defendant has satisfied the rule’s corroboration test on the basis of inadmissible evidence, should it permit the defendant to introduce that evidence in order to convince the jury to credit the declarant’s statement? Suppose, for example, the defendant offers a police report that includes an unavailable witness’ description of the culprit that matches the declarant’s physical appearance better than it does the defendant’s. Problems also arise if the defendant offers evidence of the declarant’s commission of other crimes, similar to the crime charged against the defendant, but the evidence does not satisfy the “clear and convincing” standard imposed under rule 404(b). Moreover, the defendant might offer the opinion of a police officer that the declarant is a “known thief” or an addict who steals to support his habit. One might argue that the jury should hear these sorts of evidence because the judge already has applied a test under rule 804(b)(3) in determining the statement’s trustworthiness, a test that is higher than the one the jury would apply in finding reasonable doubt. Without this

648. The judge may conduct the rule 104(a) inquiry out of the jury’s hearing, see Fed. R. Evid. 104(e) (inquiry out of jury’s hearing when interests of justice so require), and probably should conduct the inquiry out of the jury’s presence. See United States v. Sarmiento-Perez, 633 F.2d 1092, 1101 n.5 (5th Cir. 1980) (pretrial or non-jury hearing preferred).

649. Revised Draft, supra note 1, at 325.

650. See McClellan Letter, supra note 82, at 33,642. Senator McClellan objected that rule 104(d) “appears to be an unwarranted extension of Simmons v. United States, 390 U.S. 377 (1968) and a narrowing of Walder v. United States, 347 U.S. 62 (1954).” Id. Senator McClellan probably correctly believed that the Revised Draft’s version of rule 104(d) extended Simmons and Walder. The Advisory Committee, however, disagreed with his interpretation. See Advisory Committee Note to Revised Draft, supra note 1, at 328 (Simmons and Walder reflected in rule 104(d)).

651. As enacted, rule 104(d) reads: “The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.” Fed. R. Evid. 104(d).

652. See Harris v. New York, 401 U.S. 222, 225-26 (1971) (Government may use statement taken in violation of Miranda only to impeach); Simmons v. United States, 390 U.S. 377, 394 (1968) (Government may not use suppression hearing testimony against defendant at trial).

653. A court also should permit the defendant to introduce these sorts of otherwise inadmissible evidence if it allows the jury to ask whether the declarant’s statement is actually against penal interest. The jury must answer this question to decide if the statement is conditionally relevant under rule 104(b). Before
otherwise inadmissible evidence, the jury might distrust the declarant’s credibility or fail to understand the relevance of the declarant’s statement even though the judge already had decided the credibility of the statement as a matter of law.

Apart from constitutional considerations,654 the Federal Rules of Evidence provide little room for the court to allow the jury to hear this sort of evidence. Rule 102 states that the “rules shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”655 That directive, however, might not be broad enough to permit a court to ignore the more specific command of a different rule.656 Rule 404(a), for example, bars introduction of a “person’s character,” in contrast to a party’s character, except when, as in rule 404(b), a party offers evidence for other purposes, such as proof of “motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”657 Each of these purposes might be relevant when the evidence is a penal interest statement. The federal courts interstitially have imposed the clear and convincing evidence standard when the Government has offered such evidence against the defendant because such evidence is potentially very prejudicial.658 Because the introduction of evidence that the declarant committed other crimes would

the evidence reaches the jury, however, the judge must have answered that question affirmatively as a threshold admissibility condition under rule 104(a). Advisory Committee Note to Supreme Court Draft, supra note 1, at 197. The relevance of such a statement also is conditioned upon the declarant’s having spoken against his penal interest. Because rule 104(b) requires that this condition exist, the rule may authorize the jury to ask the very question that rule 104(a) ordered the judge to answer as a threshold admissibility condition. If the jury can ask that question, the court arguably should provide the jury with the same otherwise inadmissible evidence that the court considered in reaching its rule 104(a) determination.

The legislative history does not explain the relationship of rules 104(a) and (b). The Preliminary Draft of rule 104(b) ordered the court to instruct the jury concerning its role in assessing conditionally relevant evidence; the judge was to instruct the jury to disregard the evidence unless the jury found that the condition was satisfied. Preliminary Draft, supra note 1, at 186-87. The Advisory Committee, however, deleted that order without explanation from subsequent drafts. Nonetheless, the judge still might instruct the jury that, in assessing the persuasiveness of the penal interest statement, it may consider the circumstances in which the declarant allegedly made the statement. Thus, the judge indirectly might inform the jury that it may ignore the statement either if it distrusts the declarant or the reporting witness or if it is unsure of the import of the statement.

654. For a discussion of the defendant’s emerging right to present evidence under either the compulsory process or the due process clauses, see notes 771-839 infra and accompanying text.

655. FED. R. EVID. 102.

656. Albert Jenner, the chairman of the Advisory Committee, however, suggested that courts should interpret rule 102 expansively. In referring to rule 102, he said:

The whole premise on which these rules were drafted was that the law of evidence should grow and develop under these rules as a format. The history of the rulemaking process under the enabling act has been that the Advisory Committee will, with the input of the bar, . . . of the courts . . . , [and] of the Congress, revise the . . . rules . . . .

House Subcommittee Hearings, supra note 15, at 525-26 (testimony of Albert E. Jenner, Jr.). See also Senate Judiciary Hearings, supra note 118, at 212 (testimony of Albert E. Jenner, Jr.) (policy of rule 102 makes it “greatest of all of the rules submitted by the Court”); Moore & Bendix, Congress, Evidence and Rulemaking, 84 YALE L.J. 9, 12-13 (1974) (rule 102’s directive to interpret rules to “promot[e] . . . growth and [the] development of the law of evidence” provides the “necessary lubricant of growth”).

657. FED. R. EVID. 404(b).

658. See generally Advisory Committee Note to Supreme Court Draft, supra note 1, at 219-21.
aid, rather than prejudice, the defendant, a court might apply a lower standard of proof in deciding whether the declarant committed the other crimes and whether they were relevant to the charge against the defendant.

V. THE CONSTITUTIONALITY OF RULE 804(b)(3)

Surprisingly, neither Congress nor the Advisory and Standing Committees discussed the constitutionality of rule 804(b)(3)'s penal interest exception.659 No federal court has decided whether the rule is constitutional.660

Before considering the constitutionality of the penal interest exception, two preliminary observations are in order. First, neither the Supreme Court's review of the Federal Rules of Evidence nor Congress' approval of the rules forecloses a constitutional attack on rule 804(b)(3) or any of the other rules.661

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659. Both Committees were quite aware of the confrontation clause problem in introducing hearsay evidence against the defendant. See Advisory Committee Note to Supreme Court Draft, supra note 1, at 291-92 (discussing evolution of confrontation clause challenges to hearsay evidence). Thus, their failure to recognize the compulsory process problem of restrictions like the "simple corroboration" test on the defendant's ability to introduce evidence is inexplicable. Similarly, the House Subcommittee apparently failed to consider the constitutionality of its higher corroboration requirement, despite requests to clarify the relationship between that requirement and Chambers. The Subcommittee may have discussed the constitutional question during its October 2, 1973 session; the tape recording of that session omits the discussion of defense-offered penal interest statements. If the Subcommittee did discuss the issue, however, its decision not to delete the corroboration requirement is irrelevant for constitutional purposes. Although Congress may increase the protection beyond what is constitutionally mandated, it may not decrease that protection. See Katzenbach v. Morgan, 384 U.S. 641, 648-51 & n.10 (1966) (literacy requirement need not be adjudged violative of equal protection to be prohibited; yet Congress may not dilute equal protection guarantee). Second, Congress apparently did not discuss the constitutional problem of imposing the corroboration requirement only on the defendant, although it was informed of the disparity. See Letter from Melvin B. Lewis to Representative William L. Hungate (July 18, 1973), reprinted in SUPPLEMENT TO SUBCOMMITTEE HEARINGS, supra note 10, at 210-11.

660. Although two federal courts of appeals have suggested in dictum that the rule "is no more restrictive than the Constitution permits, and may in some situations be more inclusive," United States v. Satterfield, 572 F.2d 687, 692 (9th Cir.) (quoting Barrett), cert. denied, 439 U.S. 840 (1978); United States v. Barrett, 539 F.2d 244, 253 (1st Cir. 1976), neither court explained when the rule might admit a statement whose admission was not constitutionally required.

661. HOUSE SUBCOMMITTEE HEARINGS, supra note 15, at 16-17 (testimony of Judge Albert B. Maris) ("rulemaking by the Court could not . . . function" unless Court retained authority to review constitutionality of any rule it transmitted to Congress); see Mississippi Publishing Co. v. Murphee, 326 U.S. 438, 444 (1946) (Supreme Court promulgation of Federal Rules of Civil Procedure does not preclude judicial review of validity); 11 Moore, supra note 4, ¶ 501[3], at 5031 & n.21 (same).

Although a defendant ordinarily lacks standing to challenge the facial constitutionality of a statute whose application to him is not unconstitutional, courts have made exceptions. See, e.g., County Court v. Allen, 442 U.S. 140, 159-60 (1979) (dictum) (court may examine facial constitutionality of mandatory presumptions); Wardius v. Oregon, 412 U.S. 470, 476-77 (1973) (state notice-of-alibi rule with no provision for reciprocal discovery unconstitutional on its face even though state court might have inferred reciprocity had defendant given notice); Leary v. United States, 395 U. S. 6, 37 (1969) (presumption of knowledge of illegal drug importation inferred from possession; irrelevant whether Congress might have made possession itself illegal); United States v. King, 552 F.2d 833, 840 (9th Cir. 1976) (statute providing for depositions of Government witnesses not facially unconstitutional), cert. denied, 430 U. S. 966 (1977). See generally Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 IND. L. REV. 711, 807-08 (1976) (facial attack on evidentiary exclusionary rule rare because issue of exclusion depends on importance of evidence in particular case). In any event, a defendant could challenge a restrictive interpretation of the various tests of rule 804(b)(3)'s first sentence or of the corroboration requirement as applied in his case.
In *United States v. Matlock*, *Chambers v. Mississippi*, and *United States v. Harris* the Supreme Court did not implicitly approve rule 804(b)(3) as enacted because that rule differs from the version of the rule pending at the time of each of these decisions. Thus, constitutional review of the penal interest exception appears justified, particularly because Congress changed the *Supreme Court Draft* of the rule by increasing the corroboration requirement.

Second, the separation of powers doctrine limits the extent to which courts may ignore clear congressional intent in order to limit a constitutional attack on a statute. At least one commentator has argued that Congress' decision about the trustworthiness of certain types of evidence—like statements against penal interest—supersedes a different evaluation by the Supreme Court. If a court nonetheless refuses to follow Congress' guidance in applying the penal interest exception, it may consider whether the exception is unconstitutional on its face or in its application.

In assessing the constitutionality of the penal interest exception, a court must ascertain Congress' intent. Unfortunately, as demonstrated throughout this article, Congress never clearly defined the exception. Because the meaning of the corroboration requirement, the penal interest standard, and

665. In *Chambers* the Supreme Court specifically referred to the *Supreme Court Draft*. 415 U.S. at 177. In *Matlock*, 410 U.S. at 299 n.18, and *Harris*, 403 U.S. at 584, the Court referred only to the proposed rules.

666. Congress' change should eliminate any hesitancy or embarrassment the Court might have in overturning a rule it had approved under the current rulemaking procedures. See *Amendments to Rules of Civil Procedure*, 374 U.S. at 869-70 (statement of Black and Douglas, J.J.) (amendments to Fed. R. Civ. P.); *Weinstein, Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 935 (1976).
668. See *Martin, supra* note 667, at 196 (federal courts must apply higher corroboration test of rule 804(b)(3) because it has "substantive effect" of making conviction more likely in some cases). Repeatedly told that the Congress had the authority to change the *Supreme Court Draft*, the House Subcommittee may have been more willing to change a rule, like the penal interest exception, that it thought involved substantive rather than procedural decisions. *Cf. House Subcommittee Hearings, supra* note 15, at 494 (testimony of Stuart H. Johnson, Jr.) ("simple corroboration" requirement a substantive change).

Congressional supremacy rests on the assumption that it gathered sufficient information to make an informed assessment about the probative value of penal interest statements different from that of the Court and its Committees. *Cf. Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (courts should not review congressional resolution of competing factors concerning literacy requirement if basis exists for prohibition). See also *House Subcommittee Hearings, supra* note 15, at 224 (testimony of John J. Cleary) ("The function of Congress before it passes legislation is to gather information."). Because Congress failed to develop that record, see notes 670-707 infra and accompanying text, federal courts arguably are not bound to enforce congressional intent. Nonetheless, because federal courts are divided over the proper interpretation of rule 804(b)(3), allowing the courts to ignore the rule's restrictions will lead to ad hoc, inconsistent results until the Supreme Court announces an evidentiary or constitutional test. In any event, in passing upon the constitutionality of a statute, the federal courts may search for information if Congress failed to develop an adequate record. *See Leary v. United States*, 395 U.S. 6, 38 (1969) (court may supplement legislative record to sustain constitutionality of presumption). Moreover, the courts may reconsider the facts upon which Congress relied if those facts no longer are applicable. *Id.* at 38 n.68.
the "reasonable man" test are unclear, we must develop our own model of the rule to capture Congress' intent. For the remainder of this discussion, assume that a penal interest statement offered by the defendant is admissible only if it exculpates the defendant by substituting someone else in a one-person crime and it is corroborated by clear and convincing evidence. Furthermore, assume that the Government may introduce without corroboration a statement implicating the defendant.

As formulated, the rule is constitutionally suspect in four respects. First, Congress relied on several unwarranted assumptions to justify the high corroboration burden imposed on the defendant. Second, the rule improperly discriminates between the defendant and the Government because the defendant alone must satisfy the corroboration requirement. Third, if the defendant does not satisfy the corroboration requirement, the rule forecloses jury assessment of the declarant's credibility. Finally, the rule clashes with the defendant's fifth and sixth amendment rights to introduce evidence.

A. CONGRESS FAILED TO JUSTIFY THE CORROBORATION REQUIREMENT

The corroboration requirement, unique among hearsay exceptions, is disproportionate to the possibility that the declarant will fabricate a statement

669. Although this model makes a constitutional attack on the rule easier than would a less restrictive model, the legislative history contains sufficient support to justify these assumptions. Although the model compels consideration of the constitutional issues, such an examination appropriately determines the constitutional limitations of a restrictive hearsay exception. Moreover, models less restrictive than that proposed in the text are also constitutionally suspect. But cf. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting) (Supreme Court should interpret statutes narrowly to find statutes constitutional).

670. The penal interest exception as applied to defense evidence operates differently from every other hearsay exception. The New York City Bar Association stated in a letter to the Subcommittee:

The hearsay exceptions are permitted because the law makes a rough determination that certain statements are sufficiently probative to justify being admitted, but their weight is at all times for the trier of facts. To condition admissibility [under the penal interest exception] upon a showing of corroborating circumstances indicating trustworthiness is in effect to decide what weight the declaration against interest should have as a concomitant to admitting it.


Thus, the rules generally do not authorize the judge to exclude other forms of hearsay if he believes them to be untrustworthy. Rule 403, for example, enables the judge to exclude statements whose potential prejudice or confusion outweighs its probative value. Lilly, supra note 456, § 78, at 265 (1978); 4 Weinstein, supra note 16, ¶ 804(b)(3)(a) at 804—92. But cf. House Subcommittee Hearings, supra note 15, at 252 (testimony of Judge Henry J. Friendly) (judge's authorization to exclude statements under rule 403 not clear). Nonetheless, 403 does not specifically mention trustworthiness as a ground to exclude evidence. Moreover, those few rules like rule 804(b)(3) that advance trustworthiness as a ground for exclusion highlight the uniqueness of the penal interest exception. Rules 803(6)-(8) permit the judge to exclude certain records as untrustworthy. This authorization originated in Palmer v. Hoffman, 318 U.S. 109 (1943), in which the Supreme Court upheld exclusion of an accident report prepared for litigation. Id. at 111. The Advisory Committee Note suggests that because the report was not prepared in the regular course of business, the report's accuracy was questionable. Advisory Committee Note to Supreme Court Drafts, supra note 1, at 309-10. According to rules 803(6)-(8), however, the opponent carries the initial
to aid the defendant. To restrict the admissibility of evidence, Congress must justify its decision.\textsuperscript{572} Congress, however, did not and could not have justified the corroboration requirement. Moreover, the corroboration requirement is overinclusive and therefore violates the due process clause of the fifth amendment and the compulsory process clause of the sixth amendment.

Congress made several unwarranted assumptions in drafting the penal interest exception. First, the House Subcommittee misinterpreted the purpose of the “simple corroboration” test. The House Subcommittee wrongly assumed that the Advisory and Standing Committees added that requirement to the \textit{Supreme Court Draft} out of a fear that defendants too easily could introduce untrustworthy evidence. In fact, the Advisory and Standing Committees simply succumbed to the pressure exerted by Senator McClellan.\textsuperscript{1}

\textsuperscript{1} burden of indicating the record lacks trustworthiness. In contrast, rule 804(b)(3) requires the defendant—the proponent—to establish trustworthiness by a standard higher than that usually imposed under rule 104(a).

Similarly, hearsay offered under rule 803(24) and 804(b)(5), the “catch-all” provisions, may be admitted more easily than under rule 804(b)(3). A court may admit hearsay under those rules if, \textit{inter alia}, “circumstantial guarantees of trustworthiness” “equivalent” to other hearsay exceptions exist. Although Congress did not indicate which hearsay exceptions should be the guide for “catch-all” hearsay, the Senate Report suggests a narrow interpretation. To convince the House of Representatives of the wisdom of “catch-all” provisions, the Senate Judiciary Committee argued that “there are certain exceptional circumstances where evidence which is found ... to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible.” \textit{SENATE JUDICIARY REPORT, supra note 10, at 19, [1974] U.S. CODE CONG. \\& AD. NEWS at 7065} (citing Dallas County v. Commercial Union Assoc. Co., 286 F.2d 388 (5th Cir. 1961), one of the few pre-rules cases where federal courts admitted hearsay that satisfied no recognized exception). Despite Congress’ narrow interpretation of rules 803(24) and 804(b)(5), federal courts have admitted many hearsay statements under the two rules. See, \textit{e.g.}, United States v. White, 611 F.2d 531, 538 (5th Cir. 1980) (claim form executed by payee of check who died prior to trial admissible under rule 803(24) due to circumstantial guarantees of trustworthiness); United States v. West, 574 F.2d 1131, 1135, 1137-38 (4th Cir. 1978) (grand jury witness’ testimony admissible over confrontation clause objection because essential and trustworthy under rule 804(b)(5)); United States v. Lyon, 567 F.2d 777, 784 (8th Cir. 1977) (FBI agent’s transcribed interview of defendant’s landlady admissible under Rule 804(b)(5) because accuracy guaranteed by detailed testimony of transcribing technique). See \textit{generally Note, The Residual Exceptions to the Hearsay Rule in the Federal Rules of Evidence: A Critical Examination, 31 RUTGERS L. REV. 687 (1978)}. Because a declarant’s statement inevitably will be vital to the defense, courts also should apply the corroboration requirement liberally. \textit{Cf.} United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir. 1976) (requiring lesser demonstration of trustworthiness as importance of hearsay to proponent increases). No court has admitted hearsay, inadmissible under rule 804(b)(3), under the “catch-all” provisions. \textit{Cf.} Lowery v. Maryland, 401 F. Supp. 604, 608 (D. Md. 1975) (admissibility of penal interest statements offered by defendant governed by rule 804(b)(3); therefore rule 804(b)(5) inapplicable), \textit{aff’d. without opinion, 532 F.2d 750 (4th Cir.), cert. denied, 429 U.S. 919 (1976).}

671. \textit{See Chambers v. Mississippi, 410 U.S. 284, 302 (1973)} ("the accused . . . must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."). Commentators agreed that Congress could amend any rule in the \textit{Supreme Court Draft}, as long as Congress enacted its own draft of all the rules. \textit{House Subcommittee Hearings, supra note 15, at 24} (testimony of Judge Albert B. Maris); \textit{id. at 148, 151} (testimony of Justice Arthur J. Goldberg).

672. \textit{See note 668 supra and accompanying text} (deference to congressional decisions assumes informed assessment and basis for choice). \textit{See also Jaffe, supra note 248, at 308-64} (criticizing rule 804(b)(2), “dying declarations” hearsay exception, as lacking empirical justification); \textit{Letter from Professor Kenneth W. Graham, Jr., to Committee on Rules of Practice and Procedure (July 28, 1971), reprinted in House Subcommitteee Hearings, supra note 15, at 196-97} (psychotherapist privilege lacks factual basis). Congress, however, expanded the defendant’s ability to introduce evidence through the penal interest exception because federal courts had not recognized that exception. The common law undoubtedly contributed to Congress’ niggardly version of the exception.
Second, the House Subcommittee feared that the defendant could satisfy the "simple corroboration" test by testifying that he was innocent. 673 Although the Advisory Committee originally took this position, the Standing Committee rejected it, stating that the defendant's testimony alone was insufficient. 674 In agreeing with the Advisory Committee, the House Subcommittee increased the corroboration requirement based on a groundless concern. Third, the House Subcommittee erred in assuming that friends, relatives, or fellow inmates provide most defense-offered penal interest statements and that such declarants inevitably are untrustworthy. 675 Finally, the House Subcommittee failed to justify its greater distrust of penal interest statements as compared to statements against pecuniary or proprietary interest or other forms of

673. The Subcommittee expressed this fear as its sole concern over the "simple corroboration" test. HOUSE REPORT, supra note 10, at 16, [1974] U.S. CODE CONG. & AD. NEWS at 7089-90. Rather than increase the requirements of the rule, the Subcommittee simply should have provided that a defendant could not satisfy the "simple corroboration" test by denying his guilt.

674. The Standing Committee acted in response to Senator McClellan's objection raised at his September 22, 1971 meeting with members of the Advisory and Standing Committees.

675. Although Judge Friendly and associate counsel offered no support for the argument, the Department of Justice offered two cases to support its theory that friends, relatives, and fellow prison inmates were most likely to be declarants. See Justice's First Letter, supra note 63, at 33 (citing United States v. Dovico, 380 F.2d 325 (2d Cir.), cert. denied, 389 U.S. 944 (1967), and Scolari v. United States, 406 F.2d 563 (9th Cir.) (per curiam), cert. denied, 395 U.S. 981 (1969)). In Dovico the Government separately convicted the declarant and the defendant for selling cocaine. 380 F.2d at 326. While in prison, the declarant allegedly admitted to a fellow inmate that he sold the cocaine. The evidence at trial indicated that the declarant retrieved a brown sack from a garbage container in which the defendant had placed a brown sack. Id. A witness revealed the declarant's statement shortly after the declarant's death, thereby providing grounds for a new trial. Id. At the second trial, however, the judge excluded the statement as untrustworthy and found the defendant guilty. Id. The court of appeals affirmed, acknowledging that although it perhaps should recognize the penal interest exception, it found no error because the declarant had not exposed himself to the possibility of other punishment with his admission. Id. at 327. In Scolari the Government charged the defendant with smuggling amphetamines. 406 F.2d at 563. He sought to introduce a statement by a passenger in his car that she put the drugs in one of the car's tires. Id. at 563. Following Donnelly v. United States, 228 U.S. 243 (1913), the court excluded the statement, leaving for "a more propitious occasion the question as to how old, or how badly reasoned" Supreme Court precedent must be before a court should abandon it. Id. at 564. In both Dovico and Scolari the court's interpretation of the exception appears consistent with the common law. Nonetheless, both courts should have admitted the statement because such confessions, if true, are crucial to the defendant. By admitting the statements, the courts could have allowed the factfinder to assess the credibility of each statement.

A few other cases, however, do add support to the Subcommittee's assumption. See Witham v. Mabry, 596 F.2d 293, 295-97 (9th Cir. 1979) (cousin's confession to crime inadmissible because not shown to be against penal interest); United States v. Satterfield, 572 F.2d 687, 693 (9th Cir.) (codefendant's statement that defendant not involved inadmissible because good reason to believe codefendant lied), cert. denied, 439 U.S. 840 (1978); Lowery v. Maryland, 401 F. Supp. 604, 607-08 (D. Md. 1975), (defendant's statement that fire was set accidentally inadmissible because uncorroborated and not necessarily reliable), aff'd without opinion, 532 F.2d 570 (4th Cir.), cert. denied, 429 U.S. 919 (1976); People v. Chapman, 50 Cal. App. 3d 872, 880-81, 123 Cal. Rptr. 862, 867-68 (Ct. App. 1975) (admission by jailed codefendant that he fired fatal shot inadmissible because it did not exculpate defendant; codefendant's statement that defendant attempted to stop fight also inadmissible because it was not against codefendant's penal interest); Brown v. State, 99 Miss. 719, 726, 55 So. 961, 961 (1911) (confession of defendant's brother to crime charged inadmissible because confession "mere hearsay"); Ryan v. State, 95 Wis. 2d 83, 85-89, 289 N.W.2d 349, 355 (1980) (fellow inmate's confession inadmissible because not shown to be against penal interest, made to strangers, and too vague to provide probable cause to arrest).
Beginning with the Sussex Peerage,676 courts have considered penal interest statements less reliable than other types of against-interest statements or other forms of hearsay.678 They feared that recognizing the penal interest exception might tempt defendants either to claim falsely that a third party had confessed or to induce a third party to give a false confession.679 The Subcommittee wrongly assumed that the Advisory and Standing Committees shared this common law belief, a belief that assumes the defendant's guilt.680

These four errors suggest that the corroboration requirement is arbitrary and overbroad. As Washington v. Texas681 illustrates, legislatures may not establish "arbitrary rules that prevent whole categories of defense witnesses..." admitted as hearsay.

676. This distrust may be justified in some instances. See, e.g., United States v. Hughes, 529 F.2d 838, 839 (5th Cir. 1976) (uncorroborated testimony of defendant's brother regarding third party admission of guilt excluded as untrustworthy); United States v. Dovico, 380 F.2d 325, 326 (2d Cir.) (witness' statement that codefendant confessed to sole responsibility for crime after codefendant's death inadmissible because witness subject to no further punishment), cert. denied, 389 U.S. 944 (1967); United States v. Miller, 277 F. Supp. 200, 206 (D. Conn. 1967) (new trial based on declarant's two written confessions denied because declarant repudiated confessions and substantial evidence that confessions originally made under duress); Steadman v. United States, 358 A.2d 329, 331 (D.C. 1976) (testimony that unknown person or persons confessed to murder excluded as unreliable); People v. Edwards, 396 Mich. 551, 568, 242 N.W.2d 739, 747 (1976) (Coleman, J., with Fitzgerald, J., dissenting) (court should have excluded statement by fellow inmate offered after discussion of crime with defendant because statement not of "trustworthy calibre"). In Hughes, Dovico, Steadman, and Edwards the witness' credibility, not the declarant's credibility, was in dispute. The Government usually should be able to develop that issue on cross-examination. Indeed, the Advisory Committee rejected the issue as a cause for concern. Reporter's Comments to Revised Draft, supra note 54, at 114d.

The remarkable example advanced by the Government in Chambers v. Mississippi, 410 U.S. 284 (1973), to justify its argument that the penal interest exception should not be constitutionally recognized, does not justify lower courts suspecting the trustworthiness of all penal interest statements. The Government argued that in a typical case the defendant (D) and the declarant (T) would collaborate so that T, after confessing to the witness (W), would disappear. Id. at 301 n.21. D then would be acquitted on the testimony of W. If T were later apprehended and charged, T would call D as a witness who would admit that he had committed the crime. Once D had been acquitted, he could not be retried because retrying him would be unconstitutional on double jeopardy grounds. Id.

677. 8 WIGMORE, supra note 4, § 1476, at 349-58.

678. See Brennan v. State, 151 Md. 265, 271, 134 A. 148, 150 (1926) (many persons accused of crime likely to yield to temptation and introduce perjured testimony of third party). The historical justification for any corroboration requirement probably is misguided. Common law courts probably pointed out the reasons why the declarant's statement appeared to be reliable to justify deviating from the strong judicial disapproval of the exception expressed in influential cases like the Sussex Peerage and Donnelly. Later, those justifications for departing from precedent were interpreted as requiring corroboration as an independent test for admission. Note, Declarations Against Penal Interest, supra note 328, at 173 n.134. 680. Professor Lewis noted:

The spectre of a criminal defendant arranging for a contrived confession by an accomplice gifted with an unassailable alibi in order to create a reasonable doubt of his own guilt, is just that: a spectre. I know of no case where any such thing has happened; but there are many recorded instances of inculpatory third-party confessions induced by promises and lenity, on the premise that the person accused within the confession is a more direct prosecutive target than is the confesser. The rule, as proposed, is an extremely unfortunate one, and works a fundamental revision of the relationship between the citizen and his Government.

Letter from Professor Melvin B. Lewis to Representative William L. Hungate (July 18, 1973), reprinted in Supplement to Subcommittee Hearings, supra note 10, at 211.
from testifying on the basis of a priori categories that presume them unworthy of belief. In *Washington* the Supreme Court held unconstitutional two Texas statutes prohibiting coparticipants in a crime from testifying for each other while permitting each to testify for the Government against the other. Because the statutes failed to "rationally [set] apart a group of persons who are particularly likely to commit perjury," they arbitrarily infringed upon the defendant's sixth amendment right to compulsory process. Although these statutes operated somewhat differently from rule 804(b)(3), *Washington* requires that a legislature justify its evidentiary exclusionary rules.

The analysis used in testing the constitutionality of a presumption that excuses the Government from adding evidence reinforces the *Washington* requirement that legislatures justify limitations on the defendant's ability to introduce evidence. If the presumption is permissive, allowing but not

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682. Id. at 22.
683. Id. at 23. The defendant, Washington, and several companions searched for the new boyfriend of his former girlfriend. Another individual, Fuller, joined the group with his shotgun. Washington claimed that Fuller shot the new boyfriend. Id. at 15. In defense, Washington insisted that Fuller was drunk, that he unsuccessfully implored Fuller to give him the shotgun, and that he fled immediately before Fuller shot the boyfriend. At trial Washington sought to call Fuller as a witness. Fuller had previously been convicted of the murder and would have confirmed Washington's version of the facts. The two Texas statutes, however, precluded Washington from examining Fuller. Id. at 16-17.
684. Id. at 22. According to the Supreme Court, the rule's exceptions demonstrated its absurdity. An accomplice could testify for the Government against his coparticipant. Moreover, the ban no longer applied to an accused accomplice once he was acquitted, at which time he would be completely free to incriminate himself without fear of punishment. Id.
685. Id. at 22-23.
686. Although rule 804(b)(3) sometimes precludes the defendant from introducing a penal interest statement, the Texas statutes always precluded a defendant from calling a coparticipant as a witness. Furthermore, in *Washington* the Government could have cross-examined Fuller. Such cross-examination is impossible when a court admits the statement of an unavailable declarant. While these differences suggest that Congress might have justified the rule's corroboration test more easily than Texas could have justified its statutes, Congress failed to do so.
687. Convinced by Senator McClellan that not every declarant would implicate the defendant to help himself, the Standing Committee changed its position to permit the Government to introduce such a statement. See notes 198-99 supra and accompanying text (discussing change in position). Neither the Standing Committee nor the House Subcommittee, however, made the sort of empirical inquiry that the *Washington* Court expected when they decided not to impose the corroboration requirement on the Government. Cf. Chambers v. Mississippi, 410 U.S. 284, 295-98 (1972) ("voucher" rule prohibiting defendant from impeaching own witness irrational and destructive of truth-gathering process).
688. The constitutional analysis of rule 804(b)(3)'s corroboration requirement is distinguishable from an analysis of the defendant's burden of proving, or of adding evidence to prove, an affirmative defense. A substantive criminal statute may constitutionally impose on the defendant the burden of persuasion with respect to an affirmative defense or a factor mitigating the degree of criminality. See Patterson v. New York, 432 U.S. 197, 205-09 (1977) (burdening defendant with proving affirmative defense of extreme emotional disturbance constitutional). The *Patterson* doctrine, superficially analogous to the "two-trial" model of rule 804(b)(3), see notes 714-15 infra and accompanying text, is inapposite for several reasons. First, penal interest statements almost always relate to the identity of the culprit rather than to an affirmative defense. Thus, they concern an element of the crime that the Government must prove. No statute, however, may constitutionally impose an affirmative burden of production or persuasion on the defendant with respect to an element of the crime itself. Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975). Second, the affirmative defense doctrine concerns the burden of production or persuasion, rather than the admissibility of evidence. In contrast, rule 804(b)(3) acts as a bar to the introduction of evidence. Third, the defendant is burdened with proving certain affirmative defenses because he has greater access to the evidence relevant to those defenses. With respect
requiring the jury to infer the presumed fact once the basic fact has been proven, the party challenging it must demonstrate its invalidity as applied to his case.\textsuperscript{689} In contrast, a mandatory presumption, one requiring the defendant to rebut or disprove the presumed fact once the Government proves the basic fact, is constitutional only if facially so, rather than as applied in the specific case.\textsuperscript{690} The basic fact proved must support the inference beyond a reasonable doubt.\textsuperscript{691} Congress must demonstrate the relationship by empirical evidence.\textsuperscript{692}

This presumption analysis can justifiably be applied to rule 804(b)(3) because the rule operates like a mandatory presumption: The court admits a statement only if the defendant satisfies the corroboration requirement.\textsuperscript{693} Thus, to withstand judicial scrutiny, the rule must be constitutional on its face. The House Subcommittee believed that statements against penal interest offered by the defendant were untrustworthy because it assumed that declarants usually were friends, relatives, or fellow inmates of the defendant. Congress, however, did not develop an empirical record to justify either the "basic fact," the nature of the declarants, or the "presumed fact," the untrustworthiness of statements by these sorts of declarants. Had Congress demonstrated that such declarants generally were untrustworthy, it might have legitimately imposed the corroboration requirement in cases involving these declarants.\textsuperscript{694} Because Congress failed to develop such a record, the corroboration requirement is unconstitutional on its face.\textsuperscript{695}

to rule 804(b)(3), the defendant will have the statement itself and yet may know no more about the declarant than the Government. Finally, the nature of the defendant's burden in proving an affirmative defense remains unsettled. May a statute impose a standard of "beyond reasonable doubt," of "clear and convincing" evidence, or only of "a preponderance" of the evidence? If the latter standard applies, the burden of proof would be lower than the evidentiary burden imposed on the defendant by rule 804(b)(3)'s corroboration requirement (as modeled) when he attempts to introduce evidence relevant to an affirmative defense.

\textsuperscript{689} County Court v. Allen, 442 U.S. 140, 157 (1979).
\textsuperscript{690} Id. at 157-60 (dictum).
\textsuperscript{691} Id. at 167. The Supreme Court applied the "more likely than not" test to a permissive presumption. Id. at 166-67.
\textsuperscript{692} The Supreme Court has reviewed not only the legislative history but also other relevant sources in evaluating that relationship. See Turner v. United States, 396 U.S. 398, 408-18 (1970) (presumption of illegal importation knowledge from heroin possession valid due to surveys, reports, and common sense indicating that awareness).
\textsuperscript{693} Cf. Jaffe, supra note 248, at 227 (challenging constitutionality of rule 804(b)(2)'s dying declaration exception in same way).
\textsuperscript{694} Congress would have had to refine the requirement with regard to inmates. Although a court justifiably should be concerned about an inmate's exoneration of the defendant long after the Government convicted the defendant, a court should put more stock in an inmate's confession to a crime committed while he and the defendant were serving time together.
\textsuperscript{695} Similarly, Congress' failure to justify its fear that most penal interest statements are untrustworthy regardless of the declarant's status also suggests constitutional defects. The presumption cases eliminate the argument that constitutional review of rule 804(b)(3) is precluded by the congressional ability to condition the admission of evidence. See Tot v. United States, 319 U.S. 463, 472 (1943) (illegal possession of firearm may not be presumed from possession despite Congress' ability to outlaw possession). Furthermore, Congress' failure to justify the corroboration requirement is suspect because courts are eliminating the requirement in other circumstances presenting the danger of witness fabrication or error. See Arnold v. United States, 358 A.2d 335, 343-45 (D.C. 1976) (en banc) (corroboration of rape victim's testimony serves no legitimate purpose); People v. Edwards, 396 Mich. 551, 566 n.43, 242 N.W.2d 739, 746 n.43 (1976) (because no corroboration required of undercover agents and informers who are "professional dissem-
Washington v. Texas also provides a procedural due process attack on the rule's corroboration requirement. The Texas statutes implicitly presumed that "the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue." Those premises also underlie Congress' decision to increase the corroboration requirement. The Washington Court suggested that less drastic measures could have protected the accuracy of the factfinding process. Texas, for example, simply could have trusted the jury to assess the "credit and weight" of the coparticipant's testimony.

The Advisory Committee in the Preliminary and the Revised Drafts would have permitted the jury to assess the credibility of both the declarant and the witness who reported the declarant's statement. The assumption in those drafts was that the jury properly could evaluate the reliability of the statement. Furthermore, as long as the court found that the statement satisfied the penal interest test of the rule's first sentence, it did not need to exclude the statement to prevent jury error. The Standing Committee withdrew that role from the jury because it wanted to placate Senator McClellan and not because it disagreed with the Advisory Committee's belief that the jury could assess credibility and weight accurately. Congress' failure to justify this shift in the roles of judge and jury renders it constitutionally suspect in light of Washington.

697. Id. at 22 (quoting Rosen v. United States, 245 U.S. 467, 471 (1918)). Professor Westen reaches the same conclusion, but he too recognizes that the Supreme Court did not specifically use an "alternative-means" analysis. Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 73, 115 n.20 (1974) [hereinafter, Westen, Compulsory Process]. Professor Westen has argued that other decisions by the Court also illustrate that a legislature must adopt the least drastic approach when limiting the defendant's ability to introduce evidence. See Westen, Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense, 66 Calif. L. Rev. 935, 968-69 (1978) (state's interest in preventing perjury should be promoted by jury evaluations of credibility rather than by exclusion) [hereinafter Westen, Order of Proof]. See also Clinton, supra note 661, at 800 (when Governmental interest advanced, court must consider whether evidentiary objectives justifying infringement of defendant's constitutional rights attainable with less drastic means).
698. See Advisory Committee Note to Revised Draft, supra note 1, at 444 ("Questions of possible fabrication are better trusted to the competence of juries than made the subject of attempted treatment by rule."); Advisory Committee Note to Preliminary Draft, supra note 1, at 386 (same).
699. Professor Cleary recognized this problem:

The amendment [of the House Subcommittee increasing the corroboration requirement] seems to inject the judge unduly into the area reserved to juries. The same may be said with respect to establishing the standard of proof as "clearly" a burden beyond that ordinarily attending the admissibility of evidence by any party and particularly going beyond burdens that have been thought properly to be imposed upon defendant in criminal cases.

Reporters' Comments to Subcommittee Print, supra note 176, at 38. Unfortunately, the Advisory and Standing Committees did not inform the House Subcommittee of Professor Cleary's concern. Congress never responded to a similar criticism of the "simple corroboration" test made during the hearings. See House Subcommittee Hearings, supra note 15, at 239 (statement of John J. Cleary, Executive Director, Federal Defenders of San Diego, Inc.) (lack of corroboration applicable to weight, not admissibility).
The possibility that the declarant’s unavailability might reduce the jury’s ability to assess his credibility does not justify imposing the corroboration requirement as a condition of admissibility. If less drastic methods exist to inform the jury of the credibility issue, procedural due process requires that a court use them. In a related context, the Supreme Court has noted that a hearsay declarant’s failure to testify raises the issue of his credibility for the jury.

Congress could have made changes in the rule that would have limited the possibility for a due process attack on the rule. Congress, for example, could have imposed the rule’s corroboration burden only when the declarant was a friend, relative, or a fellow prison inmate. Congress even might have excluded any statement made after the defendant had been convicted. Congress could have ordered every trial court to warn the jury of the

700. The facts in United States v. Satterfield, 572 F.2d 687 (9th Cir.), cert. denied, 439 U.S. 840 (1978), illustrate why the corroboration test should be a matter of weight rather than of admissibility. In affirming the exclusion of declarant Merriweather’s exculpation of Satterfield, the court of appeals listed three facts that corroborated and four facts that undercut the reliability of the statement. Reliability was corroborated because Merriweather allegedly made the statement during an argument with Satterfield, suggesting spontaneity; Merriweather worried that his statement would jeopardize his appeal; and the alleged ill will between Merriweather and Satterfield reduced the likelihood that Merriweather would falsely exculpate Satterfield. Id. at 693. Reliability was undercut, however, by the low likelihood that Merriweather would prevail on appeal; the substantial period of time between the robberies and Merriweather’s statements; the possibility that Merriweather concocted his statement; and the identification of Satterfield as the robber by eight eyewitnesses. Id. Because any jury could have understood and evaluated these competing considerations, the court of appeals should not have excluded the statement.

701. See Dutton v. Evans, 400 U.S. 74, 88 (1970) (plurality opinion) (“[declarant’s] statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight”); id. at 91 (Blackmun, J., with Burger, C.J., concurring) (“I am at a loss to understand how any normal jury . . . could be led to believe, let alone be influenced by, this astonishing account by [the witness of what the declarant had said]”; id. at 99 (Harlan, J., concurring in the result) (“The jury, with the guidance of defense counsel, should be alert to the obvious dangers of crediting such testimony [of the witness about the declarant’s implication of the defendant].”)

702. Although Professor Cleary thought it was impossible to distinguish between types of declarants or statements in the rule, Memorandum No. 19, supra note 52, at 291, the Advisory Committee’s instructions on using the “simple corroboration” test would have given courts discretion to demand more corroboration if the declarant were a friend, relative, or a fellow prison inmate. See Advisory Committee’s Note to Supreme Court Draft, supra note 1, at 327 (test should be construed to effectuate purpose of circumventing fabrication).


The motion based on the defendant’s claim to have “newly discovered” the exculpatory statement also must be made within two years of final judgment. Fed. R. Crim. P. 33. The defendant, however, might have no remedy if his only claim is that he was erroneously convicted in an otherwise error-free trial. Cf. Moore v. Illinois, 408 U.S. 786, 795-96 (1972) (absent constitutional obligation for Government to disclose evidence, irrelevant that evidence was probative of innocence).
credibility problem\textsuperscript{704} or could have permitted courts to comment on the credibility of the particular statement.\textsuperscript{705} Congress might have required the defense to notify the Government whenever the defendant intended to offer a penal interest statement.\textsuperscript{706} By notifying the Government of the identity of

704. Courts should be more willing to admit hearsay evidence if the trial judge can identify the credibility and weight issues for the jury. In the Preliminary Draft the Advisory Committee had ordered the judge to explain to the jury how it should evaluate conditionally relevant evidence. Preliminary Draft, supra note 1, at 14-15 ("If under all the evidence upon the issues the jury might reasonably find that the fulfillment of the condition is not established, the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled"). One way for the judge to inform the jury of the credibility problem is to add this command deleted from later drafts. Another way is for the judge to comment on the evidence. Although Congress refused to enact Proposed Federal Rule of Evidence 105, Supreme Court Draft, supra note 1, at 199 (summing up and comment by the judge), neither the House of Representatives nor the Senate thereby intended to forbid federal courts from continuing the federal common law practice of commenting on the weight of the evidence. See June 28, 1973 Print, supra note 10, at 151 (refusal to adopt rule 105 does not affect existing common law); Senate Judiciary Committee Report, supra note 10, at 24 (same). Senator McClellan offered this suggestion:

[W]here the declarant himself had been involved in the past in criminal offenses, [the judge should instruct the jury that] his statement should be received and credited only with the utmost care because of the special danger of perjury and the virtually universal experience of the untrustworthiness of such declarations.

McClellan Letter, supra note 82, at 33,648. Senator McClellan did not explain why the instruction was appropriate only when the declarant had been "involved in the past in criminal offenses," the restriction's meaning, or the basis of "virtually universal experience." The suggestion in the text goes further, with the court instructing the jury whenever the defendant offered a purported statement against interest, or at least whenever the declarant was a friend, relative, or a fellow inmate.

In other contexts, the Supreme Court has held that an instruction adequately protects the defendant from untrustworthy evidence offered by the Government. See, e.g., Parker v. Randolph, 442 U.S. 62, 73-74 (1979) (plurality opinion) (instruction that codefendant's confession be considered only against source avoids confrontation clause violation); Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (juries intelligently measure weight of identification evidence despite untrustworthy aspects); Opper v. United States, 348 U.S. 84, 95 (1954) (severance not required despite admission of codefendant's incriminating statements). The Court has approved cautionary instructions concerning an accomplice's testimony against the defendant. See Cool v. United States, 409 U.S. 100, 103-04 (1972) (per curiam) (discussion of use of accomplice's testimony). Conversely, an instruction cautioning the jury to view defense evidence skeptically could be constitutional. Cf. id. (jury instruction to credit defense witness, an alleged accomplice, unconstitutional only if testimony true beyond reasonable doubt).

705. See Prop. Fed. R. Evid. 105, Supreme Court Draft, supra note 1, at 199 (summing up and comment by judge on weight of evidence and credibility of witnesses). Although Congress refused to enact this rule because the matter was considered procedural rather than evidentiary, the Senate correctly understood that it reflected federal common law practice. Senate Judiciary Report, supra note 10, at 24.

706. This suggestion parallels the notification requirements of rules 803(24) and 804(b)(5), which condition admission of a statement on the proponent's notification to the opponent of "his intention to offer the statement and the particulars of it, including the name and address of the declarant." Fed. R. Evid. 803(24); Fed. R. Evid. 804(b)(5). Such notification probably does not infringe upon the defendant's fifth amendment right. See United States v. Nobles, 422 U.S. 225, 233-34 (1975) (production of defense investigator's notes presents no fifth amendment violation); Williams v. Florida, 399 U.S. 78, 82-86 (1970) (notice-of-alibi statute does not violate fifth and fourteenth amendments); cf. Fed. R. Crim. P. 12.1 (notice of alibi); id. 12.2 (notice of insanity defense); id. 16(b) (defense obligation to permit Government inspection of documents, tangible objects, reports of examinations, and tests when defense has sought similar items from Government); id. 26.2 (production of statement by any witness other than the defendant). The defense would almost certainly accept a disclosure requirement in exchange for eliminating or reducing the corroboratior requirement. Moreover, compared to Professor Westen's suggestion, see Westen, Order of Proof, supra note 697, at 978 (state might require defendant to disclose substance of his trial testimony before trial or out of presence of jury), this suggestion is less radical and thus probably more feasible.
both the declarant and the witness, the content of the statement, the way in which the defense obtained the statement, and the relationship between the declarant and the defendant, the defendant would provide the Government with an adequate opportunity to challenge the credibility of both the declarant and the reporting witness.707

B. THE RULE DISCRIMINATES BETWEEN THE GOVERNMENT AND THE DEFENDANT.

Washington v. Texas708 suggests an equal protection challenge to rule 804(b)(3).709 Under the Texas statutes at issue, the state could call a coparticipant to testify against the defendant, but the defendant could call only an acquitted coparticipant as a witness.710 In his concurring opinion, Justice Harlan wrote: "Texas has put forward no justification for this type of discrimination between the prosecution and the defense in the ability to call the same person as a witness, and I can think of none."7711

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707. If the defendant refused to disclose or if, upon disclosure, the Government could not challenge the credit and weight of the declarant's statement, the court might exclude the statement under rule 403. See note 670 supra (discussing whether judge may invoke rule 403 to exclude otherwise admissible hearsay). In People v. Chapman, 50 Cal. App. 3d 872, 123 Cal. Rptr. 862 (Ct. App. 1975), for example, the defendant and the declarant were identified as having fought with and killed the victim. The defendant admitted his presence but claimed that he had tried to break up the fight. While the defendant and the declarant were in jail, the declarant reportedly twice admitted that he shot the victim and once said that the defendant tried to intervene. A relative of the defendant's was prepared to testify that, before the two were arrested, the declarant admitted sole responsibility. A third person who also was present, however, denied this last confession. Furthermore, the Government claimed that the declarant admitted responsibility because he would be sentenced as a juvenile and would therefore not be treated harshly and that the defendant asked the declarant to testify falsely under threat of bodily harm. Id. at 875-79, 123 Cal. Rptr. at 864-66. The trial court refused to admit any of this evidence on the ground that the declarant's statements were untrustworthy, a decision affirmed on appeal for two reasons. The trial court not only had authority to assess credibility as a condition to admission but also could exclude the evidence as prejudicial, misleading, or confusing. Id. at 879-82, 123 Cal. Rptr. at 866-67. Chapman was wrongly decided because the Government adequately contested the hearsay and the jury could have assessed the credit and weight of the statements.

708. 388 U.S. 14 (1967). The Supreme Court, however, did not mention equal protection.

709. Cf. Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam) (due process violation to exclude from jury's consideration coparticipant's penal interest statement when state had introduced same statement in separate trial against another coparticipant); Cool v. United States, 409 U.S. 100, 100 (1972) (per curiam) (conviction reversed for error in two jury instructions, one to convict if it believed uncorroborated accomplice's testimony, the other to acquit if it believed accomplice's exculpation of defendant beyond reasonable doubt); United States v. Benveniste, 564 F.2d 335, 339 (9th Cir. 1977) (court reversed conviction for exclusion of penal interest statement under rule 804(b)(3) while noting trial court's exclusion of exculpatory statements and inclusion of inculpatory statements).


711. Id. at 24 (Harlan, J., concurring). Nonetheless, Justice Harlan concurred on due process grounds. Id. at 25.
Rule 804(b)(3) creates a difference between the Government’s ability and the defendant’s right to introduce a penal interest statement by imposing a corroboration requirement solely on the defendant.712 The rule may create a second difference because it allows the Government to introduce a related statement against the defendant but allows the defendant to introduce only a third-party statement that substitutes the declarant for the defendant in a one-person crime.713

Two examples illustrate these differences. In a one-person crime, the Government prosecutes the defendant and the defendant “prosecutes” the declarant.714 The Government may introduce an admission or confession by the defendant without corroboration.715 The defendant, however, may not introduce the declarant’s statement without satisfying the rule’s corroboration requirement. When the Government prosecutes the defendant in a three-person crime, it may introduce the second coconspirator’s statement implicating the defendant without corroborating its reliability under either rule 804(b)(3) or rule 801(d)(2)(E).716 The defense, on the other hand, may not introduce the third coconspirator’s statement exonerating the defendant without meeting the rule’s corroboration requirement. Moreover, if the word “exculpate” in the second sentence of rule 804(b)(3) limits admissibility of third-party statements offered by the defense to those that substitute the declarant for the defendant, the defendant may not introduce the third coconspirator’s statement, even if he can corroborate it. The third coconspirator’s exculpation of the defendant, however, is related to his self-implication in the same way as the second coconspirator’s implication of the defendant is related to his self-implication.

Congress gave no reason for imposing the corroboration requirement solely on the defendant.717 The likely way in which the jury might err in evaluating penal interest statements suggests that the corroboration requirement should be imposed upon the Government rather than upon the defendant. Admitting hearsay poses the risk that the jury will overvalue the reliability of the...
The jury, however, might undervalue the reliability of a statement offered by the defendant to exonerate himself, assuming that the jury might infer the defendant's guilt simply because he has been charged. Furthermore, the jury might undervalue the statement because the Government has decided to continue the prosecution. The jury might assume that the Government would have dismissed the charge against the defendant if the declarant's statement was reliable. Additionally, the jury might undervalue the declarant's statement if the reporting witness called by the defendant appears to be biased (a friend or a relative of the defendant) or of questionable status (one who obtained the statement while in jail).

In contrast, the jury might overvalue the reliability of the declarant's implication of the defendant because it will have greater difficulty in recognizing pressure by the Government than by the defendant on a declarant. The status of the police officer, the usual witness who reports the declarant's implication of the defendant, also might enhance the reliability of the statement. The declarant, however, might lie in implicating the defendant to shift suspicion from himself to obtain a favor from the Government, or to avenge a grudge against the defendant. The House Subcommittee, the Advisory Committee, and the Standing Committee recognized that the declarant might falsely implicate the defendant. This statement is equally subject to fabrication as a statement from a prison inmate or a friend or relative of the defendant. Yet the Subcommittee failed to impose the corroboration requirement when the Government offered that sort of statement. In this instance, the rule's corroboration requirement is as underinclusive as it is overinclusive in not singling out friends, relatives, or fellow prison inmates as the only declarants whose statements must be corroborated by the defendant.

The Subcommittee's failure to impose the corroboration requirement on the Government apparently resulted from its misinterpretation of the defendant's confrontation clause protection rather than from a belief that the declarant would not speak against his penal interest in implicating the defendant. During the June 12, 1973 markup session, for example, Represent-
tative Holtzman asked why the corroboration requirement should not be imposed on the Government. In response, associate counsel argued such a requirement was superfluous because Bruton created a confrontation clause bar to all Government-offered penal interest statements by an unavailable declarant.

Neither Bruton nor several of the Supreme Court’s later efforts to explain the confrontation clause provide the defendant with this protection. Associate counsel and the Subcommittee apparently assumed that the Court admitted the codefendant’s implication of Bruton as substantive evidence. The Court, however, admitted the codefendant’s statement only against the codefendant in Bruton. The Court explicitly reserved consideration of the confrontation clause problem that exists when a hearsay statement satisfies an exception and is therefore substantively admitted against the defendant. If a statement satisfies the confrontation clause whenever it satisfies a hearsay exception, the House Subcommittee created an equal protection problem in not imposing the corroboration requirement on the Government.

724. Id. In the Subcommittee’s June 28, 1973 print the reinserted “Bruton sentence” reads: “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, is not admissible.” JUNE 28, 1973 COMMITTEE PRINT, supra note 10, at 175. The Subcommittee may have initially believed that a declarant’s implication of the defendant was inadmissible under any hearsay exception on constitutional grounds. The Advisory and Standing Committees suggested changing the final clause of the June 28 version from “is not inadmissible” to “is not within this exception.” Committees’ Response to Subcommittee Print, supra note 175, at 298. The Subcommittee adopted the suggestion, and its October 10, 1973 print included the change of language. OCTOBER 10, 1973 PRINT, supra note 10, at 388. This change would permit the Government to introduce the declarant’s implication through some other hearsay exception or through the coconspirator doctrine of rule 801(d)(2)(E). The Subcommittee thus apparently narrowed its constitutional concern to rule 804(b)(3).


727. The Supreme Court noted:

We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence . . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.

Id. at 128 n.3. Instead, the Court was concerned with the effectiveness of a judicial instruction to ignore the codefendant’s statement in determining the defendant’s guilt. Id. at 137. Because the Court thought that no jury would follow such an instruction, it feared that the jury would misuse the nontestifying codefendant’s statement as substantive evidence against the defendant, denying the defendant his right to confront his accuser. Id.

728. The House Subcommittee perhaps understandably misinterpreted Bruton because it was misled by the Supreme Court’s emphasis on the confrontation clause rather than the procedural due process clause. See generally Haddad, Post-Bruton Developments: A Reconsideration of the Confrontation Ration-
Since Bruton, the Supreme Court has attempted to explain the role of the confrontation clause when a hearsay statement is admitted against the defendant. In its first relevant attempt, Dutton v. Evans, the Government introduced the declarant's hearsay statement against the defendant under Georgia's hearsay exception for coconspirator's statements. The statement, however, did not automatically satisfy the confrontation clause. In a plurality opinion, the Court apparently established two tests to determine whether a hearsay statement satisfies the confrontation clause: The statement must satisfy a hearsay exception and it must be reliable.

Justice Stewart's plurality opinion left several points unclear. First, is a showing of reliability a separate test? If the statement satisfies a widely-accepted hearsay exception, why is an independent demonstration of its reliability necessary? Hearsay exceptions generally assume the reliability of a qualifying statement. Second, what kind and what quantum of evidence satisfies the "indicia of reliability" test? The supporting evidence in Dutton was equivocal. Was the Court satisfied because the defendant could have subpoenaed the declarant to testify, because the declarant's statement was not "crucial" to the Government or "devastating" to the defense, or because the "trier of fact [had] a satisfactory basis for evaluating the truth of the prior statement"? If the declarant was unavailable (as he must be under rule 804(b)(3)) or if the statement played a more important role in the Government's proof, would the Court expect a more convincing demonstration of reliability? If either is true, how should lower courts interpret Justice Stewart's conclusion that the declarant's statement was reliable? If Georgia had a penal interest exception like rule 804(b)(3), would satisfaction of such a penal interest exception simultaneously satisfy the confrontation clause? If this is the meaning of Dutton, it follows that the confrontation clause offers no protection when the Government introduces an uncorroborated penal interest

ale, and A Proposal for A Due Process Evaluation of Limiting Instructions, 18 AM. CRIM. L. REV. 1 (1980) (Bruton protection better understood in due process rather than confrontation clause terms). In Nelson v. O'Neil, 402 U.S. 622 (1971), Justice Brennan argued that the majority in O'Neil overvalued the effectiveness of a jury instruction to ignore the codefendant's implication of the defendant, admitted only against the codefendant, in holding that the confrontation clause was not violated when the codefendant testified. Id. at 633-34 (Brennan, J., with Douglas & Marshall, JJ., dissenting).

729. 400 U.S. 74 (1970). The Court decided California v. Green, 399 U.S. 149 (1970), several months before Dutton. Although hearsay was admitted against the defendant in Green, the defendant was able to cross-examine the declarant both at the preliminary examination and at trial. 399 U.S. at 151-52. In Dutton the declarant did not testify at any point, although apparently either party could have subpoenaed him. 400 U.S. at 83 & n.15. Because rule 804(b)(3) conditions admissibility of the declarant's statement on his unavailability, the rule establishes a factual setting more analogous to Dutton.

730. 400 U.S. at 83 & n.15.

731. Id. at 82-83. The Supreme Court held that Georgia's expansive coconspirator exception, permitting the Government to introduce a coconspirator's statement made during the concealment phase of the crime, did not violate the confrontation clause. Id. at 83. The Court noted that federal court decisions excluding statements made during the concealment stage of a conspiracy were based on an evidentiary rule promulgated pursuant to the Court's supervisory power and did not establish a constitutional limit on the exception. Id. at 82.

732. Justice Stewart found that the statement bore "indicia of reliability" because the statement was spontaneous and against the declarant's penal interest. Id. at 89.

733. Id. at 88 n.19.

734. Id. at 87.

735. Id. at 89 (quoting California v. Green, 399 U.S. 149, 161 (1970)). See also Mancusi v. Stubbs, 408 U.S. 204, 213 (1972) (quoting Dutton and Green).
statement under rule 804(b)(3). Thus, the confrontation clause would not provide the sort of protection that the House Subcommittee anticipated.

The Court's most recent confrontation clause decision, Ohio v. Roberts,736 clarifies some of the ambiguity in Dutton but introduces other interpretive problems. The Court confirmed that the confrontation clause demands a demonstration of the reliability of a hearsay statement.737 In evaluating whether the statement bore "indicis of reliability," the Court indicated that the "[r]eliability [of the hearsay statement] can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."738 If the statement falls outside these exceptions, "the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."739

The Court's dictum can be read in different ways. The Court correctly stated that the dying declaration exception is "firmly rooted" in history.740 The Court's approval of the dying declaration exception suggests that any hearsay exception, widely accepted by many jurisdictions, satisfies the confrontation clause's test of reliability.741 The constitutionality of a hearsay exception, however, should be tested by the likelihood of the statement's reliability rather than the longevity of the exception's acceptance. The Court's reference to the business record and the prior cross-examined testimony exceptions, which are thought to cover evidence more reliable than dying declarations, suggests that the confrontation clause may require an analysis of the premises of the particular exception and that the dying declaration exception enjoys special treatment solely because of its age.

Neither of these interpretations of the Court's dictum is compelling. Although the business records exception also is well established, its premises remain controversial.742 In Roberts the Court did not explain the meaning of

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736. 100 S. Ct. 2531 (1980). In Roberts the defendant, convicted of forgery of a check and with possession of stolen credit cards, defended on the ground that the victim's daughter gave him permission to use the checkbook and credit cards. Id. at 2535. To establish this defense, counsel called the daughter as a witness at the preliminary examination. Id. She denied that she had given the defendant such permission. Id. When the defendant testified at his trial that the daughter gave him permission, the prosecutor introduced the daughter's preliminary examination testimony in rebuttal. Id. The daughter did not testify at trial. Id. 737. Id. at 2539. The Court held that, as a threshold test, the declarant must be unavailable and the Government must make a good faith effort to produce him at trial. Id. at 2538-39, 2543. The Court noted, however, that unavailability need not be demonstrated if the utility of trial confrontation is minimal. Id. at 2538 n.7 (citing Dutton).

738. Id. at 2539. The Court's examples of "firmly rooted" exceptions were those for dying declarations, cross-examined prior testimony, and business records. Id. & n.8.

739. Id. at 2539 (footnote omitted).

740. See Mattox v. United States, 156 U.S. 237, 243 (1895) ("from time immemorial [dying declarations] have been treated as competent testimony"). The dying declaration exception might have been the only exception recognized at the time the confrontation clause was ratified. See F. Heller, the Sixth Amendment 105 & n.65 (1951) (dying declaration only exception recognized at common law at time of constitutional convention); cf. H. Rotsschaefer, Handbook of American Constitutional Law 796 (1939) (citing Kirby v. United States, 174 U.S. 47, 61 (1899), which stated that dying declaration exception well established at time of constitutional convention).

741. This possibility rests upon the belief that the dying declaration exception admits what is perhaps the most unreliable type of hearsay. See House Subcommittee Hearings, supra note 10, at 217 (statement of a Committee of New York Trial Lawyers on the Proposed Federal Rules of Evidence) (arguing that only justification for exception is necessity because in homicide cases declarant obviously unavailable to testify against defendant).

742. In Roberts the Supreme Court quoted a student comment that included the business records
“firmly rooted,” for it again declined to comment on the constitutionality of all hearsay exceptions.743 Furthermore, the Court accepted prior cross-examination as a substitute for judicial inquiry into the reliability of the hearsay.744 Yet the Court did not explain how a court determines whether a particular exception (other than those for dying declarations and business records) that involves no cross-examination is “firmly rooted” or how it decides that challenged hearsay is reliable in a particular case.

The penal interest exception could be “firmly rooted” because many jurisdictions accept it, commentators have argued that penal interest statements are reliable, and the Supreme Court has recognized the exception.745 If the Government need only demonstrate that the exception is “firmly rooted,” the corroboration requirement of rule 804(b)(3) is unconstitutional because it imposes a higher burden on the defendant. If a court does not consider the exception “firmly rooted,” it also might examine the exception on a case-by-case basis not only because the exception is included in rule 804 rather than in rule 803,746 but also because common law courts historically have been skeptical of penal interest statements.747 If this test of “particularized guarantees of trustworthiness” is interpreted generously for the Government, the constitutional problem remains. If a court, for example, focuses on the trustworthiness of the declarant’s self-implication rather than on the evidence that links the defendant to the crime, the Government’s confrontation clause burden might be lower than the defendant’s corroboration burden under rule 804(b)(3). Moreover, because rule 804(b)(3) does not impose the corroboration...

743. See 100 S. Ct. at 2538 (no attempt to “map out theory of the Confrontation Clause that would determine the validity of all . . . hearsay ‘exceptions’”) (quoting California v. Green, 399 U.S. 149, 162 (1970)). The Court’s case-by-case interpretation of the confrontation clause is similar to a due process analysis with a preference for in-court confrontation. See Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 CRIM. L. BULL. 99, 133 (1972) (right to confront accuser important symbol of fairness).

744. See 100 S. Ct. at 2541-42 (defense counsel’s questioning of daughter at preliminary hearing partook of cross-examination as matter of form).


746. The exception was included in rule 804 because against interest statements were thought to be less reliable than those in 803. Following Chambers, however, at least one commentator wondered whether rule 804(b)(3) should be transferred to rule 803, which does not require that the declarant be unavailable. Letter from Gilbert G. Ackroyd to Representative William L. Hungate (July 18, 1973), reprinted in SUPPLEMENT TO SUBCOMMITTEE HEARINGS, supra note 10, at 207 (Chambers might require transfer of against interest exception to rule 803). See also note 52 supra (Advisory Committee rejected transfer of exception to rule 803).

747. See notes 25-42 supra and accompanying text (discussing common law courts’ treatment of penal interest statements).
tion requirement on the Government, courts might require less supporting evidence from the Government to satisfy the Roberts test than rule 804(b)(3) demands of the defendant.

The Court's decision in Roberts does not explain whether the confrontation clause provides the same protection as the corroboration requirement. If the same protection is not provided, an equal protection imbalance exists. To avoid this constitutional problem, courts could impose the corroboration requirement on the Government when it seeks to introduce a declarant's statement\(^\text{748}\) and could permit the defendant to introduce a related statement when the crime was committed by more than one person. Such a judicial interpretation of the rule\(^\text{749}\) probably is justified because the Advisory and Standing Committees overlooked the corroboration imbalance\(^\text{750}\) and the

\(^{748}\) Although not attempting to correct an equal protection imbalance, the United States Court of Appeals for the Fifth Circuit imposed a corroboration requirement on the Government in United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978). Lopez, an alleged coconspirator of the defendant Alvarez, sold heroin to an undercover agent. Lopez later testified that a then-dead third coconspirator told him that Alvarez supplied the heroin. Id. at 695. The court of appeals first concluded that the Government's independent evidence of a conspiracy was insufficient to justify admission of the hearsay evidence under rule 801(d)(2)(E). Id. at 699. The court then concluded that the Government had to corroborate the coconspirator's statement in order to introduce it as a penal interest statement under rule 804(b)(3). Id. at 701. The court reasoned that to rule otherwise would circumvent rule 801(d)(2)(E)'s additional requirements Id. See also United States v. Oliver, 626 F.2d 254, 261 (2d Cir. 1980) (without discussion court assumes rule imposes corroboration requirement on Government); NEW YORK PROPOSED CODE OF EVIDENCE, rule 804(b)(3) ("A statement tending to expose the declarant to criminal liability and offered in a criminal proceeding is not admissible unless other evidence corroborates the trustworthiness of the statement").

In contrast to Alvarez, the Fifth Circuit in United States v. Sarmiento-Perez, 633 F.2d 1092 (5th Cir. 1980), distinguished between the Government's and the defendant's burden, imposing on the Government a higher burden of showing that the declarant had spoken against his penal interest in implicating the defendant than the defendant faced in proving that the declarant had spoken against penal interest in exculpating the defendant. Id. at 1098, 1100. The court thought that the "tend to subject" language of rule 804(b)(2)'s first sentence set the penal interest burden only for the defendant. Id. at 1096. Although claiming that this distinction was not constitutionally required, the court thought that it was justified by confrontation clause principles. Id. at 1099. Moreover, the court went radically further by saying that a declarant in custody could never speak against his penal interest by implicating the defendant. Id. at 1102-03. The court's dual conclusions clash with the Advisory and Standing Committees' position, and probably with Congress' as well. The decision is justified, if at all, only as a constitutional decision. However, because Roberts orders an analysis of the reliability of any hearsay not encompassed within a "firmly rooted" exception, Roberts may implicitly reject any sort of automatic exclusion of hearsay.

\(^{749}\) Alternatively, a court could protect the defendant by applying rule 403's balancing test of prejudice against probativity to an uncorroborated statement that implicates the defendant. The court, however, would face three problems. First, rule 403 might not authorize exclusion of evidence that satisfies a hearsay exception. See note 670 supra (discussing whether rule 403 authorizes exclusion). Although the court could exclude evidence on evidentiary rather than constitutional grounds, rule 403 might be inapplicable because the Supreme Court has held that the confrontation clause is satisfied when a hearsay statement falls within a hearsay exception. See Ohio v. Roberts, 100 S. Ct. 2531, 2539 (1980) (reliability inferred when evidence satisfies firmly rooted hearsay exception). Second, rule 403 might not permit exclusion of hearsay for unreliability because the rule does not use that term. However, the rule's provisions for "unfair prejudice, confusion of the issues, or misleading the jury" arguably include unreliable evidence. Finally, assuming rule 403 authorizes exclusion, the defendant must prove that the danger of unfair prejudice substantially outweighs the probative value of the evidence. This burden would be difficult to meet if the hearsay statement was an important part of the Government's evidence. Moreover, the Government is not similarly burdened when the defendant offers the statement.

\(^{750}\) See note 200 supra and accompanying text (Standing Committee did not notice disparity when failing to impose corroboration requirement on defendant); Comment, Inculpatory Statements, supra note 199, at 1216 & n.155 (logical expansion of corroboration requirement to inculpatory statements simply overlooked by Advisory Committee).
House Subcommittee, incorrectly interpreting *Bruton*, did not impose the corroboration requirement on the Government.\(^{751}\)

By imposing the corroboration requirement on the Government, however, a court will not eliminate the equal protection imbalance between the Government's ability to introduce an unavailable declarant's statement implicating the defendant and the defendant's ability to introduce an exculpatory statement. The Government still can resort to the coconspirator rule.\(^{752}\) A trial court may admit a coconspirator's statement if the Government separately establishes\(^{753}\) that a conspiracy existed and that the defendant was a member of it.\(^{754}\) The majority of federal courts satisfy these requirements by interpreting rule 104(a) to impose a preponderance of evidence test on the Government under the coconspirator rule.\(^{755}\) This test imposes a lower burden of proof on the Government than the corroboration requirement would impose on the defendant.\(^{756}\) Moreover, the coconspirator rule does not require the Government to establish the reliability of the statement. If the coconspirator rule is "firmly rooted,"\(^{757}\) the confrontation clause provides no

\(^{751}\) The Subcommittee's refusal to eliminate the imbalance should not bar interstitial interpretation. Cf. Letter from Melvin B. Lewis to Representative William L. Hungate (July 18, 1973), reprinted in *Supplement to Subcommittee Hearings*, supra note 10, at 210-11 (rule should be changed because implications of corroboration imbalance disturbing); Recommendations of the District of Columbia Bar Study Committee on the Federal Rules of Evidence (July 31, 1973), reprinted in *Supplement to Subcommittee Hearings*, supra note 10, at 291 (three of 15 committee members recommended imposing corroboration requirement on inculpatory statements).

\(^{752}\) *Fed. R. Evid.* 801(d)(2)(E). By Resorting to rule 801(d)(2)(E), the Government could circumvent the problem of whether the coconspirator's implication of the defendant is against his penal interest. See Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1396 (1972) (coconspirator's purported penal interest statement implicating defendant should be excluded under both hearsay exceptions).

\(^{753}\) See Glasser v. United States, 315 U.S. 60, 74 (1942) (declaration of conspirator against absent alleged coconspirator inadmissible unless coconspirator connected with conspiracy). At least two courts of appeals, however, now permit consideration of the statement in determining whether rule 801(d)(2)(E) has been satisfied. These courts interpret rule 104(a), which permits consideration of otherwise inadmissible information in deciding questions of admissibility, to authorize examination of the statement. See United States v. Enright, 579 F.2d 980, 985 n.4 (6th Cir. 1978) (arguably, court may consider statement to determine admissibility under rule 104(a)); United States v. Martorano, 557 F.2d 1, 12 (1st Cir. 1977) (new rules permit consideration of statement when it simply corroborates significant independent evidence), cert. denied, 435 U.S. 922 (1978).

\(^{754}\) *Fed. R. Evid.* 801(d)(2)(E). Because of these conditions, the coconspirator rule might not always apply when a coconspirator's statement is inadmissible under rule 804(b)(3). A declarant's statement to a police officer that implicates the defendant, for example, is unlikely to satisfy either requirement of rule 801(d)(2)(E).


\(^{756}\) *Rule 801(d)(2)(E)'s requirement that the statement be made "in furtherance of the conspiracy," however, does provide separate protection for the defendant. This protection disappears if a state adopts rule 804(b)(3) but not the "in furtherance of" requirement of rule 801(d)(2)(E). Cf. *Dutton v. Evans*, 400 U.S. 74, 78 (1970) (plurality opinion) (although coconspirator's statement could not have been admitted under federal rules, Georgia rules permitted because no "in furtherance of" requirement). A court could also give the defendant additional protection by instructing the jury to ignore this statement if the jury determined that the alleged coconspirator's statement did not further the conspiracy or that the defendant was not a party to it. Authorities disagree whether this instruction should be given. Compare United States v. Herrera, 407 F. Supp. 766, 772 (N.D. Ill. 1975) (under rule 104(a) jury should not reconsider questions of admissibility decided by court) with *McCormick*, supra note 4, § 53 at 124 n.97 (jury could be instructed to disregard evidence).

\(^{757}\) See *Dutton v. Evans*, 400 U.S. 74, 87 (1970) (plurality opinion) (exception well-established under
separate protection for the defendant. The Government could circumvent a judicial imposition of the corroboration requirement by applying the coconspirator rule with its lower burden of proof.\textsuperscript{758} Interstitial judicial interpretation of rule 804(b)(3) then would not eliminate the equal protection imbalance.\textsuperscript{759}

C. THE RULE STRIPS THE JURY OF ITS CUSTOMARY FACTFINDING ROLE

Although the jury usually evaluates the credit and weight of the evidence, the corroboration requirement transfers this customary function to the judge.\textsuperscript{760} The requirement makes the issue of trustworthiness a threshold question of admissibility rather than a jury question of relevance conditioned on fact. The Advisory Committee originally assigned the question of trustworthiness to the jury in the \textit{Preliminary} and \textit{Revised Drafts}.\textsuperscript{761} With the addition of the “simple corroboration” requirement in the \textit{Revised Definitive} and \textit{Supreme Court Drafts}, the Standing Committee shifted this responsibility to the judge.\textsuperscript{762}

state statutory law). Although the Supreme Court has not determined the constitutionality of rule 801(d)(2)(E), the rule is probably constitutional. See Comment, \textit{Independent Evidence Requirement}, \textsuperscript{supra} note 755, at 1447-48 (courts continue to rely upon validity of preponderance of evidence test under rule 801(d)(2)(E)); cf. United States v. Nixon, 418 U.S. 683, 701 n.14 (1974) (describing evidentiary requirements for admitting coconspirator's statement less restrictively than federal courts of appeals have interpreted requirements of rule 801(d)(2)(E)).

758. The Government also might use rule 804(b)(5), the “catch-all” hearsay exception, to introduce an unavailable declarant's statement that implicates the defendant. The United States Court of Appeals for the Eighth Circuit, for example, has held that rule 804(b)(5) permits the admission at trial of grand jury testimony that implicated the defendants. United States v. Carlson, 547 F.2d 1346, 1355 (8th Cir. 1976), \textit{cert. denied}, 431 U.S. 914 (1977). The coconspirator exception did not apply because the witness had not testified at the grand jury “in furtherance of the conspiracy.” \textit{Id. See also United States v. Payne}, 492 F.2d 449, 452 (4th Cir.) (in prerules decision, witness’ written, unsigned statement to Government agent that implicated himself and brothers admitted when witness could not remember incident or making the statement), \textit{cert. denied}, 419 U.S. 876 (1974); United States v. Thevis, 84 F.R.D. 57, 73 (N.D. Ga. 1979) (statements by declarant implicating defendant in several crimes admissible under rule 804(b)(5)).

759. The appellate treatment of an error in admitting a coconspirator's statement or in excluding a defense-offered declarant's statement also creates a disparity between the Government and the defendant. When the trial court errs in either instance, that error might be treated as harmless on appeal. \textit{Cf. Parker v. Randolph}, 442 U.S. 62, 71 n.5 (1979) (citing cases holding introduction of coconspirator's statement harmless error). \textit{Compare United States v. Sarmiento-Perez}, 633 F.2d 1092, 1104 (5th Cir. 1980) (erroneous introduction of coconspirator's penal interest statement not harmless error) \textit{with STATE v. Wahle}, 298 N.W.2d 795, 798 (S.D. 1980) (assuming that admission of wife's statement implicating defendant was error, error was harmless). Thus, the error in admitting a coconspirator's inculpatory statement or in excluding a declarant's exculpatory statement may not warrant reversal even if the error prejudices the defendant. Furthermore, the jury might be affected by a coconspirator's statement, admitted subject to a motion to strike, even if later instructed to ignore it. This explanation considers why one court has held that the trial court should decide whether to admit the coconspirator's statement pretrial or out of the jury's presence, \textit{United States v. James}, 590 F.2d 575, 579-80 (5th Cir. 1979) (en banc), and has suggested that the trial court decide whether to admit a coconspirator's statement under rule 804(b)(3) in the same way. \textit{United States v. Sarmiento-Perez}, 633 F.2d 1092, 1101 n.5 (5th Cir. 1980). In contrast, jury error never benefits the defendant because the court is unlikely to admit the declarant's statement subject to a later motion to strike if the defendant fails to satisfy the corroboration requirement.

760. This criticism particularly applies to a judicial evaluation of the credibility of the witness as a condition of admissibility. See notes 237-43 \textsuperscript{supra}, and accompanying text (discussing \textit{United States v. Bagley}, 537 F.2d 162 (5th Cir. 1976)).

761. \textit{See} text accompanying note 626 \textsuperscript{supra} (according to Advisory Committee notes to \textit{Preliminary Draft} and \textit{Revised Draft}, questions of possible fabrication better trusted to competence of jury).

762. \textit{See} text accompanying note 627 \textsuperscript{supra} (Standing Committee transferred trustworthiness question
Neither the Standing Committee at its September 30, 1971 meeting nor the House Subcommittee during its markup sessions discussed this important transfer. The transfer is justified only by assuming that the jury could not understand a judicial instruction that explained the meaning of the “simple corroboration” requirement or that the jury would nonetheless consider the statement even if they properly understood an instruction and decided that the statement was not sufficiently corroborated.

The first explanation is subject to the same criticism as the corroboration requirement: The shift was based upon a nonprincipled compromise, not a substantive evaluation of the trustworthiness of defense-offered statements. The jury explanations also are suspect because in our system of justice we assume that a jury can evaluate the credit and weight of the evidence and will follow a judicial instruction.763

Several state courts have refused to impose a corroboration requirement on the defendant, concluding that this requirement was relevant only to the probative of the statement and not to its admissibility.764 In United States v. Satterfield765 the United States Court of Appeals for the Ninth Circuit similarly expressed concern that an admissibility determination by the judge under rule 104(a) about the credibility of the witness might interfere with the jury’s customary responsibility.766

In Cool v. United States767 the Supreme Court rejected a trial court’s instruction to the jury to disregard the defense-offered exculpatory testimony of an accomplice unless the jury believed the testimony was true beyond a reasonable doubt.768 The Court held that the instruction violated the defendant’s sixth amendment right to present evidence.769 In one sense, the Cool instruction is less obstructive than the corroboration requirement because the corroboration requirement’s burden of proof, although high, is lower than proof “beyond a reasonable doubt.” The corroboration requirement is more

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763. If the jury is thought able to follow a judicial instruction to ignore the defendant’s impeaching convictions on the issue of guilt, see Spencer v. Texas, 385 U.S. 554, 560-61 (1967) (in determining guilt and sentence jury informed of defendant’s prior conviction for murder), it is surely able to follow an instruction to inspect closely the defense-offered penal interest statement. See also note 704 supra.


766. Id. at 691-92. After examining the legislative history of rule 804(b)(3), however, the court suggested, without deciding, that judges may exclude an exculpatory statement if corroborating circumstances do not clearly indicate the trustworthiness of the witness. Id. at 692. The Ninth Circuit decision, however, was probably incorrect. See notes 632-38 supra and accompanying text (Satterfield incorrectly permitted judge to assess witness credibility).

767. 409 U.S. 100 (1972) (per curiam).

768. Id. at 104.

769. Id.
obstructive, however, because the jury will not even consider the trustworthiness of the statement if the court decides not to admit the statement.

Thus, the corroboration requirement in rule 804(b)(3) is constitutionally suspect because it strips the jury of its customary role of evaluating the credit and the weight of the evidence. Nonetheless, the constitutional focus arguably should be on the corroboration requirement itself rather than on the judge-jury division because the judge makes a similar admissibility determination in other hearsay exceptions.

D. THE RULE CONFLICTS WITH THE DEFENDANT’S RIGHT TO PRESENT EVIDENCE

The Supreme Court, which has seldom considered the defendant’s constitutional right to introduce evidence under the compulsory process clause of the sixth amendment, has never explained the relationship of this right to the defendant’s right to exclude evidence under the confrontation clause of the sixth amendment. This section of the article, which will discuss this relationship, first assumes that the rights are directly related because the defendant may introduce any evidence that he could not prevent the Government from introducing. The section then will focus on the importance of introducing penal interest statements for the defense and will assume that the rights are inversely related because, under certain circumstances, the defendant may introduce evidence regardless of the Government’s ability to do so.

Whether or not a penal interest statement satisfies either reliability requirement of Roberts, our model of the corroboration requirement of rule 804(b)(3) arguably imposes a higher burden on the defendant than Roberts imposes on the Government. An analysis of Dutton v. Evans demonstrates

770. An analogous issue is the judge-jury division when a factual issue determines both the admissibility of evidence and the jury’s decision on the merits. See State v. Lee, 127 La. 1077, 1080-81, 54 So. 356, 357 (1911) (“Mack Lee” murdered the victim; the defendant, identified as Mack Lee, called Mack Lee’s wife to testify that he was not Mack Lee; her testimony excluded when Government asserted spousal immunity privilege). In this setting the court, by deciding the admissibility question, may preclude the proponent from introducing his only available evidence on the ultimate issue. As a result, the court arguably should adopt the rule 104(b) approach, admitting the evidence if a reasonable juror could conclude that the evidence was relevant and instructing the jury to ignore it otherwise. See generally R. LEMPERT & S. SALTZBURG, supra note 701 at 1138-39. Similarly, the court could admit a defense-offered penal interest statement upon a finding, under rule 104(b), that a reasonable juror could find that the declarant’s statement was reliable.

771. The judge assesses trustworthiness as an issue of admissibility under hearsay exceptions 803(6), 803(7), and 803(8) for certain types of records. The applicable standards, however, in these exceptions are lower and the opponent has the burden of providing evidence of untrustworthiness. See also Note, The Theoretical Foundation of the Hearsay Rules, 93 HARV. L. REV. 1786, 1804-07 (1980) (discussing inconsistency of hearsay rules with traditional role of jury).


775. 400 U.S. 74 (1970) (plurality opinion).
that the Government bears a lower burden in satisfying the confrontation clause than the defendant bears in satisfying the corroboration requirement. In *Dutton* the Supreme Court inferred that the declarant had not falsely implicated the defendant because the declarant's statement, made in response to a witness' question, was spontaneous and against the declarant's penal interest. The declarant's statement, however, would not have satisfied the "excited utterance" hearsay exception of rule 803(2). Moreover, the declarant's statement, which was extremely ambiguous, required the Court to draw a questionable penal interest inference because the statement did not directly implicate either the defendant or the declarant. Additionally, even if the witness did not fabricate the statement, he might not have understood what the declarant said. Thus, the objections to the version of rule 804(b)(3) in the Preliminary and Revised Drafts, which contained no corroboration requirement, apply to the declarant's statement in *Dutton*: It was ambiguous, it was not obviously against the declarant's penal interest, it did not substitute the declarant for another person, and it might not have been reported honestly or accurately.

The Court's analysis in *Dutton* of the "indicia of reliability" test apparently suggests that the confrontation clause does not impose on the Government as high a proof burden as the corroboration requirement of rule 804(b)(3) imposes on the defendant. In his plurality opinion, however, Justice Stewart described the declarant's statement as neither "crucial" to the Government nor "devastating" to the defense. Thus, the Court might demand additional evidence of reliability if the hearsay statement played a more important role in the Government's case. Nonetheless, that additional evidence might not

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776. *Id.* at 89.

777. The declarant's statement in *Dutton* was not spontaneous because it was made long after the commission of the crime. Furthermore, the statement would not have been admissible under rule 803(1) as a present sense impression or under rule 803(3) as an existing mental condition.

778. 400 U.S. at 104 (Marshall, J., dissenting); see notes 440-41 *supra* and accompanying text (declarant's statement subject to different interpretations).

779. The declarant apparently ran no penal interest risk in speaking: He had already been convicted and the Court did not suggest that his statement jeopardized any appeal he might have been pursuing.

The Court also claimed that the declarant's conviction corroborated the reliability of his statement. 400 U.S. at 88. This argument is doubly flawed. It begs the question whether the verdict was accurate; it is irrelevant to the issue whether the *Dutton* jury had sufficient information to evaluate the reliability of the declarant's statement because the jury did not learn of his conviction.

Because the Government probably could have introduced the declarant's statement against him at his own trial as a personal admission, the Court's analysis all but equates the party admission and penal interest doctrines.

780. *Id.* at 103 & n.5 (Marshall, J., dissenting) (doubtful that declarant made statement attributed to him).

781. For the setting in which the witness reportedly heard the statement, see note 440 *supra* (quoting court of appeals' description).

782. 400 U.S. at 87.

783. In *Roberts* the Court implied that the "crucial-devastating" language of *Dutton* was relevant to the first confrontation clause test of whether the declarant was unavailable. See Ohio v. *Roberts*, 100 S. Ct. 2531, 2538 n.7 (1980) (utility of trial confrontation so remote that *Dutton* did not require prosecution to produce seemingly available witness). In *Roberts* the Court did not discuss the corroborating factors in *Dutton*. Thus, the Court arguably viewed the introduction of the declarant's statement in *Dutton* as harmless error rather than as a violation of the confrontation clause. This interpretation of *Dutton* is supportable because Justice Blackmun, the author of the majority opinion in *Roberts*, concurred in *Dutton* on harmless error grounds. *Dutton* v. Evans, 400 U.S. 74, 90 (1970) (Blackmun, J., concurring).
equal the amount of evidence required to satisfy the corroboration requirement.

In both *Dutton* and *California v. Green* the Court stated that the confrontation clause was satisfied when "the trier of fact [had] a satisfactory basis for evaluating the truth of the prior statement." If this is a test separate from the *Roberts* "indicia of reliability" inquiry and if this test is applied to defense-offered penal interest statements, *Dutton* suggests that these statements will not be given undue weight by the jury. The jury also should recognize the possible untrustworthiness of any penal interest statement. The statement should be particularly suspect if made or reported by a friend, relative, or fellow prison inmate of the defendant, or if the defendant cannot link the declarant to the crime. Moreover, the Government should have an adequate opportunity to challenge the trustworthiness of the statement, particularly when the defense must disclose the statement in advance of trial. In addition, the jury might be skeptical of a statement if it does not have access to otherwise inadmissible information that the defendant presented during the admissibility hearing. This interpretation indicates that the corroboration requirement's burden of proof is too high as long as the second part of the *Roberts* test might be satisfied by asking whether the factfinder has sufficient information to distrust the hearsay.

In *Chambers v. Mississippi*, however, the Court's discussion of the defendant's due process right to introduce evidence poses a problem with the initial assumption that the defendant's right to introduce evidence iscoterminal with his right to exclude evidence. The *Chambers* Court held that the trial court's exclusion of exculpatory hearsay testimony and the state's voucher rule, which precluded the defendant from cross-examining the declarant, did not violate the confrontation clause because the defense had cross-examined him at the preliminary examination hearing.

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784. 399 U.S. 149 (1970). In *Green* the declarant testified at trial but claimed that he did not remember the incident. *Id.* at 152. The Court held that the introduction of the declarant's preliminary examination testimony did not violate the confrontation clause because the defense had cross-examined him at the hearing. *Id.* at 153.


786. In *Roberts* the Supreme Court did not consider whether the factfinder had an adequate opportunity to evaluate the truth of the witness' preliminary examination testimony. See *Ohio v. Roberts*, 100 S. Ct. 2531, 2542-43 (1980) (cross-examination afforded satisfactory basis to evaluate truth of prior statement). As a result, the Court might not use this version of the confrontation clause analysis in the future.

787. Any defense-offered penal interest statement will carry a mark of unreliability like that which the *Dutton* Court found stamped on the declarant's statement. See 400 U.S. at 88 (declarant's statement not given undue weight by jury because contained no express assertion about past fact); Westen, *Confrontation and Compulsory Process*, supra note 773, at 599 (hearsay evidence has inherent deficiencies).

788. *See* notes 643-52 supra and accompanying text (discussing evidence judge may consider in rule 104(a) hearing).

789. This interpretation of *Roberts* indicates that the result in *Edwards*, *see* notes 596-606 supra and accompanying text, was correct and that excluding a statement like that in *State v. Smith*, 415 A.2d 553 (Me. 1980), was wrong. In *Smith* the trial court excluded a statement by the defendant's wife that she and not the defendant had killed the victim. *Id.* at 558-59. The court of appeals affirmed, holding that the defendant had failed to corroborate his wife's statement. *Id.* at 561. The wife was motivated to lie, thought the court of appeals, for several reasons: the two had been married only after each was arrested, she spoke only once the defendant had lost his motion to suppress his own confession, she had earlier said that both had killed the victim, and he might have convinced her to lie in his favor. *Id.* at 560-61. Although these factors do suggest that the wife might have lied, the Government could have introduced them to convince the jury not to credit her exoneration of the defendant.

declarant, violated the defendant's due process rights. The Court's opinion is confusing. On the one hand, the Court emphasized the defendant's right to adduce evidence. On the other hand, the Court observed that the defendant normally cannot circumvent evidentiary exclusionary rules, that its decision was based on a close reading of the facts, and that the decision established no new principles of constitutional law. A long list of corroborating factors convinced the Court that the declarant's extrajudicial statements were trustworthy and that the trial court should have admitted them under the due process clause. The Court did not explain whether it intended that this amount of corroborating evidence was required to invoke the defendant's due process right. If this amount of evidence is required, the corroboration requirement of rule 804(b)(3) probably is constitutional on its face because the corroborating evidence in Chambers would surely satisfy the clear and convincing evidence burden of the penal interest exception.

A comparison of the Court's language in Chambers and in California v. Green also suggests that the defendant can exclude more evidence than he can admit. In Chambers the Court concluded that the "hearsay statements involved . . . were originally made and subsequently offered at trial under

791. Id. at 302. The declarant, McDonald, confessed to the murder that the Government charged against Chambers. McDonald, however, later repudiated his confession. Id. at 287-88. At trial, Chambers called McDonald as a witness and had his repudiated confession admitted into evidence. Id. at 291. Because of a state voucher rule, however, Chambers was unable to cross-examine McDonald or introduce the testimony of three witnesses to whom McDonald had admitted the crime. Id. at 294.

792. See McCormick, Evidence 84 (Supp. 1978) (Chambers has constitutional issue of uncertain dimension). The interpretive problem partly results from the Court's blending of the defendant's compulsory process clause and confrontation clause arguments into one "fair trial" decision. See Westen, Compulsory Process, supra note 697, at 152-53 (Chambers blended two constitutional arguments into single "fair trial" decision). Professor Westen, who briefed and argued the case before the Supreme Court, suggests that the Court decided Chambers on due process rather than on compulsory process grounds because of a procedural quirk: The defendant made only a due process argument in the state appellate proceedings. See Westen, Confrontation and Compulsory Process, supra note 773, at 607 n.108 (Court assumed only question concerned due process).

793. See 410 U.S. 284, 302 (1973) (few rights more fundamental than right to present witnesses in own defense).

794. The Court stated that "we need not decide in this case whether, under other circumstances, [the rationale of excluding a penal interest statement because of fear of fabrication] might serve some valid state purpose by excluding untrustworthy testimony." Id. at 300. The Court also stated that "the accused . . . must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Id. at 302. At least two courts subsequently have used this dictum to justify excluding penal interest statements. See Lee v. State, 338 So. 2d 399, 402 (Miss. 1976) (Chambers suggests that less trustworthy statements might be excluded); Commonwealth v. Nash, 457 Pa. 296, 302, 324 A.2d 344, 346 (1974) (Chambers did not intend that every penal interest statement be admitted).

795. See 410 U.S. at 303 ("[W]e hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.").

796. Id. at 302.

797. The Court noted a number of corroborating factors: Each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder, an eyewitness saw McDonald shoot the victim, McDonald was seen with a gun immediately after the shooting, and evidence indicated that McDonald owned a gun of the same type as used to kill the victim. Id. at 300-01.

798. Id. at 302.

799. The corroborating facts in a particular case, however, should not be required to match precisely those in Chambers. See notes 589-91 supra and accompanying text (several courts have wrongly concluded that corroborating evidence should match precisely Chambers evidence).
circumstances that provided considerable assurance of their reliability." In Green the Court admitted the Government-offered statement because it had been "given under circumstances that [made] it reasonably reliable . . . ." The "considerable assurance" standard arguably imposed a higher burden on the defendant than the "reasonably reliable" standard imposed on the Government. Although the Chambers Court could have been describing the force of the facts rather than the contours of the due process right to introduce evidence, the Court might think the defendant's rights should differ because of the effect of admitting or excluding evidence on a jurisdiction's choice of hearsay exceptions.

The Government usually attempts to fit its hearsay evidence within an existing hearsay exception. Were the Court to hold such an exception unconstitutional, it would reject the determination of reliability in the state's evidentiary rules. Such a ruling might impede the development of additional exceptions to the hearsay rule. In contrast to the Government, a defendant resorts to the constitutional right to introduce evidence only when the jurisdiction has no relevant hearsay exception. Were the Court to hold that the defendant may introduce such evidence, the Court would reject the jurisdiction's determination of what constitutes unreliable hearsay. To avoid interference in state rulemaking, the Court in Chambers might have intended to require more corroborating evidence from the defendant than from the Government.

Nonetheless, in Chambers the Court arguably overwrote the decision because it hesitated to deny the right of Mississippi and other jurisdictions not

800. 410 U.S. at 300.
801. 399 U.S. at 167 n.16.
802. Cf., e.g., Dutton v. Evans, 400 U.S. 74, 87-88 (1970) (coparticipant's statement admitted under Georgia hearsay exception; no violation of confrontation clause); California v. Green, 399 U.S. 149, 152-53 (1970) (preliminary examination testimony admitted under California Evidence Code; no violation of confrontation clause); Bruton v. United States, 391 U.S. 123, 125-26 (1968) (Government apparently conceded that codefendant's statement, admitted at joint trial, was admissible only against codefendant). But cf. United States v. Rogers, 549 F.2d 490, 499 n.11 (8th Cir. 1976) (Government unsuccessfully argued that statement could satisfy confrontation clause without satisfying hearsay exception), cert. den., 431 U.S. 918 (1977). The "catch-all" hearsay exceptions permit the Government to introduce hearsay that does not satisfy a traditional exception. See Fed. R. Evid. 803(24) (permitting admission of hearsay statements not covered by exceptions listed); Fed. R. Evid. 804(b)(5) (same). If the Government offers hearsay through one of these exceptions, the court should analyze trustworthiness in light of the confrontation clause test in Roberts.

803. The Supreme Court assured states that its decision in Chambers was not a constitutional intrusion into state evidentiary rules. See 410 U.S. at 302-03 ("Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures").

804. This consideration convinced Justice Harlan to alter his interpretation of the confrontation clause. In California v. Green he argued that the confrontation clause required the Government to produce any available witness whose declarations it seeks to use. 399 U.S. at 174 (Harlan, J., concurring). In Dutton he argued that the confrontation clause only gave the defendant the right to cross-examine any witness against him. 400 U.S. at 95 (Harlan, J., concurring). Justice Harlan altered his interpretation because his Green position "would significantly curtail development of the law of evidence" and would unnecessarily require the production of declarants in certain instances, such as the business records exception. Id. at 95-96. His Green position was inconsistent with the Advisory Committee's original intent to broaden the circumstances when hearsay should be admissible. See Preliminary Draft, supra note 1, at 345 ("A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available").
to recognize the penal interest exception.\textsuperscript{805} The Court’s opinion also suggests that the Court would find a due process violation with less corroborating evidence. The Court noted that the penal interest exception had not been universally accepted because many jurisdictions wanted to avoid fabricated admissions of guilt.\textsuperscript{806} In \textit{Chambers}, however, the declarant apparently did not implicate himself to help the defendant.\textsuperscript{807} Because the declarant’s statements were therefore “well within the basic rationale of the exception for declarations against penal interest,”\textsuperscript{808} the Court might find a due process violation with less convincing evidence. The Court also implied that the declarant’s statements would have been admissible under the \textit{Supreme Court Draft} version of rule 804(b)(3),\textsuperscript{809} which included the lower “simple corroboration” test. Thus, the Court eventually might conclude that the burden of proof in rule 804(b)(3) is too high.\textsuperscript{810}

Because the Supreme Court has never explained the contours of the defendant’s compulsory process right to introduce evidence, whether the defendant could introduce more evidence under the compulsory process clause than under the Court’s interpretation of the due process clause in \textit{Chambers} remains unclear. Although the Court in \textit{Chambers} riveted its decision to the facts of the case,\textsuperscript{811} the opinion contains language broad

\textsuperscript{805} See \textit{Chambers} v. Mississippi, 410 U.S. 284, 299 (1973) (penal interest exception not accepted by most states).
\textsuperscript{806} \textit{Id}.
\textsuperscript{807} See \textit{id.} at 288 (Liberty claimed that he confessed only because he hoped to share in lawsuit with Chambers for false arrest).
\textsuperscript{808} \textit{Id.} at 302.
\textsuperscript{809} See \textit{id.} at 299 & n.18 (exclusion of statements against penal interest not required under new rules).
\textsuperscript{810} The Supreme Court’s decision in \textit{Green} v. Georgia, 442 U.S. 95 (1979) (per curiam), suggests that the Court might eventually support the position that a restrictive interpretation of the penal interest exception is unconstitutional. In \textit{Green} the defendant and his accomplice were tried separately and convicted of murder. At his sentencing trial the defendant was not permitted to introduce an exculpatory hearsay statement made by his accomplice because Georgia did not have a penal interest exception. \textit{Id.} at 95-96. The Supreme Court held that the exclusion of the accomplice’s hearsay statement, “[i]n these unique circumstances,” was a violation of due process. \textit{Id.} at 97. By “unique circumstances,” the Court apparently was referring to the nature of the punishment and the use of the accomplice’s statement in his own trial. The Court, however, did not inspect this statement as carefully as the Court did in \textit{Chambers} in evaluating the declarant’s confessions. In \textit{Green} the Court concluded that the accomplice’s statement was reliable because it was made spontaneously to a close friend and because other evidence corroborated its truth. \textit{Id.} at 97. The Court’s finding of spontaneity, however, has less evidentiary justification than similar findings in \textit{Chambers} and \textit{Dutton} because the record did not indicate the circumstances surrounding the statement in \textit{Green}. See \textit{Green} v. State, 242 Ga. 261, 264-65, 249 S.E.2d 1, 5 (1978) (failing to describe circumstances), rev’d, 442 U.S. 95 (1979). Additionally, the Court failed to review the record carefully to determine whether the accomplice’s statement was trustworthy. The Court simply stated that “there was no reason to believe that [the accomplice] had any ulterior motive” in exculpating the defendant. 442 U.S. at 97. Thus, \textit{Green} suggests that a defendant need only corroborate the truth of the declarant’s self-condemnation and show that no collusive relationship exists. A more restrictive interpretation of rule 804(b)(3) might be unconstitutional.
\textsuperscript{811} 410 U.S. at 303.
enough to conclude that rule 804(b)(3) unconstitutionally restricts the defendant's due process right to introduce evidence.\textsuperscript{812}

The Court in \textit{Chambers} characterized the excluded evidence as "critical" to the defense.\textsuperscript{813} But because the trial court permitted the defendant to introduce one of the declarant's confessions,\textsuperscript{814} he was not totally prevented from shifting responsibility to the declarant. In contrast, a defendant who is unable to satisfy the corroboration requirement of rule 804(b)(3) usually will be unable to substitute the declarant for himself or to separate himself from the criminal activity of the declarant. Thus, the corroboration requirement or a restrictive interpretation of the word "exculpate" significantly weakens the defendant's defense more than did the exclusion of the evidence in \textit{Chambers}.

The declarant's statement is usually the cornerstone of the defense\textsuperscript{815} and is often the only evidence the defendant can offer except for his testimonial denial of guilt.\textsuperscript{816} Because the declarant's statement is "critical,"\textsuperscript{817} the defense is not simply "far less persuasive"\textsuperscript{818} without the statement. A trial court should permit the defendant to introduce the penal interest statement under the compulsory process clause. In this sense, the defendant's compulsory process right is inversely related to his confrontation clause protection.\textsuperscript{819}

\textsuperscript{812} See \textit{id.} at 302 ("[F]ew rights are more fundamental than that of an accused to present witnesses in his own defense"). A due process approach balances the defendant's interest in admitting hearsay against the legislature's interest in excluding unreliable evidence. \textit{See Tanford & Bocchino, supra} note 531, at 560 (court balances state interests with defendant's rights).

A court would find further support for the conclusion that rule 804(b)(3) is unconstitutional if it followed the Warren Court's practice of interpreting a specific amendment, such as the right to compulsory process, as providing more protection for the defendant than due process considerations. \textit{See Nowak, Foreword—Due Process Methodology in the Postincorporation World, 70 J. CRIM. L.C. & P.S. 397, 401 (1979)} (Warren Court focused on Bill of Rights rather than due process considerations); \textit{Tanford & Bocchino, supra} note 531, at 563 (Court must decide if violation of specific right under strict standard of review). Under this approach the Government must establish a compelling interest in order to exclude the defense-offered penal interest statement. \textit{See, e.g., Clinton, supra} note 661, at 798 (Government must show compelling interest since right to cross-examine only overcome for compelling reasons). Professor Westen also has argued that the defendant is entitled to a "presumption in favor of admitting evidence, trusting the jury to evaluate evidence for its appropriate weight and credibility, except regarding the most tendentious and inherently dubious evidence." \textit{Westen, Future of Confrontation, supra} note 311, at 1200.

\textsuperscript{813} 410 U.S. at 302. The defendant's defense "was far less persuasive than it might have been had...the other confessions been admitted." \textit{Id.} at 294.

\textsuperscript{814} \textit{Id.} at 291.

\textsuperscript{815} My conclusion is based on conversations with defense attorneys throughout the preparation of this article. Excluding a penal interest statement often leads to the exclusion of other evidence that supports the defendant's defense. In \textit{Commonwealth v. Hackett}, 225 Pa. Super. Ct. 22, 307 A.2d 334 (1973), for example, the trial court convicted the defendant for possession of heroin and operating a car under the influence of a narcotic drug. The defendant alleged that he was involuntarily drugged and unsuccessfully attempted to introduce the exculpatory statements of the person who allegedly drugged him. In excluding the statement, the trial court also refused to admit defense evidence that narcotics users usually have needle marks on their bodies. The defendant had no such marks. \textit{Id.} at 23-24, 307 A.2d at 335.

\textsuperscript{816} The defendant might also fear testifying if he can be impeached by prior convictions.

\textsuperscript{817} \textit{See Chambers v. Mississippi, 410 U.S. at 302} ("[C]onstitutional rights directly affecting the ascertainment of guilt are implicated"). \textit{See also Mattox v. United States, 146 U.S. 140, 152 (1892)} (admission by defense of dying victim's exonerating statement justified on ground of necessity).

\textsuperscript{818} \textit{Chambers v. Mississippi, 410 U.S. at 294}.

\textsuperscript{819} \textit{See Clinton, supra} note 661, at 808-09 ("[T]he admission of hearsay evidence with no extrinsic
Whether a restrictive interpretation of the penal interest exception systematically distorts the factfinding process is impossible to determine. The decision of the United States Court of Appeals for the Fifth Circuit in United States v. Thomas,\textsuperscript{820} is apparently the only federal example of a retrial following a reversal of a conviction for erroneous exclusion of a defense-offered penal interest statement. In other cases, the Government has not reprosecuted the declarant.\textsuperscript{821} Thus, these decisions do not indicate how a jury might have assessed the significance of the declarant's excluded statement. The Thomas decision, however, illustrates the importance of admitting the declarant's statement.\textsuperscript{822}

In Thomas the Government jointly charged the defendant and codefendant for a bank robbery.\textsuperscript{823} The defendant's version of the robbery significantly differed from the codefendant's.\textsuperscript{824} At the preliminary hearing, all of the attorneys and the magistrate heard the codefendant say, "[T]hey ought to let [the defendant] go, he didn't have anything to do with it."\textsuperscript{825} Nonetheless, the trial court did not permit the defendant to introduce the statement at trial.\textsuperscript{826} The Fifth Circuit reversed, holding that the trial court should have admitted the statement because it was a statement against penal interest\textsuperscript{27} and it had indicia of reliability might be constitutionally compelled if the evidence is of critical importance to the accused." (footnote omitted). Dutton should not be interpreted to impose a higher reliability burden on the defendant if the declarant's penal interest statement is central to the defendant's defense because the Government has no confrontation clause protection.

\textsuperscript{820} 571 F.2d 285 (5th Cir. 1978).

\textsuperscript{821} In Chambers, for example, the state refused to charge the declarant or to retry the defendant. The state, however, did not dismiss the charge against the defendant. Conversation with Professor Westen (May 7, 1979). In United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977), the Government dismissed the charge after the defendant's conviction was reversed. Conversation with defense counsel (May 16, 1979). In United States v. Atkins, 558 F.2d 133 (3d Cir. 1977), the Government did not reprosecute the defendant when he was resentsenced to a long prison term on other counts to which the excluded penal interest statement was not relevant. Conversation with defense counsel (May 7, 1979). In United States v. Goodlow, 500 F.2d 954 (8th Cir. 1974), the Government did not recharge the defendant because he was incarcerated for a year while his successful appeal was pending. Conversation with defense counsel (May 16, 1979).

\textsuperscript{822} Admittedly, one example provides frail support for the conclusion that a high corroboration burden or a restrictive interpretation of "penal interest" is invariably unfair to the defendant. Cf. Jackson v. Denno, 378 U.S. 368, 402-03 (1964) (Black, J., dissenting and concurring) (theoretical suggestions by commentators cannot completely replace empirical data from actual litigation). Moreover, in Thomas the defense counsel, informed of the strengths and weaknesses of the evidence at the first trial, could have presented a better defense at the retrial.

\textsuperscript{823} 571 F.2d at 287.

\textsuperscript{824} Id. at 287-88. The defendant retestedified that he unknowingly participated in the robbery. Id.

\textsuperscript{825} Id. at 288.

\textsuperscript{826} Id. The trial court was concerned that by admitting the statement, it would have to grant a mistrial for the codefendant, a concern rejected by the court of appeals. Id. Paradoxically, the trial court thought that the Government, but not the defendant, could introduce the statement against the codefendant at a separate trial. Id. The codefendant would have had no hearsay objection to the statement because it was not offered for the truth of the matter stated but instead would have been offered to show his state of mind. Id. at 289-90.

\textsuperscript{827} Id. at 288. The Fifth Circuit rejected the Government's argument that rule 804(b)(3) admitted only "direct confessions of guilt." Id. Instead, the court adopted the party admissions analogy: The trial court may admit the statement for the defendant if it could have been admitted against the declarant. Id.
been corroborated. At the retrial the magistrate reported the exculpatory statement, and the jury acquitted the defendant. Although *Thomas* is the only example of the importance of defense-offered penal interest statements to accurate factfinding, other evidentiary restrictions reinforce the conclusion that both the corroboration requirement and a narrow interpretation of rule 804(b)(3) unfairly discriminate against the defendant. In attempting to shift responsibility to the declarant in a one-person crime or to exonerate himself in a multiple-person crime, the defendant must rely on the penal interest exception. A declarant's assertion

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828. *Id.* at 290. Because the trial court had not decided whether the "corroborating circumstances clearly indicate the trustworthiness of the statement," *id.*, the Fifth Circuit did not apply the "clearly erroneous" standard on appeal. *Id.* The court found that corroboration existed because the Government's evidence against the defendant was weak, the codefendant had spoken spontaneously at the preliminary examination, and he had no reason to fabricate. *Id.* *Thomas* and United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977), are the only decisions that have examined the strength of the Government's case in evaluating corroboration. Although the strength of the Government's case arguably relates instead to harmless error, a court nonetheless should consider this factor.

829. Conversation with defense counsel (May 7, 1979). On direct examination, the codefendant acknowledged that he admitted his own complicity in the robbery in the preliminary hearing but denied that he exculpated the defendant. *Id.* Although the reasons for the second jury's acquittal are not known, the only difference in the evidence presented at both trials was the codefendant's statement.

830. The judicial inconsistency in interpreting the significance of particular corroborating facts provides another reason why the corroboration requirement is questionable. Courts have divided over the corroborating significance of a sworn statement by the declarant, see note 444 *supra*; of a statement written by the declarant, see note 444 *supra*; of a statement to defense counsel or the declarant, see note 458 *supra*; to a friend or relative of the declarant, see note 448 *supra*; to someone unconnected to the defense, see note 452 *supra*; or to someone close to the declarant, see note 451 *supra*; and of the declarant's repetition of the statement. See note 462 *supra*. This division confirms that the rule provides no direction, and that appellate reconsideration of the exclusion of a defense-offered statement may turn more on the harmlessness of exclusion than on the rule itself.

831. The defendant probably cannot use other hearsay exceptions to introduce the declarant's statement. The declarants in *Chambers* and *Dutton*, for example, did not speak under circumstances that would have satisfied rule 803(2)'s "excited utterance" exception. In contrast, the Government probably has avenues other than rule 804(b)(3) to introduce a declarant's implication of the defendant. If the declarant recants his earlier implication of the defendant while testifying at trial, the Government could introduce his hearsay implication that was made before a grand jury or at a preliminary examination. See United States v. Garner, 574 F.2d 1141, 1145-46 (4th Cir.) (accomplice's grand jury implication of defendant admitted under rule 804(b)(5) when accomplice denied grand jury testimony at trial), *cert. denied*, 439 U.S. 936 (1978); Fed. R. Evid. 801(d)(1)(A) (witness' earlier inconsistent statement made under oath admissible as substantive evidence if he testifies at trial); cf. Fed. R. Evid. 801(d)(2)(E) (coconspirator exception). Furthermore, the defendant probably will be unable to depose the declarant. See Fed. R. Crim. P. 15(a) (limiting right to depose to exceptional circumstances). Even if the defendant receives permission to depose the declarant, the Government undoubtedly would explain the privilege against self-incrimination to the declarant.

If penal interest is narrowly interpreted to exclude a declarant's exonerations of the defendant in a multiple-person crime, an interesting contrast with the admissibility of nonassertive conduct results. A difficult question at common law was whether conduct constituted an implied assertion by the actor and was therefore hearsay. Admitting nonassertive conduct poses a greater danger of misinterpretation than admitting a verbal assertion. Nonetheless, rule 801(a) treats nonassertive conduct as nonhearsay, because it is less likely to be insincere. See Advisory Committee Note to *Supreme Court Draft*, *supra* note 1, at 293-94. (situations giving rise to nonverbal conduct virtually eliminate questions of insincerity.) Thus, the declarant, for example, might introduce evidence of the departure of migrant workers immediately after a murder to shift responsibility to them. See note 48 *supra* (discussing People v. Mendez, 193 Cal. 93, 223 P. 65 (1924)). If the departing migrant workers had announced that they committed the crime, this statement exonerating the defendant would be inadmissible. Moreover, if they had said nothing, the admissibility of
of the privilege against self-incrimination demonstrates the importance of a generous interpretation of this exception. Prompted by the Government or the court, the declarant might invoke the privilege and prevent the introduction of the defendant's exculpatory evidence, which can now be introduced only through rule 804(b)(3). The court, which must interpret the privilege liberally, probably will conduct a limited examination of the declarant. The defendant cannot require the Government either to grant the declarant immunity or to force the declarant to invoke the privilege.

Another problem concerns the Government's obligation to disclose favorable evidence to the defense. If the prosecutor, for example, learns of an exculpatory statement by a declarant but is unable to locate the declarant, is the prosecutor obliged to disclose this information voluntarily? The Supreme Court has stated that the prosecutor must disclose only "evidence" that is "obviously exculpatory." United States v. Agurs, 427 U.S. 97, 107 (1976); cf. Giles v. Maryland, 386 U.S. 66, 74 (1967) (nondisclosed evidence of two police reports justifies remand; court did not decide prosecutor's duty to disclose); Brady v. Maryland, 373 U.S. 83, 87 (1963) (prosecutor's suppression of material evidence violates due process). If such evidence is not disclosed, the defendant's conviction will be reversed "if the omitted evidence creates a reasonable doubt that did not otherwise exist." United States v. Agurs, 427 U.S. 97, 112 (1976). Although the declarant's statement might be "obviously exculpatory," the key word in Agurs is "evidence." The Court has not explained whether "evidence" means information that is admissible. If the evidence must be admissible, the prosecutor may believe that he is free to determine whether the statement satisfies rule 804(b)(3). Thus, the prosecutor may disclose the information only if he thinks that the rule is satisfied. In the above example, the prosecutor will probably decide that the rule is not satisfied because the necessary corroboration is absent. Moreover, if the crime was committed by more than one person, the prosecutor might conclude that the statement simply justified charging the declarant. A prosecutor might risk not disclosing on the expectation that an appellate court could later find that nondisclosure was harmless error. If the prosecutor had disclosed the statement, however, the defendant might have been able to find the declarant or to amass sufficient corroborating evidence to justify introducing the statement.

832. See United States v. Roberts, 503 F.2d 598, 600 (9th Cir. 1974) (after codefendant pleaded guilty to one count, he invoked fifth amendment when called as witness by defendant because Government did not dismiss other counts), cert. denied, 419 U.S. 1113 (1975); United States v. Johnson, 488 F.2d 1206, 1209 (1st Cir. 1973) (codefendant invoked fifth amendment because he feared conspiracy charge).

833. See Hoffman v. United States, 341 U.S. 479, 486 (1951) (fifth amendment privilege must be accorded liberal construction). The California Court of Appeals' decision in People v. Johnson, 39 Cal. App. 3d 749, 114 Cal. Rptr. 545 (Cl. App. 1974), demonstrates the unfairness of interpreting penal interest restrictively. In Johnson the defendant murdered the victim with a knife. Id. at 752-53, 114 Cal. Rptr. at 547. Involving his self-incrimination privilege, a witness to the murder refused to testify. Citing a penal interest exception, the defendant then attempted to introduce a statement by the witness that he gave the defendant the knife during a struggle with the victim. The trial court excluded this statement as hearsay evidence. Id. at 760, 114 Cal. Rptr. at 553. Although the court of appeals held that the witness could invoke the fifth amendment, it agreed that the witness' hearsay statement was not against his penal interest because "it is indeed difficult to discern that [the witness], a layman, should have realized, or in fact did realize, that his statement was a distinct threat against his penal interest." Id. at 762, 14 Cal. Rptr. at 554. Because narrowly interpreting penal interest is unfair, the declarant's assertion of the privilege justifies concluding that his statement was against interest. See note 470 supra and accompanying text (invocation of privilege arguably confirms reliability of statement).

834. Although the trial court may make a limited examination of the witness in an in camera hearing, see Fed. R. Evid. 104(a) (preliminary questions concerning existence of privilege determined by court), the court must respect the privilege "[if] the [self-incrimination] danger might exist . . . without requiring the witness to demonstrate that a response would incriminate him . . . ." United States v. Melchor Moreno, 536 F.2d 1042, 1046 (5th Cir. 1976) (emphasis in original).

835. See note 7 supra (discussing Government grants of use immunity). This result has been criticized because the prosecution always could prosecute the declarant based on his out-of-court statement and other existing evidence. See generally Note, The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses, 91 Harv. L. Rev. 1266 (1978) (compulsory process clause should require state to grant
before the jury. Furthermore, defense counsel may not call a witness if he expects the witness to invoke the privilege. If the witness invokes the privilege, the defendant cannot ask the jury to infer the truth of the question from the assertion of the privilege. Additionally, the court may consider a “missing witness” instruction to be inappropriate if the defendant is unable to produce the declarant because he will invoke the privilege. These

immunity to defense witnesses unless state can justify denial). Chambers and Dutton suggest that penal interest statements should be admitted if the Government refuses to offer immunity. In both decisions, the Supreme Court noted that the declarant was available for cross-examination by the objecting party. Chambers v. Mississippi, 410 U.S. at 291; Dutton v. Evans, 400 U.S. at 78. Because the Government controls whether the otherwise unavailable witness will testify, a court should require the Government to grant immunity or have its hearsay objection overruled. Professor Westen suggests that the compulsory process clause requires the Government to either grant immunity or dismiss the prosecution. See Westen, Confrontation and Compulsory Process, supra note 773, at 581 n.18 (if testimony material, court can force prosecution to grant immunity or dismiss prosecution); Westen, Compulsory Process, supra note 697, at 166-70 (compulsory process clause requires Government to grant immunity to defense witnesses). The defendant might tactically prefer to introduce the hearsay statement because it would not be subject to examination. If the witness, who was granted immunity, denied making the earlier statement or denied its truth, the defendant then could introduce the statement to impeach the testimony.

836. See, e.g., United States v. Martin, 526 F.2d 485, 487 (10th Cir. 1975) (defendant properly prevented from calling informant to plead fifth amendment before jury); United States v. Lacroix, 495 F.2d 1237, 1240 (5th Cir.) (defendant properly prevented from calling witness to plead fifth amendment before jury), cert. denied, 419 U.S. 1053 (1974); United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973) (defendant properly prevented from calling codefendant to plead fifth amendment before jury); Bowles v. United States, 439 F.2d 536, 542 (D.C. Cir. 1970) (en banc) (witness should not testify for purpose of exercising privilege before jury). But see id. at 545 n.11 (Bazelon, C.J., dissenting) (defendant may have constitutional right to have witness invoke privilege before jury). Convictions may be reversed when a witness called by the Government has invoked the fifth amendment. Although it did not find reversible error in Namet v. United States, 373 U.S. 179 (1963), the Supreme Court stated that reversal was

warranted

when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege [and when] in the circumstances of a
given case, inferences from a witness’ refusal to answer added critical weight to the prosecution’s case in a form not subject to cross-examination . . .

Id. at 186-87. Courts, however, have not interpreted Namet as barring the Government from testing whether the witness will invoke the privilege to each question. See United States v. Mayes, 512 F.2d 637, 650 (6th Cir.) (extensive questioning unfair trial tactic but not reversible error), cert. denied, 422 U.S. 1008 (1975); Cota v. Eyman, 453 F.2d 691, 695 (9th Cir. 1972) (no constitutional error in questioning witness after he invoked privilege). Moreover, courts have not interpreted Namet to require a hearing before the witness testifies to determine whether he will invoke the privilege. See People v. Chandler, 17 Cal. App. 3d 798, 804, 95 Cal. Rptr. 146, 149 (Ct. App. 1971) (pretestimonial hearing not required). Finally, courts have not interpreted Namet to require the Government to notify the court of the witness’ intent to invoke the privilege if the prosecutor does not believe that the witness can properly invoke it. See Rado v. Connecticut, 607 F.2d 572, 581 (2d Cir. 1979) (no misconduct when prosecutor believed witness had no fifth amendment privilege to invoke).

837. Such conduct would constitute an ethical violation. ABA STANDARDS FOR CRIMINAL JUSTICE, chap. 3, standard 5.7(c), at 3.84 (prosecutor); id. chap. 4, standard 7.6(c), at 4.90 (defense counsel).

838. See Supreme Court Draft, supra note 1, at 260 (PROP. FED. R. EVID. 513; no inference from invocation of privilege permitted). This restriction probably is justified if the witness’ testimony is unknown and therefore the assertion of the privilege is ambiguous. The restriction, however, is not justified if the declarant has made an earlier penal interest statement. A second reason for the restriction is that the witness has not testified to anything and therefore the jury has no evidence before it to consider. Although conceptually sound, this reason should be rejected because the Government controls immunity.

possibilities highlight the unfair burden a defendant carries when he attempts to introduce a declarant's statement under rule 804(b)(3).

E. THE NEED FOR REMEDIAL CONGRESSIONAL ACTION

To eliminate these constitutional problems, Congress should revise rule 804(b)(3). First, it should confirm that the form of a declarant's statement is irrelevant and that admissions, confessions, and opinions equally are admissible as long as the statement satisfies rules 401, 602, and 701. Second, it should confirm that the declarant's personal assessment of the significance of his statement is relevant, even if he makes that assessment long after he uttered the statement. That confirmation would eliminate the need for the Government to immunize a declarant who is unavailable because he has invoked the fifth amendment. Third, Congress should add to rule 804(b)(3) the disclosure obligation of the "catch all" hearsay rules to require the defendant to inform the Government of the substance of the statement, the identity and whereabouts of the declarant (if known) and the reporting witness, and the circumstances under which the declarant made the statement and how it was reported to the defense. It could authorize the court to give a cautionary instruction to alert the jury to the trustworthiness problem. Finally, Congress should eliminate the corroboration requirement. The penal interest test already provides a trial court with an adequate test to exclude a declarant's statement on the ground that the declarant spoke to advance his self-interest or did not understand the disserving effect of his statement. If Congress believes that the rule must contain some form of corroboration requirement, however, it should reframe that requirement to conform to the corroboration requirement of rules 803(6)-(8). The defendant then would carry the burden of proving trustworthiness only when the Government raises a legitimate question about the declarant's credibility. If Congress retains a corroboration test, it should impose that burden on the Government as well as on the defendant. With these changes, the defendant will be better able to convince the jury either of his innocence or of the Government's failure to prove him guilty.841

Admittedly, these changes will not preclude a defendant from introducing a fabricated statement. Nonetheless, Congress should act to eliminate the constitutional problems that pervade rule 804(b)(3). On balance, these changes should lead to more accurate factfinding.

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840. Moreover, statements which implicitly challenge the Government's evidence should also be admitted. In Brinson v. State, 382 So. 2d 322 (Fla. Dist. Ct. App. 1979), for example, an eyewitness described the robbers as a black man and woman. Id. at 323-24. The defendant, a black woman, unsuccessfully sought to introduce the confession of a white man who asserted the fifth amendment when called by her as a witness. Id. at 324. The appellate court reversed, reasoning that the white man's confession indirectly challenged the accuracy of the eyewitness' description. Id. at 324-25.

841. As the Chief Justice said in a different context, "admissions of guilt by wrongdoers, if not coerced, are inherently desirable." United States v. Washington, 431 U.S. 181, 187 (1977) (not requiring that grand jury target who implicated himself be given Miranda warnings).
VI. Conclusion

Born of the common law’s fear of fabrication, the penal interest exception developed during the last century as a child of judicial and legislative misinterpretation. Rule 804(b)(3), the product of that development, emerged from a system that is not as well designed to promote well-reasoned rulemaking as it should be. The evolution of rule 804(b)(3) illustrates several reasons why the Advisory and Standing Committees should publish more of their work as a means of improving the rulemaking process.842

First, more complete disclosure will help the Committees resist improper and overly influential political pressure. By not publishing the alternative versions of the rule and the rationale behind those choices, the Committees forfeited the substantial political weight of the organized bar for resisting the pressure exerted by the Department of Justice to a lesser extent and Senator McClellan to a greater extent. Without such help, the Committees lacked the political clout to fend off the Senator in his attempt to limit the Supreme Court’s rulemaking autonomy.

Second, fuller disclosure will help Congress in its review of the Committees’ proposals. Unaware that the Committees added the “simple corroboration” requirement to placate Senator McClellan, the House Subcommittee increased the corroboration requirement because it thought the Committees’ test was too vague and it feared that a defendant could satisfy the test by testifying to his own innocence.843 Unfortunately, the secrecy that cloaked the relationship between Senator McClellan and the Advisory and Standing Committees hid the nonsubstantive rationale underlying the “simple corroboration” test.844

Finally, increased disclosure would force the Committees to undertake a more thorough review of relevant source materials. Such a review would have substantially improved the development of rule 804(b)(3). That development suffered from a review that proceeded in a factual vacuum with no analysis of the case law to determine either the typical relationship between the defendant and the declarant or the types of statements defendants typically

842. The process that led to revisions in rule 804(b)(3) for nonsubstantive, political reasons might be an isolated incident, not the tip of an iceberg. Although I have not reviewed the unpublicized work of the Advisory and Standing Committees that lie behind the development of other rules for the Supreme Court, no colleague who teaches in the fields of evidence, criminal procedure, or civil procedure has provided me with similar examples. Thus, the development of the Federal Rules of Evidence probably represents an unprecedented chapter in the rulemaking process, a chapter that developed only because the rules engendered so much controversy.

843. The Subcommittee also misunderstood the Advisory and Standing Committees position with respect to the “Bruton sentence.”

844. Although Senator McClellan eventually published his letter to the Standing Committee and explained that he met with the representatives of the Advisory and Standing Committees on September 22, 1971, neither he nor his staff notified the House Subcommittee that he intended to hold the rules hostage until the Advisory and Standing Committees accepted the changes he had demanded. Unfortunately, the Advisory and Standing Committees never publicized their reaction to the Senator’s excessive demands. Although that omission was understandable as long as only Senator McClellan was attempting to limit the Supreme Court’s rulemaking autonomy, those Committees should have fought harder to preserve their earlier versions of the penal interest exception once the House Subcommittee began considering legislation to increase Congress’ oversight of the rulemaking process. Ironically, Congress reduced the Supreme Court’s rulemaking autonomy largely because the Committees worked in secret and failed to explain publicly the rationale behind the changes they made in the Supreme Court Draft.
offered and courts usually admitted. Furthermore, except for the Department of Justice, which expressed its belated concern about the effect of *Chambers v. Mississippi*, each group that considered rule 804(b)(3) either was unaware of or blithely ignored the constitutional implications of each version of the rule. That omission, as unsettling as it is for scholars, may continue to be more distressing and discomforting to defendants.

The Judicial Conference should publish or at least make available for public review the background work of the reporter, the alternative versions of each rule considered by the Advisory and Standing Committees, the public comments received throughout the Committees’ deliberations, and the reasons the Committees rejected the various alternatives of a rule.\(^8\)\(^4\)\(^5\) Publication has its costs: Disclosure occasionally might prove embarrassing and might impede a frank discussion among the Committee members. Publication has its benefits, too: It might strengthen the Committees’ ability to resist political pressure; it should reduce the likelihood that Congress will misinterpret the Committees’ proposals; it will assist courts in applying the rule ultimately adopted by Congress; and it only can heighten the image of the rulemaking process as a professional, dispassionate, unpolticized approach to achieving needed changes in the law.\(^8\)\(^4\)\(^6\) Increased disclosure would have enhanced the development and the application of rule 804(b)(3) and would have prevented the procedural and constitutional problems that result from the current version of the rule.